

LECTURE

Regulating the Workplace Through Mandated Personnel Policies*

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The field of employment law is a complex web of federal and state statutory, administrative, and common law rights and responsibilities, with constitutional protections for public sector workers thrown in for good measure. Trying to stay current with the latest developments is a daunting, perhaps foolhardy, enterprise. All over the country there are seminars for employers on traversing the minefield of workplace regulation. For instance, one area law firm recently held a full-day program entitled, "Hiring and Firing: How to Do It Legally." Another gives its clients a list of what it considers *the* most important labor and employment statutes, thirty-five in all. The briefest of conversations with employers, or with attorneys who represent employers, can result in bitter grumbling about what they regard as the government's constant and intrusive meddling into employers' relationships with their employees.

Yet, if you were to call the local office of the Wage and Hour Division of the United States Department of Labor in Kansas City, you would get another view of the state of governmental regulation of the workplace. First, you would encounter one of those long recorded messages. You know the kind: it begins with the instruction, "If you are calling from a touch-tone telephone and know your party's extension, you may enter it at any time during this recording. If you are calling from a rotary phone, remain on the line and your call will be answered in the order it was received." The voice then presents a menu of choices for further information. If you enter "1," you hear the following:

There are a number of employment practices which the federal labor laws do not regulate, and we are unable to assist you in those areas.

The federal law does not require any breaks or lunch periods, regardless of the amount of hours worked.

* This paper was presented as the Fifty-Sixth Inaugural Lecture for Distinguished Professorships at the University of Kansas on October 11, 1999.

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The federal law does not require immediate payment of the final paycheck upon termination from your job. The final paycheck is due on the next normal payday after you leave the job.

The federal law does not require vacation, holiday, severance, or sick pay.

The federal law does not require pay raises, fringe benefits, a discharge notice, or reasons for discharge.

If an employer agreed to provide any of these benefits and then failed to do so, the employee has the right to pursue any loss in small claims court or through a private attorney.

Some states have laws that regulate various benefits. For more information, contact the state department of labor for the state in which the business is located.

If you have additional questions, please stay on the line and follow the instructions.¹

This telephone message tells a different tale, the other side of employment regulation, or nonregulation. In many respects, traditional employer prerogatives with regard to day-to-day workplace issues, such as control of the means and manner of work, establishment and enforcement of workplace rules, provision of fringe benefits, and the extent of any fringe benefits that are provided, remain, if not totally, at least relatively untouched. To the extent that employment law in this country restricts employer prerogatives, it has, until very recently, done so largely in a negative fashion. Regulation has tended to be proscriptive rather than prescriptive,² prohibiting employers from doing certain things, such as discriminating on the basis of race, interfering with workers' organizational activities, or firing an employee because he or she filed a claim for workers' compensation benefits, rather than requiring that employers take affirmative steps to do other things, such as providing break periods, vacations, or health benefits to their employees.

I want to talk about an interesting phenomenon involving Congress, some state legislatures, and most recently the United States Supreme Court with respect to these areas of traditional employer freedom. I hesitate to call this phenomenon a trend because it is far too early to discern one yet, if indeed there is to be one, and because each of the changes in law I am

1. United States Dep't of Labor Wage and Hour Division, District Office, Kansas City, Kan., (913) 551-5721 (October 1999).

2. See MARK A. ROTHSTEIN, ET AL., 1 EMPLOYMENT LAW 5-6 (2d ed. 1999).

about to discuss came about for different reasons, out of different political circumstances. What has been happening, however, is the piecemeal imposition on employers of very specific requirements to make sometimes radical changes in the way they manage their workforces, in their personnel policies, practices, and rules. I have chosen three particular examples: (1) mandated hiring procedures, (2) mandated fringe benefits, and (3) mandated education, training, and complaint procedures.

