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The Supreme Court, Employment Discrimination, and an Overview of Civil Rights

Early morning, April 4
Shot rings out in the Memphis sky
Free at last, they took your life
They could not take your Pride

–U2 (*Pride*)

Half a century ago, the civil-rights community came together to fight pervasive discrimination. Dr. Martin Luther King, Jr., and others, helped bring equality in many areas of the law, including employment. These changes made the laws much more inclusive for minority groups across the country as workplace discrimination on the basis of race, color, sex, national origin, and religion became a federal violation.

The Supreme Court – and more precisely the Court under Chief Justice John Roberts – has walked many of these important advances back over the past several years, undermining the changes so many in the civil-rights community had fought for decades to achieve. Many of the decisions of the Roberts Court have gone largely undetected as they have turned on technical subtleties in the law, thus allowing the cases to fly largely under the radar. This text helps synthesize these cases in a meaningful way, bringing to light the subtle actions of the Supreme Court that have culminated in very substantive changes for workers.

THE CASE LAW

In *Wal-Mart* v. *Dukes*,[1] a million and a half women claimed that the nation's largest retailer had adopted a corporate policy of pay discrimination. These female employees of Wal-Mart maintained that the company had systematically acted on a company-wide basis to ensure that men were paid more and promoted at a faster pace. The proposed class action stole headlines across the country, and the massive case was poised to bring the discount giant to its knees. This would all change, however, when

FIGURE 1.1 Dr. Martin Luther King and Mathew Ahmann at the Civil Rights March on Washington, August 28, 1963.
Credit: Sherman, Rowland / US Information Agency / National Archives at College Park, MD.

the Supreme Court stepped in to reverse the appellate court's certification of the class action and to stop the systemic litigation in its tracks. The case was decided by a razor-thin majority, with the conservative Justices all aligned on the prevailing side.

Likewise, in *Ledbetter* v. *Goodyear*,[2] discussed in detail later in this chapter, the Court would act to suppress the rights of female workers in another high-profile claim involving pay and gender discrimination. In *Ledbetter*, the conservative Justices of the Court would change the rules of pay discrimination cases and make it far more difficult for female workers to bring these claims. The case would alter the administrative guidelines for the timing of filing such suits, and abrogate the Court's previous – and more flexible – rules for bringing these claims. The case would subsequently take on a political dimension as the plaintiff, Lilly Ledbetter, became an advocate for women's rights in the following presidential election. In the first bill signed during his presidency, Barack Obama overturned the Supreme Court's decision in *Ledbetter*.

And, in *Ricci* v. *DeStefano*,[3] the Supreme Court would act to protect the rights of *white male* workers of a local municipality. In the case, these majority class members sued the New Haven, Connecticut, fire department, arguing that they were discriminated against on the basis of race when the city threw out the results of a test for promotion that it deemed to have an adverse impact against black workers. Reversing the decision of the lower court, the 5–4 conservative majority shifted the protections of discrimination law toward the majority class. The case would serve as a lightning rod during the confirmation hearings of Sonia Sotomayor, who had voted as part of the lower court to reject the claims of these white workers.

These high-profile decisions of the Supreme Court in recent years have thus caused confusion and discontent among those groups advocating for the rights of minority workers. Each decision has acted to strip minority groups of some of their protections and shifted control of the workplace more toward the employer and the majority class. Unfortunately, these decisions are not isolated events and represent only those instances where the Court was acting in a high-profile way to eviscerate the rights of minority workers. Several other decisions have gone largely undetected in the public eye and have further limited the discrimination protections of the workplace.

While *Wal-Mart*, *Ricci*, and *Ledbetter* are spectacular decisions that have gained widespread attention, the Roberts Court has also acted in a much more subtle and consistent way to limit the workplace rights of minority employees over the past ten years. This book addresses the seismic shift that has taken place in employment law over the last decade and explores the common thread that ties the Supreme Court's decisions together. When the Court's decisions are examined in a meaningful way, three primary trends emerge that suggest a dramatic shift on key procedural issues in employment-discrimination cases that all act together to limit the rights of minority workers.

