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Panel 5 - The Future of Employment Law

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TRANSCRIPT OF VIDEO FILE:

PANEL 5 - THE FUTURE OF EMPLOYMENT LAW

BEGIN TRANSCRIPT:

FACILITATOR: All right everyone, welcome to our last panel, “The Future of Employment Law.” I want to quickly introduce our moderator, Karla Gilbride, the co-director of the Access to Justice Project. Karla, you can take it away.

KARLA GILBRIDE: Thank you so much. Thanks to the American University Journal of Gender, Social Policy, & the Law, and the National Institute for Workers’ Rights for hosting this symposium today. I’m excited to be here with four very talented panelists, leaders in their field who are going to discuss the future of employment law. For those of you who have been with us throughout the day, we’ve been hearing a lot about the shortcomings and problems with the existing legal frameworks for employment discrimination and we’re going to brainstorm in our last session together, about some ways that the law can move into a better direction in the future.

Participating with me in that discussion are Michael Selmi, who is a professor at the University of Arizona Sandra Day O’Connor College of Law. Professor Selmi, before coming to ASU, taught at the George Washington School of Law for over twenty years and has also taught at the University of North Carolina, Boston University and Harvard Law School. He teaches and writes in the areas of employment discrimination, employment law and civil rights, and before joining academia, he litigated employment discrimination cases at the Lawyers’ Committee for Civil Rights in Washington D.C., and the Civil Rights Division of the U.S. Department of Justice. He’s a graduate of Harvard Law School and Stanford University. [00:01:34]

Also with us today is Professor Marcia McCormick, who teaches at the Saint Louis University School of Law. She teaches courses on employment discrimination, federal courts, and gender and the law. Professor McCormick

began her legal career as a staff attorney with the International Human Rights Institute, where she directed analysis of research into allegations of sexual violence committed during the war in what was formerly known as Yugoslavia. She then went to the Illinois Attorney General's Office where she litigated civil appeals in state and federal court, before becoming a professor. She received her BA from Grinnell and was an honors graduate of Iowa Law School. [00:02:10]

Also with us, giving the current practitioner's perspective, is Geraldine Sumter. She's been an attorney in North Carolina with the firm of Ferguson, Chambers and Sumter, since 1982. Her practice there focuses on employment discrimination, but she also handles cases in other areas of civil rights, including voting rights and school desegregation. Ms. Sumter received her BA in political science and economics summa cum laude from Howard University and her law degree from Duke Law School.

Last but not least, we have Stephen Rich, who is a professor at the University of Southern California Gould School of Law, where he teaches courses on employment discrimination, constitutional equality law, and civil procedure. His scholarship focuses on anti-discrimination law, the shortcomings of existing statutory frameworks, and the need for a broader conception of diversity that would apply beyond the limited context of traditional affirmative action programs. Before becoming a professor, he practiced law at Cleary, Gottlieb, Steen and Hamilton and he received his law degree, as well as a degree in African American Studies, from Yale. [00:03:20]

So, with that introduction, I'd like to just give folks a little bit of an overview since, you know, the future of employment law is a very broad topic. So, what we're—we're going to divide our conversation today into sort of what have we learned in the last couple of years from the COVID-19 pandemic, about where employment law needs to change. What are some of the immediate lessons learned that we can take into hopefully, some better directions for making the workplace and our legal frameworks fit the current realities that we've learned about from the pandemic? We're then going to talk about the sort of limitations of the competitive workplace and the concept of equal opportunity and how that can be expanded to include the concept of equal investment. Then we're going to talk a little bit more specifically about Title VII and some reform initiatives that might improve kind of the new Civil Rights Restoration Act for Title VII. And finally, we'll discuss the need to change the damage caps and a little bit more empirical research on where the damage caps are causing problems and what can be done to address that problem. [00:04:31]

So, beginning with what we've learned from the pandemic. Obviously,

you know, the pandemic has exposed a lot of the gaps and the holes in our social safety net and specifically, I'd like to turn to Geraldine Sumter to talk a little bit about scheduling, what we've learned from the pandemic about when work is done and what are some of the things that need to change in that regard.

GERALDINE SUMTER: Thank you. It's a real pleasure to be here and an honor to be part of this panel. I think that the pandemic highlighted for a lot of us, the difficulties that . . . I want to call them—some of you called them frontline workers. I will call them in-person, required in-person workers. That's everything from food workers, grocery store workers, public safety and what have you, and for those restaurants that continue to be open and provide services, we have always known that a lot of that work is done in shifts that don't equal an eight-hour day. So the problems that the pandemic exposed were the difficulties that these people had in number one, finding transportation, paying for that transportation, going to a job for maybe three or four hours, then having a break and then come back later for another three or four hours, in order to get to twenty-eight hours or thirty hours in a week, none of which equates to what we generally think of as full-time work. So, what do we do to address that? [00:06:24]

One of the ways that we possibly could do to—one of the things that we possibly could do to address that is to have states and federal governments put a minimal amount of time on a work schedule, say five hours or six hours. Now for the young people who are in high school and are going into the workplace just for discretionary income, those short shifts may not mean anything, but we know that in this economy and this country, that over forty percent of the American workers are in low wage jobs and many of those low wage jobs are jobs that don't constitute an eight-hour workday. Perhaps we ask that there be a minimum number of hours greater than this three or four and we could also ask companies to reorganize their work schedules, not necessarily their workflow but their work schedules. If you've got somebody that you are going to require to work or give somebody twenty-eight hours of work that you're spreading over five or six days, what's wrong with reorganizing your workforce so that those hours are spread over four days, for instance. You don't necessarily end up increasing the cost of your labor, it's just that it's compacted more so that it makes better sense for everybody else. [00:08:00]

I think that one of the things that the pandemic taught us is that for those people who were eligible for the federal stimulus money or the supplemental unemployment benefits is that you know in a state like North Carolina, where the unemployment benefit maxes out at \$350 a week, that additional \$600 put those people in an entirely different tax bracket and it lasted for twenty-

six weeks, where in North Carolina the maximum number of weeks is thirteen. So, we know, for instance, that that money made a huge difference to people. In terms of the safety net, more than ever we know that \$7.25 an hour is not cutting it in this world for anybody who is trying to pay for food, shelter, and clothing for themselves, less more for a family. The federal relief-imposed moratoriums on evictions that has been followed but now that that's being lifted, we are seeing how much we really need to increase wages to a living wage so that people are able to afford the basic human needs. [00:09:31]

