To: All Potential Authors
From: Ann McGinley and Nicole Porter
Re: Revised Call for Authors, *Feminist Judgments: Employment Discrimination Opinions Rewritten*
Date: January 30, 2018

The U.S. Feminist Judgments Project seeks contributors to rewrite judicial opinions to reflect feminist perspectives, and commentaries on the rewritten opinions, for an edited book collection tentatively titled *Feminist Judgments: Employment Discrimination Opinions Rewritten*. This edited volume is part of a collaborative project among law professors and other legal specialists to rewrite, from feminist perspectives, key judicial decisions in the United States. The initial volume, *Feminist Judgments: Rewritten Opinions of the United States Supreme Court*, edited by Kathryn M. Stanchi, Linda L. Berger, and Bridget J. Crawford, was published in 2016 by Cambridge University Press. Cambridge University Press has published the first volume in the series, *Feminist Judgments: Rewritten Tax Opinions* (2017). Other approved volumes in the series include family law and reproductive justice. Cambridge University Press welcomes proposals for additional volumes in the series that focus on other areas of law.

The Employment Discrimination volume will be edited by Ann McGinley and Nicole Porter. We seek prospective authors for a number of employment discrimination opinions, listed below.[1] We have selected the cases with the goal of creating a body of cases that can be largely internally consistent and that ultimately would improve employment discrimination law from feminist perspectives. Opinion authors will be given the freedom to choose how to rewrite their opinions from various feminist perspectives. The volume editors will provide initial guidance on how the rewritten opinions might have improved the outcomes for all women (and some men), regardless of the particular feminist approach taken by the author of the rewritten opinion. We are open to your ideas, and would love to discuss them and our own ideas with you. We are particularly interested in opinions that use intersectional and multidimensional analyses, and that recognize the rich diversity of individuals who are protected by the employment discrimination laws.

Interested prospective contributors should submit a proposal to either: (1) rewrite an opinion (subject to a 10,000 word limit, including footnotes), or (2) comment on a rewritten opinion (4,000 word limit, including footnotes). Unlike the original volume, and because we seek to create a body of consistent opinions, all rewritten opinions should be written as majority opinions of the court, without regard to whether political or practical considerations would have permitted the author to achieve an actual majority at the time of the original opinion. Authors of rewritten opinions will be bound by the law and precedent in effect and supplemental materials available at the time of the original decision. Commentators should explain the original court decision and its context, how the feminist judgment differs from the original judgment, and what difference a feminist judgment might have made. Commentators may also explain how the rewritten opinion would have changed the law, for example, by noting subsequent cases that would not have been decided or would have been decided differently, if the rewritten opinion had been adopted.

---

[1] Subject to review and approval by the Series Editors and the publisher, this volume will reprint two opinions that were included in the original volume: FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT: *Oncale v. Sundowner Offshore Services, Inc.* and *Meritor Savings Bank v. Vinson*.

Those who are interested in rewriting an opinion or providing commentary should apply no later than February 12, 2018, by e-mailing the following information to Ann McGinley, ann.mcginley@unlv.edu and Nicole Porter, nicole.porter2@utoledo.edu:

1. Your CV, your areas of employment discrimination interest or expertise, and why you are interested in and well suited to participate in this project. We are committed to including authors and commentators from diverse backgrounds and encourage applications from authors representing traditionally marginalized groups (for example, gender, race, ethnicity, sexual orientation, or status within the academy). If you feel an aspect of your personal identity is important to your work on this project, please feel free to include that information.
2. Your top three preferences from the list of proposed cases below, whether you propose to write a commentary or a feminist majority opinion; and
3. Any time constraints and other obligations that may impact your ability to meet the submission deadlines.

The editors will inform selected authors and commentators by February 26, 2018. After we have selected the authors and commentators, and the authors have had an opportunity to begin thinking about their drafts, we plan to host a Feminist Judgments Writing Workshop at the University of Nevada, Las Vegas, Boyd School of Law on April 20 and 21, 2018. All authors, commentators, and members of the Advisory Board are invited and urged to attend. Selection of authors does not depend on their ability or willingness to attend the April workshop. Draft opinions will be due by June 30, 2018. Draft commentaries will be due by August 15, 2018. If review and approval takes longer than expected, we may have to extend these deadlines, as we do not expect authors to begin to draft opinions until after the publisher has accepted the proposal for publication.

