

AALS Joint Newsletter
Section on Employment Discrimination Law
Section on Labor Relations & Employment Law
2017

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Newsletter compiled by Section Secretaries Stephanie Bornstein (University of Florida Levin College of Law, Employment Discrimination Law Section) & Michael Oswalt (Northern Illinois University College of Law, Labor Relations and Employment Law Section). Our thanks to Seth Brostoff, Reference Librarian & Professor of Legal Research at the University of Florida Levin College of Law for assistance compiling this year's publications.

AALS Section Events

Joint Section Breakfast

Friday, January 5, 7:00-8:30 AM – Joint Section Breakfast

Cardiff Room, South Tower/3rd Floor

Labor Relations and Employment Law and Employment Discrimination Law

The cost is \$45.00. You must purchase your ticket to the event at least 24 hours prior to the breakfast (tickets will not be sold at the door). Information on purchasing tickets is available at this [link](#).

Section Panels

Thursday, January 4, 3:30-4:45 PM - *New and Emerging Voices Program*

Leucadia Room, South Tower/Ground Level

Labor Relations and Employment Law and Employment Discrimination Law

Presenters: Deepa Das Acevedo, “Unbundling Freedom in the Sharing Economy” (Miriam Cherry commenting); Stephen Rich, “Whose Diversity?” (Joey Fishkin commenting); and Jennifer Shinall, “The Pregnancy Penalty” (Joanna Grossman commenting)

Friday, January 5, 8:30-10:15 AM – *Relationships in Employment Law*

Pacific Ballroom Salon 26, North Tower/Ground Level

Employment Discrimination, Co-Sponsored by Labor Relations and Employment Law

Panelists: Elizabeth Emens (Columbia), Angela Onwuachi-Willig (Berkeley), Vicki Schultz (Yale), Catherine Smith (Denver), and Noah Zatz (UCLA)

Scholars have increasingly come to recognize the critical role of relationships in the workplace, including how relationships inside and outside of work shape our workplace experiences and opportunities. Given the central role of relationships to work, it is not surprising that employment discrimination law has multiple intersections with these relationships, both in terms of the law influencing these relationships and these relationships influencing the law. From sexual harassment law to relational discrimination to retaliation and beyond, employment discrimination law regulates and shapes relationships with customers, coworkers, friends, lovers, and family members. And certain relationships can also determine whether and how employment discrimination law is deployed and enforced. This panel brings together scholars studying the intersection of employment discrimination law and relationships across various domains for a conversation about the current status of the role of our relationships in the regulation of employment discrimination.

Friday, January 5, 1:30-3:15 PM – *The American Workplace in the Trump Era*

Pacific Ballroom 26, North Tower/Level 1

Labor Relations and Employment Law, Co-Sponsored by Administrative Law, Employee Benefits and Executive Compensation, and Employment Discrimination Law

Panelists: Lance Compa (Cornell ILR), Dick Griffin (former GC of the NLRB), Orly Lobel (San Diego), Sam Bagenstos (Michigan), and Sachin Pandya (Connecticut)

This program will focus on the changes to the American workplace during the first year of the Trump administration. With new judges on the federal courts, new leadership in the federal workplace regulatory agencies, and promises to rescind many of President Obama's employment-related Executive Orders, the new administration signals a major shift in policy. Presenters will describe the impact of this new leadership on American employers and employees. A panel of leading labor and employment scholars will discuss a broad range of hot-button issues such as the overtime rule, the enforceability of class action waivers in arbitration agreements, whether discrimination on the basis of sexual orientation is prohibited by Title VII, the NLRB's position on joint employment and "quickie" election rules, and whether President Trump's promise to trim the federal workforce has resulted in a dismantling of civil service protections for federal employees.

Other AALS Programs of Interest

Wednesday, January 3

1:30 pm - 3:15 pm Minority Groups

Structural and Procedural Hurdles to Justice Affecting Minorities

3:30 pm - 5:15 pm Administrative Law

The Never-Ending Assault on the Administrative State?

3:30 pm - 5:15 pm Disability Law, Co-Sponsored by Election Law, Law and Mental Disability, and Legislation and Law of the Political Process

Could We Pass the ADA Today? Disability Rights in an Age of Partisan Polarization

Thursday, January 4

10:30 am - 12:15 pm AALS Open Source Program

Mainstreaming Feminism

10:30 am - 12:15 pm Law and Sports

Legal Implications of Social and Political Activism in Sports

10:30 am - 4:30 pm Law, Medicine, and Health Care, Co-Sponsored by Aging and the Law, Biolaw, and Law and Mental Disability
The Transformation of American Health Care

1:30 pm - 3:15 pm Alternative Dispute Resolution, Co-Sponsored by Litigation
ADR and Access to Justice: Current Perspectives
(* Speakers include section member Michael Z. Green (Texas A&M))

Friday, January 5, 2018

8:30 am - 10:15 am AALS Hot Topic Program
Rethinking the Campus Response to Sexual Violence: Betsy DeVos, Title IX, and the Continuing Search for Access to Justice

10:30 am - 12:15 pm AALS Open Source Program
The Genetic Information Non-Discrimination Act (GINA) at 10 Years

10:30 am - 12:15 pm Litigation
American-Style Litigation: A Force for Good or Ill?

10:30 am - 12:15 pm Minority Groups, Co-Sponsored by National Security Law
Technology as a Sword and a Shield: Law at the Intersection of Civil Rights and Surveillance

1:30 pm - 3:15 pm AALS Open Source Program
Civil Rights Enforcement and Administrative Law

Saturday, January 6, 2018

9:00 am - 12:00 pm Women in Legal Education
Whispered Conversations Amplified

10:30 am - 12:15 pm Employee Benefits and Executive Compensation, Co-Sponsored by Insurance Law, Law, Medicine, and Health Care, and Taxation
Saving for Healthcare

10:30 am - 12:15 pm Evidence
Daubert After 25 Years: A Prospective Look at the Next Great Challenges in Expert Reliability

10:30 am - 12:15 pm Sexual Orientation and Gender Identity Issues
Relationships Between Religious Exemptions and Principles of Equality and Inclusion

Faculty News

Bradley Areheart (Tennessee) was awarded the Second Annual Michael J. Zimmer Memorial Award at the 2017 Colloquium on Current Scholarship in Labor and Employment Law. The award is given to “a rising scholar who values workplace justice and community, and who has made significant contributions to labor and employment law scholarship.”

Stephanie Bornstein (University of Florida) was promoted from Assistant to Associate Professor of Law. Her article, *Reckless Discrimination*, 105 CALIFORNIA L. REV. 1055 (2017), was selected as a winner of the 2017 Southeastern Association of Law Schools (SEALS) Call for Papers competition.

Gilbert Paul Carrasco (Willamette) has been selected as a Fulbright Specialist.

Katie Eyer (Rutgers) was selected as a co-recipient of the 2017 SALT Junior Faculty Teaching Award.

Michael Green (Texas A&M) was cited on October 30, 2017 by the U.S. District Court for the Southern District of New York, Judge Katherine Failla, in the Ezekiel Elliott football player’s case, [*National Football League Mgmt. Council v. National Football League Players Ass’n*](#). The court cited Michael Green & Kyle T. Carney, *Can NFL Players Obtain Judicial Review of Arbitration Decisions on the Merits When A Typical Hourly Union Worker Cannot Obtain This Unusual Court Access?*, 20 N.Y.U. J. LEGIS & PUB. POL’Y 403, 442-43 (2017).

