

## FEMINIST JUDGMENTS: REWRITTEN EMPLOYMENT DISCRIMINATION OPINIONS

How would feminist perspectives and analytical methods change the interpretation of employment discrimination law? Would the conscious use of feminist perspectives make a difference? This volume shows the difference feminist analysis can make to the interpretation of employment discrimination statutes. This book brings together a group of scholars and lawyers to rewrite fifteen employment discrimination decisions in which a feminist analysis would have changed the outcome or the courts' reasoning. It demonstrates that use of feminist perspectives and methodologies, if adopted by the courts, would have made a significant difference in employment discrimination law, leading to a fairer and more egalitarian workplace, and a more prosperous society.

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# Feminist Judgments: Rewritten Employment Discrimination Opinions

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For my mother, Mary McGinley, who loved life, lived more than a century,  
and gave those around her unconditional love –*ACM*

For the most important females in my life: my mom, Annette, and my three  
daughters, Kayla, Elise, and Ava –*NBP*

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## Preface

Could feminist perspectives and methods change the shape of employment discrimination law? To answer this question, we assembled a group of scholars and lawyers to use feminist perspectives and methodology to rewrite significant employment discrimination cases from the US Courts of Appeals and the US Supreme Court.

This volume, like all of the books in Cambridge University Press's Feminist Judgments series, demonstrates that judges with feminist viewpoints could have changed the law and the reasoning underlying the law, based on the precedent and other legal sources in effect at the time of the original decision. It demonstrates that use of feminist approaches can assure a more accurate and fair resolution of employment discrimination disputes – a resolution that more closely mirrors the purposes of the employment discrimination statutes.

In essence, employment discrimination laws were enacted to protect the most vulnerable workers – those who are less powerful because of their age, race, color, sex, gender identity and expression, sexual orientation, national origin, disability, and religion – from discriminatory hiring, working conditions, promotions, and discharges. But unfortunately, the law has developed in ways that make it difficult for vulnerable workers who have suffered discrimination to prevail in their claims. Some of these reasons entail the complexity and difficulty of proving employment discrimination. Others include a focus on the intent of the individual decision-maker rather than the systemic policies and practices that affect vulnerable workers more harshly than others. Finally, judges' reliance on their own "common sense" and refusal to accept expert testimony that explains why employers act as they do also contributes to the law's stymied development.

Together, the opinions and commentaries in this volume illustrate the importance of diversity on the bench so that judges do not approach their

work with a uniform worldview influenced by the same set of preconceptions and privileges. For judges, lawyers, legislators, students, and members of the general public, reading these opinions helps to expose the ways in which judges – and, in turn, the development of the law – are subtly influenced by preconceptions, existing power hierarchies, prevailing social norms, and “conventional” wisdom. This book demonstrates that employment discrimination law is not neutral, but rather shaped by the society that produces it and the judges who apply it. At the same time, this book offers the hope that employment discrimination law can be reformed to be an instrument of greater justice and equality for all people. One possible way of doing this is for Congress to step in and overrule some of the more egregious decisions by the federal bench. Another is to increase diversity on the bench and so shift perspectives and understanding among the federal judges. And another is for state legislatures to continue to enact broad-based employment discrimination laws and for state judges to interpret those laws in ways that expand the protections of vulnerable workers beyond the limited protections that the federal laws afford today.



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