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Introduction

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Equal pay, equal work, and equal working conditions for women and all other subordinated groups are crucial to their ability to live productive lives in our society. Historically, cultural and legal structures defined roles for women with reference to men (particularly white, heterosexual, gender-conforming men). Men were deemed the heads of families with responsibility to earn the family's income, and women served as caretakers of the family. These gender-based roles and sex stereotypes still dominate our culture today; as a result, many women, those men who fail to live up to male stereotypes, and other gender-nonconforming individuals suffer discrimination in hiring and terms and conditions of employment. Moreover, those with intersectional identities, such as racial minority, LGBTQ+, older, and disabled individuals, have even greater hurdles to jump.

Federal statutes such as the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964 were enacted to assure workplace gender equality, but, as we shall see, changing cultural norms is not simple, and many court decisions that may appear neutral failed to achieve the ideal of equal working conditions for all. This failure highlights the importance of interpreting law through a feminist lens so that all members of the community may achieve workplace success. Feminist perspectives and those offered by masculinities and critical race theorists provide important tools with which to consider workplace law and its approach to equality at work. This book seeks to offer an alternative view of what the law could have been had judges interpreting the law consciously engaged with these tools.

BACKGROUND

This book is a volume in the Feminist Judgments series. The first book of the series, *Feminist Judgments: Rewritten Opinions of the Supreme Court*, was

edited by Kathryn M. Stanchi, Linda L. Berger, and Bridget J. Crawford. The volume included twenty-five rewritten US Supreme Court opinions that were originally decided between 1873 and 2015 and commentaries on each rewritten decision.¹ The contributors rewriting the opinions used feminist methodologies, perspectives, and theories to decide the cases. The editors of the original volume were inspired by the UK Feminist Judgments project, which also influenced a number of other feminist judgments projects dealing with law in Canada, Ireland, Australia, and New Zealand.²

An important goal of the editors of that original US volume was to “uncover that what passes for neutral law making and objective legal reasoning is often bound up in traditional assumptions and power hierarchies.”³ The editors posited that using feminist approaches widened the lens through which law is created. In our view, the original volume successfully demonstrates that “systemic inequalities are not intrinsic to law, but rather may be rooted in the subjective (and often unconscious) beliefs and assumptions of the decision makers.”⁴

Because of the success of the original US book, Cambridge University Press has contracted with a number of editors to publish additional volumes that rewrite US opinions from the Supreme and lower federal courts and from state courts that deal with specific doctrinal areas of the law. This volume on rewritten employment discrimination cases is part of this series.

This book includes fifteen rewritten opinions from the US federal courts, accompanied by fifteen commentaries. Two of the rewritten opinions – *Meritor Savings Bank v. Vinson* and *Oncale v. Sundowner, Inc.* – are published “as is” from the original book, but with new commentaries to keep the analysis fresh. The commentaries accompanying those cases in the original book, *Feminist Judgments*, are excellent, but it has been four years since its publication, and we believed that new commentaries would capture important changes that have occurred since then. The other thirteen rewritten opinions included in this volume are entirely original, as are their accompanying commentaries.

Goals

We decided early on that we wanted this book to accomplish two major goals. First, in keeping with the original, this volume would be a compilation of

¹ FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT (Kathryn M. Stanchi, Linda L. Berger, & Bridget J. Crawford eds., 2016).

² *Id.* at 6–7.

³ *Id.* at 4.

⁴ *Id.* at 5.

rewritten opinions in employment discrimination law that would be grounded in feminist theories, perspectives, and methodologies; it would challenge the supposed objectivity and neutrality of current employment discrimination law. Second, this volume differs from the original *Feminist Judgments* because we aimed to create a collection of employment discrimination opinions that would be internally consistent. In other words, our second goal was to create a volume that would demonstrate a potential (but untaken) path for the body of employment discrimination law had the courts considered feminist theories and perspectives when they decided the cases. Our hope was to create a volume that, when read in its entirety, would demonstrate that employment discrimination law would be significantly more protective of the rights of employees if the courts had used feminist theories and perspectives. By the same token, we did not want to sacrifice the power of individual cases or our authors' creative decisions to that goal of internal consistency. This approach resulted, in some instances, in a tension when it came to selecting the cases for inclusion and the writing and editing of the opinions. Creating a body of only fifteen cases that were to be internally consistent was an extremely tricky endeavor, especially considering the rules established for all volumes in the *Feminist Judgments* series – but it was one worth undertaking.