These three procedural guideposts are all indicative of the paradigmatic shift in the law. Navigating these guideposts, this book explains how the Roberts Court has attempted to minimize worker rights by sidestepping major substantive issues and, instead, rejecting cases on more "technical" procedural grounds that are far less likely to capture the public's attention and imagination. This book does more than simply identify the problem, however. It also suggests workable solutions to allow civil-rights advocates the ability to better survive during this detrimental period. While the deck is stacked against workers on these issues, there are still opportunities available to help minimize the impact of the Court's decisions.

Broken down to its core, there are three overriding areas where the Court has acted to limit the protections of the workforce. The common theme of these holdings is the use of *procedural* – rather than *substantive* – mechanisms to limit worker

rights. First, the Court has made it far more difficult in recent years to even bring a lawsuit. In *Bell Atlantic Corp.* v. *Twombly* and *Ashcroft* v. *Iqbal*, the Court has substantially raised the burden on plaintiffs for what is required to bring a viable lawsuit.[4] The lower courts have seized on the decisions and made it far more difficult for civil-rights litigants to pursue their claims. Attempts at congressional intervention have fallen flat, and employment-discrimination plaintiffs now face an uphill battle when pursuing these cases.

Similarly, the Supreme Court has acted to limit the ability of workplace plaintiffs to *aggregate* their claims. As seen in the *Wal-Mart* decision, the Court has intervened to block systemic employment claims and to require workers to bring their lawsuits on an individual level. Historically, class-action lawsuits have served a fundamental role in employment litigation – they have propelled widespread positive change in various industries that could not have been achieved on an individual level. These cases have provided a recovery for millions of workers who may not otherwise have brought a claim if they had been forced to act by themselves. These litigants are now left to pursue these cases on their own. And, after *Twombly* and *Iqbal*, it is far more difficult for these individual claims to even make it out of the starting gate.

Finally, even where employment-discrimination litigation is successful, the Supreme Court has stepped in to limit the relief available to workers. Thus, even where plaintiffs can successfully navigate the procedural hurdles put in place by the Court, the relief that they will attain is far less. In particular, the Court has acted to strike down the availability of punitive damages in these cases, and without this type of relief, there is far less incentive for workers to bring these claims in the first instance. The compensatory and punitive damages that seemed so robust when they were added to Title VII through statutory amendments have now become much more watered down and difficult to achieve. The statutory caps on these damages have remained static over the last two decades, and the impact of this form of relief has waned.

Thus, at each procedural turn in an employment-discrimination case – filing the claim itself, aggregating claims, and obtaining relief – the Court has put sizable hurdles in place to block civil-rights litigants from prevailing. This substantial shift in the law has taken place gradually over the past decade, and we are now faced with a landscape that greatly favors employers and the majority class in workplace disputes. The procedural hurdles are now present in other major areas of employment law, including claims of retaliation, and arbitrating claims before private judges. This book explains the subtleties of how the Supreme Court has acted to move the law toward employers in all of these areas. And, this text identifies the best ways for civil-rights litigants to survive during this era of uncertainty and adversity.

The Roberts Court has carefully manipulated the use of *procedural* mechanisms over the past decade to alter the *substance* of workplace claims. Indeed, no area of

the law other than employment has seen this level of scrutiny and reconfiguration with respect to procedural issues. This book identifies and synthesizes these changes – and presents them in an easily accessible way. Though many of these cases have gone undetected over the last several years, the aggregate result of this body of case law is quite troubling. Before civil-rights advocates or Congress can act, however, the problem must be clearly understood. This book takes that first crucial step toward identifying the issue and addresses this paradigmatic shift in employment law head on. It seeks to spark a debate on how workplace litigants have been disadvantaged over the past decade. It is time for that debate to begin.

THE HIGHS AND LOWS OF EMPLOYMENT LAW

The theory of employment discrimination likely saw its heights in 1964 with the passage of Title VII of the Civil Rights Act. The statute was passed after much contentious debate, and was the direct result of years of concerted and concentrated efforts on behalf of the civil-rights community. Dr. Martin Luther King, and many others, fought hard for this legislative change in employment (as well as in many other areas of the law). While this book does not purport to provide a complete historical overview of the political wranglings behind the Civil Rights Act, it is worth highlighting the substantial and courageous efforts that directly lead to this important statute.

