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EMPLOYMENT DISCRIMINATION LAW

8th Edition

2018 CUMULATIVE SUPPLEMENT

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Preface

This Supplement updates the 8th edition through the end of the 2017-18 Supreme Court term and includes relevant court decisions through mid-June, 2018. We thank our students and Casebook users for their helpful suggestions. The bold page numbers indicate the place in the Casebook affected by the supplemental materials.

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CHAPTER 2

DISCRIMINATORY TREATMENT AND DISPARATE IMPACT PROOF CONSTRUCTS

§ 2.01 DISCRIMINATORY TREATMENT CLAIMS

[A] Individual Discrimination

Page 73, Note 4.

In *Vasquez v. Empress Ambulance Serv.*, 835 F.3d 267 (2d Cir. 2016), the court held that the *Staub v. Proctor Hospital* "cat's paw" theory could be applied to circumstances in which the discriminatorily motivated disciplinary information relied upon by the deciding official came from a coworker of the claimant rather than a supervisor. After the female claimant reported a male coworker's sexual harassment, she was terminated based upon false documents prepared by that male coworker indicating that the claimant had been the person guilty of sexually harassing behavior. The deciding official refused to consider any contradictory evidence and the court found that he should have suspected that the coworker's accusations were based upon a retaliatory motive. The court held that where the deciding official negligently relies upon discriminatory information provided by a coworker, the employer may be held liable for the claimant's discharge. Although the Seventh Circuit has also held that the "cat's paw" proof construct can be applied to situations in which deciding officials have been influenced by information provided by discriminatorily motivated coworkers, no liability will be found if claimants are unable to establish that information provided by such biased coworkers actually influenced the decisions involved. See *Milligan-Grimstad v. Stanley*, 877 F.3d 705 (7th Cir. 2017).

Page 79. Note 14.

In *Green v. Brennan, Postmaster General*, 136 S. Ct. 1769 (2016), the Court held that the statute of limitations begins to run in a constructive discharge case when the adversely affected employee gives notice of his intent to resign, and not on the effective date of that notice.

Page 86, Note 1.

In *Quigg v. Thomas City School Dist.*, 814 F.3d 1227 (11th Cir. 2016), the court held that a mixed motive plaintiff only needs to demonstrate that her protected characteristic – here gender – was a *motivating factor* with respect to the adverse employment action she experienced. The court refused to apply the *McDonnell Douglas* mixed motive approach which requires claimants to show – after the employer articulates a nondiscriminatory explanation -- that the impermissible factor was the "true reason" for the action being challenged.

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§ 2.02 DISPARATE IMPACT CLAIMS

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NOTE

In 2005 and 2008, several Massachusetts cities used exams when determining the police officers to be promoted to sergeant. Although the exams had a disparate impact on a number of minority candidates, the district court found that the police departments acted reasonably in relying upon expert opinions finding that the question-and-answer portion and "education and experience" ratings assigned to the candidates constituted a "valid selection tool" under EEOC guidelines. On appeal, the First Circuit Court sustained the district court's findings, due to the failure of the claimants to show that reliance on the challenged factors was not reasonable or to demonstrate that a less discriminatory alternative could have been used. *Lopez v. City of Lawrence*, 823 F.3d 102 (1st Cir. 2016), *cert. denied*, 137 S. Ct. 1088 (2017).

Page 144.

NOTE

Jones v. City of Boston, 845 F.3d 28 (1st Cir. 2016), concerned a challenge to a police departments use of hair drug testing to determine if officers were using illegal drugs. Although the testing procedure had a disparate impact on African-American officers, in part due to false positives generated, the court indicated that the practice would be job related and consistent with business necessity due to the department's need to preclude the use of illegal drugs by police officers. Nonetheless, it remanded the case to the district court for it to consider whether an alternative drug testing method would have a less discriminatory impact on African-American employees.

Page 144, Note 11.

