

THE EMPLOYMENT RELATION AND ITS ORDERING AT CENTURY'S END: REFLECTIONS ON EMERGING TRENDS IN THE UNITED STATES

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Abstract: *The enormous success of the United States economy in producing new jobs has focused world-wide attention on the flexibility of the American labor market, and on the malleability of the legal order that regulates it. Despite our reputation for sparse public regulation of the employment relationship, however, the past decade has been a period of unprecedented judicial and legislative activity. The United States now has more formal employment regulation than ever before. The following piece places these developments in the context of a decline in the practice of private law-making, and identifies four movements that have emerged and which characterize the developments of this period.*

I. INTRODUCTION AND OVERVIEW

During the past decade, the United States increasingly has become regarded as a model for post-industrial social and economic arrangements. The success of the American economy in producing new jobs has focused much attention on the flexibility of our labor market, as well as on the malleability of the legal order that shapes and governs it. As is generally well known, the United States historically has provided comparatively meager formal legal protections of the employment relationship. Foreign observers typically characterize us as a "hire and fire" society, and one well-informed German governmental official recently remarked that the United States is noteworthy for "its

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rigid deregulation of the labor market."¹ Some years ago, another equally knowledgeable German scholar stated that when it comes to labor and employment law, the United States represents something of a developing country.²

Developing we may be, but in the field of the public regulation of the employment relationship, development certainly has occurred during the period under review. Indeed, when it comes to labor and employment ordering matters, the theme of the past decade may be that reputation and reality do not always neatly coincide. Despite our renown for relatively abstemious public intervention in workplace relationships and our general preference for private ordering, the previous ten to fifteen years has been a period of unusual legislative and judicial activity. Two not wholly unrelated developments account for much of the growth in the juridification of employment relations that has occurred in the United States during this time.³ The first of these has been the persistent decline in unions and in the practice of, and support for, collective bargaining. The erosion of this institution has had a considerable impact on other trends in employment ordering during the past two decades. What might be termed the employee rights revolution constitutes the second of these developments. To be understood properly, its unfolding must be seen in the context of the general growth of legally cognizable individual rights, which so strongly has characterized the past thirty or so years of the American legal and political scene. In recent years, the extension of these rights to the employment relationship has come about not through collective activity and private negotiation, but by state action.

At one point, the institution of collective bargaining played a major role in shaping the employment relationship of unionized and non-unionized employees alike, including that of managerial employees. Thus, although union density rates never exceeded about one-third of the private sector workforce, the self-determined patterns of wages, working conditions and due process in disciplinary and discharge matters established through collective agreements set stan-

¹ Edmund L. Andrews, *Choice for Economics Post Spurs Offer by Schröder*, N.Y. TIMES, Oct. 20, 1998, at A3.

² Dieter Reuter, *Gibt es eine arbeitsrechtliche Methode?* [Is there a legal scientific method for labor law?], in *FESTSCHRIFT FÜR MARIE LUISE HILGER UND HERMANN STUMPF* 573, 586 (Thomas Dieterich et al. eds., 1983).

³ See generally Spiros Simitis, *Juridification of Labor Relations*, in *JURIDIFICATION OF SOCIAL SPHERES* 113 (Gunther Teubner ed., 1987).

dards which affected nearly everyone performing market work.⁴ This wide-reaching influence reflected the Congressional choice, embodied in the 1935 National Labor Relations Act ("NLRA"),⁵ for a private law-making system that would involve minimal state intervention in the employment relationship. A key feature of this institution is its private dispute resolution scheme, the grievance arbitration process that the employer and union jointly administer. This process commonly has jurisdiction over nearly every sort of dispute that might arise concerning the employment relationship, including employee discharge and disciplinary matters. The presence of arbitration machinery generally precludes the courts or other arms of the state from adjudicating matters that fall under its jurisdiction.⁶

As noted, at their height, unions represented slightly better than a third of the private sector workforce. Consistent with a trend that began in the early 1960s, however, union density rates continued to fall during the 1990s, but at a faster pace than observers had expected at the beginning of the decade. Presently, just over ten percent of private sector employees are unionized. This long-term and ongoing drop in union membership is part of a much broader and more deeply troubling trend that has affected nearly every sort of "mediating group"⁷ in the United States—such as families, neighborhoods, religious congregations, social and civic clubs and similar sorts of voluntary sodalities.

As the significance of collective bargaining has receded, statutes (especially against various forms of employment discrimination) and innovations in common law doctrines (primarily concerning discharge protections) have come to occupy some, but not all, of the field it once dominated. At the same time, the enervation of this institution has helped to shift the initiative to public regulation. Since 1990, for example, three major federal employment law statutes have

⁴ See generally S. SLICHTER ET AL., *THE IMPACT OF COLLECTIVE BARGAINING ON MANAGEMENT* (1960).

⁵ See 29 U.S.C. §§ 151–169 (1994).

⁶ See *infra* notes 77–88 and accompanying text.

⁷ A "mediating group" is so-called because such bodies "mediate" the relation between individuals and the large institutions of the state and the market. On this theme, see Thomas Kohler, *Civic Virtue at Work: Unions as Seedbeds of the Civic Virtues*, in *SEEDBEDS OF VIRTUE* 131 (Mary Ann Glendon & David Blankenhorn eds., 1995), and Thomas Kohler, *The Overlooked Middle*, in *THE LEGAL FUTURE OF EMPLOYEE REPRESENTATION* 224 (Matthew Finkin ed., 1994).

been enacted: the Americans with Disabilities Act of 1990;⁸ the Civil Rights Act of 1991;⁹ and the Family and Medical Leave Act of 1993.¹⁰ Similarly, several important decisions of the United States Supreme Court have continued the development of employment discrimination law doctrine, especially in the relatively new and highly significant area of sexual harassment law.