We also know, for instance, that between the years 2000 and 2019, sixty-five percent or more of the net new jobs were created by small businesses, and many of those businesses employed a number of people lower than the Title VII threshold, lower than the ADA threshold, lower than the ADEA thresholds. So, I would think that going forward, if our economy is going to be generating jobs at this rate, we need to figure out how to impose the Title VII, ADEA and ADA guidelines on these smaller businesses. Now that might mean that they fall in the lower damages capped but a tremendous number of sexual harassment and racial harassment cases occur at these small employers, and those people have little or no redress under the law. So, in terms of where we go in dealing with the changes that we see in employment that were highlighted in the pandemic, one of the other things that we noticed is that remote work became a salvation for a lot of companies and employees, but it didn't reflect those people who didn't have office jobs really and it was a great thing for keeping office jobs. [00:11:13]

Now some statistics, I read something that showed me that twenty-eight percent of the people who were working remotely during the pandemic were making less than \$25,000 a year and only about fifty percent of the people working remote were making up to \$50,000 a year. So, these are not the high paying jobs and in those circumstances, who pays for the expense of this remote work? We hear that companies are liking remote work and some employees are liking remote work; some don't have to commute; they can stay at home or what have you. That's all well and good for the middle-class people who have a lot of space and money and time. For families who are squeezed into two-bedroom houses or apartments or even less than that and who have other people in their homes who need to rely upon the technology that allows them to do their jobs, the question must be asked and legislation must be passed which would require employers to foot the bill for that. [00:12:35]

Employers who allow remote work as an accommodation generally do not have to provide payment for those expenses, the electricity, the hardware, the software, what have you. The only law that I have been able to find is the

FLSA or the Fair Labor Standards Act, which requires employers to reimburse employees for work related expenses incurred while working remotely if it causes that employee to earn less than \$7.25 per hour minimum wage or, if it's a salaried employee, if it falls below the \$684 a week threshold. So, what are you talking about? You're talking about people at minimum wage, making eight thousand or so dollars a year, or if they're salaried, \$35,000 a year. Are we saying that anybody who is above those thresholds should be required to pay for the computers, the cell phones, and the cost of those services? That should be answered with a resounding no by appropriate legislation that makes that a federal mandate. Ten or so states and the District of Columbia require employers to reimburse their employees for those necessary and required expenses and it seems that if technology and the future of work is going to encompass a larger degree of remote work, then we must address that issue and the payment of those costs. [00:14:22]

When I think of the future of work, I have to think that we must look not only at the categories of work which will be affected by technology—and we know that there are going to be job shifts because of technology and innovation, it always happens. You know, there was a time when people only read books that were written by hand and then finally, you know you went to various printing formats and now you can read them electronically. So technology advances things, but there are some things that technology will not advance. They have yet to figure out how we're going to pick crops that we eat by technology; there will be manual labor. The people who are providing caregiving in nursing homes and hospitals are going to be providing hands on care. And so, the question is, how do we value those workers and how do we compensate them for the work that they do? I think the answer to that is a federal living wage, not a minimum wage, but a living wage. The benefit of course is that all of these workers, once they are granted a living wage, have the opportunities to enhance their own safety nets and improve lives for their families. [00:16:01]

It may escape some of us that agricultural workers, food workers, are not allowed to organize. That ought to be a federal policy change that all of us embrace. It's—you know we've seen the power of that organization in places in California historically and it needs to expand. You know food production occurs all over the South and the Eastern Seaboard, as well as other places in this country, and that protection is critical in my view. Now in addition to that concern about the minimum wage versus the living wage, I think that we ought to be trying to get all of our federal anti-discrimination and anti-harassment laws applied to as many working people and working categories as possible. [00:07:13]

There are many undocumented workers in this country who provide

essential services and functions and there is case law which prohibits them from sometimes, some of them, from obtaining the relief available under the anti-discrimination laws. I think that we have to move in this country, to a point where if a person is working for any employer and suffers a violation of our anti-discrimination and anti-harassment laws, that full recovery ought to be available to them without regard to the undocumented status. It is, I think, a travesty that we have as many people who are providing essential services who are undocumented, who are not covered by the anti-discrimination laws. [00:18:23]

One of the other things that I think we need to address is the differences in mobility of people within job classes and across job categories. We know that we have forty-four or forty-five percent of the American workforce in low wage jobs. The statistics show that the opportunity to move from low wage jobs is, or the opportunity for mobility is worse in low wage jobs than in all of the other categories and sometimes the best way to get out of a low wage job or industry, retail, food production, hospitality for instance, is for people to be able to change the industry in which they are employed. And we know that there are differences in mobility based on race and gender, even within those industries where mobility is more difficult. [00:19:31]

The government just passed this infrastructure bill that the president says is supposed to be building America better and that has some opportunities for upward mobility, but it won't be effective unless the government uses its power to require equal opportunity across the board as it is trying to rebuild roads and bridges and put in infrastructure for Internet and transportation. The government must be willing to step up and require that from all contractors and the government itself. It needs to hire workers to fulfill that mandate and make sure that those requirements be put in place. I'm a civil rights affirmative action believer. For instance, the federal Department of Transportation still—has set aside programs because there is still a demonstrated lack of diversity with respect to that industry and I think that the government needs to revisit and do feasibility studies to determine whether we need additional programs such as that to ensure that there is upward mobility for everyone. [00:21:05]