Under the rules of the original volume, which were also applicable to this book, authors of the rewritten opinions were limited to using only those materials that were available at the time of the original opinion. Besides the records of the original cases, authors consulted scholarly or other relevant materials only if those sources had already been published at the time the original cases were decided. Given this rule and our goals, our approach was often to select the earliest cases possible to obviate the need to rewrite many of the cases decided later. In essence, had the earlier cases in a particular area been decided as rewritten, those later cases that answered questions raised in the earlier cases would never have come before the courts. With the goal of internal consistency in mind, one other rule created some limitations: a rule forbidding opinion authors from citing other rewritten opinions in the book. This meant that our authors did not have the benefit of building on the rewritten opinions of cases originally decided earlier than their own. Had they been able to do so, we may have achieved even more internal consistency.

Although the authors of the rewritten opinions were limited to citing materials available at the time of the original opinions, the authors of the commentaries were subject to no such limitation. This freedom permitted commentary authors to explain the original opinions, comment on the restrictions to which the authors of the rewritten opinions were subject, detail how the rewritten opinion would have changed the law in that particular area, and

explain which subsequent opinions would have been avoided had the law been decided as in the rewritten opinion.

Given our goals, case selection was key. We wanted to rewrite opinions that would allow for interesting analyses and would generate the greatest potential impact not only for women, but also for all workers who suffer the effects of discrimination in the workplace. Unlike the original book, this volume is not limited to US Supreme Court cases, but we wanted the cases we included to have an impact. We therefore selected decisions of the US Supreme Court and federal courts of appeals that we believed would best fit with our goals. Because we hoped to create an internally consistent body of law, we limited our authors to rewriting majority opinions only, but we did not limit our case selection to those decisions that we sought to reverse. Instead, we selected cases with holdings that we believed were consistent with feminist perspectives if we thought that the opinions themselves could have more forcefully furthered feminist goals (i.e., *Oncale*; *Desert Palace*; *Johnson Controls*; *Young*; *Hively*; *Meritor Savings Bank*).

We also wanted to include a broad variety of cases that demonstrated different deficiencies: procedural (i.e., *Ricci*; *Wal-Mart*) and substantive (i.e., *Young*; *Hively*; *AFSME*; *Meritor*; *Sears*); a failure to adopt a feminist process, such as a refusal to describe the facts when the courts found them to be too explicit (i.e., *Oncale*; *Etsitty*; *Desert Palace*); a failure to recognize a potential conflict in legal rights (i.e., *Breeden*; *Johnson Controls*); and a failure to explain potential intersectional harms (i.e., *Meritor*; *Webb*; *Jespersen*; *Catastrophe Management*).

Employment discrimination law as it stands today is extraordinarily complicated, with various theories of recovery (e.g., individual disparate treatment and disparate impact), proof methodologies for both individual cases and class actions, burgeoning gender-based theories (e.g., sex stereotyping, harassment, and the rights of LGBTQ+ individuals), a number of statutes dealing with many protected classes (i.e., the Equal Pay Act of 1963, Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, and the Americans with Disabilities Act of 1990), a concern with implicit and explicit biases, a general refusal to engage in intersectional analysis, and three major forms of violating the various statutes (discrimination, harassment, and retaliation). To comprehensively rewrite employment discrimination law, we would have had to rewrite many more than fifteen opinions. Given our numerical constraint, we chose those opinions that would result in the most representative range of cases and deal with many of the fundamental questions in the law today.⁵

⁵ See the next section for an explanation of why we chose not to rewrite certain key cases or address other areas of employment discrimination law.

We leave to the readers to decide whether we have accomplished these goals.

Process: Case Selection and Editing

Our first task was to recruit an Advisory Board that would help us to select the cases for the volume.⁶ The Advisory Board comprises a cross-section of well-known scholars in employment discrimination, gender law, and feminist theory.⁷ We, the editors of this volume, separately compiled a list of potential cases to rewrite, and we asked our Advisory Board to do the same. When the lists were aggregated, we had more than ninety cases. We narrowed that list to approximately thirty cases that would serve the purposes of the book. At that point, we sent the revised list to the Advisory Board, with questions (e.g., Would you select Case A or Case B for the purposes of rewriting a disparate impact case? A class action case? A case that illustrates appearance discrimination?) and asked the Advisory Board members for their comments. With the help of their replies, we narrowed our list to twenty cases. Finally, we considered how we might group the cases, established those groups, and eliminated five more cases from the list.

