Sandra F. Sperino
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# UNEQUAL

## How America's Courts Undermine Discrimination Law

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## *How America's Courts Undermine Discrimination Law*

**SANDRA F. SPERINO**

AND

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OXFORD
UNIVERSITY PRESS

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Oxford University Press is a department of the University of Oxford. It furthers the University's objective of excellence in research, scholarship, and education by publishing worldwide. Oxford is a registered trade mark of Oxford University Press in the UK and certain other countries.

Published in the United States of America by Oxford University Press
198 Madison Avenue, New York, NY 10016, United States of America.



Library of Congress Cataloging-in-Publication Data
Names: Sperino, Sandra F., author. | Thomas, Suja A., author.
Title: Unequal : how America's courts undermine discrimination law /
Sandra F. Sperino and Suja A. Thomas.
Description: New York, NY : Oxford University Press, 2017. |
Series: Law and current events masters | Includes bibliographical references and index.
Identifiers: LCCN 2017006323| ISBN 9780190278380 (hardcover : alk. paper) |
ISBN 9780190278403 (epub) | ISBN 9780190682279 (online course content)
Subjects: LCSH: Discrimination—Law and legislation—United States. |
Discrimination in employment—Law and legislation—United States. |
Courts—United States. | Justice, Administration of—United States.
Classification: LCC KF4755 .S965 2017 | DDC 344.7301/133—dc23
LC record available at https://lccn.loc.gov/2017006323

9 8 7 6 5 4 3 2 1

Printed by Sheridan Books, Inc., United States of America

*For John, Joe, Mom,*
*Dad and Grams—SFS*

*For the many whose cases of discrimination*
*were unjustly dismissed—SAT*

## CONTENTS

# PREFACE AND ACKNOWLEDGMENTS

This book tells the surprising story of what happens when workers file employment discrimination cases in federal court. Judges dismiss many of these cases before a jury can hear them or even after they hear them.

Judges dismiss cases where supervisors grope women, call them whores and sluts, and repeatedly ask them on dates. Judges dismiss cases where supervisors use racial epithets against black workers. Judges dismiss cases where an employer gives an employee a negative evaluation because of her race. In dismissing these cases, judges declare that these actions do not count as discrimination.

Congress passed discrimination laws that offer broad protections against discrimination. Yet, over the past several decades, courts have created ways to analyze discrimination cases that favor employers and disfavor workers. Judges have slowly built up a set of rules that govern discrimination cases allow them to dismiss cases—instead of properly enforcing the laws.

This book examines each of these judge-made "rules." Many of these "rules" are contrary to both the text and the purposes of the discrimination statutes. They are also factually unsupported. While the individual judge-made "rules" are troubling enough, when all of them are put together, workers have little chance of prevailing. Judges use all of these frameworks and doctrines to dismiss employees' cases. Often, cases do not reach a jury. Even in the rare cases that make it to jury trial, judges often overturn verdicts where the jury found in the worker's favor.

This book focuses on the reasons judges use to dismiss cases. Other than the discrimination cases that reached the United States Supreme Court, we have changed the names of the people and employers involved in the cases used as examples in this text. The focus is on the faulty reasoning of the judges—not the outcomes of individual cases. Many of the examples illustrate legal arguments that judges used in many different cases, and the footnotes provide lists of cases that relied on similar reasoning.

In discussing the cases, we describe the evidence presented by the worker and, where relevant, the contrary evidence provided by the employer. We recognize that some of the comments and conduct described is offensive but describing the comments and conduct is necessary to understanding the cases. We do not choose sides or otherwise try to determine what happened in the case. When there is a dispute about the facts of the case, it is the role of the jury to determine who is telling the truth and who is not. Looking at the evidence shows how judges regularly invade the province of the jury, evaluating cases in ways that favor employers, even when the evidence suggests discrimination.

While this book analyzes decisions made by federal courts, its impact extends to the states. Each state has its own laws prohibiting discrimination, but states often follow the lead of federal courts in interpreting their own laws. If a federal court interprets federal law in a particular way, states will often read their state law in a similar way. All state laws and federal laws are not coterminous, however. Some states provide greater protections and remedies for workers than federal law, some provide the same level, and some provide less.

