Equal Opportunity: Federal Employees' Right to Sue on Title VII and Tort Claims

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INTRODUCTION

For three years, Donald Rochon experienced a systematic campaign of racial discrimination and harassment from his coworkers that extended far beyond their mutual workplace. In addition to being subjected to racially discriminatory stories regarding African Americans told by his coworkers, Rochon had his competence impugned behind his back, received hate mail and harassing phone calls, experienced assault and battery, and bore threats of death, mutilation, castration, and rape, among other abusive events.[1]

Had Rochon worked for a private employer, there is little question that he could recover under a Title VII employment discrimination claim as well as under several state tort causes of action. The Supreme Court affirmed the nonexclusivity of Title VII's remedies for private-sector employees in cases such as *Alexander v Gardner-Denver Co*[2] and *Johnson v Railway Express Agency, Inc*.[3] In these cases, the Court recognized that "the legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes," and that the "clear inference is that Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination."[4]

However, because Donald Rochon worked for the Federal Bureau of Investigation, one of the first motions against him in his employment discrimination lawsuit was a motion to dismiss

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1 See *Rochon v Federal Bureau of Investigation*, 691 F Supp 1548, 1551–52 (DDC 1988).

2 415 US 36 (1974).

3 421 US 454 (1975).

4 *Alexander*, 415 US at 48–49.

the tort claims as precluded by Title VII's provisions regarding discrimination in federal employment.[5] The basis for such a distinction is the Supreme Court's decision in *Brown v General Services Administration*,[6] in which the Court held that a black employee who filed a Title VII racial discrimination claim twelve days past the statutory deadline could not instead sue for a violation of his constitutional rights with a 42 USC § 1981 claim. The Court concluded that Title VII "provides the exclusive judicial remedy for claims of discrimination in federal employment."[7] While federal employees may, at least in theory, have previously had the right to sue under the general § 1981 statute for violations of their constitutional rights in the context of employment discrimination, the Supreme Court ruled that amendments to Title VII had foreclosed that remedy.

Courts have struggled to apply *Brown* to cases in which the legal claims do not overlap as they did in that case. In particular, courts have often responded in different ways to federal employees who bring both Title VII and state tort claims. The main point of disagreement concerns whether Title VII precludes state torts under *Brown*, or whether the torts vindicate rights that can be considered entirely distinct from Title VII. In Rochon's case, the court denied the motion to dismiss the tort claims, holding that Title VII did not preclude such claims to the extent they were based on his "right to be free from bodily or emotional injury caused by another person."[8] However, the conflict over whether *Brown* applies to Title VII–tort cases is far from settled among various federal district and circuit courts, and cases that present these issues continue to arise.[9] Often, though not exclusively, such cases present facts alleging serious harms done to the employee. The uncertainty as to what relief, if any, the employee may be granted is a significant problem. Indeed, the availability of relief may vary across district and circuit courts even though the employees work for the same employer—the federal government—and this presents problems of

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5 *Rochon*, 691 F Supp at 1555.

6 425 US 820 (1976).

7 See id at 835.

8 *Rochon*, 691 F Supp at 1556.

9 See, for example, *Charlot v Donley*, 2012 WL 3264568, *1–5 (D SC) (presenting a case in which a federal employee alleged racial discrimination, retaliation, and various tort claims, including a defamation claim arising from a particular incident that was presented as factually distinct from the events underlying the discrimination claim).

consistency and fairness. Because the federal government is the nation's largest employer, this issue has the potential to affect hundreds, if not thousands, of people each year.[10]

This Comment reviews the varying approaches and decisions by federal courts over whether and how federal employees can maintain both state tort claims and Title VII actions stemming from the same or substantially overlapping facts. While a few courts have held that such claims cannot proceed with a Title VII action when the claims are based on the same set of facts, most other lower courts have used a grab bag of justifications for allowing state tort claims to proceed. Such justifications include that tort law seeks to remedy something legally distinct from employment discrimination law, that at least some tort claims are highly personal and thus deserve separate treatment, that simultaneous Title VII–tort cases that do not indicate an attempt to circumvent Title VII do not fall under *Brown*, and that tort actions against individual federal employees do not implicate the sovereign immunity concerns of *Brown*. This Comment proposes to resolve that split with a presumption that the state tort claims can proceed. It reaches this conclusion through a reexamination of the legislative history of the Equal Employment Opportunity Act and the implied-repeal doctrine in federal law.[11]

However, distinguishing torts that do not vindicate substantially separate rights from employment discrimination is also an important part of the inquiry. Congress chose to amend Title VII to include a cause of action for federal employees largely based on its understanding that such employees could not obtain relief for employment discrimination due to the government's sovereign immunity. Federal employees *could* sue the government in tort under the Federal Tort Claims Act[12] (FTCA), however. This raises important questions about the interplay of each act given the importance of strictly construing waivers of sovereign immunity. This Comment proposes to distinguish these torts with a test that assesses whether the tort in question is serving as the functional equivalent of an employment discrimination claim. Such an inquiry will add clarity to the existing case law,

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[10] See Executive Order 13583, 3 CFR 266 (2011) (stating, by executive order, that the United States is the largest employer and must "lead by example" on issues of diversity in the workplace).

[11] See *Brown*, 425 US at 831–32.

[12] Pub L No 79-601, 60 Stat 842 (1946), codified in various sections of Title 28.

which has unsuccessfully attempted to apply more formalistic tests to determine whether the tort causes of action vindicate distinct legal rights. By asking whether the cause of action serves functionally the same purpose as a Title VII employment discrimination claim, courts can more clearly balance the congressional goals of providing federal employees with substantially similar remedies as private employees without overextending the federal government's waivers of sovereign immunity for Title VII and state torts.

This Comment proceeds in three parts. Part I reviews the *Brown* case and the legislative history of the Equal Employment Opportunity Act of 1972. It also summarizes the Federal Tort Claims Act, which provides specific conditions and processes for the federal government's waiver of sovereign immunity when tort claims are brought against government agencies. Part II surveys lower court cases that have applied *Brown* to Title VII–state tort actions brought by federal employees. Part III explains the proposed solution. First, it discusses the justification for a presumption that the state tort claims may proceed. Then, it argues that the defendant should be able to rebut this presumption by demonstrating that the tort is an end run around Title VII's procedures and remedies.

I. SECTION 717 AND *BROWN V GENERAL SERVICES ADMINISTRATION*: THE LEGISLATIVE AND JUDICIAL LANDSCAPE OF CONGRESS'S DISCRIMINATION REMEDY FOR FEDERAL EMPLOYEES

This Part provides background information necessary for understanding the disagreement among courts concerning Title VII–tort cases involving federal employees described in Part II and the proposed new hybrid framework described in Part III. It provides an extensive legislative history of the Equal Employment Opportunity Act of 1972[13] (EEOA), part of which the Supreme Court relied on heavily in its *Brown* decision and part of which the Court did not discuss at all. It also summarizes the *Brown* decision and the Federal Tort Claims Act, the latter of which will be an important consideration in Part III's discussion of whether the EEOA preempts state tort claims.

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[13] Pub L No 92-261, 86 Stat 103, codified in various sections of Title 5 and 42.

A. A Federal Remedy for Federal Employment Discrimination: The Equal Employment Opportunity Act of 1972

The Equal Employment Opportunity Act of 1972 was passed eight years after the monumental Civil Rights Act of 1964,[14] primarily to give the Equal Employment Opportunity Commission the ability to judicially enforce the Civil Rights Act.[15] However, the EEOA also addressed employment discrimination in the federal workplace, which had previously been exempted from Title VII of the Civil Rights Act.[16] This amendment, § 717, was in response to the perceived inability of federal employees to obtain redress for employment discrimination under Title VII.[17] While the EEOA still technically exempted the federal government from being defined as an "employer," the Act added § 717 to Title VII. Section 717 created a separate, but similar regime for employment discrimination that allowed federal employees to file equal employment opportunity complaints with the Civil Service Commission. If an employee's complaint is not satisfactorily resolved by the Civil Service Commission, she could file an employment discrimination lawsuit in federal court.[18] As in the rest of Title VII, § 717 made it clear that administrative remedies must be exhausted before filing suit and that there were strict time limits for those seeking to vindicate their rights in

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14 Pub L No 88-352, 78 Stat 241, codified as amended in various sections of Titles 2, 28, and 42.

15 See *Equal Employment Opportunities Enforcement Act of 1971*, S Rep No 92-415, 92d Cong, 1st Sess 1 (1971) (stating the "principal purpose" of the statute "is to amend title VII of the Civil Rights Act of 1964 to provide the Equal Employment Opportunity Commission with a method for enforcing the rights of those workers who have been subjected to unlawful employment practices").

16 Civil Rights Act of 1964 § 701(b), 78 Stat at 253 ("The term 'employer' . . . does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or a State or political subdivision thereof . . . .").

17 See *Equal Employment Opportunities Enforcement Act of 1971*, S 2515, 92d Cong, 2d Sess, in 118 Cong Rec 4929 (Feb 22, 1972) (statement of Senator Alan Cranston) ("My Federal Government EEO amendment included in the committee bill would . . . . [f]or the first time, permit Federal employees to sue the Federal Government in discrimination cases.").

18 EEOA § 717, 86 Stat at 111–12. The Equal Employment Opportunity Commission replaced the Civil Service Commission as the body in charge of handling federal employment discrimination claims in 1978. See Reorganization Plan No. 1 of 1978, Pub L No 95-633, 92 Stat 3781 (1978).

court.[19] The statute also applied several procedural aspects from other sections of Title VII to federal employee suits wholesale.[20]

The Supreme Court in *Brown* considered congressional statements regarding the necessity of an amendment to Title VII to be the most significant portions of the EEOA's legislative history, discussing them at length in the opinion.[21] Employment discrimination by the federal government had been considered illegal under the Fifth Amendment for many years.[22] However, members of Congress acknowledged that federal employees were unable to pursue their claims in courts due to sovereign immunity, which barred suits against the United States to which the government did not consent.[23] Among other parts of the legislative history, the Court quoted heavily from the Senate Report on the EEOA, which stated, "an aggrieved Federal employee does not have access to the courts. In many cases, the employee must overcome a U.S. Government defense of sovereign immunity or failure to exhaust administrative remedies with no certainty as to the steps required to exhaust such remedies."[24] Thus, in order for the federal government to be "a model of equal employment opportunity," Congress had to waive its sovereign immunity through legislation, which is what § 717 explicitly did.[25]

However, unlike the statements regarding sovereign immunity that played a prominent role in the opinion, the *Brown* Court did not take note of several statements from members of

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19 EEOA § 717(c), 86 Stat at 112.