As the courts became more conservative in the 1980s, they would begin to cut back on the protections for workers found in Title VII. This was largely accomplished by the federal courts' narrow interpretation of the statute and its accompanying regulations. Congress would intervene in 1991 with several important amendments to Title VII. In particular, Congress codified unintentional discrimination claims, gave workers the right to a jury trial, and imposed compensatory and punitive damages on potential wrongdoers.

The year 1991 thus marked another high point for employees and the protections they were afforded against workplace discrimination. Again, however, the courts would turn more conservative with the addition of judges confirmed during the George W. Bush era. Indeed, over the last decade, the Supreme Court has issued a string of decisions that have cut at the core of the protections for minority workers. This text will explore these decisions in detail. For example, in *Vance* v. *Ball State*,[5] the Court defined the term "supervisor" very rigidly, limiting the ability of many workers to impute liability for discrimination to their company. And, in *University of Texas Southwestern Medical Center* v. *Nassar*,[6] the Supreme Court raised the bar for plaintiffs to establish causation in retaliation cases, again making it more difficult for workers to prevail on these claims. These cases, along with a host of other Supreme Court decisions, signaled a marked shift in the Court's approach to employment discrimination. An era of subtle maneuvering by the Court to strip workers of their

rights has emerged. We thus find ourselves at another "low" point for workers and the civil-rights community, and litigants must now proceed with extreme caution when bringing an employment-related claim during the era of the Roberts Court.

This text lays the groundwork for explaining this marked shift in the law. It sets the stage by explaining how the Court's rigid interpretation of the federal employment statutes in recent years has impacted worker rights. It explains how the Court has consistently – over the past decade – chipped away at the protections of minority workers. Before delving into this topic, a brief overview of workplace antidiscrimination law can be helpful. This text is intended for both the casual and sophisticated reader, and an explanation of the mechanics of filing a workplace claim can be useful to those pursuing (or defending) claims in this area.

The Employment Protections of the Workplace

Perhaps the best known, and most frequently used, antidiscrimination law is Title VII of the Civil Rights Act of 1964, which provides numerous protections for workers. In particular, employees are protected under the statute from adverse actions by their employers on the basis of a protected characteristic. The statute expressly states that it is unlawful for an employer to "refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[7] Title VII thus makes it an unlawful employment practice for employers to discriminate on one of these protected bases. The Age Discrimination in Employment Act (ADEA) – which was enacted three years later – operates in a similar manner to prohibit discrimination on the basis of one's age (those forty years of age or older). The Americans with Disabilities Act (ADA) adds additional protections for individuals in the workplace who have disabilities.

These federal statutes all work together to prohibit employers from taking an adverse action on the basis of several protected categories – race, color, religion, sex, national origin, age, and disability. There are other constitutional protections as well that make discrimination unlawful, giving workers equal protection under the law. And, numerous state and local laws add additional protections and often prohibit discrimination against workers on the basis of gender identity, appearance, and marital status.

The Equal Employment Opportunity Commission and the Administrative Process

When a worker believes that she has been discriminated against by her employer, she must typically file a charge of discrimination with the Equal Employment

Opportunity Commission (EEOC). The EEOC is the federal agency charged with enforcing Title VII, the ADA, and the ADEA, among other statutes. An individual has 180 or 300 days to file a charge of discrimination, depending on the state (the vast majority of jurisdictions carry the longer 300-day window). For continuing violations, such as harassment, an individual must file the charge within 180/300 days of the last discriminatory event that has occurred.

When the EEOC receives a charge, it will typically triage it. "A" charges will be heavily pursued, "B" charges will be investigated more thoroughly, and "C" charges will often be rejected. After examining the charge, the Commission will either find cause or no-cause to believe that discrimination has occurred. For no-cause findings, individuals will be given a right-to-sue letter and will have ninety days to file a lawsuit in federal court. For those cases where the Commission finds cause (about 5 percent of the cases, though this number varies), it will attempt to settle the case through a process known as conciliation. If conciliation fails, the EEOC will either bring suit in the case itself, or issue a right-to-sue letter permitting the individual to bring a federal claim within ninety days.

