Neoliberalism and the Lost Promise of Title VII

Author : Henry L. Chambers, Jr.

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Deborah Dinner, Beyond "Best Practices": Employment-Discrimination Law in the Neoliberal Era, 92 **Ind. L.J.** 1059 (2017).

In *Beyond "Best Practices": Employment-Discrimination Law in the Neoliberal Era*, Professor Deborah Dinner explores how neoliberalism of the late twentieth century has influenced Title VII's interpretation and destroyed Title VII's ability to transform the American workplace into one where employees are properly treated, fairly valued, and fully compensated. She suggests that neoliberalism's focus on a minimal role for state intervention and on the individual worker as a completely realized market actor capable of protecting her interests through negotiation with an employer is problematic. It has led to an interpretation of Title VII that functionally expands employer prerogatives regarding terms of employment, limits employee power, and legitimates the economic inequality and class subordination that Title VII should attempt to eliminate. Consequently, even "best practices" that fully enforce Title VII "are insufficient to realize a labor market responsive to the needs of low-income workers for adequate wages, safe work conditions, and work hours and schedules that allow for fulfilling family and civic lives."

The article is a Thing I Like Lots because it takes two seemingly unrelated topics – Title VII and neoliberalism – and explores how they are connected. Dinner notes neoliberalism is not a tight theory, but a general outlook that focuses on a free-market ideal that favors deregulation and individual autonomy. Accordingly, the article situates employment discrimination law inside of our American culture, recognizing that a law or its interpretation does not exist separate from the society in which it operates. Simply, Title VII – the statute considered most likely to bring substantive and procedural equality to the workplace – can be blunted by interpretations provided by courts and commentators operating in a neoliberal society. The article notes the roads not taken and laments the unmet possibilities of employment discrimination law. That is worthwhile to consider even for a reader who may tend to focus on employment discrimination doctrine rather than theory.

Among the article's most interesting points is its argument that Title VII can no longer remedy class-based subordination in the workplace given how it has been interpreted. In Dinner's telling, Title VII's narrow effect stems from the rise of neoliberal thought in the United States, which has created a cramped focus on anti-stereotyping and workplace efficiency. That ideology, Dinner notes, "transform[s] citizens from democratic subjects and actors into individual wealth maximizers." That leads neoliberal institutions to ignore the broader community-based goal of moving toward a fair and equitable workplace for all and to embrace the smaller individual-based goal of less granular discrimination against and between employees. The result is an employment discrimination regime that tolerates systemic inequality and economic inequality while championing individual freedom.

Dinner suggests that if the path that labor feminists had trod and attempted to continue to walk had not been choked off by neoliberalism, Title VII could have been interpreted to eliminate class subordination in the workplace, which would have led to a structural change that guaranteed substantive equality for women and less-advantaged workers. However, neoliberalism killed that approach and left Title VII focused largely on anti-essentialist stereotyping, leaving individuals free to fight for equality inside of a fundamentally unequal employment structure.

Though the thrust of the article – that neoliberalism choked off Title VII's promise – is undoubtedly correct, it raises what might be considered a chicken-and-egg problem. Title VII arguably was a neoliberal law when passed or, at least, was passed with neoliberal impulses. It may be exactly the type of legislation a democratic, neoliberal society in the midst of the civil rights movement would produce. Title VII's explicit focus on anti-discrimination rather than on anti-

subordination may reflect the assumption that anyone can flourish based on merit if he is unburdened by discrimination on the basis of immutable or largely fixed characteristics. Whether that vision of the world comports with reality is beside the point if the 1960s America that passed Title VII believed in it.

Still, Title VII could have been interpreted to support anti-subordination, even if it may not have been intended to be a vehicle for that purpose. Fundamentally altering the workplace is a sensible goal, but may be more easily accomplished through legislation that – unlike Title VII – is not aimed so specifically at the treatment of individuals in the workplace. Passing substantive laws that require an explicit remaking of the workplace, e.g. the Family and Medical Leave Act or parental leave laws, may be more obviously aimed at anti-subordination than a statute that explicitly focuses on anti-discrimination. However, this is more a quibble than a criticism — a neoliberal interpretation of Title VII limits its effect.

No matter my quibbles with the article, I like it because it is a thoughtful consideration of the current limitations of employment discrimination law and their causes that also forces readers to think about the possibilities of employment discrimination law. The article should be read by anyone who is casually interested in employment discrimination or fully engaged in studying employment discrimination law.

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