20 EEOA § 717(d), 86 Stat at 112. Because § 717 is included within Title VII and involves substantially similar remedies to traditional Title VII suits, the terms are often used interchangeably in this Comment. A claim filed under § 717 may be called a Title VII claim, for example.

21 See *Brown*, 425 US at 825–29.

22 See S Rep No 92-415 at 12 (cited in note 15).

23 See id at 16:

> The testimony of the Civil Service Commission notwithstanding, the committee found that an aggrieved Federal employee does not have access to the courts. In many cases, the employee must overcome a U.S. Government defense of sovereign immunity or failure to exhaust administrative remedies with no certainty as to the steps required to exhaust such remedies.

24 *Brown*, 425 US at 828–29, quoting S Rep No 92-415 at 16 (cited in note 15).

25 118 Cong Rec at 4929 (remarks of Senator Alan Cranston) (cited in note 17). See also *Brown*, 425 US at 829. Waivers of sovereign immunity are strictly construed by courts in favor of the government, which likely complicated the Supreme Court's analysis in *Brown* of whether § 717 precluded other remedies for employment discrimination. See *United States v Idaho*, 508 US 1, 6–7 (1993) ("There is no doubt that waivers of federal sovereign immunity must be 'unequivocally expressed' in the statutory text. . . . 'Any such waiver must be strictly construed in favor of the United States.'").

Congress regarding the type of discrimination they had in mind in creating the legislation and how they felt the amendment related to the portions of Title VII applying to private employees. These statements play an important role in determining the scope of § 717's exclusivity in Part III.

Both the House and Senate committee reports on the bill noted the importance of the amendment for adding moral authority to the federal government's regulation of private businesses under Title VII. The House report stated:

> The Federal service is an area where equal employment opportunity is of paramount significance. Americans rely upon the maxim, "government of the people," and traditionally measure the quality of their democracy by the opportunity they have to participate in governmental processes. It is therefore imperative that equal opportunity be the touchstone of the Federal system.[26]

The Senate Report similarly addressed the symbolic need for the bill, stating: "The Federal government, with 2.6 million employees, is the single largest employer in the Nation. . . . Consequently, its policies, actions, and programs strongly influence the activities of all other enterprises, organizations and groups. In no area is government action more important than in the area of civil rights."[27]

Several members of the House and Senate also spoke individually on the issue of § 717 during hearings on the EEOA. These congressmen and congresswomen consistently emphasized the need to provide similar remedies for federal employees and private employees who experience discrimination. Senator Alan Cranston, who authored § 717, stated that the amendment would, "[f]or the first time, permit Federal employees to sue the Federal Government in discrimination cases."[28] He compared the amendments related to federal employees to those previously provided to private employees: "Subsection (c) of the new section 717 creates a remedy in Federal district court—*comparable to private employment actions*—for any employee who has exhausted the equal employment opportunity complaint procedure within

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[26] *Equal Employment Opportunities Enforcement Act of 1971*, HR Rep No 92-238, 92d Congress, 1st Sess 22 (1971).

[27] S Rep No 92-415 at 12 (cited in note 15).

[28] 118 Cong Rec at 4929 (cited in note 17).

his Federal agency."[29] That view was affirmed by Senator Harrison A. Williams, chairman of the Committee on Labor and Public Welfare, who stated:

> Previously, there have been unrealistically high barriers which prevented or discouraged a Federal employee from taking a case to court. This will no longer be the case. *There is no reason why a Federal employee should not have the same private right of action enjoyed by individuals in the private sector*, and I believe that the committee has acted wisely in this regard.[30]

Significantly, in the committee reports, members of Congress consistently spoke of a particular *type* of employment discrimination. Namely, the legislation was specifically designed to address the federal government's failure to hire minorities and women and to advance them proportionately. While it is unlikely that Congress did not intend to include more extreme examples of discrimination in federal employment within the scope of the Act, its focus was on systemic discrimination and its effects. There was little discussion regarding the more vivid, individualized examples of discrimination, as is frequently seen in the cases this Comment discusses.

The legislative history is replete with discussion of systemic concerns. The committee reports of both houses of Congress and the remarks of Representative Carl Perkins, chairman of the Committee on Education and Labor, describe the underrepresentation of minorities and women in federal employment, particularly at higher pay grades.[31] Other legislators who spoke specifically of the overall failure to hire and promote women and minorities in reference to § 717 include: Representative Herman Badillo,[32] Representative Patsy Mink,[33] and Delegate Walter

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29 Id at 4921 (emphasis added).

30 Id at 4922 (emphasis added).

31 See HR Rep No 92-238 at 23 (cited in note 26); S Rep No 92-415 at 13–14 (cited in note 15); *Equal Employment Opportunities Enforcement Act of 1971*, H Res 542, 92d Congress, 1st Session, in 117 Cong Rec 31960 (Sep 15, 1971) (statement of Representative Perkins) (recounting evidence of the exclusion of women and minorities).

32 See 117 Cong Rec at 32101–03 (cited in note 31) (statement of Representative Badillo) (describing the underrepresentation of Spanish-speaking employees in the federal service).

33 See id at 32105 (statement of Representative Mink) (describing discrimination against women in federal employment).

Fauntroy.[34] When extreme examples of discrimination were mentioned, it was to distinguish them from the cases motivating the proposed legislation. Specifically, the House Report and Senate Report criticized the federal Civil Service Commission for focusing on cases in which there was "malicious intent," rather than looking at systemic discrimination in federal employment.[35] As will be discussed later, that legislators were focused on systemic discrimination in creating § 717 and appeared to believe that more extreme examples of discrimination were already being addressed by the Civil Service Commission to at least some degree is relevant to the issue of whether Title VII preempts state tort actions.

B. A Sovereign Immunity Wrinkle: The Federal Tort Claims Act

Federal employees with simultaneous tort and employment discrimination claims frequently sue only the federal government, not individual employees. Therefore, the Federal Tort Claims Act, the federal government's partial waiver of sovereign immunity for tort claims, is also relevant to the issue of concurrent tort and employment discrimination claims. The Act, passed in 1946, provides another set of procedural and substantive limitations for federal employees who wish to sue on discrimination and tort claims. Specifically, anyone seeking to assert a tort claim against the government must first file an administrative complaint with the requisite agency.[36] If the agency denies the claim in writing or fails to respond within six

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[34] See id at 32094. Delegate Fauntroy, an African American pastor who represented the District of Columbia for twenty years as a nonvoting member of Congress, eloquently stated the problem that federal employees, many of whom were his constituents, faced:

> My father was employed at the U.S. Patent Office here for 44 years before retiring. He knew the effects of discrimination and we, his children, knew his frustration and despair. He trained two generations of white employees who were then passed up and over the shoulder to higher level and higher paying jobs. From all the evidence I have seen, even today in this supposedly enlightened time, these practices continue daily with little substantive change.

[35] HR Rep No 92-238 at 24 (cited in note 26) ("The Civil Service Commission seems to assume that employment discrimination is primarily a problem of malicious intent on the part of individuals. It apparently has not recognized that the general rules and procedures it has promulgated may actually operate to the disadvantage of minorities and women in systemic fashion."); S Rep No 92-415 at 14 (cited in note 15) (making the same point).

[36] 28 USC § 2675(a).

months, the complainant may then file a tort suit.[37] To prevail on a tort claim against the federal government, the employee who committed the tort against the plaintiff must have been acting within the scope of his employment.[38] If a claim is filed against the United States, the federal employee who committed the tort cannot also be sued individually.[39] Moreover, punitive damages and interest on the judgment are unavailable and attorney's fees are limited.[40]

Lastly, there are several circumstances under which recovery from the United States is barred. These include when the employee-tortfeasor performed discretionary actions with due care,[41] as well as when an employee allegedly committed "assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights."[42] Thus, while the FTCA provides important context regarding the federal government's waivers of sovereign immunity for torts, it is important to note that for many of the torts at issue in this Comment, employees may be sued only as individuals and only if they are acting outside the scope of their duty. In these cases, there is no sovereign immunity question at all, provoking a separate analysis of § 717's potential exclusivity. There are, however, some additional protections for federal employees sued individually for tort claims based on absolute or qualified immunity for federal officials.[43]

C. The Supreme Court Takes On § 717 Exclusivity: *Brown v General Services Administration*

The Supreme Court's decision in *Brown v General Services Administration* provides the current framework for the exclusivity of Title VII. The Court relied on part of the EEOA's legislative history, the structure of § 717, and general canons of statutory

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37 28 USC § 2675(a).

38 28 USC § 2675(a).

39 28 USC § 2676.

40 28 USC §§ 2674, 2678.

41 28 USC § 2680(a).

42 28 USC § 2680(h).

43 See *Harlow v Fitzgerald*, 457 US 800, 806–07 (1982) (noting that legislators acting in their legislative capacity, judges acting in their judicial capacity, and select executive officers have absolute immunity, but that most executive officers will have qualified immunity based on the level of discretion in their activities).

construction to reach its conclusion. In the case, the plaintiff, Clarence Brown, was an African American employee of the defendant agency who had been passed up for promotions in favor of white men on two different occasions. He filed a complaint of racial discrimination with the agency's equal employment office and the office responded that they did not believe race played a role in the promotions.[44] Brown then requested and received a hearing before the Civil Service Commission. The body reached the same conclusion and notified Brown that he had thirty days to file a suit in district court.[45] Brown sued in district court forty-two days later, making claims under Title VII, the Civil Rights Act of 1866, and the Declaratory Judgment Act.[46] The district court dismissed the claims and the circuit court affirmed because the thirty-day statutory deadline for Title VII claims had elapsed and Title VII precluded the other claims.[47]

The Supreme Court in *Brown* was thus presented with the question of whether Title VII provided the exclusive remedy for employment discrimination for federal employees. Prior to the case, the Court had held that Title VII was *not* the exclusive remedy for private employees in *Alexander v Gardner-Denver Co*[48] and *Johnson v Railway Express Agency, Inc.*[49] However, unlike in *Brown*, which focused exclusively on the EEOA, both earlier cases addressed the legislative history of the Civil Rights Act of 1964, which created the original Title VII. *Alexander* cited the legislative goals of "[c]ooperation and voluntary compliance," legislators' decision to include multiple fora to adjudicate Title VII claims, and the "congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes" to hold that a plaintiff did not forfeit his Title VII claim by pursuing a discrimination remedy under a collectively bargained arbitration process.[50] In *Johnson*, the Court pointed to the same congressional intent, citing *Alexander*, but also to specific congressional statements regarding the continued availability of § 1981 as a remedy for private employees to "augment" Title VII to conclude that the

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44 *Brown*, 425 US at 822.

45 Id at 822–23.

46 Id at 823.

47 *Brown v General Services Administration*, 507 F2d 1300, 1307–08 (2d Cir 1974).

