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Diminishing Deference: Learning Lessons from Recent Congressional Rejection of the Supreme Court's Interpretation of Discrimination Statutes

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I. Introduction

The winter of 2008 and 2009 has not been kind to the Supreme Court's interpretations of federal employment discrimination statutes. On January 1, 2009, the 2008 amendments to the Americans with Disabilities Act ("ADA") became effective, radically changing the definition of disability under the ADA as interpreted by the Supreme Court.[1] On January 29, 2009, President Obama signed into law the Lilly Ledbetter Fair Pay Act of 2009, which superseded the Supreme Court's interpretation of the continuing violation doctrine as it applied to certain federal pay discrimination claims.[2]

Both state and federal courts routinely apply the Supreme Court's interpretations of the federal employment discrimination statutes in their analysis of discrimination claims brought pursuant to state law. Considering the recent Congressional rejections of the Supreme Court's interpretation of discrimination statutes, it seems an appropriate time to reconsider how much deference federal interpretations of discrimination laws should be given.

This Article posits that the blind adherence to federal interpretations of discrimination principles on state employment discrimination claims is not only often inappropriate, but also has seriously impacted the development of employment discrimination law. Further, this paper argues that some state discrimination statutes will be in a period of interpretive upheaval as state and federal courts struggle to determine how the

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[1] ADA Amendments Act of 2008, Pub. L. 100-325, S. 3406 (2008) (noting that the Supreme Court had unnecessarily restricted the scope of the ADA's definition of disability in Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999), and Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002)).

[2] Lilly Ledbetter Fair Pay Act of 2009, Pub. L. 111-2 (2009); Ledbetter v. Goodyear Tire & Rubber Co., Inc., 550 U.S. 618 (2009).

2008 ADA Amendments and the Ledbetter Fair Pay Act affect state statutes that have not undergone subsequent amendment in response to this federal legislation.

II. Why Presumptive Deference Is Often Unsound

The federal government, through statutes such as the ADA, the Age Discrimination in Employment Act (ADEA), Title VII of the Civil Rights Act of 1964 (Title VII), amendments to Title VII in the Civil Rights Act of 1991, and 42 U.S.C. section 1981, prohibits certain employers from engaging in discrimination against employees on the basis of disability, age, race, color, national origin, gender, and religion.[3] State statutes also prohibit discrimination in the workplace.[4] Many federal and state courts apply interpretations of federal statutes when interpreting the state regimes.[5] Blanket acceptance of this statutory construction principle is flawed for several reasons, some of which are highlighted further by Congress' recent rejection of so many Supreme Court interpretations of discrimination law.

First, while it can be argued that some of these statutory regimes were modeled, at least in part, on their federal counterparts, the language of the state statutes often differs in whole or in part from its federal counterparts.[6] In some cases, the state statutes were not

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[3] Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (2000); Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (2000); Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701-716, 78 Stat. 241, 253-66 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (2000)) (Title VII).