Wendy Greene (Cumberland-Samford) served as a Visiting Professor of Law at the University of Iowa College of Law in Fall 2017. In Spring 2018, she will serve as a Visiting Research Scholar at the Center of Law, Equality, and Race at the University of California-Irvine School of Law. Her scholarship on perceived identity discrimination or what she has coined as “misperception discrimination” will be featured in a forthcoming Human Rights Campaign report advocating for the inclusion of “perceived as” language in federal and state workplace discrimination laws—a report to which she also contributed. Wendy has also recently accepted a position on the Editorial Board of the *Employee Rights and Employment Policy Journal*, housed at the Chicago-Kent College of Law.

Tanya Hernandez (Fordham) was named the Archibald R. Murray Chair at Fordham Law School.

Marcy Karin (UDC-Clarke) was promoted to full professor with tenure at the University of the District of Columbia Clarke School of Law, where she is now the Jack & Lovell Olender Professor of Law and Director of the Legislation Clinic.

Orly Lobel (San Diego) reports that the University of San Diego has launched a concentration in Employment and Labor Law as well as an LLM in Employment and Labor Law. She has been named faculty supervisor.

Martin Malin (Chicago-Kent) reports that, in May 2017, he, along with the other Obama appointees, was removed from his position as a Member of the Federal Service Impasses Panel by President Trump, about which he notes: “I am almost as proud of being fired by President Trump as I was of being appointed by President Obama.” Marty also organized, edited, and wrote the introduction to a symposium on The Labor and Employment Law Opinions of Justice Scalia, published in 21 EMPL. RTS. & EMP. POL’Y J., No. 1 (2017).

Abigail Perdue (Wake Forest) has launched a new blog on law school pedagogy, TeachLawBetter.com, dedicated to celebrating experiments in pedagogy and facilitating the exchange of innovative law teaching ideas. She notes that past posts have included ideas on teaching labor and employment law doctrines.

Ani Satz (Emory) was appointed as an Emory Global Health Institute Fellow. She was also elected to the University Senate, Faculty Council, and the University Senate Governance Committee at Emory. She reports that Emory’s Health Law, Policy & Ethics Project co-hosted (with the Human Toxicology Project Consortium) the national symposium *Exploring New Technologies in Biomedical Research*.

Paul Secunda (Marquette) was named the first non-UK Ambassador to the UK Pension Transparency Taskforce, where he serves as co-leader of the International Best Practice Team (working on global pension transparency index).

Sandra Sperino (Cincinnati) received the Goldman Prize for Teaching from students at Cincinnati Law.

Gary Spitko (Santa Clara) received Santa Clara University’s 2017 University Award for Recent Achievement in Scholarship.

Suja Thomas (Illinois) was named the Peer and Sarah Pedersen Professor of Law at the University of Illinois.

Deborah Widiss (Indiana) was awarded a Fulbright Senior Scholar grant to study Australian work/family policies in 2018. She reports that she will be a visiting researcher at the Centre for Employment and Labour Relations Law at University of Melbourne Law School, noting: “I’d love any contacts or suggestions for Australian scholars (other than those at the Centre that’s hosting me) with whom I should try to connect while I’m there.”

Noah Zatz (UCLA) was named a 2017-2018 Open Society Fellow for his project “Get to Work or Go to Jail.”

Other Announcements

The 2017-2018 Louis Jackson National Student Writing Competition in Employment and Labor Law, Co-sponsored by Jackson Lewis LLP and IIT Chicago-Kent College of Law, the Institute for Law and the Workplace, is currently underway. Entries are due by January 17, 2018. First prize is \$3,000; two second prizes of \$1,000 each will also be awarded. Entries are blind judged by a panel of five law professors. (The competition is sponsored by Jackson Lewis and administered by Chicago-Kent's Institute for Law and the Workplace, but neither Jackson Lewis nor Chicago-Kent has any say in judging and selecting the winners.) For more information, visit this [link](#).

The Thirteenth Annual Colloquium on Scholarship in Employment and Labor Law (COSELL) will be held at the University of South Carolina School of Law in Columbia, South Carolina on September 27-29, 2018. For more information, visit this [link](#).

2017 Publications

Books

VULNERABILITY AND THE LEGAL ORGANIZATION OF WORK (Martha Albertson Fineman & Jonathan W. Fineman eds., 2017).

STEPHEN F. BEFORT & NICOLE BUONOCORE PORTER, DISABILITY LAW: CASES AND MATERIALS, 1ST EDITION (2016/2017)

ELLEN BERREY, ROBERT L. NELSON & LAURA BETH NIELSEN, RIGHTS ON TRIAL: HOW WORKPLACE DISCRIMINATION LAW PERPETUATES INEQUALITY (2017)

TRISTIN K. GREEN, DISCRIMINATION LAUNDERING: THE RISE OF ORGANIZATIONAL INNOCENCE AND THE CRISIS OF EQUAL OPPORTUNITY LAW (2016/2017).

ORLY LOBEL, YOU DON'T OWN ME: HOW MATTEL V. MGA ENTERTAINMENT EXPOSED BARBIE'S DARK SIDE (2017).

CATHARINE A. MACKINNON, BUTTERFLY POLITICS (2017).

ABIGAIL L. PERDUE, THE ALL-INCLUSIVE GUIDE TO JUDICIAL CLERKING (2017).

MACK A. PLAYER & SANDRA F. SPERINO, FEDERAL LAW OF EMPLOYMENT DISCRIMINATION IN A NUTSHELL, 8TH EDITION (2017)

LAURA ROTHSTEIN & ANN C. MCGINLEY, *DISABILITY LAW: CASES, MATERIALS, PROBLEMS*, 6TH EDITION (2017).

PAUL M. SECUNDA, JEFFREY M. HIRSCH & MICHAEL C. DUFF, *LABOR LAW: A PROBLEM-BASED APPROACH*, 2ND EDITION (2017)

JOSEPH A. SEINER, *THE SUPREME COURT'S NEW WORKPLACE: PROCEDURAL RULINGS AND SUBSTANTIVE WORKER RIGHTS IN THE UNITED STATES* (2017).

SANDRA F. SPERINO & SUJA A. THOMAS, *UNEQUAL: HOW AMERICA'S COURTS UNDERMINE DISCRIMINATION LAW* (2017).

E. GARY SPITKO, *ANTIGAY BIAS IN ROLE-MODEL OCCUPATIONS* (2016/2017).

Articles & Book Chapters

Charlotte S. Alexander, *Misclassification and Antidiscrimination: An Empirical Analysis*, 101 MINN. L. REV. 907 (2017).

Alicia Alvarez, *Lawyers, Organizers, and Workers: Collaboration and Conflict in Worker Cooperative Development*, 24 GEO. J. ON POVERTY L. & POL'Y 353 (2017).

Bradley A. Areheart, *The Symmetry Principle*, 58 B.C. L. REV. 1085 (2017).

Miriam H. Baer, *Reconceptualizing the Whistleblower's Dilemma*, 50 U.C.D. L. REV. 2215 (2017).

Richard A. Bales & Christian Patrick Woo, *The Uber Million Dollar Question: Are Uber Drivers Employees or Independent Contractors?*, 68 MERCER L. REV. 461 (2017).

Kenneth A. Bamberger & Orly Lobel, *Platform Market Power*, 32 BERK. L. & TECH. J. _ (forthcoming 2017).

William W. Berry III, *Employee-Athletes, Antitrust, and the Future of College Sports*, 28 STAN. L. & POL'Y REV. 245 (2017).

Matthew T. Bodie, Miriam A. Cherry, Marcia L. McCormick & Jintong Tang, *The Law and Policy of People Analytics*, 88 U. COLO. L. REV. 961 (2017).

Matthew T. Bodie, *The Best Way Out Is Always Through: Changing the Employment At-Will Default Rule To Protect Personal Autonomy*, 2017 U. ILL. L. REV. 223 (2017).