48 415 US 36 (1974).

49 421 US 454 (1975).

50 *Alexander*, 415 US at 44–48.

statute of limitations on a § 1981 claim did not toll during a Title VII claim.[51]

In *Brown*, however, the legislative history of the Civil Rights Act played no such role; rather, the Court focused exclusively on the history of the EEOA, which added § 717 to provide the benefits of Title VII to federal employees. The Court first commented: "[T]he question is easier to state than it is to resolve. Congress simply failed explicitly to describe § 717's position in the constellation of antidiscrimination law. We must, therefore, infer congressional intent in less obvious ways."[52] The Court relied on legislative history—specifically statements as to why there had previously been no remedy for federal employees—and the structure of the EEOA to conclude that Brown's other claims were barred. The Court explained that while injunctive relief was possible, courts had largely held that sovereign immunity barred monetary remedies against the federal government for employment discrimination.[53] The Court noted that the legislative history of the Act also strongly indicated that legislators believed sovereign immunity barred such suits before the EEOA. Whether or not Congress's understanding of the law was correct, the Court relied on this understanding to determine Congress's intent to waive sovereign immunity.[54]

The Court then examined the structure of the Act, which contains "complementary administrative and judicial enforcement mechanisms."[55] The Act includes several prerequisites for obtaining judicial relief, such as requiring plaintiffs to seek administrative relief first, a thirty-day limit to file claims, and carryover provisions from Title VII governing "venue, the appointment of attorneys, attorneys' fees, and the scope of relief."[56] The

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51 *Johnson*, 421 US at 459.

52 *Brown*, 425 US at 825.

53 See id at 826.

54 See id at 828 ("[T]he relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what its perception of the state of the law was."). Given the similarity of § 717 to the remedies provided to private employees and the statements of several members of Congress regarding the scope of § 717 discussed in Part I.A, it is perhaps questionable that the purposes of the Civil Rights Act were not considered in *Brown*. However, as seen in the discussion accompanying this note, the Court appeared to consider the fact that § 1981 was not considered applicable to federal employees prior to the EEOA as dispositive of whether it remained inapplicable afterwards, and did not consider whether Congress sought to make that remedy available to federal employees via its inclusion under Title VII.

55 Id at 831.

56 *Brown*, 425 US at 832.

Court reasoned that this structure demonstrates that § 717 of the Equal Employment Opportunity Act was meant to be the "exclusive remedy" for employment discrimination for federal employees.[57] The Court noted 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."[58]

In *Brown*, the Court rejected Brown's reliance on *Johnson* for the idea that § 1981 was available to federal employees, reasoning that *Johnson* was "inapposite" due to legislators' belief, as evinced in the EEOA legislative history, that there had been no proper remedies for federal employees before § 717.[59] In other words, that private employees had other claims for which they could seek remedies in addition to Title VII had no bearing on the fact that federal employees did not have such remedies prior to the EEOA.[60] Lastly, the Court relied upon a canon of statutory construction that the specific governs the general to conclude that "a precisely drawn, detailed statute pre-empts more general remedies."[61] Specifically, the more-detailed § 717 preempted the Civil Rights Act of 1866, which provided the more general § 1981 remedy for discrimination in the making and enforcement of contracts.[62]

Given the desire expressed by legislators to put federal employees on equal footing with private employees, the holding in *Brown* is questionable. Nevertheless, the most relevant feature of *Brown* for the purposes of this Comment is that the case did not deal with state tort causes of action. The statutes in question were federal civil rights statutes and did not address the type of infringements addressed by the cases described in Part II, namely harms to a federal employee that would constitute torts even in the absence of an employment relationship. In particular, the Supreme Court in *Brown* did not need to consider if the type of discrimination Brown claimed to have suffered was contemplated by Congress when it passed the EEOA; being passed

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57 See id at 831–32.

58 Id at 832.

59 Id at 833.

60 See *Brown*, 425 US at 833–34.

61 Id at 834.

62 See Civil Rights Act of 1866, 14 Stat 27, codified as amended at 42 USC § 1981 et seq.

over for employment opportunities is a classic example of employment discrimination contemplated by members of Congress in their comments about the Act.[63] As will soon be evident, the process of reconciling *Brown* with state tort claims, particularly in the shadow of the Federal Tort Claims Act, has been far from predictable.

II. THE EVOLUTION OF THE CASE LAW AFTER *BROWN*

Brown's declaration that Title VII is the exclusive remedy for discrimination in federal employment has left courts sharply divided on the question of whether § 717 precludes state tort claims from being litigated simultaneously with Title VII discrimination claims. Essentially, the question for courts is whether the torts in question aim to remedy employment discrimination or some other distinct legal right. This question can become complicated depending on the nature of the tort in question and other factors. Even when courts agree that such claims should be allowed, the reasoning is often disparate. After several decades, the result is a muddied, divided landscape in which some federal employees' tort claims can proceed (although rarely under the same test) and others' cannot. Thus, the success of such claims often depends on the court in which the cases are filed. Even within districts and states, the standards judges apply can vary. This Part explores and categorizes those decisions.

A. Cases That Have Allowed Simultaneous Tort and Title VII Claims

1. The distinct-legal-right/highly-personal-wrong exception.

The most common, although somewhat ill-defined exception to *Brown* is the distinct-legal-right exception. In such cases, courts have allowed simultaneous claims when they determine that a plaintiff has suffered a harm separate from discrimination—that is, when the associated tort claim involves legal rights distinct from the right to be free from discrimination. Generally, though not exclusively, courts have also indicated

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[63] See 117 Cong Rec at 31960 (cited in note 17) (statement of Representative Perkins) (describing the purpose of § 717 as being to remedy the failure to hire and promote women and minorities at sufficient rates).

that in addition to involving separate rights, the torts must involve a "highly personal wrong[ ]" to the plaintiff to be allowed to proceed.[64] A common thread running through many of these cases, either explicitly or implicitly, is the question of whether the tort in question is sufficiently distinct from the type of employment discrimination Congress had in mind when it passed § 717.[65]

One of the first cases to deal with potential distinctions between tort and discrimination claims for federal employees was *Stewart v Thomas*,[66] which (ironically) involved an employment discrimination claim made by an employee of the Equal Employment Opportunity Commission (EEOC).[67] The plaintiff sued the Commission for sex discrimination and the individual offending employee for assault, battery, outrage, and intentional infliction of emotional distress.[68] The District Court for the District of Columbia distinguished the case from *Brown* on the basis that Stewart sought to vindicate "two distinct and independent rights: her right to be free from discriminatory treatment at her jobsite and her right to be free from bodily or emotional injury caused by another person."[69] The court noted the inadequacy of an employment discrimination claim to remedy bodily harm and, to some extent, emotional injury due to the "highly personal" nature of such harms, which the court described as "beyond the meaning of 'discrimination.'"[70] Rather, the court concluded that the employment discrimination and tort remedies may both be required, the former to cure the harms to society and the latter to cure the physical and emotional harms of an individual.[71] In relying on the notion of "distinct and independent rights," *Stewart* is one of the first examples of the distinct-legal-right exception to *Brown*.[72] *Stewart* remains one of the most frequently cited cases in this context.[73]

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64 *Brock v United States*, 64 F3d 1421, 1423 (9th Cir 1995) (quotation marks omitted).

65 See, for example, *Gerentine v United States*, 2001 WL 876831, *7 (SDNY).

66 538 F Supp 891 (DDC 1982).

67 Id at 893.

68 See id.

69 Id at 895.

70 See *Stewart*, 538 F Supp at 896.

71 See id at 897.

72 Id at 895.

73 As of October 2013, a Westlaw search lists sixty case citations to *Stewart*. Several cases rely on *Stewart*'s reasoning wholesale. One such case is *Otto v Heckler*, 781 F2d 754 (9th Cir 1986), a sexual harassment case involving claims of assault, invasion of

Shortly after *Stewart*, the same district court articulated another, potentially stronger statement of the distinct-legal-right standard in *Rochon v Federal Bureau of Investigation*.[74] The court extensively discussed *Brown*, and rejected the defendants' assertion that *Brown* precluded Rochon's claims of intentional infliction of emotional distress, outrageous conduct, invasion of privacy, assault and battery, and other torts. "*Brown* stands for the proposition that Title VII preempts other remedies for discrimination in federal employment *only* when the federal employee is challenging action directly and singularly related to discrimination in the terms and conditions of his or her employment."[75] The court analyzed several cases in which Title VII was held not to be preemptive, dividing them into three categories: (1) tort claims that vindicated rights that Title VII could not remedy, (2) additional legal claims that were based on different facts than the Title VII claim, and (3) tort claims that provided remedies for harms that went over and above discrimination.[76] Ultimately, the court held that only a distinct legal right need be present; the same facts or a harm greater than discrimination were not required for a plaintiff's claim to proceed.[77]

Brunetti v Rubin[78] provided a similarly strong statement against § 717's preclusive effect based on a reevaluation of the Act's legislative history. *Brunetti* involved sexual harassment claims by an employee of the Internal Revenue Service, who also claimed that her employer engaged in "extreme and outrageous

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privacy, intentional infliction of emotional distress, and defamation, with plaintiff alleging that the sexual harassment ultimately contributed to a miscarriage.

74 691 F Supp 1548 (DDC 1988). The disturbing facts of this racial discrimination case were stated in this Comment's Introduction.

75 Id at 1555.

76 See id at 1556.

77 Id. The District Court for the District of Columbia took up the issue again in *Boyd v O'Neill* and appeared to give plaintiffs the option of proving that there was a distinct legal right *or* a highly personal wrong at issue. See *Boyd v O'Neill*, 273 F Supp 2d 92, 96 (DDC 2003). It is thus unclear after this case whether a supplemental tort claim must be merely different from the Title VII discrimination claim, or both different *and* more personal than discrimination to go forward. Intriguingly, the defendants also argued that *Stewart* should be ignored because Title VII was amended to provide for compensatory and punitive damages. The court rejected the defendants' "double recovery" argument because "each [cause of action] seeks to remedy a different wrong." *Boyd*, 273 F Supp 2d at 96–97.