This book focuses on three types of claims raised by workers: claims of individual disparate treatment, harassment, and retaliation. An individual disparate treatment claim is one in which an individual worker or a small group of workers assert that race, sex, or another protected trait played a role in a negative employment outcome. The focus is on such intentional discrimination claims brought by individuals.

There are additional types of claims that workers can raise. They can bring pattern or practice claims. In those cases, they allege that their employer discriminated against an entire group based on its protected

trait. Workers can also allege that an employer's practices have a significant effect on a certain group of people—what the courts call disparate impact claims. Further, scholars are theorizing a rich literature about implicit bias and structural discrimination, developing a way for workers to pursue these claims in court. This book does not discuss claims based on pattern or practice, disparate impact, structural discrimination, or implicit bias.

The book begins by describing the overall trajectory of discrimination law, showing how courts have eroded the law's promise over the last several decades. Chapter 2 walks readers through the court process, explaining how cases work and describing the different procedures that judges use to dismiss or affect employment discrimination claims before or after a jury verdict. Chapters 3, 4, 5, and 6 describe the doctrines that courts have created to limit discrimination law. Each chapter describes actual cases and shows how judges reason their way to dismissal.

The next chapters explore why courts limit discrimination law and propose solutions to bring the court doctrine more in line with the federal discrimination statutes that Congress drafted. Chapter 7 addresses the role of politics. Chapter 8 discusses claims made by judges that the courts are flooded with frivolous discrimination lawsuits. Chapter 9 shows how the doctrine of discrimination law pushes cases toward dismissal, even if a particular judge does not have a pro-employer bias. Chapter 10 proposes ways that Congress, the courts, citizens, and others can positively influence the future of discrimination law.

This book would not be possible without the help and insights of many people. Early drafts of this book benefited from the comments of faculty members of the University of Cincinnati College of Law as part of its summer workshop series and junior faculty workshop, and also from workshops at the Benjamin N. Cardozo School of Law at Yeshiva University and the Colloquium on Scholarship in Labor and Employment Law hosted by the Maurer School of Law Indiana University Bloomington. Professor Sperino is especially thankful to colleagues who read early drafts, including Michael Solimine, Janet Moore, and Felix Chang. We also thank Melissa Carrington and Jennifer Morales for their comments on the book and Stephanie Davidson of the University of Illinois College of Law for her

help archiving the Internet sources. All Internet references are archived at Perma.cc (available at https://perma.cc).

Research assistant Elizabeth Newman provided valuable feedback and citechecking on the earliest drafts of the book. We also appreciate librarian Ron Jones and research assistants Caitlin Graham Felvus and Erin Alderson Shick for their invaluable help in tracking down resources and assisting with research projects. And thanks to our editors, David Kairys and David McBride, who supported this project from beginning to end.

# 1

# Introduction

> If I had a world of my own, everything would be nonsense. Nothing would be what it is, because everything would be what it isn't. And contrary wise, what is, it wouldn't be. And what it wouldn't be, it would. You see?
>
> —*Alice in Wonderland*

On July 2, 1964, President Lyndon Johnson sat in the East Room of the White House. With Martin Luther King Jr. standing behind him, President Johnson signed the Civil Rights Act of 1964 into law. President Johnson proclaimed that the Act would "eliminate the last vestiges of injustice in our beloved country."[1]

This historic law prohibited discrimination in a wide range of American life, including at the ballot box, in restaurants, and in hotels. Title VII of that law prohibited discrimination in the American workplace. For the first time in the United States, it became unlawful for many employers to discriminate against workers because of their race, sex, religion, color, and national origin.[2] Congress later passed laws making age and disability discrimination illegal.

This book shows how federal judges approach discrimination cases brought by workers who are protected under these laws. Over time, judges have created dozens of frameworks, rules, and inferences to help them analyze discrimination cases. But all of these frameworks, rules, and

inferences do not help judges determine whether discrimination actually happened.

Instead, this analysis has created an alternative reality. Here, no discrimination happens when a supervisor gropes a woman's breast, so long as the supervisor only does it one or two times. In this world of federal discrimination law, some judges declare it is legal and not discriminatory for an employer to give a worker a negative evaluation based on the color of her skin. This is not discrimination. In this alternative universe, when a supervisor calls a woman a "cunt," a "whore," and a "bitch," this is not evidence that the supervisor is biased. When a supervisor says, "all blacks are lazy" or uses vile racial epithets, this is not evidence of racism. These are simply stray remarks that the judge can disregard. The book tells the stories of workers and how courts dismissed their claims.

