Berkeley Journal of Employment & Labor Law

Volume 39 | Issue 1 Article 10

7-1-2018

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Link to publisher version (DOI)
https://doi.org/10.15779/Z38D50FX7J

BECAUSE OF SEX: ONE LAW, TEN CASES, AND FIFTY YEARS THAT CHANGED AMERICAN WOMEN'S LIVES AT WORK

Gillian Thomas. St. Martin's Press, 2016. 272 Pages.

Eileen M. Sherman†

In *Because of Sex: One Law, Ten Cases, and Fifty Years that Changed American Women's Lives at Work*, Gillian Thomas[1] recounts the story of ten women who brought landmark sex-discrimination cases during the fifty years following the enactment of Title VII of the Civil Rights Act of 1964. Throughout the book, Thomas showcases her thorough research by including an impressive level of detail in describing the evolution of the legal landscape for women at work.

The book starts by exploring the legal landscape against which Congress enacted Title VII, describing it as a world in which women were banned from working as bartenders unless it was in their husband or father's establishment, so as to prevent them from flaunting their sexuality or from "hazards that may confront a barmaid without such protecting oversight."[2] Thomas also describes the influence of race in the status of women in the workplace at the time. While white women were viewed as stay-at-home wives whose bodies were unsuited for work, women of color were notably "never placed on such a pedestal; indeed, from slavery through subsequent

DOI: https://doi.org/10.15779/Z38D50FX7J

†. J.D. 2018 (U.C. Berkeley).

1. Thomas is a Senior Staff Attorney with the American Civil Liberties Union Women's Rights Project, specializing in equal employment opportunity. She has extensive experience in employment discrimination cases on behalf of women in male-dominated workplaces from her tenure as a Senior Trial Attorney with Legal Momentum, a legal advocacy organization for women. *See* Gillian Thomas biography, ACLU, https://www.aclu.org/bio/gillian-thomas (last visited Nov. 6, 2018).

2. GILLIAN THOMAS, BECAUSE OF SEX: ONE LAW, TEN CASES, AND FIFTY YEARS THAT CHANGED AMERICAN WOMEN'S LIVES AT WORK 38 (2016).

generations their labor made it possible for white women to stay home."[3] While Thomas makes it a point of discussion, she could do more to explore the intersectionality between gender and race in labor law in the mid-1900s to set the stage for many of the cases she discusses later in the book, where plaintiffs or those most grossly affected by workplace discrimination were women of color.

In keeping with cultural mores that tended to keep women in the domestic sphere, lawmakers did what they could to keep women from attaining workplace rights. Before Title VII, from the late 1800s into the mid-1900s, state legislatures had enacted various "protective" labor laws limiting how long women could be at work, detailing which tasks they could perform without hurting themselves or becoming too fatigued, or granting them special rest breaks.[4] Such distinctions reinforced the rigid cultural separation between men and women at work.

Eventually, there was a gradual, albeit slow, acceptance of women at work. As protective labor laws started to disappear following the enactment of Title VII, fetal protection policies began to proliferate. Fetal protection policies purported to exclude women from positions that might endanger their unborn children, but were in fact excuses to keep women from entering male-dominated professions. Such policies were "most prevalent in well-paid, unionized industries from which women historically had been excluded."[5] The Supreme Court eventually issued a unanimous ruling in *Auto Workers v. Johnson Controls, Inc.*[6] holding that such policies violated Title VII, but the themes of domesticity and female protection still rang true years after the state legislatures' protective laws.

Thomas traces the lineage of ten cases waged in the wake of Title VII, highlighting two points particularly well: (1) addressing the victories as well as the shortcomings of each case, and (2) including details shocking to the modern reader, thereby giving life to the women behind the cases.

I.
EXPLORING VICTORIES AND SHORTCOMINGS

First, Thomas balances both the shortcomings and victories of the women who had to actually fight the workplace battles leading up to these landmark cases. Thomas argues that the women plaintiffs were effectively sacrificial lambs. They rarely walked away with what they initially sought, but left a better working world for women who would come after them. For

3. *Id.* at 37–38.
4. *See id.* at 37.
5. *Id.* at 152.
6. UAW v. Johnson Controls, Inc., 499 U.S. 187 (1991).

example, in *Phillips v. Martin Marietta Corp.*,[7] the plaintiff prevailed in the Supreme Court against a corporation for discriminating against mothers in their hiring process, but acquired so little money from her victory that she could not even pay for adequate cancer treatment.