We also have seen a steady increase in the rates of employment-related litigation before the courts. This trend began well before the survey period but has continued throughout it. Between 1970 and 1989, for instance, the overall caseload in federal courts grew by 125%.¹¹ During the same period, the employment discrimination caseload before those courts grew by 2,166%.¹² In 1989, there were 8,993 employment discrimination matters filed in federal courts; in 1997, plaintiffs filed 24,174 cases. Presently, approximately one in every eleven civil cases on federal court dockets involve a question of employment discrimination.¹³

Nor does employment discrimination represent the only area of growth in employment-related litigation, and hence, in actual or potential state intervention in the employment relationship. From a regulatory standpoint, much of the flexibility associated with the American labor market grows out of the employment at-will rule. As will be explained more fully below, this rule had the effect of shielding most discharge decisions from legal challenge because it created the presumption that either party to the employment relationship could terminate it at any time, and for any reason, even bad or morally repugnant ones.

The at-will rule has been a feature of American common law for more than a century. Beginning in the mid- to late 1970s, however,

⁸ See generally Pub. L. No. 101-336, § 2, 104 Stat. 327 (codified at 42 U.S.C. §§ 12101-12213 (1994)) ["ADA"]. Title I of the ADA covers employment and applies to any employer "in an industry affecting commerce who has 15 or more employees"

⁹ See generally Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 42 U.S.C. (1994)). The 1991 Act was intended to modify and augment the provisions of Title VII of the Civil Rights Act of 1964 [hereinafter Title VII], which forbids discrimination in employment on the basis of race, color, creed, sex or national origin. See 42 U.S.C. §§ 2000e-2000e-17 (1994).

¹⁰ See generally Pub. L. No. 103-3, 107 Stat. 6 (codified at 29 U.S.C. §§ 2611-2654 (1994)).

¹¹ See John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 985 (1991).

¹² See *id.*

¹³ See Richard T. Seymour & Barbara Berish Brown, *Equal Employment Law Update*, 1998 A.B.A. SEC. LAB. & EMPLOYMENT L. vi-vii (BNA, Spring ed.).

courts slowly began to recognize exceptions to this once sacrosanct doctrine, a trend which grew considerably during the following decade. Prior to 1980, wrongful discharge actions were almost unknown in the United States. In contrast, one study found that in 1992, there were 20,000 wrongful discharge cases on court dockets.¹⁴ Research conducted by another distinguished group revealed that of the wrongful discharge cases that went to a jury trial in California, plaintiffs were successful 70% of the time, and won verdicts in amounts that averaged between \$300,000 to \$500,000.¹⁵

In sum, it is safe to say that at the century's end, the United States has more formal employment law than ever before. Moreover, and contrary to widely-held assumptions about employer behavior, the remarkable increase in job growth in the United States has occurred during a period of unparalleled expansion of formal regulation of the employment relationship. If recent experience serves as any guide, it may well be that the relationship between job creation and employment regulation is less direct, or at least considerably more complicated than typically is portrayed.

The profile of those most likely to pursue claims under this growing body of law, however, strongly tends to follow the patterns of income distribution. Thus, litigants pursuing employment discrimination claims today tend to be relatively better educated and compensated employees who are challenging their discharges from employment rather than an initial failure to be hired.¹⁶ Similarly, some observers estimate that 60 to 80% of successful plaintiffs in wrongful discharge cases are middle or upper managerial or professional employees, and that lower-level workers "only infrequently" prevail in such cases, which they are in any event less likely to bring.¹⁷

In reviewing and evaluating the past decade, we can identify the emergence of four movements or thematic developments that more or less characterize the trends of this period. The first represents attempts to ensure access to and continued participation in the paid

¹⁴ See JAMES N. DERTOUZOS & LYNN A. KAROLY, RAND INSTITUTE FOR CIVIL JUSTICE, LABOR-MARKET RESPONSES TO EMPLOYER LIABILITY 35 (1992).

¹⁵ See MODEL EMPLOYMENT TERMINATION ACT, Prefatory Note at 424, 7A Part 1, U.L.A. 421 (1999).

¹⁶ Cf. Donohue & Siegelman, *supra* note 11, at 983.

¹⁷ See MODEL EMPLOYMENT TERMINATION ACT, *supra* note 15, at 424. The committee that framed the Model Employment Termination Act also estimated that "two million nonprobationary, nonunion, non-civil service [i.e., non-state employees] are estimated to be discharged annually", of whom 150,000-200,000 would have well-founded wrongful discharge claims. See *id.*

labor force, particularly for women and people with disabilities. Legislation passed at the beginning of the decade, like the Americans with Disabilities Act and the Family and Medical Leave Act, are symbolic of these efforts, but they also include various initiatives voluntarily instituted by employers such as on-site daycare, telecommuting, and the institution of similar sorts of flexible work arrangements. A second movement is the use of wrongful discharge actions and employment discrimination charges by middle- and upper-level employees as a means to challenge dismissal decisions. A third theme concerns arguments and the growing uncertainty over the role of law and the efficacy of courts in handling disputes growing out of the employment relationship. As will be seen, one of the most controversial developments in this area concerns the "privatization" of public law, through the use of agreements which require employees to submit all disputes arising out of the employment relationship to binding private arbitration. A fourth theme, which suffuses the entire field, involves questions about whether and to what degree changes have occurred in the nature and stability of the employment bond.¹⁸

In the discussion that follows, the paper will attempt briefly to address these themes. In the next section, the paper will turn to a consideration of the major legislative and judicial developments of the past decade which are intended to ensure access to market work. This section will have a special concentration on recent developments in employment discrimination law. The third section will outline the growing doubts about the role of law and the public regulation of the employment relationship. The final section will provide a brief assessment of where we are and the questions that now confront us.

