Employment Discrimination Law in the United States: On the Road to Equality?

Risa L. Lieberwitz
Associate Professor
School of Industrial & Labor Relations
Cornell University

Paper prepared for the 9th JILPT Comparative Labor Law Seminar (Tokyo Seminar),
"New Developments in Employment Discrimination Law," February 18 – 19, 2008

Employment Discrimination Law in the United States:
On the Road to Equality?

Risa L. Lieberwitz

Table of Contents

I. Introduction

U.S. antidiscrimination law seeks to address a history of workplace exclusion of individuals and groups on the basis of race, sex, national origin, and religion. Added to the core protections against discrimination on these bases, more recent legislation has recognized the need to expand the law to include discrimination on the basis of age and disability. Yet, as significant as antidiscrimination law has been, the U.S. workforce continues to reflect occupational segregation on these bases. Added to these problems is the growing insecurity of workforce made up increasing by contingent employees, who are often drawn from the same groups needing protection under employment discrimination laws.

The legislative and judicial agenda, thus, must remain focused on the same fundamental questions that led to initial passage of antidiscrimination laws. What goals should these laws seek to achieve? How should progress toward equality be measured? Should the law be concerned with equal treatment of individuals as well as equal results for protected groups? Can the law provide substantive equality in addition to formal equality?

This paper describes and analyzes U.S. antidiscrimination law. It begins by setting the legal context of labor and employment law in the U.S., set against the background of the doctrine of employment at will. The discussion then focuses on Title VII of the Civil Rights Act, which has been central to developing discrimination theory that has been applied to subsequent antidiscrimination laws. In addressing Title VII, the Age Discrimination in Employment Act, and the Americans With Disabilities Act, the paper presents an analysis of the progress achieved by these statutes. As importantly, the paper critiques the limits of the legislation, particularly as interpreted by the courts. Finally, the paper examines the growing contingent workforce and its need for legislative protection.

II. Common Law Background: Employment at Will

U.S. labor and employment law is still strongly influenced by the common law doctrine of "employment at will." Under the familiar litany of employment at will doctrine, an employer may hire or discharge an individual for "a good reason, a bad

reason, or no reason at all," emphasizing employers' unilateral power to decide whether to initially employ or continue to employ an individual. In other words, the employer has no obligation to make rational hiring decisions or to discharge employees only for "just cause."[1] Although most collective bargaining agreements include just cause provisions, less than 8% of the private sector workforce is unionized.[2] Further, most employees do not have individual contracts on which to based "unjust dismissal" claims. Many public sector employees are protected by a just cause requirement under civil service statutes or collective bargaining agreements. Even in a unionized workforce, however, hiring decisions are usually outside the scope of mandatory subjects of bargaining.

Given the scope of employer power under the employment at will doctrine, statutory limitations on the common law doctrine are especially important for restricting socially irresponsible employment decisions. These legal limitations have taken the form of federal and state labor and employment legislation prohibiting employers from basing employment decisions on an individual's union activities, race, sex, national origin, religion, age, or disability. This legislation has its origins in the National Labor Relations Act of 1935[3] and subsequent laws resulting from the 1960s Civil Rights movement, including the federal Equal Pay Act of 1963,[4] requiring employers to pay men and women equally for performing substantially similar work, and Title VII of the Civil Rights Act of 1964,[5] which prohibits employment discrimination on the basis of race, sex, national origin, or religion. Congress has enacted additional anti-discrimination legislation, including the Age Discrimination in Employment Act of 1967 (ADEA),[6] prohibiting employment discrimination against individuals forty years of age or older,

---

[1] MACK A. PLAYER, FEDERAL LAW OF EMPLOYMENT DISCRIMINATION IN A NUTSHELL, FOURTH EDITION 85-95 (2004). (discussing employment-at-will and common law exceptions).

[2] The current union membership in the U.S. is at 12.1 percent, including public and private unionization. Union membership is 7.5 percent in the private sector and 35.9 percent in the public sector. See, Bureau of Labor Statistics, *Union Members in 2007*, available at http://www.bls.gov/news.release/pdf/union2.pdf

[3] 29 U.S.C. §§ 141 *et. seq.*

[4] 29 U.S.C. sec. 206(d).

[5] 42 U.S.C. sec. 2000e et seq., *amended by* Civil Rights Act of 1991, P.L. 102-166, 105 Stat. 1071. Title VII, the ADEA, and the ADA regulate public and private employers, labor organizations, and employment agencies with more than 15 employees (or union members) for Title VII and the ADA, and more than 20 employees (or union members) for the ADEA.

[6] 29 U.S.C. sec. 621 et seq.

and the Americans with Disabilities Act of 1990 (ADA).[7] State anti-discrimination laws provide analogous prohibitions, with some state laws adding other grounds, such as employment decisions on the basis of sexual orientation or marital status.[8]

As significant as anti-discrimination laws are, their scope is limited by the U.S. "negative rights" model, which works in tandem with employment at will doctrine. As a background legal condition, employment at will gives employers almost complete unilateral control over the employment relationship. A negative rights model of anti-discrimination leaves this employer power largely intact by creating discrete restrictions on employer conduct. For example, under Title VII, an employer is prohibited from refusing to hire a woman because of her gender. But Title VII does not require an employer to increase its hiring of women. Nor is the employer required to have just cause to discharge or discipline employees. Title VII and other employment discrimination laws define prohibited bases for employer action, but leave the employer otherwise free to take actions for good or bad, fair or unfair reasons.

In contrast, a positive rights model would make greater incursions on employer unilateral power. For example, "unjust discharge" claims by employees could include claims of sex, race, or other forms of discrimination, but would go beyond anti-discrimination by creating a positive right to fair treatment. A positive rights model would also create a stronger foundation for legislating benefits for all employees, including paid vacation, paid sick leave, and health insurance. With a weak welfare state, the U.S. leaves such benefits to contract, whether through collective bargaining or individual agreements.[9] A positive rights model could have a significant effect on the judicial interpretation of anti-discrimination laws, leading to greater substantive equality.

III. Title VII Negative Rights Model: Formal Equality

The negative rights model has its strongest expression in disparate treatment theory, which is centered on intentional employment discrimination. Disparate treatment

---

[7] 42 U.S.C. sec. 12101 et seq.

[8] See Arthur S. Leonard, "Twenty-First Annual Carl Warns Labour & Employment Institute: Sexual Minority Rights in the Workplace," 43 *Brandeis Law Journal* 145 (2004/2005); WILLIAM N. ESKRIDGE, JR. AND NAN D. HUNTER, SEXUALITY, GENDER, AND THE LAW 948-50 (1997) (discussing statutes in nine states and the District of Columbia, as well as executive orders in at least thirteen states, and ordinances in more than 150 cities).

[9] *See* Frank Munger, *The New Economy and the Unraveling Social Safety Net: How Can We Save the Safety Net?*, 69 BROOKLYN L. REV. 543, 550-51 (2004).

theory is most effective as a means of achieving formal equality for women, racial and ethnic minorities, disabled persons, and older people. Creating conditions of "formal equality" does further the legislative goal of expanding equal opportunity for women and minorities who meet the same employment criteria applied to majority group applicants.[10] For example, an employer is prohibited from treating male and female applicants differently on the basis of sex in filling a position of engineer. The judicial focus on formal equality has resulted in an extensive body of disparate treatment cases defining the methods of proving intentional discrimination.

While it seems uncontroversial that intentional discrimination should be unlawful, Title VII's actual language refers only to the broader concept of causation rather than intent.[11] Nevertheless, the courts have developed a long history of cases defining disparate treatment in terms of intentional discrimination. Further, although "intent" is not the same as "motive," the courts often use these terms interchangeably. While intent refers to a conscious state of mind, motive may include unconscious factors, such as stereotypes that cause bias in decision-making.[12]

Disparate treatment cases encompass all types of intentional discrimination under Title VII.[13] Depending on the type of case – alleging discrimination against an individual, a group, or in a class action – the method of proving the employer's intent or motive will vary. The Supreme Court's development of disparate treatment theory under Title VII has created a template that has been used to interpret other employment discrimination laws. The judicial path in defining intentional discrimination under Title VII, however – particularly in cases of discrimination against an individual – has not been smooth. The current status of judicial doctrine of intent under Title VII is, in fact, in disarray. The Supreme Court cases before and after the Civil Rights Act of 1991 are responsible for this confusion. Prior to 1991, the Court created two different approaches for proving

---

[10] *See, e.g.*, MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH ch. 6, 8 (2003); KATHERINE T. BARTLETT**,** GENDER AND THE LAW: THEORY, DOCTRINE, COMMENTARY (1993); Christine Littleton, *Reconstructing Sexual Equality*,75 CALIF. L. REV. 1279 (1987).

[11] *See* Linda Hamilton Krieger and Susan T. Fiske, "Behavioral Realism in Employment Discrimination," 94 *California Law Review* 997 (2006): 1053 ("The intent requirement itself is a judicial innovation.")

[12] *See* Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995).

[13] *See* Risa L. Lieberwitz, "Bad Intentions,"*in* TELLING STORIES OUT OF COURT: NARRATIVES ABOUT TITLE VII OF THE CIVIL RIGHTS ACT (Ruth O'Brien, ed.) (forthcoming, Cornell University Press).

Title VII disparate treatment violations. After 1991, the Court still has not answered the question of whether both approaches continue to co-exist.

The Supreme Court developed the first approach in a case where the disparate treatment allegation was based mainly on circumstantial evidence. In its 1973 decision of *McDonnell Douglas v. Green*,[14] the Court described what legal scholar Mack Player has called the "three step minuet."[15] In the first step, the plaintiff must prove that he or she was a member of a protected class under Title VII; applied for the position for which the employer was seeking applicants (or held a position with the employer); was qualified for the job in question; was denied the job (or was disciplined or discharged); and the employer continued to seek applicants for the job or filled the job with a person from a different class.[16] The plaintiff who proves these elements by a preponderance of the evidence has successfully made a *prima facie* case for inferring the employer's unlawful intent.[17] As the second step of the "minuet," the defendant may rebut the inference of illegal intent by "articulating" a non-discriminatory reason for his action.[18] The defendant – most of the time, an employer – has only a burden of production of admissible evidence, not a burden of persuasion. Finally, in the third step of the dance, plaintiff must carry the burden of persuasion on intent by proving that the defendant's reason was pretextual – either false or a cover for the real unlawful discriminatory reason.[19] Proving pretext, however, does not prove unlawful intent as a matter of law. The Supreme Court, in a closely divided decision, held that the judge or jury could still permissibly conclude that the pretext was a cover for some reason other than race, sex, national origin, or religion.[20]

The Supreme Court's second approach to proving intentional discrimination, known as a "mixed motives" case, is more favorable to plaintiffs. Sixteen years after

---

[14] 411 U.S. 792 (1973).
[15] PLAYER, *supra* note 1, at 85-95.
[16] McDonnell Douglas, 411 U.S. at 802. Proof of other allegations of disparate treatment in employment conditions – such as wage discrimination or layoffs – would entail evidence that the plaintiff was treated differently from other similarly situated employees. PLAYER, *supra* note 1, at 85-91.
[17] McDonnell Douglas, 411 U.S. at 802. See also, Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993); Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000) (all cases developing the *McDonnell Douglas* approach).
[18] McDonnell Douglas, 411 U.S. at 802-03.
[19] *Id.* at 804-05.
[20] St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993).