78 999 F Supp 1408 (D Colo 1998).

conduct."[79] The court, looking at the same legislative history as that analyzed by the Supreme Court in *Brown*, stated: "Nothing in that history [ ] suggests that Congress intended to prevent federal employees from suing their employers or supervisors for constitutional, statutory, or common law violations against which Title VII provides no protection at all."[80] Thus, the court in *Brunetti* determined that *Brown* stands for the proposition that the preclusive effect of § 717 is limited to employment discrimination *and nothing more*. Citing *Stewart*, the court held that "to the extent [a federal employee's] emotional injuries were a direct result" of a supervisor's tortious behavior and not a result of the work environment, a claim against the supervisor could proceed.[81]

While cases such as *Rochon* and *Brunetti* suggest that distinct legal rights being affected need not be further qualified to obtain tort relief, the Ninth Circuit again underscored the need for a "highly personal wrong[ ]" in *Brock v United States*[82] in its analysis of whether tort claims could proceed with a Title VII claim. In *Brock*, a female Forest Service employee claimed that her direct supervisor sexually harassed and raped her.[83] The Ninth Circuit reasoned that the FTCA claim against the United States could proceed because the plaintiff suffered a "highly personal wrong[ ]" as a result of the government's negligent supervision of her superior. Notably, the plaintiff's harasser continued to work in the same agency for months after the rape, and the plaintiff was harassed by other coworkers after she requested and received a transfer to another department.[84] This variant of the distinct-legal-right rationale justified the potential additional compensation that the plaintiff could receive because the plaintiff was subject to a wrong that was not just distinct from, but *more harmful* than discrimination.[85]

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79 Id at 1409.

80 Id at 1412.

81 Id at 1411.

82 64 F3d 1421, 1423 (9th Cir 1995) (quotation marks omitted).

83 See id at 1422. Note the previous discussion of assault and battery being unavailable in an FTCA tort claim. See Part I.B.

84 See *Brock*, 64 F3d at 1423.

85 See id. The same employee had filed an EEOC complaint for sex-based discrimination based on the same events, which was settled out of court before the plaintiff brought the tort claim, raising the possibility of the plaintiff receiving compensation beyond what Title VII contemplated.

The *Brock* court invoked a greater-includes-the-lesser argument to conclude that the sexual assault was both potentially tortious and de facto discrimination and that the "ultimate harm" of rape goes beyond the "lesser offense" of discrimination.[86] This distinction has been frequently cited despite its meaning and boundaries being unclear on the surface and rarely explained by courts.[87] The *Brock* court also noted that *not* allowing simultaneous tort and Title VII suits under these circumstances would "contravene the basic purposes of Title VII" by preventing employees assaulted based on gender from suing under the FTCA, but allowing those employees assaulted for reasons other than their gender to seek such a remedy.[88] Without explicitly going into the legislative history of § 717, the court concluded that such a result could not possibly be within Congress's intent.[89]

Jones v Perry[90] demonstrates the potential confusion in using the language of both distinct legal rights and highly personal wrongs to determine whether tort claims can proceed. There, the plaintiff sued the Defense Contract Audit Agency for sexual harassment under Title VII and her supervisor for assault and battery based on the same events.[91] The court noted that whether a tort claim could go forward depended on "the extent that Title VII fails to capture the personal nature of the injury done to the plaintiff as an individual."[92] The court indicated, however, that such claims may not go forward if they "arise from the type of employment discrimination contemplated by Title VII."[93] According to the court in *Jones*, then, an exception to *Brown* requires that the injury be personal *as well as* unrelated to Congress's conception of discrimination to be remedied in tort. Such an explanation of the standard differs from *Brock*'s and *Stewart*'s uses of highly personal wrongs and distinct legal rights by requiring an analysis not just of modern conceptions of what statutes seek to remedy, but an analysis of what Congress at the time of § 717 understood itself to be addressing.

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86 *Brock*, 64 F3d at 1423.
87 See id at 1422.
88 Id at 1423–24.
89 Id.
90 941 F Supp 584 (D Md 1996).
91 See id at 585.
92 Id at 586, citing *Stewart*, 538 F Supp at 897.
93 *Jones*, 941 F Supp at 586.

One of the biggest concerns with the distinct-legal-right and highly-personal-wrong standards is that the contours of such standards are difficult to readily define. Because the courts in many of these cases only face the potential dismissal of a tort claim under the Federal Rule of Civil Procedure 12(b)(6) standard, which is relatively lenient for plaintiffs, they have not often had to decide precisely when a highly personal violation or distinct legal right has been implicated, only whether there is a reasonable possibility of one. In *Wallace v Henderson*,[94] however, the court did make such a determination. In *Wallace*, the plaintiff was a witness to sexual harassment who complied with an EEOC investigation.[95] As a result, he suffered retaliation that included stalking and threats to his body, life, and employment.[96] The plaintiff sued his employer under Title VII and his coworkers who engaged in the retaliation for intentional infliction of emotional distress, seeking punitive damages.[97] The court relied on the *Stewart*, *Brock*, and *Brunetti* decisions to hold that "a federal employee who has brought a Title VII claim is not precluded from suing for a 'highly personal violation' that goes beyond discrimination."[98] The court held that a separate legal right *was* apparent from the facts of the case, which included not only retaliatory behavior outside the workplace, but also "particular threats and conduct" that made the plaintiff too "afraid to leave his apartment" and caused his "heart condition [to worsen]."[99] The latter determination is reminiscent of the facts historically necessary to prove the tort of intentional infliction of emotional distress, namely, that the plaintiff's distress be accompanied by physical effects.[100] Thus, *Wallace* implies that the likelihood of the tort claim's success or the presence of a tangible physical injury may strengthen a claim that a highly personal wrong or distinct legal right has been implicated.

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94 138 F Supp 2d 980 (SD Ohio 2000).

95 See id at 981.

96 See id.

97 See id at 982.

98 *Wallace*, 138 F Supp 2d at 984.

99 Id at 986.

100 See *Lynch v Knight*, 11 Eng Rep 854, 863 (HL 1861) (Wensleydale).

2. Cases that emphasize Title VII's procedural and remedial limitations.

The concern that a plaintiff might be attempting to circumvent Title VII's procedural and remedial limitations to obtain an easier or greater recovery is pervasive in cases addressing Title VII–tort claims. The procedural concern tends to arise in cases using the distinct-legal-right or highly-personal-wrong standard, despite its somewhat uneasy fit with such substantive discussions of legal rights and personal wrongs.[101] Some courts have focused on whether a plaintiff followed Title VII's procedural requirements as a proxy for assessing the merits of a particular claim. These courts have even gone so far as to use such behavior to determine whether the claim involves a distinct legal right. The court in *Stewart*, for example, noted favorably that the plaintiff had not tried to circumvent the administrative remedies of Title VII, but rather had exhausted her remedies under Title VII and sought additional relief.[102] The court further alluded to the plaintiff's intentions by stating that Stewart "does not ask this court to stretch 'marginally applicable statutory, common law, and constitutional theories of individual recovery'" to her situation.[103] Thus, based in part on procedural issues, the court felt comfortable in stating that Stewart was not attempting to elide Title VII's procedural or remedial limitations, but rather address separate harms with separate remedies.

As in *Stewart*, *Baird v Haith*[104] relied heavily on a plaintiff's possible intent to circumvent Title VII's many procedural requirements. The plaintiff alleged religious discrimination based on her refusal to work Saturdays and sued under Title VII and for intentional infliction of emotional distress.[105] Citing *Stewart*, the court determined that Title VII did not preempt "causes of action which, while arising from the same set of facts, are

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[101] The concern over circumventing Title VII comes not just from the statute's procedural requirements, but also because Title VII limits remedies for employment discrimination, which prompts concerns about overrecovery as well as procedural evasion. See Civil Rights Act of 1991, Pub L No 102-166, 105 Stat 1071, codified as amended in various sections of Titles 2 and 42 (allowing compensatory and punitive damages in cases of intentional discrimination, but limiting the amount available).

[102] See *Stewart*, 538 F Supp at 896.

[103] See id at 895, quoting *Neely v Blumenthal*, 458 F Supp 945, 952 (DDC 1978).

[104] 724 F Supp 367 (D Md 1988).

[105] See id at 369–70.

completely distinct from discrimination."[106] To determine whether such a cause of action is actually distinct, the court examined the plaintiff's complaint "to determine if she is attempting to bypass the administrative and remedies restrictions of Title VII 'by the simple expedient of putting a different label on the pleadings.'"[107] The court did not describe how its test could be administered; the court simply observed that all of the plaintiff's emotional distress complaints stemmed from occurrences in her workplace.[108]

3. The official/unofficial activity exception.

Many courts have recognized an exception to the *Brown* framework when, instead of suing the federal government, a plaintiff sues another federal employee based on his actions toward the plaintiff outside the scope of the employee's official duties. While there is some overlap with the distinct-legal-right exception in these cases, it is worth discussing them separately. Suing an individual employee, if correctly done, does not implicate any of the sovereign immunity issues that complicated the court's decision in *Brown*, and so these types of cases may be set aside when discussing the preemptive scope of Title VII. These cases are important to discuss, however, because such a determination is necessary before applying a more complex solution.

In *Wood v United States*,[109] the court held that *Brown* did not apply when a federal employee sued another employee individually because there was no sovereign immunity issue.[110] In *Wood*, a US Army employee attempted to sue her supervisor for assault and battery related to his sexual harassment of her, which had culminated in her dismissal.[111] The plaintiff's ability to sue the major individually was particularly important because the federal government has not waived immunity for assaults and batteries of its employees under the Federal Tort Claims Act.[112] In *Wood*, the federal government attempted to substitute itself for the defendant under the FTCA—arguing that the employee was acting within the scope of his duty—and

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106 Id at 373.
107 Id at 373–74, quoting *Brown*, 425 US at 833.
108 See *Baird*, 724 F Supp at 376.
109 760 F Supp 952 (D Mass 1991).
110 See id at 956.
111 See id at 953–54.
112 See 28 USC § 2680(h).

then have the suit dismissed because of the FTCA exception for assault and battery. The court, however, concluded that the behaviors alleged were not in the scope of employment under the required test, which involved applying the relevant state's law of respondeat superior.[113] Thus, the court held that the plaintiff's claim against her supervisor could continue on an individual basis and that *Brown* did not preclude tort suits against individual federal employees.[114]

Several of the cases mentioned above also discussed the relevance of the plaintiff suing an individual federal employee based on his unofficial acts as opposed to suing the government based on respondeat superior. In *Baird*, the court dismissed the individual defendants' argument that sovereign immunity barred the intentional infliction of emotional distress (IIED) claim.[115] The court noted that the FTCA provided a potential waiver of sovereign immunity, but stated that the plaintiff did not follow the required procedure because she sued the defendants in their official capacities instead of the United States.[116] In *Boyd v O'Neill*,[117] the court granted the defendant's motion to substitute the United States for the defendant, applying the law of the District of Columbia regarding what constitutes "the scope of employment."[118] The court determined that the defendant's alleged assaults occurred while discussing employment issues with the plaintiff, satisfying the requirement that conduct be "incidental to the conduct authorized."[119] Thus, the defendant's actions were within the scope of employment.[120]

Lastly, consideration of employees as individuals played a significant role in *Rochon*, in which the court dismissed claims against some of the officers for their failure to investigate the

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[113] See *Wood*, 760 F Supp at 955. Note that this means that even if a court agreed with the premise that the assault and battery involved a legal right that could be vindicated separate from discrimination, if the offending employee was determined to have been acting within the scope of his employment, there may be no remedy for the plaintiff.