I. MANDATED HIRING PROCEDURES

As part of its expansive prohibitions on discrimination on the basis of disability, the Americans with Disabilities Act³ (ADA) contains a provision that has dramatically altered the long-standing hiring practices of many companies. This provision, section 102(d)(2)(A), flatly prohibits preemployment medical examinations and inquiries by stating that an employer may not “conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.”⁴ While employers may still ask about an applicant’s ability to perform job-related functions, the standard preemployment physical examination, the application form with the question, “Do you now have or have you ever had any of the following,” coupled with a checklist of physical or mental conditions, and any other preemployment questions that are, in the words of the Equal Employment Opportunity Commission (EEOC), “likely to elicit information about a disability”⁵ are prohibited by the ADA.

For instance, an employer concerned about absenteeism may ask an applicant, “How many Mondays or Fridays were you absent last year on leave other than approved vacation leave?,” but the employer may not ask, “How many days last year were you sick?”⁶ The latter question is unlawful because it relates directly to the severity of the applicant’s impairments and could, therefore, elicit information about a disability. Alcoholism may be a disability, but mere “overindulging social drink[ing]” is not,⁷ so an employer may ask an applicant questions about his or her drinking habits as long as those questions do not cross the line into eliciting information

3. 42 U.S.C. §§ 12101-12213 (1994 & Supp. III 1997).

4. *Id.* § 12112(d)(2)(A).

5. EEOC: *Enforcement Guidance on Pre-Employment Inquiries Under the Americans with Disabilities Act*, 8 Fair Empl. Prac. Man. (BNA) 405:7191, 7192 (Oct. 1995) [hereinafter *Enforcement Guidance*]. The text of this EEOC policy statement is also available on the Internet at <http://www.eeoc.gov/docs/preemp.txt>.

6. See *Enforcement Guidance*, *supra* note 7, at 405:7194.

7. *Burch v. Coca-Cola Co.*, 119 F.3d 305, 316 (5th Cir. 1997), *cert. denied*, 522 U.S. 1084 (1998).

about alcoholism. The employer may ask whether the applicant drinks alcohol or whether he or she has ever been arrested for driving under the influence, but the employer may not ask how much alcohol the applicant consumes or whether he or she has ever been in an alcohol rehabilitation program.⁸ And, as one employer in the Tenth Circuit recently learned, the following preemployment questions, which were contained in its application form, are unlawful: "Have you received Worker's Compensation or Disability Income payments? If yes, describe" and "Have you physical defects which preclude you from performing certain jobs? If yes, describe."⁹

Congress's purpose for this restriction on preemployment inquiries was to prevent employers from engaging in blanket screening to eliminate applicants with so-called "hidden" disabilities, such as heart disease, diabetes, epilepsy, or cancer.¹⁰ To accomplish this goal, it did something very interesting. Section 102(d)(2) is unique in that it specifically prohibits the asking of the question. Although most employers long ago removed from their application forms questions about race, sex, religion, and age, under federal law and the laws of most states, the mere asking of questions such as "How old are you?" or "What child care arrangements do you have?" is not prohibited by statute. These questions are, however, highly inadvisable, if not just plain stupid, because they create the fairly obvious suspicion that the employer intends to use the information in its decision-making process, but they are not, standing alone, violations of the law. The applicant still has to prove two things: (1) prohibited discrimination, that the answer to the question was used to differentiate between the applicant and other individuals based on the applicant's membership in a group protected by statute; and (2) causation, that this protected group status was a motivating factor in the employer's decision not to hire the applicant.¹¹

Preemployment medical inquiries and examinations are, however, an independent violation of the ADA. As a result, the courts that have been presented with the matter have held that a person who does not, in fact, have a disability has standing under section 102(d) to challenge prohibited questions and medical examinations.¹² Thus, section 102(d) eliminates

8. See *Enforcement Guidance*, *supra* note 7, at 405:7196.

9. *Griffin v. Steeltek, Inc.*, 160 F.3d 591, 592 (10th Cir. 1998), *cert. denied*, 119 S. Ct. 1455 (1999).

10. See H.R. REP. NO. 101-485(II), at 72-73 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 355.

11. See 42 U.S.C. § 2000e-2(m) (1994); see also *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (requiring proof of both discrimination and causation).

