

APPENDIX A

Here are some useful questions to help lawyers ensure that they have uncovered all available evidence of bias from plaintiffs in Title VII race and gender cases.

B. PROVE-IT-AGAIN

Numbers that are potentially useful include whether women take longer to get promoted than men and whether base pay, pay raises, or bonuses are lower for women than men. It is also useful to look for a pattern of polarized evaluations, where a few women superstars get very high evaluations, while most women get very low evaluations. Another pattern is where positive feedback about men translates into high ratings, but positive feedback about women does not.⁸⁵³

In a class case with performance evaluation data, assess whether they are judging men and women on the same criteria. Also look for the “halo/horns effect,” where one success or strength is generalized into an overall positive assessment for men but not for women, or where one mistake or weakness is generalized into an overall negative assessment for women but not for men.⁸⁵⁴ Along the same lines, are men more likely to be seen as having promise than women?⁸⁵⁵

Investigating Prove-It-Again bias first entails investigating whether in-group favoritism has affected the hiring and/or advancement of women or people of color. If a company hires based on internal referrals, see if they have records about who has been hired based on internal referrals, and see if there’s a demographic pattern.

Does your company hire people based on internal referrals?

In some workplaces, it’s really important in order to be promoted to have a sponsor—a sponsor is a mentor who is willing to spend their political capital to help your career. Is that true in your workplace? If so, are men more likely to have sponsors than women?

In some workplaces, it’s really important to be part of a tight little in-group in order to get promoted or get access to good work. Is that true in your workplace? If so, why is it important?

Other questions to tease out Prove-It-Again bias:

Have you had to prove yourself more—to get a job, get promoted, get a raise or a bonus, in order to get high-quality work—than your male colleagues with similar education and experience?⁸⁵⁶

853. Monica Biernat, M. J. Tocci & Joan C. Williams, *The Language of Performance Evaluations: Gender-Based Shifts in Content and Consistency of Judgment*, 3 SOC. PSYCH. & PERSONALITY SCI. 186, 190–91 (2012).

854. See generally Rosenburg et al., *supra* note 133; Thorndike, *supra* 132.

855. Daniel Storage, Tessa E. S. Charlesworth, Mahzarin R. Banaji & Andrei Cimpian, *Adults and Children Implicitly Associate Brilliance with Men More Than Women*, 90 J. EXPERIMENTAL SOC. PSYCH. (2020).

856. Depending on a variety of factors, the comparison can be drawn with men in general, or white men in particular for all of the Prove-It-Again questions.

Have you been told you have to do one thing for promotion—but then when you do that one thing, another is added (on and on and on) in a way that doesn't happen to men?

*Do white men get promoted or get other work benefits based on their promise or potential, or based on the assumption that they will pick up what they need to know after they have the job or promotion—while you have to show you have met every requirement **before** you get the job, promotion, etc.?*

Are objective rules and requirements applied leniently to white men but rigidly to everyone else?⁸⁵⁷ (This is such a broad and important category; follow-up questions may well be needed.)

Has your work been hyper-scrutinized, more so than is the case for men (or white men)?

Is a credential more valued when white men have it?

Are your mistakes or oversights more likely to be noticed and remembered, or more likely to come back to haunt them, than men's are? Has this happened to you?

Do other people regularly get credit for ideas you originally offered?

Have your successes and accomplishments been written off (for example, as "just luck") or overlooked in a way that doesn't happen to white men (or white people)?

Have you had to prove yourself more—to get a job, get promoted, get a raise or a bonus, or high-quality work—than your white (or white male) colleagues with similar education and experience?⁸⁵⁸

Have you been told you have to do one thing for promotion—but then when you do that one thing, another is added (on and on and on) in a way that doesn't happen to white colleagues (or white men)?

*Do white men (or white people) get promoted or get other work benefits based on their promise or potential, or based on the assumption that they will pick up what they need to know after they have the job or promotion—while you have to show you have met every requirement **before** you get the job, promotion, etc.?*

Are objective rules and requirements applied leniently to white peoples (or white men) but rigidly to everyone else?⁸⁵⁹ (This is such a broad and important category; follow-up questions may well be needed.)

Has your work been hyper-scrutinized, more so than is the case for white men (or white people)?