[4] *See* ALA. CODE §§ 25-1-21 to -28 (LexisNexis 2000); ALASKA STAT. § 18.80.220 (2004); ARIZ. REV. STAT. ANN. §§ 41-1463 to -1465 (2004); ARK. CODE ANN. § 16-123-107(a)(1) (2006); CAL. GOV'T CODE §§ 12920-12926 (West 2005); COLO. REV. STAT. § 24-34-402 (2006); CONN. GEN. STAT. ANN. § 46a-60 (2008); DEL. CODE ANN. tit. 19, § 711 (2008); FLA. STAT. ANN. § 760.10 (West 2009); GA. CODE ANN. §§ 45-19-29 to -35 (2008); HAW. REV. STAT. ANN. §§ 378-2 to -3 (LexisNexis 2008); IDAHO CODE ANN. §§ 67-5909 to 67-5910 (2008); 775 ILL. COMP. STAT. ANN. 5/2-102 to -105 (2008); IND. CODE ANN. §§ 22-9-1-3, 22-9-2-2, 22-9-5-19 (West 2009); IOWA CODE ANN. § 216.6 (West 2009); KAN. STAT. ANN. § 44-1009 (2009); KY. REV. STAT. ANN. §§ 344.040-.050 (West 2009); LA. REV. STAT. ANN. §§ 23:312,:323,:332,:342,:352,:368 (2009); ME. REV. STAT. Ann. tit. 5, §§ 4572-4573 (2009); MD. ANN. CODE art. 49B, §§ 14, 16 (2009); MASS. GEN. LAWS ANN. ch. 151B, § 4 (West 2009); MICH. COMP. LAWS ANN. §§ 37.2102, .2202-.2206 (West 2009); MINN. STAT. ANN. § 363A.08 (West 2009); MISS. CODE ANN. §§ 25-9-103, 25-9-149 (West 2009); MO. ANN. STAT. §§ 213.010, .055 (West 2009); MONT. CODE ANN. §§ 49-2-101, 49-4-303 (2007); NEB. REV. STAT. §§ 48-1101 to -1115 (2009); NEV. REV. STAT. ANN. §§ 613.330-.390 (LexisNexis 2008); N.H. REV. STAT. ANN. §§ 354-A:1-A:7 (LexisNexis 2009); N.J. STAT. ANN. §§ 10:5-4 to -12 (West 2002); N.M. STAT. ANN. §§ 28-1-7, 28-1-9 (LexisNexis 8; N.Y. EXEC. LAW §§ 291, 296 (McKinney 2009); N.C. GEN. STAT. §§ 143-422.1-.3 (2009); N.D. CENT. CODE §§ 14-02.4-03 to 14-02.4-09 (2009); OHIO REV. CODE ANN. § 4112.02 (LexisNexis 2009); OKLA STAT. ANN. tit. 25, §§ 1302-1308 (West 2008); OR. REV. STAT. §§ 659A.006, .009, .030 (2007); 43 PA. CONS. STAT. ANN. § 955 (West 2008); R.I. GEN. LAWS §§ 28-5-1 to -7 (2009); S.C. CODE ANN. §§ 1-13-10 to -80 (2007); S.D. CODIFIED LAWS § 20-13-10 (2009); TENN. CODE. ANN. §§ 4-21-401 to -408 (2009); TEX. LAB. CODE ANN. §§ 21.051-.055 (Vernon 2009); UTAH CODE ANN. §§ 34A-5-101 to -106 (2008); VT. STAT. ANN. tit. 21, § 495 (2009); VA. CODE ANN. § 2.2-2639 (2009); WASH. REV. CODE ANN. §§ 49.60.040, 49.60.180 (West 2002 & Supp. 2007); W. VA. CODE ANN. §§ 5-11-3, -9 (LexisNexis 2008); WIS. STAT. ANN. §§ 111.321-.322 (West 2008); WYO. STAT. ANN. §§ 27-9-101 to -105 (2008).

[5] *See* Alex B. Long, *If the Train Should Jump the Track: Divergent Interpretations of State and Federal Employment Discrimination Statutes*, 40 GA. L. REV. 469, 477 (2006) (arguing that courts sometimes go to great lengths to read state discrimination laws as being consistent with federal law).

[6] *See, e.g.*, Hoffman-La Roche, Inc. v. Zeltwager, 144 S.W.3d 438, 445 (Tex. 2004) (indicating that Texas anti-discrimination act was modeled after Title VII); Dare v. Wal-Mart Stores Inc., 267 F. Supp. 2d 987, 992 (D. Minn. 2003) (explaining that Minnesota did not amend its state statute to reflect amendments made

originally modeled on the federal statutes.[7] It seems odd for a court to interpret a state law in tandem with a federal law, without any independent examination of the state law, when the language of the statutory regimes differs in important ways.

Second, in some instances, portions of a state's discrimination statute mimic the federal discrimination legislation, while other portions do not. Interpretations of federal statutes might be more relevant in instances where the statutory language is the same under both federal and state law. However, subsequent courts often use general statements about the appropriateness of applying a federal interpretation without regard to whether the state statute fully mimics the federal statutory language.[8]

Third, even where state and federal regimes share similar language as to one provision, differences in other statutory provisions may lead to divergent statutory interpretation. This is especially true where Supreme Court interpretation of a federal provision is founded on a review of the effects of other statutory provisions on the language in question.

Fourth, many Supreme Court interpretations of federal statutes do not rely on strict construction, but rather attempt to fill in areas of statutory silence. For example, in creating the *Faragher/Ellerth* defense to certain types of harassment claims, the Supreme Court created a new common law of agency for Title VII, significantly modifying traditionally accepted agency doctrines.[9] In these areas, there is no reason for courts to presume that the federal statutory interpretation should be given deference. Although the federal interpretation might serve as persuasive authority, it is problematic for the federal courts' common law interpretation to be given a presumptive hold over the state statutes, especially when the underlying state law principles may differ significantly from the created federal common law.

