Sex Discrimination: Crash Course Government and Politics #30

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(0:02) Hi, I'm Craig, and this is Crash Course Government and Politics and today I am going to talk to you about something the affects almost everybody, jobs. Unless you are very lucky or very unlucky, at some point in your life, you will probably have a job and more likely than not, you will be employed by someone else. The big boss. The person who tells you what to do. Stan, are you my boss? I'm more of a contractor.

(0:23) The rules about what employers can and can't do are very complicated and changing all the time, but one thing they are not allowed to do is discriminate against certain groups of people. Probably the largest group protected from discrimination is the one we are going to talk about today, women.

(0:34) [Intro]

(0:42) So, before we get into the nitty gritty of the employment discrimination against women, we need to go back a little and explain the middle level of Supreme Court Review. Helpfully called intermediate scrutiny, not midzi scrutiny, as I would like to call it. It's kind of hard to define, but as the name suggests intermediate scrutiny is more stringent than rational basis review, where the government usually wins and its actions are allowed to stand, and strict scrutiny where the government usually loses.

(1:04) So that's about as helpful as I can get in terms of letting you know what the outcome of a case will be when courts apply intermediate scrutiny. It's more useful for you to know when intermediate scrutiny applies and that's mainly in cases involving women. Now, hold on. I know many of you are saying "I know that women are often discriminated again for being women so what makes them different from other groups that face discrimination like black people or Jewish people or at least in the past, Irish people." All of the groups I just mentioned have one common characteristic, at least where the courts are concerned. And this is that the thing that makes them a discrete group is something that they can't change. Now, current ideas about sex and gender make this characterization more problematic than the Supreme Court likes to think, but Supreme Court justices weren't always the most progressive.

(1:39) Also problematic are religion, since we are free to adopt or discard religion as we want. But, I guess that since religion is specifically mentioned in the first amendment and that when the courts decided on its categories, religious discrimination was more prevalent than it is now. That's why religion is included as a category that will trigger the court to take a closer look. But, given the way that the court tends to look at these things, you'd think that sex, by which I mean male and female, would be the kind of thing that would put you in a specific group that might be subject to discrimination based on that group identity, right?

(2:05) Well, probably, but the court's key reasoning here has to do with the fact that racial, religious and ethnic groups are almost always minorities. And women statistically, at least, are not. For the courts, majority groups have a good chance of winning in the legislative process and therefore they don't need the same level of judicial protection as minority groups. Still, there's been some recognition, that despite there non-minority numbers, women have still historically been treated unequally to men. Let's just come right out and say that they have been given inferior status. And because of this a law or government action that specifically mentions or is aimed at women will cause the court to look more carefully than when women aren't mentioned but less carefully than when religious, ethnic, or racial minorities are mentioned and that's intermediate scrutiny.

(2:41) So, the 14th amendment guarantees equal protection of the laws but most of the actual rules against discrimination come out of the federal civil rights act of 1964 and various state anti-discrimination statutes. This is one of the most far reaching and important pieces of federal legislation ever and its history is fascinating, but we're not going to get too much into it here, because this isn't a History class, this is Government. Sometimes, we talk about history, but not now, ok? The important thing is that it outlawed discrimination against race, religion, ethnicity, or sex in a whole bunch of situations, including public accommodations and transportation and most important employment. The key section of the civil rights act dealing with employment is title 7, if you'll excuse the legal language, the most relevant part of the statute is this:

(3:19) [A] EMPLOYER PRACTICES. It shall be an unlawful employment practice for an employer [1] To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or [2] To limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(3:51) Despite all the legal language, that seems pretty straight forward. Unfortunately, it's a lot easier to say what an unlawful employment practice is than it is to prove that your employer is doing it. This is where we again have to get legalistic and explain how discrimination claims work their way through the courts. Let's also get Thought Bubbleistic.