McDonnell Douglas, the Court held in *Price Waterhouse v. Hopkins*, that "[i]f an employer allows gender to affect its decision-making process, then it must carry the burden of justifying its ultimate decision."[21] The plaintiff has the initial burden to prove that the employer was motivated, at least in part, by an unlawful basis under Title VII. Having established that the employer was a "wrongdoer," the employer must carry the burden of persuasion of an affirmative defense that it would have made the same decision in the absence of such discrimination.[22]

These two different approaches to proving intentional discrimination caused much confusion in the lower courts. Most federal courts distinguished the approaches by finding that *Price Waterhouse* required the plaintiff to present "direct evidence" of the employer's illegitimate motive.[23] Where the plaintiff's case relied only on circumstantial evidence, the employer had the low burden of "articulating" its defense under *McDonnell Douglas*, leaving it to the plaintiff to meet the difficult burden of proving pretext. Given the hazy line between direct and circumstantial evidence, lower federal courts reached inconsistent and surprising conclusions about whether evidence such as racist or sexist statements were simply "stray remarks," but not direct evidence of unlawful intent.[24]

Congress re-entered this terrain in the Civil Rights Act of 1991 (CRA of 1991),[25] adding Section 703(m) to Title VII, which explicitly recognizes the existence of mixed motive disparate treatment cases.[26] Shortly thereafter, in 2003, the Supreme Court interpreted Section 703(m) in *Desert Palace v. Costa*.[27] The Court held that a plaintiff may prove an employer's illegal intent through direct and/or circumstantial evidence.[28] This approach comports more with the reality that intentional discrimination will likely be evidenced through a pattern of treatment and conduct rather than through direct statements of animus toward the plaintiff based on her protected class status.

---

[21] Price Waterhouse v. Hopkins, 490 U.S. 228, 235 (1989).
[22] *Id.* at 249.
[23] The lower courts relied on Justice O'Connor's concurring opinion in *Price Waterhouse*. See William R. Corbett, *An Allegory of the Cave and the Desert Palace*, 41 HOUSTON L. REV. 1549 (2005).
[24] ROBERT BELTON, DIANNE AVERY, MARIA L. ONTIVEROS, AND ROBERTO L. CORRADA, EMPLOYMENT DISCRIMINATION LAW: CASES AND MATERIALS ON EQUALITY IN THE WORKPLACE, SEVENTH EDITION 146-47 (2004).
[25] Pub. L. 102-166
[26] 42 U.S.C. Sec. 2000e-2(m)
[27] 539 U.S. 90 (2003).
[28] *Id.* at 2153-55.

Since the *Desert Palace* Court did not even mention *McDonnell Douglas*, this leaves lower courts uncertain about which approach to apply in disparate treatment cases. Most courts continue to apply both *McDonnell Douglas* and *Desert Palace.*[29] The Fifth Circuit Court of Appeals uses *McDonnell Douglas* analysis in "single motive" or "pretext" cases and has also tried "merging" the two cases.[30] A district court in the Eighth Circuit found that all disparate treatment cases should be analyzed only under the *Desert Palace* mixed-motives approach.[31] Subsequently, the Eighth Circuit Court of Appeals concluded that *McDonnell Douglas* remains relevant at the summary judgment stage. Many legal commentators, in contrast, find nothing more than "nostalgia"[32] to support the continued use of *McDonnell Douglas*.[33]

The choice between *McDonnell Douglas* or *Desert Palace* is more than "academic." In applying *McDonnell Douglas*, federal district court judges raised the bar on plaintiffs by either discounting the power of circumstantial evidence or deferring to the employer's "honest belief" in its reason for hiring, discharge, or discipline.[34] This made it very difficult for plaintiffs to prove that the employer's reasons were pretextual.[35] Federal judges, under a *McDonnell Douglas* analysis, granted summary judgments at a high rate to employers,[36] "transform[ing] the circumstantial evidence case into a 'toothless tiger.'"[37]

Even if a plaintiff goes to trial, a judge could create an advantage for the employer by instructing the jury under *McDonnell Douglas*. *Desert Palace*, by contrast, elevates

---

[29] *See, e.g.*, McGinest v. GTE Serv. Corp., 360 F.3d 1103 (9th Cir. 2004); Diamond v. Colonial Life & Accident Ins. Co., 416 F.3d 310 (4th Cir. 2005); Griffith v. City of Des Moines, 387 F.3d 733 (8th Cir. 2004). *See also* Corbett, *supra* note 23, at n.71.
[30] Rachid v. Jack in the Box, 376 F.2d 309 (5th Cir. 2004). See Corbett, *supra* note 23, at 1565.
[31] Dare v. Wal-Mart Stores, Inc., 267 F. Supp.2d 987 (D. Minn. 2003); Griffith v. City of Des Moines, 387 F.3d 733 (8th Cir. 2004) See Corbett, *supra* note 23, at n.72.
[32] Corbett, *supra* note 23, at 1551.
[33] *See* Corbett, *supra* note 23; Jeffrey A. Van Detta, *"Le Roi est Mort; Vive le Roi!"; An Essay on the Quiet Demise of McDonnell Douglas and the Transformation of Every Title VII Case after Desert Palace, Inc. v. Costa into a 'Mixed-Motives' Case*, 52 DRAKE LAW REVIEW 71, 72 (2003); T. L. Nagy, *The Fall of the False Dichotomy: The Effect of Desert Palace v. Costa on Summary Judgment in Title VII Discrimination Cases*, 46 TEXAS L. REV. 137 (2004); Michael Zimmer, *The New Discrimination Law: Price Waterhouse is Dead, Whither McDonnell Douglas?* 53 EMORY L. J. 1887 (2004).
[34] Anne Lawton, *The Meritocracy Myth and the Illusion of Equal Employment Opportunity*, 85 MINNESOTA L. REV. 587, 612-28 (2000).
[35] *Id.*
[36] *Id.*
[37] *Id.* at 661.

the status of circumstantial evidence to use in a mixed motives case, where the allocation of the burdens of proof is more evenly distributed. Under Section 703(m) of the CRA of 1991, once the plaintiff proves that the employer was motivated by an unlawful reason, the employer is liable for having violated Title VII. The employer's affirmative defense – that it would have taken the same action anyway – is relevant only to the appropriate remedies awarded to the plaintiff. An employer that proves an affirmative defense will be subject to a cease and desist order and will be obligated to pay the plaintiff's attorney's fees.[38] If the employer is unsuccessful in its defense, the plaintiff's further remedies may include: reinstatement into a job; back pay; front pay; and compensatory damages, which includes "pain and suffering" and damages for collateral consequences, such as mortgage foreclosure resulting from loss of wages.[39] The plaintiff who proves that the employer acted with "malice or with reckless indifference" to her federally protected rights may also be awarded punitive damages.[40] The 1991 CRA caps compensatory plus punitive damages at maximums determined by the size of the employer, setting a range that extends from $50,000 for employers under 101 employees to $300,000 for employers with more than 500 employees.[41] The plaintiff's chances of a damage award may be increased by the 1991 CRA, which creates the right to a jury trial

[38] The CRA of 1991 amended Title VII to add Section 706(g)(2)(B), providing that if a plaintiff proves that the defendant was unlawfully motivated under Section 703(m), and if the defendant "demonstrates that [it] would have taken the same action in the absence of the impermissible motivating factor," the court "may grant declaratory relief, injunctive relief…and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under [Section 703(m)]." The provision also instructs that a court "shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or [back pay]."

[39] CRA of 1991, section 102 amends 42 U.S.C. Sec. 1981 to add provisions for remedies for intentional discrimination claims under Title VII of the Civil Rights Act of 1964, the Americans With Disabilities Act, and the employment provisions of the Rehabilitation Act of 1973. Under Title VII, after the plaintiff proves that the employer was unlawfully motivated, but the employer fails to prove its affirmative defense, 42 U.S.C. Sec. 1981a provides for recovery of "compensatory damages," defined as "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses."

[40] The new 42 U.S.C. Sec. 1981a, created by Section 102 of the CRA of 1991, provides for recovery of "punitive damages" (except against a governmental employer), where the plaintiff proves that the defendant's actions were made "with malice or reckless indifference to the federally protected rights of an aggrieved individual."

[41] Section 102 of the CRA of 1991 provides that the award of compensatory and punitive damages is made in addition to any back pay or front pay. The cap on compensatory and punitive damage amounts, therefore, does not affect the separate award of back pay or front pay.

in cases where a plaintiff seeks compensatory or punitive damages – in other words, in disparate treatment cases alleging intentional discrimination.[42]

IV. Sexual Harassment: Defined as Disparate Treatment

The U.S. courts have been active, if not always clear, in interpreting sexual harassment claims under Title VII.[43] In *quid pro quo* cases, a supervisor or manager makes sex a condition of employment, for example, by threatening an employee with discharge or other negative consequences for refusing to comply with sexual demands. Or the supervisor might promise to reward the employee for sexual favors.[44] While the plaintiff must prove that the alleged sexual advances were unwelcome,"[45] a "voluntary" relationship could still be sexual harassment.[46]

Prior to developing case law on hostile environment sexual harassment, the courts had found that creation of racial and national origin hostile environments violated Title VII.[47] A "hostile environment" claim consists of "unwelcome sexual advances" or "other verbal or physical conduct of a sexual nature" that were "sufficiently severe or pervasive" as to unreasonably interfere with the employee's work or create "an intimidating, hostile, or offensive working environment."[48] The determination of "severe or pervasive" conduct depends on a two-part test. First, under an objective test, the plaintiff must prove that a "reasonable person in [her] position" would find the conduct severe or pervasive.[49] Secondly, under a subjective test, the plaintiff must show that she, personally, found that the conduct created an abusive working environment. The plaintiff need not prove that "tangible psychological injury" resulted.[50] The Supreme Court has emphasized, though,