Is a credential more valued when white people (or white men) have it?

857. "He didn't do the planner, and wasn't dinged for it. She was." Interview with Jocelyn Larkin, Executive Director, Impact Fund (Nov. 13, 2019) (on file with authors).

858. See *supra* note 856 and accompanying text.

859. "He didn't do the planner, and wasn't dinged for it. She was. . . . If a guy didn't achieve his goal, it was overlooked. If a woman didn't, it was not." Interview with Jocelyn Larkin, Executive Director, Impact Fund (Nov. 13, 2019) (on file with authors).

Are people of color's mistakes or oversights more likely to be noticed and remembered, or more likely to come back to haunt them, than white peoples' (or white men's) are? Has this happened to you?

Do other people regularly get credit for ideas you originally offered?

Have your successes and accomplishments been written off (for example, as "just luck") or overlooked in a way that doesn't happen to white people (or white men)?

Do you sometimes feel that you can't afford to make a single mistake?

Does your workplace hire only people of color with elite degrees, but white people from a broader range of schools?

Have your accomplishments and/or credentials been written off on the grounds that you're "just an affirmative action hire"?

B. TIGHTROPE

1. Gender & Race

Have you ever been faulted for being too self-confident or too assertive in ways that are readily accepted from (men, white people, white men)?

Have you received comments about your personality on your performance evaluations?

Have you gotten pushback for giving critical feedback of a type readily accepted from (men, white people, white men)?

Have people ever sent the message, overtly or covertly, that they wanted you to be supportive and nice, rather than rigorous and demanding, whereas (men, white people, white men) can just "go for it"?

Have you ever been penalized for showing anger in ways that are readily accepted from (men, white people, white men)?

Have you ever been penalized for sharing your accomplishments and successes in ways that are readily accepted from (men, white people, white men)?

Have you felt wary about sharing your accomplishments and successes, although the (men, white people, white men) do that all the time?

Do you feel like you are expected to be uncomplaining "worker bees" who do not demand the limelight, but support those who do? Do you feel that other (women, people of color) are?

If there is a way to track assignments, look for patterns in who gets career-enhancing work. Some useful questions:

Are there any key times when (men, white people, white, men) have been given a chance to shine before the higher-ups that women are not—perhaps men are more likely to be promoted as a result?

Are (men, white people, white, men) been given more of a chance to develop skills required for promotion than you and other members of your group have?

Are (men, white people, white, men) given better access to career-enhancing work, or given access to it earlier in their careers, than you and members of your group have gotten?

2. Race

Have you ever been called words like “difficult,” “aggressive,” “a poor communicator,” or sent messages that assertive behavior accepted in (white people or white men) is inappropriate in you?

Have people interpreted your behavior as “angry,” “emotional,” or “out of control,” when they would readily accept similar behavior from (white people or men)?

Have people interpreted your behavior as angry when you weren’t angry at all—you were just having a business disagreement?

Do you feel like you (and members of your group) are expected to be uncomplaining “worker bees” who do not demand the limelight, but support those who do?

Have you gotten pushback for giving critical feedback of a type readily accepted from (white people or white men)?

3. Gender

Have you ever been called words like “bossy,” “difficult,” “strident,” “aggressive,” “too tough,” “sharp elbows,” “a poor communicator,” or told to be nicer when you are behaving in ways that are readily accepted from men (or white men)? If the client is a woman of color, also ask if she has been called “feisty,” “fiery,” “sassy,” or a “dragon lady.”

Have people you supervise expected you to be the ever-supportive office mom rather than the boss who insists on quality work?

Have you ever felt pressures to behave in feminine ways—to be the peacemaker, or the office mom who takes care of everyone around her, or the dutiful daughter who aligns with a powerful man but never threatens him? Are the same things expected of men?

At your workplace, do women do more of the office housework? Have you done more than your colleagues? This includes literal housework like ordering the lunch, cleaning up the room after a meeting, or being expected to plan parties and get signatures on birthday cards.

Are women in your workplace (and are you) more likely to be given administrative tasks than men, such as being expected to take notes of the meeting, find a time everyone can meet, or send follow-up email?

