

Introduction

“I left the workforce to have a baby. But when I thought about going back, I realized how unpleasant it was for me there. The culture was so miserable. And I knew there’d be no slack given to parent the baby—ever. So, I chose not to go back.”

“Nobody hits on me. There’s a line with them. But it still feels like a locker room in there sometimes.”

“They never said, ‘you’ve lost your spark since the baby.’ But they just stopped giving me the good assignments from the good partners.”

“He’s a jerk to everyone. It’s not like he highlights the fact that I’m a woman when he screams at me. I’m just not cut out for this.”

“I was assigned a formal mentor along with everyone else, and we have lunch when we’re supposed to, but everyone knows that the career-making partners select the people that they gel with socially.”

“When my class entered the firm as first years, the women outnumbered the men. Now it’s just a few years later, and I’m tired of always being the only woman in the room.”

“I knew then that anything I said was going to come across as shrill, angry, and overly ambitious, but if a guy said what I needed to say, he could pull it off.”

We have seen, heard, and even experienced contemporary sex discrimination in the workplace. We know what it looks like, and yet, we seem somehow amused and surprised when we realize that others can relate. We share blog posts, memes, and cartoons online about the coded messages we receive, the unspoken, knowing glances we exchange, and the universal feelings of helplessness and frustration that we experience because we know better. We know that something is amiss, and we know that what is happening isn’t right. But we also know that it is legally permissible (or that the cards would, at the very least, be stacked against us if we were to attempt to bring a claim). People with little to no knowledge of, or experience with, the law nonetheless instinctively realize that what’s happening is “too hard to prove” or just somehow “alright” because they know from their experiences in the world that these sorts of

things continue, typically unchecked, and are not really societally frowned upon; they're just the way things go. In fact, that's why women commiserate over the memes and cartoons that depict these things with other women¹ – because, somehow, we know that while some of us “get it,” others are oblivious to what is occurring. And there's something very telling about that.

People who have studied the law of discrimination, of course, realize what is happening. They realize that the law's strictures, limitations, and omissions – coupled with the courts' constructions and interpretations of the law and promulgation of doctrines to adjudicate cases brought under it – have simply failed to capture a great deal of what has befallen women in the workplace for as long as the law prohibiting workplace discrimination because of sex has been in effect. And they see that what befalls women in the workplace has largely changed over the years, as more overt discrimination and harassment have become socially recognized as taboo. Consciousness and behaviors have changed, even as attitudes and, more importantly, workplace demographics may not have changed as rapidly or as drastically. The result? A contemporary American workplace governed by outmoded, poorly interpreted laws with gaping holes that fail to capture much of what is occurring within it, and a resultant power structure that, by and large, finds women woefully underrepresented in its highest levels.

¹ The author does not seek to minimize sex or other discrimination against anyone who does not, for any reason, identify as a woman. While this book is about workplace discrimination against women, portions of it may have great applicability to many who do not identify as such. Cf. Peter Blanck et al., *Diversity and Inclusion in the American Legal Profession: First Phase Findings from a National Study of Lawyers with Disabilities and Lawyers Who Identify as LGBTQ+*, 23 U. D.C. L. REV. 23 (2020); Shirley Lin, *Dehumanization “Because of Sex”: The Multiaxial Approach to the Rights of Sexual Minorities*, 24 LEWIS & CLARK L. REV. 731, 732 (2020). Similarly, the subject of intersectionality when it comes to race, color, religion, or other protected classes is raised throughout the book because it is inextricably linked with many women's experiences. The subject of race and workplace discrimination is one of the utmost significance and, while much has been written on the subject, there is much more work to do – especially when it comes to providing an exposition of the unspoken beliefs that undergird racism in the workplace and its abhorrent effects. This book focuses mainly on sex discrimination, but the following is a mere sliver of the rich literature available and simply a jumping-off point for those who wish to study discrimination and intersectionality in the workplace: James Thuo Gathii, *Writing Race and Identity in a Global Context: What CRT and Twail Can Learn from Each Other*, 67 UCLA L. REV. 1610, 1628 (2021); Joan C. Williams et al., *Beyond Implicit Bias: Litigating Race and Gender Employment Discrimination Using Data from the Workplace Experiences Survey*, 72 HASTINGS L.J. 337 (2020); Devon W. Carbado & Cheryl I. Harris, *Intersectionality at 30: Mapping the Margins of Anti-essentialism, Intersectionality, and Dominance Theory*, 132 HARV. L. REV. 2193 (2019); Serena Mayeri, *Intersectionality and Title VII: A Brief (Pre-)history*, 95 B.U. L. REV. 713 (2015).