---

[42] CRA of 1991, Section 102 creates the right to a jury trial, in 42 U.S.C. Sec. 1981a (c).
[43] In 2006, the 12,000 sexual harassment charges comprised about one-quarter of all Title VII charges filed with the EEOC (in fiscal year 2006, 45,785 of the total 75,768 discrimination charges against private sector employers were Title VII charges). Equal Employment Opportunity Commission, "Job Bias Charges Edged Up in 2006, EEOC Reports," http://www.eeoc.gov/press/2-1-07.html *See* Susan K. Hippensteele, *Mediation Ideology: Navigating Space from Myth to Reality in Sexual Harassment Dispute Resolution*, 15 AMER. U. J. GENDER, SOCIAL POL'Y & LAW 43, n. 14 (2006) (citing E.E.O. C. statistics).
[44] Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986).
[45] *Id.* at 68.
[46] *Id.* at 61-62.
[47] *See* Meritor, 477 U.S. at 65-66 (discussing lower federal court decisions).
[48] *Id.* at 65. *See* Risa L. Lieberwitz, *Sexual Harassment: Gaining Respect and Equality,in* TELLING STORIES OUT OF COURT: NARRATIVES ABOUT TITLE VII OF THE CIVIL RIGHTS ACT (Ruth O'Brien, ed.) (forthcoming, Cornell University Press).
[49] Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993).
[50] *Id.* at 22.

that "merely offensive comments" or even "sporadic use of abusive language, gender-related jokes, and occasional teasing" will not create a hostile environment.[51]

Feminist scholars have criticized various aspects of the judicial development of sexual harassment law. Some courts have raised the evidentiary bar so high as to make claims of sexual harassment difficult to prove. Legal scholar Judith Johnson concludes that many judges are defining "severe *or* pervasive" hostile environment as if it means "severe *and* pervasive" harassment.[52] Professor Theresa Beiner's empirical study of hostile environment cases over an 11-year period reveals that the federal courts granted summary judgment in more than half of all cases because of inadequate evidence of severe or pervasive conduct.[53]

The categorization of sexual harassment as disparate treatment has, itself, come under criticism. Most recently, the Supreme Court emphasized proof of discriminatory treatment when it held that same-sex harassment may violate Title VII. In *Oncale v. Offshore Services,* the Court stated: "The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."[54] Such judicial insistence on proving the men and women are treated differently, however, seems irrelevant to addressing the harm of sexual harassment.[55] Such inquiries can lead, as well, to an intrusive and offensive focus on the sexual orientation of the alleged harasser and victim.[56]

---

[51] *Id.* at 21. Faragher v. City of Boca Raton, 524 U.S. 775 (1998), 788 (quoting BARBARA LINDEMANN AND DAVID D. KADUE, SEXUAL HARASSMENT IN EMPLOYMENT LAW 175 (1992)).

[52] Judith J. Johnson, *License To Harass Women: Requiring Hostile Environment Sexual Harassment To Be "Severe Or Pervasive" Discriminates Among 'Terms And Conditions' Of Employment*, 62 MD. L. REV. 85, 111 (2003).

[53] Theresa M. Beiner, *The Misuse of Summary Judgment in Hostile Environment Cases*, 34 WAKE FOREST L. REV. 71, 101 (1999) (Between 1987 and 1998, employers were granted summary judgment in 175 out of 302 cases, or 58 percent). *See also*, Anne Lawton, *Tipping the Scale of Justice in Sexual Harassment Law*, 27 OHIO NORTHERN U. L. REV. 517 (2001): 533.

[54] 523 U.S. 75, 80 (1998), *quoting* Harris v. Forklift Systems, Inc., 510 U.S. at 25-26 (Justice Ginsburg, concurring).

[55] The so-called "equal opportunity" harasser, who creates an abusive environment for men and women, has not engaged in sex discrimination. For a critique of this defense, as applied in *Holman v. Indiana*, 211 F.3d 399 (2000), see Michelle A. Travis, Arthur S. Leonard, Joan Chalmers Williams, and Miriam A. Cherry, *Gender Stereotyping: Expanding The Boundaries Of Title VII: Proceedings Of The 2006 Annual Meeting, Association Of American Law Schools, Section On Employment Discrimination Law*, 10 EMPL. RTS. & EMPLOY. POL'Y J. 271, 278 (2006) (remarks by Arthur Leonard).

[56] The Supreme Court does not find it as "easy to draw" an inference that the same-sex harasser's conduct was discriminatory as it does in other cases of sexual harassment. Oncale, 523 U.S. at 80.

The Supreme Court has also been criticized for its recent creation of a unique affirmative defense in hostile environment cases. In its 1998 decisions in *Faragher v. City of Boca Raton*[57] and *Burlington Industries v. Ellerth*,[58] the Supreme Court held that an employer could defend against hostile environment claims by fulfilling a two-prong test: first, that the employer took reasonable care to prevent or remedy the hostile environment; and second, that the employee claiming harassment was unreasonable in not taking full advantage of employer measures, such as internal complaint processes.[59] This affirmative defense is not available, however, where the sexual harassment produces a "tangible employment action," such as a discharge or demotion. An employer remains strictly liable if a sexual harassment victim proves that s/he faced "a significant change in employment status."[60]

In 2004, the Court further defined the affirmative defense in cases where an employee resigns her employment due to sexual harassment. In *Pennsylvania State Police v. Suders*,[61] the plaintiff alleged that she was the victim of a tangible employment action, consisting of a "constructive discharge"; that is, the sexual harassment was so intolerable that she felt forced to resign. The Court held that a constructive discharge is a tangible employment action only where the employee's resignation results from harassment involving "official action," such as an employee's resignation in response to a humiliating demotion.[62] If the alleged constructive discharge does not involve official action, the employer may attempt to prove its affirmative defense to a hostile environment claim.[63]

The sexual harassment affirmative defense could encourage employers to adopt educational programs and internal complaint processes to investigate and remedy sexual harassment problems. However, the defense may also give employers an easy way to avoid meritorious claims. Empirical studies have found that many employers use these

[57] 524 U.S. 775 (1998).
[58] 523 U.S. 742 (1998).
[59] Faragher, 524 U.S. at 807; Burlington Industries, 524 U.S. at 765.
[60] Burlington Industries v. Ellerth, 524 U.S. at 765.
[61] 524 U.S. 129 (2004).
[62] 524 U.S. at 148-49.
[63] *Id.*

processes as "window dressing"[64] or "file cabinet compliance."[65] Further, the affirmative defense in combination with the severe or pervasive standard place employees in a difficult position.[66] To comply with *Faragher*, an employee may file an internal grievance immediately after an incident of harassment. If she then files a Title VII lawsuit, a judge may conclude that the alleged conduct is too isolated to create a hostile environment. But if she waits too long to file an internal complaint, a judge could dismiss her lawsuit based on the employer's affirmative defense.[67]

V. Recent Developments in Disparate Treatment Theory

The Supreme Court decided two recent intentional discrimination cases; one hurts plaintiffs and the other helps.[68] The first case, *Ledbetter v. Goodyear Tire & Rubber Co., Inc.,*[69] was decided on procedural grounds with the result of limiting individual plaintiffs' ability to bring Title VII wage discrimination claims. Plaintiff Ledbetter alleged wage discrimination based on evidence that over many years she was paid less than men in similar jobs. The Supreme Court held, however, that Ledbetter's claim was untimely, as it was filed with the EEOC outside the 180 day limitations period. The Court concluded that Ledbetter was required to file her claim within 180 days from her employer's initial decision to pay her less than the men.[70] The Court rejected plaintiff's argument and the EEOC's position that her claim was timely because each paycheck perpetuated her employer's earlier discriminatory actions in setting her salary.

---

[64] Anne Lawton, "Operating in an Empirical Vacuum: The Ellerth and Faragher Affirmative Defense," 13 *Columbia Journal of Gender and Law* 197 (2004): 235-42, 260-66; Joanna L. Grossman, "The First Bite is Free: Employer Liability for Sexual Harassment," 61 *University of Pittsburgh Law Review* 671 (2000); Hernandez, "A Critical Race Feminism Empirical Research Project: Sexual Harassment and the Internal Complaints Black Box"; Theresa M. Beiner, "Using Evidence of Women's Stories in Sexual Harassment Cases," 24 *University of Arkansas Little Rock Law Review* 117 (2001).

[65] Anne Lawton, "Operating in an Empirical Vacuum: The Ellerth and Faragher Affirmative Defense," 213-16.

[66] White, "Hostile Environment: How the 'Severe or Pervasive' Requirement and the Employer's Affirmative Defense Trap Sexual Harassment Plaintiffs in a Catch-22," 857-63; Johnson, "License To Harass Women: Requiring Hostile Environment Sexual Harassment To Be 'Severe Or Pervasive' Discriminates Among 'Terms And Conditions' Of Employment," 134.

[67] White, "Hostile Environment: How the 'Severe or Pervasive' Requirement and the Employer's Affirmative Defense Trap Sexual Harassment Plaintiffs in a Catch-22," 857-63; Johnson, "License To Harass Women: Requiring Hostile Environment Sexual Harassment To Be 'Severe Or Pervasive' Discriminates Among 'Terms And Conditions' Of Employment," 134.

[68] *See* Lieberwitz, *supra* note 13.

[69] 550 U.S. __, 127 S. Ct. 2162 (2007).

[70] *Id.*

Justice Ginsburg, dissenting, explained that it may take years before an employee learns of discriminatory wage disparities. Even where employees have access to information about other employees' wages and raises, the cumulative effect of compensation differences may not be apparent immediately. Ginsburg called for Congress to "correct [the] Court's parsimonious reading of Title VII." [71] A bill has already been introduced in the U.S. House of Representatives to amend Title VII to legislatively overrule the *Ledbetter* decision.[72]

In *Burlington Northern & Santa Fe Railway Co. v. White,*[73] a unanimous Supreme Court expanded the scope of plaintiffs' claims under Section 704(a)[74] the "anti-retaliation provision" of Title VII. While Section 703(a)[75] protects employees against prohibited discrimination in employment decisions, Section 704(a) protects employees' right to participate in proceedings to enforce Title VII or employees' right to oppose employer unlawful conduct, which could include employee complaints at work or formal employee charges or testimony in the legal realm. In *Burlington Northern,* the Court held that prohibited employer conduct under Section 704(a) is not confined to "actions and harms…related to employment or [that] occur at the workplace."[76] For example, unlawful retaliation under Section 704(a) might consist of an employer filing false criminal charges against a former employee who complained about discrimination.[77] The Court held, further, that employer actions will be found to be unlawful retaliation only if they "would have been materially adverse to a reasonable employee or job applicant," meaning that "they could well dissuade a reasonable worker from making or supporting a

---

[71] *Id*. at 2188. Justice Ginsburg was joined in her dissenting opinion by Justices Stevens, Souter, and Breyer.
[72] Jacqueline Palank, *Democrats Will Try to Counter Ruling on Discrimination Suits*, N.Y. TIMES, Jul. 13, 2007, at A-13.
[73] 548 U.S. ___ , 126 S.Ct. 2405 (2006).
[74] 42 U.S.C. § 2000e-3(a). The ADEA has a similar provision in Sec. 4(d) (29 U.S.C. § 623(d)), as does the ADA in Sec. 503 (42 U.S.C. § 12203(a)).
[75] 42 U.S.C. § 2000e-2(a).
[76] 126 S.Ct. at 2409.
[77] *Id.* at 2412, citing with approval, Berry v. Stevinson Chevrolet, 74 F.3d 980, 984 (10th Cir. 1996).