## 1. RACHEL, TINA, ANTHONY, AND JOHN

To introduce you to this world of discrimination law, we start with three stories based on cases in the U.S. federal courts.

Rachel is black. Her supervisor, Bill, is white. Bill accidentally copies Rachel on an email in which he states he will never give a black employee a positive evaluation. Later, Bill gives Rachel a negative evaluation. Is it possible that Bill's conduct is discrimination? According to one federal appellate court, the answer is no.[3] The negative evaluation does not count as discrimination.

Tina is a cashier. Tina sued her employer for sexual harassment. In her suit, she presented evidence that her supervisor asked her out on dates many times, even offering "financial assistance" if she would agree.[4] He once "removed from his pants a large bottle of wine, offered Plaintiff a drink, and then asked her to join him later at a local hotel where they could have a 'good time.'" She also claimed that on at least two occasions, he touched her breasts and touched her buttocks once. The court dismissed Tina's claim, ruling that what happened to Tina was not sexual harassment.

Anthony and John are African American men. They both sought promotions at a company to become shift managers. Neither received a promotion.[5] Instead, the white plant manager promoted two white men. The plant manager admitted that he had not followed the written qualifications for the shift manager job when he made the decisions about whom to promote.[6] Moreover, Anthony and John provided evidence that the manager referred to them as "boy." They also had evidence, though disputed by the employer, that they were better qualified than the white employees who were selected for the promotions.[7] They also submitted evidence that no black worker had ever been promoted to the shift manager position that they had sought.[8]

Though jury trials are rare, Anthony's and John's cases made it to a jury. The jury found the employer discriminated against Anthony and John based on their race. Despite this verdict, the judge who presided in the case decided there was insufficient evidence of discrimination and dismissed the cases, finding for the employer. The judge noted that using the term "boy" when referring to Anthony and John was not "probative of racial animus."[9]

The appellate court that reviewed the case agreed with the trial court on a number of matters. Calling African American men "boy" was not evidence of racial discrimination, and the jury was wrong when it found discrimination in Anthony's case. However, the appeals court ordered a new trial for John, finding that John had more evidence to support his case.[10]

In these cases, the courts made a decision: what happened to Rachel, Tina, and Anthony was not discrimination. In cases like Rachel's and Tina's, the judges were so sure of the correct outcome that they were willing to dismiss the cases before they ever reached juries. In Anthony's case, the judges felt comfortable ignoring a jury's verdict. According to these judges, there was only one right answer in each case: the employer had not discriminated against the employees. The worker should lose the case and the employer should win. These are not isolated cases. Searches of federal cases reveal case after case with similar results, where judges dismiss cases brought by workers who allege they are subject to racial epithets or when workers have evidence, for example, that that their supervisors thought

they were too old to do their jobs.[11] Courts dismiss cases when women allege that their boss or their coworkers repeatedly touched their breasts or buttocks, where supervisors repeatedly asked them out on dates or for sexual favors, or where they were repeatedly the victim of unwanted sexualized comments and gestures.[12]

The results of these cases are surprising, especially when you consider the traditional rules of litigation. Under these norms, judges decide legal issues, and when there is a dispute about facts, the jury decides. Federal judges are not supposed to pick winners and losers in cases where the facts are contested. If a case presents facts suggesting discrimination, a jury should decide the outcome. If a case is a close call, it is supposed to go to a jury.

As you will see, federal judges do not apply the traditional rules of litigation to discrimination cases. Instead, judges have created a new set of rules. These rules are not neutral. They favor employers and disfavor workers.

Judges have constructed a complex system of legal frameworks, doctrines, and evidentiary rules that allow them to dismiss claims before trial. Even when a case makes it to trial, and a jury finds that discrimination has occurred, trial court and appellate judges use these same legal frameworks to overturn the jury's verdict. In fact, discrimination cases are some of the most disfavored cases on the federal docket. Judges dismiss these claims at rates far higher than most other kinds of claims.

