

**European Commission**  
Employment, Social Affairs, and  
Equal Opportunities DG

**Legal Seminar on the Implementation of  
EU Law on Equal Opportunity and  
Anti-Discrimination**

Presentation by Professor David B. Oppenheimer  
University of California, Berkeley School of Law

---

---

---

---

---

---

---

---

**Outline**

- I. An Overview of the Primary Sources of U.S. Anti-Discrimination Law
- II. A Review of U.S. Anti-Discrimination Enforcement Mechanisms
- III. Recent Developments in U.S. Anti-Discrimination Law
  - I. The growing conflict between Congress and the Supreme Court over who defines discrimination
  - II. The move in equality law justification from anti-discrimination to diversity

Professor David B. Oppenheimer, University of California, Berkeley School of Law, U.S.A.

---

---

---

---

---

---

---

---

**Primary Sources of  
U.S. Anti-Discrimination Law**

- U.S. Constitution
- Federal Civil Rights Statutes
- Federal Administration Agency Regulations
- Federal Executive Orders
- State Constitutions

Professor David B. Oppenheimer, University of California, Berkeley School of Law, U.S.A.

---

---

---

---

---

---

---

---

## Primary Sources of U.S. Anti-Discrimination Law

- State Civil Rights Statutes
- State Administrative Agency Regulations
- Local Ordinances
- Common Law Remedies
  - Breach of Contract
  - Tort
  - Tortious Breach of Contract

Professor David B. Oppenheimer, University of California, Berkeley School of Law, U.S.A.

---

---

---

---

---

---

---

## United States Constitution

- Amendment 14
- Amendments 13 and 15
  - 1866-1867

Professor David B. Oppenheimer, University of California, Berkeley School of Law, U.S.A.

---

---

---

---

---

---

---

## Federal Civil Rights Statutes

- 1866 and 1867 Civil Rights Act

Professor David B. Oppenheimer, University of California, Berkeley School of Law, U.S.A.

---

---

---

---

---

---

---

## Federal Civil Rights Statutes



Professor David B. Oppenheimer, University of California, Berkeley School of Law, U.S.A.

---

---

---

---

---

---

---

---

## Federal Civil Rights Statutes

- 1964 Civil Rights Act:
  - Prohibits discrimination in:
    - Employment
    - Education
    - Public Accommodations
    - Government Contracting
  - Based on:
    - Race, Sex, Color, Creed, National Origin, Religion

Professor David B. Oppenheimer, University of California, Berkeley School of Law, U.S.A.

---

---

---

---

---

---

---

---

## Federal Civil Rights Statutes

- Griggs v. Duke Power Co., 401 U.S. 424 (1971)
  - Held: Unintentional (indirect) discrimination is unlawful absent job relatedness and business necessity

Professor David B. Oppenheimer, University of California, Berkeley School of Law, U.S.A.

---

---

---

---

---

---

---

---

## Federal Civil Rights Statutes

- McDonnell Douglas v. Green 411 U.S. 792 (1973)
- Held: Once a plaintiff introduces some evidence of differential treatment, the burden shifts to the defendant to prove a non-discriminatory motive

Professor David B. Oppenheimer, University of California, Berkeley School of Law, U.S.A.

---

---

---

---

---

---

---

---

## Federal Civil Rights Statutes

- 1965 Voting Rights Act
- 1967 Age Discrimination in Employment Act
- 1968 Fair Housing Act
- 1990 Americans with Disabilities Act
- 1993 Family Medical Leave Act
- 2009 Lillie Ledbetter Act

Professor David B. Oppenheimer, University of California, Berkeley School of Law, U.S.A.

---

---

---

---

---

---

---

---

- Federal Administrative Agency Regulations
- Federal Executive Orders

Professor David B. Oppenheimer, University of California, Berkeley School of Law, U.S.A.

---

---

---

---

---

---

---

---

- State Constitutions
- State Civil Rights Statutes
- State Administrative Agency Regulations

Professor David B. Oppenheimer, University of California, Berkeley School of Law, U.S.A.

---

---

---

---

---

---

---

- Local Ordinances
- Common Law Anti-Discrimination Doctrines
  - Breach of Contract
  - Tort
  - Tortious Breach of Contract

Professor David B. Oppenheimer, University of California, Berkeley School of Law, U.S.A.