The shortcomings in these cases are present in both the consequences for the plaintiffs as well as unclear messaging by the Supreme Court. Several opinions contained open-ended questions and unresolved matters. Thomas traces the lineage of cases, pointing out where the Court was willing to deal with unresolved matters from a prior case, and alluding to where the next challenge would emerge. For example, "although the Supreme Court a few years earlier in *Phillips v. Martin Marietta Corp.* had seemed open to a more lenient standard for determining what constitutes sex discrimination, Justice Thurgood Marshall's separate opinion chastising the majority sent a mixed message about how the Court would rule in the future."[8]

The law on sexual harassment similarly progressed through a series of cases which had both shortcomings and victories. Throughout the 1970s, courts responded to complaints about sexual harassment from supervisors with "a collective shrug that conveyed, '[y]ou can't blame a guy for trying.'"[9] Thus, women crept forward slowly, but with each triumph they faced some drawback or caveat. For example, in *Meritor Savings Bank, FSB v. Vinson*,[10] the Court took the plaintiff's "provocative dress" into account when evaluating her workplace sexual harassment claim, despite her attorneys likening the use of the plaintiff's dress to the prohibited use of a victim's previous sexual behavior as evidence in rape cases.[11]

Women won rights in the workplace while still falling prey to antiquated notions about why it may be justified to keep a woman out of a position for purported good reason. Thomas reports on harassment and discrimination taking place high up on the corporate ladder and the process by which courts expanded the definition of what constitutes discrimination under Title VII. For instance, Thomas discusses *Price Waterhouse v. Hopkins*,[12] highlighting the ubiquitous nature of sex stereotyping in the workplace. In *Price Waterhouse*, the employer tried to use gender stereotypes as a way of keeping women out of higher positions, which the court found was sex discrimination.[13] This was after a long battle in the lower courts, where the

7. *See* Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971).
8. THOMAS, *supra* note 2, at 42–43.
9. *Id.* at 46.
10. *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986).
11. THOMAS, *supra* note 2, at 103.
12. *See* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).
13. THOMAS, *supra* note 2, at 137.

courts focused on such stereotypes and why they potentially could be legitimate reasons for hiring a man instead of a woman.[14]

Thomas recognizes that sometimes it was not the outcome of a case itself, but rather what followed that is of true interest. In other words, the victory was not only in the decision, but also in the consequences. Following the Supreme Court's decision granting women equal pension protection despite evidence that women, as a whole, lived longer than men in *City of Los Angeles Department of Water and Power v. Manhart*,[15] twenty-four states responded "by adopting sex-neutral actuarial tables for the primary workers' pension schemes" where women were formerly paying more than men solely on the basis of their gender.[16] Efforts such as this one, which equalized benefits by ensuring that individual women did not have to pay more for health insurance simply because the group lived longer as a whole, leveled the playing field in the workplace. These cases are responsible for challenging deeply entrenched gender stereotypes that had been so heavily relied on in the past to justify unequal treatment. Thomas's exploration of such victories and shortcomings makes her perspective unique and rewarding for the reader.

II.
WHAT'S IN A NAME? THE WOMAN BEHIND THE CASE

Thomas's second noteworthy, and perhaps most striking, achievement in the book is her use of vivid detail in telling the human story behind the court case. In doing so, Thomas not only humanizes the plaintiffs, but illustrates what was really at stake in bringing their claims. She opens each chapter, organized by case, by giving a compelling description of the female plaintiff who dreamed of working in a certain position and had taken all the right steps (such as studying the profession at university, preparing to fulfill all the job qualifications, or even just applying and meeting all the criteria) to lawfully gain her desired employment on the merits, but was denied the job on account of being female. Then, after an in-depth exploration of the victory in the Supreme Court and the resulting case law, Thomas rounds out the story by revealing to the reader what eventually happened to the seemingly victorious plaintiff—most times closing with a disappointing and anti-climactic recovery of some small monetary sum.

The women plaintiffs typically did not receive adequate relief even upon victory, but rather walked away with very little despite having left a better employment landscape for working women of the future. Plaintiff Ann

14. *See id.*

15. City of Los Angeles, Dep't of Water and Power v. Manhart, 435 U.S. 702 (1978).

16. *Id.* at 79.