Karlo v. Pittsburgh Glass Works, LLC, 849 F.3d 61 (3d Cir. 2017), involved a company policy which adversely affected employees over fifty more than employees in their forties. The court rejected the claim that disparate impact claims under the ADEA had to compare the impact of neutral policies on persons forty and older with the impact on persons under forty, and it held that persons in their fifties could challenge a neutral policy that had a greater impact on them than it had on coworkers in their forties. The court based its decision on the Supreme Court's decision in *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996), in which the Court had held that individuals prosecuting discriminatory treatment claims under the ADEA did not have to show that they lost out to person under forty, but only had to demonstrate that they lost out to younger individuals – even if over forty – because of age discrimination. The *Karlo* court rejected decisions by several other circuit courts which had held that disparate impact claimants had to show that persons forty and older were disadvantaged compared to persons under forty.

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CHAPTER 3

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED

§ 3.01 SCOPE OF COVERAGE

§ 3.02 RACE/COLOR

Page 201.

NOTE

The black mayor of Freeport, N.Y., decided that he wanted to integrate its all-white command staff. Christopher Barrella, a white Italian-American applied to become the chief of police, but lost out to Miguel Bermudez, a white Cuban. Although the city claimed that no "race" discrimination had occurred, the Second Circuit Court rejected this defense, finding that "race" under both Title VII and § 1981 "includes ethnicity . . ., so that discrimination based on Hispanic ancestry or lack thereof constitutes racial discrimination . . ." *Village of Freeport v. Barrella*, 814 F.3d 594 (2d Cir. 2016).

Page 202, Note 4.

In *EEOC v. Catastrophe Mgmt. Sols.*, 852 F.3d 1018 (11th Cir. 2016), rehearing denied, 876 F.3d 1273 (11th Cir. 2017), motion to intervene and file petition for cert. denied, 138 S. Ct. 2015 (2018), the court rejected the EEOC's claim that an employer's refusal to consider a black job seeker for employment due to the fact she refused to cut off her dreadlocks constituted race discrimination since based upon such a race-based cultural characteristic. The court indicated that only distinctions based upon immutable characteristics associated with particular races would constitute violations of Title VII.

[A] Police Records of Applicants

Page 229.

NOTES

1. In *Rogers v. Pearland Indept. School Dist.*, 827 F.3d 403 (5th Cir. 2016), cert. denied, 137 S. Ct. 820 (2017), the court held that a school district did not discriminate against a black job applicant for an electrician position based upon his race, when it refused to hire him due to his failure to disclose several prior serious criminal convictions , where several selected candidates were also black and the proffered white comparator who had also concealed a prior felony conviction had only been convicted of a one-time drug offense for which he had been given probation, while the plaintiff had sustained at least three convictions resulting in sentences up to

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ten years duration.

2. See T. Pettinato, *Employment Discrimination Against Ex-Offenders: The Promise and Limits of Title VII Disparate Impact Theory*, 98 MARQ. L. REV. 831 (2014). See

3. See P. Shethji, *Credit Checks Under Title VII: Learning from the Criminal Background Check Context*, 91 N.Y.U. L. REV. 989 (2016).

§ 3.03 RELIGION

Page 277.

NOTE

See D. Flake, *Religious Discrimination Based on Employer Misperception*, 2016 WIS. L. REV. 87 (2016).

§ GENDER

[A] Compensation Differentials

Page 317, Note 1.

In *Rizo v. Yovino*, 887 F.3d 453 (9th Cir. 2018) (en banc), the court held that the Equal Pay Act exception based upon "any other factor other than sex" does not allow employers to defend gender-based pay differentials for equal work based solely upon the lower prior salaries earned by females before they were hired by their current employers. The court found that this exception only included job related factors such as education, skill, and experience, but not merely prior salaries that often continue to reflect the very historical undervaluing of female work the Equal Pay Act was intended to eliminate. The *Rizo* rationale would presumably prevent employers from relying upon this exception when defending intentional pay differentials under Title VII.

