2023

Reasonably Accommodating Employment Discrimination Law

William Corbett

Reasonably Accommodating Employment Discrimination Law

William R. Corbett[*]

Contents

I. THE ACCOMMODATING YEARS: 2015 AND 2023

In 2015 the United States Supreme Court decided two cases addressing issues of employers' duties to make reasonable accommodations under federal employment discrimination laws. In *Young v. United Parcel Service, Inc.*,[1] the Court recognized that pregnant employees claiming that employers violated Title VII by failing to make reasonable accommodations for limitations associated with pregnancy, childbirth, or related medical conditions may prevail on such claims under some circumstances.[2] A couple of months later the Court rendered its decision in *EEOC v. Abercrombie & Fitch Stores, Inc.*,[3] holding that a plaintiff need not prove that an employer actually knew that the applicant's (or employee's) practice that conflicts with a workplace requirement was based on the applicant's religious beliefs; rather, all that is required is that the plaintiff prove that the need for an accommodation is a motivating factor in the employer's adverse decision.[4] The two decisions were connected in that they addressed issues of duties of reasonable accommodation for two distinct protected characteristics covered under Title VII. Moreover, the two decisions were interpreting Congressional amendments of Title VII, with Congress having added the sections regarding pregnancy[5] and reasonable accommodation of religious practices[6] to change the law articulated in Supreme Court decisions.[7]

---

[1] 575 U.S. 206 (2015).
[2] *Id.* at 230.
[3] 575 U.S. 768 (2015).
[4] *Id.* at 772.
[5] Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, § 1, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k)).
[6] Equal Employment Amendments Act of 1972, Pub. L. No. 92-261, § 2, 86 Stat. 103 (codified at 42 U.S.C. § 2000e(j)).
[7] The accommodation of religion amendment was intended to change the result in a decision in which the Court affirmed by an evenly divided Court a circuit court decision. H.R. REP. 101-644(I), 101st Cong., 2d Sess. 1990, 1990 WL 259280 (Leg. Hist.) (citing Dewey v. Reynolds Metals Co., 402 U.S. 689 (1971)). The Pregnancy Discrimination Act was intended to change the law from the Court's holdings in two cases. H.R. REP. No. 27(I),

The common themes of *Young* and *Abercrombie & Fitch* invited comparisons, and law professors were quick to accommodate.[8] Although the holdings in the two decisions were generally seen as victories for plaintiffs and represented expansions or broad interpretations of employee rights under Title VII, some commentators criticized the Court's explications of employment discrimination law.[9] Most scathing was Professor Harper's critique that the decisions revealed that the Court has difficulty distinguishing between the theories of discrimination that it created--disparate treatment and disparate impact.[10]

Déjà vu in 2023; this year, like 2015, is the year of accommodations law in employment discrimination law. This time, however, Congress joined the Supreme Court in revisiting and revising the duties of reasonable accommodation. Congress addressed the issue of reasonable accommodation for pregnancies, childbirth, and related medical conditions ("pregnancy discrimination") with President Biden's signing the Pregnant Workers Fairness Act (PWFA)[11] into law on December 29, 2022,[12] and the law went into effect on June 27, 2023.[13] The PWFA

117th Cong., 1st Sess. 2021, 2021 WL 1940249 (Leg. Hist.) (citing Geduldig v. Aiello, 417 U.S. 484 (1974); General Electric Company v. Gilbert, 429 U.S. 125, 135–36 (1976)).

[8] It is just what we do! *See, e.g.*, Michael C. Harper, *Confusion on the Court: Distinguishing Disparate Treatment from Disparate Impact in* Young v. UPS *and* EEOC v. Abercrombie & Fitch, Inc., 96 B.U. L. REV. 543 (2016); Stephanie Bornstein, *Reckless Discrimination*, 105 CAL. L. REV. 1055, 1092-93 (2017); Meghan Boone, The Autonomy Hierarchy, 22 TEX. L. CIV. LIBERTIES & CIV. RTS. 1 (2016); Elizabeth Tippett, *Opportunity Discrimination: A Hidden Liability Employers Can Fix*, 23 EMPL. RTS & EMPLOY. POL'Y J. 165, 182-83 (2019); William R. Corbett, *Breaking Dichotomies at the Core of Employment Discrimination Law*, 45 FLA. ST. U. L. REV. 763, 765-66 (2018) [hereinafter Corbett, *Breaking Dichotomies*].

[9] *See* Harper, *supra* note ___ *passim*; Boone, *supra* note __ *passim*.

[10] Harper, *supra* note ___ *passim*.

[11] Consolidated Appropriations Act 2023 Div. KK, Pub. L. No. 117-328, 136 Stat 4459 (codified at 42 U.S.C. §§ 2000gg through 2000gg-6).

[12] *See, e.g.,* J. Edward Moreno, *Accommodating Pregnant Workers: New Workplace Law Explained*, BLOOMBERG LAW: DAILY LAB. REP. (Jan. 3, 2023). On the same day, President Biden also signed the PUMP for Nursing Mothers Act, which amends the Fair Labor Standards Act to impose obligations on employers to provide time and place for nursing mothers to express milk. Consolidated Appropriations Act 2023, Div. KK, Pub. L. No. 117-148, 136 Stat. 4459.

[13] Alisha Haridasani Gupta, *A New Law Aims to Stop Pregnancy Discrimination at Work*, N.Y. TIMES (June 27, 2023), available at https://www.nytimes.com/2023/06/27/well/live/pregnancy-workers-fairness-act-discrimination.html; Equal Employment Opportunity Commission, What You Should Know About the Pregnant Workers Fairness Act, available at https://www.eeoc.gov/wysk/what-you-should-know-about-pregnant-workers-fairness-act.

provides that employers have an obligation to make reasonable accommodations for limitations encountered by pregnant employees and applicants. The Supreme Court again took up the issue of reasonable accommodations for religious practices,[14] rendering its decision in *Groff v. DeJoy* on June 29, 2023.[15] That decision clarified the "undue hardship" standard that limits employers' duty to make reasonable accommodations for employees' and applicants' religious practices.

Both the PWFA and *Groff,* like the 2015 Court decisions*,* seemingly expand the duties of employers to make reasonable accommodations for conditions or practices emanating from protected characteristics under Title VII. While the expansion of these duties can be celebrated by advocates and supporters of employment discrimination law, I come not to praise them, but to offer them as the most recent exemplars of some significant problems in federal employment discrimination law. Much as Professor Harper argued that the two 2015 Supreme Court accommodations decisions demonstrated the Court's misunderstanding of its self-created theories of discrimination, I argue that the 2022-23 legislation and Supreme Court decision demonstrate the largely dysfunctional piecemeal approach that two branches of the federal government have followed for over half a century in revising and updating the body of federal employment discrimination law. It goes something like this: the Supreme Court interprets language from one of our several employment discrimination statutes,[16] which have different

[14] The Court had not addressed the issue since its 2015 decision *in Abercrombie & Fitch*. However, it became clear that the Court was moving toward reconsideration of the duty of reasonable accommodation. There seemed to be a reasonably good prospect in 2021 that the Supreme Court would grant certiorari in a pair of cases to decide whether to revisit and overturn the precedents holding that the Title VII duty to make reasonable accommodations for religion is merely *de minimis*. However, the court denied cert. in the cases: Dalberiste v. GLE Assocs., Inc., 814 Fed. Appx. 495 (11th Cir. 2020), *cert. denied*, 141 S. Ct. 2463 (2021); Small v. Memphis Light, Gas & Water, 952 F.3d 821 (6th Cir. 2020), *cert. denied*, 141 S. Ct. 1227 (2021). Justices Gorsuch and Alito dissented from the denial of cert. in *Small* in a strongly worded opinion.

[15] No. 22-174, ____ F. 4th ___, 2023 WL 4239256 (June 29, 2023).

[16] The four most significant statutes under which claims are asserted are the following: the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 66 (codified as amended at 42 U.S.C. 2000e to 2000e-15); the Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621-634; the Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101-12117; and section 1981, 42 U.S.C. § 1981. Congress enacted the Genetic Information Nondiscrimination

language and different analytical structures; Congress sometimes disagrees with Supreme Court decisions and enacts amendments that legislatively overturn or change the result of the decision (essentially "patches"); and the Court then interprets the new law. Over the decades that this has been going on, it has produced a body of law has developed with too many separate employment discrimination statutes and with too many distinctions or asymmetries in the law among the separate statutes and the various protected characteristics. Although some asymmetry is intended and appropriate, some is not. The product is an unnecessarily complex and almost incomprehensible body of law. Much of it results from this back-and-forth piecemeal approach of Congress and the Court. A different approach is needed. But before discussing that approach, let us consider the evolution of the law regarding pregnancy and religious accommodation.