Hopkins of *Price Waterhouse* described the day the Supreme Court took her case as "one of the worst days of [her] life."[17]

For several cases, Thomas details quotes from supervisors that make the reader feel as though the plaintiff had an open-and-shut case before even engaging in dialogue about the legal merits of the plaintiff's case. Sadly, the plaintiff often had a long road ahead before encountering any reprieve. For instance, in *Harris v. Forklift Systems*,[18] Harris's boss told her that she had a "racehorse ass" and should avoid wearing a swimsuit because her "ass [was] so big, if [she] did there would be an eclipse and no one could get any sun."[19] Such anecdotes make the book a vivid and sometimes shocking read. Thomas's inclusion of direct quotes from supervisors highlights the outright vulgarity with which supervisors behaved toward female employees. In *Harris*, despite agreeing that the male supervisor was ill-mannered and out of line, the lower court did not find that the supervisor's behavior had "seriously affect[ed]" the plaintiff's well-being, which was the legal standard at the time.[20] Not only is it uncomfortable to read of these details from the supervisors, it is even worse to know that esteemed judges downplayed the harm and unjust treatment for so long.

Thomas scrutinizes famous players in today's legal world, including criticizing Justice Clarence Thomas—then Chair of the Equal Employment Opportunity Commission (EEOC)—for backtracking on EEOC guidelines for approving hostile work environment claims. Despite the fact that Anita Hill, the assistant to Clarence Thomas while he was the Assistant Secretary of the U.S. Department of Education's Office for Civil Rights and later as EEOC Chair, alleged that Thomas had sexually harassed her, Thomas was soon after elevated to the nation's highest court without adequate investigation into her story.[21] This anecdote was mentioned in the backdrop of Mechelle Vinson's story in *Meritor Savings Bank*,[22] where the plaintiff had not only been harassed but also raped at the bank where she worked. By examining the two cases in conjunction, Thomas demonstrates the institutional bias that women such as Hill and Vinson were up against.

In *Dothard v. Rawlinson*,[23] a landmark women's rights case that afforded women equal opportunity in prison guard jobs, the plaintiff's attorney knew she would be scrutinized for what she wore to her oral argument before the Supreme Court. Thomas's investigation reveals that the

17. *Id.* at 140.

18. Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993).

19. THOMAS, *supra* note 2, at 169.

20. Harris v. Forklift Sys., Inc., 976 F.2d 733 (6th Cir. 1992), *rev'd*, 510 U.S. 17 (1993); THOMAS, *supra* note 2, at 174.

21. *Id.* at 104.

22. *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986).

23. Dothard v. Rawlinson, 433 U.S. 321 (1977).

attorney opted for a conservative dress and blazer, but no bra as a way to silently rebel.[24] These details bring life to the cases, and are the reason I would recommend the book to a friend or colleague.

Thomas closes the book by listing the advances owed to the enactment of Title VII: the right to keep one's job through a pregnancy, the right to work and have children, the right to hold a job that was once only reserved for men, the right to be evaluated based on one's own capabilities rather than on group traits or stereotypes, the right to be free from sexual harassment or abuse in the workplace, and the right to look and act like oneself.[25]

Despite illustrating the progress made through detailed and careful exploration of each landmark case and its consequences, Thomas recognizes that women still have a long road ahead. She discusses how states are left to fill the gaps left by federal case law through state and local legislation. For example, there is still no universal judicial recognition that "sex" protection encompasses gender identity and sexual orientation. Thomas would do well to offer more tangible solutions or advice for where to go next in addition to identifying those blind spots, though she points out that "[c]omplete legal answers to these problems are beyond the scope of this book. But the law must take better account for how, in the endlessly diverse real world, bias is manifested—including the fact that much of the bias that causes discriminatory decision making is unconscious."[26] If Thomas were to write a book with such proposed solutions, I would be happy to read it.

The *New York Times* has called Thomas a "gifted storyteller" providing her reader with "lots of head-shaking moments."[27] Julie Berebitsky, a professor of history and women and gender studies at the University of the South, Sewanee, reviewed *Because of Sex* with great praise, saying that the cases Thomas explore "put the muscle on the new law's bones."[28] Berebitsky commends Thomas for her meticulous research, and comments that one of the book's strengths "is her acute awareness of how people have responded to chance accidents, improbable circumstances and unimagined consequences."[29] I agree with Berebitsky's praise and more—*Because of Sex* is an essential read if we want to understand the backdrop behind women's rights at work and continue to push for substantial change.

Eileen M. Sherman, J.D. 2018 (U.C. Berkeley)

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24. THOMAS, *supra* note 2, at 53.

25. *See id.* at 229.

26. *Id.* at 237.

27. Julie Berebitsky, *'Because of Sex,' by Gillian Thomas*, N.Y. TIMES (Mar. 8, 2016), https://www.nytimes.com/2016/03/13/books/review/because-of-sex-by-gillian-thomas.html.

28. *Id.*

29. *Id.*