Page 318, Note.

When a female commission-based sales associate for a home builder was transferred from a successful community with high volume and sales prices to a more challenging community with significantly lower earning potential, her performance in the original community had been strong, and she was replaced by a male associate whom she had trained, the court found this to constitute unlawful sex discrimination. *Delaronde v. Legend Classic Homes, Ltd.*, 716 Fed. Appx. 322 (5th Cir. 2018).

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[C] Marriage and Family Obligations

[D] Maternity

Page 383.

NOTES

1. If an employer only provided light-duty assignments to employees whose needs arose from work-related injuries, could pregnant employees denied such light-duty work challenge the policy under the disparate impact approach, showing that while many others with work-related limitations could get light-duty assignments no pregnant employees were given such options? See *Legg v. Ulster County*, 820 F.3d 67 (2d Cir. 2016) (suggesting that such a claim might be viable).

2. See C. Hebert, *Disparate Impact and Pregnancy: Title VII's Other Accommodation Requirement*, 24 AM. U.J. GENDER, SOC. POL'Y. & L. 107 (2015). See also E. Simon, *Parity by Comparison: The Case for Comparing Pregnant and Disabled Workers*, 30 COLUM. J. GENDER & L. 254 (2015).

Page 384, Note 4.

In *Hicks v. City of Tuscaloosa*, 870 F.3d 1253 (11th Cir. 2017), the court agreed with the *Houston Funding II Ltd.* decision of the Fifth Circuit and held that breastfeeding is covered under Title VII and that employers who discriminate against employees because of this condition are engaged in unlawful sex discrimination.

[E] Grooming Codes

Page 432, Note 2.

In *EEOC v. Catastrophe Management Solutions*, 852 F.3d 1018 (11th Cir. 2016), rehearing denied, 876 F.3d 1273 (11th Cir. 2017), motion to intervene and file petition for cert. denied, 138 S. Ct. 2015 (2018), the court held that since a job applicant's dreadlocks hairstyle was a mutable characteristic, the employer did not violate Title VII when it rescinded an offer of employment pursuant to its race-neutral grooming policy after the claimant refused to cut her dreadlocks, even though her hairstyle was historically and culturally associated with persons of African descent.

Page 433, Note 3.

See Bennett-Alexander, D. & Harrison, L., *My Hair is Not Like Yours: Workplace Hair Grooming Policies for African-American Women as Racial Stereotyping in Violation of Title VII*, 22 Cardozo J. L. & Gender 437 (2016).

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[F] Sexual Harassment

Page 448, Note 2.

Blomker v. Jewell, 831 F.3d 1051 (8th Cir. 2016), involved a woman who had one worker point his finger at her chest and come close to touching her breasts, who also came close to her while showing an erection in his pants, who came very close to her on several other occasions and blocked her movement at her cubicle. Despite these different incidents, the court found that these seven alleged incidents were not sufficiently severe or pervasive to establish an objectively hostile environment where there was no actual touching involved.

Ellen Betz was a registered nurse who worked in an environment with other female nurses. Those coworkers regularly joked with each other "by licking, groping, making lewd gestures, or pretending to grope each other's breasts and genitals, and they made sexually provocative comments." These acts occurred on a daily basis. Some also placed similar acts on Facebook. Although Ms. Betz found these acts to be highly offensive and complained repeatedly to her supervisors about them, no actions were taken. Her law suit claiming that such behavior had created a sexually hostile environment was dismissed, based upon the finding that she had failed to establish that any discriminatory or harassing behavior had been directed at her, or that such acts were "because of" her gender. *Betz v. Temple Univ. Health Sys.*, 659 Fed. Appx. 137 (3d Cir. 2016). See also *Maldonado-Catala v. Municipality of Naranjito*, 876 F.3d 1 (1st Cir. 2017).