We had our fifteen cases.⁸

Our next step was to select authors for the rewritten opinions and the commentaries. It was important to the editors of the original *Feminist Judgments* book that the opinion and commentary authors should represent a broad, diverse group of individuals from the legal academy. We share that value and were convinced that if we were going to produce the best volume possible, we needed to recruit a very diverse group not only from the legal academy (and all aspects of it), but also from practice. We instituted a broad search by putting out a call for authors and asking applicants to note their first, second, and third choices for opinions or commentaries. We received a large number of applications and selected nearly all authors from among those applications, but we also recruited directly some authors whom we thought were particularly qualified to rewrite certain opinions, based on their expertise in certain areas. The result was impressive: we ended up with an extremely diverse group of men and women, junior and senior professors, practitioners and scholars, spanning diverse races, religions, and sexual

⁶ The editors of the original *Feminist Judgments* book were extremely helpful throughout the entire process described in this section.

⁷ The members of the Advisory Board and their credentials are listed in the preliminary pages of this book.

⁸ This entire selection process took many months to complete.

orientations. Among those who are in the legal academy, we have chaired professors, and full, associate, assistant, clinical, and legal writing professors, from a total of twenty-five different law schools. Many of our authors and commentators have published in the area of feminist theory, masculinities theory, employment discrimination, and/or employment law – including books, law review articles, and other scholarly publications. Some are experts in legal writing – specifically, law and rhetoric. Others are practitioners or academics who previously practiced law and who have served in various professional leadership roles. This diversity, we believe, is one of the great strengths of this volume.

After submitting our volume proposal to the original editors and Cambridge University Press, we conducted a workshop at University of Nevada, Las Vegas, Boyd School of Law, in April 2018. At the workshop, which was attended by nearly two-thirds of the opinion and commentary authors, we discussed feminist theory and different possible approaches to rewriting the case opinions and writing the accompanying commentaries. We also discussed employment discrimination law as it currently stands. We then asked opinion authors to submit their first drafts by August 2018, and we sent them on to the commentary authors, so that they could begin working on the commentaries.

While each of us took the lead for half of the opinions and commentaries, we both edited all of the opinions and commentaries, reviewing each at least four times. Our goal was to allow as much freedom to the authors and commentators as possible, while keeping the quality of the opinions and commentaries consistent in theory, doctrine, and writing. Some authors made decisions that one or both of us did not agree with, but all of the authors' decisions, we believe, are rational and justifiable.

Potential Uses of This Volume

We envision this volume being used to teach law courses in a number of ways, including as a stand-alone text or as a supplement in an employment discrimination law course, a course on feminist theory and law, or a seminar on judicial writing from a feminist perspective. Its purpose would be to teach students alternative ways of thinking of the case law and to challenge their acceptance of the supposed neutrality and objectivity of federal courts' decisions in important cases. One of the editors (Ann) plans to use this volume in a seminar titled "Employment Discrimination Law, Feminism, and Judicial Writing". She plans to ask all seminar students to read original opinions and rewritten opinions and commentaries, and then to discuss how the substance changed when viewed through a feminist lens. In the second half of the

seminar, students will each rewrite one opinion that has not previously been rewritten and will write a commentary on another student's rewritten opinion.

Researchers should find this volume, as a whole, useful in examining how feminist employment discrimination scholars believe the law in the area could have developed if the courts had applied feminist methodologies, perspectives, and theories. Researchers can also consider how the opinion authors and commentators interpret the original cases, how the opinions could have originally been written, and the effect that such a rewrite would have on the individual case and the entire body of employment discrimination law.

Practicing lawyers and judges can use this volume to reconsider how to frame their arguments and opinions. Moreover, state court judges who are not bound by federal antidiscrimination laws when interpreting their own state antidiscrimination laws may find this volume useful in avoiding the errors that harm the most vulnerable employees among us.