[114] See id at 956–57.

[115] See *Baird*, 724 F Supp at 376.

[116] See id at 376–77.

[117] 273 F Supp 2d 92 (DDC 2003).

[118] Id at 97.

[119] Id at 98–101.

[120] See id. It may be worth noting the breadth of the District of DC standard compared to the District of Massachusetts standard; the wide variety of jurisdictional standards for respondeat superior is outside the scope of this Comment, but nonetheless poses interesting questions regarding the varying ability for plaintiffs to sue federal employees for torts as individuals.

plaintiff's racial discrimination claims. The court determined that these officers' (lack of) action was subject to absolute immunity because their actions were not "manifestly or palpably beyond [their] authority" and were discretionary in nature.[121] The court dismissed the claims even though the officers in question were accused of not only failing to investigate, but of "participating in, condoning, or covering up various acts of racial harassment" in the course of their supervisory activities.[122]

4. Cases that recognize exceptions exist, but do not apply them.

In addition to cases that create and apply the distinct-legal-right and highly-personal-wrong exceptions, several other courts have acknowledged that those exceptions exist, but have proved unwilling to apply those exceptions. Some courts have distinguished between cases where the tort claim is substantiated by a separate set of facts and those where the tort claim is "wholly derivative"[123] of the employment claim.[124] In *Roland v Potter*,[125] a United States Postal Service employee sued her employer under Title VII, alleging racial discrimination and retaliation when she was demoted for selling cosmetics at work, as well as for the tort of intentional infliction of emotional distress.[126] The court acknowledged that since *Brown*, "courts have strived to delimit the preemptive effect of Title VII over various state law claims," such as those that remedy wrongs other than workplace discrimination.[127] However, the court noted that "[t]here is not a clear cut answer [ ] as to whether a claim for intentional infliction of emotional distress caused by discriminatory conduct seeks a different remedy than a Title VII claim."[128] The court in *Roland* determined that separate facts did not support the IIED claim and

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[121] *Rochon*, 691 F Supp at 1561, citing *Martin v District of Columbia Police Department*, 812 F2d 1425, 1429 (DC Cir 1987).

[122] *Rochon*, 691 F Supp at 1562.

[123] *Roland v Potter*, 366 F Supp 2d 1233, 1236 (SD Ga 2005).

[124] This has occurred despite the fact that courts applying the distinct-legal-right standard in many earlier cases have denied, either implicitly or explicitly, the need for a separate set of facts. See, for example, *Rochon*, 691 F Supp at 1556. See also Part II.A.

[125] 366 F Supp 2d 1233 (SD Ga 2005).

[126] See id at 1233–34.

[127] Id at 1235.

[128] Id.

that the claim was therefore "wholly derivative" from the Title VII claim and thus preempted.[129]

In an opinion that blurs the distinct-legal-right exception and the individual-employee exception discussed above, the court in *Gerentine v United States*[130] employed a standard of "traditional workplace behavior"[131] to determine whether a tort suit could proceed. There, the plaintiff sued the US Army for gender discrimination and retaliation and her individual supervisors for defamation and IIED stemming from alleged sexual harassment and retaliation.[132] The court noted that the plaintiff did not follow Title VII procedure for the defamation- or IIED-related claims. It determined that she was trying to use tort law to get around the procedural requirement.[133] The court acknowledged, however, that "[n]otwithstanding Title VII's broad preemptive scope, some courts have held that a tort claim will lie against a federal employer, including an individual supervisor, if the supervisor's actions exceed conduct that constitutes traditional workplace behavior."[134] To test for such behavior, the court asked if the behavior in question was the type of workplace discrimination contemplated by Title VII. The court decided that Gerentine's complaints fell into that category and thus could not also qualify as a tort.[135] However, it is unclear whether "traditional workplace behavior" refers to the determination that the behavior was highly personal or involved a legal right distinct from discrimination, or whether the employee was acting outside the scope of his employment and could thus be sued individually.

Lastly, judicial criticism of the vagueness of the contours of the highly-personal-wrong standard arose in the Ninth Circuit case *Sommatino v United States*.[136] The majority concluded that tort claims could not proceed in a Title VII case because the wrongs were not "of the order of magnitude of the personal violation of rape in *Brock*, the forced sexual assaults in *Arnold* [*v United States*] (forced kissing, fondling, and blocking the door),

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129 See *Roland*, 366 F Supp 2d at 1235–36.
130 2001 WL 876831 (SDNY).
131 Id at *7.
132 Id at *1.
133 Id at *7.
134 *Gerentine*, 2001 WL 876831 at *7.
135 See id.
136 255 F3d 704 (9th Cir 2001).

and the following and phone calling at home in *Otto*."[137] Judge Stephen Reinhardt addressed the potential problems in applying the court's highly personal standard in a partial dissent. Judge Reinhardt detailed the allegations of Sommatino that her coworker repeatedly and intentionally brushed his arms against her breasts and "restrained" her in conversations outside of the office, noting that he did "not believe that the majority opinion establishe[d] a principled line between conduct that gives rise to an FTCA claim and conduct that does not."[138] Judge Reinhardt instead proposed that any conduct meeting the standard of an assault should suffice for FTCA purposes.[139] Judge Reinhardt's criticisms of the highly-personal-wrong standard are prescient; it is unclear whether his proposed standard could be seen as a version of the distinct-legal-rights standard, or whether he would view determining whether a tort is sufficiently distinct from employment discrimination to pose similar problems, but such a broad standard as his has yet to be adopted by any court.

B. Cases That Have Not Allowed Simultaneous Tort and Title VII Claims

A number of courts have held that tort claims cannot be pursued simultaneously with Title VII claims. Looking more closely at each case, however, one may question whether the courts could have achieved the same result more narrowly, either by concluding that a plaintiff was attempting to bypass Title VII by converting employment discrimination claims into tort claims, or by determining that the tort claims were meritless.

One of the earliest cases to deny plaintiffs the ability to sue on both tort and Title VII causes of action was *DiPompo v West Point Military Academy*,[140] in which the plaintiff argued that the academy discriminated against him on the basis of his learning disability by requiring passage of several tests for employment as a firefighter.[141] In *DiPompo*, the court relied on *Brown* to

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137 Id at 712.

138 Id at 713.

139 See id. Note, however, that assault is one of the exceptions for which the government cannot be held liable under the FTCA. The case does not state the specific tort the plaintiff alleged, but it is possible that the plaintiff alleged a negligent supervision tort similar to the one used in *Brock*.

140 708 F Supp 540 (SDNY 1989).

141 See id at 542. Note that disability discrimination was covered by the Rehabilitation Act of 1973, Pub L No 93-112, 87 Stat 355, codified at 29 USC § 701 et seq, at the

dismiss the plaintiff's statutory and IIED claims. The court noted the Supreme Court's concern that the administrative requirements of Title VII would be ignored if other, less procedurally rigorous causes of action were allowed.[142] The court dismissed the tort claims against individual defendants, stating: "DiPompo merely takes the allegations of employment discrimination, allocates them among the individual defendants, and sees in the result . . . the intentional infliction of emotional distress."[143] The dismissal of the tort claim is so curt that it is plausible that the judge considered the tort claim to be meritless, independent of its preemption by Title VII.

Pfau v Reed[144] provides one of the clearest, if flawed, tests to determine whether a federal employee's tort claim can proceed. In short, the court held that plaintiffs could not file simultaneous Title VII–tort suits arising from the same set of facts.[145] In that case, the plaintiff sued the Defense Contract Audit Agency for gender discrimination and retaliation under Title VII after she was allegedly sexually harassed by her immediate supervisor, who she claimed made "lewd and suggestive comments," "request[ed] sexually provocative behavior from" her, retaliated against her when she refused, and eventually terminated her.[146] Pfau sued the supervisor individually for intentional infliction of emotional distress in addition to pursuing a Title VII cause of action. The Fifth Circuit affirmed the lower court's dismissal of the IIED claim, citing *Brown*'s preemptive effect as the "exclusive" remedy for federal employment discrimination: "We have interpreted the Supreme Court's mandate in *Brown* to mean that, when a complainant against a federal employer relies on the same facts to establish a Title VII claim and a non-Title VII claim, the non-Title VII claim is 'not sufficiently distinct to avoid' preemption."[147]

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time, and is now covered by the Americans with Disabilities Act of 1990, Pub L No 101-336, 104 Stat 327, codified at 42 USC § 12101 et seq. However, the statutes parallel Title VII in their employment discrimination language, and courts frequently interpret such acts in tandem with Title VII holdings, as evidenced in this case. See *DiPompo*, 708 F Supp at 544–45.

142 See *DiPompo*, 708 F Supp at 544 (stating that "DiPompo seeks to do precisely what *Brown* prohibits").

143 Id at 547.

144 125 F3d 927 (5th Cir 1997), vacd and remd on other grounds 525 US 801 (1998).