II. ENSURING ACCESS TO EMPLOYMENT: LEGISLATIVE AND JUDICIAL DEVELOPMENTS

If anything seems clear about the trends in American society that have emerged during the past quarter-century, it is that one's life takes on publicly intelligible meaning largely through participation in market work. The job not only constitutes one's chief claim to wealth, but is also the prime determinant of one's status. Consequently, to be outside the paid labor force is to be outside of, or at least to stand on the fringes of, society. A life given over to the performance of unpaid work, such as caring for family members, for example, or to doing

¹⁸ On this topic, see Thomas C. Kohler & Matthew W. Finkin, *Bonding and Flexibility: Employment Ordering in a Relationless Age*, 46 AM. J. COMP. L. 379, 396-401 (1998).

caritative work in the fashion once undertaken by religious orders, has at best an ambiguous significance in the minds of many people today. Similarly, to be excluded from market work on the grounds of various forms of invidious discrimination has come to be regarded as a harm with more than merely economic ramifications. As markets have become the focal point of contemporary culture, protecting and furthering individual choice has become a primary goal of the law. At the same time, the law increasingly has come to understand persons, in terms of their being market actors, and to comprehend the character of those actors in their complementary roles as producers and consumers.

The federal employment legislation enacted during the 1990s clearly reflects these attitudes and concerns. In their own way, each of these pieces of legislation seeks to keep open the channels to labor force participation, particularly for segments of the population whose involvement in market work historically has been limited. We will here turn to a brief description of these statutes.

A. Legislation

The Americans with Disabilities Act ("ADA") of 1990 provides a good example of the sort of legislative effort described above. The ADA is a far-reaching statute whose provisions are intended "to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for . . . individuals [with disabilities]."¹⁹ In furtherance of this goal, the statute, among other things, prohibits discrimination in the furnishing of public services and requires various affirmative steps to make public accommodations, means of mass transit and telecommunications facilities accessible to the disabled.

Title I of the statute contains the Act's provisions concerning employment. In contrast to continental approaches such as that embodied in German law,²⁰ which tend to encourage the employment of the disabled through the use of incentives and quotas and to levy fixed fees against employers who fall short of the statutorily established goals,²¹ the ADA follows the pattern of Title VII of the Civil

¹⁹ 42 U.S.C. § 12101(a)(8) (1994).

²⁰ See Gesetz zur Sicherung der Eingliederung Schwerbehinderter in Arbeit, Beruf und Gesellschaft [Law to Secure the Integration of the Disabled in Work, Career and the Community] (Schwerbehindertengesetz), v. 26.8.1986 (BGBl. I S.1421, amended by BGBl. I S.3158, v. 19.12.1997).

²¹ See *id.* § 2.

Rights Act of 1964.²² Consequently, an employer's failure to comply with Title I of the statute is treated as an actionable civil wrong.²³ Remedies under Title VII and the ADA are identical, and include not only such traditional employment law remedies as reinstatement and backpay, but tort-like compensatory and punitive damages as well, the latter of which are subject to certain statutory limits.²⁴

The ADA covers nearly all employers with fifteen or more employees and prohibits discrimination in all aspects of employment against any "qualified individual with a disability."²⁵ A disability is defined by the statute as "a physical or mental impairment that substantially limits one or more of the major life activities" of an individual and includes having had "a record of such impairment" and "the perception of having had such an impairment."²⁶ A "qualified individual" for the purposes of the statute is one who "with or without reasonable accommodation, can perform the essential functions" of the position the individual holds or desires.²⁷ Among other things, employers have an affirmative obligation to make "reasonable accommodation" for "the known physical or mental limitations" of applicants and employees, so long as its implementation would not constitute an "undue hardship" for the employer.²⁸

²² See Donohue & Siegelman, *supra* note 11. Thus, *inter alia*, the ADA finds that like racial minorities, "individuals with disabilities are a discrete and insular minority" who have been "subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society." 42 U.S.C. § 12101(7), 2000e-5(f)(1) (1994).

²³ Like Title VII, enforcement of Title I of the ADA comes under the authority of the federal Equal Employment Opportunity Commission ["EEOC"], and the ADA incorporates the same procedures and remedies stated in Title VII. See 42 U.S.C. § 12117 (1994). Persons alleging discrimination in violation of the ADA are required to file a charge with the EEOC, which is to conduct an investigation, and to seek conciliation if "reasonable cause" exists to conclude that unlawful discrimination has occurred. See 42 U.S.C. § 2000e-5. Upon the alleged victim's request, however, the EEOC will issue a "right to sue" letter, which permits the aggrieved party the right to pursue a civil action in federal court. See 42 U.S.C. § 12117.

²⁴ The Civil Rights Act of 1991 makes jury trials, as well as compensatory and punitive damages, available in cases of intentional discrimination under both Title VII and the ADA. See 42 U.S.C. § 1981(a)(1) (1994). Damages are subject to the following limits: for employers with 15-100 employees, \$50,000; 101-200 employees, \$100,000; 201-500 employees, \$200,000; more than 501, \$300,000. See 42 U.S.C. § 1981(b)(3) (1994).

²⁵ See 42 U.S.C. § 12112(a) (1994).

²⁶ See 42 U.S.C. § 12102(2) (1994).

²⁷ See 42 U.S.C. § 12111(8) (1994).

²⁸ See 42 U.S.C. § 12111(9), (10) (1994).

Space precludes anything but the most cursory discussion of this important statute. The generality of its provisions, however, coupled with the fact-specific character of the inquiry they require, make them subject to what United States Supreme Court Justice Felix Frankfurter once termed "the process of litigating elucidation."²⁹ Litigation has followed in the statute's wake, but at least to date, the results are not what many had expected.³⁰ Despite the breadth of the statute's provisions, a recently published study of 1,200 cases showed that employers prevailed in 92% of the ADA Title I cases decided in federal court and in 86% of the cases resolved by the federal Equal Employment Opportunity Commission.³¹ Perhaps not surprisingly, the courts have come under criticism from various quarters for having too narrowly interpreted and applied the ADA's provisions, while others have called attention to asserted shortcomings in the language of the statute itself. Nevertheless, in light of its comprehensive nature, and factors such as the aging of the work force, the ADA can be expected to play a prominent role in employment ordering matters.