We know the story all too well. In 1964, in the midst of the Civil Rights Movement, Congress passed Title VII of the Civil Rights Act. It prohibited, among other things, discrimination against women in the workplace, meaning that employers of a certain size were forbidden from treating women differently from men with respect to the terms, privileges, and conditions of their employment “because of sex.”² This occurred against a rather dramatic backdrop and a bleak landscape; in 1964, there were fewer women in the workforce, and very few of those women held leadership positions. In 1967, 14.8 million women had full-time jobs, compared to 36.6 million men.³ At that time, only 15 percent of those women held management positions.⁴ The premise of Title VII of the Civil Rights Act was simple: systemic and societal discrimination must not operate to divest individuals of the right to pursue happiness and the American dream by interfering with their workplace and professional prospects. Mandated inclusion would compel equality of opportunity and make the workforce look truly representative of all those who seek to participate in it.

This, however, has not been the case. For fifty-plus years, Title VII and other civil rights laws have been used to vindicate the rights of victims of discrimination. Both federal and state legislatures have updated and amended the laws, and the courts have set about interpreting them in ways that aim to achieve the ends sought by their architects. And yet, still, women make up 46.5 percent of the workforce and less than 8 percent of its top leadership.⁵ This book is about viewing the failure of society and those entrusted with running its regulatory institutions to confer upon women parity and equality with men with respect to power, prestige, and compensation in the workplace. This failure is all too often handily dismissed and ascribed to a singular or monolithic cause or issue, like “work–life balance.”⁶ In reality, a multiplicity of legal, behavioral, and psychological phenomena join forces to prematurely and disproportionately winnow out and siphon off female employees from the corporate ladder

² See Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e.

³ Dr. Robert Groves, *Women in the Workforce*, UNITED STATES CENSUS BUREAU (Aug. 12, 2011), www.census.gov/newsroom/pdf/women_workforce_slides.pdf.

⁴ *Id.* at 11.

⁵ *The Conundrum of the Glass Ceiling*, ECONOMIST (Jul. 21, 2005), www.economist.com/node/4197626.

⁶ See Sarah Green Carmichael, *Ambitious Women Face More Obstacles Than Just Work-Life Balance*, HARV. BUS. REV. (Sept. 5, 2013), <https://hbr.org/2013/09/ambitious-women-face-more-obst>; Kimberly Seals Allers, *Rethinking Work-Life Balance for Women of Color*, SLATE (Mar. 5, 2018, 10:00 AM), <https://slate.com/human-interest/2018/03/for-women-of-color-work-life-balance-is-a-different-kind-of-problem.html>.

and the workplace generally before they can attain the same status and power as men at the helm of employer enterprises.

The expression “glass ceiling” is ubiquitous. For decades, it has been used to describe an invisible or transparent barrier to the ascension or promotion of women into positions of greater power, influence, and compensation in the workplace. The phrase conjures up a palpably powerful metaphor. Women trying to ascend the corporate ladder may be fooled at its bottom, unable to perceive the impervious but transparent barrier at all, but they will invariably progress to the point at which they make contact with it and are obstructed. Then, thanks to its translucence, they will be able to see up into the upper echelons of the organization, but remain unable to transcend the barrier and gain access.