12. See *Cossette v. Minnesota Power & Light*, 188 F.3d 964, 969-70 (8th Cir. 1999); *Fredenburg v. Contra Costa County Dep't of Health Servs.*, 172 F.3d 1176, 1181-82 (9th Cir. 1999); *Griffin v. Steeltek, Inc.*, 160 F.3d 591, 593-95 & n.5 (10th Cir. 1998), *cert. denied*, 119 S. Ct. 1455 (1999); *Roe*

proof of the element of discrimination based on membership in the class protected by the rest of the ADA. Some solace to employers can, I suppose, be found in the courts' apparent requirement that, to receive any monetary recovery, even the nondisabled applicant has to prove a tangible injury caused by the impermissible question. If the connection between the violation and some injury to the applicant cannot be shown, the employer would win, but only after incurring the expense and inconvenience of litigation. In addition, EEOC, which sues in the public interest, is not bound by many of the requirements imposed on private litigants and can seek declaratory and injunctive relief against violations, such as questions and practices that are unlawful under section 102(d).¹³

Before I go on to fringe benefits, I feel I should address the thought you've probably all been having: "But wait, I don't want the driver of the next truck that comes bearing down on me on the Turnpike to have epilepsy or the pilot of the next airplane I'm on to have poor vision." (Neither does the United States Supreme Court, as it turned out last spring, albeit for a provision of the ADA different from that discussed here.)¹⁴ Employers do have some legitimate reasons to know about an applicant's physical and mental condition and even his or her workers' compensation history. The ADA's answer to these concerns is that employers can try to learn whether an individual has a nonobvious disability at the post-offer stage. An employer may make an offer of employment to an individual conditioned on what the ADA calls an "employment entrance examination."¹⁵ This employment entrance examination must be the very last step of the hiring process, after any written tests, after the interview, after the reference checks, after the criminal background checks, after every part of the hiring process, when the employer has made an offer to an individual. At that stage, then and only then, the employer may require a physical examination,

v. *Cheyenne Mountain Conference Resort, Inc.*, 124 F.3d 1221, 1228-29 (10th Cir. 1997). Cf. *Armstrong v. Turner Indus., Inc.*, 141 F.3d 554, 559-62 (5th Cir. 1998) (holding that, regardless of standing, the plaintiff demonstrated no compensable injury resulting from the prohibited inquiry).

13. See, e.g., *EEOC v. Goodyear Aerospace Corp.*, 813 F.2d 1539, 1544-45 (9th Cir. 1987) (recognizing injunctive relief for the EEOC).

14. In two companion cases, the Court held that whether an individual has a disability within the meaning of the ADA must be determined with reference to measures that mitigate the individual's impairment, such as medication or corrective lenses. See *Sutton v. United Air Lines, Inc.*, 119 S. Ct. 2139, 2149 (1999); *Murphy v. United Parcel Serv.*, 119 S. Ct. 2133, 2137 (1999). The plaintiff in *Murphy* was a mechanic who had hypertension controlled by medication, and the plaintiffs in *Sutton* were airline pilots with severe myopia corrected by glasses or contact lenses. In both cases, the Court held that the effect of these corrective measures had to be taken into account in deciding whether the plaintiffs' impairments "substantially limit[ed] one or more . . . major life activities." 42 U.S.C. § 12102(2)(A) (1994); *Sutton*, 119 S. Ct. at 2149; *Murphy*, 119 S. Ct. at 2137.

15. 42 U.S.C. § 12112(d)(3).

and, here, the statute places no restrictions on the nature or extent of the exam.¹⁶

Of course, note the result if an applicant is rejected at the post-offer stage. Assuming the condition revealed during the post-offer exam is a disability within the meaning of the ADA, the issue is whether the rejection because of that condition can be justified by one of the few statutory defenses. At this stage, for instance, the trucking company can argue that a driver with epilepsy is not qualified for the job. The employer will not have available to it, however, the whole host of facially neutral reasons often raised in race or gender discrimination failure-to-hire cases, like relative lack of qualifications or lack of a vacant position. The applicant has already been selected as the most qualified candidate for a vacancy that, in fact, exists, and he or she is rejected because of the results of the physical examination.