This book shows how the methods that courts use to evaluate discrimination cases are flawed. These methods do not reliably allow courts to determine whether discrimination occurred in a particular case. Instead, the procedures courts use allow them to declare that no discrimination happened, even when the worker has evidence that her race, her sex, or other protected trait caused her to lose her job or otherwise negatively affected her position.

We start from a simple premise. When a worker presents evidence that he or she faced a negative consequence because of his or her race, sex, or other protected trait, a jury should hear the case, consider the contested evidence, and decide whether discrimination occurred.[13] At a jury trial,

the employee (plaintiff) can put forward evidence to convince the jury that the employer discriminated. The employer (defendant) can challenge the worker's evidence and try to convince the jury that the plaintiff has not presented sufficient evidence of discrimination and has not proven by a preponderance of the evidence that he or she was discriminated against.

The stories in this book show that judges have narrowed the definition of discrimination. When a male supervisor touches a woman's breast and buttocks, the supervisor may have engaged in a form of discrimination more precisely referred to as sexual harassment. When a supervisor calls black men "boy," race discrimination might have occurred. When a supervisor says that he would never give workers of certain religions good evaluations and then gives them bad evaluations, that might be religious discrimination. In each of these cases, a jury could determine that race, sex, or religion negatively affected the worker's job. This book shows why judges should not dismiss these cases before or after a jury trial.

## 2. THE SUPER-STATUTE

There are three federal laws that serve as the cornerstone protections against employment discrimination—Title VII, the Age Discrimination in Employment Act, and the Americans with Disabilities Act.

Congress passed Title VII in 1964. Title VII prohibits employers from discriminating against workers based on race, sex, color, national origin, and religion. It has had a profound impact in reshaping workplace norms and opportunities. Title VII is so important that scholars William Eskridge and John Ferejohn labeled it a "super-statute."[14] To attain super-statute status, the law must embrace a great principle. For Title VII, that principle is combatting employment discrimination.

When Congress deliberated about Title VII, a question arose about whether age should also be a protected class. Although Congress was not ready to add age as a protected category in 1964, it did so three years later when it passed the Age Discrimination in Employment Act (ADEA).

The ADEA protects workers 40 years old and older from age discrimination. Several years later, in 1990, Congress enacted the Americans with Disabilities Act, which expanded discrimination law to cover people with disabilities. Workers can also file claims for race discrimination under 42 U.S.C. § 1981.

Taken together, these laws are supposed to provide a level playing field for workers in these protected categories, and they have had some positive effect in limiting workplace discrimination. In the past, companies had policies that segregated workers. Black employees could hold only certain jobs—often the jobs that paid less.[15] Some companies also had policies that required women to quit their jobs when they married or became pregnant.[16] State laws prohibited women from working at night.[17] Thanks in part to the passage of these laws, all of these actions are now illegal.

## 3. THE CONVENTIONAL WISDOM

With the election of President Barack Obama in 2008, there were new discussions about America's progress toward equality including entering a new post-racial era. In this allegedly post-racial era, Americans have transcended the legacy of race discrimination. Similarly, many people believe that other types of discrimination are rare and only happen at the hands of a few bad actors.

The American workplace is far less equal than many people would like to believe.[18] One study by Professor Devah Pager[19] shows the magnitude of the inequality. Professor Pager sent out white and black testers to apply for jobs. During the application process, some of the applicants indicated they had no criminal history while others suggested that they did have a criminal record. Professor Pager's study found that white applicants without criminal records received callback interviews for jobs 34 percent of the time[20] while black applicants without criminal records received callback interviews only 14 percent of the time.[21] White applicants with criminal records received callback interviews 17 percent of the time[22] while black applicants with criminal records received callback interviews

only 5 percent of the time.[23] So white men *with* criminal records actually received more callbacks than African American men *without* a criminal record.[24]

Race matters in hiring. Depending on the study, white applicants were "anywhere from 1.5 to 5 times more likely to receive a callback or job offer relative to equally qualified black applicants."[25] Over time, the unemployment rate for African American workers, which may be affected by these racialized hiring practices, has typically been about twice the rate of white Americans.[26]