The term “glass ceiling” was initially coined in 1984 by magazine editor Gay Bryant.⁷ In 1986, it debuted in a *WALL STREET JOURNAL* article entitled, “The Glass Ceiling: Why Women Can’t Seem to Break the Invisible Barrier That Blocks Them from the Top Jobs,” and then soon found its way into the titles of scholarly articles, often by feminist academics.⁸ The term was seen as perfectly encapsulating the phenomenon whereby, despite the passage of the Civil Rights Act of 1964 and the widespread education of society about sex discrimination and sexual harassment, sex inequality persists in the American workplace when it comes to everything from promotion to compensation. And despite the repeated refrains that women are tired of making pennies on the dollar as compared with men doing the same jobs, and being taken less seriously as colleagues, supervisors, or bosses than are their male counterparts, the rift between the sexes when it comes to power, prestige, influence, and compensation has continued, sometimes deepening with the passage of time.

In 1991, the federal government established a “Glass Ceiling Commission” charged with examining the barriers of (1) skills honing and development; (2) the hiring of management and supervisory employees; and (3) reward and compensation systems.⁹ The Glass Ceiling Commission, which consisted of twenty-one members and was chaired by the Secretary of Labor, was disbanded in 1996, but the intractable problem of the glass ceiling did not disappear with it.¹⁰ Interestingly, as it has persisted, those who study it have started to challenge the metaphor of the glass ceiling, arguing that it

⁷ Manish Rana, *Glass Ceiling*, www.scribd.com/document/176204299/Glass-Ceiling (last visited Jun. 10, 2020).

⁸ *The Conundrum of the Glass Ceiling*, *supra* note 5.

⁹ *Id.*

¹⁰ Glass Ceiling Commission, *DIGITALCOMMONS@ILR*, <https://digitalcommons.ilr.cornell.edu/glassceiling/> (last visited Jun. 10, 2020).

misguidedly depicts a singular obstruction in the pipeline of a career trajectory, rather than what it is: the complex, subtle tapestry made of factors that present themselves in the workplace, the legislatures, and the courts.¹¹

This book asserts that the glass ceiling is not made up of one translucent piece of glass, and it posits several distinct problems with a body of law and its interpretation that fail to capture what it sets out to capture and to ensure parity for women in the workplace. Each issue, viewed in isolation, may not seem like a wide-reaching phenomenon. But combined, just like panes of clear glass when laid one on top of another, they eventually form a thick and opaque barrier through which light has trouble penetrating. The glass ceiling becomes murkier, cloudier, and more impenetrable. And the most insidious part of these “panes,” or flaws in the law and/or its interpretation, is that many stem from one or more unspoken beliefs that inhere in hearts, minds, and society, but elude exposition because they are so often left unsaid.

Many Americans may not know who Todd Akin is, but few can forget the phrase that he infamously made famous in the summer of 2012: “legitimate rape.”¹² Questioned about his stance on abortion in cases of rape, the former Congressman shot back that pregnancy following a rape would be “really rare,” noting that “if it’s a legitimate rape, the female body has ways to try to shut that whole thing down.”¹³ By daring to qualify the word “rape” with the word “legitimate,” Akin gave voice to the taboo and unspoken belief that there is such a thing as “illegitimate rape,” where the word “rape” is applied, but consent is somehow not truly withheld. While this notion is appalling, it being voiced is what truly shocked so many people. The law surrounding gender equality is rife with “unspoken beliefs” that many, if not most people

¹¹ See Zoe Williams, *The Glass Ceiling: A Metaphor That Needs to Be Smashed*, GUARDIAN (Jul. 27, 2016), www.theguardian.com/us-news/2016/jul/27/hillary-clinton-glass-ceiling-metaphor-that-needs-to-be-smashed (“[T]he phrase [‘glass ceiling’] stuck . . . it spawned a whole raft of related executive hurdles made of glass”); *Glasloft/Glass Ceiling*, GILL GATFIELD (2015), www.gillgatfield.com/projects-exhibitions/glasloft-glass-ceiling/ (“The elusive ‘glass ceiling’ is not transparent, a singular high barrier or a level playing field. It is a structural membrane with multifaceted and toughened components, in multiple dimensions.”); Jenna Goudreau, *A New Obstacle for Professional Women: The Glass Escalator*, FORBES (May 12, 2012, 2:28 PM), www.forbes.com/sites/jennagoudreau/2012/05/21/a-new-obstacle-for-professional-women-the-glass-escalator/#3506d2a41135 (“[W]omen started flooding the labor market and taking on the male-dominated corporate world, they then hit a glass ceiling. . . . Now, they must contend with yet another advancement obstacle, the ‘glass escalator.’”).