II. 2015: THE SUPREME COURT'S ACCOMMODATIONS DECISIONS

A. Young v. UPS: *Accommodating Pregnancy*

The seed for the enactment of the PWFA in 2022 was planted by the Supreme Court in 2015.[17] In *Young v. United Parcel Service, Inc.,*[18] the Court addressed the issue of whether the Pregnancy Discrimination Act of 1978 (PDA)[19] imposes a duty on employers to reasonably accommodate pregnancy, childbirth, or related medical conditions. Notably, the 1978 PDA was

Act in 2008. Pub. L. No. 110-233, 122 Stat. 881 (2008) (codified as amended in scattered sections of 26, 29 & 42 U.S.C.). The volume of charges filed under this Act has been small, and there are few reported cases discussing this Act. *See* Charge Statistics (Charges filed with EEOC) FY 1997 Through FY 2022, available at https://www.eeoc.gov/data/charge-statistics-charges-filed-eeoc-fy-1997-through-fy-2022 (in 2022, 444 charges, 0.6% of charges filed, alleged genetic information discrimination). The Rehabilitation Act of 1973 mandates nondiscrimination under federal grants and programs and does not create a cause of action for private sector employees. Pub. L. 93-112, Title V, § 504, Sept. 26, 1973, 87 Stat. 394 (codified as amended at 29 U.S.C.A. §§ 701-796).

[17] H.R. REP. NO. 117-27(I), reprinted in 2021 WL 1940249 (Leg. Hist.) (explaining that *Young v. UPS* does not guarantee pregnant workers a reasonable accommodation and it forces plaintiffs to identify a comparator—an "oftentimes insurmountable hurdle").

[18] 575 U.S. 206 (2015).

[19] Pub. L. No. 95-598, 92 Stat. 2679 (1978) (codified as amended at 42 U.S.C. § 2000e(k)).

Congress's means of overturning two Supreme Court decisions holding that pregnancy discrimination was not sex discrimination.[20] Rather than amend section 703(a) of Title VII,[21] which enumerates the "unlawful employment practice[s]," Congress amended section 701,[22] the definition section. The uncertainty regarding whether the PDA created a duty of reasonable accommodation stemmed from both the section Congress chose to amend and the relationship between the two clauses of the PDA.[23] The statutory language did not expressly create a duty of reasonable accommodation as the Americans with Disabilities Act (ADA) did for disabilities[24] and the 1972 amendment of Title VII did for religion.[25] The Court rejected two extreme positions for which the parties advocated in *Young*,[26] and instead adopted a middle ground position by fitting a sometimes-duty-to-accommodate into the undisputed champion of individual disparate

[20] *See supra* note ___.
[21] 42 U.S.C. § 2000e-2(a).
[22] 42 U.S.C. § 2000e(k).
[23] The two clauses are separated by a semicolon. The first clause seemingly treats pregnancy discrimination as nothing more than a subset of sex discrimination, which would not encompass a duty on the part of the employer to make reasonable accommodations for pregnant employees. The second clause, on the other hand, seemingly requires something more than nondiscrimination on the basis of sex. The second clause can be interpreted as imposing a duty of reasonable accommodation because it states that pregnant employees are to be accorded the same treatment as a group of nonpregnant employees who have abilities and disabilities similar to those of pregnant employees. The PDA provides as follows:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work . . . .

42 U.S.C. § 2000e(k).
[24] 42 U.S.C. § 12112 (a)(5)(A).
[25] Equal Employment Amendments Act of 1972, Pub. L. No. 92-261, § 2, 86 Stat. 103 (codified at 42 U.S.C. § 2000e(j)).
[26] The plaintiff's interpretation would have required employers in some circumstances to provide reasonable accommodations to pregnant employees if they provide them to similarly situated nonpregnant comparators. The employer's would have treated pregnancy as merely a subset of sex discrimination and would not have required reasonable accommodation regardless of the employer's accommodation of other similarly disabled nonpregnant employees. *Young*, 575 U.S. at 220.

treatment analysis—the *McDonnell Douglas* pretext analysis.[27] Essentially, the Court held that a plaintiff *may* prevail on a failure-to-accommodate claim by producing sufficient evidence that the employer's legitimate, nondiscriminatory reason for not providing an accommodation is pretextual.[28] A plaintiff could prove pretext, the Court explained, by proving that the employer's policies impose a significant burden on pregnant women which cannot be justified by the given legitimate, nondiscriminatory reason and which permits an inference of discrimination.[29] Such a significant burden can be proven by showing that the employer provides accommodation to a large percentage of nonpregnant workers but does not do so for a large prercentage of pregnant workers.[30] Most surprising about the decision was the fact that the Court grafted a disparate impact analysis onto the disparate treatment analysis.[31] Justice Scalia in his dissent was quick to point out this theretofore unpardonable sin.[32] Prior to *Young*, the Court had always insisted that the two theories of discrimination were distinct and could never be blended.[33] Of course, the *Young* majority did not acknowledge that it was blending the two theories and thereby treading on previously forbidden ground.

The analysis cobbled together by the Court in *Young* has to be among the most unusual and garbled analyses ever articulated by the Court. It obliquely recognized a duty to reasonably accommodate pregnancy if it could be fashioned in a specific case by cramming the evidence

---

[27] McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). The *McDonnell Douglas* pretext analysis is pervasive in disparate treatment analysis. *See generally* SANDRA F. SPERINO, *MCDONNELL DOUGLAS*: THE MOST IMPORTANT CASE IN EMPLOYMENT DISCRIMINATION LAW (2018).
[28] Young v. United Parcel Serv., Inc., 575 U.S. 206, 229-30 (2015).
[29] *Id.*
[30] *Id. at* 230.
[31] *See, e.g.,* Deborah L. Brake, *The Shifting Sands of Employment Discrimination: From Unjustified Impact to Disparate Treatment in Pregnancy and Pay*, 105 GEO. L.J. 559 (2017).
[32] Stating that the decision "allow[s] claims that belong under Title VII's disparate-impact provisions to be brought under its disparate-treatment provisions instead." *Young*, 575 U.S. at 249 (Scalia, J., dissenting).
[33] *See, e.g.,* Raytheon Co. v. Hernandez, 540 U.S. 44 (2003); Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011); Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993); United Automobile Workers v. Johnson Controls, Inc., 487 U.S. 977 (1988).

into the *McDonnell Douglas* three-part burden-shifting analysis. The Court majority even seemed shy, and perhaps apologetic, about this strange analysis, explaining that it would not likely be needed much in the future[34] because most failure-to-accommodate pregnancy claims would be asserted under the ADA in light of the enactment of the Americans with Disabilities Act Amendments Act of 2008.[35]

Returning to the theme of an ineffective back-and-forth between the Supreme Court and Congress, note that two Supreme Court decisions beget the PDA, which, in turn, beget *Young*. More to come on pregnancy accommodation, but first we turn to the Court's other accommodations decision from 2015.

B. EEOC v. Abercrombie & Fitch: *Accommodating Religious Practices*

Unlike *Young* and the PWFA, the Court's 2015 decision in *EEOC v. Abercrombie & Fitch*[36] was not the direct impetus for its 2023 decision in *Groff v. DeJoy*. The two decisions share the Court's expansion of the duty of reasonable accommodation for religion.

There were common threads between *Abercrombie & Fitch* and *Young*, which were decided about two months apart. In *Abercrombie & Fitch*, reminiscent of *Young*, the Court was interpreting a 1972 amendment of Title VII[37] that was intended to overturn a Supreme Court decision affirming a lower court decision that held employers were not required to accommodate religious practices.[38] Also in *Abercrombie & Fitch*, as in *Young*, the Court was interpreting an amendment not of Title VII's section 703 but of section 701, the definition section of Title VII.[39]

---

[34] *Young*, 575 U.S. at 218-19.
[35] Pub. L. No. 110-325, § 2, 122 Stat. 3553, 3553–54 (codified as amended at 42 U.S.C. § 12101 *et seq*.).
[36] 575 U.S. 768 (2015).
[37] Pub. L. 92-261, § 2(7), 86 Stat. 103 (codified at 42 U.S.C. s 2000e(j)).
[38] Groff v. DeJoy, ___ S. Ct. at ___ (citing Dewey v. Reynolds Metals Co., 402 U.S. 689 (1971), *aff'g by an equally divided Court*, 429 F.2d 324 (6th Cir. 1970)); *see also supra* note ____.
[39] 42 U.S.C. §2000e(j).

The Court in *Abercrombie & Fitch* held that an applicant (or employee) is not required to prove the employer's actual knowledge that a practice of the applicant that conflicted with a work requirement was linked to the applicant's religion. Rather, looking to the language of Title VII, as amended by the Civil Rights Act of 1991 (CRA of 1991),[40] the Court held that a plaintiff is required to prove only that a desire not to provide an accommodation for religion is a motivating factor[41] in the employer's adverse decision.