145 See *Pfau*, 125 F3d at 932.

146 Id at 930–31.

147 Id at 932, quoting *Rowe v Sullivan*, 927 F2d 186, 189 (5th Cir 1992).

The court rejected all of Pfau's attempts to distinguish her case from *Brown*. Her arguments included: (1) that an IIED claim requires that a plaintiff prove different legal elements than a sexual harassment claim, (2) that the purposes of the two laws are distinct, (3) that different facts supported each claim, and (4) that her claim was valid under the Federal Tort Claims Act and could therefore not be preempted.[148] The court concluded that the preemptive scope of *Brown* largely outweighed any other argument. Because the tort claim was for a more general remedy and all of the facts of the case could support the Title VII claim, there was nothing to distinguish the tort claim.[149] The court also held that Title VII was preemptive as to suits against individual federal employees as well as departments or agencies, going further than any other court in that regard.[150] Significantly, however, the judge's evaluation of the merits of the Title VII claims also appeared to play a role; the Fifth Circuit rejected the discrimination claims based on a narrow interpretation of an employer's responsibility to know about and remedy sex discrimination by its employee.[151] That position was repudiated by the Supreme Court, which summarily remanded the case to be adjudicated consistently with its previous opinions.[152]

In *Mathis v Henderson*,[153] the Eighth Circuit followed *Pfau*'s same-set-of-facts test, holding that the same facts could be used to prove employment discrimination or tortious conduct, but not both.[154] There, the plaintiff, a former United States Postal Service employee, sued her supervisor under Title VII for sexual harassment and retaliation, as well as under several state law claims, including "loss of consortium."[155] The district court held that some of the supervisor's behavior was outside the scope of his employment and that Title VII did not preclude the claims against the plaintiff's supervisor as an individual. The lower court's conclusion resembles the cases mentioned above that

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148 See *Pfau*, 125 F3d at 932.
149 See id at 933–34.
150 See id at 934.
151 See id at 938–41.
152 See *Pfau*, 525 US at 801.
153 243 F3d 446 (8th Cir 2001).
154 Id at 449–51.
155 Id at 447.

determine if a state tort claim can proceed based on the employee's official or unofficial behavior.[156]

On appeal, the Eighth Circuit agreed that Title VII precluded the tort claims against the United States based on the supervisor's activity that fell within the scope of his official employment.[157] The court then evaluated the preclusive effect of Title VII for the supervisor's behavior that was outside his scope of employment.[158] The court determined that, as long as the plaintiff intended to use that behavior as part of her Title VII claim against the government, she was unable to sue the defendant individually: "[E]ither supervisor Dick's extracurricular 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."[159] In other words, the court concluded that the same facts could not be used to support claims of discrimination and other torts, even when the defendants were different; the preclusive effect of § 717 eclipsed any suits against individuals based on the same incidents.[160]

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This comprehensive overview of combined Title VII–tort suits demonstrates that courts have not settled on a single test or framework to apply when confronted with such cases. Each of the current approaches is flawed in its own way. The distinct-legal-right approach relies on formalistic determinations of which laws vindicate which rights and forces courts to assess

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156 See Part II.A.3.

157 *Mathis*, 243 F3d at 449.

158 Id at 450.

159 Id at 451.

160 A few additional courts have concluded that § 717 has a similarly preclusive effect, but have gone into less detail in their reasoning. In *Mannion v Attorney General*, 2000 WL 1610761 (D Conn), the court relied on *Brown*'s conclusion that the "'balance, completeness and structural integrity' of Title VII" made it "the exclusive remedy for federal employees complaining of discrimination." Id at *2, quoting *Brown*, 425 US at 832. While the court acknowledged that state tort claims were allowed in private employer Title VII suits, the court suggested that its hands were tied by *Brown* with regard to federal employees. See *Mannion*, 2000 WL 1610761 at *2. In *Lewis v Snow*, 2003 WL 22077457 (SDNY), the district court cited *Mannion* to conclude that the plaintiff's intentional infliction of emotional distress claim was precluded by his Title VII claims of hostile work environment and retaliation, but also brought up familiar concerns that plaintiffs might attempt to evade the procedural requirements of Title VII. *Lewis*, 2003 WL 22077457 at *11–12.

fine-grained arguments about the rights in question. It is possible to imagine a court distinguishing any tort from employment discrimination merely because two separate causes of action exist. Similarly, the highly-personal-wrong standard is overly broad in that employment discrimination is also often highly personal in character. Thus, it does not provide a useful distinction between torts and employment discrimination claims. Analyses that focus on whether a plaintiff has complied with the procedural requirements of Title VII are unreliable because they focus entirely on the behavior of a plaintiff rather than on legal distinctions. Whether a plaintiff is suing an individual or the federal government is a similarly incomplete distinction, as a determination that the individual may be sued does not answer any of the sovereign immunity questions that arise in suing the federal government. And, decisions that categorically exclude tort claims brought in conjunction with Title VII claims misunderstand the law, as many other areas of law do not require separate factual allegations to vindicate rights under multiple causes of action. Thus, a different approach to explaining this type of case is required.

III. A PRESUMPTION IN FAVOR OF PERMITTING TITLE VII–TORT SUITS BY FEDERAL EMPLOYEES

As should be apparent, combined Title VII–tort suits present a host of complex, often-intertwined issues. It is not surprising that courts have resolved these issues in divergent ways. This Comment provides a framework for thinking about these hybrid cases in a way that stays true to *Brown* but is not unduly constrained by its holding, which did not consider state tort law at all. In particular, this Comment argues that there should be a presumption that the employee can sue on a state tort claim, but the presumption can be rebutted by evidence that the state tort is serving as the functional equivalent of an employment discrimination claim. The presumption in favor of allowing the tort suits to proceed is supported not only by extensive legislative history regarding the purpose and focus of the EEOA, but also by Supreme Court doctrine regarding implied repeals of federal law.

However, Congress's belief that employment discrimination actions by federal employees had previously been barred by sovereign immunity mitigates this presumption to some degree. The Court relied on this aspect of legislative history in *Brown* to

hold that employment discrimination claims by federal employees are limited solely to § 717, and any approach to Title VII–tort cases must consider whether the tort is serving any purpose other than remedying employment discrimination. To do so, judges should consider whether the tort in question serves as the functional equivalent of a Title VII employment discrimination claim.

The functional-equivalent test shares much in common with courts' previous attempts to provide a distinct-legal-right test, but addresses the extent to which *Brown* precludes tort claims in a functional, rather than formalistic, manner that draws on the preemption of state law doctrine. This functional approach better captures what the Court in *Brown* aimed to eliminate, namely, allowing another cause of action to serve as an end run around a Title VII claim. This approach also better allows courts to consider the intent of plaintiffs who are pursuing tort remedies. Rather than using procedural evasion as a proxy for the merits of a claim, courts using the functional-equivalent test can explicitly consider whether the plaintiff could have filed a Title VII claim and chose not to, or other indicators that the plaintiff is using a tort claim as the equivalent of a Title VII claim.

A. Creating a Presumption in Favor of Permitting State Tort Claims

Given the holding in *Brown*, it may seem strange to argue that there should be a presumption *in favor* of allowing state tort claims to proceed in a federal employee's Title VII case. The *Brown* court emphatically denied the plaintiff a § 1981 remedy, holding that § 717 provides the "exclusive judicial remedy for claims of discrimination in federal employment."[161] However, there are two significant factors that differentiate the Court's holding in *Brown* from Title VII–tort cases discussed in this Comment. First, because the Congress was focused on systemic discrimination when it passed § 717, rather than the malicious-intent discrimination that most frequently results in additional tort claims, the *Brown* Court's reasoning is less persuasive for most of the state law torts involved in these cases. Second, the Supreme Court's doctrine of implied repeal of federal statutes, which was implicitly at issue in *Brown*'s analysis of Title VII's

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[161] *Brown*, 425 US at 835.

preemption of § 1981,[162] counsels a different conclusion in the area of state torts given the federal government's explicit waiver of sovereign immunity for torts in the FTCA.[163]

As recounted in Part I.A, § 717 was added to Title VII to solve the problem of systemic discrimination in federal employment.[164] Statements in the committee reports, as well as comments by Representatives Perkins, Badillo, and Mink and Delegate Fauntroy, indicate that Congress was most concerned with federal employment and advancement of minorities and women.[165] Thus, to the extent that Congress intended § 717 to be an exclusive remedy, it is incongruous to think that it intended for that remedy to reach situations such as those in *Brock* and *Rochon*, in which federal employees were sexually assaulted and openly threatened by their fellow employees.[166] Indeed, the committee reports make clear that such actions motivated by malicious intent were *not* the primary reason for adding § 717, potentially because there were existing legal or administrative remedies for such acts before the Civil Service Commission or in tort.[167]

Secondly, different conclusions about Title VII's exclusivity arise in applying the Supreme Court's doctrine of implied repeal to *Brown* and to cases involving state torts. The Supreme Court

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[162] 42 USC § 1981(a) (forbidding racial discrimination in the right to "make and enforce contracts," which has been interpreted to include employment relationships).

[163] It is worth noting that the Supreme Court received a fair amount of criticism after its decision in *Brown*, but none of that criticism addressed the effect of the decision on cases where state tort claims are brought with Title VII claims. Rather, the focus has been on what *Brown* means for the preclusive effect of Title VII with respect to other general federal civil rights statutes, such as § 1983 and § 1981. See Michele W. Homsey, *Employment Discrimination in the Public Sector: The Implied Repeal of Section 1983 by Title VII*, 15 Labor L 509, 522 (2000) (describing the *Brown* decision as confusing in the wake of *Johnson* and concluding that artful pleading to circumvent Title VII was permissible); Nancy Levit, *Preemption of Section 1983 by Title VII: An Unwarranted Deprivation of Remedies*, 15 Hofstra L Rev 265, 266 (1987) (arguing that preemption of § 1983 often leaves plaintiffs without a remedy at all for discrimination if they are unable to navigate the procedural complexity of Title VII); Stephen J. Shapiro, *Section 1983 Claims to Redress Discrimination in Public Employment: Are They Preempted by Title VII?*, 35 Am U L Rev 93, 108 (1985) (calling the court's conclusion about the preemptive scope of Title VII as "at best, a nonsequitor").

[164] See HR Rep No 92-238 at 24 (cited in note 26); S Rep No 92-415 at 14 (cited in note 15).

[165] 117 Cong Rec at 32101–03, 32105–06, 32094 (cited in note 31).

[166] See *Brock*, 64 F3d at 1422; *Rochon*, 691 F Supp at 1551–52.

[167] See HR Rep No 92-238 at 24 (cited in note 26); S Rep No 92-415 at 14 (cited in note 15).

provides a detailed description of its implied-repeal analysis in *Posadas v National City Bank*:[168]

> Where there are two acts upon the same subject, effect should be given to both if possible. There are two well-settled categories of repeals by implication: (1) Where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act. But, in either case, the intention of the legislature to repeal must be clear and manifest.[169]

It is not immediately apparent that the *Brown* Court believed that it was engaging in an implied-repeal analysis with regard to the general § 1981 statute and § 717 of Title VII; whether § 717 repealed part of § 1981 was never explicitly presented as an issue in the case. However, a main component of the doctrine of implied repeal involves the Court avoiding repeal by implication whenever possible by reading potentially conflicting statutes in a way that allows both statutes to coexist.[170] This type of avoidance of the implied-repeal question did take place in *Brown*, albeit somewhat implicitly. The Court relied on statements by members of Congress that there was *no* remedy for discrimination in federal employment to conclude that § 1981 did not provide a remedy for federal employment discrimination. Thus, there was nothing for § 717 to preclude.[171] The Court therefore appeared to view Brown's suit as an attempt to argue *for the first time* that the relatively general § 1981 civil rights statute should serve as a remedy for discrimination in federal employment, despite the availability of Title VII.

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168 296 US 497 (1936).

169 Id at 503.

170 See *Branch v Smith*, 538 US 254, 273–74 (2003).

171 See *Brown*, 425 US at 828:

> The legislative history thus leaves little doubt that Congress was persuaded that federal employees who were treated discriminatorily had no effective judicial remedy. And the case law suggests that that conclusion was entirely reasonable. Whether that understanding of Congress was in some ultimate sense incorrect is not what is important in determining the legislative intent in amending the 1964 Civil Rights Act to cover federal employees. For the relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what its perception of the state of the law was.