Matthew T. Bodie, *Employment as Fiduciary Relationship*, 105 GEO. L.J. 819 (2017).

Stephanie Bornstein, *Reckless Discrimination*, 105 CAL. L. REV. 1055 (2017).

Jamillah Bowman Williams, *Breaking Down Bias: Legal Mandates vs. Corporate Interests*, 92 WASH. L. REV. 1473 (2017).

Deborah L. Brake, *The Shifting Sands of Employment Discrimination: From Unjustified Impact to Disparate Treatment in Pregnancy and Pay*, 105 GEO. L.J. 559 (2017).

Erin Buzuvis, *Coaches in Court: Legal Challenges to Sex Discrimination in College Athletics*, 6 TENN. J. RACE, GENDER & SOC. JUST. 41 (2017).

June Carbone & Nancy Levit, *The Death of the Firm*, 101 MINN. L. REV. 963 (2017).

Susan D. Carle, *Analyzing Social Impairments Under Title I of the Americans with Disabilities Act*, 50 U.C.D. L. REV. 1109 (2017).

Gilbert Paul Carrasco, *Short-Hoeing the Long Row of Bondage: From Braceros to Compassionate Farm Worker Migration*, in COMPASSIONATE MIGRATION AND REGIONAL POLICY IN THE AMERICAS (Steven W. Bender & William F. Arrocha eds., 2017).

Miriam A. Cherry & Antonio Aloisi, “*Dependent Contractors*” in the Gig Economy: A Comparative Approach, 66 AM. U. L. REV. 635 (2017).

Pat K. Chew, *Comparing the Effects of Judges’ Gender and Arbitrators’ Gender in Sex Discrimination Cases and Why It Matters*, 32 OHIO ST. J. ON DISP. RESOL. 195 (2017).

Jessica A. Clarke, *Protected Class Gatekeeping*, 92 N.Y.U. L. REV. 101 (2017).

Jessica A. Clarke, *Frontiers of Sex Discrimination Law*, 113 MICH. L. REV. 809 (2017) (reviewing Kimberly Yuracko, *Gender Nonconformity and the Law*).

Jessica A. Clarke, *Feminism and the Tournament*, TEX. L. REV. ONLINE (forthcoming 2017) (reviewing Naomi Cahn, June Carbone, & Nancy Levit, *Gender and the Tournament*, TEX. L. REV. (forthcoming 2017)).

Judson E. Crump & Alfred L. Brophy, *Twenty-One Months a Slave: Cornelius Sinclair’s Odyssey*, 86 MISS. L.J. 457 (2017).

Matthew Dimick, *Better than Basic Income? Liberty, Equality, and the Regulation of Working Time*, 50 IND. L. REV. 473 (2017).

Deborah Dinner, *Beyond “Best Practices”*: Employment Discrimination Law in the Neoliberal Era, 92 IND. L.J. 1059 (2017).

Deborah Dinner, *Equal by What Measure? The Lost Struggle for Universal State Protective Labor Standards*, in VULNERABILITY AND THE LEGAL ORGANIZATION OF WORK (Martha Albertson Fineman & Jonathan W. Fineman eds., 2017).

V.B. Dubal, *Winning the Battle, Losing the War?: Assessing the Impact of Misclassification Litigation on Workers in the Gig Economy*, 2017 WISC. L. REV. 739 (2017).

V.B. Dubal, *Wage Slave or Entrepreneur?: Contesting the Dualism of Legal Worker Identities*, 105 CAL. L. REV. 65 (2017).

V.B. Dubal, *The Drive To Precarity: A Political History of Work, Regulation, & Labor Advocacy in San Francisco's Taxi & Uber Economies*, 38 BERKELEY J. EMP. & LAB. L. 73 (2017).

Renalia DuBose, *Compliance Requires Inspection: The Failure of Gender Equal Pay Efforts in the United States*, 68 MERCER L. REV. 445 (2017).

Marc Edelman, *The Future of College Athlete Players Unions: Lessons Learned from Northwestern University and Potential Next Steps in the College Athletes' Rights Movement*, 38 CARDOZO L. REV. 1627 (2017).

Katie Eyer, *Protected Class Rational Basis Review*, 95 N.C. L. REV. 975 (2017).

Catherine L. Fisk & L. Song Richardson, *Police Unions*, 85 GEO. WASH. L. REV. 712 (2017).

Dallan F. Flake, *Employer Liability for Non-Employee Discrimination*, 58 B.C. L. REV. 1169 (2017).

Rafael Gely, *Collective Bargaining and Dispute System Design*, 13 U. ST. THOMAS L.J. 218 (2017).

Rafael Gely, *A Few Thoughts About Justice Scalia's Dissenting Opinion in Rutan v. Republican Party of Illinois and His View of the Public Workplace*, 21 EMPLOYEE RTS. & EMP. POL'Y J. 163 (2017).

Heidi Gilchrist, *Security Clearance Conundrum: The Need for Reform and Judicial Review*, 51 U. RICH. L. REV. 953 (2017).

Jennifer Gordon, *Regulating the Human Supply Chain*, 102 IOWA L. REV. 445 (2017).

William B. Gould IV, *Some Reflections on Contemporary Issues in California Farm Labor*, 50 U.C.D. L. REV. 1243 (2017).

Matthew W. Green, Jr., *Same-Sex Sex and Immutable Traits: Why Obergefell v. Hodges Clears a Path to Protecting Gay and Lesbian Employees from Workplace Discrimination Under Title VII*, 20 J. GENDER RACE & JUST. 1 (2017).

Michael Z. Green, *Negotiating While Black*, in THE NEGOTIATOR'S DESK REFERENCE (Christopher Honeyman & Andrea Kupfer Schneider eds., 2017).

Michael Z. Green, *The Audacity of Protecting Racist Speech Under the National Labor Relations Act*, 2017 U. CHI. LEG. FORUM (forthcoming 2017).

Michael Z. Green, *Reconsidering Alternative Dispute Resolution Prejudice in Black Work Matters*, 70 SMU L. REV. (forthcoming 2017).

Michael Z. Green & Kyle T. Carney, *Can NFL Players Obtain Judicial Review of Arbitration Decisions on the Merits When a Typical Hourly Union Worker Cannot Obtain This Unusual Court Access?*, 20 N.Y.U. J. LEGIS. & PUB. POL'Y 403 (2017).

Steven Greenberger, *Justice Scalia and the Demise of the Employment Class Action*, 21 EMPLOYEE RTS. & EMP. POL'Y J. 75 (2017).

D. Wendy Greene, *Splitting Hairs: The Eleventh Circuit's Take on Workplace Bans Against Black Women's Natural Hair in EEOC v. Catastrophe Management Solutions*, 71 U. MIAMI L. REV. 987 (2017).

D. Wendy Greene, *To Be Aggrieved by "Misperception Discrimination" in the Workplace*, in 97 BULL. OF COMPARATIVE LABOUR REL.1 (William Bromwich & Olga Rymkevich eds., 2017).

Thelma L. Harmon, *Young v. United Parcel Services, Inc.: The Equal Treatment Fallacy*, 20 J. GENDER RACE & JUST. 97 (2017).

Stacy L. Hawkins, *The Long Arc of Diversity Bends Towards Equality: Deconstructing the Progressive Critique of Workplace Diversity Efforts*, 17 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 61 (2017).

Wendy F. Hensel, *People with Autism Spectrum Disorder in the Workplace: An Expanding Legal Frontier*, 52 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 73 (2017).

Lonny Hoffman & Christian J. Ward, *The Limits of Comprehensive Peace: The Example of the FLSA*, 38 BERKELEY J. EMP. & LAB. L. 265 (2017).