charge of discrimination."[78] Retaliation claims filed with the EEOC have increased from 15 percent of all claims in 1993 to 29.5 percent in 2006.[79]

VI. Moving Beyond the Limits of "Formal Equality"

While opening opportunities, the formal equality model of individual disparate treatment claims restricts the potential of anti-discrimination law, as it defines white men as "the norm." That is, formal equality extends equal rights only where plaintiffs can prove that they are "the same" as the norm – white men – and that the employer intentionally excluded plaintiffs due to their protected group status.[80] This definition envisions equality in a "formal" sense, seeking to eliminate intentional discrimination against "similarly situated" groups. Formal equality, however, fails to fully counter the historical and social conditions that have caused women and minorities to be "differently situated" from white men. Although some sex-based biological differences exist in reproduction, these physical differences create differences in employment status because gender roles have been socially assigned in the workplace and family. Women's gender role of primary caretaking in the family has created obstacles to their achievements in education and employment. Women and minority groups are different, as well, because they are disproportionately poor, which limits their ability to gain higher education and employment skills. Under these social conditions, white men have monopolized the best paying and highest status jobs in the workplace, with women and minorities disproportionately represented in part-time, low-paid, and low-status jobs. Redressing these social and economic inequalities takes more than extending formal equality to women and minorities who manage to meet the "white male" norm.[81]

Formal equality is certainly important. But can the law extend beyond comparisons of similarly situated groups? Some judicial interpretation has opened disparate treatment to consider social conditions, gender roles, and unconscious

---

[78] *Id.* at 2409. The evidence in this case proved that the plaintiff suffered "material adverse employment actions" of work transfer and suspension.

[79] Lawrence E. Dube, *Employee Retaliation Claims are on the Rise, But Rules are in Flux, NYU Conference Told*, 108 DAILY LAB. REP. B-1, Jun. 6, 2007.

[80] *See* Catharine A. MacKinnon, Feminism Unmodified: Discourses on Life and Law 32-45 (1987).

[81] *See, e.g.*, Katharine T. Bartlett, *Gender Law*, 1 DUKE J. GENDER L. & POL'Y 1, 3-6 (1994); Christine Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279 (1987); MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH: A THEORY OF DEPENDENCY (2004).

discrimination. In so doing, the courts have added greater substantive equality to Title VII.

A. Required Gender Conformity as Disparate Treatment

In *Price Waterhouse v. Hopkins*, the Supreme Court concluded that evidence of gender role stereotypes was relevant to proving intentional sex discrimination. Despite Hopkins' impressive work record, the firm's partners turned down her bid for promotion based on her poor "interpersonal skills." Several of the male partners also criticized her for being "too macho," for "overcompensating for being a woman," and for being "a lady using foul language." They counseled her to "walk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[82] The Court concluded that the employer's reliance on stereotypes about femininity blocked Hopkins from being promoted. From the employer's viewpoint, Hopkins would never be the same as men. As Justice Brennan explained, an "employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible Catch 22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind."[83] Thus, the Court recognized that disparate treatment includes an employer's evaluation of job performance and qualifications through the lens of socially constructed stereotypes.[84]

The Supreme Court's analysis of the impact of gender role stereotypes on women should logically apply to men who do not conform to stereotypes about masculinity. For example, in a lower federal court case pre-dating *Price Waterhouse*, Donald Strailey claimed that he was discharged from his nursery school teaching position because the employer found him too effeminate for wearing a small earring.[85] Analogous to Hopkins' claim, Strailey argued that the employer fired him for displaying the same "feminine" traits that were essential qualities for female child care employees. The federal district judge rejected his argument, however, concluding that his claim was based

[82] 490 U.S. at 235.
[83] *Id.* at 251.
[84] *See* Lieberwitz, *supra* note 13.
[85] DeSantis v. Pacific Telephone & Telegraph Co., 608 F.2d 327 (9th Cir. 1979)

on sexual orientation discrimination, which the federal courts have found to be outside the scope of Title VII sex discrimination.[86]

The Supreme Court has not considered the issue of whether Title VII covers sexual orientation discrimination. In *Oncale v. Sundowner Offshore Services*, though, the Court opened the door to broader use of gender stereotypes by holding that same-sex harassment may violate Title VII.[87] *Oncale* provides lower federal courts with a basis for finding unlawful workplace harassment due to a plaintiff's gender non-conformity. Legal scholar Arthur Leonard notes that in these cases "judges walk a fine line" between finding sexual harassment due to their non-conforming appearance and behavior[88] and finding discrimination on the basis of sexual orientation.[89]

B. Intersectional Claims of Discrimination

Courts deepen their consideration of social conditions by allowing plaintiffs to bring claims based on the interactive effects of race, sex, national origin, age, and other unlawful bases of discrimination. The courts are divided in their views on the validity of intersectional claims. Some courts use a formalistic interpretation that maintains divisions among categories of discrimination. A federal district court in Missouri held that the plaintiffs could prove a claim that that the employer laid them off because they were women or because they were black, or both, but not because they were Black women.[90] Other courts have recognized that an intersectional claim alleges a unique form of discrimination. The Fifth Circuit Court of Appeals held that a plaintiff could claim that she was denied a promotion and discharged because of the intersection of race and sex. The court concluded that "discrimination against black females [could] exist

---

[86] *Id.*

[87] Oncale v. Sundowner Offshore Services, 523 U.S. 75 (1998).

[88] For cases applying this theory, *see e.g.*, Rene v. MGM Grand Hotel, 305 F.3d 1061 (9th Cir. 2002) (en banc), cert. denied, 538 U.S. 922 (2003); Centola v. Potter, 2002 U.S. Dist. LEXIS 1504 (D. Mass. 2002).

[89] For cases rejecting claims because they were based on sexual orientation discrimination, see e.g., King v. Super Service, Inc., 68 Fed. Appx. 659 (6th Cir. 2003); Mims v. Carrier Corporation, 88 F.Supp.2d 706 (E.D. Tex. 2000). *See* Leonard, *supra* note 55, at 279; Leonard, *supra* note 8, at 152-58.

[90] Degraffenreid v. General Motors Assembly Division, 413 F.Supp. 142 (E.D. Missouri 1976). The judge concluded that intersectional claims "clearly raises the prospect of opening the hackneyed Pandora's box." *See also*, Tanya Kateri Hernandez, *A Critical Race Feminism Empirical Research Project: Sexual Harassment and the Internal Complaints Black Box*, 39 U.C. DAVIS L. REV. 1235, 1269 (2006) (noting the "scarcity of intersectional analyses of sexual harassment issues"); Kimberlé Williams Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, 1989 U. CHI. LEGAL FORUM 139 (1989).

even in the absence of discrimination against black men or white women."[91] The Tenth Circuit agreed in a case involving racial and sexual hostile environment.[92] The Ninth Circuit has recognized an intersectional race and gender claim in a case alleging discrimination against an Asian woman.[93] A federal district court in Pennsylvania permitted a plaintiff to claim discrimination against older women, an intersection of two federal statutes.[94]

C. Group-Based Claims of Intentional Discrimination

1. Explicit Exclusion of a Protected Group

Group-based disparate treatment cases move intentional discrimination beyond formal equality by shifting the focus from comparing individuals to analyzing systemic discrimination. The most straightforward case of group-based intentional discrimination is an employer's explicit exclusion of a protected group from a particular job. In such cases, the only defense available to employers is proof that the exclusion is a "bona fide occupational qualification" (BFOQ) "reasonably necessary to the normal operation of the business."[95] While the BFOQ applies to exclusions based on sex, national origin, religion, and age, Title VII does not permit the BFOQ defense for explicit group-based exclusions on the basis of race.[96]

To guard against broad exclusions based on stereotypes and unsubstantiated generalizations, the employer must meet a heavy burden of proof of a BFOQ. For example, in *UAW v. Johnson Controls,*[97] the Supreme Court held that a battery manufacturer violated Title VII by excluding women of child bearing capacity from jobs with lead exposure or that were on the job ladder to such positions. The Court rejected Johnson Controls' BFOQ argument that lead exposure could endanger fetuses. This evidence did not prove "that all or substantially all [pregnant or potentially pregnant women**]** would be unable to perform safely and efficiently the duties of the job

---

[91] Jefferies v. Harris Co. Community Action Ass'n, 615 F.2d 1025, 1032 (5th Cir. 1980).
[92] Hicks v.The Gates Rubber Co., 833 F.2d 1406 (10th Cir. 1991).
[93] Lam v. University of Hawaii, 40 F.3d 1551 (9th Cir. 1994).
[94] Arnett v. Aspin, 846 F.Supp. 1234 (E.D. Pa. 1994). See Nicole Buoncore Porter, *Sex Plus Age Discrimination: Protecting Older Women Workers*, 81 DENVER U. L. REV. 79 (2003).
[95] 42 U.S.C. 2000e-2(e)(1) (permitting job qualifications on the basis of "religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.")
[96] *Id.*
[97] 499 U.S. 187 (1991).

involved."[98] As the Court observed, "Concern for a woman's existing or potential offspring has historically been the excuse for denying women equal employment opportunities."[99]

2. Pattern or Practice of Group-based Exclusion

Like explicit exclusions of a protected group, pattern or practice cases are group-based claims of intentional discrimination.[100] Unlike explicit exclusion cases, however, pattern or practice claims are difficult for plaintiffs to prove. Based primarily on statistical evidence, the pattern or practice case is brought by the EEOC or Department of Justice, or as a private class action alleging long-term discrimination.[101] A successful claim takes intentional discrimination beyond formal equality by inferring intent on the basis of historical patterns of hiring and promotions that result in occupational segregation. This evidence of exclusion reveals discrimination as a systemic problem rather than simply a series of individual discriminatory employment decisions.

