Pick Up the Pace
100 Pine Street, 33rd Floor
San Francisco, CA 94111
Telephone: 415.217.7302
Facsimile: 415.217.7307
cfishman@sbcglobal.net

TELECOMMUNICATIONS TRANSMITTAL SHEET

September 18, 2017

PLEASE NOTE: This facsimile and the information it contains are intended to be a confidential communication only to the person(s) specified in the "To" Line below. If you have received this facsimile in error, please notify us by telephone and return the original fax to the above address by United States Mail. Thank you.

TO: Professor Suja Thomas FAX: (217) 244-1478

FROM: Charlotte Fishman

TOTAL NO. OF PAGES (including this cover page): 3

Here's a copy of my Daily Journal book review of

Unequal: How America's Courts Undermine Discrimination Law.

Thanks for your interest.

SAN FRANCISCO DAILY JOURNAL

How courts undermir

By Charlotte Fishman

In "Unequal: How America's Courts Undermine Discrimination Law," Professors Sandra Sperino and Suja Thomas explain why individual cases alleging disparate treatment, harassment or retaliation on the basis of sex, race or other protected status so often come to grief in federal court: They are subjected to court-created doctrines, inferences, frameworks and procedural devices that tilt the scales of justice in favor of employers. In language accessible to the general public, supported by extensive footnotes that reference caselaw, law review articles, legislative history, and government statistics, this meticulously researched book provides a clear-eyed, unsparing critique of the many ways victims of employment discrimination victims get a raw deal in the federal courts.

BOOK REVIEW

None of this will be news to plaintiff-side employment lawyers, but even battle-hardened veterans may be stunned at the sheer volume of hurdles and barriers presented. The authors, who are well known for their scholarly work in the field, argue convincingly that victims of employment discrimination are held to a higher standard than other litigants at every stage of the litigation process.

In chapters that read like novels ("How Discrimination Disappears," "Down the Rabbit Hole," "Fakers and Floodgates," "Why Workers Lose"), the authors demonstrate that court-created rules, doctrines and frameworks uniquely applied to employment discrimination cases undermine the promise of equal employment opportunity embodied in landmark civil rights legislation: Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967 and the Americans with Disabilities Act of 1990.

Title VII prohibits discrimination in broad language, but in "How Discrimination Disappears" the authors provide a wealth of cringe-inducing examples that show how federal courts make discrimination "disappear" by the simple expedient of ignoring or discounting offensive conduct.

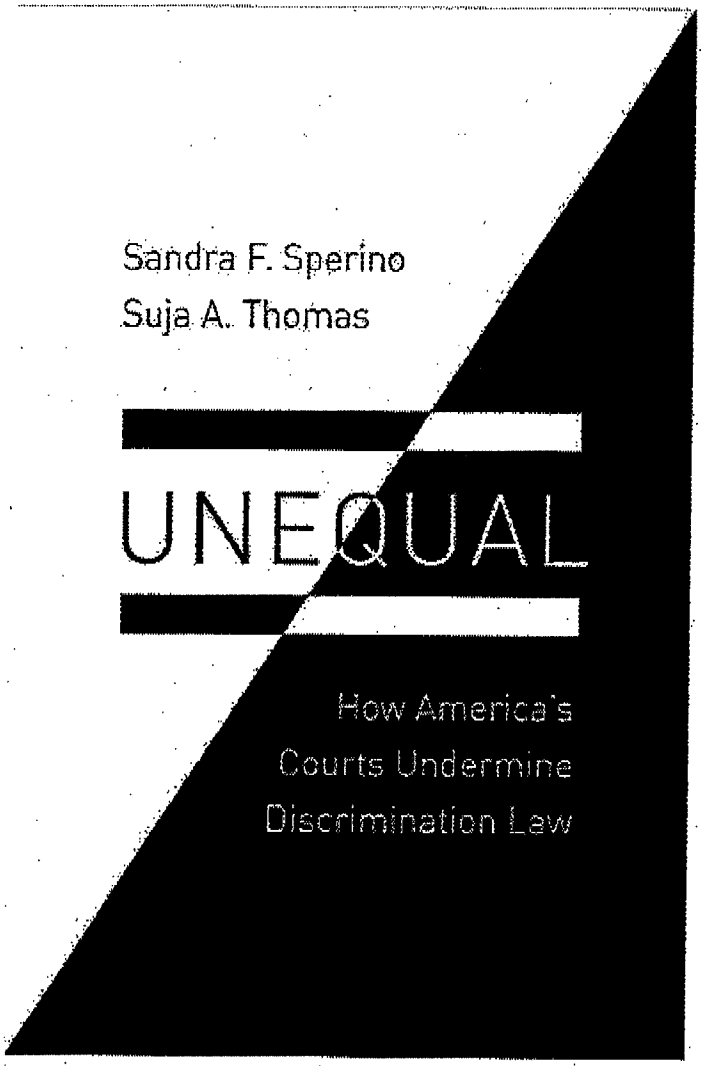
Case in point: A female police officer is subjected to continuous harassment by a sheriff who, among other offensive acts, tried to kiss her at the department's Christmas party, told her "you can just walk into the room and I'd get an erection," looked down her shirt, rubbed up against her, chased her around the office, picked her up over his head, and opened the door to the women's restroom to flash the lights on and off when she was inside. The trial court dismissed her case and the appellate court upheld its decision, citing the fact the sheriff *only touched her three times*.