Sharona Hoffman, *Big Data and the Americans with Disabilities Act*, 68 HASTINGS L.J. 777 (2017).

Trina Jones, *A Different Class of Care: The Benefits Crisis and Low-Wage Workers*, 66 AM. U. L. REV. 691 (2017).

Lily Kahng, *Who Owns Human Capital?*, 94 WASH. U. L. REV. 607 (2017).

Marcy L. Karin, *"Other than Honorable" Discrimination*, 67 CASE WESTERN L. REV. 135 (2017)

Marcy L. Karin & Brian Clauss, *Rights of National Guard and Reserve Members Under the Uniformed Services Employment Rights and Reemployment Act (USERRA)*, in SERVICEMEMBER AND VETERANS RIGHTS (2017).

Pauline T. Kim, *Data-Driven Discrimination at Work*, 58 WM. & MARY L. REV. 857 (2017).

Candace Kovacic-Fleischer, *Food Stamps, Unjust Enrichment, and Minimum Wage*, 35 LAW & INEQ. 1 (2017).

Jennifer J. Lee, *U.S. Workers Need Not Apply: Challenging Low-Wage Guest Worker Programs*, 28 STAN. L. & POL'Y REV. 1 (2017).

Nancy Leong & Aaron Belzer, *The New Public Accommodations: Race Discrimination in the Platform Economy*, 105 GEO. L.J. 1271 (2017).

Michael H. LeRoy, *Bare Minimum: Stripping Pay for Independent Contractors in the Share Economy*, 23 WM. & MARY J. WOMEN & L. 249 (2017).

Ariana R. Levinson, Alyssa Hare, & Travis Fiechter, *Federal Preemption of Local Right-to-Work Ordinances*, 54 HARV. J. ON LEGIS. 457 (2017).

Ernest F. Lidge III, *Wrongfully Discharged In-House Counsel: A Proposal to Give the Employer a Veto Over Reinstatement While Giving the Terminated Lawyer Front Pay*, 52 WAKE FOREST L. REV. 649 (2017).

Vicki J. Limas, *The Tribal Labor Sovereignty Act: Do Indian Tribes Finally Hold a Trump Card?*, 41 AM. INDIAN L. REV. 343 (2016-2017).

Orly Lobel, *The Gig Economy & The Future of Employment and Labor Law*, 51 U.S.F. L. REV. 51 (2017).

Orly Lobel, *The Uber-Waymo Law Suit: It Should Be Easy to Poach Talent, But Not IP*, HARVARD BUSINESS REV. (June 2017).

Orly Lobel, *Secrets and Innovation: The Defend Trade Secret Act as Part of the New Secrecy Ecology*, _ BUSINESS, ENTREPRENEURSHIP & TAX LAW REV. _ (forthcoming 2017).

Anne Marie Lofaso, *Justice Scalia's Labor Jurisprudence: Justice Denied?*, 21 EMPLOYEE RTS. & EMP. POL'Y J. 13 (2017).

Ann Marie Lofaso, *Groomed for Exploitation! How Applying the Statutory Definition of Employee to Cover Division 1A College Football Players Disrupts the Student-Athlete Myth*, 119 W. VA. L. REV. 957 (2017).

Anne Marie Lofaso, *Workers' Rights as Natural Human Rights*, 71 U. MIAMI L. REV. 565 (2017).

Ira C. Lupu & Robert W. Tuttle, *The Mystery of Unanimity in Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 20 LEWIS & CLARK L. REV. 1265 (2017).

Martin H. Malin & Jon Werner, *14 Penn Plaza LLC v. Pyett: Oppression or Opportunity for U.S. Workers; Learning from Canada*, 2017 U. CHI. LEGAL FORUM (forthcoming 2017).

Marcia L. McCormick, *Stereotypes As Channels and the Social Model of Discrimination*, 36 ST. LOUIS U. PUB. L. REV. 19 (2017).

Marcia L. McCormick, *Religious Privilege to Discriminate as Religious Freedom: From Charitable Choice to Faith Based Initiatives to RFRA and FADA*, 56 WASHBURN L.J. 229 (2017).

Ann C. McGinley, *Subsidized Egg Freezing in Employment: Autonomy, Coercion, or Discrimination?*, 20 EMPLOYEE RIGHTS & EMP. POL'Y J. 331 (2017).

Ann C. McGinley, *Employment Law Considerations for Law Schools Hiring Legal Writing Professors*, 66 J. LEGAL EDUC. 585 (2017).

Ann C. McGinley & David McClure, *We Are All Contingent: Institutionalizing Vulnerability in the U.S. Workplace*, in VULNERABILITY AND THE LEGAL ORGANIZATION OF WORK (Martha Albertson Fineman and Jonathan W. Fineman eds., 2017).

Paul E. McGreal, *Horseshoes and Hand Grenades: Protecting Compliance Officers from the At-Will Employment Doctrine*, 48 U. TOL. L. REV. 485 (2017).

Peter S. Menell, *Tailoring a Public Policy Exception to Trade Secret Protection*, 105 CAL. L. REV. 1 (2017).

Viva R. Moffat, *Human Capital as Intellectual Property? Non-Competes and the Limits of Its Protection*, 50 AKR. L. REV. 903 (2017).

Angela D. Morrison, *Executive Estoppel, Equitable Enforcement, and Exploited Immigrant Workers*, 11 HARV. L. & POL'Y REV. 295 (2017).

Luke P. Norris, *Labor and the Origins of Civil Procedure*, 92 N.Y.U. L. REV. 462 (2017).

James M. Oleske, Jr., *A Regrettable Invitation to 'Constitutional Resistance,' Renewed Confusion over Religious Exemptions, and the Future Free Exercise*, 20 LEWIS & CLARK L. REV. 1317 (2017).

Maria L. Ontiveros, *H-1B visas, Outsourcing, and Body Shops: A Continuum of Exploitation for High Tech Workers*, 38 BERKELEY J. EMP. & LAB. L. 1 (2017).

Michael M. Oswald, *The Right to Improvise in Low-Wage Work*, 38 CARDOZO L. REV. 959 (2017).

Sanjukta M. Paul, *Uber as For-Profit Hiring Hall: A Price-Fixing Paradox and Its Implications*, 38 BERKELEY J. EMP. & LAB. L. 233 (2017).

Abigail Perdue, *Man Up or Go Home: Exploring Perceptions of Women in Leadership*, 100 MARQ. L. REV. 1233 (2017).

Jessica L. Roberts, I. Glenn Cohen, Christopher R. Deubert & Holly Fernandez Lynch, *Evaluating NFL Player Health and Performance: Legal and Ethical Issues*, 165 U. PA. L. REV. 227 (2017).

Jessica Roberts, I. Glenn Cohen, Christopher R. Deubert, & Holly Fernandez Lynch, *The Legality of Tracking Professional Athletes Through Biometric Screening*, 17 AMER. J. BIOETHICS 65 (2017).

Jessica Roberts & Leah Fowler, *How Assuming Autonomy Undermines Wellness Programs*, 27 HEALTH MATRIX 101 (2017)

Jessica Roberts, Stephanie Morain & Leah Fowler, *What to Expect When (Your Employer Suspects) You're Expecting*, 176 JAMA INTERN MED. 1597 (2016).

Jessica Roberts & Brittainie Zinsmeyer, *Fit to Play in the NBA? Reconciling the NBA Collective Bargaining Agreement with the Americans with Disabilities Act*, 166 UNIV. PENN. L. REV. ONLINE (forthcoming 2017).