Key to proving a pattern or practice case is demonstrating that the employer disproportionately excluded a protected group as its standard operating procedure.[102] While the proof is, primarily, based on statistical evidence of discriminatory patterns of hiring, promotions, wages, and job assignments, plaintiffs usually bolster statistics with "anecdotal" evidence of individual instances of discrimination.[103]

Since the mid-1990s, there has been a "sharp rise" in class action suits alleging system-wide race and sex discrimination.[104] Class actions focused on the low percentage of women in management have been brought against employers in industries as different as securities and grocery store chains. Despite settlements in some cases for millions of

---

[98] *Id.* at 216.
[99] Id at 211. In contrast, in *Dothard v. Rawlinson*, 433 U.S. 321 (1977), the Supreme Court upheld the state of Alabama's exclusion of all women from guard positions in state maximum security prisons. The Court concluded that women's "very womanhood" endangered themselves and others in those prisons. Justice Marshall, in dissent, castigated the Court for treating women unequally based on "old canards" of gentility. *Id.* at 343.
[100] *See* Lieberwitz, *supra* note 13.
[101] 42 U.S.C. § 2000e-6(a) (Title VII); 42 U.S.C. § 12117(a) (ADA). *See also,* BELTON ET. AL, *supra* note 24, at 170, 175-77 (discussing pattern or practice cases under the ADEA, and private class action employment discrimination suits under Title VII, ADA, and ADEA).
[102] International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977).
[103] *Id.* at 338-39.
[104] Michael Selmi, *Sex Discrimination in the Nineties, Seventies Style: Case Studies in the Preservation of Male Workplace Norms*, 9 EMPL. RTS & EMPLOY. POL'Y J. 1, 5 (2005).

dollars, women's representation in management has not significantly increased.[105] The recent well publicized class action against Wal-Mart alleges system-wide sex discrimination in wages and promotions to management positions.[106] As a class action of 1.6 million women suing the largest employer in the world,[107] it has been described as "the largest Title VII sex discrimination class action ever and the largest civil rights class action in U.S. history."[108]

Plaintiffs in class action and pattern or practice sex discrimination cases have encountered employer defenses that women are not interested in management positions. This "lack of interest" defense argues that women's roles as spouse and mother motivate them to choose jobs that enable them to fulfill their family responsibilities.[109] From this perspective, women prefer jobs that leave time for caretaking and allow them to move easily in and out of the workforce; that is, part-time positions, jobs with regular day time hours, and non-managerial positions. Legal scholar Vicki Schultz's study demonstrated that employers made this argument successfully in almost half of the 54 sex discrimination cases between 1972 and 1989 raising the "lack of interest" defense.[110] Most of these cases alleged class-wide discrimination.[111] With the addition of jury trials under the CRA of 1991, perhaps juries will less readily accept the lack of interest defense.

VII. Disparate Impact Theory: Moving Toward Substantive Equality

[105] For example, a class action against Publix grocery stores settled for $81.5 million, and the class action against Lucky's grocery stores settled for $107 million. *Id.* at 15-16. Yet, as Selmi concludes: "Despite the bevy of lawsuits, it is equally clear that the pattern of discrimination with the grocery industry remains entrenched today, some twenty years after the initial suits were filed." *Id.* 18. In the securities industry, Selmi describes the situation: "As of 1996 when many of the cases were filed, approximately 15 percent of the more than 100,000 brokers nationwide were women, and women held fewer than 10 percent of the senior management positions. By 2003, the figures were nearly the same." *Id.* at 6.

[106] Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137 (N.D. Cal. 2004), *aff'd*, 2007 U.S. App. LEXIS 28558 (9th Cir. 2007) (certifying the class for "all women employed at any Wal-Mart domestic retail store at any time since December 26, 1998, who have "been or may be subjected to Wal-Mart's challenged pay and management track promotions policies and practices). *See* Winnie Chau, *Something Old, Something New, Something Borrowed, Something Blue and a Silver Sixpence for her Shoe: Dukes v. Wal-Mart & Sex Discrimination Class Actions*, 12 CARDOZO J. LAW AND GENDER 969, 987, n. 108 (2006).

[107] Chau, *supra* note 106, at 987, n. 108.

[108] *Id.* at 986.

[109] *See, e.g.* EEOC v. Sears, Roebuck & Company, 839 F.2d 302, 320 (7th Cir. 1988) (accepting the defense). *See* Vicki Schultz, *Telling Stories About Women in Title VII Cases: Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1802-06 (1990).

[110] Schultz, *supra* note 109, at 1776-77.

[111] Plaintiffs "prevailed on the interest issue in 57.4% of the claims" where the employer asserted this defense. *Id.* at 1776-77.

U.S. anti-discrimination law makes progress toward substantive equality through the "disparate impact" theory of discrimination, which is often referred to as "indirect discrimination" in legal systems outside the U.S. Disparate impact is a judicially created theory that did not appear in the words of Title VII. In its landmark 1971 decision of *Griggs v. Duke Power Co.*,[112] the Supreme Court read disparate impact into the statute. The Court concluded that this theory met the "objective of Congress…to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."[113] Under disparate impact theory, neutrally stated employment practices that, in application, have a disproportionately negative effect on a statutorily protected group are unlawful, unless the employer can prove that the practice is job-related and a business necessity.[114]

Like pattern or practice cases, disparate impact theory is essential for addressing the systemic nature of discrimination.[115] Further, similar to pattern or practice cases, disparate impact theory is based primarily on statistical evidence. Disparate impact, though, is potentially a more revolutionary method of analysis because the evidence is not used to infer intentional discrimination. Rather, disparate impact is concerned with the effect of employer practices that exclude protected groups, regardless of intent. In the words of the Supreme Court, "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability."[116] Eliminating the relevance of intent moves the analysis closer to the original Title VII statutory language of causation.[117] It also moves closer to a legislative goal of equality of results rather than simply equal opportunity.

---

[112] 401 U.S. 424 (1971). This was the Supreme Court's second decision interpreting Title VII. Michael Selmi, *Was the Disparate Impact Theory a Mistake?* 53 UCLA L. REV. 701, 707-16 (2006) (discussing the lower court decisions, legal scholarship, and EEOC positions that influenced the *Griggs* Court).
[113] Griggs, 401 U.S. at 429-30.
[114] The Court held that employment practices "fair in form, but discriminatory in operation," violated Title VII. *Id.* at 431. Here, the "neutral" requirements of a high school degree and passing the two written tests froze the status quo of Duke Power's prior race discrimination.
[115] *See* Risa L. Lieberwitz, *It's All in the Numbers: The Toll Discrimination Takes," in* TELLING STORIES OUT OF COURT: NARRATIVES ABOUT TITLE VII OF THE CIVIL RIGHTS ACT (Ruth O'Brien, ed.) (forthcoming, Cornell University Press).
[116] *Id.* at 432.
[117] *See* Krieger and Fiske, *supra* note 11, at 1038.

Under disparate impact theory, the plaintiff must prove that an employment practice, "neutral on its face," has a disproportionately negative impact on a statutorily protected group. In some cases, like *Griggs*, the effects are so great that the disproportionate impact is obvious. In less clear cases, most courts have applied a "rule of thumb" developed by the EEOC to determine whether the plaintiff's group has at least an 80 percent success rate of the comparison group. For example, in a Title VII sex discrimination case, if women's success rate on a required test is lower than 80 percent than men's pass rate, the courts will generally find that the employment practice has a disproportionately negative impact on women.[118]

Next, the employer may defend by proving that the employment practice was both job-related and necessary to the business. If an employer carries its burden of proof, the plaintiff may rebut by demonstrating that there is an alternative practice that would fulfill the employer's business needs without the negative impact on the protected group.[119] Disparate impact theory and this allocation of proof were explicitly included in the Civil Rights Act of 1991.[120]

Disparate impact theory opens a wide range of employment practices to judicial scrutiny, from objective requirements of educational degrees and written or physical tests to subjective hiring criteria determined through interviews. Its potential has not been realized, however, due to limited legislative and judicial interpretations.

A. Problems of Proving Disparate Impact Claims

Griggs raised expectations for the potential of disparate impact claims, followed by a Supreme Court decision setting a high bar for the employer's burden of proof of job relatedness. In *Albemarle v. Moody*,[121] the Court described the employer's burden as including three important elements. First, the employer must use objectively recognized methods to validate a discriminatory test, which often requires a professional job evaluation study. Secondly, this study must evaluate the actual duties that are important

[118] *See* PLAYER, *supra* note 1, at 110-18; *EEOC Guidelines*, 29 CFR 1607.3D.
[119] Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975).
[120] 42 U.S.C. Sec. 2000e-2(c).
[121] 422 U.S. 405 (1975).

to the job at issue. Third, the employer must show that success on the test is correlated with success in performing these job duties. [122]

Later judicial decisions dashed the hope created by these early cases, as the Supreme Court steadily raised the evidentiary burden on the plaintiff, while lowering it on the defense. While expanding disparate impact theory to apply to subjective employment practices, such as interviews,[123] the Court also made it more difficult to prove a *prima facie* case. In *Wards Cove Packing v. Atonio*,[124] the Court held that plaintiffs must identify "the specific employment practice that is challenged" and prove that it caused a disparate impact on a protected group."[125] Further, the Court held that the employer has only a burden of production of a "business justification."[126] This decision was a primary reason for enacting the 1991 Civil Rights Act, which reinstated the employer's burden to prove under Title VII, by a preponderance of the evidence, both the job relatedness and business necessity of a challenged practice.[127] Under the 1991 Act, the plaintiff can avoid the requirement to identify a specific employment practice with a disproportionate impact by proving that "the elements of [an employer's] decisionmaking process are not capable of separation for analysis."[128]

Although the CRA of 1991 restored the pre-*Wards Cove* interpretation of disparate impact, plaintiffs continue to face an uphill battle.[129] Michael Selmi's recent study demonstrates its steady decline. Analyzing 130 federal circuit court of appeals and 171 federal district court disparate impact cases in six years between 1983 and 2002, Selmi finds a low success rate for plaintiffs, who won only 19.2 percent of their cases in the appellate courts and only 25.1 percent of their cases in the district courts.[130] As Selmi notes, even these low success rates may be too high, as they include remands and

---

[122] *Id.* at 431. The EEOC Guidelines provide detailed descriptions of the methods for proving job relatedness through professional validation studies. See 29 CFR Secs. 1607.5(b)(3)(4), which are discussed in *Albemarle*, 422 U.S. at 432-33, n30.
[123] Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 994 (1988).
[124] 490 U.S. 642 (1989).
[125] Ibid. at 656, *quoting. Watson*, 487 U.S. at 994.
[126] Wards Cove, 490 U.S. at 659.
[127] 42 USC 2000e(k)(1)(B)(i).
[128] *Id.*
[129] *See* Linda Lye, *Title VII's Tangled Tale: The Erosion and Confusion of Disparate Impact and the Business Necessity Defense*, 19 BERKELEY J. EMPLOY. & LAB. L. 315, 348-53 (1998); Nicole J. DeSario, *Reconceptualizing Meritocracy: The Decline of Disparate Impact Discrimination Law*, 38 HARV. C.R-C.L. L. REV. 479, 504-07 (2003); Selmi, *supra* note 112, at 734-57.
[130] Selmi, *supra* note 112, at 735-38.

plaintiffs survivals of employer summary judgment motions.[131] These rates are even lower than the 35 percent success rate for plaintiffs, overall, in employment discrimination cases in federal court. In contrast, defendants won 59 percent of the time in appellate courts' affirming the grant of summary judgment motions.[132]