Are women in your workplace (and are you) more likely to be expected to take care of other people’s emotions or personal and professional development in ways men aren’t, such as being the peacemaker, or doing the mentoring, or running the summer program, or the like?

Are women in your workplace (and are you) more likely to be under pressures to do the back-office or undervalued tasks, while men are seen as a better fit for the glamour work—career-enhancing tasks?

C. MATERNAL WALL

1. Gender

First, some numbers to be crunched:

Do women's pay or promotions fall when they get pregnant, return from maternity leave, or ask for workplace flexibility (job sharing, part time, flex time, telecommuting, etc.)?

Are women pressured to go part time even when they are working the same number of hours as men who are full time? (This can mean that women are working longer hours for the same pay.)

Here are additional questions for mothers.

Did your work get hyper-scrutinized after you got pregnant, returned from leave, or asked for workplace flexibility? Were you criticized for things men are rarely criticized for?

Did men get a pass for things you did not get a pass for?

Were you assumed to be less competent, less productive, or less committed because you are a mother?

Were you deprived of opportunities or shifts that might have led to a promotion, higher pay, or other benefits because people at work assumed that, as a mother or a wife, you would not want them?

Were you deprived of opportunities that required you to move your family that might have led to a promotion, higher pay, or other benefits because people at work assumed that, as a mother or a wife, you would not want them?⁸⁶⁰

Were you pressured to go part time after you had children?

Did or do people keep assuming that you won't return to work after you had children (even if you have never given any signal or made a statement to that effect)?

Are women told that they are not getting hired, getting raises, or getting paid as much, because their husbands, fiancés, or boyfriends are, or should be, supporting them or that men are being paid more because "he has a family to support"?⁸⁶¹

If you asked for an accommodation for pregnancy or breastfeeding, has anyone else been given a similar accommodation for other reasons?

2. Race

The Center for WorkLife Law has run a hotline for twenty years for workers who encounter discrimination based on family responsibilities. We regularly hear from women of color who have been denied workplace accommodations that are routinely offered to white women.

860. See *Lust v. Sealy, Inc.*, 383 F.3d 580, 583 (7th Cir. 2004). "Sometimes managers made assumptions that women with a number of children or husband were not interested in a more important job because they couldn't move." Interview with Jocelyn Larkin, Executive Director, Impact Fund (Nov. 13, 2019) (on file with authors).

861. *Costa v. Desert Palace*, 299 F.3d 838, 845 (9th Cir. 2002), *aff'd*, 539 U.S. 90 (2003).

Have you been denied or penalized for asking for accommodations like leaves or workplace flexibility that are readily offered to white women?

D. TUG OF WAR

1. Gender

Do some women hold each other to higher standards because “that’s what it takes to succeed here as a person of color”?

Do women undercut each other by criticizing each other for being too masculine or too feminine (in clothing, voice, manner, etc.)?

Do women undercut each other for taking too much time off to be with children—or too little?

Do some women join the boys’ club, aligning with men against other women?

In your workplace, is there room for only one woman on certain teams or high-profile committees? If so, do women feel the need to compete with each other to get that one position? Has this affected you?

Do you get the same level of support from support staff as the men in your environment do?

2. Race

Do some people of color hold each other to higher standards because “that’s what it takes to succeed here as a person of color”?

Do people of color fault each other for acting “too white” or “not white enough”?

In your workplace, is there room for only one person of color on certain teams or high-profile committees? If so, do people of color feel the need to compete with each other to get that one position? Has this affected you?

Do you get the same level of support from support staff as your colleagues?

E. RACIAL STEREOTYPES (NOT OTHERWISE MENTIONED)

1. For Black Individuals

Have you been criticized for talking loudly when you were just speaking in a normal tone of voice, or for dominating the conversation, when you were contributing no more than other people were?

Has your behavior been treated as threatening when you were just behaving in ways other people behave all the time?

Have you ever been treated with the kind of disrespect not typically shown to others in your workplace?

2. For People of Asian Descent

Have you been criticized for being “passive”?

Do colleagues assume you will, or should, work more, or do more with less, than is expected of your colleagues?

Do colleagues hold you to higher standards when it comes to technical work on the assumption that people of Asian descent are naturally good at technical work?

Do colleagues assume you are good at technical work but that you lack social skills or leadership potential?