When the EEOC was first created after the passage of Title VII, it had no independent litigation authority, and thus no real ability to enforce the statute. Congress subsequently amended the law, allowing the agency to bring suit on its own behalf against those that ran afoul of Title VII. The EEOC will typically bring between 200 and 400 lawsuits a year, though this number is also subject to variation. These raw litigation numbers may seem somewhat high, but in reality they represent an extremely small fraction of the charges that are filed in a given year, which fluctuate between 75,000 and 100,000 total charges. The data shown in Table 1.1 reflect the number of charges received by the EEOC in recent years. The spike in charges between 2008 and 2012 is likely the result of the great recession, when many workers found themselves suddenly unemployed.

Regardless of whether the EEOC or the individual files suit, the administrative process is complete at this stage of the proceedings and federal litigation may be initiated. The case will then be treated like any other civil claim in federal court, and will be subject to the same Federal Rules of Civil Procedure ("Federal Rules" or "Rules"), as well as the same discovery mechanisms.

The Civil Claim

When filing a civil claim of employment discrimination in federal court, the "rules" that apply are the same as they would be for other cases brought outside of the civil-rights context. The Federal Rules require that a plaintiff file a complaint showing entitlement to relief, and further provide litigants access to the rules of discovery. While the federal rules are generally applied to employment-discrimination claims in a manner

TABLE 1.1 *General Rise of EEOC Charges in Recent Years*

Year	Charges
1997	80,680
1998	79,591
1999	77,444
2000	79,896
2001	80,840
2002	84,442
2003	81,293
2004	79,432
2005	75,428
2006	75,768
2007	82,792
2008	95,402
2009	93,277
2010	99,922
2011	99,947
2012	99,412
2013	93,727
2014	88,778
2015	89,385
2016	91,503

Source: EEOC, Charge Statistics FY 1997 through FY 2016.

that would be similar to other civil cases, one nuance occurs with the requirement that workplace plaintiffs establish discriminatory intent in the case. By and large, the statutory language in this area mandates that an aggrieved party show that she was discriminated against *because of* a protected characteristic. This *because of* language has been widely interpreted as a requirement that the plaintiff show that the defendant acted with some type of discriminatory intent. Though a subset of important employment-discrimination cases exists for claims alleging unintentional discrimination, these cases are largely beyond the scope of this text, though this theory will be visited briefly later in this book with a discussion of the Court's decision in *Ricci* v. *DeStefano*.

If there is some type of direct, overt evidence of discrimination in a case, discriminatory intent is much easier to establish. Where an employer tells a worker that he is

being fired because he "is black," he "is a Muslim," or because he "has a disability," showing discriminatory intent will be relatively straightforward. Though such evidence may have been possible to access decades ago when the statutes were first passed, today it is highly unusual to uncover this type of direct evidence of discrimination. Given that Title VII applies only to employers with fifteen or more employees, businesses of this size are typically sophisticated enough to steer clear of these openly discriminatory remarks in this day and age. There are some exceptions, of course, such as where a company or business attempts to maintain authenticity in its operations, or where safety concerns are implicated. These types of "Bona Fide Occupational Qualifications" are also beyond the scope of this work, but can become important distinctions in a very small subset of cases. For the most part, then, it is extremely rare to uncover direct, overt evidence of discrimination when litigating a workplace dispute.

Where there is no clear signal of discriminatory animus, the courts are typically left to infer such intent through circumstantial evidence. Years ago, the Supreme Court developed the test for these claims in perhaps the best known case of employment-discrimination law – *McDonnell Douglas Corp.* v. *Green*.[8] The *McDonnell Douglas* case held that, to give rise to an inference of discrimination, a plaintiff must show that she is in a protected class, that she is qualified, that she has suffered an adverse action, and that there is some other evidence of discrimination. Once this standard is met, the plaintiff has satisfied the *prima facie* case of discrimination, and the defendant (through a burden of production) must articulate a legitimate nondiscriminatory reason for its actions. The plaintiff – who maintains the burden of persuasion throughout the case – must then establish that the employer's stated reason is pretextual for true discrimination. The chart in Figure 1.2 helps illustrate how these elements are analyzed.