II. MANDATED FRINGE BENEFITS

The example I have chosen in the area of fringe benefits is leaves of absence. The federal Family and Medical Leave Act of 1993¹⁷ (FMLA) requires that covered employers permit an eligible employee to take up to twelve weeks of unpaid leave in any twelve-month period for childbirth or adoption; for the care of seriously ill children, spouses, or parents; or for an employee's own serious illness. During FMLA leave, the employer must maintain the employee's existing health care benefits, if it provides any, under the same terms and conditions as if the employee were not on leave, and, at the end of the leave, the employer must restore the employee to the position he or she held before the start of the leave with no loss of any benefit accrued before the leave began. Thus, covered employers who did not previously provide extended leaves of absence must now do so, with statutorily required terms and conditions, and those who did provide leaves of absence must modify their policies to come into compliance with the FMLA.

One criticism of the scheme of the FMLA is that it tends to benefit high-income, dual-earner couples because few others can afford to take three months off without pay.¹⁸ Perhaps not surprisingly then, although

16. The ADA does require, however, that all entering employees in the same job category must be subject to an examination, regardless of disability, and all medical information must be collected and maintained on separate forms and in separate medical files and treated as confidential. *See id.*

17. 29 U.S.C. §§ 2601-54 (1994 & Supp. III 1997).

18. *See* Marion Crain, *Confronting the Structural Character of Working Women's Economic Subordination: Collective Action vs. Individual Rights Strategies*, 3 KAN. J.L. & PUB. POL'Y 26, 27-28 (1994).

some of the reported litigation under the FMLA involves questions of entitlement to lengthy unpaid leave,¹⁹ a common fact pattern is that of an employee who has accumulated a poor attendance record for reasons not covered by the FMLA. The employee then incurs the next absence, which turns out to be one absence too many under the employer's attendance policy, and the employer fires him or her. The employee claims that this last absence was because of a "serious health condition,"²⁰ the statutory trigger for medical leave, and therefore he or she was entitled to use FMLA leave and cannot be fired because of the absence. There is a growing group of cases discussing whether various medical problems, such as high blood pressure,²¹ peptic ulcer disease,²² gastritis,²³ and hypothyroidism,²⁴ constitute serious health conditions as they manifest themselves in individuals who are fired for absenteeism. Thus, not only does the FMLA require fairly lengthy leaves in some situations, but it also alters traditional employer attendance requirements and places a burden on employers to decide whether those "last" absences are protected by the statute.

This concept of requiring employers to accommodate events in employees' personal lives has resulted in some interesting state laws as well. Minnesota, for instance, requires employers to grant paid leaves of absence, not to exceed forty work hours, for employees who donate bone marrow.²⁵ California prohibits discrimination against a parent or a guardian who takes time off for a required appearance in school after a child is suspended.²⁶ Utah requires employers to grant time off for a parent to attend his or her child's juvenile proceedings,²⁷ and a law that went into effect in Hawaii on July 1, 1999, requires employers to permit employees to express breast milk during meal or break periods.²⁸

19. See, e.g., *Marchischeck v. San Mateo County*, 199 F.3d 1068 (9th Cir. 1999).

20. 29 U.S.C. § 2611(11); see also 29 C.F.R. § 825.114 (1999).

21. See, e.g., *Austin v. Shelby County Gov't*, 3 S.W.3d 474, 478-79 (Tenn. Ct. App. 1999).

22. See, e.g., *Victorelli v. Shadyside Hosp.*, 128 F.3d 184, 189-90 (3d Cir. 1997).

23. See, e.g., *Thorson v. Gemini, Inc.*, 123 F.3d 1140, 1141 (8th Cir. 1997).

24. See, e.g., *Bailey v. Amsted Indus., Inc.*, 172 F.3d 1041, 1045-46 (8th Cir. 1999).

25. See MINN. STAT. ANN. § 181.945 (1993 & Supp. 2000).

26. See CAL. LAB. CODE § 230.7 (Supp. 2000).

27. See UTAH CODE ANN. 78-3a-112(2) (1996 & Supp. 1999).

28. See 1999 Haw. Sess. Laws 172, reprinted in *Fair Empl. Prac. Man.* (BNA) 454:1871, 1873 (Sept. 1999).

III. MANDATED EDUCATION, TRAINING, AND COMPLAINT PROCEDURES

My third example of regulation by personnel policy comes from the United States Supreme Court. Unlike Congress, the Court has not been as precise in its commandments, although knowledgeable observers ought to be able to figure out what the Court wants employers to do. This chapter of regulation through the imposition of personnel policies began in the area of sexual harassment and then expanded last year to many other kinds of discrimination.