Selmi concludes that the more stringent proof requirements for plaintiffs, combined with the greater willingness of courts to defer to employer business necessity defenses, have increased the difficulty of winning disparate impact cases.[133] His study also reports "the waning importance of disparate impact theory after the Civil Rights Act of 1991," demonstrated by the existence of fewer than twelve cases with "any substantial doctrinal discussion."[134] Unlike advocates and commentators calling for broadened use of disparate impact theory, Selmi proposes renewed attention to using statistical evidence to bring pattern or practice disparate treatment cases.[135]

B. The Limited Scope of Disparate Impact Claims

The potential of disparate impact theory to achieve greater substantive equality has been best realized in cases of clearly defined objective requirements, such as height and weight requirements that have a negative impact on women.[136] Women plaintiffs have faced an uphill battle, though, in challenging physical ability tests for jobs such as firefighter or police officer.[137]

Feminist legal scholars have been particularly interested in the potential of disparate impact theory to challenge the discriminatory effects on women of such "normal" practices as leave policies, work day scheduling, and job evaluation systems.[138] The courts, however, have not interpreted disparate impact doctrine to apply to such

---

[131] *Id.* at 738.
[132] *Id.* at 738-39.
[133] *Id.* at 742-44.
[134] Selmi, *supra* note 112, at 735.
[135] *Id.* at 779-80.
[136] See e.g., Dothard v. Rawlinson, 433 U.S. 321, 328-32 (1977) (minimum 5'2" height and 120 pound weight requirements for state prison guard positions had a disproportionately negative impact on women. The qualification of height and weight was neither job related nor a business necessity to determine applicants' strength, which could be measured directly.)
[137] *See*, Berkman v. City of New York, 536 F.Supp. 177 (E.D.N.Y. 1982); Berkman v. City of New York, 705 F.2d 584 (2d Cir. 1982) (women plaintiffs won a class action suit against the city of New York, challenging the physical test portion of the exam for entry level firefighter positions. In a second disparate impact claim challenging the new firefighter physical exam, the Second Circuit Court of Appeals deferred to the city's validation of business need argument for the test as administered.).
[138] *See* Selmi, *supra* note 112, at 704-05, n.12 (discussing the broad range of issues proposed for disparate impact analysis); Lieberwitz, *supra* note 115.

accepted practices as inflexible work schedules, long work days, or extensive travel,[139] which disadvantage women due to their gender role as primary caretakers in the family.[140] This burden has a particularly negative impact on women in the United States, given the absence of publicly funded childcare programs. Further, the federal Family Medical Leave Act of 1993 (FMLA) does not provide significant relief, as it provides the right to only unpaid leave of twelve weeks per year for childbirth or serious illness of immediate family members. The FMLA covers only employers with at least 50 employees.[141]

Two categories of employment practices are virtually off limits to disparate impact challenges, despite their negative impact on women and minorities. Plaintiffs can bring Title VII challenges to seniority systems only by proving that they were created with the intent to discriminate.[142] The second category consists of Title VII challenges to compensation systems. The federal courts have rejected Title VII "pay equity" or "comparable worth" claims, which would go beyond the formal equality of the Equal Pay Act.[143] A comparable worth claim is based on gender or racial disparities resulting from the use of job evaluation systems that place a higher value on occupations held predominately by white men.[144]

VIII. Further Legal Issues of Substantive Equality

A. Affirmative Action

Affirmative action plans also have significant potential for achieving substantive equality, as positive measures for increasing the inclusion of women and minorities in occupations in which they are under-represented. The Supreme Court's interpretation of Title VII provides only partial progress toward this goal. The Court has held that employers may voluntarily adopt temporary affirmative action plans that seek to correct a

---

[139] *Id.* at 750.
[140] *See* Mary Joe Frug, *Securing Job Equality for Women: Labor Market Hostility to Working Mothers*, 59 BOSTON U. L. REV. 55 (1979).
[141] 29 U.S.C. Secs. 2601-2654.
[142] 42 U.S.C. Sec. 2000e-2(h).
[143] See, e.g., AFSCME v. Washington, 770 F.2d 1401, 1407 (9th Cir. 1985); American Nurses Ass'n v. Illinois, 783 F.2d 716 (7th Cir. 1986). Even with the Equal Pay Act, women currently earn 77 percent of the rate of pay for men. Amy Joyce, *Wal-Mart Suit May Force Wider Look at Pay Gap Between Sexes*, WASH. POST, Jun. 24, 2004, sec. E, at 1.
[144] *See, Symposium, The Gender Gap in Compensation: The Theory of Comparable Worth as a Remedy for Discrimination*, 82 GEO. L. J. 139 (1993).

"manifest imbalance" in the representation of women and minorities, but the plans must not "unduly trammel" the rights of white men by excluding them from consideration for the jobs in question.[145] The courts will not mandate that an employer adopt an affirmative action plan, given the Title VII prohibition of required preferential treatment on the basis of race, sex, national origin, or religion.[146]

B. Mandatory Pre-Employment Arbitration Agreements

In *Circuit City Stores, Inc. v. Adams,*[147] the Supreme Court upheld the validity of mandatory pre-employment agreements to arbitrate employment-related disputes in non-union workplaces. The broad agreement in that case provided that the employee will submit to final and binding arbitration all employment-related disputes arising under statutory or common law in all jurisdictions, including breaches of contract, torts, and anti-discrimination laws such as Title VII, the ADA, and the ADEA.[148] Under such an agreement, therefore, the employee waives, as a condition of employment, his right to bring employment disputes in court.[149]

The Court sang the praises of private arbitration as an "alternative dispute procedure[ ] adopted by many of the Nation's employers" that could enforce statutory rights equivalent to a judicial forum.[150] With the greater use of mandatory arbitration agreements, courts have policed them to ensure due process, including the employee's right to participate in choosing the arbitrator, to have an attorney, and to have a full hearing where the arbitrator can award full remedies.[151] Some courts also require that the

---

[145] United Steelworkers of America, AFL-CIO-CLC v. Weber, 443 U.S. 193 (1979); Johnson v. Transportation Agency, Santa Clara County, Cal., 480 U.S. 616 (1987).
[146] 42 U.S.C. sec. 2000e-2 (j).
[147] 532 U.S. 105 (2001).
[148] 532 U.S. at 109-10. The Court interpreted the Federal Arbitration Act (FAA), 9 U.S.C. Secs. 1-16, a 1925 federal statute compelling judicial enforcement of written arbitration agreements. Although the FAA was enacted to overcome judicial hostility to enforcing arbitration agreements in commercial cases, the Court held that the FAA also covers employment contracts, except for transportation workers.
[149] *See also*, Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) (enforcing a mandatory arbitration agreement in the securities industry, while avoiding the need to interpret the FAA's exclusion provision, due to the unusual facts of the case).
[150] 532 U.S. at 123-24. *See also* EEOC v. Waffle House, Inc., 534 U.S. 279 (2002) (EEOC has independent government enforcement power to sue an employer for violations of the ADA, regardless of an employee's agreement to resolve all employment-related disputes through private arbitration).
[151] *See* Dennis R. Nolan, *Employment Arbitration After Circuit City*, 41 BRANDEIS L. J. 853, 867-80 (2003).

employer pay the arbitrator's fee.[152] Faced with these developments, some employers have abandoned mandatory arbitration agreements, opting instead to require employees to agree to waive their right to a jury trial.[153]

IX. The ADEA and the ADA: Formal Equality or Substantive Equality?

Given the central role of Title VII in U.S. employment discrimination law, judicial interpretation of subsequent legislation has relied heavily on Title VII theories of discrimination. As importantly, the case law has distinguished the ADEA and the ADA from Title VII, either because of explicit statutory differences or based on judicial interpretations of distinctive legislative goals of the statutes.

A. The Age Discrimination in Employment Act

A significant difference between the ADEA and Title VII concerns the definition of protected groups. Under Title VII, individuals may bring claims regardless of whether they are in a group that has historically been subject to discrimination. Thus, men as well as women, whites as well as Blacks or other racial groups, and individuals of any national origin or religion are protected under Title VII. Congress, the Supreme Court has held, intended to achieve equality through a society that is "blind" to race, sex, or other Title VII category.[154] The ADEA, in contrast, explicitly limits the protection against age discrimination to employees who are aged 40 or older.[155] Further, in *General Dynamics Land Systems, Inc. v. Cline*,[156] the Supreme Court clarified that the ADEA only prohibits discrimination against older workers, but not age discrimination that favors older workers.[157] The Court has also held that the prohibition on age discrimination is

---

[152] *Id.* at 874-75. See Cole v. Burns Int'l Security Services, 105 F.3d 1465 (D.C. Cir. 1997).
[153] *See* Dianne LaRocca, *The Bench Trial: A More Beneficial Alternative to Arbitration of Title VII Claims*, 80 CHI.-KENT L. REV. 933, 945-50 (2005); Chester S. Chuang, *Assigning the Burden of Proof in Contractual Jury Waiver Challenges: How Valuable is Your Right to a Jury Trial?*, EMP. RTS. & EMPLOY. POL'Y J. 10 (2006): 211-23. The few courts that have examined the validity of such pre-dispute jury waivers have evaluated whether they were entered with "knowing and voluntary consent."
[154] McDonald v. Sante Fe Trail Transportation Co., 427 U.S. 273 (1976).
[155] 29 U.S.C. Sec. 623. The ADEA covers public and private employers. The Supreme Court has held, however, that state employers are immune from private ADEA damage claims, under the Eleventh Amendment to the U.S. Constitution. The EEOC may bring ADEA claims for injunctive relief against state employers. Kimel v. Florida Board of Regents, 528 U.S. 62 (2000).
[156] 540 U.S. 581 (2004).
[157] 540 U.S. at 590-92.

evidenced by the fact that a plaintiff was replaced by a "substantially younger" individual, even if the replacement is aged 40 or older.[158]

Disparate treatment theory under the ADEA has been interpreted similarly to Title VII, defining intentional discrimination under the *McDonnell Douglas* steps of analysis in "pretext" cases and using the *Price Waterhouse* approach in mixed motives cases.[159] Conversely, judicial interpretations of the ADEA have been applied to Title VII cases. Notably, the Supreme Court first interpreted the BFOQ in an ADEA case.[160] More recently, the Supreme Court limited an employer's ability to defend against an ADEA disparate treatment claim by using evidence the employer acquired after discharging the employee.[161] The enactment of the CRA of 1991, however, may have opened significant gaps between Title VII and the ADEA. The CRA of 1991 did not extend to the ADEA important amendments made to Title VII, including imposing liability in mixed motive cases after the plaintiff successfully proves a prima facie case; the defendant's affirmative defense goes only to remedies. Thus, it is unclear whether all lower federal courts will apply the Supreme Court's *Desert Palace* decision, interpreting the 1991 CRA, to the ADEA.[162] This issue will affect the federal courts' use of circumstantial and direct evidence in disparate treatment cases. The 1991 CRA also creates a right to jury trials and additional damage remedies in intentional discrimination cases under Title VII and the ADA. However, Congress had already amended the ADEA to provide the right to a jury trial.[163] Further, the ADEA provides for compensatory damages, as well as liquidated damages in cases of willful violations.[164]