¹² David Cohen, *Earlier: Akin: “Legitimate Rape” Rarely Leads to Pregnancy*, POLITICO (Aug. 19, 2012), www.politico.com/story/2012/08/akin-legitimate-rape-victims-dont-get-pregnant-079864.

¹³ *Id.*

would feel uncomfortable expressing publicly, but which need to be challenged. This book argues that these beliefs have given rise to inconsistencies and fallibilities in the law, vulnerabilities in the interpretation of the law, and the failure of those who make, interpret, and enforce the law to capture the entire spectrum of behavior and beliefs that subordinate women's rights to men's.

There are gaping holes in every layer of netting in the legal system meant to capture the root causes of workplace sex inequality. These holes can be best explained by a series of beliefs, largely unspoken in polite society, about women, their place in society, and those who would discriminate against or harass them. The laws themselves, as written, often evince flaws and fail to provide the protections, accommodations, or guarantees that would be most conducive to the successful recruitment, retention, and promotion of women in the workplace. On another level, both the interpretations of those laws and the doctrines crafted by judges to aid in the adjudication of cases brought under those laws are full of inconsistencies undergirded by unspoken beliefs.¹⁴ Finally, the absence of certain laws and protections shows society's failure to grapple with and accept the existence of certain behaviors and cultures in the workplace that are antithetical to the recruitment, retention, and promotion of talented women in the workplace. This book will be organized by unspoken beliefs and the phenomena engendered by each one. Each chapter will contain illustrative examples and hypotheticals, an exposition of the unspoken belief addressed, with its manifestations in the law and the U.S. legal system, and the legal and social science research to contextualize that particular "pane" of the glass ceiling, before concluding with takeaways. Takeaways may include some useful ways of thinking about, or addressing, the problems outlined in a chapter, but at a minimum, they will provide parting thoughts or summaries as to how we might identify and confront each belief.

Throughout the book, there will be snippets or recaps of interviews conducted and discussions had with working women to highlight or illustrate points being made. In the interest of preserving the privacy and/or anonymity of these women, identifying details about their identities have been changed,

¹⁴ See, e.g., *EEOC v. Catastrophe Mgmt. Sols.* 852 F.3d 1018 (11th Cir. 2016) (finding that a company asking an African American woman to cut her dreadlocks was not discrimination because it was not an "immutable characteristic of race"); *Tse v. N. Y. Univ.*, No. 10 Civ 7207 (DAB), 2013 WL 5288848, at *44 (S.D.N.Y. Sept. 19, 2013) (finding that two stray comments were insufficient to survive the defendant's motion for summary judgment).

and some stories have been altered or blended. They are included to enhance classroom discussion when this book is used in an academic context.¹⁵

LEGAL BACKGROUND: A QUICK PRIMER

Before we get into this litany of unspoken beliefs, it is important to understand the current state of employment discrimination law. Employment in the United States is essentially at-will.¹⁶ This means that in almost every state (Montana is a notable and singular exception),¹⁷ the background presumption underlying every employment relationship at its inception is that employees serve at the will of their employers. This means that, in theory, employees may be fired at any juncture and for any reason, no matter how arbitrary. Similarly, employees are free to leave employment at their pleasure.

Atop this background presumption are several things that may overwrite it. One may be a contractual arrangement between the employer and the employee that may guarantee, among other things, that the employee may not be fired, or may not be fired except for cause, for a specified period of time. Interestingly, because of the law's aversion to anything resembling compelled servitude, an employer who breaches such a contract may be forced to reinstate the terminated employee, but an employee who quits her job in contravention of such an agreement will not be ordered by a court to return to work against her will, though she may owe the employer damages for the breach.¹⁸

Another thing that may be engrafted atop the at-will presumption is legislation or case law that mandates that an employer¹⁹ may not fire an employee

¹⁵ See *supra* disclaimer in note 1 regarding interviews and dialogue.