In its 1986 decision in *Meritor Savings Bank, FSB v. Vinson*,²⁹ the Supreme Court recognized sexual harassment as a form of sex discrimination that violates Title VII of the Civil Rights Act and approved the lower courts' distinctions of two categories of harassment, quid pro quo and hostile environment. Most litigated cases involve the hostile environment form, where there has been unwanted sexual conduct that is "severe or pervasive"³⁰ but where no tangible employment action has been taken against the harassed employee. A major question left unanswered by *Vinson* was the circumstances under which an employer could be held liable for hostile environment harassment engaged in by its supervisors. Employers argued that sexually harassing subordinate employees was not within the scope of a supervisor's employment, one of the tests for vicarious employer liability, and, further, they (the employers) did not know the conduct was taking place, another test. The lower courts struggled for more than a decade with a variety of different standards for liability. In 1998, the Supreme Court finally clarified the matter, to a certain extent, in two cases: *Burlington Industries, Inc. v. Ellerth*³¹ and *Faragher v. City of Boca Raton*.³² The Court said that an employer can avoid liability for a supervisor's sexual harassment of a subordinate where no tangible employment action was taken³³ if it can show: "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."³⁴ Then the Court said that "a

29. 477 U.S. 57 (1986).

30. *Id.* at 67.

31. 524 U.S. 742 (1998).

32. 524 U.S. 775 (1998).

33. In *Ellerth*, the Court rejected the use of the terms quid pro quo and hostile environment as "of limited utility," 524 U.S. at 751, and substituted instead the distinction between harassment that leads to a tangible employment action and harassment that does not, *id.* at 764-65.

34. *Ellerth*, 524 U.S. at 745.

stated [anti-harassment] policy suitable to the employment circumstances”³⁵ would be a significant element in establishing part (a) of the defense, and that “any unreasonable failure to use any complaint procedure provided by the employer”³⁶ would normally satisfy part (b).

In *Faragher*, the plaintiff was a female lifeguard working for the city of Boca Raton, Florida. Her supervisors and coworkers engaged in repeated and offensive touching, lewd remarks, and threats. The Court applied the defense it had just articulated and concluded that the city could not be found to have exercised reasonable care to prevent sexual harassment. It had “completely failed”³⁷ to disseminate its anti-harassment policy to its beach employees and had not tried to monitor the behavior of its supervisors. Moreover, even if Beth Ann Faragher had known of the policy, the policy was flawed because it did not contain any assurance that harassing supervisors could be bypassed in making a complaint.³⁸

Title VII contains fairly simple and straightforward mandates, at least for intentional discrimination, and there is no provision in the statute that requires employers to have anti-harassment policies with complaint procedures. There is a requirement that employers post a notice approved by EEOC containing excerpts from the statute and information about filing a charge of discrimination with the agency,³⁹ but failure to post this notice does not affect liability in an employee lawsuit.⁴⁰ After *Faragher* and *Ellerth*, however, anti-harassment policies, appropriately structured, promulgated, maintained, and enforced, will allow employers to avoid liability entirely in most cases. According to EEOC, an anti-harassment policy and complaint procedure should contain, at a minimum:

- A clear explanation of prohibited conduct;
- Assurance that employees who make complaints of harassment or provide information related to complaints will be protected against retaliation;
- A clearly described complaint process that provides accessible avenues of complaint;
- Assurance that the employer will protect the confidentiality of harassment complaints to the extent possible;

35. *Id.*

36. *Id.*

37. *Faragher*, 524 U.S. at 782.

38. *See id.* at 808.

39. A willful failure to post the Title VII notice is punishable by a fine of up to \$100 for each offense. *See* 42 U.S.C. § 2000e-10(a) (1994). In contrast, the ADEA does not provide penalties for failure to post. *See* 29 U.S.C. § 627 (1994). The ADA does not specifically provide penalties for failure to post, *see* 42 U.S.C. § 12115 (1994), but EEOC takes the position that Title VII’s penalty provision is incorporated into the ADA, *see* 29 C.F.R. § 1601.30 (1999).