KARLA GILBRIDE: Okay. Thank you so much, that is an ambitious and thought-provoking agenda. I'm still sort of processing and thinking about some of the things that you've said. I was particularly struck by what you were saying about—when you were talking about investment in what people need in order to work from home if remote work is going to continue to be a large part of our—the way that more people do their jobs. What is the employer's responsibility to recognize that everyone is not equally situated with respect to what technology they have at home and what they need in

order to do those tasks? And similarly, with respect to scheduling. Not everyone is similarly situated with how easy it is for them to get somewhere and work the three-hour shift and how it is going to impact their life, and that recognizing that people are sort of coming from different starting points. I think this is a good segue to talk to Professor Rich and his notion of how equal opportunity can be a limited framework if it doesn't also account for equal investment in workers and in people to account for where they're starting from. Do you want to talk a little bit more about that, Professor Rich? [00:22:37]

STEPHEN RICH: Sure, I'd love to. Thanks, Karla. So, I'm interested in the ways in which firms themselves, organizations themselves, may be origin points for inequality or may exacerbate inequality between their workers. To that end, I take what one might call a relational approach to inequality in order to diagnose certain features, or shortcomings, of our current employment discrimination law regime that I think show the law to be insufficiently informed by this relational approach. So, I'll just, I'll go through them fairly quickly and if there's follow-up then I'll say more. [00:23:18]

The first shortcoming is what I would call a transactional bias whereby the doctrine seeks to determine the lawfulness of employment decisions by judging the fairness of particular transactions, looking at particular transactions, that is focusing on a moment of decision, which is a common phrase that we see in the Supreme Court's disparate treatment cases. The doctrine does not understand discrimination longitudinally—that is, as something that happens over time—even when a person's competitive fitness is stunted or weakened by the firm's choices or the firm's interactions with that person.

The second shortcoming concerns a particular understanding of capability and performance. The doctrine treats capability and performance as causally prior to employment decisions—that is, as causally prior to those transactions. So, it seems to presume that decisions compare and evaluate workers based on performance and capability using informational inputs that are themselves prior to the transaction itself, to the decision being made. Making the right decision based on performance or capability does not then implicate the organization as possibly having played a role in the distribution of capabilities or of opportunities to develop superior performance. [00:24:40]

The third shortcoming that I'm focused on is the law's view of human capital investments as extra-organizational and therefore causally prior to discrimination, that in fact they are employee-driven or are presumed to be employee-driven activities. So, education, for example, is presumed to be a

valid basis to prefer one employment candidate over another because it's considered to be a reasonably reliable proxy for capability and because inequalities of educational endowment are presumed to result from the candidate's own choices and capabilities as they interact with the choices of educational institutions themselves, rather than from the organization's choices, from the firm's choices. So existing doctrine has difficulty recognizing the organization's role in human capital investment, a role that may come from the distribution of opportunities within the firm. And then finally, there's a failure to see the employment relationship longitudinally, again based on this idea of investment. [00:25:45]

I want to suggest that many employers, particularly in high-wage work—and I do recognize that my theory of investment is one that would benefit high-wage workers more than it would benefit low wage workers—but firms do often see their relationships with high-wage workers as investments. After all, their workers are an important business asset, and so organizations make decisions to award or deny positions or compensation based on comparative judgments of capability and performance, but the doctrine doesn't significantly recognize the role that organizations play as investors in the cultivation of the same capability and performance that they prize. Investors seek and in fact depend upon growth over time. Employers aren't different in that respect. But, because firms have a role in investing in the growth and development of employee potential, they also constitute sites for the introduction of new forms of inequality; that is, inequality as unequal investment. [00:26:48]

Now I think both current disparate treatment doctrine and disparate impact doctrine have a lot of difficulty in taking in these kinds of criticisms. First, seen through a disparate treatment framework, capability and performance are presumptively legitimate, nondiscriminatory reasons for employer's decisions. The inability to disprove the employer's assessment of the plaintiff's employment merits relative to those of his peers or competitors is generally fatal to the plaintiff's case and the doctrine rarely affords an opportunity to ask how this inequality of so-called merit came to be. Seen through the disparate impact prism, we get the ability to question whether the qualifications considered by an employer are really indicia of merit in an occupationally relevant sense. This is our inquiry into job relatedness and business necessity, right, but it's not an inquiry into the origin of inequality between individuals. In fact, in a sense, *Griggs* sets aside that origin question entirely by locating the origin of inequality between white and black workers in the public education system, thus moving it away from the employer. I have to wonder what the *Griggs* court might have said about a situation in which it could trace inequality between black and white workers to the

activities of the business itself. I doubt very much that it would have held the business blameless in that context if it didn't hold Duke Power blameless. [00:28:21]

I think there is a certain consonance between what I'm suggesting and the equal opportunity concept that we have received from *Griggs*. But what I want to suggest about merit essentially is this: that merit is not only measured by employment decisions, but it is made. It is not only measured by organizations, but it is made by organizational activities; organizational structures and practices may serve either to enhance equal opportunity by providing equal investment, or to increase inequality between workers by engaging in preferential investments. I think that that's something that we need to take seriously if we're going to really enlarge our understanding of what equal opportunity is. I do recognize, if one puts these concerns—these arguments—into the context of traditional human capital theory, one could say that what I'm asking is for employers to fund worker mobility or to subsidize worker mobility and to some extent I am. That is, I don't think that would be a bad policy outcome. Worker mobility is better than stagnation and unemployment, right? And certainly, if those are our two choices, it would behoove us to have a system in which employers were required to make more fair investments even if those investments increase the prospect of mobility. [00:30:00]

I also think, in keeping with the theme of this panel that, as we see workers move between employers at really fantastic rates, this concern with the longitudinal perspective on the employment relationship doesn't go away but, in some sense, becomes intensified. Because if a person is going to be expected to move from one employer to another, particularly in high-wage work, many times over the course of a career, then what happens in one employment relationship definitely has an impact on one's prospects in another, an impact that we should be mindful of. It should be an important concern, in my view, of equal employment opportunity.