(4:06) So, let's say you feel you've been discriminated against at work by your employer. What can you do? At least under federal law. First, you have to be in a protected class as defined by the law, which means that you'll need to show that the discrimination was based on your race, color, religion, sex, or national origin. Now, sometimes this'll be easy to prove. Like in a case where you're employer says, I'd give you a promotion if you weren't black, or gee, I'm sorry to let you go, but you know you're a woman and we can't have too many women working here. This happens almost never because most people aren't that bigoted or that stupid, but it does happen and if you have this kind of statement and witnesses to back it up, you have a pretty good chance of winning. The more common cases are those where nobody who is a member of a minority group gets promoted or members of those groups are disproportionately fired.

(4:41) Say if the company has 90 white employees and 10 black employees, and when they lay off 10% of the work force, 9 black workers are fired and only 1 white one is. This is called a disparate impact and if this happens, new court procedures kick in. If you are in a protected class and feel that you are a victim of disparate impact discrimination and you can show that your employer's action has the effect of exclusion, then the burden of proof, which normally is with the party making the complaint, you, in this case, shifts to your employer, who then has to prove that his actions were caused by a business necessity. I can't imagine there would be a business necessity for firing 90% of your black work force. If the employer is able to show that he was forced by business necessity to fire most of his black employees, then burden shifts again back to the plaintiff to show that the employer's reasons are untrue. That they are just pretext and the action was really taken because the employees were in the protected group.

(5:24) Much of the evidence to show this will probably be statistical and it may be hard to get, which points out a crucial thing about discrimination claims. They are hard to prove. Thanks Thought Bubble. By now, I'll bet many of you are saying, Craig! I thought you said you were going to focus mainly on women, but the

discrimination you've been describing applies to all sorts of protected groups!

(5:40) Eagles are a protected species, but that's different. So, women are protected against adverse employment actions by federal and state legislation, but they are also protected against sexual harassment in the work place, this might not seem like discrimination right away, but if you think of discrimination as negative treatment based on one's membership in a specific group, then it starts to make sense. It makes even more sense when you read about some of the things that women have had to go through at work that have led to discrimination cases. I'm not going to go into graphic detail, but it's pretty horrible.

(6:04) You should that there are two types of sexual harassment, quid pro quo and hostile workplace environment. Quid pro quo harassment is when an employer or withholds workplace benefits like promotions in exchange for sexual favors. This is obviously wrong and terrible. Hostile Work Environment is a bit trickier because it can be the result of other employees and not necessarily an employer, but courts have ruled that it is an employer's responsibility to ensure that the workplace is friendly to all employees.

(6:27) I said I wasn't going to get graphic, but I think one example might help to understand what sorts of things constitute workplace sexual harassment. In the case of Burlington vs. Ellerth, Kim Ellerth was subject numerous unwanted advances from her supervisor. In one of her conversations with the supervisor, he denied her request on a relatively inconsequential business matter, but added, "are you wearing shorter skirts yet Kim, because it would make your job a whole heck of a lot easier." That's just disgusting and no one should have to endure those kinds of remarks at work. Ellerth won her suit against Burlington and I'm going to stop on that relatively cheerful note. It's important that we have an understanding of workplace discrimination, because most of us will spend time working and since some of us will be employers, we should have an idea of how to behave and what is that about.

(7:03) Women do get some special treatment under the law, a reflection of the fact that they have historically been, and continue to be singled out for mistreatment. The laws and courts have recognized this which is why women receive legal protections from discrimination. But women have made some gains which is probably a result of their increasing presence in the workplace and power as voters. And if their strides for greater equality on the job and elsewhere continue, I'd say that's a very good thing.

(7:23) It'd be nice if someday there was no need for a heightened level of scrutiny when it comes to laws concerning women, but we're not there yet, so the fact that anti-discrimination laws in intermediate scrutiny exist is also a good thing. Thanks for watching, I'll see you next week.

(7:34) Crash Course Government and Politics is produced in association with PBS Digital Studios, support for Crash Course Government comes from Voqal. Voqal supports nonprofits that use technology and media to advance social equity, learn more about their mission and initiatives at Voqal.org. Crash Course is made with the help of all these nice women and men. Thanks for watching.