"Down the Rabbit Hole" discusses three of what are known to plaintiff-side employment lawyers as "problem" doctrines: the "stray remarks doctrine," the "honest belief rule" and the "same actor inference." The "stray remarks doctrine" is an evidentiary rule that permits judges to ignore explicit discriminatory remarks (e.g., calling a black employee "boy"; a female employee "bitch"; an older male employee "too damn old to do the job.") if they are sufficiently remote in time from the ultimate employment decision, or were made by someone other than the ultimate decision-maker.

The "honest belief" rule allows an employer to obtain summary judgment if the decision-maker "honestly believed" that a terminated black employee had falsified her time card, even if there is evidence that the charge is not true and the human resources department has a recorded history of complaints that black employees have been unfairly disciplined in the past. The "same actor" inference is premised on the psychologically implausible, demonstrably false belief that the person who hires an employee will never discriminate against that person when making future decisions (a laughable assumption when googling "glass ceiling" will instantaneously provide 3,740,000 results).

The authors provide a devastating critique of the oft-repeated mantra, "Courts do not sit as a super-personnel department." The phrase is shorthand for judicial abdication of the responsibility to take into account evidence that challenges the validity of the employer's asserted nondiscriminatory explanation. Refusing to consider evidence of deviation from normal practice, failure to follow policies, or shifting explanations is the same as turning a blind eye to evidence that is the "meat and potatoes" of a disparate treatment discrimination claim. The authors note that a court's refusal to sit as a "super-personnel department" often results in its taking on the forbidden role of a "super juror" — making factual judgments that lead to the conclusion that the case involves mere unfair treatment, not actionable discrimination.

ıe discrimination law



There is just so much to like in this book, but if I had to choose, my hunch is that its greatest contribution will be found in the "Fakers and Floodgates" chapter, a searing look at the false narrative that generates the restrictive doctrines and pro-employer inferences that push discrimination cases toward dismissal. The authors' discussion of the Supreme Court decision in the *University of Texas Southwestern Medical Center v. Nassar* is simply stunning.

In *Nassar*, the court was tasked with choosing between "motivating factor" and "but for" causation as the standard to be applied in Title VII retaliation claims. The Court rejected the more generous "motivating factor" test of *Price Waterhouse v. Hopkins* in favor of the more restrictive "but for" test on grounds that to do otherwise would be to "contribute to the filing of frivolous claims, which would siphon resources from efforts by employers, administrative agencies and courts to combat workplace harassment."

The trouble with this "fakers and floodgates" meme is that it exists in an evidence-free zone. Aside from the obvious fact that lawyers who earn their living trying employment discrimination claims in federal court depend on their ability to *screen out* frivolous claims to remain in business, there is actual empirical data that debunks the "floodgates" narrative. The authors present publicly available data from the Federal Judicial Center showing that, at the time the case was pending, the number of employment discrimination cases filed in federal court had been steadily declining.

In short, "Unequal: How America's Courts Undermine Discrimination" is a splendid book. It is a sobering "must read" for lawyers, judges, policy makers and scholars involved in employment law issues. It is also a highly engaging discussion of those issues, suitable for any reader who cares about justice in the American workplace.

Charlotte Fishman *is a San Francisco attorney whose practice emphasizes glass ceiling gender discrimination in the workplace. She is a member of the executive board of the National Employment Lawyers Association and a frequent contributor to CLE programs on hidden bias in the workplace.*

FISHMAN