KARLA GILBRIDE: So, I think this is a really interesting sort of construct in the concept of what equal investment might look like. What do you see as needing to be done in order to bring that to fruition? Would it require new legislation? Do you think it's something that can be done through sort of cultural change or educating employers that if you make this investment in your workers, it will be better for you in the long run? What are the sorts of tools and mechanisms to try to bring this shift about? [00:31:14]

STEPHEN RICH: So, that's an interesting question, Karla, and it's a tough one, and I'm at the sort of conceptual stage, but let me offer a couple thoughts. First is I've been doing some work teaching civil rights law, including employment discrimination law, from a more historical

perspective recently. And so, from that experience, I'm encouraged to think that maybe there are multiple pathways to get to this outcome that wouldn't necessarily require a change in legislation. It could start with a change in how the EEOC functions in its oversight role, what sorts of questions it's asking of employers and what sorts of employers it wants to focus its own efforts—enforcement efforts—on, and why. Why is it that, at your firm, Black employees tend to come out doing worse than they were going in, or that the gap between Black and white employees tends to increase within your firm and not within this other firm within your sector? That would be, I think, a good question for the EEOC to be asking and if that were to happen, I think that might also influence courts. [00:32:19]

I also think that *McDonnell Douglas* and *Griggs* gave to employees the ability—well, gave to employees a certain language and a certain framework from which—to make claims against the employer, both in court and outside of court, right? So, in a certain sense, investment in human capital at the relational level means negotiations between the parties. It means not just an ongoing relationship, but perhaps an ongoing conversation between the parties. A legal language that gives employees a set of terms through which to express what it is that they can ask for and why their relational demands actually matter to the law, I think, would be a nice thing to have and hopefully would have some impact on employer behavior. Finally, yes, in some cases we would be asking factfinders to make determinations about the relative equality of investments between two individuals over time or between numerous individuals over time. [00:33:25]

I think one thing to emphasize about my theory is that I'm not calling for identical investments on a transaction-by-transaction basis, that's exactly what I'm not calling for. What I'm calling for is a longitudinal perspective that focuses on the substantive equality of investment over time. And so that is a new inquiry, but there have been new inquiries before, right? What's the disparate impact inquiry, what's the business necessity inquiry or job relatedness inquiry? What's the disparate treatment inquiry? These are all new inquiries to which finders of fact had to become accustomed and that, in response to which, employers shaped their practices—that is, employers began to keep records and to engage in more formal processes so that they could demonstrate legal compliance as the requirements of compliance evolved over time. So, I'd look to articulate to employers a new set of requirements that they'd have to meet, yes, but not a set of requirements that necessarily stand apart from existing prohibitions against disparate treatment and disparate impact. As employers come to understand their compliance obligations differently, I think that they would generate for us the kinds of evidence that we would need to show the viability of relational

discrimination claims. Yes, we'd be in a fragile or vulnerable spot in that it's possible that courts would defer too much to what employers may say constitutes legal compliance, as Professor Lauren Edelman reminds us in her work. I think that's something we should be mindful of, but I also think it would be worthwhile to begin a new conversation about compliance from a relational perspective. [00:34:44]

KARLA GILBRIDE: That's fascinating. Do you see . . . You know, you talked a little bit about the challenge for courts and getting courts used to a different way of thinking of things. Do you have a sense for what, for what litigators would be looking for, what sort of evidence litigators would be looking for if they wanted to build a case of how two employees were not equally invested in by their employer? [00:35:13]

STEPHEN RICH: You know, I'm going to say something that's going to sound really ironic, but again, I'm thinking about this from a historical perspective. I'm thinking about the NAACP Legal Defense Fund's role in litigating *Griggs* and, you know, choosing a case. What does it mean to choose a case, right? Perhaps practitioners would be better off choosing, first, to pursue this kind of theory against employers whom they know, or have strong reason to believe, do engage in some kind of record-keeping with regard to their investments in individual employees. Start there. Start with the employer that has the evidence that you wish to collect—that is what I would suggest. Of course, you also want that employer to be the employer in which the disparity between men and women or the disparity between blacks and whites increases over time within the firm, right? You want those two things to be true: that the employer preserves the evidence and that you would see the disparity increase over time. I would suggest that we look for that sort of case, and see what happens. [00:36:21]

KARLA GILBRIDE: Great. Lots of, lots of food for thought, I hope people are taking notes. And this, obviously the moment in time which you alluded to, we're trying to do a freeze-frame of how people were situated at a particular moment in time when a decision was made is one of the things that the courts tend to focus on when they're looking at Title VII and other types of discrimination cases. I wanted to turn next, to Professor McCormick, to talk about some of the other fixations or rabbit holes that courts tend to go down when they're analyzing Title VII fact patterns and what ideas you have for how to break them out of those rabbit holes. [00:37:07]

MARCIA MCCORMICK: Thank you, Karla. I should probably preface my remarks a little bit with saying that much of what I write and complain about is the way that courts misinterpret Title VII all the time, and the answer may be that we stop asking the courts to do things because they're just messing it up. And so, take this recommendation with a grain of salt. One of

the things, I think, that has happened in the, sort of, back-and-forth that we've seen over and over again that was alluded to with one of the panels this morning, is that Congress passes a statute, the Supreme Court and the lower courts interpret it, and the statute's protection gets smaller and smaller and smaller and smaller, and then Congress comes back and passes some kind of an amendment to say, "No, we really meant it the first time and so we're going to try and reestablish that scope," in their findings of why they're passing this amendment. In other words, they'll explain the way that the Court had gotten things wrong and in what *ways* they had gotten it wrong. [00:38:16]

One of the topics that wasn't talked about earlier today—we heard a little bit about the Civil Rights Act of 1991—but not about the ADA Amendments Act of 2008, which was really a great example of that terrible narrowing. In those decisions narrowing the scope of the ADA, the Court had said things like, "Well, if there are only X million people who have disabilities then basically, nobody can have a disability, or if they have a disability then it has to be so—it has to impair their functioning so much that it's going to be almost impossible to prove that they are a qualified individual able to perform the essential functions of the job." And so, Congress came back and in bipartisan legislation again, just as the ADA was, provided new language. They didn't provide any new causes of action, they didn't provide any new remedies, but instead elaborated on the protected class a little bit and had this really long and detailed explanation about the purpose of the ADA and about the purpose of the Amendments Act that really just said, in kind of plain language, "Look we're serious that this is—the term, 'disability,' at least—is supposed to be interpreted very broadly, and in doing that you should also think about the congressional history—the reports that came out of the committees while we were hearing this. And one report in particular should be thought of as authoritative, et cetera, et cetera."