SUMMARY OF REWRITTEN OPINIONS

Chapter 2, "Supreme Court and Gender Narratives," contains one case: *Desert Palace, Inc. v. Costa*.⁹ The original case decided by the Supreme Court was a victory for the plaintiff, who argued that, when proving a mixed-motives case under the 1991 Amendments to Title VII, she need not limit her case to direct evidence. Like other civil plaintiffs, the Court held, Title VII plaintiffs may use direct or circumstantial evidence, or a combination of both. The original opinion, however, reported the facts in a very brief and "neutral" manner without taking into account the evidence before the jury. The feminist judgment – authored by Anne Mullins, with a commentary by Naomi Mann – corrects this omission by detailing the egregious facts in the case that shed light on the gendered treatment suffered by the plaintiff. This treatment included repetitive severely hostile behaviors by her coworkers and differential treatment by her supervisors. Mullins' rewritten opinion gives the reader a significantly different view of the case from that presented in the original opinion. Mullins demonstrates that the feminist method of storytelling illuminates how the facts occurred in the real world and creates a counterbalance to the presumably "neutral" and "objective" view presented by the Court.

Chapter 3, "Pregnancy Discrimination," deals with an issue that affects many, if not most, women: pregnancy or the ability to become pregnant. In *International Union, UAW v. Johnson Controls*,¹⁰ the Court held that the

⁹ 539 U.S. 90 (2003).

¹⁰ 499 U.S. 187 (1991).

employer's fetal protection policy that broadly excluded fertile women, but not men, from jobs working with lead was sex discrimination under Title VII and could not be justified by the Bona Fide Occupational Qualification (BFOQ) defense. Because of the breadth of the policy, which excluded nearly all women absent proof of sterilization, this case was a victory not only for pregnant women, but also for all women working at the company. Nonetheless, the original opinion failed to focus on the stories of hardships of individual women who would be excluded from work, ignored evidence that men's offspring can also suffer harm from excess exposure to lead, and failed to suggest that workplaces with toxic substances should clean up and/or provide personal protective equipment to the extent feasible rather than exclude employees from valuable jobs. The rewritten opinion by Marcia McCormick, with a commentary by Wynter Allen, uses feminist emphasis on narrative to tell the stories of three of the individual plaintiffs: two women and one man. It details the economic and personal hardships suffered by the plaintiffs, and it explains that, in 1979, 100,000 women were excluded from jobs as a result of fetal protection policies, the majority in male-dominated positions. The rewritten opinion disavows the stereotypes furthered by the policy that all women are potential mothers for nearly their entire working lives and concludes that the policy lets employers avoid their duty to eliminate workplace health hazards. While the rewritten opinion does not change the holding, it places emphasis on the importance of avoiding gender-based and sex stereotypes and on furthering healthy workplaces for all employees.

*Young v. United Parcel Service, Inc.*¹¹ deals more directly with pregnancy. In the original case, the Court held that a pregnant employee can establish that an employer's refusal to make accommodations for her pregnancy violates the Pregnancy Discrimination Act of 1978 by demonstrating that the employer accommodates a large percentage of nonpregnant workers while failing to accommodate a large percentage of pregnant workers. Although this was seen as a positive step for pregnant women, the Court's convoluted analysis generated a great deal of criticism. The feminist judgment, rewritten by Deborah Widiss, with a commentary by Bradley Areheart, takes a much more straightforward approach. Widiss holds that when an employer provides accommodations for employees with physical restrictions that are similar to those of the pregnant plaintiff, the employer must provide those same accommodations to the pregnant employee. Widiss highlights the history of discrimination against pregnant women, which has proven to be a significant cause of women's subordination in the workplace. This subordination occurs because many

¹¹ 135 S.Ct. 1338 (2015).

women have been forced to quit when their employers refused to provide them with simple accommodations that would allow the employees to remain employed while pregnant.

