FOREWORD

COURTS' CENTRAL ROLE IN IMPLEMENTING EQUAL EMPLOYMENT OPPORTUNITY

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During this century we have seen a near evisceration of the old common law doctrine of at will employment and a concomitant development of a broad panoply of statutory protections of employees' rights in the American workplace. The nondiscrimination principle first articulated in Title VII of the Civil Rights Act of 1964,[1] which protects employees and applicants from discrimination on the bases of race, religion, color, national origin and sex, was subsequently extended, in 1967, to protect workers over age forty from age discrimination,[2] and later, in 1990, to protect all Americans with disabilities who are qualified to work.[3] While the progress toward recognizing and protecting human and civil rights in the workplace has been uneven, it is clear that the impetus to these reforms has arisen from our most fundamental constitutional principles and that Congress has regarded the national policy against discrimination to be of the "highest priority."[4] As one congressman said in 1964, the Civil Rights Act was intended to conform "[t]he practice of American democracy . . . to the spirit which motivated the Founding Fathers of this nation — the ideals of freedom, equality, justice, and opportunity."[5] The Supreme Court has referred to Title VII as a "complex legislative design directed at an historic evil of national proportions,"[6] and to the age discrimination act as "part of an ongoing congressional effort to eradicate discrimination in the workplace" that "reflects a societal condemna-

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1. 42 U.S.C. § 2000e *et seq.*

2. Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1967).

3. Americans with Disabilities Act, 42 U.S.C. §§ 12101-12113 (1990); *see* Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796 (1996) (protecting persons with disabilities from discrimination in employment by the federal government and other entities who operate in a close nexus with the federal government through a contract or receipt of federal assistance).

4. Newman v. Piggie Park Enters., 390 U.S. 400, 402 (1968).

5. H.R. REP. No. 88-914, pt. 2 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2123 (separate views of Rep. McCulloch et al.).

6. Albemarle Paper Co. v. Moody, 422 U.S. 405, 416 (1975).

tion of invidious bias in employment decisions."[7] When the Americans with Disabilities Act was enacted, the President remarked that "the American people have once again given clear expression to our most basic ideals of freedom and equality."[8] Employment discrimination law, in common with many areas of American public law, provides a microcosmic view of our basic constitutional system in operation, revealing the dynamic interplay of congressional legislative enactments, enforcement agency interpretations, and judicial construction of those enactments as the law is shaped and reshaped in response to our ongoing commitment to the core values of freedom, equality and opportunity. Although the statutes set out the basic prohibitions against discrimination, the Supreme Court has played a vital role in breathing life into the statutory terms. Absent judicial interpretation we would not have understood, as we do today, the theory of discrimination based on the adverse impact of neutral practices not justified by business necessity,[9] nor the concept that the creation of a hostile working environment on the basis of sex constitutes a form of prohibited sex discrimination,[10] nor the principle that employers are vicariously liable for supervisors' harassment of their subordinate employees subject to an affirmative defense.[11]

In recent years, we have observed numerous examples of the Supreme Court's role in correcting the interpretive errors of the lower courts. In *Oubre v. Entergy Operations, Inc.*,[12] the Court held unequivocally that a waiver of claims that does not conform to the requirements of the Older Workers Benefit Protection Act[13] cannot bar an ADEA claim and that a defective waiver is not ratified by an employee's retention of the severance benefits. In *Oncale v. Sundowner Offshore Servs.*,[14] the Court recognized that nothing in Title VII bars a claim of sex discrimination in a hostile environment harassment case merely because the plaintiff and defendant are of the same sex. In

7. *Moody*, 422 U.S. at 416.

8. President George Bush's Statement on Signing the Americans with Disabilities Act of 1990, 1070 (July 26, 1990).

9. *See* Dothard v. Rawlinson, 433 U.S. 321, 331-32 (1977) (addressing the adverse impact on women of an employer's minimum-height and weight requirements); Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1974) (construing 42 U.S.C. § 2000e-2(a)(2) and (b) as prohibiting practices neutral in intent that have an adverse impact on protected groups and recognizing the disparate impact of a high school diploma requirement unrelated to the jobs at issue on minority applicants).