Thus, by expanding and making clear that the classes are large and that Title VII's goal is to provide equal opportunity and not just formal equality, a Title VII amendments act could go a long way towards giving ammunition to litigants who were in court, to talk about ways that a lot of the doctrine has developed, as Dr. Rich was talking about. [00:40:40]

And so, what ends up happening is that people tend to think, wrongly, that employment discrimination law is highly technical. I don't know if you all have experienced this, but my sense from my own practice and from my students is that people have this tendency to believe this, and the result is that you have these frameworks that are very specific. You have a framework for reductions in force; you have a framework for age and reductions in force; you have a framework for discriminatory discipline; you have a framework

that involves Susan with a blue shirt on in February, practically. It seems that ridiculous sometimes. And the people who practice in this area, we get a lot of satisfaction from the mastery of these frameworks. We're mastering these frameworks and we're using them, and as a result, we're perpetuating them. What ends up happening then, is that you slice and dice the facts of employee cases to a point where average people wouldn't recognize what was going on anymore. You end up looking at discrimination—I think Karla, you put it this way—like a single moment in time. In that single moment in time, was this one thing enough to show that the person's race or the person's sex or the person's age was *the* reason that the decision was taken? And we all know decisions don't get made like that. [00:42:05]

And so over and over again, the courts produce these decisions that average people looking at the facts cannot recognize. It seems like all I do in my employment discrimination class is give people bad news, like, here is a fact pattern, do you think discrimination happened? And my students are like, yeah that's totally discrimination. That sense or reaction is driving the #MeToo movement, it's driving Black Lives Matter. It's driving so much of the activism in this area. But courts look at the same situation and they say, well, in this one second, you know, we can't really tell that it was this one thing, just race or just sex or something like that, that caused the outcome. And so, my suggestion is to sort of pull us back out, get rid of the frameworks, and look at the big picture. The legal question should be, is it more likely true than not that the person's identity, whether it's intersectional in this, particular instance, or maybe just—it never is *just* in reality—but maybe just race or just sex... Could that protected class have played a role in the outcome? And if it could have played a role in the outcome, then a jury should decide. [00:43:21]

KARLA GILBRIDE: So, I wanted to dig into a couple of points you just made. I mean one is, it seems to be, you're calling for a broadening, you know instead of this narrow laser focus on one moment in time and also on one aspect of a person's identity and say is this one, you know prohibited factor, the thing that made the decision. You're advocating both a broader narrative, which sounds like what Professor Rich was talking about, more of a longitudinal, "What is the whole history of this relationship?," but also more of a focus on intersecting identities and the fact that people can be discriminated against based on more than one aspect of their identity. Can you talk a little bit more about how you'd like to see the law changed to recognize intersectionality? [00:44:09]

MARCIA MCCORMICK: I actually don't want to see the law changed so much as just even a statement that recognizes that the classes defined in Title VII are not boxes with impermeable barriers that someone must fit

themselves in. It's hard not to think about the *DeGraffenreid* case that Kimberlé Crenshaw wrote about in her path-breaking article on intersectionality, where she coined the term and the concept of intersecting systems of oppression affecting people. But that is the archetypical situation where the Court couldn't recognize that a Black woman was experiencing something unique to the fact that she was a Black woman because of stereotypes of Black women that are different from white women and different from Black men. It's so easy to lose a clear discrimination case when the court asks whether you were treated worse than white women or worse than Black men. The answer will likely be, not necessarily. And if that's the case, then there's no discrimination at all. You have to pick one or the other. Courts aren't that bad anymore, but they still tend to get really caught up in this. [00:45:24]

And so, my suggestion is just a reminder that Title VII's classes and categories are a belt-and-suspenders approach to discrimination. I don't even care if they use that terrible language, "belt-and-suspenders," because if you look at the classes as they are it's obvious that this was Congress's intent in the first place. I think it's obvious anyway—maybe this is my whole problem. The classes are race, color, national origin, etc. Looking at those three, you might be confused as to the difference among those. They are completely intertwined, and often religion is completely intertwined, as well, and all of those people also have a sex. So, the idea that they are completely separable categories is artificial in the first place. Thus, really, the question is, but for the, the person's protected class—and it isn't just one or the other—could discrimination have occurred, or would the decision have been made? [00:46:29]

KARLA GILBRIDE: Do you think part of what is—what judges are getting tripped up on and what some—causing these rulings to be so narrow is that they want a framework and right now, you know the framework, it's like they want a structure to follow and right now what they have is the *McDonnell Douglas* framework. If we could replace that framework with something else, do you think that would change the outcomes or are you more advocating to just get rid of the framework entirely? [00:47:00]

MARCIA MCCORMICK: That's a really good question because there is more than one framework. The Seventh Circuit, for a while, experimented with something called the "convincing mosaic" framework, which was an attempt to look at the totality of the circumstances. What ended up happening was that the district courts then started building, like barnacles on a boat, little pieces of what a convincing mosaic had to mean, with additional factors and the parts of the inquiry. And so, the Seventh Circuit decided not to use that language anymore because it created this whole superstructure of a new

framework, completely counter to the point of the new language. And so, *McDonnell Douglas* isn't the only framework but it's comforting. It's like math, and once you've mastered the math you can just go through the process and feel like you've done your job and that's the end of it. And so, I do think that courts really—especially district courts—really like these frameworks, but the Supreme Court actually has said totality of the circumstances is what we should be doing. [00:48:07]

KARLA GILBRIDE: So, we have a question and I think it's relevant to this topic, so before we move on to talk about damage caps, I wanted to open this up to anyone who wants to answer, either Professor McCormick or someone else. Talk about the changes to Title VII that were proposed for sexual harassment claims as part of the Be Heard in the Workplace Act. I don't know if anyone is particularly familiar with what the Be Heard in the Workplace Act would do, but we have a question to sort of talk more about that legislative proposal and its pros and cons.