The proposed cases (in chronological order):

AFSCME v. State of Washington, 770 F.2d 1401 (9th Cir. 1985) (holding that the state's decision to ignore evidence of pay discrimination based on the comparable worth theory did not create liability under disparate impact or disparate treatment theories). Even though this opinion is not a Supreme Court opinion, most scholars agree that this case sounded the death knell for the comparable worth theory, and allowed employers to rely on the "market" when setting pay. This has made the task of narrowing the pay gap between men and women very difficult.

E.E.O.C. v. Sears, Roebuck & Co., 839 F.2d 302 (7th Cir. 1988) (holding that the EEOC failed to establish that the employer discriminated against women in hiring for commission sales positions because the court credited the employer's "lack of interest" defense).

Int'l Union, UAW v. Johnson Controls, 499 U.S. 187 (1991) (holding that being a fertile woman is not a BFOQ for excluding women from certain jobs in a battery manufacturing plant).

Clark County School District v. Breeden, 532 U.S. 268 (2001) (holding in part that a woman's retaliation claim under Title VII fails because no reasonable person could believe that a single incident of sexual harassment violated Title VII).

Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003) (holding that direct evidence of discrimination is not required in mixed-motive cases under Title VII). While the actual holding of this opinion may be unobjectionable from most feminist perspectives, a feminist rewrite of this opinion could potentially use storytelling to highlight the egregious facts in this case that are ignored by the Court in the original opinion.

Jespersen v. Harrah's Operating Co., 444 F.3d 1104 (9th Cir. 2006) (en banc) (holding that the employer's gender-specific grooming policy, which included a very specific (and intensive) requirement of makeup for female employees, did not constitute sex discrimination based on the unequal burdens it placed on women, nor did it constitute unlawful sex stereotyping).

Etsitty v. Utah Transit Authority, 502 F.3d 1215 (10th Cir. 2007) (holding that discrimination based on status as a transgender person was not discrimination because of sex under Title VII and that terminating the plaintiff for not using the restroom consistent with her biological sex was a legitimate, non-discriminatory reason).

Ricci v. DeStefano, 557 U.S. 557 (2009) (holding (as a matter of law) that the City of New Haven engaged in intentional discrimination when it refused to use the results of a promotional exam for firefighters that had a disparate effect on African American and Latino test takers). The Court's analysis of the evidence in the record makes it more difficult for a plaintiff to prove disparate impact in race-based and gender-based cases by easing a defendant's burden to prove what constitutes "job related" and "consistent with business necessity" and by making plaintiff's burden of proving "less discriminatory alternatives" more difficult.

Webb v. City of Philadelphia, 562 F.3d 256 (3d Cir. 2009) (holding that accommodating a female police officer's request to wear a headscarf required by her religious beliefs places an undue burden on the defendant because it would require the City to favor one religion over another).

Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011) (reversing the lower court's certification of a class of one and one-half million female plaintiffs alleging sex discrimination under Title VII because the plaintiffs' claims lacked commonality). In reaching its holding, the Court discussed both the plaintiffs' disparate impact and systemic disparate treatment claims.

Young v. United Parcel Service, Inc., 135 S.Ct. 1338 (2015) (holding that a pregnant employee can establish that an employer's policies impose a significant burden on pregnant employees (and thus violate the Pregnancy Discrimination Act) by providing evidence that the employer accommodates a large percentage of non-pregnant workers while failing to accommodate a large percentage of pregnant workers). This opinion is generally thought to be a positive one for pregnant women, but arguably it does not go nearly far enough in providing accommodations to all pregnant employees who have workplace limitations because of their pregnancies.

E.E.O.C. v. Catastrophe Management Solutions, 852 F. 3d 1018 (11th Cir. 2016) (holding in a disparate treatment case that refusal to hire a black woman because of her dreadlocks is not racial discrimination because the Congress that passed Title VII in 1964 would not have defined race to include hair styles, and concluding that only "immutable" characteristics can be the subject of a Title VII cause of action).

Hively v. Ivy Tech Community College, 853 F.3d 339 (7th Cir. 2017) (en banc) (holding that sexual orientation discrimination is sex discrimination under Title VII). Although this case was a positive outcome for LGBT individuals, a rewritten opinion might better illustrate how feminist, anti-discrimination, and gay rights scholars would approach the question presented.