10. *See* Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986); Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993).

11. *See* Faragher v. City of Boca Raton, 524 U.S. 775 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998).

12. 522 U.S. 422 (1998).

13. 29 U.S.C. § 621 (1994).

14. 523 U.S. 75 (1998).

Robinson v. Shell Oil Co.,[15] the Court clarified that the meaning of "employee" in the anti-discrimination statutes must be read flexibly to permit a former employee to bring a claim for retaliation. In *O'Connor v. Consolidated Coin Caterers, Corp.*,[16] the Court determined that the comparator in an age discrimination case need not be under age forty to create an inference of age-based discrimination against an older employee. In *McKennon v. Nashville Banner Publ'g Co.*,[17] the Court reversed a rapidly expanding doctrine developed in the lower courts and held that an employer may not use after-acquired evidence of an employee's wrongdoing as a defense or justification for intentional discrimination. Finally, in *Harris v. Forklift Sys., Inc.*,[18] the Court instructed the lower courts that sexual harassment plaintiffs are not required to prove psychological injury to state a claim.

The Court's interpretive role, of course, has not always gone unchallenged. The constitutional checks and balances of our system permit the democratically elected legislative branch to override interpretations that conflict with Congress's view of how the anti-discrimination goals of the nation should be implemented. Thus, Congress has acted to limit Court rulings that stated: pregnancy discrimination is not necessarily discrimination based on sex;[19] an employer does not have the burden of persuasion on the business necessity of an employment practice that has a disparate impact;[20] an employer avoids liability by showing that it would have taken the same action absent any discriminatory motive;[21] and age discrimination in fringe benefits is not unlawful.[22]

The articles in this volume demonstrate the array of complex issues confronting courts and litigants in the realm of employment law today: employee access to benefits such as health insurance and pensions after the termination of employment; school boards' liability for damages under Title IX when a teacher sexually harasses a student; the circumstances under which employers may be liable under Title VII for their supervisory employees' sexual harassment of their subordinates; the extent to which the Americans with Disabilities Act may

15. 519 U.S. 337 (1997).
16. 517 U.S. 308 (1996).
17. 513 U.S. 352 (1995).
18. 510 U.S. 17 (1993).
19. *See* General Elec. Co. v. Gilbert, 429 U.S. 125 (1978); Nashville Gas Co. v. Satty, 434 U.S. 136 (1977), *overruled by* The Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k).
20. *See* Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989), *overruled by* §§ 104 -105 of the Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(k).
21. *See* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), *overruled in part by* § 107 of the Civil Rights Act of 1991, 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B).
22. *See* Public Employees Retirement Sys. of Ohio v. Betts, 492 U.S. 158 (1989), *overruled by* Older Workers Benefits Protection Act of 1990, 29 U.S.C. § 623(f)(2).

protect an employee who is HIV-positive when he works in a produce department or as a surgical technician; and the burgeoning use of mandatory arbitration agreements as an alternative mechanism for resolving some of these thorny disputes. The last topic merits particular attention. The growing popularity of arbitration in employment law is rooted in the Supreme Court's 1991 decision that statutory discrimination claims may be submitted to arbitration.[23] Despite the widespread adoption of arbitration agreements, it seems obvious that most complicated issues of statutory construction will remain within the province of the courts, and that ultimately either the Supreme Court or Congress will revisit the question of the propriety of submitting questions and cases arising out of our nation's commitment to equal employment opportunity to arbitration rather than to Article III judges.

Whatever the lessons of the decisions under review in this volume, the larger lesson of the history alluded to above, of the interplay of decisional law and congressional response, is that nothing is ever "finally" resolved in the realm of employment law, in part because of the perpetually evolving sensitivities of public policy makers to the terrible human and economic cost of workplace discrimination.

23. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).