The Family and Medical Leave Act ("FMLA") is the second piece of significant employment legislation enacted during the past decade.³² Briefly stated, the Act covers employers with fifty or more employees. It entitles persons who have worked for the affected employer for more than a year to take up to twelve weeks of uncompensated leave in the following circumstances: on the birth or the adoption of a son or daughter; where necessary to care for an immediate family member or a parent who is suffering from "a serious health condition"; and, where "a serious health condition" has rendered the employee unable to work.³³ Either an aggrieved individual employee or the United States Department of Labor may bring an action to enforce the statute.³⁴ Remedies include reinstatement, the award of lost

²⁹ See *International Assoc. of Machinists v. Gonzalez*, 356 U.S. 617, 619 (1958).

³⁰ Since the ADA's effective date of 1992, charges filed under its provisions have constituted approximately one-fifth of the filings made by individuals with the EEOC. See *EEOC Charge Statistics FY1992 through FY1999* (visited Feb. 2, 2000) <<http://www.eeoc.gov/stats/charges/html>>.

³¹ See *Study Finds Employers Win Most ADA Title I Judicial and Administrative Complaints*, 22 MENTAL AND PHYSICAL DISABILITY L. REP. (A.B.A.) 403, 403 (1998). One lawyer who represents management stated that such a success rate was "expected" and attributed it to "meritless ADA claims" that were included as part of the allegations in unfair-discharge or employment discrimination cases. See Darryl Van Duch, *Corporate Brief: Employers Win in Most ADA Suits*, NAT'L L.J., June 29, 1998, at B1.

³² See 29 U.S.C. §§ 2601-2654 (1994).

³³ See 29 U.S.C. § 2612(a)(1).

³⁴ See 29 U.S.C. § 2617.

wages and benefits, and actual monetary losses sustained by the employee as a result of a violation. Double damages can be awarded unless the employer had "reasonable grounds for believing" that its actions were not unlawful.³⁵

The FMLA provides a good example of the substitution by statute for the sorts of arrangements that once were left to negotiation through collective bargaining. Previously, patterns would have been allowed to develop in the unionized context which, once established, gradually would have been adopted by larger, non-unionized employers. The FMLA also provides an excellent window on social and workplace trends. Among the findings embodied by the statute are that "the number of single-parent households and two-parent households in which the single parent or both parents work is increasing significantly" and that "the lack of employment policies to accommodate working parents can force individuals to choose between job security and parenting."³⁶ The statute is also remarkable for recognizing that "the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men."³⁷ Intervening to integrate and to maintain women in market work represents the statute's underlying purpose. Although not as generous as the types of statutorily guaranteed leaves found in some other advanced economies, the FMLA was surprisingly controversial, and represents the first federal legislation of its type in the United States.

The Civil Rights Act of 1991 represents the third significant piece of employment legislation enacted at the federal level during the survey period.³⁸ Succinctly described, the Act legislatively reversed several rulings made by the United States Supreme Court during its 1989 term, which critics regarded as having weakened established protections against employment discrimination under Title VII of the Civil Rights Act of 1964 and related statutes.³⁹ Present circumstances per-

³⁵ See 29 U.S.C. § 2617(a)(1).

³⁶ See 29 U.S.C. § 2601(1), (3) (1994).

³⁷ 29 U.S.C. § 2601(5) (1994).

³⁸ See Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 42 U.S.C. (1994)).

³⁹ See generally *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) (restricting the coverage of a provision of the Civil Rights Act of 1866 solely to cases of contract formation, and not to post-formation conduct); *Lorance v. AT&T*, 490 U.S. 900 (1989) (addressing the statute of limitations for challenging an allegedly discriminatory seniority system); *Martin v. Wilks*, 490 U.S. 755 (1989) (concerning the ability of persons not parties to a case to object to settlements of employment discrimination cases); *Wards Cove Packing Co. v.*

mit only a brief mention of some of this Act's most significant provisions.

As previously noted, the 1991 Act provides for jury trials and makes compensatory and punitive damages available in cases alleging intentionally unlawful discriminatory acts under Title VII and the ADA.⁴⁰ Additionally, the 1991 Act signaled Congressional approval of the use of "disparate impact" analysis, which the United States Supreme Court developed in its landmark 1971 opinion *Griggs v. Duke Power Co.*⁴¹ Disparate impact focuses solely on discriminatory outcomes and not the existence of unlawful intent. It prohibits the use of employment practices that are "fair in form, but discriminatory in operation,"⁴² unless the employer can show that the challenged practice is "job related for the position in question and consistent with business necessity."⁴³ In addition, the 1991 Act extends the protections of Title VII and the ADA to U.S. citizens working abroad for American companies, and it contains various provisions concerning employment testing policies, proof requirements, and the availability of certain forms of injunctive relief in employment discrimination cases. It also specifically provides that nothing in its provisions should be construed to affect any court-ordered affirmative action programs. Nevertheless, affirmative action remains one of the most contentious issues in American society, and the contours of the law concerning the voluntary use of affirmative action programs is not wholly clear.⁴⁴

Antonio, 490 U.S. 642 (1989) (concerning the scope of "disparate impact" theory in Title VII litigation); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (establishing burden of proof requirements).

⁴⁰ See Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 42 U.S.C. (1994)); Pub. L. No. 101-336, § 2, 104 Stat. 327 (codified at 42 U.S.C. §§ 12101-12213 (1994)).

⁴¹ 401 U.S. 424 (1971).