---

---

---

---

---

---

---

## A Review of U.S. Anti-Discrimination Enforcement Mechanisms

- How do we enforce anti-discrimination laws in the U.S?
  1. Private lawsuits for damages
  2. Administrative agencies
  3. Voluntary conciliation
  4. Best Practices and Corporate Mission Statements
  5. Union Actions

Professor David B. Oppenheimer, University of California, Berkeley School of Law, U.S.A.

---

---

---

---

---

---

---

## A Review of U.S. Anti-Discrimination Enforcement Mechanisms

How do we enforce anti-discrimination laws in the U.S?

6. Arbitration
7. Mediation
8. Removal of state funding
9. Civil prosecution by the state
10. Diversity promotion policies and training

Professor David B. Oppenheimer, University of California, Berkeley School of Law, U.S.A.

---

---

---

---

---

---

---

---

## Congressional Debates in 1963–1964

- Liberals wanted federal enforcement agency
- Moderates wanted civil prosecution by U.S. Department of Justice
- Conservatives wanted:
  - No prohibition of discrimination (freedom of contract)
  - No prohibition of discrimination (State's rights)
  - Voluntary compliance through conciliation

Professor David B. Oppenheimer, University of California, Berkeley School of Law, U.S.A.

---

---

---

---

---

---

---

---

## Private Lawsuits for Damages

- Federal Court:
  - 30,000 cases filed/year (including 500 +/- filed by Federal government)
  - 900 cases tried to verdict/year
  - Plaintiffs win 30% of cases tried
  - Median jury verdict is \$150,000
  - Median bench trial award is \$71,000

Professor David B. Oppenheimer, University of California, Berkeley School of Law, U.S.A.

---

---

---

---

---

---

---

---

## Private Lawsuits for Damages

- California State Court: (reported jury verdicts)
  - 135 cases reported as tried to verdict/year
  - Plaintiffs win 48% of reported cases tried to juries
  - Median award in reported cases is \$249,000

Professor David B. Oppenheimer, University of California, Berkeley School of Law, U.S.A.

---

---

---

---

---

---

---

---

## Administrative Agencies

- EEOC:
  - 95,000 charges filed in 2008, including
  - 34,000 race discrimination
  - 28,000 sex discrimination (of which 50% were for sexual harassment)
  - 25,000 age discrimination
  - 19,000 disability discrimination
  - 3,000 religion discrimination

Professor David B. Oppenheimer, University of California, Berkeley School of Law, U.S.A.

---

---

---

---

---

---

---

---

## Administrative Agencies

- 9,000 settlements
- 1,000 successful conciliations
- 4,000 findings of reasonable cause
- 47,000 findings of no cause
- 17,000 closings without finding cause or no cause
- 17,000 merit resolutions

Professor David B. Oppenheimer, University of California, Berkeley School of Law, U.S.A.

---

---

---

---

---

---

---

---

## Administrative Agencies

- New York State Division of Human Rights
  - 7,000 cases filed
  - 900 findings of probable cause
  - 900 settlements
  - 900 dismissals
  - 4,500 findings of no probable cause
- Filings are up 25% so far in 2009!

Professor David B. Oppenheimer, University of California, Berkeley School of Law, U.S.A.

---

---

---

---

---

---

---

---

## Voluntary Conciliation

- Through EEOC, state and local human rights agencies, community groups, employer associations, individual employer plans (including ombudspersons).

Professor David B. Oppenheimer, University of California, Berkeley School of Law, U.S.A.

---

---

---

---

---

---

---

---

## Best Practices and Corporate Mission Statements

- Commonly used to promote good employment practices and reduce conflict, discrimination, and litigation.

Professor David B. Oppenheimer, University of California, Berkeley School of Law, U.S.A.

---

---

---

---

---

---

---

---



## Union Actions

- Common provision in CBA's.
- Clearly grievable under new Supreme Court decision.

Professor David B. Oppenheimer, University of California, Berkeley School of Law, U.S.A.

---

---

---

---

---

---

---

---

## Arbitration

- Very common in employment contracts

Professor David B. Oppenheimer, University of California, Berkeley School of Law, U.S.A.

---

---

---

---

---

---

---

---

## Mediation

- Very common in:
  - Employment contracts
  - Court ordered ADR
  - Voluntary pre-litigation settlement efforts
  - Voluntary litigation settlement efforts

Professor David B. Oppenheimer, University of California, Berkeley School of Law, U.S.A.

---

---

---

---

---

---

---

---

- Contract Compliance -- Removal of State Funding
- Civil Prosecution by the State
- Diversity promotion policies and training

Professor David B. Oppenheimer, University of California, Berkeley School of Law, U.S.A.