The *Abercrombie & Fitch* majority began its analysis with a declaration that that there are only two causes of action for discrimination under Title VII—disparate treatment and disparate impact.[42] Before that declaration, many courts and commentators considered failure-to-accommodate as a distinct cause of action with its own elements and analysis.[43] The majority opinion explained why failure to accommodate is not a separate and distinct cause of action: as enacted in 1964, section 703 prohibits just two enumerated practices.[44] The 1972 amendment by Congress placed the religious accommodation requirement in the definitional section of Title VII, section 701,[45] not the prohibition of unlawful employment practices in section 703. Justice Thomas, who concurred, agreed with the majority on only one point—that there are only two causes of action for discrimination under Title VII.[46] However, Justice Thomas explained that the majority was inserting the statutory definition of religion into section 703(a).[47] In fact, that is

---

[40] Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified as amended in scattered sections of 42 U.S.C.).
[41] 42 U.S.C. § 2000e-2(m).
[42] EEOC v. Abercrombie & Fitch Stores, Inc., 575 U.S. 768, 771-72 (2015).
[43] *See, e.g.,* Reed v. Great Lakes Cos., 330 F.3d 931 (7th Cir. 2003); Wilson v. U.S. W. Commc'ns, 58 F.3d 1337 (8th Cir. 1995); Roberto L. Corrada, *Toward an Integrated Disparate Treatment and Accommodation Framework for Title VII Religion Cases*, 77 U. CIN. L. REV. 1411, 1411 (2009); David Benjamin Oppenheimer, *Negligent Discrimination,* 141 U. PA. L. REV. 899, 936 (1993) Noah D. Zatz, *Managing the Macaw: Third-Party Harassers, Accommodation, and the Disaggregation of Discriminatory Intent*, 109 COLUM. L. REV. 1357, 1361 (2009).
[44] *Abercrombie & Fitch*, 575 U.S. at 771-72 ("These two proscriptions, often referred to as the 'disparate treatment' (or 'intentional discrimination') provision and the 'disparate impact' provision, are the only causes of action under Title VII.").
[45] Act of Mar. 24, 1972, Pub. L. No. 92-261, § 2, 86 Stat. 103 (codified at 42 U.S.C. § 2000e(j)).
[46] *Abercrombie & Fitch*, 575 U.S. at 780-81 (Thomas, J., concurring in part and dissenting in part).
[47] *Id.* at 783.

what the majority was doing, and that is what enabled the majority to make the failure-to-accommodate claim part of disparate treatment in 703(a)(1),[48] and concomitantly enabled it to invoke the "motivating factor" standard in section 703(m),[49] which was the key to the majority's holding.

By incorporating motivating factor into the non-accommodation analysis and by refusing to recognize a separate cause of action for failure to accommodate, the Court in *Abercrombie & Fitch* set the stage for considerable asymmetry among the three protected characteristics for which federal employment discrimination law recognizes a duty of reasonable accommodation—religion, pregnancy, and disability.

First, the Court's invocation of the "motivating factor" causation standard imported one of the most significant asymmetries in the federal employment discrimination statutes into its failure-to-accommodate analysis. Congress in the CRA of 1991 inserted the motivating factor standard into section 703 of Title VII, but Congress did not add it to the Age Discrimination in Employment Act (ADEA)[50] or the Americans With Disabilities Act.[51] Moreover, the Supreme Court has held that, because the CRA of 1991 amended only Title VII's section 703, but-for causation is required to prove claims under the ADEA[52] and the anti-retaliation provision of Title VII. [53] Although the Court has not yet decided the issue, it seems likely that it will hold that but-

[48] Justice Thomas would have situated the claim under section 703(a)(2) disparate impact.
[49] 42 U.S.C. § 2000e-2(m).
[50] Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (1967) (codified as amended at 29 U.S.C. §§621 to 634a).
[51] Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended at 42 U.S.C. §§ 12101 to 12117).
[52] *See* Gross v. FBL Fin. Servs., Inc., 557 U.S. 167 (2009).
[53] *See* University of Texas Southwest Medical Center v. Nassar, 570 U.S. 338 (2013).

for causation also is required for claims under the ADA.[54] Furthermore, although section 1981[55] of the Civil Rights Act of 1866[56] has no language regarding a causation standard, the Supreme Court has applied its default standard of but-for causation to claims under that statute.[57]

Second, the Court in *Abercrombie & Fitch* declared that there is no failure-to-accommodate cause of action under Title VII. In contrast to Title VII, however, the language of the ADA seems to establish a distinct cause of action for failure to accommodate because it enumerates the types of discrimination and expressly lists failure to make reasonable accommodations.[58] Before the enactment of the PWFA, the rationale of *Abercrombie & Fitch*, that failure to accommodate is not a separate cause of action, should have applied to the *Young*-based claim for non-accommodation of pregnancy, childbirth, and related medical conditions because, as with religion, the PDA added pregnancy as a protected characteristic by amending section 701, the definitional section of Title VII,[59] not the unlawful practices section.

---

[54] *See, e.g.,* Gentry v. E. W. Partners Club Mgmt. Co., Inc., 816 F.3d 228, 234 (4th Cir. 2016) (joining 6th and 7th circuits in applying but-for causation); Lewis v. Humboldt Acquisition Corp., Inc., 681 F.3d 312, 321 (6th Cir. 2012) (holding mixed-motives analysis is not applicable to the ADA based on Gross); Serwatka v. Rockwell Automation, Inc., 591 F.3d 957, 963-64 (7th Cir. 2010) (same). *But see* Hoffman v. Baylor Health Care Sys., 597 F. App'x 231, 237 (5th Cir. Jan. 6, 2015) (stating that standard of causation under the ADA is "motivating factor"), *cert. denied*, 136 S. Ct. 45 (2015); Siring v. Or. State Bd. of Higher Educ. 977 F. Supp. 2d 1058, 1063 (D. Or. 2013) (same). If the ADA used the language "because of," the result would seem certain based on *Gross* and *Nassar*. However, the ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2, 122 Stat. 3553, 3553–54 (codified as amended at 42 U.S.C. § 12101 et seq.), changed the language from "because of" to "on the basis of." 42 U.S.C. §12112(a). That change injects some uncertainty into the issue, but it seems likely the Court will interpret "on the basis of" the same as "because of."

[55] 42 U.S.C. § 1981.

[56] "Sections 1981 and 1983 are parts of the Civil Rights Acts that were enacted after the Civil War to 'give force and effect to the newly ratified Thirteenth, Fourteenth, and Fifteenth Amendments.'" Kelly Koenig Levi, *Allowing a Title VII Punitive Damage Award Without an Accompanying Compensatory or Nominal Award: Further Unifying the Federal Civil Rights Law,* 89 KY. L.J. 581, 589 (2001) (quoting BARBARA LINDEMANN SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 668 (2d ed. 1983)); *see also* Danielle Tarantolo, Note, *From Employment to Contract: Section 1981 and Antidiscrimination Law for the Independent Contractor Workforce*, 116 YALE L.J. 170, 185-88 (2006) (discussing the history of section 1981).

[57] Comcast Corp. v. National Association of African American-Owned Media, 140 S. Ct. 1009 (2020).

[58] 42 U.S.C. § 12112 (b)(5).

[59] Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, § 1, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k)).

Thus, *Abercrombie & Fitch* exacerbated the asymmetry and incoherence of federal employment discrimination law in the realm of accommodations law, and set the stage for more of the same by Congress and the Court in 2022-23.

III. 2023: CONGRESS AND THE SUPREME COURT REVISE AND REPAIR ACCOMMODATIONS LAW

A. The PWFA: Congress Once Again Cleans Up After the Court

The PWFA had been introduced in every session of Congress since 2012.[60] It finally was enacted in December 2022 and signed into law by President Biden before the end of the year.[61] The law imposes a duty on employers to make reasonable accommodations for an employee's or applicant's known limitations related to pregnancy, childbirth, or related medical conditions. Pregnancy thus became the third protected characteristic under federal employment discrimination law for which there is an express statutory duty imposed on employers to make reasonable accommodations. Under the law, several things are enumerated as unlawful practices.[62] The first unlawful practice is not making a reasonable accommodation unless the employer can prove that making such an accommodation would impose an undue hardship.[63] The second is requiring an employee to accept an accommodation other than a reasonable accommodation determined by an interactive process.[64] The third unlawful practice is denying employment opportunities based on the need to make reasonable accommodations.[65] The fourth is to require a qualified employee to take paid or unpaid leave if another reasonable

[60] H.R. REP. NO. 117-27(I), *supra* note __, at ___; Erin Jackson & Eliza Horne, *The Birth of New Rights for Pregnant, Postpartum, and Nursing Employees,* 97 FLA. B.J. 44 (May/June 2023).
[61] *See supra* text accompanying notes ___-___.
[62] Consolidated Appropriations Act 2023 Div. KK, Pub. L. No. 117-328, 136 Stat 4459, § 103.
[63] *Id.* § 103(1).
[64] *Id.* § 103(2). "Interactive process" is included in the definitions of "reasonable accommodation" and "undue hardship," and all those terms have meanings derived from the Americans with Disabilities Act. *Id.* §102(7).
[65] *Id.* § 103(3).

accommodation can be provided.[66] Finally, as with all federal employment discrimination laws, the PWFA includes an anti-retaliation provision.[67]

Although the PWFA incorporates the powers, remedies, and procedures of Title VII,[68] the terminology and concepts of the duty of reasonable accommodation are based on those in the ADA.[69] Employees and applicants covered by the Act are "qualified employees," meaning those who can perform the essential functions of the job, with or without reasonable accommodations.[70] Similar to the ADA, which requires reasonable accommodation of "known physical or mental limitations of an otherwise qualified individual with a disability,"[71] the PWFA requires employers to make reasonable accommodations "to the known limitations related to the pregnancy, childbirth, or related medical conditions of a qualified employee."[72] The PWFA adopts as a method of determining reasonable accommodations the "interactive process"[73] required by the ADA, although that term was used in the ADA regulations[74] and not in the statutory language of the ADA or the ADA Amendments Act of 2008. The PWFA also limits the duty of employers to provide reasonable accommodations and creates an affirmative defense to failure-to-accommodate claims by providing that employers are not required to provide