John E. Rumel, *Public Employment Law: Answering the Unanswered and Related Questions in Lane v. Franks*, 34 HOFSTRA LAB. & EMP. L.J. 243 (2017) (academic version), *revised and republished in* 34 ILLINOIS PUBLIC EMPLOYEE RELATIONS REPORT 3 (2017) (practitioner version).

Stephen Rushin, *Police Union Contracts*, 66 DUKE L.J. 1191 (2017).

Ani B. Satz, *Animals as Living Accommodations*, 24 ANIMAL L. REV. (forthcoming 2017).

Leticia M. Saucedo, *Employment Authorization, Alienage Discrimination and Executive Authority*, 38 BERKELEY J. EMP. & LAB. L. 183 (2017).

Naomi Schoenbaum, *The Case for Symmetry in Antidiscrimination Law*, 2017 WISC. L. REV. 69 (2017).

Naomi Schoenbaum, *Heteronormativity in Employment Discrimination Law*, 56 WASHBURN L.J. 245 (2017).

Paul M. Secunda, *Uber Retirement*, 2017 U. CHI. L. FORUM (forthcoming Nov. 2017).

Jennifer Bennett Shinall, *The Substantially Impaired Sex: Uncovering the Gendered Nature of Disability Discrimination*, 101 MINN. L. REV. 1099 (2017).

Jennifer Bennett Shinall, *Less is More: Procedural Efficacy in Vindicating Civil Rights*, 68 ALA. L. REV. 49 (2017).

Theodore J. St. Antoine, *Labor and Employment Arbitration Today: Mid-Life Crisis or New Golden Age?*, 32 OHIO ST. J. ON DISP. RESOL. 1 (2017).

Katherine V.W. Stone, *The Bold Ambition of Justice Scalia's Arbitration Jurisprudence: Keep Workers and Consumers Out of Court*, 21 EMPLOYEE RTS. & EMP. POL'Y J. 189 (2017).

Lea VanderVelde, *Henry Wilson: Cobbler of the Frayed Constitution, Strategist of the Thirteenth Amendment*, 15 GEO. J.L. & PUB. POL'Y 173 (2017).

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Noah D. Zatz, *Disparate Impact and the Unity of Equality Law*, 97 B.U. L. REV. 1357 (2017).

Selected Case and Statutory Developments

Sexual Orientation, Gender Identity, and Sex Discrimination – Part I

Evans v. Georgia Regional Hospital (11th Cir. 2017) (petition for certiorari pending)[\[link\]](#)

Kenosha Unified School District No. 1 Board of Ed v. Whitaker (7th Cir. 2017) (petition for certiorari pending)[\[link\]](#)

By Katie Eyer (Rutgers School of Law)

Federal employment discrimination law continues to lack explicit protections for sexual orientation and gender identity. However, there have long been strong arguments that anti-LGBT discrimination is also necessarily sex discrimination, and thus should be protected under federal sex discrimination laws. (Most straightforwardly, virtually all anti-LGBT discrimination would turn out differently “but for” the actual or perceived sex of the victim – For a more

extensive discussion, see [here](#)). For many years, however, the lower courts rejected these arguments based on an assumption of contrary Congressional intent. In the early 2000s this trend began to shift as many transgender employees—and a smaller number of lesbian, gay and bisexual employees—started to win sex discrimination claims. The last several years have seen even more dramatic shifts towards favorable results for LGBT plaintiffs (in both the sexual orientation and gender identity context), following the EEOC’s decisions in *Macy v. Holder* (EEOC 2012) and *Baldwin v. Foxx* (EEOC 2015), holding anti-LGBT discrimination to be per se sex discrimination.

Last Term, the Supreme Court declined to reach the merits in a case that could have led to the Court’s first pronouncements on this issue (*Gloucester County School Board v. GG*) after the Trump administration withdrew the administrative guidance on which the lower court opinion had been based. However, this Term there are two additional cases in which petitions for certiorari have been filed (*Evans v. Georgia Regional Hospital* and *Kenosha Unified School District No. 1 Board of Ed v. Whitaker*) which could give the Court the opportunity to take up this issue again.

In *Evans v. Georgia Regional Hospital*, the plaintiff was subjected to harassment and discrimination based on her perceived sexual orientation and gender presentation. The 11th Circuit found that to the extent that the plaintiff argued that discrimination based on her sexual orientation was actionable as sex discrimination, this claim was barred by Circuit precedent. (The Plaintiff’s narrower appearance-focused gender stereotyping claim was vacated and remanded to allow the Plaintiff leave to amend her complaint). Judge Pryor concurred to explain why, in his view, sexual orientation discrimination cannot be considered sex discrimination under a gender stereotyping theory. Judge Rosenbaum dissented in part to explain why, in her view, sexual orientation discrimination must be considered sex discrimination under a gender stereotyping theory (“Plain and simple, when a woman alleges...that she has been discriminated against because she is a lesbian, she necessarily alleges that she has been discriminated against because she failed to conform to the employer’s image of what women should be—specifically, that women should be sexually attracted to men only.... That is discrimination ‘because of ... sex’ ...”)

In *Kenosha Unified School District No. 1 Board of Ed v. Whitaker*, the Seventh Circuit affirmed a grant of a preliminary injunction in favor of a transgender student suing under Title IX. The Seventh Circuit found that the plaintiff had established a likelihood of success on the merits where he contended that he had been barred from using a boys’ restroom at school based on his transgender status (Whitaker’s birth certificate designates his sex as “female” but he identifies and presents as a boy). Specifically, the Court concluded that “A policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX[’s prohibition on sex discrimination].” Although *Whitaker* is a Title IX case, not a Title VII case, most courts interpret Title IX and Title VII’s sex discrimination proscriptions (“because of...sex” “on the basis of sex”) to be co-extensive. *Whitaker* also involves an Equal Protection claim, as to which the Circuit Court held that heightened scrutiny applied on a sex discrimination theory (and that success on the merits was likely)—this holding is also being challenged in the petition for certiorari.

How the Supreme Court would come out in either of these cases, if certiorari is granted, remains to be seen. Although Justice Kennedy (likely the swing Justice in either case) has shown himself to be very receptive to the equality claims of gay and lesbian plaintiffs in the

constitutional context, he has a much more mixed record in the statutory context. In particular, in the past Justice Kennedy has repeatedly voted with the majority in affording a 1st Amendment defense to anti-discrimination defendants seeking exemption from state LGBT-protective anti-discrimination laws (the *Masterpiece Cakeshop* case pending this Term raises similar arguments, so may present a more recent test of Kennedy's perspective in this area). In addition, Justice Kennedy joined in granting a stay of the lower court's injunction in *G.G.* (an injunction which had ordered access to a gender-identity-appropriate restroom for the transgender plaintiff on a sex discrimination theory). Both of these contexts, however, involved distinctive substantive considerations, and thus may not be a reliable barometer of Kennedy's general perspective on whether anti-LGBT discrimination should be considered sex discrimination.

Even if the Court does not take up either the *Evans* or the *Whitaker* case, and opts instead to allow these issues to percolate longer in the lower courts, this is an issue that no doubt eventually will be resolved by the Court. There are many pending cases in the lower courts that could afford the Court an opportunity to take this issue up in the near future, even if it declines cert in *Evans* and *Whitaker*.

[Eds. Note: On December 11, 2017, the Supreme Court denied certiorari in *Evans v. Georgia Regional Hospital*.]

Sexual Orientation, Gender Identity, and Sex Discrimination – Part II

Hively v. Ivy Tech Community College, 853 F.3d 339 (7th Cir. 2017) (en banc).