Another important difference concerns disparate impact theory. It was not until 2005, in *Smith v. City of Jackson*,[165] that the Supreme Court extended the disparate

---

[158] O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308, 313 (1996) (56 year old plaintiff was replaced by a 40 year old person).
[159] See cases discussed in BELTON, et.al, *supra* note 24, at 669-70.
[160] Western Air Lines, Inc. v. Criswell, 472 US 400 (1985). Mandatory retirement is now prohibited under the ADEA, unless the employer can prove a BFOQ. Exceptions for state and local government retirement age for police and firefighters were reinstated by legislation in 1996. *See* BELTON, et.al, *supra* note 24, at 689.
[161] McKennon v. Nashville Banner Publishing Co., 513 U.S. 352 (1995).
[162] *See* Rachid v. Jack in the Box, Inc., 376 F.3d 305 (5th Cir. 2004) (applying *Desert Palace* in an ADEA case and discussing other federal courts' positions on the issue).
[163] 29 U.S.C. § 626(c)(2).
[164] 29 U.S.C. § 626(b).
[165] 544 U.S. 228 (2005).

impact theory to the ADEA. An earlier decision, in *Hazen Paper v. Biggins*,[166] had cast doubt on whether the Court would apply *Griggs* to the ADEA. In *Smith v. City of Jackson*, the municipal employer issued a wage increase to all police officers and dispatchers to bring their salaries up to the regional average of police salaries.[167] Police officers and dispatchers older than 40 and with greater seniority in the department alleged that the city's salary increase plan had a disproportionately negative impact on the basis of age. The wage increases for police officers with less than five years seniority were proportionally larger than for officers with greater seniority.[168] The Supreme Court held that the disparate impact theory does apply to the ADEA, but that the scope of the theory's application is narrower than under Title VII, given the provision in Section 4(f)(1) of the ADEA permitting any "otherwise prohibited" action "where the differentiation is based on reasonable factors other than age" (RFOA).[169] Under this defense, the City of Jackson had acted lawfully, as the wage increase was designed to create parity with the average regional salary, which was a reasonable goal other than age, even though older employees may have received a relatively lower pay increase.[170] Thus, in contrast to the "business necessity" defense under Title VII, the ADEA defense to disparate impact requires proof only that the employer's action was reasonable.[171]

Yet another difference in disparate impact theory under the ADEA concerns the allocation of burdens of proof. The 1991 CRA was passed, in part, to legislatively overrule the Supreme Court's *Wards Cove* decision, which had held that the employer had only a burden of production in disparate impact cases. Under Title VII, as amended, the employer has the burden of persuasion of job relatedness and business necessity. Under the ADEA, the employer only has a burden of production of a RFOA.[172]

---

[166] 507 U.S. 604 (1993).
[167] 544 U.S. at 231.
[168] *Id.*
[169] 29 U.S.C. § 623(f). 544 U.S. at 232, 239-41.
[170] 544 U.S. at 242-43.
[171] *Id.* at 243. Further, apart from the RFOA defense, the Court concluded that the plaintiffs' *prima facie* case had not been adequately supported, as the plaintiffs' challenge to the salary increase was not directed at a specific employment practice.
[172] *Id.* at 267(O'Connor, Kennedy, Thomas, concurring).

B. The Americans With Disabilities Act

The ADA covers public and private employers, prohibiting "discrimination against a qualified individual with a disability because of the disability…in regard to" employment conditions, including job applications, hiring, promotion, discharge, and compensation.[173] In *Raytheon Company v. Hernandez*,[174] the Court reiterated the viability of both disparate treatment and disparate impact theories under the ADA, while also emphasizing the importance of distinguishing between the elements required to prove each theory.

The ADA defines a "qualified individual with a disability" as "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[175] The scope of discrimination under the ADA includes an employer's failure to make "reasonable accommodations to the known physical or mental limitations of a qualified…applicant or employee, unless [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the business…"[176] In setting "qualification standards" for a job, an employer "may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace."[177]

Federal law prohibiting employment discrimination on the basis of disability has not lived up to its promise of changing the workplace to accommodate the needs of individuals with disabilities. In interpreting key ADA provisions, the Supreme Court has applied a theory of formal equality in a particularly wooden manner. The Court has defined an "individual with a disability" so narrowly as to exclude large groups of disabled persons from statutory coverage. In several cases, the Court held that individuals whose medication or corrective devices mitigate their physical impairment

---

[173] 42 U.S.C. Sec. 12112(a). The Supreme Court held that the states are immune, under the Eleventh Amendment to the U.S. Constitution, from private suits for money damages brought by state employees under the ADA. The EEOC may bring ADA claims for injunctive relief against state employers. Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356 (2001).
[174] 540 U.S. 44 (2003).
[175] 42 U.S.C. Sec. 12111(8).
[176] 42 U.S.C. Sec. 12112(b)(1), (3), (5).
[177] 42 U.S.C. Sec. 12113(b).

may be excluded from the definition of individuals with a disability.[178] A disabled person may be denied a job if he/she is unable to fulfill its essential requirements. However, a disabled individual who is able to perform the job due to medication or other corrective devices may be found not disabled enough to be protected under the ADA.

The Supreme Court has also defined the term "disability" in a way that creates problems for plaintiffs. The ADA defines a "disability" as "a physical or mental impairment that substantially limits one or more major life activities of [an] individual."[179] EEOC regulations define "major life activities" to include activities "such as caring for oneself, performing manual tasks, walking, seeing, hearing, breathing, learning and working.[180] In *Toyota Motor Manufacturing v. Williams*,[181] the lower court had found that plaintiff's carpal tunnel syndrome and tendonitis substantially limited her performance of manual tasks on the job. The Court held, though, that the limits on manual tasks must "prevent[ ]or severely restrict[ ] the individual from doing activities that are of central importance to most people's daily lives," such as brushing her teeth and doing laundry. Further, the impact of the impairment must be "permanent or long-term."[182]

The Court, in *Toyota*, did not define other major life activities, such as lifting or working. Significantly, the Court has yet to hold that "working" is a major life activity under the ADA. In an earlier case, *Sutton v. United Air Lines, Inc.*, the Court had held that, assuming that "working" is a major life activity, "a claimant would be required to show an inability to work in a 'broad range of jobs,' rather than a specific job."[183]

The greatest potential for implementing a model of substantive equality is found in the ADA's requirement that employers provide reasonable accommodations to enable individuals with disabilities to meet job requirements. An employer must make a reasonable and good faith effort to find an appropriate accommodation, such as a job

---

[178] *See,* Albertson's, Inc. v. Kirkingburg, 527 U.S. 555 (1999); Murphy v. United Parcel Service, 527 U.S. 516 (1999); Sutton v. United Airlines, Inc., 527 U.S. 471 (1999). *See,* Cynthia L. Estlund, *The Supreme Court's Labor and Employment Cases of the 2001-2002 Term*, ABA NETWORK <http://www.abanet.org/labor/annsecrpt.pdf> at 7, 21 (2002).
[179] 42 U.S.C. Sec. 12102(2)(A).
[180] 29 CFR 1630.2(i)
[181] 534 U.S. 184 (2002).
[182] *Id.* at 198.
[183] Sutton v. United Airlines, Inc., 527 U.S. 471 (1999), as discussed in *Toyota,* 534 U.S. at 198-200.

reassignment or a job modification. This process contemplates an interactive process between the employer and employee.[184] The employer has the burden of proving that the accommodation would be an "undue hardship," which is defined as an action requiring "significant difficulty or expense."[185] An employer is not required, however, to accommodate a disability by eliminating an essential function of the position or by reallocating essential functions to other workers.[186]

In *US Airways, Inc. v. Barnett*,[187] the Supreme Court held that seniority systems generally override a disabled employee's claim for "reasonable accommodation," such as job assignments.[188] This holding applies to seniority systems that are part of an enforceable collective bargaining agreement in a unionized workplace, as well as to seniority systems that are unilaterally adopted and controlled by non-union employers, as in *US Airways*. Where a workplace seniority system exists, the plaintiff may show that the requested accommodation is "reasonable" by proving "special circumstances," such as an employer's regular practice of unilaterally changing the seniority system.

X. Employees Left Out in the Cold: The Contingent Workforce

The term "contingent employee" has been used to identify a variety of employment arrangements, including part-time employees, temporary employees, and employees hired as independent contractors.[189] Although there is no agreed upon definition of the scope of employees within the category of contingent employees, there is consensus that the rate of contingent employment increased dramatically since the 1990's.[190]

---

[184] See, *EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act* (including discussions of federal court decisions), available at, http://www.eeoc.gov/policy/docs/accommodation.html#N_16_

[185] *Id.*

[186] *Id.*

[187] 535 U.S. 391 (2002).

[188] When plaintiff's mailroom job became open to bidding by more senior employees, the employer refused plaintiff's request to retain the job, as an exception to the seniority rules, in order to accommodate his disability.

[189] See, *Id.* at 526; Vosko, Leah F., "Leased Workers and the Law: Legitimizing the Triangular Employment Relationship: Emerging International Labor Standards From a Comparative Perspective," 19 COMP. LAB. L. & POL'Y J. 43, 46 (1997).

[190] There was some slowing of the growth of contingent employment in the latter part of the late 1990s. *See* JARED BERNSTEIN, LAWRENCE MISHEL, AND SCHMITT, JOHN, STATE OF WORKING AMERICA 2000-01 (Economic Policy Institute 2000), <http://epinet.org/books/swa2000/swa2000intro.html> at 3. (In the United States, "the share of workers employed by temporary agencies grew 60% from 1991 to 1995 but by just 26% from 1995-1999....In terms of all types of nonstandard work - including regular part-time,

Given the continued force of the employment at will doctrine in the U.S., most employees are vulnerable to being discharged at any moment. Therefore, the term "contingent employee" signifies an even greater degree of employment instability than the "regular" workforce. Further, contingent employees often have lower wage rates and lack benefits given to regular employees.[191] The growth in the temporary workforce has taken place most significantly through contracts between a "user" employer and a third party temporary employment agency (TEA) that acts as the "supplier" of temporary employees through the TEA.[192] In addition creating a "second tier" of wages and benefits for temporary employees,[193] the user employer also shifts the costs of employer statutory obligations, such as paying workers' compensation premiums, to the TEA as the direct employer.[194] Similarly, employers may hire employees as independent contractors to save costs of paying benefits and of fulfilling statutory obligations such as paying workers' compensation premiums, payroll taxes, or Fair Labor Standards Act overtime premiums.[195]

---

temporary help agency, on-call, independent contracting, and contract firm work - the share of workers in these arrangements fell from 26.4% to 24.8% of total employment during 1995-99."); Renate M. de Haas, *Business Law: Employee Benefits: Vizcaino v. Microsoft*, 13 BERKLEY TECH. L. J. 483 (1998) (Citing estimates of temporary workers as 20-30% of the United States workforce and placing the growth rate of contingent employment in the United States at "at least 40% greater than that of the workforce as a whole during 1998."); Reinhold Fahlbeck, *Flexibility: Potentials and Challenges for Labor Law*, 19 COMP. LAB. L. & POL'Y J. 515, 526 (1998) (describing "atypical" workers, who "represent an important and increasing proportion of the workforce, anywhere from 15-20 to some 35-40% of the entire working population."); Danielle Tarantolo, *From Employment to Contract: Section 1981 and Antidiscrimination Law for the Independent Contractor Workforce*, 116 YALE L. J. 170, 176 (2006) (citing estimates from 16% to 29% of the U.S. workforce).