---

[66] *Id.* § 103(4).
[67] *Id.* § 103(5).
[68] *Id.* § 104(a).
[69] H.R. REP. NO. 117-27(I), *supra* note __, 2021 WL 1940249 (Leg. Hist.) at *26-*27.
[70] Consolidated Appropriations Act 2023, *supra* note __, § 102(6).
[71] 42 U.S.C. § 12112(b)(5)(A).
[72] Consolidated Appropriations Act 2023, *supra* note __, § 103(1).
[73] *Id.* §§ 102(7) & 103(2).
[74] 29 C.F.R. § 1630.2(o)(3):

> To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

accommodations that impose an "undue hardship on the operation of the business,"[75] just as the ADA limits the duty of reasonable accommodation.[76]

B. The Groff *Decision: The Court Once Again Revises and Repairs Accommodations Law*

The Court rendered its decision in *Groff v. DeJoy*[77] on June 29, 2023—just two days after the effective date of the PWFA. The Court said it was "clarifying" its standard for the statutory "undue hardship" limitation on employers' duty to reasonably accommodate religious practices.[78]

The plaintiff, an employee of the U.S. Postal Service, was an Evangelical Christian and held a religious belief that Sunday is a day meant for rest and worship. He informed his employer that he was unable to work on Sundays. The employer offered to find employees to swap shifts with plaintiff, but for twenty or more Sundays, no co-worker would swap. The plaintiff did not work his Sunday shifts, and the employee was disciplined and quit his job. He sued USPS for failure to make a reasonable accommodation for his religious beliefs and practices.

The district court granted and the Third Circuit affirmed summary judgment for the employer.[79] The Third Circuit first held that the accommodation offered by the employer, shift swapping, was not a reasonable accommodation because no coworkers swapped shifts with plaintiff; thus, the offered accommodation did not eliminate the conflict between the job requirement and plaintiff's religious practice.[80] The court then turned to the question of whether the plaintiff's requested accommodation, exempting him from Sunday work, would impose an

[75] Consolidated Appropriations Act 2023, *supra* note __, §§ 102(7) & 103(1).
[76] 42 U.S.C. §§ 12111(10) & 12112(a)(5).
[77] No. 22-174, ___ S. Ct. ___, 2023 WL 4239256 (2023).
[78] *Groff*, __ S. Ct. at ___ (stating that much of the existing EEOC guidance on religious accommodation would "be unaffected by our clarifying decision").
[79] Groff v. DeJoy, 35 F. 4th 162 (3d Cir. 2022).
[80] *Id.* at 173. The court stated, "[E]ven though shift swapping can be a reasonable means of accommodating a conflicting religious practice, here it did not constitute an 'accommodation' as contemplated by Title VII because it did not successfully eliminate the conflict." *Id.*

undue hardship on the employer. Applying what lower courts had long understood (almost half a century) to be the Supreme Court's standard that more than a *de minimis* cost constitutes an undue hardship, the court reasoned that exempting plaintiff from Sunday work would impose on co-workers, disrupt workflow, and diminish employee morale.[81] Thus, the court found that plaintiff's requested accommodation would impose an undue hardship on the employer and affirmed the summary judgment.

The Supreme Court granted certiorari on two questions: (1) whether the Court should disapprove the more-than-de-minimis-cost test for refusing Title VII religious accommodations stated in *Trans World Airlines, Inc. v. Hardison*;[82] and (2) whether an employer may demonstrate "undue hardship on the conduct of the employer's business" under Title VII merely by showing that the requested accommodation burdens the employee's co-workers rather than the business itself.

The Supreme Court disapproved the standard derived from *Hardison* by lower courts that defines undue hardship as more than *de minimis* cost. The Court explained that the phrase has been given more importance by the lower courts than the Court intended in *Hardison*.[83] The Court explained that the appropriate standard for undue hardship, drawn from the statutory language and a proper understanding of the entire *Hardison* opinion in context, is that an accommodation would impose a substantial burden in the overall context of the employer's business.[84]

The Court revisited *Hardison* and explained that a single sentence had been wrenched out of context and given meaning as the authoritative interpretation of the statutory limitation "undue

[81] *Id.* at 175.
[82] 432 U.S. 63 (1977).
[83] *Groff*, ___ S. Ct. at ___.
[84] *Id.* at ___.

hardship."[85] That sentence read as follows: "To require TWA to bear more than a *de minimis* cost in order to give Hardison Saturdays off is an undue hardship."[86] The *Groff* Court explained that, seen in historical context, the *Hardison* case was framed by the parties as a Constitutional challenge under the Establishment Clause to the 1972 amendment of Title VII, which created the duty of reasonable accommodation for religious practices.[87] However, the *Hardison* Court did not address that issue but instead focused on whether the Title VII duty of reasonable accommodation requires an employer and a union that are parties to a collective bargaining agreement with a seniority system to violate the seniority rights of an employee in order to accommodate a junior employee's religious practices.[88] The Court explained that *Hardison*'s clear guidance is that employers are not required to violate such seniority rights. For accommodations other than seniority rights, however, *Hardison*'s guidance is much less clear.[89] When considering accommodations that would have given the plaintiff his requested days of worship but imposed financial costs on the employer, the *Hardison* Court used other language—"substantial additional costs" and "substantial expenditures."[90] Considering that language and, of course, dictionary definitions (an obsession of the Court in recent times)[91] of the words "hardship" and "undue," the Court held that the appropriate standard for undue hardship is that "the burden of granting an accommodation would result in substantial increased costs in relation

[85] *Id.* at ___.
[86] Trans World Airlines v. Hardison, 432 U.S. 63, 84 (1977).
[87] *Groff*, ___ S. Ct. at __.
[88] *Id.* at ____.
[89] *Id.* at ___.
[90] *Id.* at ___.
[91] *See generally* Mark A. Lemley, *Chief Justice Webster*, 106 IOWA L. REV. 299, 299 (2020) (stating that "[t]he Court's obsession with dictionaries as the arbiter of statutory meaning is a recent phenomenon"); *see also* Aaron-Andrew P. Bruhl, *Statutory Interpretation and the Rest of the Iceberg: Divergences Between the Lower Federal Courts and the Supreme Court*, 68 DUKE L.J. 1, 66 (2018) (describing the "dictionary-obsessed monoculture" interpretive method of the Court).

to the conduct of its particular business."[92] The Court explained that all relevant factors must be considered, including the particular accommodations at issue and the size and operating cost of an employer.[93]

In fashioning the "clarified" standard for undue hardship, the Court rejected the positions for which the plaintiff and the Government argued. The Court rejected the Government's argument that the EEOC's interpretation of *Hardison* has been correct.[94] The Court also rejected the plaintiff's argument that the statutory language of the Americans with Disabilities Act, "significant difficulty or expense,"[95] and ADA caselaw should be borrowed.[96] The Court explained that both arguments went too far. Regarding the EEOC's interpretation, the Court explained that much of the EEOC's guidance has been sensible and is unlikely to be changed by the Court's newly articulated standard.[97] For example, the regulation providing that no undue hardship is imposed by temporary costs, voluntary shift swapping, or administrative costs is likely to remain the same.[98] However, the Court noted that the EEOC's interpretation heretofore has been against the backdrop of lower courts' misinterpretation of *Hardison*.[99]

Turning to the second question, the Court held that an employer does not necessarily satisfy the undue hardship test merely by showing that the accommodation would impose a burden on co-workers.[100] The language of the statute requires an undue hardship "on the conduct of the employer's business."[101] Thus, an accommodation's effect on other employees may impact

---

[92] *Groff*, ___ S. Ct. at ___ (citing *Hardison*, 432 U.S. at 83 n.14).
[93] *Id.* at ___.
[94] *Id.* at. ___ The Court explained that the EEOC has sought to soften the impact of the "more than *de minimis* cost" standard. *See* 42 C.F.R. § 1605.2.
[95] 42 U.S.C. § 12111(10)(A).
[96] *Groff*, ___ S. Ct. at ___.
[97] *Id.* at ___.
[98] *Id.* at ___ (citing 29 C.F.R. § 1605.2(d)).
[99] *Id.* at ___.
[100] *Id.* at ___.
[101] 42 U.S.C. § 2000e(j).

the conduct of the employer's business," but the court must analyze that issue and not merely assume it. The Court then explained that adverse effects on co-workers do not necessarily constitute an undue hardship on the conduct of the business.[102] They may, or they may not. If the effect is the accommodation's triggering the animosity of co-workers toward the particular religion or religion in general, that does not factor into the undue hardship analysis.[103] Moreover, an employer is required to assess not just a particular accommodation but also to consider options.[104] For example, in the case before the Court, the employer should not merely conclude that paying other employees to work overtime would be an undue hardship; it also should consider other possible accommodations, such as voluntary shift swaps.[105]