⁴² See *id.* at 431.

⁴³ See 42 U.S.C. § 2000e-2(k)(1)(A)(i) (1994). In the alternative, the 1991 Act also allows the plaintiff/employee to prevail under a disparate impact theory if she can show that (1) an alternative practice would have a lesser impact on a protected group and (2) that the defendant/employer refuses to adopt the alternative practice. See 42 U.S.C. § 2000e-2(k)(1)(A)(ii) (1994).

⁴⁴ As commentators have noted, some provisions of the Civil Rights Act of 1991 can be read to call the legality of voluntary race or sex-based plans into question. The legality of the use of these plans by private employers is governed by Title VII, not the United States Constitution. To be lawful under present Court rulings, such programs must be conducted according to a stated plan that is temporary in nature, narrowly tailored to accomplish its purposes, does not "unduly trammel" the interests of those not covered, and must have an adequate factual basis for its use. A "manifest imbalance" in "traditionally segregated job categories," for example, has been held to constitute a sufficient basis for use of affirmative action plans. See, e.g., *Johnson v. Transportation Agency*, 480 U.S. 616, 632 (1989) (involv-

Like most legislation, and perhaps particularly that touching on employment, the 1991 Civil Rights Act represents the product of a series of legislative compromises. As is so often the case in such circumstances, the drafting process left several open questions whose resolution will come only over time, and at the hands of the courts. Despite the legislative innovations it contains, the 1991 Act is in some core respects backward-looking. Not only does it represent a reaffirmation of the values that illuminated Title VII of the 1964 Civil Rights Act, but, assuming a model of relatively long-term, stable employment relationships, it also accepts and confirms the basic approaches taken by that landmark piece of legislation to remedying the problems of workplace discrimination, and extends their application to contemporary circumstances.

B. *Judicial Activity*

If the legislative developments of the past decade can be characterized as efforts to open access to market work and ensure continued participation in it, then that theme even more strongly stamps many of the leading employment law cases issued by the United States Supreme Court during this period. The Court's landmark opinion in *International Union, UAW v. Johnson Controls* provides an important example of this trend.⁴⁵ This case involved a challenge to a fetal protection policy which barred fertile women from working in areas of the employer's battery plant where they—and any fetus they might be carrying—could be exposed to lead. The plaintiffs and their union alleged that the policy constituted unlawful sex discrimination under Title VII.

Although both the trial court and the federal court of appeals upheld the employer's policy, the Supreme Court had little difficulty concluding that it was unlawful.⁴⁶ Interpreting the 1978 Pregnancy Discrimination Act's amendments to Title VII,⁴⁷ the Court stated that "women as capable of doing their jobs as their male counterparts may

ing a sex-conscious affirmative action plan); *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 197 (1979) (involving a race-conscious affirmative action plan). For a discussion of constitutional standards governing the review of race-conscious affirmative action plans of governmental actors, see generally *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

⁴⁵ 499 U.S. 187, 200 (1991).

⁴⁶ See *id.* at 193–96.

⁴⁷ Pub. L. No. 95–555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e–(k) (1978)).

not be forced to choose between having a child and having a job."⁴⁸ The employer's "professed moral and ethical concerns about the welfare of the next generation,"⁴⁹ the Court ruled, did not state a legal grounds for excluding fertile women from performing the work in question. "Decisions about the welfare of future children," it instructed, "must be left to the parents who conceive, bear, support, and raise them rather than to the employers who hire those parents."⁵⁰

The Court closed its opinion by remarking that its holding was "neither remarkable nor unprecedented. Concern for a woman's existing or potential offspring," it stated, "historically has been the excuse for denying women equal employment opportunities."⁵¹ The law makes clear, the Court continued, that it would be "no more appropriate for the courts than it is for individual employers to decide whether a woman's reproductive role is more important to herself and her family than her economic role. Congress has left this choice to the woman as hers to make."⁵² The opinion also makes clear that the additional costs that might be associated with employing members of one sex cannot provide an affirmative defense for the refusal to hire them.⁵³ Among its many implications, *Johnson Controls* makes clear that individual choice—at least in formal terms—constitutes one of the key values of the legal system.

Perhaps the most important developments in the field of employment discrimination during the past decade, however, have come in the heavily discussed and frequently controversial area of sexual harassment law. The statutory basis for this law rests on the interpretation and application of Title VII, which forbids an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."⁵⁴ The prohibition against sexual discrimination was a last-minute addition to the Act by its legislative opponents, who had hoped that its inclusion would result in the statute's defeat. Despite the addition of the new category and the lack of any debate about its scope and meaning, the

⁴⁸ *Johnson Controls*, 499 U.S. at 204.

⁴⁹ *Id.* at 206.

⁵⁰ *Id.*

⁵¹ *Id.* at 211.

⁵² *Id.*

⁵³ Cf. *International Union, UAW v. Johnson Controls*, 499 U.S. 187, 211–19 (1991) (White, J., Rehnquist, C.J., Kennedy, J., concurring).

⁵⁴ 42 U.S.C. § 2000e-2(a)(1) (1994).

amended version of Title VII quickly was passed and became law. Bereft of legislative history to guide it, the interpretation of Title VII's prohibition of sexual discrimination has posed some considerable challenges for the judiciary. These difficulties have been exacerbated by the fact that the topic itself represents something of a moving target, the contours of which have evolved dynamically during the past thirty years. An additional complexity lies in the fact that the analogies between racial and sexual discrimination are at best inexact and often completely lacking.