MARCIA MCCORMICK: I actually am not familiar with what was in the Be Heard in the Workplace Act, so I would defer to anyone else who has more expertise on this one. [00:49:05]

KARLA GILBRIDE: Oh, it looks like it's—so I Googled it because this is the beauty of technology and being remote.

GERALDINE SUMTER: All I know about it is the definition of harassment that it uses, but I don't, I don't know much about what else it would do.

KARLA GILBRIDE: We can come back to this. (laughs)

MARCIA MCCORMICK: That might be a good idea.

KARLA GILBRIDE: Why don't we use our Googling skills in the interim, but while some of us are doing that, I wanted to turn the mic over to Professor Selmi to specifically—you know, when we talk about civil rights restoration acts of various types, one of the issues that comes up over and over again is how long it's been since the damage caps were raised and how they talk about the minimum wage not keeping up with inflation. We have some damage caps that are pretty antiquated at this point, and if you want to talk a little bit more about how that plays out in some of your empirical research and what you would propose to do about it. [00:50:12]

MICHAEL SELMI: Sure. Thank you. It's a pleasure to be here. I believe I am the last formal speaker on a Friday afternoon, which I'm in Arizona, so you know almost 5:30, so I'll keep this relatively short. Although I also realize every time I say that when I'm about to speak then I go over. So, I shouldn't, I probably shouldn't have said that part.

I thought what I'm going to do before the damage caps, just consistent with what others have talked about is give a few comments on sort of this

future of work, future employment law, if you don't mind, in a couple different ways. One is I'm of the view that tinkering with the law or the doctrine won't make much of a difference. You know, the one case that might have made a difference back in the day, so to speak, was the *Hicks* case, which has generally been lost now, but that mandatory presumption of discrimination in the circumstance where the employer's argument is not believed. That could have made a difference because it's actually dictating a judgment, but we lost on that, and there's not much of a movement to go forward on that now. Otherwise, I think, you know, one of the encouraging things, signs, that's occurring now is the judges that President Biden is appointing. [00:51:37]

The judges have always been a focus, at least going back quite a ways, for Republican administrations but less so for Democratic administrations. President Biden is appointing a really impressive group of judges, district court and appellate, they're getting them confirmed. How long that will last is anybody's guess, but that can make a difference if you're bringing people onto the court who have a different perception of the continuing relevance of discrimination in the workplace, which I think is sort of a key aspect to getting some of these issues addressed. [00:52:12]

I also think we are clearly in a moment for workers, I mean there is a lot going on. I'm about to teach employment law in the spring and I feel like I should just start fresh, there is so much going on. I'm going to try and do that by focusing on current cases. We've got workers on strike that we haven't seen for years, including the Deere plant, the workers at Deere who turned down a contract that their union approved. That's pretty unusual these days. They're organizing up at Starbucks in Buffalo and the extent that Starbucks is doing—you know going to fight that organizing, just like Amazon did in Alabama where Amazon was successful, but it's just, it's a very interesting time. [00:53:06]

Today, I assume most of you saw, it was reported that 4.4 million people quit jobs last month. The largest ever in a month and you know this increased mobility of workers, a willingness to quit bad jobs presumably, or at least quitting jobs for better opportunities or less, less willingness to put up with bad jobs, that could be a really important moment. I think, if we're going to see improvements in the workplace, it's going to be from workers leveraging all this new power essentially. Just like with inflation, I think with the worker agitation that's going on or worker turnover that's going on, we don't know if this is a significant change or just a momentary disruption in the process. I think there's a good possibility that we're going to see employers respond favorably to the workplace, not just by raising wages but you know increasing remote work, reducing the use of arbitration agreements, that sort

of thing, and I think that's going to come more from workers than from changes in the law. [00:54:21]

I also think one of the interesting things to think about going forward too is assuming there is an increase in use of remote work and it's still, you know a question of how much change there will be. Presumably, that will put—that should reduce discrimination in the workplace, assuming that a lot of discrimination comes from personal interactions. There's other, you know, other things can happen that may balance that out but it will be interesting to see whether there is any perceived change in harassment in the workplace as a result of more remote work and also presumably, employers will start taking issues more seriously if workers are going to be quitting over these bad jobs and the like. It's just, it's hard to know, but I think there's a serious possibility that increased use of remote work should lead to a reduction in discrimination. [00:55:18]

I also think, in a piece I'm writing now, that an increased use of technology or algorithms by employers has the potential to significantly reduce discrimination too. Not necessarily, and there's been a lot written on the use of algorithms. They're not used widely in employment yet, but a lot of employers are considering the use of big data to try and find better predictors for workplace performance, and there's also a lot of good work in computer science going on, about how to reduce discrimination with the use of algorithms too. I think there's been concern that algorithms can be discriminatory, which they can, but it's hard to see how they're going to be worse than people. You know if it's between a machine and individuals and discrimination, I'm likely to go with the machine, at least for some period of time, given everything we know about the humans who are making decisions. But I also think this is an area where disparate impact, the disparate impact theory, is actually adequate to deal with algorithms. If anybody is interested in reading my piece just ask. [00:56:30]

I think there's a lot of interesting things going on that could actually improve the quality of the workplace and reduce discrimination. I think one thing, this is my pet peeve that I've had for a long time, but I am now getting a chance to discuss, and that is the damage caps for Title VII, which were put into place in 1991, the \$300,000 limit. It's kind of crazy that they haven't been raised and those damage caps . . . So, \$300,000 today, you know is worth \$160,000 in terms of the value and to the extent that damages are necessary to deter bad behavior, discrimination has gotten half as expensive as it was in 1991. That just seems backwards, especially when you think about something like antitrust law where damages are trebled. These damages are halved for discrimination. Even if we just wanted to keep the damage caps in place, at the same level, given—they should be

approximately \$600,000 today. That feels like it should be an easy fix. Nothing is easy obviously with this Congress and that's probably going to be true for some time moving forward. [00:57:53]