Rather than applying the newly articulated standard for undue hardship to the facts of the case, the Court remanded to the lower courts for application of the standard to the facts and consideration of whether further factual development was needed.[106]

Justice Sotoymayor wrote a concurring opinion in which Justice Jackson joined. The concurrence agreed that *Hardison* has been misconstrued as authority for the *de minimis* standard.[107] The concurrence praised the majority for not overruling *Hardison* and instituting in its place the "significant difficulty or expense" standard urged by plaintiff, explaining that *stare decisis* is particularly strong in statutory cases.[108] Despite the introduction of numerous bills since *Hardison* was decided in 1972 and even though Congress has amended Title VII to displace other Supreme Court decisions with which it disagreed, Congress has not enacted a

[102] *Groff*, ___ S. Ct. at ___.
[103] *Id.* at ___.
[104] *Id.* at ___.
[105] *Id.* at ___.
[106] *Id.* at ___.
[107] *Id.* at __ (Sotomayor, J., concurring).
[108] *Id.* at ___.

statute to displace *Hardison.*[109] Regarding the second question on which certiorari was granted, the concurrence emphasized that adverse impacts on other employees often affect the overall operation of the employer because of the pivotal role of labor in many businesses. Thus, "undue hardship on the conduct of a business may include undue hardship on the business's employees."[110]

IV. WHERE ARE WE? TOO MANY STATUTES AND TOO MUCH ASYMMETRY

A. Federal Employment Discrimination Law Generally

Federal employment discrimination law has developed over sixty years through both Congress's passage of statutes and courts' interpretation of those statutes and development of doctrine under them. Additionally, the EEOC has issued regulations and various guidance documents interpreting the statutes. Most of Congress's laws since 1964, other than the major statutes (the ADEA, the ADA, and GINA) have been reactions to Supreme Court decisions that Congress wishes to overturn.[111] The result of this piecemeal approach is a complex body of law filled with asymmetries across the separate statutes and across the several protected characteristics. There has been no comprehensive rethinking of this body of law, and so we have an incoherent body of law that is difficult both to understand and to apply.

---

[109] *Id.* at ___.
[110] *Id.* at ___ (citing *Hardison*, 432 U.S. at 79-81).
[111] Among the amendments have been the following: the Pregnancy Discrimination Act of 1978, amending Title VII, Pub. L. No. 95-555, § 1, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k) (2012)); the amendment to add the definition of religion to Title VII, including non-accommodation, Act of Mar. 24, 1972, Pub. L. No. 92-261, § 2, 86 Stat. 103 (codified at 42 U.S.C. § 2000e(j) (2012)); the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 42 U.S.C.); the ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2, 122 Stat. 3553, 3553–54 (codified as amended at 42 U.S.C. § 12101 (2012)); and the Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (codified in scattered sections of 29 & 42 U.S.C.).

So, what's so bad about the state of employment discrimination law? I have dealt with this problem in employment discrimination law generally in other articles,[112] so I offer here only a brief synopsis. There are four major statutes[113] that have significant differences that cause theoretical, analytical, and practical difficulties. Chief among those differences are the causes of action/theories of discrimination, causation standards, and proof frameworks.

The law of reasonable accommodations increasingly has become a microcosm of this incoherent body of law.

B. The Law of Reasonable Accommodation

Before 1972, when Congress reacted to a Supreme Court decision regarding employers' duty of reasonable accommodation for religious practices,[114] no federal employment discrimination statute imposed such a duty. The 1972 Act changed that, but it did that not by defining failure to accommodate as an unlawful discriminatory practice, but instead it added a definition of religion to Title VII that included the duty.[115] The Rehabilitation Act of 1973[116] imposed a duty of accommodation[117] in the context of government contracting, federal employees and federal grants when it was enacted.[118] Moreover, the Rehabilitation Act's reasonable accommodations provision served as the model for the later-enacted ADA.[119] When

---

[112] *See, e.g.,* Corbett, *Breaking Dichotomies*, *supra* note __; William R. Corbett, *Calling on Congress: Take a Page from Parliament's Playbook and Fix Employment Discrimination Law*, 66 VAND. L. REV. EN BANC 135 (2013); William R. Corbett*, Cross-Statute Employment Discrimination Claims and the Need for a "Super Statute,"* 99 WASH. U. L. REV. 1773 (2022*); Intolerable Asymmetry and Uncertainty: Congress Should Right the Wrongs of the Civil Rights Act of 1991*, 73 OKLA. L. REV. 419 (2021).

[113] I am including section 1981, Title VII, the ADEA, and the ADA because most of the litigation arises under those statutes.

[114] *See supra* note __.

[115] 42 U.S.C. § 2000e (j).

[116] 29 U.S.C. §§ 791-96.

[117] 29 U.S.C. § 794a(a)(1).

[118] *See, e.g.,* Stephen F. Befort & Tracey Holmes Donesky, *Reassignment Under the Americans With Disabilities Act: Reasonable Accommodation, Affirmative Action, or Both*, 57 WASH. & LEE L. REV. 1045, 1047 (2000).

[119] H.R. REP. NO. 101-485 (II), 101st Cong., 2d Sess. 1990, 1990 U.S.C.C.A.N. 303, 304.

Congress enacted the PDA in 1978, it was unclear whether it imposed a duty of reasonable accommodation. In the PDA, Congress followed its playbook from the 1972 religion amendment and again amended the definition section of Title VII.[120] As described above, in 2015 the Supreme Court interpreted Title VII as amended by the PDA as creating a duty of accommodation in *Young v. United Parcel Service*.[121] Then in 2022 Congress enacted the PWFA expressly creating such a duty.[122] The PWFA largely follows the model of the ADA, which is the most carefully crafted reasonable accommodation statute, enacted in 1990. Thus, in 2023, we have three protected characteristics in our federal employment discrimination law for which there is a statutory duty to make reasonable accommodations, which can be found in three separate statutes. The law of accommodations has been created by this clumsy back-and-forth process between Congress and the Supreme Court.

So, what's so bad about the state of accommodations law? In short, it is bad for the same reasons as employment discrimination law generally. The problem is three separate statutes and three protected characteristics with different causes of action/theories of recovery, different causation standards, and different proof frameworks.

1. Causes of Action/Theories of Discrimination[123]

The Court in *Abercrombie & Fitch* rejected the notion that failure to make a reasonable accommodation is a distinct cause of action under Title VII, stating that there are only two causes of action—disparate treatment and disparate impact.[124] The Court so reasoned, hearkening back

[120] 42 U.S.C. § 2000e(k).
[121] *See supra* Part II.A.
[122] *See supra* Part III.A
[123] I have addressed elsewhere the Court's use of different terms to describe disparate treatment and disparate impact—"causes of action," "theories," or ways of proving discrimination. *See* Corbett, *Breaking Dichotomies, supra* note __, at 807-14.
[124] *See supra* Part II.B.

to the idea that section 703(a)(1)[125] describes disparate treatment[126] and section 703(a)(2)[127] embodies disparate impact.[128] As discussed above,[129] there was a reason for this: rejecting the idea of reasonable accommodation as a separate cause of action and situating the duty to accommodate religious practice in section 703(a) gave the Court a basis on which to invoke the motivating factor standard in section 703(m) and to hold that an employer does not have to actually know of the applicant's or employee's religion-based need for an accommodation so long as it was motivated by a desire to avoid making an accommodation.[130] The Court's interpretive gymnastics were inaccurate, unnecessary, and deleterious to accommodations law.

First, it was an inaccurate description of the then-current state of employment discrimination law. A lot of water had passed under the bridge since the Court anchored disparate treatment and disparate impact in those specific statutory sections in Title VII.[131] Congress had amended Title VII several times, including inserting, via the CRA of 1991, a statutory proof framework for disparate impact into Title VII.[132] Moreover, although the Court did not acknowledge it in *Abercrombie & Fitch*, it actually had recognized what most commentators would call multiple theories of discrimination or causes of action or theories of recovery.[133] For example, sexual harassment does not fit comfortably under disparate treatment.[134] Consider that

[125] 42 U.S.C. § 2000e-2(a)(1).
[126] *See, e.g.,* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).
[127] 42 U.S.C. § 2000e-2(a)(2).
[128] Tex. Dep't Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 530-31 (2015). The Court in *Inclusive Communities* accepted the "party line" that the Court in *Griggs v. Duke Power*, 401 U.S. 424 (1971), discovered disparate impact in section 703(a)(2).
[129] *See supra* Part. II.B.
[130] E.E.O.C. v. Abercrombie & Fitch Stores, Inc. 575 U.S. 768, 773-74 (2015).
[131] Section 703(a)(1) was identified as the statutory authorization for disparate treatment
[132] 42 U.S.C. § 2000e-2(k).
[133] *See, e.g.,* Corbett, *Breaking Dichotomies*, *supra* note __, at 807-14.
[134] *See* Deborah L. Brake*, The Shifting Sands of Employment Discrimination: From Unjustified Impact to Disparate Treatment in Pregnancy and Pay*, 105 GEO. L.J. 559, 586 (2017) (stating that harassment claims, although categorized as disparate treatment, are "difficult to situate as simple disparate treatment"); Henry L. Chambers, Jr., *A Unifying Theory of Sex Discrimination*, 34 GA. L. REV. 1591, 1593 (2000) (positing that sexual harassment hostile environment claims do not fit well under disparate treatment and recommending creation of a new cause of action

sexual harassment has a distinct set of elements that a plaintiff must prove to recover as compared with disparate treatment.