The United States Supreme Court's first opinion concerning sexual harassment came in its 1986 opinion in *Meritor Savings Bank v. Vinson*.⁵⁵ It was "[w]ithout question," the Court stated, that "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex."⁵⁶ This is so even if the subordinate suffers no tangible economic loss.⁵⁷ The statutory phrase, "terms, conditions, or privileges of employment," the Court instructed, was intended "to strike at the entire spectrum of disparate treatment of men and women" in employment.⁵⁸ Consistent with the theme of removing barriers to participation in market work, the Court stated that the goal of Title VII is to guarantee "employees the right to work in an environment free from discriminatory intimidation, ridicule, or insult."⁵⁹ Noting that racial harassment long had been held to constitute a violation of Title VII, the Court observed that "[s]exual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality."⁶⁰ Consequently, behavior that is sufficiently severe or pervasive to create a discriminatorily hostile or abusive work environment is actionable under Title VII.

Meritor established the basic analytical and conceptual patterns for sexual harassment cases. Subsequent opinions have confirmed its holding and made clear that actionable harassment need not "seriously affect [an] employee['s] psychological well-being."⁶¹ So long as

⁵⁵ 477 U.S. 57, 73 (1986).

⁵⁶ *Id.* at 64.

⁵⁷ *See id.*

⁵⁸ *Id.* (quoting *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)).

⁵⁹ *See id.* at 65.

⁶⁰ *See Meritor Savings Bank*, 477 U.S. at 67 (quoting *Henson v. Dundee*, 682 F.2d 897, 902 (11th Cir. 1982)).

⁶¹ *See, e.g., Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993).

a reasonable person would perceive the work environment as hostile or abusive, it is actionable.⁶² In its most recent opinions in this area, the Supreme Court has made clear that harassment by members of the same sex is actionable⁶³ and has further clarified the analytical framework to be used to determine whether an employer can be vicariously liable for the harassing conduct of its supervisory employees.⁶⁴

This area of discrimination law can be expected to remain of considerable legal significance and to be a topic of continued academic research and debate. Recent domestic events have made questions about sex and the workplace matters of widespread discussion and debate and the Court's approach to the area has come under considerable critical scrutiny.⁶⁵

III. MODESTY OR ABANDONMENT? GROWING DOUBTS ABOUT THE ROLE OF LAW IN THE EMPLOYMENT RELATIONSHIP

The early years of the past decade constituted a period of unusual legislative activity in the area of employment regulation. This movement toward increased public intervention in various aspects of the employment relationship, however, has not been without its significant countercurrents. Doubts about the proper role of the law in employment have arisen in various quarters of the society, including both the judicial and legislative branches of government. In this section, the paper will discuss briefly the grounds for these doubts, and the ways in which they have been expressed.

A. Legislative Initiatives in Broad Outline

Any review risks leaving something of significance unmentioned. With this caveat in mind, four legislative initiatives might be noted that reflect doubts about the role of the law in the employment relationship, and which attempt to curb the reach of public intervention in that relationship.

⁶² See *id.*

⁶³ See *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998).

⁶⁴ See *Faragher v. City of Boca Raton*, 524 U.S. 775, 807-09 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764-65 (1998).

⁶⁵ See generally, e.g., Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683 (1998); Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691 (1997).

The first of these initiatives would amend the key structural provision of the nation's basic labor-relations law: Section 8(a)(2) of the National Labor Relations Act.⁶⁶ Although only one sentence long, Section 8(a)(2) was the most controversial provision of the NLRA at the time of its framing in 1935. Designed to ground the integrity of the collective-bargaining process, it requires that any form of group dealings between an employer and its employees occur through bodies that are independent of the employment relationship. The statute thereby made unlawful an extensive variety of employer-initiated and sponsored worker-participation schemes that had been developed as alternatives to collective bargaining.

Since Section 8(a)(2) casts doubt on the legality of the use in non-unionized settings of many popular participative devices, such as joint employer-employee committees, quality circles and the like, its provisions have once again become a matter of some controversy.⁶⁷ Unions strenuously have opposed any attempts to amend this provision and President Clinton vetoed a largely Republican sponsored bill that would have done so in 1996. Subsequent bills have died in Congress, but efforts to amend Section 8(a)(2) will continue.

Another piece of New Deal employment legislation that has come under scrutiny during the latter part of the 1990s is the Fair Labor Standards Act of 1938 ("FLSA").⁶⁸ In contrast to the practice in other developed countries, such as Germany, the United States long has used federal legislation to establish national wage and hour floors. Under current law, employers are required to compensate employees covered by the terms of the FLSA "at a rate not less than one and one-half times the regular rate" for any time worked in excess of forty hours per week.⁶⁹ A number of proposals, which have been opposed by the Clinton Administration, would modify the law to give employees uncompensated time off in lieu of the overtime pay. In a similar

⁶⁶ 29 U.S.C. § 158(a)(2) (1994).

⁶⁷ See generally, e.g., FACT FINDING REPORT: COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, REPORT AND RECOMMENDATIONS (Dep't Labor & Dep't Commerce 1994) (compiling the academic and expert opinion split regarding section 8(a)(2) by a blue-ribbon panel appointed in 1993 by the then Secretaries of Labor and Commerce in the first Clinton Administration) [hereinafter *Dunlop Report*]. In light of the low levels of union organization, many academics and others support some sort of amendment to encourage employee participation in management. See *id.* at 51-56. For further discussion, see Kohler & Finkin, *supra* note 18, at 390-91.

⁶⁸ See Fair Labor Standards Act, ch. 676, § 1, Pub. L. No. 52 Stat. 1060 (codified at 29 U.S.C. §§ 201-219 (1994)).

⁶⁹ See 29 U.S.C. § 207(a)(1) (1994).

vein, legislation has been framed that would simplify the standards used by the tax code to distinguish employees from independent contractors. The Secretary of the Treasury, among others, has criticized these proposals in part because they could too easily permit employers to exclude workers from eligibility for pensions and other benefits, and might endanger their coverage under other protective statutes.