[191] *See* Melissa A. Childs, *The Changing Face of Unions: What Women Want From Employers*, 12 DEPAUL BUS. L. J. 381, 413-14 (2000); Frances Raday, *The Insider-Outside Politics of Labor-Only Contractors*, 20 COMP. LAB. L. & POL'Y J. 413, 416 (1999).

[192] Fahlbeck, *supra* note 190, at 524, stating that "the single biggest - or one of the biggest - employer in many countries in terms of the number of employees is the leading temporary work agency, Manpower. Significant is also that the number of temporary work firms has mushroomed in recent years."

[193] Childs, *supra* note 191, at n.130 (describing the addition of the contingent workforce as creating "a two-tiered workforce."). *See, generally*, Risa L. Lieberwitz, *Contingent Labor: Ideology in Practice*, in FEMINISM CONFRONTS HOMO ECONOMICUS 324 (Martha Fineman and Terence Dougherty, eds.) (Cornell University Press, 2005).

[194] The Building and Construction Trades Department of the AFL-CIO released a report alleging that Labor Ready, a major temporary employment agency, has been "systemically misclassifying" employees' work to lower workers' compensation premiums. See, "Temporary Agencies: Union Report Asks Whether Labor Ready Is Purposely Misclassifying Temp Workers," ISSN 1521-4680, Vol. 11, No. 22, p. 583 (Nov. 6, 2000).

[195] Childs, *supra* note 191, at n.124.

The growth of the contingent workforce has affected a broad spectrum of employees, ranging from low-wage workers to higher-paid professional and technical employees.[196] Generally, stratifications exist along gender and racial lines, with women and minorities heavily represented in the temporary employee category and white men represented more predominant in the independent contractor category.[197] There are some exceptions. Although independent contractor status has gained the most recent attention in the high technology industry, employers have also attempted to classify low-wage workers as independent contractors. One well-publicized example comes from the poultry processing industry, with Perdue Farms' denial of overtime pay to "chicken catchers," arguing that they were exempt from the Fair Labor Standards Act as independent contractors. In February 2000, a federal district court rejected Perdue's argument and held that the chicken catchers and their crew leaders came within the common law definition of employees, given Perdue's control over their work.[198] Other current trends in labeling low-wage employees as independent contractors include the increase in home work, performed primarily by women paid on an hourly or piece-rate basis.[199]

The growth of the contingent workforce can also be analyzed as an employer union-avoidance tactic. Independent contractors are excluded from the protection of the NLRA. Although temporary employees are covered by the NLRA, unionization is difficult, given the multiple employment relationships and the inherent instability of the user employer's contract with the TEA.[200]

The U.S. lacks effective regulations of contingent employment. Thus far, such questions have been addressed primarily through administrative and judicial interpretations of existing legislation, such as decisions defining whether employees are

---

[196] *Id.* at n. 141; Falhbeck, *supra* note 190, at 523, 537.
[197] "Contingent and Alternative Employment Arrangements," Bureau of Labor Statistics News Release (Dec. 21, 1999) <http://stats.bls.gov.newsrels/conemp.nws.htm>; Childs, *supra* note 191, at 411-414.
[198] *See* Elizabeth Walpole-Hofmeister, *Court Finds Chicken Catchers Are Employees Covered by FLSA for Overtime*, 41 DAILY LAB. REP. A-5 (Mar. 1, 2000); de Haas, supra note 191, at 490-493 (discussing cases from other industries). In May 2001, Perdue Farms entered into a $2.4 million settlement of the suit, which covered 100 chicken catchers at three Perdue poultry processing plants. Elizabeth Walpole-Hofmeister, *FLSA: Perdue Farms Settles Overtime Suit, Will Pay Chicken Catchers $1.7 Million*, 92 DAILY LAB. REP. A-1 (May 11, 2001).
[199] Childs, *supra* note 191, at 414-415.
[200] *Id.* at 416, 418-420 (employers use leased workers to undermine the position of unionized employees).

actually independent contractors or fit a common law definition of employee.[201] Contingent employees, with the exception of independent contractors, are protected under anti-discrimination laws.[202] The U.S., however, lags far behind other countries that have legislative protections of contingent employees. Various countries are at different starting points in creating restrictions on contingent employment, with a spectrum including: prohibitions on temporary employment beyond a defined time period;[203] requirements of equal wages and benefits to be paid to regular employees and contingent employees performing similar work;[204] regulating both the supplier and user employers to ensure health and safety protections and payment of social security contributions;[205] and limits on contract labor that undermines the status and conditions of unionized employees.[206] While providing protections, such legislation does accept the legitimacy of the triangular employment relationship.[207]

---

[201] See e.g., Vizcaino v. Microsoft, 97 F.3d 1187 (9th Cir. 1996), modified en banc, Vizcaino v. Microsoft Corp., 120 F.3d 1006 (9th Cir. 1997), cert. denied, 118 S.Ct. 899 (1998), enf'd by mandamus, Vizcaino v. U.S. Dist. Ct., 173 F.3d 713 (9th Cir. 1999) The federal circuit court held that Microsoft's "permatemps," hired in technical employee positions, met a "common law" definition of employee in relation to Microsoft and were, therefore, entitled to a stock purchase plan offered to the regular Microsoft employees. Microsoft agreed to a $96.9 million settlement agreement in this litigation, which was been given approval by a federal district court. See, Vizcaino v. Microsoft Corp., 290 F.3d 1043 (9th Cir. 2002); Cutler, Mark, "Microsoft to Pay $97 Million to Settle Temporary Workers' Class Action Lawsuits," 240 Daily Labor Report AA-1 (Dec. 13, 2000).

[202] *See* Tarantolo, *supra* note 190, at 174 (discussing the fact that "contingent workers have the demographic characteristics of those who most need antidiscrimination protection," and the exclusion of independent contractors from antidiscrimination statutes, with the exception of 42 U.S.C. § 1981); *EEOC Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms*, available at, http://www.eeoc.gov/policy/docs/conting.html

[203] Raday, *supra* note 191, at 423 (citing legislation in the Philippines, India, Malaysia, Belgium, Spain, Luxembourg, France, Germany, and Italy regarding the use of temporary labor-only contracting).

[204] *Id.* at 424-425 (citing legislation in Belgium, France, Austria, Denmark, Portugal, Mexico, Italy, and the Netherlands).

[205] Leah F. Vosko, *Leased Workers and the Law: Legitimizing the Triangular Employment Relationship: Emerging International Labor Standards From a Comparative Perspective*, 19 COMP. LAB. L. & POL'Y J. 43, 67-69 (1997) (citing legislation in Japan, Norway, Sweden, France, Spain, and by Directive in the European Parliament).

[206] See, Raday, *supra* note 191, at 425-426 (citing legislation and interpretation of legislation in the United States, Canada, France, Italy, Japan, Finland, and Sweden).

[207] See, Vosko, *supra* note 189, at 70-73; Raday, *supra* note 191, at 420-422 (both sources criticizing the ILO's change in policy, shifting from a policy against labor-only contracts to the 1997 adoption of Convention 181, the "Private Employment Agencies Convention," which accepts the role of employment agencies. Convention 181 provides some protections of employees, but does not have a provision for equal treatment of the agency employees and the user's regular employees doing similar work. The ILO Draft Convention on Contract Labor does include such an equality provision, but the Draft Convention excludes private employment agency employees.).

Given the lack of protective legislation for contingent employees, unionization and collective bargaining are especially important as a means to resist employer tactics to increase contingent work. For example, the Service Employees International Union's (SEIU), in its Justice for Janitors organizational campaign, targeted the creation of more full-time jobs, with corresponding benefits, as one of its current goals in collective bargaining.[208] In 1999, the SEIU also recently won a union organizational campaign among 75,000 home health care workers in Los Angeles County.[209] This victory was possible due to recently enacted California state legislation that eliminated the practice of identifying individual clients as the employers of the state program's home health care employees. Rather, counties must now designate an employer of record, such as a public authority or a contracting provider agency.[210] Following their win in federal district court, the "chicken catchers" who brought the overtime pay lawsuit against Perdue Farms unionized in all three poultry processing plants involved in the litigation.[211]

It is particularly difficult to unionize temporary employees hired by a "user employer" through a temporary employment agency (TEA). The NLRB has decided that unions must obtain the consent of the user employer and TEA to a mixed bargaining unit of temporary employees (supplied by a TEA) and regular employees of a business (the "user employer"). If the user employer and TEA refuse to consent to a mixed bargaining unit, the union is left to organize the temporary employees in a separate unit, with the TEA as the employer.[212] These options, however, fail to recognize the economic realities of the user employer's control over the temporary employees and the common interests of the temporary and regular employees.

---

[208] *See* Elizabeth Walpole-Hofsmeister, *100,000 Janitors Covered in SEIU Pacts Bargained During 2000 in Two Dozen Cities*, 229 DAILY LAB. REP. C-1 (Nov. 28, 2000). See also, Karl E. Klare, *New Approaches to Poverty Law, Teaching, and Practice: Toward New Strategies For Low-Wage Workers*, 4 B. U. PUB. INT. L. J. 245, 269-272 (1995).

[209] *Los Angeles Home Care Workers Vote to Organize by Huge Majority*, 39 DAILY LAB. REP. A-4 (Mar. 1, 1999).

[210] *Id.*

[211] Walpole-Hofmeister, *supra* note 198.

[212] See *H.S. Care L.L.C., d/b/a Oakwood Care Ctr.*, 343 NLRB No. 76 (2004). 331 NLRB No. 173 (2000).

XI. Conclusion

U.S. antidiscrimination law is a complex body of statutes, which becomes increasingly vast and complicated with each legislative amendment and with ongoing judicial interpretations. From the standpoint of "formal equality," this body of law has contributed to the goal of inclusion of women and minorities in the workplace. As the paper has discussed, however, there is still much ground to cover to achieve "substantive equality." As has always been the case, the law evolves and responds to social movements – like the Civil Rights Movement that won this legislation. And so, in the future, social movements will continue to hold a central place in the ongoing struggle for equality.