Page 456, Note 1:

Where all but one alleged discriminatory harassment acts occurred outside the limitations period, and a single sexual joke within the limitations period was not sufficiently related to the prior acts since it was by a new coworker serving in a different department than where the previous harassment had taken place, the alleged victim could not prosecute her Title VII claim. *Dziedzic v. State Univ. of N.Y. at Oswego*, 648 Fed. Appx. 125 (2d Cir. 2016).

Page 467, Note 1.

See *Smith v. Rock-Tenn Services, Inc.*, 813 F.3d 298 (6th Cir. 2016) (where physical conduct by male coworker, such as grinding pelvis into male claimant's pelvis and pinching claimant's buttocks involved, such conduct more serious that mere harassing comments and less likely to be dismissed as "male-on-male horseplay").

Page 483, Note 6.

When a supervisor treats a female subordinate differently from her male cohorts based upon conscious or even subconscious gender-based stereotyping, she may have a claim of sex discrimination under Title VII. See *Burns v. Johnson*, 829 F.3d 1 (1st Cir. 2016). If he creates an environment that would be perceived as being objectively and subjectively hostile to women, by making negative comments about that female's work and by carrying a baseball bat in his office which he holds whenever he meets with her, a hostile environment may be found based upon the

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likelihood that women would feel more threatened by his carrying of the baseball bat than men. If he then transfers that woman from a position which involves the exercise of professional services to a relatively menial position, that would constitute "tangible action" that would preclude application of the affirmative action defense.

Page 491, Note.

Alana Shultz was a program director for a synagogue. She received notice of her termination based upon her pre-marital pregnancy. The termination was to take effect in three weeks, but was withdrawn two weeks later. She terminated her employment, and brought a discrimination action alleging that her resignation should be treated as a constructive discharge due to the harassment she had received because of her pre-marital pregnancy. Since the court found that she had suffered no actual adverse employment action, it rejected her constructive discharge claim. *Shultz v. Congregational Shearith Israel,* 867 F.3d 298 (2nd Cir. 2017). Compare *Hicks v. City of Tuscaloosa, Alabama*, 870 F.3d 1253 (11th Cir. 2017), where the court found that the police department's negative treatment of a pregnant employee was sufficiently severe to support a jury finding of a constructive discharge.

[G] Sexual Orientation & Gender Identity

Page 500.

NOTES

1. Although the EEOC has held that sexual orientation discrimination constitutes sex discrimination under Title VII, based upon the theory it adversely affects individuals whose behavior does not comport with gender stereotypes, the Eleventh Circuit Court has rejected this extension of Title VII to such forms of discrimination. *Evans v. Georgia Reg'l. Hospital*, 850 F.3d 1248 (11th Cir. 2017), *cert. denied*, 138 Sup. Ct. 557 (2017). Compare *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018) (en banc); *Hively v. Ivy Tech Community College of Indiana.*, 853 F.3d 339 (7th Cir. 2017) (holding that sexual orientation discrimination based upon failure of claimant to conform to heterosexual stereotype by having intimate relationship with same-sex partner is actionable under Title VII). See also *Anonymous v. Omnicom Group, Inc.*, 852 F.3d 195 (2d Cir. 2017). See L. Bornstein & M. Bench, *Married on Sunday, Fired on Monday: Approaches to Federal LGBT Civil Rights Protection*, 22 WM.. & MARY J. WOMEN & LAW 31 (2015); W. Eskridge, *Title VII's Statutory History and the Sex Discrimination Argument for LGBT Workplace* Protections, 127 Yale L. J. 322 (2017).M. Wasser, Note: *Legal Discrimination: Bridging the Title VII Gap for Transgender Employees*, 77 OHIO ST. L.J. 1109 (2016).

2. In *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018), the court adopted the EEOC position that discrimination based upon transgender status constitutes unlawful sex discrimination under Title VII since such discrimination is based upon "sex stereotyping" and "gender nonconforming" behavior.