Finally, even in instances where the federal and state statutory language completely mirror one another, Congress has repeatedly indicated that the Supreme Court has often chosen narrow statutory interpretations that do not comport with the liberal reading to be given to employment discrimination statutes.[10] To the extent a Supreme Court decision uses

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to Title VII); *see also* Plagmann v. Square D Co., 695 N.W.2d 333 (Iowa Ct. App. 2004) (unpublished opinion) (indicating that Iowa's Civil Rights Act does not contain language identical to Title VII's 1991 amendment).

[7] *See, e.g.*, 43 PA. CONS. STAT. ANN. § 952, 955 (West 1991) (originally enacted prior to passage of Title VII in 1964 and ADEA in 1967).

[8] Coen v. Riverside Hosp., 1999 WL 1491697, at *5 (N.D. Ohio Oct. 8, 1999) (relying on cases indicating that reference to federal statutes regarding age and gender discrimination is appropriate when interpreting Ohio state anti-discrimination law to justify similar reference to ADA); OHIO R.C. § 4112.01 (13) (containing a definition of disability that is not identical to definition under ADA); OHIO R.C. § 4112.02 (containing discrimination provisions that differ from federal legislation).

[9] Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 765 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998).

[10] *See, e.g.*, Patterson v. McLean Credit Union, 491 U.S. 164, 200-01 (1989), superseded *by statute,* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, *as recognized in* CBOCS West, Inc. v. Humphries, 128 S. Ct. 1951 (2008) (noting the frequency with which the Supreme's Court's interpretations of civil rights statutes have been overturned by Congress); *see also* Perez v. Rodriguez, 575 F.2d 21, 24 (1978) (recognizing that the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (2000) overturned Alyeska Pipeline Service Co. v. Wilderness Society*,* 421 U.S. 240 (1975)); *See also* Pagan-Alejandro v. PR ACDelco Serv. Ctr., 468 F. Supp. 2d 316, 324 (recognizing that the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (2000) overruled General Electric Co. v. Gilbert*,* 429 U.S. 125 (1976)); *See also* Lilly Ledbetter Fair Pay Act, Pub. L. 111-2, 123 Stat. 5 (2009); *see also* ADA Amendments Act of 2008, Pub. L. 110-325, 122 Stat. 3553 (2008).

a narrow interpretation of a statute and rejects an equally plausible liberal construction, repeated Congressional rejection of such interpretive techniques suggest that state regimes should not be so beholden to what may likely be faulty interpretation on the part of the Supreme Court.

III. The Deleterious Effects of Presumptive Deference

As discussed earlier, employment discrimination regulation in the United States relies on a sometimes-overlapping patchwork of state and federal causes of action. Robust development of both systems is beneficial to the employment discrimination field as a whole because it allows for the full exposition of arguments before the arguments gain predominance, thus increasing the odds that a consensus is based on thorough decision-making.[11]

Presumptive deference to the given interpretation of federal statutes leads to two separate problems. In some cases, such deference leads to disingenuous statutory construction. More problematically, such deference inhibits the full development of legal arguments, often directing both state and federal law down a path that later proves ill-considered.

Both of these principles can be illustrated with respect to deference given to federal interpretations of the ADA. Prior to the 2008 amendments, the ADA defined a person as disabled if he or she has an impairment that significantly limits a major life activity.[12] In *Sutton v. United Air Lines, Inc.*, the Supreme Court held that whether a person had a disability under the federal statute must be determined with respect to mitigating measures.[13] While the ADA's statute is arguably silent regarding the issue of mitigating measures, the Supreme Court engaged in questionable statutory construction to reach such a conclusion.

The Supreme Court's conclusion rested on three premises. First, the Court looked to the introductory section of the ADA, which indicated that 43 million people in the United States suffered from disabilities.[14] Second, the Court reasoned that mitigating measures were required because the word "limits" was written in the present tense.[15] Finally, the Court indicated that because the ADA required an individualized inquiry for each plaintiff, each plaintiff must be considered in his or her mitigated condition.[16]

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[11] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)

> To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.

Id.

But see generally Jeffrey M. Hirsch, *Taking States Out of the Workplace*, 117 YALE L.J. POCKET PART 225 (2008) (arguing that the benefits of federalism related to workplace regulation are outweighed by its detriments).

[12] 42 U.S.C. § 12102(1).

[13] Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999), *superseded by statute,* ADA Amendments Act of 2008, Pub. L. 110-325, 122 Stat. 3553 (2008).

[14] Sutton, 527 U.S.at 484.

[15] *Id.* at 482-83.

[16] *See id.* at 483.