¹⁶ *Employment-at-Will Doctrine*, CORNELL L SCH., www.law.cornell.edu/wex/employment-at-will_doctrine (last visited Feb. 5, 2020).

¹⁷ Montana's Wrongful Discharge from Employment Act (WDEA) grants some employees the right to be terminated only for just or good cause after a minimal probationary period. MONT. CODE ANN. § 39-2-904 (2019).

¹⁸ See, e.g., *Thurston v. Box Edler Cty.*, 892, P.2d 1034, 1040 (Utah 1995) ("Reinstatement may be considered as a remedy by a trial court when fashioning a remedy for breach of an employment contract."); *Bacon v. Karr*, 139, So. 2d 166, 170 (Fla. 2d DCA 1962) ("Although courts will not compel specific performance of personal service contracts, an employee may be held liable in appropriate proceedings for breach of his contract with his employer."); *Bali v. Christiana Care Health Servs.*, C.A. No. 16433 NC, 1999 Del. Ch. LEXIS 128, at *9 n.5 (Ch. Jun. 16, 1999) ("Any order of specific performance against the employee would raise substantial, if not insurmountable, objections under the Thirteenth Amendment to the United States Constitution . . .").

¹⁹ The fifteen-employee requirement is a jurisdictional threshold in a Title VII employment discrimination case. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C. § 2000e.

because of that employee's protected activity or protected class status. So, for example, an employee who works for an employer subject to Title VII – the federal centerpiece of workplace civil rights laws – may not be terminated or otherwise discriminated against with respect to workplace terms, conditions, or privileges “because of” her race, sex, religion, color, or national origin.²⁰ These are referred to as protected classes. Under other federal statutes, disability, age, and veteran's status are protected classes.²¹ Although much of what this book discusses and critiques is salient and applicable to other protected classes, especially race, because this book is about sex discrimination, instead of referencing “protected class” when discussing the statute, it will usually directly reference sex. Pursuant to the anti-retaliation provisions of Title VII and nearly every other employment law statute, an employee cannot be discriminated against or terminated because of her exercise of rights and other protected activities surrounding the vindication of rights protected under the various statutes.

As Title VII was being crafted and enacted, the nation was still feeling reverberations from the governmentally compelled desegregation of public schools in the 1950s and from the more widespread recognition that societal segregation, like that found at water fountains, on forms of transportation, and beside the lunch counters of America, was more than unconstitutional – it was repugnant. Despite this, however, the American workplace persisted in its near-categorical exclusion of women and other minorities (racial, religious, etc.) from the upper echelons of power, prestige, and compensation.²² Title VII was enacted to capture the range of discrimination that was occurring in the workplace and operating to exclude these minorities from meaningful participation in the workforce and, thus, in public life. In addition to the more straightforward claim of disparate treatment – that a plaintiff has been treated differently from others because of protected class status in direct contravention of the statute's explicit prohibition – we now also have, via amendment in 1991 and decades of construction by the federal courts, viable claims under Title VII for disparate impact discrimination and harassment.²³

²⁰ Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1).

²¹ See, e.g., Americans with Disabilities Act of 1990, § 503(a), 42 U.S.C. § 12203(a); Age Discrimination in Employment, 29 U.S.C. § 630; Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. §§ 4301–33.

²² It should be noted that many of the discussions and critiques presented here could apply with at least some force to other minority groups protected by Title VII. This book focuses on the plight of women in the workplace, but it is important to note that African Americans and other racial, religious, and ethnic minorities have been excluded from participation in public life and in the workforce in ways that have required and continued to require great remediation.

²³ Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1).

This book focuses on sex discrimination in the workplace. However, it is impossible to discuss sexism without discussing racism, and the potently invidious crossroads where they meet: intersectionality. According to a TIME magazine interview with Professor Kimberlé Crenshaw, who coined the term more than thirty years ago,²⁴ intersectionality is

a lens, a prism, for seeing the way in which various forms of inequality often operate together and exacerbate each other. We tend to talk about race inequality as separate from inequality based on gender, class, sexuality or immigrant status. What's often missing is how some people are subject to all of these, and the experience is not just the sum of its parts.²⁵

The racism that a woman faces doesn't merely combine with the sexism she faces; Professor Crenshaw has said on social media that “[i]ntersectionality is not additive. It's fundamentally reconstructive.”²⁶ Two of the most important, propulsive, and influential social justice movements of our time, Black Lives Matter and #MeToo, are educating people and promoting social justice as this book goes to press, and it is clear that intersectional feminism is key to ensuring true parity for all women. The plague that is racism is also an issue that is undergirded by a host of unspoken beliefs, and these are worthy of much thought and analysis.

