The Joy of Serious Doctrinal Analysis of Disparate Treatment and Disparate Impact Discrimination

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Michael C. Harper, Confusion on the Court: Distinguishing Disparate Treatment from Disparate Impact in Young v. UPS and EEOC v. Abercrombie & Fitch, Inc., 96 **B.U. L. Rev.** 543 (2016).

In *Confusion on the Court*, Professor Michael Harper discusses how in two recent cases the United States Supreme Court appeared to confuse two critically important concepts in employment discrimination law: disparate treatment (intentional discrimination) and disparate impact (unintentional discrimination). Professor Harper's essay is worth a Jotwell jot because it rigorously analyzes a core doctrinal issue in employment discrimination law while subtly reminding readers how issue framing can drive doctrinal analysis. I am partial to Professor Harper's approach because it is useful to four groups: judges shaping the employment discrimination field, legal scholars thinking about the field, legal practitioners working in the field, and law students just learning about the field.

The essay considers the Court's different approaches to seemingly similar factual situations. In Young v. UPS, 135 S. Ct. 1338 (2015), the Court viewed UPS's application of its disability policy to refuse to accommodate a worker's pregnancy as a disparate impact issue; whereas in EEOC v. Abercrombie & Fitch, 135 S. Ct. 2028 (2015), it viewed Abercrombie & Fitch's application of its headwear policy to decline to hire a Muslim applicant who wore a headscarf as a disparate treatment issue. As Professor Harper notes: "The Court seemed to give contradictory answers to an important, unresolved conceptual definitional question: Does disparate treatment include assigning members of a protected group, based on their protected status, to a larger disfavored group that is defined by neutral principles and that includes others who are not members of the protected group? Or, in the alternative, does such an assignment have only a disparate impact on the protected group?" (P. 545.) Professor Harper describes how the Court analyzed the cases, explains how he thinks the Court misanalyzed the cases, and suggests future course corrections.

In discussing the cases in depth, Professor Harper explains why the Court treated the cases differently. In *Young*, UPS applied its light-duty accommodation policy to a pregnant employee and declined to accommodate her. It treated the employee as a part of the larger group of people who had disabilities that did not need to be accommodated under the policy. The Court suggested that the employer's placement of the plaintiff in the broader class of people who did not need to be accommodated was not motivated by her pregnancy. Consequently, the case was treated as a disparate impact case involving the application of a rule that might lead to unintentional discrimination against pregnant women. Conversely, in *Abercrombie & Fitch*, the employer declined to hire a Muslim woman applicant who wore a headscarf. Abercrombie & Fitch functionally treated her as part of the larger group of people who would violate the company's "Look Policy" by wearing caps, whether those caps were worn for religious reasons or other reasons. However, the employer contemplated (without knowing) whether the applicant wore the headscarf for religious reasons before applying the rule and before denying her employment. Consequently, the Court treated the case as a disparate treatment matter involving intentional discrimination.

Professor Harper argues that both cases should be treated as disparate treatment cases. He explains that in both cases, the employer's policy treats a protected group as part of a larger group that is

disadvantaged under the relevant policy. Applying the policy to the larger group constitutes disparate treatment of the protected group. To him, the cases appear indistinguishable, and should be analyzed the same. The essay's careful critique of the Court's approaches to the two cases is worth the read, even if the reader is not as critical of the Court as Professor Harper is.

Ultimately, the essay requires the reader to consider how crucial framing is to doctrinal analysis. Professor Harper frames the issues in both cases as being the same. If the Court framed the issues as Professor Harper does, it would treat the cases in the same way; it does not. Professor Harper focuses on how the employers' policies applied to and affected protected groups. The rules treated protected groups differently than some non-protected groups, so the protected groups were disparately treated. Conversely, the Court focused on the employers' narrow motivation in the two cases. In *Abercrombie & Fitch*, the employer considered the applicant's protected status before applying the policy. That consideration triggered the disparate treatment (intentional discrimination) framework. In *Young*, the employer applied its policy, arguably without explicit consideration of the employee's pregnancy. Without such contemplation, the policy's application triggers merely the disparate impact (unintentional discrimination) framework. Whoever is correct, the essay forces us to think harder about why Professor Harper and the Court frame the issues differently and reach different conclusions regarding how to analyze *Young*.

The essay is good for employment discrimination judges, scholars, practitioners, and students to read because it raises doctrinal issues that courts need to decide. The doctrinal test for finding an employer liable for disparate treatment discrimination is different than the test for finding an employer liable for disparate impact discrimination. In addition, the defenses to disparate treatment are much narrower than the defenses to disparate impact. So whether a case implicates disparate impact rather than disparate treatment, or vice-versa, is important. This is especially true in pregnancy and religious discrimination cases, because employment discrimination law suggests that pregnant employees and religious employees ought to be accommodated when possible so that they may continue to work. Treating a pregnant or religious employee's case as a disparate impact matter rather than a disparate treatment matter may make a refusal to accommodate the employee easier. Thus, determining when a situation involves disparate impact rather than disparate treatment is critical. Professor Harper and the Supreme Court take different approaches to when the application of a policy should be analyzed as a disparate treatment matter. The reader can determine who is more convincing. Nonetheless, the discussion is illuminating. That makes this essay worth a serious read.

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