On the surface, this statutory interpretation is something more akin to the canon of construction that the specific governs the general. However, given that both statutes involve the issue of civil rights, the analysis can also be seen as a precursor to an implied-repeal analysis; the Court was giving effect to statutes "upon the same subject"[172] by concluding that § 1981 did not apply to the federal government, while § 717 did. Thus, despite not mentioning implied repeal explicitly, the *Brown* analysis comports with the Supreme Court's implied-repeal jurisprudence. Had the Court not chosen to avoid the implied-repeal question, *Brown*'s holding would have been much more difficult to reach. Concluding that § 717 impliedly repealed § 1981 as a remedy for federal employees would have been nearly impossible given the very strong presumption against implied repeals and the need for clear indications of congressional intent to repeal earlier statutes. By contrast, the EEOA featured statements by members of Congress that federal employees should have similar remedies to private employees, who could simultaneously sue under § 1981 and Title VII.[173] If anything, the legislative history included more statements against an implied repeal than in favor of it.

The Court in *Brown* avoided the question of a potential implied repeal by determining that § 1981 does not apply to the federal government because of sovereign immunity, in that sense giving effect to both statutes by confining § 1981 to private parties and § 717 to federal government employees.[174] This avoidance conclusion, however, does not fit cleanly with the FTCA, which includes a comprehensive waiver of sovereign immunity and remedial scheme for torts committed by federal employees.[175] In addition to the FTCA arguably not being on the same subject as the EEOA, unlike § 1981, the FTCA provides an explicit waiver of the federal government's sovereign immunity for many state law torts.[176] Thus, there is little room for the Supreme Court to sidestep the implied-repeal question by concluding that such tort remedies could not previously stand against the federal government.

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[172] *National City Bank*, 425 US at 503.

[173] See id ("The cardinal rule is that repeals by implication are not favored."). See also notes 28–30 and accompanying text.

[174] See *Brown*, 425 US at 828.

[175] See 28 USC §§ 2671–80.

[176] See Part I.B.

If the Court faced an implied-repeal analysis of the FTCA and EEOA head-on, it is difficult to imagine the Court concluding that even a partial repeal of the FTCA took place. Even if it could be argued that the FTCA and EEOA are on the same subject, the question then becomes the following: Are the FTCA provisions waiving the federal government's sovereign immunity for torts in "irreconcilable conflict"[177] with § 717, or does § 717 "cover the whole subject" of the FTCA? The answer to both questions is almost certainly no. The FTCA is aimed at a wider variety of federal employee actions than § 717 aims to cover, including most unintentional torts, and it is apparent that § 717 cannot "cover the whole subject" of the FTCA. It is similarly difficult to see where an "irreconcilable conflict" between the statutes might lie. The legislative history indicates that Congress was focused on systemic, likely nontortious employment discrimination in passing § 717. Members of Congress went so far as to contrast such practices with so-called malicious-intent discrimination, which implicates tortious behavior.[178] This focus on invidious discrimination may have been important because federal employees who suffered torts committed by their colleagues had some form of remedy, either through administrative remedies or tort claims themselves.[179] The most logical way to read § 717 and the FTCA, then, is that § 717 covers employment discrimination by federal employees that does not rise to the level of a tort, and that the FTCA continues to provide relief for torts committed by federal employees. The extent to which the statutes may still interact is discussed in Part III.B.

Lastly, it is worth noting again here that when tort lawsuits are filed against individuals, as they often are in these cases, there is no sovereign immunity issue at all.[180] Coupled with the statements of several politicians in the legislative history of the EEOA regarding the need for uniform remedies for federal and

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[177] *National City Bank*, 425 US at 503.

[178] See 28 USC §§ 2671–79. See also Part I.A. It may be relevant to note that one of the Supreme Court's most significant implied-repeal cases involves the same act as this Comment, the EEOA. In *Morton v Mancari*, 417 US 535 (1974), the Supreme Court held that § 717 of the EEOA did not implicitly repeal the provisions of the Indian Reorganization Act, Pub L No 73-383, ch 576, 48 Stat 984 (1934), codified at 25 USC § 461 et seq, that stated a preference for American Indians to be employed at the federal Bureau of Indian Affairs. See *Mancari*, 417 US at 546–48.

[179] Note that such tort claims could proceed under the FTCA, if the tort in question was not excepted from the statute or against a federal employee as an individual.

[180] See Part II.A.3.

private employees, the lack of a sovereign immunity problem suggests that federal employees should be individually liable in tort the same way private employees can be liable to their colleagues.[181] Immunity doctrine would continue to protect federal employees by providing them with official immunity for actions within the scope of their employment, but reading § 717 to protect them further would potentially not provide sufficient disincentives for federal employees to engage in tortious and discriminatory behavior.[182]

Thus, there are strong arguments that support a presumption in favor of allowing tort claims against the federal government and federal employees as individuals to proceed in Title VII–tort suits. The legislative history indicates that tortious employee conduct was not the focus of § 717, but rather that the statute aimed at providing a remedy for more systemic discrimination in federal employment, which had been explicitly excluded from the original Title VII. Moreover, the doctrine of implied repeals of federal law permitted the *Brown* Court to read § 717 and § 1981 in a way that they did not conflict by applying one specifically to the federal government and one to nonfederal actors. Such an avoidance reading is not similarly available with the FTCA. The FTCA explicitly waives the federal government's immunity for a wide variety of torts, and thus cannot be read not to apply to federal actors. Given the limited scope of § 717 in applying to employment discrimination and the lack of congressional statements that the amendment applied to tortious behavior, § 717 could not likely be read to have impliedly repealed the FTCA as it applies to federal actors who commit torts against fellow federal employees. Thus, in Title VII–tort suits against the federal government, there should be a strong presumption that such suits may proceed.

B. Barring State Tort Claims That Are the Functional Equivalent of Title VII Claims

While there are many justifications for a strong presumption in favor of allowing a tort claim to proceed with a Title VII

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[181] See 118 Cong Rec at 4921–22 (cited in note 17).

[182] See Daniel A. Morris, *Federal Employees' Liability since the Federal Employees Liability Reform & Tort Compensation Act of 1988 (the Westfall Act)*, 25 Creighton L Rev 73, 100–01 (1991) (noting the possibility that an employee could still claim individual immunity for intentional torts for which the government has not waived immunity).

claim, there remains the question of when, if ever, that presumption may be rebutted. This Comment proposes that the presumption in favor of allowing tort claims to proceed against the government should be rebuttable when the tort in question is the functional equivalent of an employment discrimination claim. The term "functional equivalent" indicates that the plaintiff is using a tort to remedy employment discrimination as understood and interpreted under Title VII.

Allowing the presumption to be rebuttable under these circumstances is important given the emphasis the *Brown* Court placed on congressional statements regarding the lack of remedies for discrimination in federal employment due to sovereign immunity. Specifically, the Court concluded that Congress added § 717 to Title VII because it believed that there was no other remedy available to employees suffering from employment discrimination, particularly systemic discrimination.[183] The Supreme Court in *Brown* held Congress to those statements regarding the lack of previous remedies in holding that § 717 was thus the *exclusive* remedy for discrimination in federal employment.

The crucial part in this next step of the analysis, then, is determining when a tort is functioning in the same manner as Title VII does. Given the statements in the legislative history regarding systemic rather than malicious discrimination, this universe of torts is potentially narrow. The lack of employment discrimination remedies for federal employees prior to § 717 does not mean that tort remedies were not available for extreme cases; the federal government could be sued in tort via the FTCA prior to Title VII and the EEOA, and individual federal employees who were acting outside the scope of their employment could also be sued in tort. In a substantial number of cases, then, the facts of the case will legitimately point to both tort and Title VII claims.[184]

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[183] See *Brown*, 425 US at 828–29, citing 118 Cong Rec at 4929 (cited in note 17) (statement of Senator Alan Cranston) ("My Federal Government EEO amendment included in the committee bill would . . . . [f]or the first time, permit Federal employees to sue the Federal Government in discrimination cases.").

[184] Given the intent of Congress to provide a remedy where there previously was none and the frequent allusions in the legislative history to systemic employment discrimination rather than malicious-intent discrimination, there is a fair argument that § 717 should not apply when there *is* a valid tort remedy under the FTCA, particularly if that remedy existed prior to the passage of § 717. However, such an interpretation would result in an impermissibly confusing statutory scheme. Plaintiffs would have to search

Multiple factors are important in considering whether a tort is the functional equivalent of an employment discrimination claim. Perhaps most obviously, a tort claim is likely not the functional equivalent of an employment discrimination claim when the plaintiff provides evidence of tortious acts committed outside of the workplace. Under such an inquiry, cases like *Rochon* and *Wallace* provide the clearest examples of what would thus *not* be a functional equivalent; the tortious behavior of the employees extended beyond the workplace, making it difficult to argue that the torts in question served as the functional equivalent of employment discrimination and nothing more.[185]

Secondly, for statutory torts or torts that have been developed and refined in state courts, the state's description of the right and cause of action, including evidence of legislative history regarding what the state was seeking to remedy and the elements a plaintiff must prove, will be relevant. Such an inquiry will focus on whether the *state* legislature or courts intended the tort to remedy employment discrimination. Lastly, a court may make a contextual inquiry as to whether the employee appears to have a prima facie case of employment discrimination under Title VII and has procedurally defaulted on it or is seeking damages in excess of Title VII's limits, implying that the use of a state tort may be an end run around Title VII. Such procedural concerns were a major factor in *Brown*, and it is appropriate to consider them in tort cases, as well.[186] None of the above factors will be dispositive, and courts may determine that other factors are equally or more important, but the named factors provide a starting point for analysis as to how a particular tort is functioning.

The guiding principles of the Supreme Court's preemption doctrine may provide another helpful lens for considering any rebuttal arguments made by the federal government. The Supreme Court has articulated a presumption *against* finding federal preemption of state law, but this presumption is not nearly as strong as the implied-repeal doctrine for federal law.[187]

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for all possible tort remedies before pursuing a Title VII claim under § 717, and failure to come across an existing remedy would pose a trap for the unwary.

185 See *Rochon*, 691 F Supp at 1551–52; *Wallace*, 138 F Supp 2d at 981–82 (describing the facts of each case).

186 See *Brown*, 425 US at 832–33.

187 See Karen Petroski, Comment, *Retheorizing the Presumption against Implied Repeals*, 92 Cal L Rev 487, 520 (2004) ("The Court clearly finds preemptive conflict less objectionable than implied-repeal conflict.").