Women and people of color are underrepresented in many jobs in certain industries and in certain positions of power. In 2015, CNN reported that there were only five black CEOs among America's 500 largest companies.[27] When Microsoft promoted Satya Nadella to CEO in 2014, *Fortune* declared that he was "one minority exec in a sea of white."[28]

Women are also underrepresented. The *New York Times* reported in 2015 that "[f]ewer large companies are run by women than by men named John . . . ."[29] In 2014, the *New York Times* reported that seven out of ten people working at Google were men.[30] At Google, three out of thirty-six of its top-ranking executives were women, and 83 percent of its engineers were men.[31] Similar numbers were reported at other large tech companies.[32] Additionally, women hold fewer than 20 percent of the board member seats at companies listed in the Standard and Poor's 500 Index.[33]

In the legal system, people of color and women are similarly underrepresented. In 2015, only about 2 percent of partners at large firms were Hispanic or Latino, and about the same number were African American.[34] In some states, fewer than 3 percent of state judges are persons of color.[35] Women are also underrepresented. Since the late 1980s, even though women make up anywhere from 40 to 50 percent of American law school graduates, fewer than 20 percent of equity partners at law firms are women.[36] Only 21 percent of leaders in corporate legal departments at Fortune 500 companies are women.[37] Almost 80 percent of the deans of American law schools are men.[38] Only 24 percent of federal judges[39] and 27 percent of state court judges are women.[40]

Race and sex also affect pay. In 2014, women who worked full-time earned about 82 percent of what men earned.[41] These numbers become worse when the worker is a woman of color. For example, Hispanic women's median salaries in 2014 were only 61.2 percent of white men's median salaries.[42]

There is debate about how much of the wage gap is due to factors other than discrimination, such as hours worked and career choice. There is also discussion about the actual size of the sex-based wage differential. No matter how you parse the data, there is an unexplained wage gap between women and men.[43] For example, one study took into account students' "college major, occupation, economic sector, hours worked, months unemployed since graduation, GPA, type of undergraduate institution, institution selectivity, age, geographical region, and marital status."[44] The study found a 7 percent difference in the earnings of male and female college graduates one year after graduation that was not explained by any of these factors.[45] The study further found that ten years after graduation, this unexplained wage gap widens to 12 percent.

It is difficult to determine how much bias contributes to these continuing disparities. Other factors, such as class, access to quality education, and societal expectations related to career choice, likely play roles. Nonetheless, the previously mentioned studies show that these factors do not completely explain why there is still so much inequality in American workplaces.

Despite these studies, there is an emerging story about the role that bias plays in this continuing inequality. Under the new conventional wisdom, "old school" race and sex discrimination is rare. A few bad actors may intentionally discriminate against workers, but companies work hard to ferret out these bad apples. Writing in 2001, Professor Michael Selmi noted: "It seems that the general consensus today is that the role discrimination plays in contemporary America has been sharply diminished."[46] The *New York Times* quoted a tech executive as saying: "This is a pretty genteel environment, and you don't usually see outright manifestations of bias. . . . Occasionally you'll have some idiot do something stupid and hurtful, and I like to fire those people."[47]

According to the popular narrative, courts provide robust protections against discrimination in cases alleging traditional discrimination. Within

the small group of traditional cases that still exist, so the story goes, the legal system does a good job of adjudicating these cases. Judges police egregious forms of discrimination[48] and separate the plausible cases from the meritless ones.[49] In these traditional cases, judges are largely correct in deciding which cases should proceed to juries.[50] The cases judges dismiss are cases that a litigant would never win. Under this narrative, federal judges are committed to combating traditional discrimination. This judicial commitment is strong, and courts will not interfere with protecting the core anti-discrimination law.[51]

So, how does bias continue to affect the workplace? In the new narrative, workplace inequity continues to exist because of complex phenomena. Scholars have argued that workplace culture and unconscious bias cause race and sex discrimination.[52] As Professor Tristin Green writes: "Race, sex, and other protected group characteristics will continue to factor into employment decisions, but the decisions are more likely to be driven by unconscious biases and stereotypes operating within a facilitating organizational context than by conscious animus operating in isolation."[53] Legal scholar Amy Wax has noted: "Some commentators have gone so far as to suggest that, as overt bigotry has waned in response to antidiscrimination laws and evolving social mores, unintentional or 'unconscious' discrimination has become the most pervasive and important form of bias operating in society today."[54]