The first case in Chapter 4, “Intersectional Approaches to Appearances,” is *Jespersen v. Harrah’s Operating Co.*¹² In that case, the Ninth Circuit held that the employer’s firing of a female bartender for failing to comply with a sex-specific grooming policy, which included a comprehensive makeup requirement for female employees, did not constitute sex discrimination based on the unequal burdens on women or unlawful sex stereotyping. The rewritten opinion is coauthored by Angela Onwuachi-Willig and JoAnne Sweeny, with a commentary written by Roxana Bell. The opinion coauthors expose the harm caused by allowing employers to have sex-specific grooming policies generally and makeup mandates specifically. They hold that the unequal burdens test should be jettisoned and propose instead that *any* sex-specific grooming policy would violate Title VII. They also hold, in the alternative, that even if the unequal burdens test were to apply, the makeup policy, which has no corollary in time or money spent for men, poses an unequal burden on the female employees of the casino. Finally, the authors hold that requiring women to wear makeup (and refusing to allow men to wear makeup) is sex stereotyping that violates Title VII. Although the plaintiff was a white woman who was not challenging the casino’s sex-specific hair requirements, the coauthors sprinkle some intersectional dicta throughout the rewritten opinion, exposing how the casino’s hair mandates could discriminate based on both sex and race.

*EEOC v. Catastrophe Management Solutions*¹³ deals more directly with race and hair. In the original case, the court held that it was not race discrimination for the employer to refuse to hire a black woman because she wore her hair in locs, stating that Title VII was meant to prohibit only discrimination based on “immutable characteristics,” and the wearing of locs is not immutable. The rewritten opinion by Wendy Greene, with a commentary by Jesse Bawa, holds that the refusal to hire black women because they wear their hair in locs is race discrimination under Title VII. The rewritten opinion first explores the lengthy and tragic history of hair discrimination against black women. The opinion then eliminates the immutability requirement, confirming that discrimination against cultural practices associated with race constitutes race discrimination. In so holding, the rewritten opinion also explores the intersectional nature of the discrimination against black women.

¹² 444 F.3d 1104 (9th Cir. 2006) (en banc).

¹³ 852 F.3d 1018 (11th Cir. 2016).

The last case in this chapter is *Webb v. City of Philadelphia*.¹⁴ In the original opinion, the Third Circuit upheld the lower court's grant of summary judgment to the City. The plaintiff, a Muslim female police officer, alleged illegal sex and religious discrimination because the City denied her an accommodation to wear a religious headscarf with her uniform, even though male police officers who are Muslim had been accommodated and permitted to wear beards. The court agreed with the City's argument that the requested accommodation would impose an undue burden on the defendant. Valorie Vojdik's rewritten opinion, with a commentary by Sahar Aziz, focuses on the intersectional harm based on the plaintiff's sex, combined with her religion, and overturns the lower court's grant of summary judgment, concluding that the defendant's argument that permitting the plaintiff to wear a headscarf tucked into her uniform shirt collar would destroy the *esprit de corps* of the police force is specious. According to the rewritten opinion, the defendant offered no evidence of harm at all, much less evidence of undue burden.

Chapter 5, "Harassment Because of Sex," contains two cases that are republished (with permission) from the original *Feminist Judgments* book, with new commentaries. In *Meritor Savings Bank, FSB v. Vinson*,¹⁵ the Supreme Court held for the first time that an employer is liable to an employee for a sexually hostile work environment created by a supervisor even absent economic harm to the employee if the behavior is severe or pervasive. The employer's liability is not automatic, but depends on agency principles. In the rewritten opinion, Angela Onwuachi-Willig, with a new commentary by Trina Jones, focuses on the hidden race issues in the case. Unlike the original opinion, the rewritten opinion explains that the black female plaintiff was especially vulnerable because of her youth and the fact that the harasser, a bank vice president and branch manager, was a well-respected man in the black community, who repeatedly assaulted her at work. Importantly, the rewritten opinion establishes a new, less stringent test for proving a hostile work environment and holds that an employer is strictly liable for injuries caused by such an environment created by a supervisor.¹⁶ By making employers strictly liable, the rewritten opinion would have effectively eliminated a number of subsequent lower court cases and two Supreme Court cases, *Burlington Industries, Inc. v. Ellerth*¹⁷ and *Faragher v. City of Boca*

¹⁴ 562 F.3d 256 (3d Cir. 2009).

¹⁵ 477 U.S. 57 (1986).

¹⁶ The rewritten opinion left untouched the "negligence" standard that courts apply when the harasser is a coworker or a third party, where an employer is liable if it knew or should have known about the harassment and failed to take appropriate remedial action.

¹⁷ 524 U.S. 742 (1998).