Zarda v. Altitude Express, 855 3d 76 (2d Cir. 2017), *reh'g en banc granted*, May 25, 2017 [En Banc argument audio [link](#)]

Evans v. Georgia Regional Hospital, 850 F.3d 1248, petition for certiorari filed Sept. 7, 2017 [link](#)

By Marcia L. McCormick (St. Louis University School of Law)

As the update by Katie Eyer on gender identity stated, federal employment discrimination law lacks explicit use of the terms "sexual orientation" or "gender identity" in On April 4, The Seventh Circuit, en banc, ruled in [Hively v. Ivy Tech](#), that sexual orientation discrimination was sex discrimination under Title VII. There were two concurrences, one by [Judge Flaum](#) and the other by [Judge Posner](#), and a dissent by [Judge Sykes](#).

In 2016, a panel of the Seventh Circuit had held, based on prior law of the Circuit, that sexual orientation was not sex discrimination. Those earlier cases had been fairly thoroughly undermined by the Supreme Court's decision in *Price Waterhouse v. Hopkins*, which recognized that gender stereotyping can be sex discrimination.

Relying on the sex stereotyping reasoning, courts of appeals had been struggling with distinguishing sex from sexual orientation in cases where plaintiffs pled that an adverse employment action was taken against them for not fulfilling sex stereotypes by choosing opposite sex romantic partners. The panel opinion in *Hively* was a prime example of this struggle, with Justice Rovner suggesting that within the Seventh Circuit, some sexual orientation

discrimination cases would be cognizable under Title VII because the context of the discrimination will be so intertwined with sex stereotyping that the issues cannot be untangled. But where stereotypes about the person are clearly linked with sexual orientation rather than sex, there would be no cognizable claim.

The en banc decision resolved the issue by holding that sexual orientation discrimination was always sex discrimination, relying primarily on the two grounds advanced by the plaintiff--but for her sex, her affectional preferences would not have resulted in an adverse employment action; and adverse employment actions taken because of the protected class of those the employee associates with or is romantically involved with, here sex, violate Title VII. The latter kind of associational claim has long been recognized for race. The court additionally drew support from the observation of the Supreme Court in *Oncale* that statutes often go beyond the principal evil they were primarily intended to address, and further support from the scenario in *Price Waterhouse v. Hopkins*, where but for the plaintiff's sex, her behavior would have been applauded. The court noted that this interpretation of Title VII was consistent with other ways that sexual orientation discrimination has been recognized as violating norms of equality, discussing *Romer v. Evans* and the same sex marriage cases. The court concluded, "the logic of the Supreme Court's decisions, as well as the common-sense reality that it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex, persuade us that the time has come to overrule our previous cases that have endeavored to find and observe that line."

Judge Posner, concurring, would have also held that sexual orientation was part of sex for purposes of Title VII as a matter of present need and understanding of the term "sex," essentially acknowledging the cultural shift in the understanding of sex and gender since 1964. He started from the premise that Congress most likely did not think in 1964 that sex included sexual orientation and offered an interpretive rationale alternative to the original understanding approach that some judges champion. Judge Flaum, joined by Judge Ripple, would have found that sexual orientation is sex because that identity is defined only by reference to the sex of the individual in relation to the sex of that person's preferred romantic partners. Under the plain language of Title VII, which prohibits employer decisions made where sex is a motivating factor, sexual orientation discrimination will always be motivated in part by the employee's sex.

Judge Sykes, joined by Judges Bauer and Kanne, dissented. She argued that the court's role was to enforce the statute in the way the enacting Congress would have done so. She argued that the courts had uniformly held that there was a difference between sex and sexual orientation, that sex meant only the way that organisms are classified into male and female, and that was what Congress in 1964 believed as well. Judge Sykes then analyzed the ways that sex and sexual orientation differed in the context of the but-for analysis and associational claim analysis done by the majority. She also explained why sexual orientation discrimination was not motivated by sex stereotyping. Ultimately, Judge Sykes argued that it was up to Congress to change Title VII, and the history of the failure of Congress to do so only strengthened the conclusion that sexual orientation discrimination was not prohibited by Title VII.

The *Hively* decision is just one in a number of cases that are hashing this issue out, making it more likely that the Supreme Court will take up the issue fairly soon. A panel at the Second Circuit, in [Christiansen v. Omnicom Group, Inc.](#), allowed a gay plaintiff's claim to proceed on a gender stereotyping theory even though it could not reconsider the court's earlier decision holding that sexual orientation discrimination claims were not cognizable under Title VII. In that case, when the decision came out, Judge Katzmann wrote a concurrence urging the

Circuit to find that sexual orientation discrimination violated Title VII. The Second Circuit seems poised to do so. It granted rehearing en banc in May in *Zarda v. Altitude Express*, 855 3d 76 (2d Cir. 2017), and held arguments in September. Meanwhile, The Eleventh Circuit issued a decision in [Evans v. Georgia Regional Hospital](#), similar to the *Hively* panel decision, finding itself bound by prior precedent, although it did not analyze the issue in the same depth as the Seventh Circuit had. Lambda Legal filed a cert petition in that case in September, and the Hospital filed its opposition in November after being requested to do so by the Court.

Pregnancy Discrimination

Hicks v. Tuscaloosa, 870 F.3d 1253 (11th Cir. 2017)

By *Marcia L. McCormick* (St. Louis University School of Law)

On September 7, 2017, The Eleventh Circuit issued an important opinion in [Hicks v. Tuscaloosa](#), affirming a jury verdict for a former police officer who was demoted to patrol duty just eight days after her return from maternity leave and then denied accommodations for breastfeeding, forcing her to quit.

In finding breastfeeding protected by Title VII, the Eleventh Circuit relied on [EEOC v. Houston Funding II](#), a 2013 case from the Fifth Circuit. In *Houston Funding*, the Fifth Circuit had held that lactation is a medical condition related to pregnancy so that terminations based on a woman's need to breastfeed would violate Title VII as amended by the Pregnancy Discrimination Act. That decision was the first circuit court of appeals decision to find that lactation was a medical condition related to pregnancy and childbirth, reasoning that it was a physiological state caused by pregnancy and subsequent childbirth. Prior to the Fifth Circuit's decision, a number of lower courts had held that lactation was not a "medical" condition because it was a natural process and not a dysfunction of a bodily process, and that it was not a condition related to pregnancy because it began only after pregnancy had ended. The Fifth Circuit rejected that reasoning, holding that "medical" meant simply any physiological condition, and lactation was clearly a result of pregnancy, and so related to it.

The Eleventh Circuit agreed with the Fifth Circuit's reasoning in *Houston Funding*, noting that the trend in the district courts since that case had been to follow it. The Eleventh Circuit went a bit farther, though, finding that breastfeeding was covered by the Pregnancy Discrimination Act because the language in Title VII says that "it covers discrimination 'because of' or 'on the basis of sex' and is 'not limited to [discrimination] because of or on the basis of pregnancy, childbirth, or related medical conditions.'" Therefore, "it is a common-sense conclusion that breastfeeding is a sufficiently similar gender-specific condition covered by the broad catchall phrase included in the PDA. Breastfeeding is a gender-specific condition because it 'clearly imposes upon women a burden that male employees need not—indeed, could not—suffer.'" (quoting *Houston Funding*). Finally, finding breastfeeding covered by the PDA was consistent with that Act's purpose to reach everything connected to the childbearing process and all of those physiological experiences characteristic of female biology as a way to guarantee women full participation in the workforce without having to sacrifice full participation in family life. If employers could readily terminate women for breastfeeding, even if they could not do so because of pregnancy, the PDA would be rendered mostly useless.

This did not answer the question about what obligations employers have to accommodate women's requests connected with breastfeeding. The Fifth Circuit had not disturbed the line of cases holding that employers had no obligation to provide "special accommodations" to breastfeeding women. But that case was decided before the Supreme Court's decision in [Young v. UPS](#). Thus, in *Hicks*, the Eleventh Circuit had the first opportunity to apply *Young* to the accommodation issue.