Perhaps the most ambitiously conceived legislative initiative of the latter part of the 1990s, however, is the "American Worker Project," an eighteen-month Congressional review of federal labor and employment law and of the U.S. Department of Labor's administration of various labor statutes.⁷⁰ According to the chairman of the committee overseeing the project, the committee's task was "to take a look at the workplace, where the country needed to be in the future and to develop a positive agenda for legislative initiatives that would make the U.S. economy globally competitive in the year 2000 and beyond."⁷¹ American labor law, he also opined, "doesn't really work for anyone."⁷² In contrast to earlier review and reform efforts undertaken during the past decade,⁷³ the Project has entailed little involvement on the part of academic experts.⁷⁴

A report from the subcommittee has not yet been issued, although the Congressman chairing the Project has stated that he expects the committee to begin drafting legislation based on its findings in early 1999.⁷⁵ As the noted scholar Clyde Summers once remarked, Congress, in enacting legislation, does "not move by small steps but rather by sporadic leaps."⁷⁶ Those leaps, some might be tempted to add, have not always been preceded by a careful look. Assuming we have reached one of those notable legislative moments in employment ordering, how far and in which direction Congress might be inclined to vault is unclear.

⁷⁰ See American Worker Project (visited February 2, 2000) <http://www.house.gov/ed_workforce/oversight/awp/awp.htm>.

⁷¹ See *Labor Law: Rep. Hockstra Reports on Status of American Worker Project on Labor Law*, Daily Lab. Rep. (BNA) (Nov. 9, 1998).

⁷² See *id.*

⁷³ See generally Dunlop Report, *supra* note 67.

⁷⁴ See American Worker Project, *supra* note 70.

⁷⁵ In August 1999, subsequent to the completion of this essay, the subcommittee on Oversight and Investigations of the Committee on Education and the Workforce released its report, entitled *Securing the Future of America's Working Families*. The report is available for download at <http://www.house.gov/ed_workforce/oversight/awp/awpreport/report.pdf>.

⁷⁶ Clyde W. Summers, *A Summary Evaluation of the Taft-Hartley Act*, 11 INDUS. & LAB. REL. REV. 405, 405 (1958).

B. *Judicial Trends*

Doubts about the role of the law in the employment relationship are not confined to the legislature. At the beginning of the century, the place of the law and the courts in employment disputes was a matter of enormous controversy. Through the development of the employment at-will rule, common law courts had abandoned any role they played in employment discharge disputes prior to 1900. Similarly, the passage of the NLRA and related statutes in the early to mid-1930s largely ended the judiciary's intervention in strikes, union-organizing efforts and the like, while the NLRA's scheme afforded the courts a relatively modest role in overseeing the Act's operation. The subsequent development of the grievance-arbitration process as an essential component of the collective bargaining process further insulated the courts from direct involvement in employment-related disputes.⁷⁷

Although its framers had not originally intended it, the passage of Title VII resulted in a substantial reintroduction of the courts into employment matters, a development which subsequent legislation has continued. Spurred by the slow collapse of collective bargaining, and by instability in long-term employment relationships that accompanied the economic changes of the 1980s, the judiciary at the state level also began to reenter the employment law field. Their portal of entry, as noted, came through the creation of exceptions to the at-will doctrine.

Space constrains more than a few brief characterizations of the trends in this area. Suffice it to say that employment at-will remains the basic rule governing employment relations in the unorganized context.⁷⁸ Hence, absent express agreement otherwise, and assuming that the action does not constitute a violation of anti-discrimination law, employers generally remain free to hire and discharge at-will and to adopt, modify or negate terms and conditions of employment. The limited exceptions to the at-will rule that have developed during the past twenty years are based in contract⁷⁹ (express or implied promises in employee handbooks, statements made by supervisors, etc.), or in

⁷⁷ See, e.g., *AT&T Tech., Inc. v. Communications Workers of America*, 475 U.S. 643 (1986); "Steelworkers' Trilogy" (*Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Navigator Co.*, 363 U.S. 574 (1960); *Steelworkers v. Enter. Wheel & Car Co.*, 363 U.S. 593 (1960)).

⁷⁸ See, e.g., *Demasse v. IIT Corp.*, 984 P.2d 1138 (Ariz. 1999) (en banc) (employment contracts without express terms are presumptively at-will).

⁷⁹ See, e.g., *Toussaint v. Blue Cross & Blue Shield*, 292 N.W.2d 880, 885 (Mich. 1980).

tort⁸⁰ (for discharges in violation of public policy, or for discharges conducted in an abusive manner). A third ground, violation of an implied covenant of good faith and fair dealing, has been recognized by relatively few jurisdictions.⁸¹

During the 1980s, the highest courts of nearly all of the fifty state jurisdictions adopted some form of exception to the at-will rule. Recent opinions of these courts, however, reveal a strong movement away from any further expansion of these exceptions. They also reveal a palpable uncertainty about whether common law courts constitute a good forum in which to resolve employment-related disputes.⁸²

That sort of uncertainty has not been confined to state courts. In its 1994 draft report on the future of the federal court system, the federal Judicial Conference's Committee on Long Range Planning recommended that "Congress should refrain from providing . . . court jurisdiction over disputes involving economic or personnel relations or personal liability arising in the workplace."⁸³ Although the Committee's final report recommended only the elimination of federal court jurisdiction "over disputes that primarily raise questions of state law or involve workplace injuries," a trend toward the removal of employment cases from the courts already is underway.⁸⁴

In its 1991 opinion, *Gilmer v. Interstate/Johnson Lane Corp.*, the Supreme Court held that an employee's right to pursue a claim under the Age Discrimination in Employment Act in a federal judicial forum could be waived through the employee's agreement to arbitrate any controversy arising out of his employment.⁸⁵ In finding the agreement

⁸⁰ See, e.g., *Gardner v. Loomis Armored, Inc.*, 913 P.2d 377, 386 (Wash. 1996).