Rather than interpreting state law to avoid conflict whenever there is no clear assertion that Congress intended to repeal it, as is generally done for federal laws,[188] the Court considers whether there is actual conflict between state and federal law, whether the state law is an obstacle to Congress's intent in creating the federal law, or whether the federal statutory scheme is so complete as to leave no room for state law to operate.[189] However, the Court has added, "The ultimate question in each case, as we have framed the inquiry, is one of Congress's intent, as revealed by the text, structure, purposes, and subject matter of the statutes involved."[190]

As has now been discussed at length, the *Brown* Court relied explicitly on Congress's intent to waive sovereign immunity for employment discrimination coupled with "[t]he balance, completeness, and structural integrity" of § 717 to conclude that it was an exclusive remedy for employment discrimination and that civil rights statutes like § 1981 were unavailable for federal employees.[191] Using that interpretation of the legislative history, it seems logical that the Court would similarly hold that state torts seeking to remedy employment discrimination are precluded.[192]

However, it is important to note that Congress's understanding of employment discrimination at the time of the EEOA did not completely intersect with modern conceptions of Title VII. Specifically, while the Supreme Court had established a test for disparate impact, or systemic discrimination, by 1971 in *Griggs v Duke Power Co*,[193] thus recognizing unintentional

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188 See *Branch*, 538 US at 273, quoting *National City Bank,* 296 US at 503.

189 See *Cipollone v Liggett Group, Inc*, 505 US 504, 545 (1992).

190 Id.

191 *Brown*, 425 US at 832.

192 This statement implies that a state has created a tort for remedying discrimination, but oftentimes, plaintiffs apply existing common law torts, such as intentional infliction of emotional distress, to a situation that would otherwise appear to fit wholly into Title VII. Recalling the legislative history of the EEOA, there is an important distinction between systemic discrimination and malicious-intent discrimination for those pursuing torts. In the former, the issue is that the tort being applied only seems to remedy employment discrimination, whereas in the latter, the tort applies to something discrete that happened in the context of a larger employment discrimination episode. The functional-equivalent test aims to distinguish when an individual is seeking a tort remedy for what is generally considered systemic employment discrimination, such as failure to hire and failure to promote based on protected status.

193 401 US 424, 429–30 (1971) (holding that a plaintiff did not need to prove discriminatory intent when a neutral employment practice had a disparate impact on a protected class of employees).

discrimination prior to passage of the EEOA,[194] the Supreme Court did not hold that sexual harassment constituted employment discrimination until 1986, in *Meritor Savings Bank, FSB v Vinson*.[195] In *Meritor Savings Bank*, the Court formalized the EEOC's definition of sexual harassment and confirmed that Title VII addressed not only economic injury due to discrimination, but also the psychological effects of a hostile work environment from severe or pervasive harassment.[196] Sexual harassment is thus by nearly all accounts a latecomer to modern understandings of Title VII, and it is unlikely that either Congress or the Supreme Court in *Brown* considered the application of § 717 to such cases.[197]

The relatively late recognition that Title VII remedied psychological as well as economic harms from discrimination, particularly in the form of sexual harassment claims, partially explains the difficulty that arises in considering the tort claims that frequently arise out of sexual harassment cases, including assault, battery, IIED, and negligent supervision.[198] While courts have previously attempted to distinguish many of such cases on the basis of distinct legal rights and highly personal wrongs, the fit of such standard has been awkward at best, as Title VII is at least partially able to account for the personal nature of sexual harassment in its remedies. Given the modern understanding of sexual harassment as employment discrimination and of discrimination including some psychological harm, the functional-equivalent test generally counsels against permitting torts such as IIED and negligent supervision to proceed against the government along with Title VII claims in such cases.[199]

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[194] *Griggs* was revolutionary in its holding that discriminatory intent need not be present for a successful Title VII claim. See id. The statements by members of Congress in the EEOA legislative history that discrimination could be systemic or maliciously motivated thus confirmed that the *Griggs* holding applied to Title VII, but do not bear strongly on the issue of malicious-intent discrimination, which was always assumed to be included in Title VII.

[195] 477 US 57, 64–65 (1986).

[196] See id.

[197] See, for example, Victoria T. Bartels, Meritor Savings Bank v. Vinson*: The Supreme Court's Recognition of the Hostile Environment in Sexual Harassment Claims*, 20 Akron L Rev 575, 576 (1987) (recounting the history of sexual harassment claims and noting they were frequently dismissed as being personal rather than employment related prior to *Meritor Savings Bank*, 477 US 57).

[198] See, for example, *Stewart*, 538 F Supp at 893.

[199] Were assault and battery claims permissible against the federal government under the FTCA, a difficult line-drawing problem might arise as to what level of assault or

The Court in *Meritor Savings Bank* established that sexual harassment must be so severe or pervasive as to affect the conditions of one's employment in order to be actionable under Title VII, and soon after, Congress again amended Title VII to provide for compensatory and punitive damages.[200] Thus, in the context of sexual harassment, Title VII appears to apply to many incidents of repugnant employee behavior that might individually be considered tortious. Absent particularly extreme circumstances, however, the *government's* liability in sexual harassment cases should be restricted to what is available under Title VII.[201] To the extent that the employee was acting outside of the scope of his duty and could be sued individually, the holding in *Brown* does not require that tort remedies be precluded.

Consider *Brock*, in which the plaintiff was raped by another federal employee, and later pursued a claim of negligent supervision against the government, and *Sommatino*, in which a plaintiff who had been sexually harassed and touched inappropriately by a supervisor filed a similar claim.[202] A negligent supervision claim generally imposes liability on an employer for failing to properly supervise an employee, an issue that is at the heart of many, if not most, employment discrimination cases and thus should be viewed skeptically.[203] Negligent supervision is distinct from employment discrimination as a cause of action in that it depends on an employee committing a separately actionable tort. But, in the examples of Title VII–tort cases where the federal government may be held liable, courts must also consider

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battery is understood to be part of sexual harassment and what part exceeds it, but that is not a question that the FTCA in its current form introduces. It is also worth noting that IIED suits have generally been filed against individual employees, and thus may not necessarily pose the sovereign immunity issue of *Brown*.

200 See Civil Rights Act of 1991 § 102, 105 Stat at 1072, codified at 42 USC § 1981a (permitting limited compensatory and punitive damages in cases of intentional discrimination).

201 Congress is, of course, free to amend Title VII in the shadow of *Brown* and the development of sexual harassment doctrine to provide more liability for the federal government to its own employees. Absent such a statement, however, *Brown* requires that § 717 be the exclusive liability for the federal government for employment discrimination, which now includes sexual harassment claims.

202 For an interesting analysis of the interplay between the negligent supervision tort and the assault and battery exception of the FTCA, see Jack W. Massey, Note, *A Proposal to Narrow the Assault and Battery Exception to the Federal Tort Claims Act*, 82 Tex L Rev 1621, 1624 (2004) (proposing that the assault and battery exception be narrowed, but that negligent supervision torts be held to a higher standard).

203 See *Brock*, 64 F3d at 1422.

not only whether the employee's actions may constitute a tort, but also whether they fall within what is commonly understood as employment discrimination or sexual harassment, which has been held to include relatively severe circumstances.[204]

Thus, a court must look to the underlying employee action to determine what the employer failed to supervise, and in the case of the federal government's liability, consider whether the underlying tort action is the functional equivalent of an employment discrimination or sexual harassment claim.[205] Had the negligent supervision claim in *Brock* been based solely on the plaintiff's sexual harassment allegations and not included the rape claims, the opposite result from what the Ninth Circuit reached in *Brock* would occur, and indeed recovery against the government in *Sommatino* would be similarly limited. Sexual harassment is not a separate tort,[206] so the employer's liability would derive exclusively from Title VII rather than tort law. It is not clear that a negligent supervision tort would not proceed under circumstances such as those described in *Sommatino* under the distinct-legal-right test—is the right in question the right to be free from an employer's negligence? If so, there is the potential to artificially distinguish a tort from almost any Title VII claim; the functional-equivalent test fares much better in determining whether the negligent supervision tort is doing any additional work.

Another challenging issue for the functional-equivalent test exists in the many cases of intentional infliction of emotional distress. IIED claims relate to a plaintiff's emotional and physical harm stemming from a particular underlying action; determining whether the emotional harm stems from a tortious action or a discriminatory action can be difficult.[207] Consider the *DiPompo* case, in which the plaintiff was rejected for a firefighter position due to his inability to pass the required tests because of a learning disability.[208] The entire basis for the IIED claim was the rejection of an employment relationship; no other

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[204] Id at 1425.

[205] Id.

[206] Id at 1423–24.

[207] It is worth noting here that the majority of IIED claims are filed against individuals and would not necessarily pose an issue for the federal government's liability. For the purposes of discussion, however, these examples are being considered from the perspective of the government being liable for IIED.

[208] See *DiPompo*, 708 F Supp at 542–43.

behavior by the defendants was mentioned.[209] Thus, any claim by the plaintiff was based on potential employment discrimination, not a separate tort. Similarly, although the court in *Pfau* correctly rejected the plaintiff's IIED claim, it did so based on the problematic same-set-of-facts test. The functional-equivalent test is a better fit for deciding this case; while the same set of facts may allow two causes of action (such as a tort and a criminal law violation), it is apparent from the case that the plaintiff's IIED claim stemmed from a fairly typical case of sexual harassment, not any otherwise-tortious behavior. Sexual harassment typically causes emotional distress, but the Supreme Court has held Title VII to include recovery for emotional harms. For this reason, Pfau's IIED claim would be the functional equivalent of another employment discrimination claim.

CONCLUSION

Employment discrimination law is an area in which cases are numerous and factual distinctions are crucial. This makes any attempt to fit a large number of Title VII–tort cases into a comprehensive framework challenging. Nonetheless, this Comment has attempted to not only categorize previous cases involving federal employees, but also offer a different lens by which to analyze future cases. By providing a basic presumption to guide judicial management of these cases, this Comment aims to clarify the post-*Brown* field in a way that is useful to judges who encounter combined Title VII–tort cases involving federal employees. Given that the congressional intent of § 717 was to provide a remedy for federal employees who suffered employment discrimination and that tort claims could be pursued against the United States prior to the amendment via the FTCA, the doctrine of implied repeal counsels that tort claims filed against the federal government should be presumptively valid because there was no congressional intent to abrogate such a remedy. Nonetheless, the Court's holding in *Brown* requires that Title VII provide the *exclusive* remedy for discrimination in federal employment, and torts that aim to remedy such discrimination and nothing more must be distinguished. This Comment recommends that judges hearing such cases adjudicate the preclusive

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[209] See id.

effect of § 717 by considering whether the tort in question is the functional equivalent of an employment discrimination claim.