40. Moreover, the poster does not even mention sexual or any other form of harassment. *See Consolidated EEO Poster*, 8A Fair Empl. Prac. Man. (BNA) 441:153 (Sept. 1997).

- A complaint process that provides a prompt, thorough, and impartial investigation; and
- Assurance that the employer will take immediate and appropriate corrective action when it determines that harassment has occurred.⁴¹

Anecdotal evidence, as well as both pre- and post-*Ellerth/Faragher* cases, indicate that well-advised employers have added anti-harassment policies and training programs for supervisors and others to their personnel practices.

Then, in June 1999, the Court expanded the impact of employer-promulgated anti-discrimination policies. The Civil Rights Act of 1991 permits plaintiffs bringing claims of intentional discrimination under both Title VII and the ADA to recover punitive damages if the employer has acted "with malice or with reckless indifference to the federally protected rights of an aggrieved individual."⁴² In *Kolstad v. American Dental Association*,⁴³ the Court held that, at a minimum, this standard of "malice or reckless indifference" requires proof that the employer discriminated against the plaintiff-employee "in the face of a perceived risk that its actions . . . violate[d] federal law."⁴⁴ Since employers generally act (and perceive) through their agents, the standard obviously raises the matter of employer liability for punitive damages because of acts of discrimination committed by their employees. Not surprisingly, the Court turned to the rules from the previous year's sexual harassment cases, *Ellerth* and *Faragher*, coupled with limits contained in the *Restatement of Agency* concerning the imposition of liability for punitive damages on a principal (employer) for the misconduct of its agent (employee). The Court remarked that an employee capable of incurring punitive damages on behalf of the employer does not have to be in the top echelons of management as long as he or she is "important,"⁴⁵ a well-recognized legal term. It then said: "Where an employer has undertaken . . . good faith efforts at Title VII compliance, it 'demonstrat[es] that it never acted in reckless disregard of federally protected rights."⁴⁶ What might these good faith efforts be? Exactly the same kinds of protective behavior mandated by *Ellerth* and *Faragher*: the adoption of anti-discrimination policies and the education of

41. EEOC: *Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors*, 8 Fair Empl. Prac. Man. (BNA) 405:7651, 7661-62 (July 1999). The text of this EEOC policy statement is also available on the Internet at <http://www.eeoc.gov/docs/harassment.html>.

42. 42 U.S.C. § 1981a(b)(1) (1994).

43. 119 S. Ct. 2118 (1999).

44. *Id.* at 2125.

45. *Id.* at 2128.

46. *Id.* at 2129 (alteration in original) (quoting *Kolstad v. American Dental Ass'n*, 139 F.3d 958, 974 (D.C. Cir. 1998) (Tatel, J., dissenting)).

employees, particularly those "important" employees, about the prohibitions of Title VII and the ADA.

Although we do not know the precise parameters of this good faith defense to liability for punitive damages, here is a recent example of employer efforts that did not qualify. In *EEOC v. Wal-Mart Stores, Inc.*,⁴⁷ a hearing-impaired worker was transferred and later fired after he refused to attend a training session requiring the viewing of a videotape. He failed to attend because the tape did not have closed-captioning and the employer did not provide a sign-language interpreter. The jury found that Wal-Mart had discriminated on the basis of the worker's disability and had retaliated against him for asserting his rights under the ADA and awarded him \$3,527.79 in compensatory damages and \$75,000 in punitive damages. In rejecting Wal-Mart's good-faith defense as to the award of punitive damages, the court remarked on the following facts. The employee's supervisor had been an assistant manager for seven years and had independent authority to suspend her subordinates. (She was, one assumes, "important.") She did not learn of "any law requiring employers to make reasonable accommodations to enable qualified employees to do their job"⁴⁸ until three years after the employee was fired, and she had not received any training about disability discrimination. The personnel manager, who was responsible for training at the store where all of this took place, had also received no training in employment discrimination generally or in the requirements of the ADA. She did not have a copy of Wal-Mart's ADA handbook. Wal-Mart contended that it had a policy of "equality and respect for the individual,"⁴⁹ but the court remarked that good intentions alone did not equal the implementation of a nondiscrimination policy of educating employees on the requirements of the law and preventing discrimination in the workplace.⁵⁰

Having a good education and training program for supervisors, managers, and other "important" people in an employer's organization and providing grievance mechanisms through which employees can voice their

47. 187 F.3d 1241 (10th Cir. 1999).