One of the things I've been working on, and I don't have all the data yet, because as I'm sure everybody knows, it's really hard to get good data on jury verdicts and the like . . . So, one of the things we're trying to figure out is whether the damage caps are inadequate for jury verdicts, because one of the interesting aspects of Title VII or this 1991 Act, is that the jury isn't told about the caps, right? So, there should be a way that we can see how many verdicts come in over the caps and how many are within the caps, but it's really hard to get that information too. Obviously, Section 1981 doesn't have the caps, but it's still kind of interesting to me. I was going to say amazing, but I'll just say interesting to me, that a lot of race discrimination cases don't have Section 1981 claims. It would seem to me that they all should be brought under Section 1981; you can avoid EEOC and you don't have the damage caps. Also true with national origin, I mean the caps primarily apply to sex discrimination and disability discrimination. There's also lots of states that don't have cap damages and we're also trying to see if verdicts are different in those states too, but even if jury verdicts regularly come in under \$300,000, having a higher damage cap would obviously increase the value of those cases for settlement purposes and the vast majority of cases are going to settle, it would also—it seems totally anomalous that the damage caps really only apply to employment discrimination. [00:59:29]

Back in the day, and I hate the fact that the Civil Rights Act of 1991 has the year in it, because I worked on it and so you know exactly how long ago that was, it's now thirty years ago. At the time, there was a sense that Congress was going to start capping damages in statutes regularly, and as far as I know, it was only employment discrimination where those caps were actually implemented and it just, it all seems backwards that the damage caps are only for discrimination, that discrimination is so cheap in that, which creates disincentives. You know, there's really not the incentive for employers to take broad actions because it's just not that expensive and it gets cheaper every year, especially in a year of higher inflation like now, you know it's getting cheaper every year. So that's one thing I think could matter. Otherwise, I'm hoping this worker agitation continues. I'm a little afraid it's going to be like the Black Lives Matter movement that created so much hope a year ago and then not much currently, as everything has changed, and I'm hoping that we'll be able to maintain more momentum with the workplace agitation than we did with the Black Lives Matter movement or even the #MeToo movement, which also has largely faded from the scene unfortunately. So, I'll stop with that. [01:00:52]

KARLA GILBRIDE: Great. We have a request for you to share the piece that you mentioned if there—it's publicly available or the link to it, that can be put in the chat or so. [01:01:07]

MICHAEL SELMI: I don't—yeah, I don't know how to do that.

KARLA GILBRIDE: Okay.

MICHAEL SELMI: If anybody e-mails me directly, I'll send it. It's going to be posted, I just finished it up. It's going to be on the SSRN.com website presumably next week, although sometimes that's taken longer too. If I could, I would, I would put it right up here, but I think that would—I would have—more likely I would knock the whole system out.

KARLA GILBRIDE: (laughs) Well don't do that. We want to—we have a few more minutes and we want people to be able to hear people's last thoughts. One other question that we had in the chat is about the federal sector, Age Discrimination provision, which refers to an action free from discrimination, is that language that we should be trying to either amend into other statutes, you know, is that sort of better than other types of causation language? And a related question talking about mixed motive analysis, as opposed to pretext, and what are the advantages for mixed motive analysis, if any? Does anyone want to take that one? [01:02:22]

MICHAEL SELMI: Well, I can, I can address the latter. I'm not as familiar with the federal Age Discrimination. For the mixed motive analysis, it seems to have really not been actively used by practitioners and folks watching this would know better, and I think there's a reason for that. I mean it's the splitting of the verdict kind of thing, with the juries having an opportunity to do in that, so damages. But I think the interesting thing to me with the mixed motives is it should make it significantly easier to get beyond summary judgment, right, that whole idea. I think the best approach to it, although I don't see it much in cases along these lines, but I think it's open, is to rely on a mixed motive theory to get by summary judgment and then abandon it for trial. I don't think there's any reason why you have to use it throughout the trial. There are a couple cases that talk about this but it does not seem like it's helped a lot with summary judgment. From what you can see and the like, summary judgment still seems to be a very forceful tool used against plaintiffs, whereas if you take the mixed motive concept and a motivating factor idea seriously, it should be much easier to get beyond summary judgment, but it—otherwise, it really seems that it has had much less effect than a lot of people expected. [01:03:50]

GERALDINE SUMTER: I think that it is good, on summary judgment and fortunately, we've had a few good decisions on summary judgment, admonishing the district courts not to engage in fact finding. I do not use the mixed motive theory any more than I do because it is, I think, a problem for

most plaintiffs' lawyers in that if you get the mixed motive instruction, the jury is told that they can find that the company discriminated against the plaintiff and that they can award only a dollar, or nothing, if they find that the company would have taken the action anyway. If a jury only awards a plaintiff a dollar, the plaintiff's lawyers can then go in and ask for attorney's fees, which could be thousands of dollars, if not \$100,000. That just doesn't swallow very well with the plaintiffs, with most plaintiffs' lawyers. Everybody wants the company to be held accountable and to be found liable, but you know, from a practical perspective, my clients want some compensation and more than a dollar. So that's a practical problem with the mixed motive analysis and using it. [01:05:11]

MARCIA MCCORMICK: I hesitate to change—and the Be Heard Act includes this actually—every statute to have a mixed motive analysis. My concern is partly that I think Title VII also has to make clear that it is really designed primarily to empower historically underrepresented people, that it's about equal opportunity and not formal equality. My only concern with, sort of, lower standards is that they get used by people who are already powerful in reverse discrimination cases pretty successfully. Maybe this is my idiosyncratic experience in cases in St. Louis, where we've had just a number of high-profile reverse discrimination cases that have been aided by these same kinds of things. [01:06:09]

KARLA GILBRIDE: That's interesting. As a follow-up to some of the maybe downsides or unintended consequences on mixed motive analysis, what do people think about using the Supreme Court's recent *Bostock* decision and how it analyzes but-for causation? Does that open up any doors to kind of get courts to think about causation differently?