---

---

---

---

---

---

---

---

### Recent Developments in U.S. Anti-Discrimination Law

1. The growing conflict between the Congress and the Supreme Court over who defines discrimination
2. The move in equality law justification from anti-discrimination to diversity

Professor David B. Oppenheimer, University of California, Berkeley School of Law, U.S.A.

---

---

---

---

---

---

---

---

### Recent Developments in U.S. Anti-Discrimination Law

- When the Democratic Party has controlled the Congress, it has passed statutes prohibiting discrimination covering race, sex, religion and national origin (1964, restored in 1978, 1991 and 2009), age (1967), and disability (1990, restored in 2009).

Professor David B. Oppenheimer, University of California, Berkeley School of Law, U.S.A.

---

---

---

---

---

---

---

---

## Recent Developments in U.S. Anti-Discrimination Law

- But each time the Congress passes a broad anti-discrimination act, enforcement efforts are blocked by the Supreme Court, which narrows each statute, relying on principles of federalism, colour-blindness or narrow readings of Congressional intent.

Professor David B. Oppenheimer, University of California, Berkeley School of Law, U.S.A.

---

---

---

---

---

---

---

---

## Recent Developments in U.S. Anti-Discrimination Law

- Some Examples
  - In 1994 Congress passed the Violence Against Women Act, which created a civil right for women to be free from violence, and established a right to sue in federal court for a violation.
  - Held: In 2000, in *United States v. Morrison*, 529 U.S. 598 (2000) the U.S. Supreme Court invalidated the right of action, holding that it was outside the Congress's power under principles of federalism. (Plaintiff was student at Virginia tech raped by two football players. School and local government declined to act.)

Professor David B. Oppenheimer, University of California, Berkeley School of Law, U.S.A.

---

---

---

---

---

---

---

---

## Recent Developments in U.S. Anti-Discrimination Law

- In 1967 Congress passed the Age Discrimination in Employment Act, prohibiting all employers of 15 or more employees, including state government, from discriminating against employees on the basis of age (over 40).
- Held: In 2000, in *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000), the U.S. Supreme Court held that the ADEA did not apply to employment practices of state governments, based on principles of federalism.

Professor David B. Oppenheimer, University of California, Berkeley School of Law, U.S.A.

---

---

---

---

---

---

---

---

## Recent Developments in U.S. Anti-Discrimination Law

- In 1990, Congress passed the American with Disabilities Act, prohibiting discrimination in employment, housing, education and public accommodations against people with disabilities.
- Held: In 2001, in *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), the Supreme Court case decided that the was unconstitutional insofar as it allowed states to be sued by private citizens for money damages, based on principles of federalism.

Professor David B. Oppenheimer, University of California, Berkeley School of Law, U.S.A.

---

---

---

---

---

---

---

---

## Recent Developments in U.S. Anti-Discrimination Law

- However, when the State of New Jersey passed a statute prohibiting discrimination based on sexual orientation, and the NJ courts applied it to order the Boy Scouts to re-admit a gay Scoutmaster, the Supreme Court . . .
- Held: In 2000, in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), the Court held that New Jersey couldn't order the gay Scoutmaster re-admitted because it would violate the Boy Scout's right of free association under the First Amendment.

Professor David B. Oppenheimer, University of California, Berkeley School of Law, U.S.A.

---

---

---

---

---

---

---

---

## Recent Developments in U.S. Anti-Discrimination Law

- *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007). School Board voluntarily adopted program to insure that its once-segregated and now integrated schools remained racially integrated, by allowing students to chose their own schools, but limiting out-of-neighborhood transfers that caused schools to "tip" into unbalance. Board's purpose was to comply with *Brown*, but Supreme Court . . .

Professor David B. Oppenheimer, University of California, Berkeley School of Law, U.S.A.

---

---

---

---

---

---

---

---

## Recent Developments in U.S. Anti-Discrimination Law

- Held: For the government to take account of a person's race, even to avoid segregation, violates the Constitutional principle of colour-blindness.
- Finally . . .
- Ricci v. DeStefano, \_\_\_ U.S. \_\_\_ (decided June 29, 2009).

Professor David B. Oppenheimer, University of California, Berkeley School of Law, U.S.A.

---

---

---

---

---

---

---

---

## Looking Ahead

- The move in equality law justification from anti-discrimination to diversity
- "We have a Black President, how could we have discrimination?"

Professor David B. Oppenheimer, University of California, Berkeley School of Law, U.S.A.

---

---

---

---

---

---

---

---