⁸¹ See, e.g., *Foley v. Interactive Data Corp.*, 765 P.2d 373, 374 (Cal. 1988).

⁸² Compare, e.g., *Rowe v. Montgomery Ward & Co., Inc.*, 473 N.W.2d 268 (Mich. 1991) (clarifying standards for finding existence of implied in-fact agreements), with *Toussaint*, 292 N.W.2d at 885 (promise not to discharge except for good cause made by express agreement, oral or written, or as a result of an employee's legitimate expectations grounded in an employer's policy statements are enforceable). See also, e.g., *Cotran v. Rollins Hudig Hall Int'l, Inc.*, 948 P.2d 412 (Cal. 1998) (criticizing *Toussaint*, and holding that where employee is hired under an implied in-fact agreement and is fired for misconduct, role of jury is not to determine whether the misconduct had in fact occurred, but rather whether employer had reasonable grounds to believe the misconduct occurred).

⁸³ COMMITTEE ON LONG RANGE PLANNING, JUD. CONF. OF THE U.S., PROPOSED LONG RANGE PLAN FOR THE FED. CTS. at 29 (1994).

⁸⁴ COMMITTEE ON LONG RANGE PLANNING, JUD. CONF. OF THE U.S., PROPOSED LONG RANGE PLAN FOR THE FED. CTS. at 34-35 (2nd ed. 1995).

⁸⁵ 500 U.S. 20, 23 (1991). The *Gilmer* opinion generated a great deal of controversy as it was thought to substantially overrule the Court's 1974 opinion, *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974). In *Gardner-Denver*, the Court had ruled that an individual employee's right to pursue an action under Title VII was not precluded by the prior submis-

to arbitrate enforceable, the Court stated that "by agreeing to arbitrate a statutory claim, [an employee] does not forgo the substantive rights afforded by the statute; [the employee] only submits to their resolution in an arbitral, rather than a judicial, forum. . . . So long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum," the Court observed, "the statute will continue to serve both its remedial and deterrent function."⁸⁶

The migration of arbitration from the collective-bargaining context to the realm of the individual employment relationship is one of the most hotly discussed developments of the past decade and views over the advisability of the "privitization" of public law are split.⁸⁷ The law in this area continues to develop, albeit to date without much further authoritative guidance from the Supreme Court.⁸⁸ As several commentators have observed, however, arbitration may provide an effective forum for the resolution of employment-related disputes, especially for lower-paid individuals who cannot afford the costs and the time entailed in bringing cases in courts.

IV. CONCLUSION: THE WAY AHEAD

In his *Commentaries*, Sir William Blackstone famously observed that the "three great relationships in private life are" those of "husband and wife," "parent and child," and "master and servant."⁸⁹ In the American context, however, there is no denying the fact that the first two of these relationships hardly are flourishing. As one group of influential observers recently reported, "the probability that a mar-

sion of his claim by his union to final arbitration under the nondiscrimination clause of a collective bargaining agreement. See 415 U.S. at 47-54. The arbitration of a grievance, the Court instructed, was intended to vindicate a contractual right under the collective bargaining agreement, while a lawsuit under Title VII asserted "independent statutory rights granted by Congress." See *id.* at 49-50. The *Gardner-Denver* Court also suggested that an individual's right to pursue such statutory actions could never be waived by a union. See *id.* at . In upholding the validity of the waiver at issue in *Gilmer*, the Court distinguished *Gardner-Denver* on the grounds that the non-unionized employee in *Gilmer* had waived his own rights. See 500 U.S. at 26-29.

⁸⁶ See *Gilmer*, 500 U.S. at 28 (quoting *Mitsubishi Motor Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628, 637 (1985)).

⁸⁷ For a thorough review of the law and views of commentators, see generally *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465 (D.C. Cir. 1997).

⁸⁸ See *Wright v. Universal Maritime Serv. Corp.*, 119 S. Ct. 391, 397 (1998) (holding, on the facts presented, that the general arbitration clause of the collective bargaining agreement in question did not waive the employee's right to pursue a statutory claim under the ADA).

⁸⁹ See WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAW OF ENGLAND* Book the 1st 410 (1765).

riage taking place today will end in divorce . . . is calculated to be a staggering 60 percent."⁹⁰ Other leading researchers similarly estimate that sixty per cent of the children born in the United States during the 1990s will live in a single-parent family before reaching the age of sixteen.⁹¹

Much of the employment regulation that has been developed over the past decade is based on the assumption that employment will be an ongoing, relatively stable relationship. Increasingly, however, the trends in the marketplace have been in the other direction. Job tenure in the United States is eroding and survey data shows that younger workers no longer expect to join a firm and remain with it for the term of their working lives.

If employment, like marriage and, at least for men, parenthood, comes to assume the character of a spot (one hesitates to say a "just-in-time") relationship, we should not be surprised. One need pass no value judgments on any of these trends to suggest that they are not entirely unrelated. While it may represent something of a trailing indicator, there is little reason to expect that the employment bond should be any more durable than life's other significant relations. Our habits not only belay any such expectations, they prepare us to accept serial affiliations as the norm.

Little in our present approaches to the regulation of employment is ready for this changed pattern of working. The newly-emerging patterns of working that are associated with "globalization" may provide many with an unprecedented freedom to organize their working life. At the same time, it raises challenges whose implications go well beyond labor regulation. These developments press the question of personhood in ways that labor scholars and others will find increasingly difficult to evade.

⁹⁰ COUNCIL ON FAMILIES IN AM., *MARRIAGE IN AMERICA: A REPORT TO THE NATION* 7 (Inst. for Am. Values, 1995).

⁹¹ See FRANK F. FURSTENBERG & ANDREW J. CHERLIN, *DIVIDED FAMILIES: WHAT HAPPENS TO CHILDREN WHEN PARENTS PART* 11 (1991).