48. *Id.* at 1249.

49. *Id.*

50. As this lecture was going to press, EEOC and the Arizona Center for Disability Law announced the settlement (in a different case from that discussed in the text) of a disability discrimination suit against Wal-Mart involving two job applicants who are deaf. Under the terms of the consent decree, among other things, Wal-Mart will make "corporate-wide changes in the hiring and training of new employees who are deaf or hearing impaired." EEOC, *Wal-Mart Settles Employment Discrimination Claim of Two Applicants Who Are Deaf* (visited Jan. 25, 2000) <<http://www.eeoc.gov/press/1-7-00-b.html>>. These changes will include training on the non-discrimination provisions of the ADA. See *id.*; *Disabilities Discrimination: Wal-Mart Changes Job Policies for the Deaf, Pays \$132,500 in Accord Reached in Arizona*, 6 Daily Lab. Rep. (BNA) A-9 (Jan. 10, 2000).

complaints about their treatment in the workplace are good things. They may well further one of the main purposes of the anti-discrimination statutes, that of preventing discrimination from taking place. So, one might ask, why has this Supreme Court, which has often ignored years of precedent and gutted provisions of these statutes, established these requirements for employers? The cynic in me notes that the requirements do at least three things: first, they shift the focus of litigation from whether the unlawful harassment or other discriminatory conduct in fact took place to whether the employer's anti-discrimination policy was reasonable and in good faith; second, in the harassment cases, they allow the employer to blame the victim by arguing that she was unreasonable in not following the employer's complaint procedures;⁵¹ and third, they permit the employer to avoid all liability in the harassment cases and liability for punitive damages in other kinds of intentional discrimination cases.

IV. CONCLUSION

So what does all this mean? Someone suggested to me that a subtitle to this talk might have been "Status, not Contract," to signify that employees now have certain rights under personnel policies mandated by courts and legislatures because of their status as employees of covered employers, and not because they have been able to contract for the rights themselves. It is precisely this fact that makes these requirements relatively ineffective in the larger scheme of things, even though they do confer valuable rights on workers. Legislatures are not often motivated to enact statutes like the FMLA, and, when they do, it is usually because of one particular perceived need. Therefore, the statutes are piecemeal reforms, and, because they must be crafted to cover all workplaces, they often end up being complex and ambiguous. This, in turn, generates quantities of litigation over the precise meaning and application of the statute. As to the Supreme Court, I do think the sexual harassment and punitive damages decisions are significant and may help to enforce existing statutes, but they do not create any new rights for workers.

As others have pointed out, the best solution to the needs of individual workers would be some new form of unionism or collective representation, so that workplace-specific answers could be crafted by workers and their

51. Indeed, in *Indest v. Freeman Decorating, Inc.*, 164 F.3d 258 (5th Cir. 1999), the court remarked that the implication of the *Ellerth/Faragher* affirmative defense is that, when the employer has an effective grievance mechanism, a harassed worker should complain long before the harassment becomes severe or pervasive. If she waits until the situation is intolerable, has she unreasonably failed to take advantage of the employer's anti-harassment policy?

representatives together.⁵² That is not likely to happen in the near future, so for the moment workers must look to the kinds of incremental reforms I have been discussing, and employers must cope with this hodge-podge of disparate requirements.

52. See CHARLES B. CRAVER, *CAN UNIONS SURVIVE?: THE REJUVENATION OF THE AMERICAN LABOR MOVEMENT* *passim* (1993); WILLIAM B. GOULD IV, *AGENDA FOR REFORM: THE FUTURE OF EMPLOYMENT RELATIONSHIPS AND THE LAW* *passim* (1993).