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3. Lori Franchina, a gay Providence firefighter, was subjected to slurs like "lesbo" and "bitch," and was spat upon, shoved, and -- on one horrifying incident -- had the blood and brain-matter of a suicide attempt victim flung at her by a coworker. Without deciding whether discrimination based solely upon sexual orientation would be actionable under Title VII, the First Circuit held that Ms. Franchina had a claim under Title VII for "sex plus" discrimination due to the fact her harassment had been based upon the fact she was a gay female. *Franchina v. City of Providence*, 881 F.3d 32 (1st Cir. 2018)

§ 3.05 NATIONAL ORIGIN

§ 3.06 RETALIATION

Page 530, Note 2.

When an employee sends multiple emails to the human resource department complaining about the negative treatment being carried out by his supervisor but fails to suggest that the supervisor's conduct may reflect the claimant's national origin or age, they will not have a cognizable claim of unlawful retaliation due to the absence of any connection to a statutorily protected factor. See *Skiba v. Illinois Cent. R. Co.*, 884 F.3d 708 (7th Cir. 2018).

Page 531, Note 4.

In *Carvalho-Grevious v. Delaware State Univ.*, 851 F.3d 249 (3rd Cir. 2017), the court ruled that the trial court improperly granted summary judgment to the employer in a § 704(a) retaliation case, since the Supreme Court's decision in the *Nassar* decision does not require plaintiffs in such cases to establish "but for" causation as part of their prima facie case. Such claimants need only assert a reasonable basis for believing retaliation occurred. Defendant employers must then articulate non-retaliatory bases for the decisions being challenged. Once employers accomplish this obligation, the burden of proof returns to the claimants who must show that a retaliatory motive was a "but for" basis for the decisions being challenged.

Page 535.

NOTE

Watford v. Jefferson County Public Schools, 870 F.3d 448 (6th Cir. 2017), involved a school teacher who was discharged for alleged misconduct, but who claimed that her termination was based upon her race, sex, and age. She filed a grievance under the applicable bargaining agreement with the Teachers Association and a separate charge with the EEOC. A provision in the bargaining agreement required that grievance proceedings be held in abeyance while any EEOC charge was being processed. Since the court found that a contractual provision making the availability of remedial action under a contractual grievance procedure contingent on the absence of any charge being filed with the EEOC would discourage individuals from raising discrimination claims with the EEOC, it found that such a practice constituted unlawful retaliatory action under Section 704(a).

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CHAPTER 4

NON-TITLE VII ANTIDISCRIMINATION PROTECTION

§ 4.01 THE CONSTITUTION

[A] Race

Page 547, end of Note 3.

In *Fisher v. University of Texas at Austin*, 136 S.Ct. 2198 (2016), the Court held that the university's race-conscious admissions program did not violate the Equal Protection Clause. The Court made clear that consideration of race in admissions decisions must withstand strict scrutiny judicial review; that a university's decision to pursue the benefits flowing from student body diversity is an academic judgment to which some, but not all, judicial deference is proper; and that, in determining whether the use of race is narrowly tailored to achieve the university's goals, a university bears the burden of demonstrating that available and workable race-neutral alternatives did not suffice.

§ 4.04 EQUAL PAY ACT

[B] Any Other Factor Other Than Sex

Page 720, add new Note 10.

Can an employer lawfully consider an employee's prior salary, alone or in conjunction with other factors, when setting the salary of its employee? In *Rizo v. Yovino*, 887 F.3d 453 (2018) (en banc), the court held that the salary paid to a female employee by her previous employer could not be considered by her current employer. The court determined that the Equal Pay Act's catchall exception "any other factor other than sex" is "limited to legitimate, job-related factors such as a prospective employee's experience, educational background, ability, or prior job performance." Prior salary "may well operate to perpetuate the wage disparities prohibited under the Act" and mask continuing inequities.

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§ 4.06 AGE DISCRIMINATION IN EMPLOYMENT ACT, AS AMENDED

Page 772, add new Note 10.

