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Rethinking the Giant Mess That is Employment Discrimination Law

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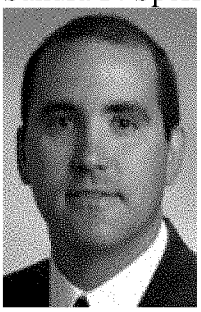
Sandra F. Sperino, *Rethinking Discrimination Law* (forthcoming Mich. L. Rev. 2011), available on SSRN.



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Employment discrimination law is a big, confusing mess. That probably doesn't come as a shock to most readers of this site. The discrimination literature is filled with attempts to vilify, clarify, or unify the existing law in this area. In her forthcoming article, *Rethinking Employment Discrimination Law*, Professor Sandra F. Sperino displays little interest in doing either of the latter. But she's also clearly interested in doing more than just vilifying the existing state of affairs.

Sperino begins by noting the development of the familiar frameworks or rubrics that courts use to evaluate discrimination claims. Of course, we are talking about *McDonnell Douglas*, *Griggs*, et al. She argues that "discrimination analysis has been reduced to a rote sorting process," with the result being that "the key question in modern discrimination cases is often whether the plaintiff can cram his or her facts into a recognized structure and not whether the facts establish discrimination." (P. 2.) This approach raises at least two problems. First, it results in a huge expenditure of (arguably wasted) time and effort on the part of judges, lawyers, and litigants. Second – and the problem Sperino primarily focuses on – is that the approach results in courts failing to recognize or even consider new theories of discrimination. In other words, by focusing so heavily on the frameworks themselves, courts have lost sight of what discrimination law is supposed to be about and what the frameworks were theoretically designed to accomplish.

Sperino provides a few examples of this approach, including the unwillingness to even consider the possibility of recognizing a claim of negligent discrimination. The courts' unrelenting focus on fitting a claim within existing frameworks, Sperino argues, has blinded courts to the possibility that discrimination occurs in a variety of ways.

Similar problems exist with respect to workplace retaliation law. There, courts spend too much time trying to define a plaintiff's conduct by reference to the statutory terms used to define protected conduct (opposing unlawful conduct, participating in a proceeding, filing a complaint, etc.) rather than looking to the underlying concerns that led to the prohibitions on employer retaliation in the first place. All too often, the results are the unnecessary expenditure of effort on the part of all parties involved and the dismissal of claims involving employer conduct that should clearly be prohibited. But at least in the retaliation context, the courts' tendencies are driven by the need not to stray too far from the statutory text. In the discrimination context, however, the fault lies primarily with the courts, which are responsible for having devised the existing frameworks to begin with. Congress certainly bears its share of the blame for its failure to unify the law in the field. But the

frameworks were initially developed by the courts, and it is the courts' rote application of these frameworks that is Sperino's primary concern.

There is already a wealth of scholarship devoted to exploring how *McDonnell Douglas* can be reconciled with *Price Waterhouse* and *Desert Palace* and *Gross* and *Griggs* and, oh yeah, where do the ADEA and ADA fit in to all of this? Some of it is quite good. But I increasingly find myself caring less about employment discrimination law primarily because the area increasingly seems to be less about employment discrimination. Instead, it seems to be more about what Sperino calls "litigating by frameworks." (P. 27.) Sperino's article represents a much-needed call to return to first principles. Instead of trying to make sense of the jumble of law that we call employment discrimination law, Sperino suggests a simpler approach that would refocus courts on what should be the fundamental question in every case: whether an employee suffered an adverse employment action because of a protected trait.

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