Second, the Court's approach was unnecessary to reach its holding. The Court could have declared that actual knowledge is not required without invoking the motivating factor standard of section 703. A constructive knowledge standard would have been satisfied under the facts of the case, which established that the employer suspected, based on store employees' observations and experience with the applicant that she wore the scarf for a religious reason.[135] Justice Alito explained this in his concurring opinion.[136] Although the majority said it would not address the question whether an employer must know or suspect that the practice it refuses to accommodate is a religious practice,[137] Justice Alito retorted that the answer is obvious that an employer must at least suspect it.[138] Thus, the Court's incorporation of motivating factor in the non-accommodation analysis was both unnecessary and awkward.

Third, it was detrimental to accommodations law. It is important to form and articulate theories of discrimination that are coherent and cogent.[139] Accommodation theory differs in very significant ways from disparate treatment. The requirement of accommodation is often juxtaposed with antidiscrimination as a distinct concept.[140] Under that view, antidiscrimination

---

combining hostile environment and disparate treatment). *Cf.* Noah D. Zatz, *Managing the Macaw: Third-Party Harassers, Accommodation, and the Disaggregation of Discriminatory Intent*, 109 COLUM. L. REV. 1357, 1367 (2009) (positing that hostile environment claims do not invoke a distinct theory, but are instead "something else entirely: a form of harm").

[135] *Abercrombie & Fitch*, 575 U.S. at 770.

[136] *Id.* at 777 n.2 (Alito, J., concurring).

[137] *Id.* at 774 n.3.

[138] *Id.* at 777-78 (Alito, J., concurring).

[139] Employment discrimination law is a particularly controversial body of law, and it does not facilitate acceptance and respect in society if it is not coherent and cogent.

[140] *See, e.g.,* Samuel Issacharoff & Justin Nelson, *Discrimination with a Difference: Can Employment Discrimination Law Accommodate the Americans with Disabilities Act?,* 79 N.C. L. REV. 307 (2001); Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1 (1996); Stephen F. Befort & Tracey Holmes Donesky, *Reassignment Under the Americans With Disabilities Act: Reasonable Accommodation, Affirmative Action, or Both?*, 57 WASH. & LEE L. REV. 1045 (2000); *see also* David Benjamin

requires disregard of differences, equal treatment, and is redistributive only to the extent necessary to produce such equal treatment; on the other hand, accommodation requires regard of differences, special treatment, and is redistributive in that it imposes special costs due to the differences and special treatment.[141] However, employment discrimination law is broad enough to accommodate the law of accommodation, just as it does disparate impact,[142] as long as it is not considered a subset of disparate treatment. Of course, that is precisely how the *Abercrombie & Fitch* majority characterized it.

After *Abercrombie & Fitch*, the Court's declaration that there are only two causes of action for discrimination must apply equally to the *Young*-recognized duty of accommodation for pregnancy.[143] Like the duty of accommodation for religious practices, the coverage of pregnancy was provided for in an amendment of the definitional section of Title VII.[144] However, the *Abercrombie & Fitch* rationale should not apply to the duty to accommodate in the ADA, which is stated in a separate enumerated subparagraph of the discrimination provision of the ADA.[145] With the passage of the PWFA, however, modeled on the language of the ADA duty of reasonable accommodation, there should now be a separate cause of action for failure to accommodate pregnancy. However, there is still a cause of action for failure to accommodate pregnancy embedded in disparate treatment under Title VII, as recognized in *Young*. The PWFA

Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 937-44 (1993) (describing failure to accommodate as negligence based).

[141] *See* Issacharoff & Nelson, *supra* note ___.

[142] *See, e.g.,* Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 653-666 (2001).

[143] I must acknowledge that *Young v. UPS* did not so much as mention "motivating factor." However, the rationale of *Abercrombie & Fitch* that motivating factor applies to religious accommodation claims under Title VII must apply to pregnancy accommodation claims under Title VII.

[144] 42 U.S.C. § 2000e(k).

[145] 42 U.S.C. §12112(b)(5). *See* Exby-Stolley v. Board of County Comm'rs, 979 F.3d 784, 836 (10th Cir. 2020 (en banc), *cert. denied*, 141 S. Ct. 2858 (2021). (McHugh, J., dissenting) (stating that "[t]he majority is correct that failure to accommodate under the ADA is a freestanding discrimination claim, while failure to accommodate under Title VII is not").

says nothing about displacing the Supreme Court decision in *Young*.[146] Thus, the law of accommodation may now have the following: for religion, a cause of action embedded in Title VII disparate treatment; for disability, a separate cause of action set forth in a separate provision of the ADA; and for pregnancy, a separate cause of action set forth in the PWFA and one under Title VII embedded in disparate treatment. Lest someone suggest that no plaintiff would pursue a *Young*-based pregnancy non-accommodation claim under Title VII, I will point out that plaintiffs tend to plead all available causes of action and theories of recovery because pleading in the alternative is permitted under the Federal Rules of Civil Procedure,[147] and prudent practice usually calls for pleading all potentially applicable theories or causes of action. Moreover, there may be different standards of causation applicable under the PWFA and Title VII, so that a plaintiff may benefit from the motivating factor standard of Title VII in a *Young*-based claim.[148]

As far as causes of action/theories of recovery, we have a rather chaotic mess now in the law of accommodations, as in employment discrimination law generally.

2. Causation Standards and Associated Proof Frameworks

As with employment discrimination law generally, the standards of causation are not uniform across accommodations law. Just how confusing a maze of standards it may be in accommodations law remains to be seen after the changes of 2023, but we already know some things and can predict others. As discussed above,[149] because the CRA of 1991 amended only

[146] The Act itself does not mention *Young*. Indeed, one section declares that nothing in the Act "shall be construed—to invalidate or limit the powers, remedies, and procedures under any Federal law . . .that provides greater or equal protection for individuals affected by pregnancy, childbirth, or related medical conditions." 42 U.S.C. § 2000gg-5 (a)(1). The principal House Committee Report is critical of *Young*, calling the *Young* standard unworkable and stating that the purpose of the PFWA is to remedy the shortcomings of the PDA, as interpreted in *Young*. H.R. REP. NO. 117-1, *supra* note __. The EEOC now lists three laws that protect applicants and employees who are pregnant against discrimination: Title VII (PDA); the PWFA; and the ADA. *See* Pregnancy Discrimination and Pregnancy-Related Disability Discrimination, available at https://www.eeoc.gov/pregnancy-discrimination.
[147] FED. R. CIV. PRO. 8(d)(2).
[148] *See infra* text accompanying notes ___-___.
[149] *See supra* text accompanying notes ___-___.

section 703 of Title VII, the motivating factor standard of causation applies to only Title VII, and but-for causation is the applicable standard under all of the following: the ADEA, the anti-retaliation provision of Title VII, section 1981, and probably the ADA. The Supreme Court has referred to "motivating factor" as a "relax[ed]" causation standard,[150] and thus plaintiffs would seemingly benefit from this standard.[151]

It seems likely that Congress, in drafting and debating the PWFA, did not think about the Supreme Court's *Gross-Nassar-Comcast* trilogy of cases interpreting employment discrimination statutes to incorporate the but-for causation standard when Congress did not expressly provide otherwise.[152] The PWFA thus is likely to join all employment discrimination statutes other than Title VII in having the higher but-for causation standard.

Just as the causation standards are asymmetrical across employment discrimination law as a whole, they are asymmetrical across accommodations law. It likely already was different for Title VII and the ADA, but consider the exacerbated state after enactment of the PWFA. Pregnancy and religious accommodation claims under Title VII are evaluated under a motivating factor standard,[153] and disability accommodation claims under the ADA and pregnancy accommodation claims under the PWFA likely are evaluated under but-for causation.[154] The

[150] EEOC v. Abercrombie & Fitch Stores, Inc., 575 U.S. 768, 773 (2015); *see also* Bostock v. Clayton Cnty, Ga., 140 S. Ct. 1731, 1740 (2020) (referring to motivating factor as a "more forgiving standard" than but for); University of Texas Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 352 (2013) (explaining that section 703 permits a plaintiff to prove employment discrimination on a showing that the protected characteristic was "a motivating factor for—and not necessarily the but-for factor in—the challenged employment action").

[151] In reality, this may not have proven to be the case. *See* Charles A. Sullivan, *Making Too Much of Too Little?: Why "Motivating Factor" Liability Did Not Revolutionize Title VII*, 62 ARIZ. L. REV. 357, 400 (2020) (positing that motivating factor has not made it easier for plaintiffs to win Title VII cases and terming it "a noble failure").

[152] There is no mention of causation standards in the report of the House Committee on Education and Labor. H.R. REP. NO. 117-27(I), *supra* note ___. It may be argued that the PWFA is an additional protection of "pregnancy, childbirth, and related medical conditions," which is covered under Title VII, and thus "motivating factor" should be incorporated into the statute. That argument seems doomed based on the Court's decision in *Gross*, and even more so in *Nassar.*

[153] But see caveat regarding pregnancy, *supra* note ___.

