

DISMANTLING STRUCTURAL DISCRIMINATION USING STEREOTYPE THEORY

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Over the past two decades, legal scholars have devoted much attention to the changing nature of how discrimination manifests in the workplace and whether U.S. antidiscrimination law can continue to serve as its remedy. Most workplace discrimination today results from the accumulation of subtle biases compounded by workplace structures over time, as opposed to overt animus against members of protected classes. Scholars have identified this phenomenon of “second generation” or “structural” discrimination¹ and grappled with the ability of the law to reach workplace inequality in this, its modern form. Yet the question persists: how to fit today’s discrimination—which is covert, cumulative, and often embedded in workplace cultures and practices—into the framework of existing antidiscrimination law—which best recognizes discrete acts, defers to employer discretion, and desires not to punish employers for societal wrongs.

Further complicating this effort are two recent Supreme Court decisions limiting the effectiveness of two of the key litigation strategies articulated to date for redressing structural discrimination. In *Wal-Mart v. Dukes* (2011), the Court circumscribed the use of “social framework” evidence based on implicit bias; in *Ricci v. DeStefano* (2009), the Court limited the reach of disparate impact theory. Interestingly, while the Supreme Court majority has become ever more skeptical of the persistence of discrimination and resistant to holding employers responsible for workplace inequality, one subset of employment discrimination lawsuits has enjoyed relative success in the courts: sex discrimination lawsuits relying on the legal theory of stereotyping. In particular, plaintiffs alleging that they were discriminated against at work based on the operation of sex stereotypes related to family caregiving responsibilities or to transgender status have pushed lower federal courts toward a more modern understanding of the role of stereotypes in discrimination.

Building upon existing theoretical and practical scholarship, based on key insights from the unusual recent success of caregiver and transgender sex discrimination lawsuits, and informed by the role of stereotypes in equal protection doctrine, this Article articulates a legal theory of employer liability for relying on stereotypes that aims to reach embedded structural discrimination in the workplace. It then applies this theory to two examples of structural discrimination: workplace scheduling practices and subjective promotion decisions. By offering a reframing focus on how employers design workplace structures that embed and actively encourage reliance on unlawful stereotypes, the Article seeks to provide a response to recent Court criticisms and create a stronger narrative of employer responsibility for structural discrimination.

¹ See, e.g., Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 Colum. L. Rev. 458 (2001); Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 Calif. L. Rev. 1 (2006).