GERALDINE SUMTER: Well, I'm certainly using it. I never thought I would read, four or five times, that but-for cause doesn't mean the only cause. In the Supreme Court decision, when I got the decision and printed out a hundred or so pages, I didn't realize that there was this huge—these huge dissents with all these appendices attached to it, but really the opinion is a 35-page opinion, single spaced opinion, and I was so encouraged by it. I'm using it, I'm quoting it word for word every opportunity that I get, and I think it's helpful. I've gotten past the summary judgment using it in one case I'm not sure I would have before *Bostock*. [01:07:24]

MARCIA MCCORMICK: Yes. I've downloaded every case so far that cited it and read them, and it is shocking how many courts are using it for the statutory interpretation. Also, a lot of courts are using the but-for analysis in ways that I wouldn't have predicted, including in a case that involves intersectional discrimination of age and sex. The court there affirmed a trial court decision and said that age and sex intersectional claims were

cognizable because of the elaboration of the but-for standard in *Bostock*. So, I think it's going to be very useful to break down the artificial distinctions that have been easy to make about distinctions between identity factors or traits that are protected and behaviors or traits that are not protected. Instead, why can't it be both? You can have multiple but-for causes, and that fits with the way decisions are made anyway. [01:08:31]

There's this great dissent that Justice Breyer wrote, I think it was in *Gross*, the mixed motives ADEA case, where he talks about but-for causation in the way that the majority in *Bostock* talks about it. The concept of but-for causation works fine when you're thinking about events in the physical world where you can observe, externally, one thing hitting another thing, hitting another one, sort of like a trail of dominoes, but that's not how decisions get made. The decision-making process is instead all a big mush up there in the brain, and we *ascribe* motive to people based on their actions. Motives or causes for decisions are not even something that people accurately can always talk about themselves, and so this concept of causation doesn't work very well. I feel like the description in *Bostock* gets at that reality much more effectively, even than Breyer's description—it's all a bunch of pudding up there. [01:09:19]

GERALDINE SUMTER: I think for the—for all of the cases where we're looking at but-for it's important, but I think it's particularly helpful in retaliation cases, because you know you have some courts saying that the passage of time is too great, two or three months. Well, I've known people to hold grudges for far less, for far longer than two or three months, so to have that as an added part of the arsenal I think is good in most retaliation cases.

STEPHEN RICH: So, I'm very heartened by the but-for causation language in *Bostock* but I'm also concerned. I mean, on the one hand, I'm glad to hear that lower courts have taken up the opportunity to rethink causation in disparate treatment cases, or rearticulate anyway, along the lines that Justice Gorsuch does in his opinion, and as well they should because that's the Supreme Court speaking. On the other hand, what I worry about is what might happen when the Supreme Court gets a chance to look at this a second time and ask itself whether or not there were unintended consequences here and maybe just take the opportunity to tell us no, no, no, what we meant was to answer the statutory interpretation question about whether or not—whether or not discrimination because of sexual orientation necessarily includes discrimination because of sex and we didn't mean to erode forty years of equating disparate treatment with intentional discrimination. That's the moment that worries me. [01:10:52]

GERALDINE SUMTER: Yes. Here today and gone tomorrow.

KARLA GILBRIDE: So, we just have a few minutes left. I know that Professor McCormick had another idea. I don't mean to put you on the spot here, but regarding the data collection and how having more data could assist the public and practitioners and academics. Do you want to talk about that for a couple minutes? [01:11:21]

MARCIA MCCORMICK: I can talk about it really briefly. We started today with the first panel of former chair—former Commissioner Lipnic and a number of other people who have had a long tenure with the EEOC and state fair employment practices agencies. One of the things that they talked about is the fact that the EEOC has collected this expanded pay data and now wasn't going to for a while because there's still a Republican majority on the EEOC and they aren't walking that decision to hold off back yet. There have been a number of calls to not only continue that gathering of greater pay data, but also to expand to other kinds of data about race and promotions and things like that. I think all of those are wonderful, but I think that there's something more that actually needs to happen, and that is that *access* to the data needs to be made available to researchers. A great example of some of the work that researchers can do was written about recently in the *New York Times*. [01:12:27]

The *New York Times* reported on this study just about two months ago, maybe. The study was a gigantic resume audit in which 83,000 resumes were sent out, and the researchers were able to reproduce studies that we've seen time and time again about how employers do not call back people with African American sounding names at the same rate that they do white sounding names. The data that they got was so fine-grained that they were able to determine that most employers had some discrimination on the basis of race and sex, but there were a few industries and a few particular employers that almost certainly are engaged in systemic disparate treatment. That kind of ability to analyze is beyond what the EEOC can do, but think about the options for researchers at universities, researchers who could take that data and really do comprehensive analysis and discover interesting things about what's going on. Those researchers could publish that description alone, not necessarily who the people are engaging in that conduct, but that information alone would be so valuable in the face of a judiciary or populace that believes discrimination is rare. [01:13:28]

Part of the reason for the disconnect that I was talking about earlier, between what people think is happening in the world and what courts think is happening in the world, is because there's not a lot of information about what is really happening other than people's own experiences. So, the more information you can get into the hands of people who then can amplify it in a way that's really sort of disciplined, I think the more likely we'll actually

see change. [01:14:00]

KARLA GILBRIDE: Thanks. That's a really useful and practical suggestion and I think that could be beneficial to lots of us, you know, especially thinking for me as a practitioner wanting to show the court how widespread something is, just having more articles that you can cite to, more sort of publicly available sources to take it away from that one moment in time and create more of a context. Any last thoughts or comments that anyone wants to make in our last minute or two? Otherwise, thank you all. I know it's a Friday evening on the East Coast, so thank you all for sticking with us and spending your Friday afternoon and evening with us. I've really learned a lot from all of you today and look forward to seeing, reading some of these papers that people have mentioned that are forthcoming, and thank you again to the journal and the organizers for really thought-provoking, really engaging discussion today. [01:15:07]

FACILITATOR: Thank you so much. This was a great discussion, we really appreciate it and like you said, we understand it's the end of the week and end of a long day, so we appreciate your time and participation. We've learned a lot. Thank you to all of our attendees. Like I said in the chat, recordings of these panels will be made available in the upcoming week or so and if you have any questions do not hesitate to reach out to any of us. Thank you again and congratulations on getting through a great panel.

[01:15:33]

END TRANSCRIPT