[154] As discussed above, there is some uncertainty about the causation standard under the ADA. *See supra* note ___.

asymmetry probably exists even within the protected characteristic of pregnancy with Title VII claims under *Young* likely evaluated under motivating factor[155] and PWFA accommodations claims likely evaluated under but-for.[156]

Causation standards are associated with proof frameworks. Generally, motivating factor is the first stage of the statutory mixed-motives framework,[157] and but-for has been aligned with the *McDonnell Douglas* pretext framework.[158] This alignment thus creates another asymmetry. If I am correct that the Supreme Court would determine that but-for causation applies to claims under the PWFA, then the mixed-motives framework of Title VII will not apply to those claims. Is that really what Congress intended in a statute designed to expand the rights of pregnant workers?

Regarding causation standards and proof frameworks, some claims under the PWFA may be appropriately analyzed under a causation standard (probably but for) and the related framework (probably *McDonnell Douglas* pretext). For example, both a claim that an employer denied an applicant a job "based on the need . . . . to make reasonable accommodations,"[159] and a claim that an employer took adverse action "on account of the employee requesting or using a reasonable accommodation"[160] appear to raise questions of causation. However, failure-to-make

---

[155] It seems that this must be so given the Court's analysis in *Abercrombie & Fitch*. However, the Court in *Young* fit a failure-to-accommodate claim into the *McDonnell Douglas* pretext framework. *See supra* Part II.A. Commentators and a plurality of the Court in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), have suggested that the *McDonnell Douglas* analysis measures but-for causation. *See, e.g.*, Corbett, *Breaking Dichotomies, supra* note __, at 817-18. However, a Court majority was equivocal on this point in *Comcast Corporation v. National Association of African American-Owned Media*, 140 S. Ct. 1009, 1019 (2020) (stating that "*McDonnell Douglas* arose in a context where but-for causation was the undisputed test, it did not address causation standards").

[156] A similar asymmetry exists for race claims asserted under Title VII and section 1981 after the Court's decision in *Comcast*. *See* Corbett, *Super Statute*, *supra* note ___, at 1790-94.

[157] The mixed motives analysis was developed in the Title VII context in *Price Waterhouse*, but Congress enacted a modified statutory version of it in Title VII via the Civil Rights Act of 1991. See 42 U.S.C. § 2000e-2(m) & §2000e-5(g)(2)(B).

[158] With the caveat here that the Supreme Court was equivocal in *Comcast* about the alignment of but-for causation with the *McDonnell Douglas* pretext proof framework. *See supra* note ___.

[159] 42 U.S.C. § 2000gg-1(3).

[160] *Id.* § 2000gg-1(5).

accommodations claims do not seem to involve questions of causation, and the pretext framework does not seem to be the appropriate analysis.[161] As the Tenth Circuit explained in an ADA accommodations case, disparate treatment claims require proof of intent associated with affirmative acts by an employer, whereas failure-to-accommodate claims entail failures to act, and the principal issue is not the employer's intent, but whether the employer failed to satisfy a legally imposed duty to reasonably accommodate.[162] Thus, the Tenth Circuit juxtaposed the elements of disparate treatment claims under the ADA with non-accommodation claims and held that the first two steps are the same: "(1) [the plaintiff] is disabled within the meaning of the ADA; (2) . . . can perform, either with or without reasonable accommodation, the essential functions of the desired job."[163] However, the third element changes from "(3) [the defendant] terminated him because of his disability,"--the third element of disparate treatment--to "[(3)] an employer [did not] take reasonable steps to [accommodate the employee]" for non-accommodation.[164] Some courts require proof an additional element--that the plaintiff was subjected to an adverse employment action.[165] The Tenth Circuit rejected that additional element, and that position is consistent with the EEOC's guidance,[166] but the Eleventh Circuit requires proof of an adverse employment action.[167] Because the PWFA uses the language of the ADA regarding the duty to accommodate, the elements of a non-accommodation claim under the PWFA should be analyzed under the same framework.

---

[161] As discussed above, accommodations theory and claims do not fit comfortably within disparate treatment.
[162] Exby-Stolley v. Board of County Comm'rs, 979 F.3d 784, 797 (10th Cir. 2020) (en banc), *cert. denied*, 141 S. Ct. 2858 (2021).
[163] *Id.* at 794.
[164] *Id.*
[165] *See, e.g.*, Beasley v. O'Reilly Auto Parts, 69 F.4th 744 (11th Cir. 2023). *See generally* Megan I. Brennan, *Need I Prove More: Why an Adverse Employment Action Prong Has No Place in a Failure to Accommodate Claim*, 36 HAMLINE L. REV. 497 (2013).
[166] *See* Brennan, *supra* note ___, at 505-06; *Exby-Stolley*, 979 F.3d at 803-04.
[167] Beasley v. O'Reilly Auto Parts, 69 F.4th 744 (11th Cir. 2023)

Failure-to-accommodate claims for religion under Title VII must be analyzed under a different framework than disability and pregnancy as required by *Abercrombie & Fitch*. Before the Supreme Court decision, courts often stated the elements of a claim as follows: (1) employee has a religious belief that conflicts with employment requirement; (2) employer was informed of belief or was aware of it; and (3) employee suffered adverse action because of failure to comply with employment requirement.[168] A federal district court explained that the Court's decision in *Abercrombie & Fitch* requires a reworking of that framework. Thus, a plaintiff now establishes a prima facie case by proving "(1) she had a bona fide religious belief that conflicted with an employment requirement; and (2) her need for an accommodation was a motivating factor in the employer's decision to take an adverse employment action against her. The burden then shifts to the employer to "(1) conclusively rebut one or more elements of the plaintiff's prima facie case, (2) show that it offered a reasonable accommodation, or (3) show that it was unable to accommodate the employee's religious needs reasonably without undue hardship."[169]

Not only do the proof frameworks for pregnancy and disability differ from that for religion, but there are other differences. For example, there is a requirement under the ADA and the PWFA that an employer engage in an "interactive process" with an employee to determine a reasonable accommodation. Although the ADA's statutory language does not include the "interactive process" the EEOC provided for it in the regulations.[170] The PWFA's statutory language provides for the "interactive process."[171] Regarding accommodation for religion, neither the statutory language of Title VII nor the regulations mention the interactive process.[172]

---

[168] E.E.O.C. v. Jet Stream Ground Servs., Inc., 134 F. Supp. 3d 1298, 1318 (D. Colo. 2015).
[169] *Id.*
[170] 29 C.F.R. §1630.2(o)(3).
[171] 42 U.S.C.§ 2000gg(7) & 2000gg-1(2).
[172] E.E.O.C. v. Jetstream Ground Servs. Inc., No. 13-cv-02340-CMA-KMT, 2016 WL 879625, at *4 n.4 (D. Colo. Mar. 8, 2016), *denying reconsideration of* 134 F. Supp. 3d 1298.

Nonetheless, some courts have discussed an employer's duty to engage in such a process regarding religious accommodation.[173]

Although it certainly seems reasonable that if the interactive process is a good means of determining reasonable accommodations for pregnancy and disability, it should be a good means for religion as well. However, unlike with disability and pregnancy, there is no requirement that an employer must know of an employee's or applicant's religious belief, as the Court held in *Abercrombie & Fitch*.[174] If the employee does not inform the employer of a religious belief that needs to be accommodated and the employer does not otherwise know, the interactive process may not be "triggered." Furthermore, the Supreme Court in *Groff v. DeJoy* rejected the plaintiff's argument that the Court should instruct lower courts to draw on ADA caselaw in determining whether an accommodation would impose an undue hardship on an employer.[175]

In sum, there is considerable uncertainty and asymmetry regarding causation standards and proof frameworks across the causes of action for accommodation, as there is in employment law generally.

Now we turn to the question of whether uncertainty and asymmetry in the law of reasonable accommodation and employment discrimination law generally is a problem. If it is, what should be done about it?

[173] *See, e.g.*, Thomas v. National Ass'n of Letter Carriers, 225 F.3d 1149, 11555 (10th Cir. 2000); Together Employees v. Mass General Brigham Inc., 573 F. Supp. 3d 412, 442 (D. Mass 2021).
[174] *See supra* text accompanying notes __-___.
[175] *Groff*, ___ S. Ct. at ___.

V. Development of Asymmetry in Employment Discrimination Law and Accommodations Law and Problems Caused

I have argued before and often that employment discrimination is filled with asymmetry among the various statutes and protected characteristics.[176] I have explored in this Essay how the theory of failure to accommodate has become littered with these asymmetries. I now address how it has been created. I then turn to why general, but not complete, symmetry or uniformity in employment discrimination law is desirable and why unjustified and unnecessary asymmetry creates fundamental problems in the law of accommodations and in employment discrimination law generally.