Prior to *Sutton*, the Equal Employment Opportunity Commission ("EEOC") and some circuit courts had interpreted the ADA's definition of disability to not require reference to mitigating measures.[17] While some states continued to interpret their statutes under a pre-*Sutton* definition of disability, many state and federal courts began to interpret state statutes in line with the *Sutton* decision.[18]

Such interpretations were accepted even for statutory regimes where a state's definition of disability differed from the federal definition, or where a state's legislative body had not expressed the number of individuals who would be protected under its anti-discrimination regime.[19] Likewise, in both *Sutton* and *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, the Supreme Court indicated that the term "substantially limits" must be narrowly construed, making it difficult for plaintiffs to prove disability.[20] Interpretations of state law began to mimic these conclusions,[21] despite the fact that civil rights statutes are often conceived as having broad remedial purposes.

Although some states maintained independent definitions of disability, the idea that mitigating measures must be considered gained support under state causes of action, as did the narrow reading of "substantial limitation."[22] These interpretations were brought about prematurely by the Supreme Court's interpretation of the ADA and the faulty application of deference. While some states may have adopted such interpretations through independent review, the hasty adherence of opinion on these issues could have been avoided or at least lessened if both state and federal courts had not been so eager to give primacy to the interpretation of the federal statutes.

While it is understandable that courts would adopt federal interpretations for state laws that mirror the federal statutes, the growing number of times that Congress has rejected Supreme Court interpretations of federal statutes should give courts pause in deferring too quickly. Where the Supreme Court has used a narrow definition or has engaged in facially problematic statutory construction, state law should not be as closely beholden to the federal model.

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[17] *See id.*

[18] *See, e.g.*, Davis v. Computer Maint. Serv., Inc., No. 01A01-9809-CV0459, 1999 WL 767597, at *6, 8-9 (Tenn. Ct. App. Sept. 29, 1999) (requiring mitigating measures to be considered under the Tennessee Handicap Act, which does not contain a definition of "handicap"); *see also* Coen v. Riverside Hosp., No. 3:97CV7425, 1999 WL 1491697, at *4-5 (N.D.Ohio Oct. 8, 1999) (applying *Sutton* to Ohio state law claims).

[19] *See, e.g.,* Davis, No. 01A01-9809-CV0459, 1999 WL at 6, 8-9; *see also* Coen, No. 3:97CV7425, 1999 WL at 4-5.

[20] *See* Sutton, 527 U.S. at 482; Toyota Motor Mfg., Kentucky, Inc. v. Williams 534 U.S. 184, 197 (2002) *superseded by statute,* ADA Amendments Act of 2008, Pub. L. 110-325, 122 Stat. 3553 (2008).

[21] *See, e.g.*, Mohr v. Michigan Dept. of Corrections, No. Civ. 04-60119, 2006 WL 932086, at *6-7 (E.D. Mich. Apr. 11, 2006) (applying ADA definition of substantially limits to Michigan disability discrimination claim, without noting that Michigan definition of disability differs from federal definition); *see also* Gillen v. Fallon Ambulance Service, Inc., 283 F.3d 11, 21 n.5, 22 (1st Cir. 2002) (interpreting Massachusetts state law as imposing the same requirement of substantially limits as federal interpretation, while noting other differences in state law).

[22] *See, e.g,.* Mohr, No. Civ. 04-60119, 2006 WL 932086 at 6-7; *see also* Gillen 283 F.3d at 21 n. 5, 22.

IV. Conclusion

With the enactment of the 2008 ADA Amendments, states are now in an interesting position. Their statutes have been interpreted to require consideration of mitigating measures and an exacting standard for substantial limitations, but Congress has now rejected these interpretations. Thus, without legislative intervention, it seems inappropriate that these same statutes should now be read in tandem with the Congressional amendments. This is the case, even though the Supreme Court's original interpretation may have been faulty. Similar arguments can be made regarding the states that adopted the Supreme Court's interpretation of the continuing violation doctrine in *Ledbetter v. Goodyear Tire and Rubber Co., Inc.*[23]

Congress' recent rejection of the Supreme Court's interpretation of aspects of the federal discrimination statutes provides an opportunity to reconsider whether deference to federal court interpretations is appropriate when considering issues of state law. While uniform interpretations of these laws may be beneficial in many instances, such uniformity should not be sought if it does not reflect the substantive diversity of state discrimination laws or if it requires conformity with faulty decision-making.

[23] Ledbetter v. Goodyear Tire and Rubber Co., Inc., 550 U.S. 618, 642-643 (2007) *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009).