These elements of the *prima facie* case have – traditionally – been evaluated by the courts at the summary judgment stage of the litigation. Like other civil cases brought in federal court, only a handful of workplace cases are even argued before a jury, thus making summary judgment, and other procedural motions, a critical part of the case. In an employment-discrimination case, summary judgment typically occurs after discovery has already taken place (depositions, document exchange, etc.). At summary judgment, an employer must establish that *even if* all of the evidence is considered in the light most favorable to the plaintiff, no reasonable jury could find in the plaintiff's favor. This standard typically requires the employer to argue that even if we look at things in the employee's favor, at least one of the elements of the *prima facie* case has not been satisfied by the plaintiff.

This basic summary of the administrative process and the civil claim provides a starting point for understanding the mechanics of a typical employment-discrimination case, and thus, how the Supreme Court has used these mechanics to severely undercut core worker protections. As will be discussed later in this text, the Supreme

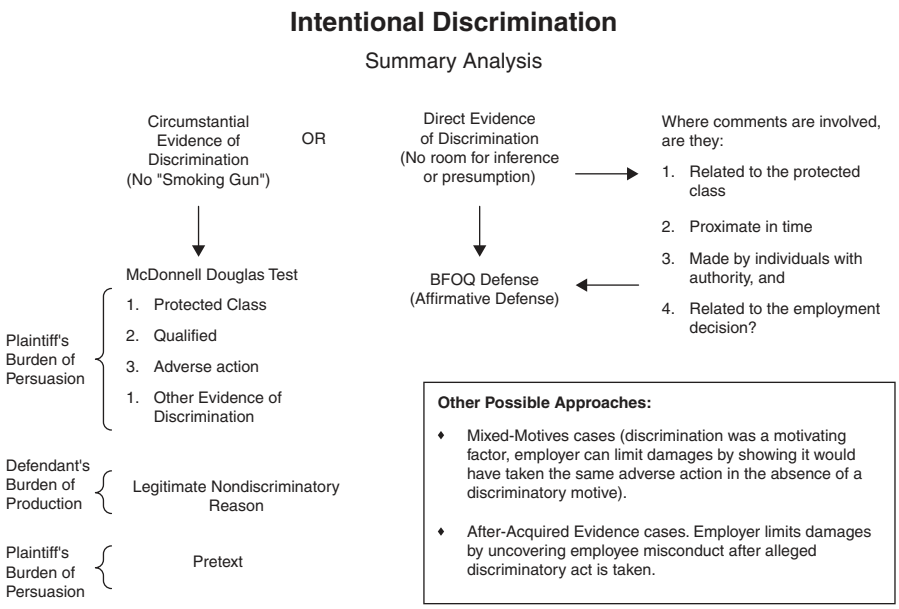

FIGURE 1.2 Intentional discrimination chart. Intentional discrimination claims play a substantial role in workplace litigation; this chart outlines how these claims are conceptualized.

Court's recent decisions have even accelerated when these *McDonnell Douglas* factors are evaluated to a much earlier stage of the proceedings. The Supreme Court's rulings in *Twombly* and *Iqbal* have raised the bar for the pleading standards in these cases and advanced the consideration of the *McDonnell Douglas* factors.[9] The *McDonnell Douglas* test has been the source of great consternation over the years, and has continually been reframed by the lower courts. Despite the widespread criticism of the test, it remains widely used in employment-discrimination cases.

There are many nuances in employment-discrimination law that are well beyond the scope of this book and that fill volumes of textbooks, treatises, and other research materials. The overview of employment-discrimination claims set forth here, however, provides a workable (though oversimplified) summary of how the vast majority of cases typically proceed. We now have a starting point and basic understanding of these claims, and can better explore and articulate the overwhelming impact that the Roberts Court has had in this area.

Relief in Discrimination Cases

In addition to the procedural mechanisms that distinguish employment-discrimination cases, the damages that are available to workplace claimants serve as an additional