The Supreme Court and Congress have recognized that even benign, neutral policies can systemically alter the employment experience for an employee, and that alteration, as experienced, is due to the employee's sex.²⁷ Thus, pursuant to a disparate impact theory of a discrimination case, a plaintiff may challenge a facially neutral policy or practice that confers a disproportionate or disparate effect upon a protected class.²⁸ If the plaintiff does this, a court will typically order the cessation of the policy or practice, unless the employer can show that it is a business necessity.²⁹ Moreover, even if the defendant employer can make that showing, the plaintiff may

²⁴ Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989(1), article 8 U. CHI. LEGAL F. 139 (1989).

²⁵ Katy Steinmetz, *She Coined the Term “Intersectionality” over 30 Years Ago. Here's What It Means to Her Today*, TIME (Feb. 20, 2020, 7:27 AM), <https://time.com/5786710/kimberle-crenshaw-intersectionality/>.

²⁶ Kimberlé Crenshaw (@sandylocks), TWITTER (June 26, 2020, 1:41 PM), <https://twitter.com/sandylocks/status/1276571389091154688?lang=en>.

²⁷ See *Dothard v. Rawlinson*, 433 U.S. 321 (1977).

²⁸ Nicholas O. Stephanopoulos, *Disparate Impact, Unified Law*, 128 YALE L. J. 1566, 1597 (2019).

²⁹ *Id.*

nonetheless identify a less intrusive alternative policy or practice for the court's consideration.³⁰

In 1986, the Supreme Court formally recognized that without a concrete adverse action, an employee's conditions of employment may be altered because of her sex by harassment in such a way as to disadvantage her palpably – and actionably – at work, in precisely the way that Title VII was designed to combat.³¹ A plaintiff may thus bring a claim for harassment under Title VII, like sexual harassment, for example, by alleging that she was subjected to harassment (which can include sexual advances, ridicule, humiliation, etc.) because of her sex, and that the harassment was sufficiently severe or pervasive so as to alter the conditions of her employment, both as perceived by the plaintiff and as would be perceived by a reasonable person.³² While there are state and local laws that afford plaintiffs protection akin to that offered by Title VII, this book will focus largely on Title VII as the primary mechanism for using the courts to vindicate women's rights in the workplace. It should be noted that men (and others with nonfemale sex or gender identities) are also victims of sexual harassment and sex-based discrimination in the workplace. However, society's views of people other than women are largely outside the scope of this book. Therefore, in many places, this book will refer to women whereas the applicable phenomenon may also apply to men (or others with nonbinary identities) who have been discriminated against in the workplace. It should also be emphasized that people of all sexes and genders can discriminate and be harassers, even against people who fall within their own protected classes.

As in all areas of law, plaintiffs confront challenges on several levels when attempting to deploy antidiscrimination law.³³ First of all, basic problems of proof persist. After alleging a fact, a plaintiff must make sure that she has the evidence to survive summary judgment.³⁴ Summary judgment is a motion, usually made by a defendant, that, if granted, would dispose of the entire case after the discovery and exchange of evidence, but before the case goes to trial.³⁵ For a judge to grant this motion, they must find that even when viewing all of the evidence in the light most favorable to the party opposing the motion

³⁰ *Id.*

³¹ *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986).

³² *See id.*

³³ Ronald A. Schmidt, *The Plaintiff's Burden in Title VII Disparate Treatment Cases: Discrimination Vel Non—St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742 (1993), 73 NEB. L. REV. 953 (1994), available at <http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1624&context=nlr>.

³⁴ Fed. R. Civ. P. 56.

³⁵ *Id.*