In doing so, the Eleventh Circuit noted that the line between discrimination and accommodation may be a fine one, and this case seemed to straddle that line. Applying *Young's* framework, though, the court noted, a reasonable jury could find that Hicks' request for accommodation--here reassignment to a desk job where she wouldn't have to wear a bulletproof vest that would be painful and could cause infection--was a request that she be treated the same as other officers. The department routinely assigned officers with injuries to desk jobs.

The court's analysis was fairly short and straightforward; it wasted little time concluding that lactation is related to pregnancy and thus sex under Title VII and that breastfeeding employees need to be accommodated the same way that other employees are accommodated. And the court summed up its decision concisely: "We find that a plain reading of the PDA covers discrimination against breastfeeding mothers. This holding is consistent with the purpose of PDA and will help guarantee women the right to be free from discrimination in the workplace based on gender-specific physiological occurrences."

De Facto Race BFOO?

United States EEOC v. AutoZone, Inc., 860 F.3d 564 (7th Cir. 2017)

By *Charles A. Sullivan** (Seton Hall Law School)

When teaching the adverse employment action doctrine, I often ask my class whether an employer would be liable if it painted the workspaces of its female workers pink while painting those of its male workers blue. Objectionable as that would be to the cause of equality in the workplace, the "adverse employment action" doctrine might well allow it: absent some additional provable harm, the décor would not be sufficient to violate the statute.

That law school hypothetical manifested in the real world in the recent Seventh Circuit case *United States EEOC v. AutoZone, Inc.*, 860 F.3d 564 (7th Cir. 2017), where Stuckey, a black employee claimed that his employer, Autozone, violated Title VII by transferring him from one store to a new location with the motive of keeping the store "predominantly Hispanic." The panel held that summary judgment was appropriate for Autozone: the EEOC failed to provide sufficient evidence showing that the transfer adversely affected Stuckey's employment status since there was no reduction in his compensation or responsibilities.

The panel was obviously skeptical of the claim to begin with but, given Stuckey's testimony that his district manager explained to him the reason for the transfer, it assumed a triable issue on that point.

* Thanks to my research assistant Henry Klimowicz, Seton Hall Law '19.

At first blush, the decision is unremarkable as a straightforward application of the adverse employment action doctrine since Stuckey suffered no diminishment in pay or responsibilities. Section 703(a)(1)'s reference to discrimination in "compensation, terms, conditions, or privileges" of employment has led to the rule that an employee has to show meaningful harm in order to state a claim. A "lateral transfer" (one without reduction in pay) has been the quintessential example of no harm/no foul. Pink offices/blue offices. Whether that result casts doubt on the whole adverse employment action doctrine is another question.

But the EEOC tried an end run around the doctrine in *Autozone* by invoking § 703(a)(2), which declares it unlawful "to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee" because of the prohibited grounds. "Segregating" would seem to be exactly what Autozone was alleged to have been doing. The panel, however, rejected that argument, reading (a)(2), similar to (a)(1), to also require the EEOC to demonstrate that the transfer deprived Stuckey of meaningful employment opportunities. In short, segregating employees by race is not necessarily a statutory violation.

The court rejected the EEOC's argument that proof of racial segregation should trigger automatic liability. Looking to the section's phrasing, it found that the Commission reading "leaves much of the statutory text with no meaningful work to do. If it's not necessary to show that the challenged employment action 'deprive[d] or tend[ed] to deprive' the employee of employment opportunities 'or otherwise adversely affect[ed] his status as an employee,' what is the point of this statutory language?"

The panel did offer one piece of comfort to the EEOC, stressing that "(a)(2) *does* cast a wider net than subsection (a)(1)," because it speaks in terms of an action that "has only a *tendency* to deprive a person of employment opportunities" while (a)(1) addresses actions that actually "discriminate against any individual." It may be that some lateral transfer immune from (a)(1) nevertheless are actionable under (a)(2) because of their tendency to deprive the employee of opportunities. Still, the dramatic new possibilities for (a)(2) envisioned by Professor Sperino in *Justice Kennedy's Big New Idea*, 96 B.U.L. Rev. 1789 (2016), are not likely to be meaningfully realized if other courts take the *Autozone* approach.

However, to return to a point mentioned above, maybe cases like *Autozone* suggest a reconceptualization of the whole adverse employment action doctrine. After all, to permit racial (and other kinds of) segregation flies in the face of the antidiscrimination project, rendering a textual analysis that leads down this path suspect. Maybe more to the point, I am not the first to note that the adverse employment action doctrine is not very firmly wedded to the text of (a)(1). Where one works is surely a "term, condition, or privilege" of employment as those terms are usually used and as the first two were interpreted under the National Labor Relations Act. Ironically, maybe a textualist reading would make (a)(1) broader than (a)(2)! Finally, perhaps the courts should think more seriously about the structure of the statute. Title VII famously has a bona fide occupational qualification defense, and equally famously, it does not reach race. *Autozone* permits exactly the result that the BFOQ would allow, without all the messy restrictions of that doctrine.

Textualism Gone Mad?

EEOC v. National Memorial Health Care, No. 15-3675 (DSD/KMM), 2017 U.S. Dist. LEXIS 104482 (D. Minn. July 6, 2017)

By *Charles A. Sullivan** (Seton Hall Law School)

A district court in Minnesota recently held that retaliation against a prospective hire for requesting an accommodation wasn't actionable under §704(a). At issue in *EEOC v. N. Mem'l Health Care*, No. 15-3675(DSD/KMM), 2017 U.S. Dist. LEXIS 104482 (D. Minn. July 6, 2017) was a claim on behalf of an applicant whose conditional offer of employment was revoked after she requested an accommodation, even though she later indicated she was willing to meet the employer's requirements.

The court gave short shrift to both the participation and opposition clauses of §704(a). There had been no filing before the revocation of the offer, so participation was not implicated. As for the opposition clause, the court reasoned that the statute required opposition to what the plaintiff in good faith believed to be unlawful discrimination, and there was no evidence that the applicant believed that North Memorial was acting unlawfully: "In other words, merely requesting a religious accommodation is not the same as opposing the allegedly unlawful denial of a religious accommodation." The court cited several other district court decisions to similar effect.

It dismissed ADA authority to the contrary on the basis of differences between the statute, especially 42 U.S.C.S. § 12203(b) (which declares it unlawful "to coerce, intimidate, threaten, or interfere" with the exercise or enjoyment of any right under the statute). But, in the process, it cited Eighth Circuit dicta to the effect that, even under the parallel language of the ADA, "it might be thought that [plaintiff's claim of retaliation for requesting an accommodation] never gets out of the starting gate." *Kirkeberg v. Canadian Pac. Ry.*, 619 F.3d 898, 907 (8th Cir. 2010).

In short, *Memorial Health Care* may be more than a one-court anomaly and but may reach beyond Title VII's duty of religious accommodation to threaten what many view as the core protection of the ADA.

One response to this is the Supreme Court's decision in *Robinson v. Shell Oil Co.*, 519 U.S. 337, 345 (1997), which read "employee" in the statute to bar retaliation in job references against a "former employee," in part "because to hold otherwise would effectively vitiate much of the protection afforded by § 704(a)." Similarly, since employers are generally said not to have a duty to accommodate unless the employee requests one, to permit discharge of individuals for requesting accommodation would essentially read the duty out of both statutes. Interesting, *Robinson* wasn't cited in either *North Memorial* or *Kirkeberg*.