A. How Has Asymmetry Developed?

Employment discrimination law need not be completely symmetrical across the several separate statutes and the various protected characteristics. At a general level, there may be reasons to create a body of race discrimination law and sex discrimination law under Title VII that is more protective of employees than the body of age discrimination law. Indeed, the Supreme Court has fashioned such asymmetrical employment discrimination law, rendering age discrimination law far weaker than the law protecting race, color, sex, religion, and national origin under Title VII.[177] The Supreme Court has discussed some differences between age discrimination and the types of discrimination covered by Title VII that justify that asymmetry.[178] At a more specific level, there may be reasons why specific concepts or provisions in one part of employment discrimination law are not made applicable to another part. For example, the bona

[176] *See supra* note ___.
[177] *See, e.g.*, Gross v. FBL Fin. Servs., Inc., 557 U.S. 167 (2009); Smith v. City of Jackson, 544 U.S. 228 (2005); General Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581 (2004); Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993).
[178] *See* EEOC v. Wyoming, 460 U.S. 226, 230-33 (1983), *superseded by statute on other grounds*; Hazen Paper Co. v. Biggins, 507 U.S. 604, 610-11 (1993).

fide occupational qualification (BFOQ) defense is applicable to age in the ADEA[179] and sex, national, origin, and religion in Title VII,[180] but not to two of the protected characteristics in Title VII—race and color—which were not included in the Title VII statutory section providing for the defense.[181] Congress was well aware that making the BFOQ defense applicable to race and color could essentially nullify the principal goal of Title VII, which was to make race discrimination in employment unlawful.[182]

Some specific asymmetries are required by statutory language, such as the bona fide occupational qualification defense and the remedies under the ADEA[183] (incorporated from the Fair Labor Standards Act) that are different from those under Title VII and the ADA. Some asymmetries are not necessarily required by the statutory language, but the courts may infer such distinctions from differences in the statutory language. For example, the Supreme Court has interpreted the mixed-motives analysis as applicable to only Title VII disparate treatment and not to Title VII retaliation claims[184] and ADEA disparate treatment claims[185] because the CRA of 1991 added the "motivating factor" standard to only Title VII. Some asymmetries are not required or even inferable from statutory language but are determined by courts on other bases, such as the courts' understanding of Congressional purpose.[186] For example, the Supreme Court

[179] 29 U.S.C. § 623(f)(1).
[180] 42 U.S.C. § 2000e-2(e).
[181] *Id.*
[182] Congress rejected an amendment that would have included race. 110 CONG. REC. 2550-2563 (1964) (documenting debate and votes on Williams amendment); *see also* William R. Bryant, Note, *Justifiable Discrimination: The Need for a Statutory Bona Fide Occupational Qualification Defense for Race Discrimination*, 33 GA. L. REV. 211 (1998).
[183] 29 U.S.C. § 626(b).
[184] University of Texas Southwest Medical Center v. Nassar, 570 U.S. 338 (2013).
[185] Gross v. FBL Fin. Servs., Inc., 557 U.S. 167 (2009).
[186] *See, e.g.,* Stephen M. Rich, *A Matter of Perspective: Textualism, Stare Decisis, and Federal Employment Discrimination Law*, 87 S. CAL. L. REV. 1197, (2014) (positing that the Court "interpret[s] virtually identical language occurring in separate but related statutes to have substantially different meanings, and to announce potentially insurmountable conflicts between basic statutory provisions never previously thought to have been in conflict").

held that Congress did not intend for reverse discrimination claims to be actionable under the ADEA,[187] although the Court has held that such claims are cognizable under Title VII.[188]

If the Supreme Court and lower courts can infer asymmetry, why then do they not choose to infer symmetry? For example, why did the Court not infer in *Gross* and *Nassar* that Congress intended for some version of the mixed-motives framework[189] to apply to the ADEA and the anti-retaliation provision of Title VII, respectively? Some, but few, courts have inferred symmetry in accommodations law. Consider, for example, that some courts have inferred that the "interactive process" of the ADA should apply to religious accommodation, although neither Title VII nor the regulations so provide.[190]

Is any real problem created by pervasive and fundamental asymmetries across employment discrimination law and the subset of accommodations law?

B. Uncertainty, Incomprehensibility, and Questionable Fairness

I have argued in several articles that unnecessary asymmetry has rendered employment discrimination law far more complex than it needs to be and laced with fundamental uncertainties.[191] This is bad for employment discrimination law. If even attorneys[192] and judges find the law baffling, surely the public will find it more so. In an area of the law as controversial as employment discrimination law, incomprehensibility threatens its legitimacy. Asymmetries among protected characteristics are fraught in an area of the law that most understand to be about

[187] General Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581 (2004).
[188] McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976).
[189] The Court rejected the idea that the mixed-motives framework developed in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), should continue to apply to the ADEA. Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 179 (2009).
[190] *See supra* note ___.
[191] For example, which proof framework to apply to evaluate a motion for summary judgment on an individual disparate treatment claim? *See, e.g.,* Corbett, *Breaking Dichotomies*, *supra* note ___, at 780-82.
[192] Consider, for example, the statement of attorney Carter Phillips during oral argument in *Gross*: "I will say in 25 years of advocacy before this Court I have not seen one area of the law that seems to me as difficult to sort out as this particular one is." Transcript of Oral Argument at 29, Gross v. FBL Fin. Servs, Inc., 557 U.S. 167 (2009) (No. 08-441), available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/08-441.pdf.

equal treatment. Consider, for example, the negative reaction to the *Gross* decision, holding that plaintiffs asserting age discrimination claims under the ADEA must prove but-for causation, the more demanding standard of causation, but plaintiffs asserting race, color, sex, religion, and national origin discrimination claims under Title VII need prove only the relaxed causation standard of motivating factor.[193]

The theory of reasonable accommodation, as discussed above, differs in significant ways from disparate treatment,[194] which is the theory of discrimination that the Supreme Court has called the "most easily understood type of discrimination."[195] The asymmetries raise questions about why there are differences among the duties of accommodation. Why does a plaintiff not have to prove the employer knew of the plaintiff's religion, but the duties of accommodation for pregnancy and disability require knowledge of the limitations? Why are there different standards of causation? Perhaps the most basic question is why the duty of accommodation does not apply to other protected characteristics. Although accommodations will not always be applicable to a protected characteristic and a job, surely there are cases in which race, national origin, sex (other than pregnancy), and age entail some limitations on job performance that might be accommodated.

---

[193] *See, e.g.,* Kenneth Terrell, AARP Urges Congress to Strengthen Age Discrimination Laws, AARP (May 21, 2019), https://www.aarp.org/politics-society/advocacy/info-2019/powada-age-discrimination.html; AARP, AARP Poll: Protecting Older Workers Against Discrimination Act National Public Opinion Poll, GS STRATEGY GRP. (June 2012), https://ropercenter.cornell.edu/ipoll/study/31086265; Patricia Barnes, *Finally, U.S. House Will Address Disastrous U.S. Supreme Court Ruling on Age Discrimination*, FORBES (Jan. 13, 2020), https://www.forbes.com/sites/patriciagbarnes/2020/01/13/finally-us-house-will-address-disastrous-us-supreme-court-ruling-on-age-discrimination/?sh=7521da8d5efd; Editorial, *Age Discrimination*, N.Y. Times (July 6, 2009), https://www.nytimes.com/2009/07/07/opinion/07tue2.html (calling for Congress to overturn *Gross*).

[194] *See supra* notes ___-___ and accompanying text.

[195] International Bhd. Of Teamsters v. United States. 431 U.S. 324, 335-36 n.15 (1977).

VI. THE SOLUTION

The Supreme Court made some progress in *Groff v. DeJoy* by closing the gap between the duty to accommodate religion and the duties to accommodate disability and pregnancy. Nonetheless, the Court maintained different standards for undue hardship for the different protected characteristics. While rejecting the *de minimis* standard, the Court recognized that it did not have a strong basis for invoking the caselaw under the ADA.[196] Rather, the Court explained that *Trans World Airlines, Inc. v. Hardison*[197] had been misinterpreted and drew the "clarified" standard from that case. Justice Sotomayor's concurring opinion, joined by Justice Jackson, praised the majority for working within the parameters of *stare decisis*, pointing out that Congress has amended Title VII but none of those amendments has sought to change the result of *Hardison*.[198] The concurrence thus could sound like a vague invitation to Congress to enact another piece of "patch" legislation.

The *Groff* majority and concurrence thus demonstrate how we got to this place. The back-and-forth between Congress and the Court over the course of six decades has created this chaotic body of law. The law of accommodations is just the latest example. Congress's approach of repeatedly enacting new statutes to correct Supreme Court decisions usually injects more uncertainty and asymmetry into the law, as with the PWFA. The way forward to create a coherent body of law with only intended and reasonable asymmetries is for Congress to comprehensively revise employment discrimination law. We have six decades of experience and learning that could be brought to bear on that undertaking. I have argued that this project could best be done by repealing the existing separate statutes and enacting one employment discrimination law.[199]

---

[196] *Groff*, ___ at ___.
[197] 432 U.S. 63 (1977).
[198] *Groff*, ___ S. Ct. at ___ (Sotomayor, J., concurring).
[199] *See* Corbett, *Super Statute*, *supra* note ___.

The enactment of the PWFA as yet another separate employment discrimination statute was a move in the wrong direction.

Employment discrimination law deserves better, as does the law of accommodations. The time is long past due for Congress to reasonably accommodate employment discrimination law.