In an en banc ruling the Eleventh Circuit affirmed a district court's dismissal of an applicant's ADEA disparate-impact suit. *Villarreal v. R.J. Reynolds Tobacco Company*, 839 F.3d 958 (11th Cir. 2016). The ADEA's disparate-impact provision, Section 4(a)(2), makes it unlawful for an employer to discriminate against "an employee" because of that employee's age. "Applicants who are not employees when alleged discrimination occurs do not have a 'status as an employee,'" the court reasoned, contrasting the text of Section 4(a)(2) with the ADEA's disparate-treatment provision, Section 4(a)(1), which expressly refers to both applicants and employees.

§ 4.07 THE REHABILITATION ACT AND THE AMERICANS WITH DISABILITIES ACT

[A] Coverage and Basic Protections

Page 831, Note 2.

Employer examinations or inquiries are also restricted by the Genetic Information Nondiscrimination Act, 42 U.S.C. § 2000ff (2018). Title II of GINA provides that it is unlawful to discriminate against employees or applicants because of genetic information in any aspect of employment. For more on GINA, see Jessica L. Roberts, *The Genetic Information Nondiscrimination Act as an Antidiscrimination Law*, 86 Notre Dame L. Rev. 597 (2011).

Page 833, before *Sutton* case.

While the ADA generally restricts or prohibits employers from obtaining medical information from applicants or employees, employers may lawfully inquire about the health of employees or examine them medically as part of a voluntary workplace wellness program. Employers may not deny employee access to a wellness program because of an individual's disability and must reasonably accommodate employees with disabilities so that they may participate in the program. A final rule issued by the EEOC (see 81 Fed. Reg. 31126, May 17, 2016) provided, among other things, that employers could provide participation rewards or impose penalties of up to 30 percent of the total cost of employee coverage as an incentive for employees to disclose ADA-protected medical information. The rule (which also interpreted GINA) was challenged in and vacated by a district court, with the vacatur order stayed until January 1, 2019, allowing the EEOC time to consider and issue a revised rule. *AARP v. EEOC*, 292 F.Supp.3d 238 (D.D.C. 2017).

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Page 889, add to Note 2.

Moses v. Dassault Falcon Jet-Wilmington Corp., 894 F.3d 911 (8th Cir. 2018); *Williams v. Fedex Corporate Services*, 849 F.3d 889 (10th Cir. 2017).

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CHAPTER 6

PROCEDURES FOR ESTABLISHING CLAIMS

§ 6.05 ALTERNATIVE DISPUTE RESOLUTION PROCEDURES

Page 1010, end of Note 2.

Epic Systems Corporation v. Lewis, 138 S.Ct. 1612 (2018), held, by a 5-4 vote, that employer-employee arbitration agreements providing for individualized arbitration proceedings to resolve employment disputes are enforceable and are not prohibited by the National Labor Relations Act. When employees sought to litigate class or collective actions under the Fair Labor Standards Act and analogous state laws in federal court class or collective actions, the employer argued that they had waived their right to do so in the arbitration agreements and that the FAA mandated enforcement of that waiver. The employees countered that the FAA's "savings clause" allowed courts to refuse to enforce arbitration agreements "save upon such grounds as exist at law or in equity for the revocation of any contract," and argued that § 7 of the NLRA protected their right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. Agreeing with the employer, the Court declared that in the FAA "Congress has instructed federal courts to enforce arbitration agreements according to their terms—including terms for individualized proceedings." The NLRA does not trump or displace this instruction, the Court concluded, as that statute does not "express approval or disapproval of arbitration" and "does not mention class or collective action procedures." A dissenting Justice Ginsburg did "not read the Court's opinion to place in jeopardy discrimination complaints asserting disparate-impact and pattern-and-practice claims that call for proof on a group-wide basis," and expressed her view that it "would be grossly exorbitant to read the FAA to devastate Title VII of the Civil Rights Act of 1964" and other antidiscrimination laws.