Unconscious biases reinforce inequality: these are the "hidden, reflexive preferences that shape most people's worldviews, and that can profoundly affect how welcoming and open a workplace is to different people and ideas."[55] A supervisor may believe he acts in a neutral way, though he may unconsciously be affected by societal stereotypes about race, sex, or age.[56]

Commentator Nicholas Kristof has discussed the "biased brain," arguing that we can better understand the roots of racial division in America by understanding this unconscious bias.[57] *Fortune* magazine has reported: "Equality is a worthy goal—but it's tough to achieve when unconscious bias so pervades the American workplace."[58] Large companies like Google have responded by embracing diversity training that focuses on identifying unconscious biases.

According to the popular narrative, courts handle traditional discrimination claims well, but they are struggling with more complex ideas like unconscious bias. Courts restrict the law where discrimination is not evident. Courts may not be able to adeptly fix problems such as unconscious bias, and it may not even be a good idea to hold employers liable for unconscious bias.[59] Legal scholar Amy Wax has been skeptical of efforts to use the legal system to this end, arguing that there are "no known methods for effectively controlling unconscious bias in the workplace" and that courts would not be particularly good at determining whether workplace decisions resulted from the "intermittent, subtle, and elusive phenomenon" of unconscious bias.[60]

Under this narrative, there is little or nothing left for courts to enforce because judges either cannot fix the problems of unconscious bias or would be bad at fixing them. If judges are dismissing lawsuits, these cases are likely newer kinds of discrimination about which judges feel less comfortable and for which there is no overt evidence that race, sex, or other protected traits directly played a role in an employment decision.

We contest this narrative. In this book, we will show that the federal judiciary often fails to decide traditional discrimination cases in a fair manner. Judges have created a whole host of frameworks, inferences, and doctrines that they use to dismiss cases and keep them away from juries, including cases that present evidence of discrimination.

Modern workplace inequality may very well be caused, in part, by unconscious bias, but this is not all that is happening. Judges do not protect the core of the discrimination statutes. When workers present evidence of traditional discrimination, judges often dismiss their cases.

## 4. INTERNAL LIMITS

There is another popular myth about American discrimination law. It is easy to win a discrimination lawsuit and also easy to win a very large verdict against an employer. The reality is much different. Congress placed specific limits in the federal discrimination statutes that are different in kind or degree from almost any other type of claim, outside of claims made

by prisoners. The discrimination laws on the books, the ones created by Congress, already contain important limits that balance the interests of workers, employers, and the courts. When the courts add on doctrines and rules to restrict claims, they limit an already narrow cause of action.

Congress limits employment discrimination claims in three important ways. First, a person alleging discrimination may not immediately go to court and file a claim. Instead, the person must present her claim to either the Equal Employment Opportunity Commission (EEOC) or a similar state agency. This requirement—to file first with an administrative agency before going to court—is an additional legal requirement. When a person has almost any other kind of claim, he can simply go to court and present his grievance.

The EEOC is a federal agency charged with enforcing many federal civil rights laws. A person alleging discrimination submits a document to the agency called a Charge of Discrimination. The Charge generally describes the worker's allegations against the employer.

The charge-filing process reduces the number of claims filed in court. After a charge is filed, the EEOC or state agency may investigate an employee's claims, possibly eliminating the need for later litigation in the courts. The EEOC also provides a voluntary mediation system to help the parties try to resolve the underlying claim.

As one court noted: "Exhaustion of administrative remedies is central to Title VII's statutory scheme because it provides the EEOC the first opportunity to investigate discriminatory practices and enables it to perform its roles of obtaining voluntary compliance and promoting conciliatory efforts."[61] But the discrimination statutes do not require that the EEOC fully investigate every claim or that the EEOC make a decision about the merits of each claim. In most of the cases that later go to court, the EEOC makes no decision about whether discrimination happened or not. Rather, the EEOC most often issues a Notice of Right to Sue letter. This notice simply declares that the EEOC process is finished, without making any decision about whether the employer violated the law.

In addition to the requirement that applicants or employees must go to the agency first, Congress limits the scope of discrimination law by