But it's also true that Justice Thomas's opinion for the Court in *Robinson* looked to larger purposes and consequences only after finding "employee" to be ambiguous to begin with. So a committed textualist might find no ambiguity in the reach of the retaliation proscription and so deem irrelevant the resultant torpedoing of the duty of accommodation.

* Hat tip to my RA, Henry Klimowicz, Seton Hall Law '19.

Maybe the whole problem under Title VII can be avoided by not looking to retaliation law in the first place. The conditional employee's offer was rescinded after she had indicated that she would "make it work" by coming in on Friday night if she could not find a replacement. That would seem to fit directly within the definition of religious discrimination announced by the Court in *EEOC v. Abercrombie & Fitch Stores*, 135 S. Ct. 2028 (2015): "an applicant need only show that his need for an accommodation was a motivating factor in the employer's decision." Thus, an employer that fires someone (or revokes an offer) for asking for an accommodation would seem to be guilty of discrimination in the first place under Title VII. (For unexplained reasons, the EEOC denied the applicant's claim of religious discrimination and pursued only the retaliation one). Similar reasoning might apply to the ADA although another way out of the textualist box under that statute is the hitherto underutilized § 12203(b).

Missouri Amends and Preempts its Employment Law

Missouri Human Rights Act Amendments

By Sachin S. Pandya (University of Connecticut)

Over the summer, Missouri's legislature enacted significant business-friendly changes to its employment law. Among other things, it (1) amended the Missouri Human Rights Act (MHRA) to require but-for causation, (2) preempted Missouri common law claims arising out of the employment relationship; and (3) cut back on the scope of MHRA aiding-abetting and retaliation liability. Here's more on these changes.

1. But-For Causation

The MHRA now expressly requires but-for causation. This makes Missouri employment-discrimination law more stringent than section 703 of Title VII, *see* 42 U.S.C. § 2000e-2(m), but closer to how the US Supreme Court reads the federal age-discrimination statute and Title VII's retaliation provision. In particular, the legislature amended the MHRA to use the phrase "because of" to denote causation and to add these definitions:

(2) "Because" or "because of", as it relates to the adverse decision or action, the protected criterion was the motivating factor. . .

(19) "The motivating factor", the employee's protected classification actually played a role in the adverse action or decision and had a determinative influence on the adverse decision or action.

Mo. Rev. Stat. § 213.010.

By these definitions, especially the word "determinative" (and "the" in "*the* motivating factor"), the legislature overrode *Daugherty v. City of Maryland Heights*, 231 S.W.3d 814, 819 (Mo. 2007). There, the court had read MHRA not to require "a plaintiff to prove that discrimination was a substantial or determining factor in an employment decision; if consideration of age, disability, or other protected characteristics contributed to the unfair treatment, that is sufficient."

By the new amendments, the Missouri legislature plainly intended to override *Daugherty* in this way, because it also added this to the MHRA's text: "The general assembly hereby expressly abrogates by this statute the cases of *Daugherty v. City of Maryland Heights*, 231

S.W.3d 814 (Mo. 2007) and its progeny as they relate to the contributing factor standard and abandonment of the burden-shifting framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).” Mo. Rev. Stat. § 213.101(4).

Indeed, the Missouri legislature expressly endorsed applying *McDonnell Douglas* doctrine on an employer’s summary judgment motion, by adding this to MHRA’s text: “If an employer in a case brought under this chapter files a motion pursuant to rule 74.04 of the Missouri rules of civil procedure, the court shall consider the burden-shifting analysis of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and its progeny to be highly persuasive for analysis in cases not involving direct evidence of discrimination.” Missouri Rev. Stat. 213.101(3). The phrase “highly persuasive for analysis” —a phrase that appears nowhere else in the State statutes or the US code—seems to denote some kind of legislative directive, albeit one just shy of a command. If so, it implies that courts have *some* discretion to depart from *McDonnell Douglas* even absent “direct evidence,” perhaps where the employer has already volunteered a legitimate non-discriminatory reason for its adverse action.

2. Preemption of Common Law Claims

The Missouri legislature also substantially preempted Missouri *common-law* employment claims, in two ways.

First, the MHRA now includes this: “This chapter, in addition to chapter 285 and chapter 287, shall provide the exclusive remedy for any and all claims for injury or damages arising out of an employment relationship.” Mo. Rev. Stat. § 213.070(2). The phrase “arising out of an employment relationship” is not further defined. This preemption provision would seem to cover *all* Missouri common law claims predicated on an employment relationship. Such claims include tortious interference with contract, negligent hiring, intentional infliction of emotional distress, defamation, and fraud. That’s because neither chapter 287 (workers’ compensation) nor chapter 285 (miscellaneous) expressly provide for a way to bring all employment-related claims under Missouri common law.

Second, the Missouri legislature added a new “Whistleblower’s Protection Act,” which contains this provision: “This section is intended to codify the existing common law exceptions to the at-will employment doctrine and to limit their future expansion by the courts. This section, in addition to chapter 213 [Human Rights] and chapter 287, shall provide the exclusive remedy for any and all claims of unlawful employment practices.” Mo. Rev. Stat. § 285.575(3). (The Act then declares what counts as an “unlawful employment practice” under the Act.)

Missouri courts “must presume every word, sentence or clause in a statute has effect, and the legislature did not insert superfluous language.” *Bateman v. Rinehart*, S.W.3d 441, 446 (Mo. 2013). So, what *more* does the MHRA preemption provision cover than the whistleblower preemption provision? This raises the possibility that the MHRA preemption provision also preempts common-law *contract* claims for breach of an employment contract. Such claims certainly “aris[e] out of the employment relationship” and entail some allegation of “injury or damages.” To be sure, it’s unlikely that Missouri’s legislators wanted to stop, for example, an *employer* who sues for breach of an employment contract. That inference runs counter to the generally business-friendly thrust of the other MHRA amendments. And yet, the text of the MHRA preemption provision doesn’t distinguish between contract and tort claims. It simply covers “any and all claims for injury or damages arising out of an employment relationship.”

3. Aid-Abetting and Retaliation

The Missouri legislature also reduced the scope of MHRA aiding-abetting and retaliation liability. Mo. Rev. Stat. § 213.070(1). Before the amendments, the MHRA declared it “an unlawful discriminatory practice” to “aid, abet, incite, compel, or coerce the commission of acts prohibited under this chapter or to attempt to do so,” Mo. Rev. Stat. § 213.070(1)[1], or “to retaliate or discriminate in any manner against any other person” for, among other things, opposing a practice the MHRA bans, *see id.* § 213.070(1)[2]. Written this way, the statute was open-ended as to *who* did the aiding or abetting or retaliating, and thus could in theory be read to cover *anyone* who engaged in such behavior. After all, the MHRA’s aiding-abetting provision was a close copy of New York’s aiding-abetting provision, which covers anyone. N.Y. Exec. Law § 296(6) (“It shall be an unlawful discriminatory practice for *any person* to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this article, or to attempt to do so.”) (emphasis added); *see, e.g., National Org. for Women v. State Div. of Human Rights*, 34 N.Y.2d 416 (1974) (newspaper publisher).

By its amendments, the Missouri legislature reduced the scope of MHRA aiding-abetting and retaliation liability by now specifying *who* would have to commit the aiding-abetting, retaliation, or other unlawful discriminatory practice, *i.e.*, “an employer, employment agency, labor organization, or place of public accommodation,” Mo. Rev. Stat. § 213.070(1). In this way, Missouri joins Texas and Louisiana, which have similarly limited the scope of their parallel provisions. *See* La. Rev. Stat. Ann. § 51:2256 (“an employer”); Tex. Lab. Code § 21.056 (“employer, labor union, or employment agency”).