UNDERSTANDING EMPLOYMENT DISCRIMINATION

Second Edition

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UNDERSTANDING EMPLOYMENT DISCRIMINATION

Second Edition

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MATTHEW BENDER

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DEDICATION

Dedicated to my Grandchildren—
Danielle Gray Crowley,
Sarah Elizabeth Hudgins,
Laura Nell Hudgins, and
John Ross Crowley

PREFACE

The operative word in the title of this book, *Understanding*, may promise more than it can deliver. It would be a presumptuous author indeed to claim to fully understand this area of the law — if that is taken to mean *knowing* all of the literally thousands of highly technical statutory and decisional rules, *comprehending* what they mean in their individual capacities; *reconciling* them into a coherent whole; and *appreciating their practical consequences* in both the workplace and in the practice of employment discrimination law.

The reasons for this obstacle to full understanding are manifold.

- First, employment discrimination law flows not from a single statutory source, but from many statutes (federal and state), constitutional provisions, administrative regulations, and cases construing these primary sources.

- Second, these sources of law, particularly the statutes and regulations, are complex and lengthy documents that do not yield easily to paraphrase. The cases construing them are similarly prolix and difficult to untangle.

- Third, many of the statutes and administrative regulations are not adroitly drafted, leaving enormous gaps and ambiguities.

- Fourth, in attempting to fill the gaps and resolve the ambiguities, the lower courts often reach conflicting decisions. Significant differences exist between each federal circuit, between panels on each circuit, between the districts within each federal circuit, and even between the individual judges within the districts and circuits. These differences account for the proportionately large number of Supreme Court decisions devoted to employment discrimination law. But the Supreme Court cannot resolve every conflict, and so employment discrimination law remains highly federal circuit/district specific.

- Fifth, when the Supreme Court does purport to resolve the differences and clarify the law, its decisions are often beset with concurring and dissenting opinions. The precise holding of many Supreme Court cases and the significance of these decisions are fertile areas of even further disagreement among the scholars and lower courts. And it is not uncommon for the Court to revisit an issue several years later, to explain what they *really* meant in a prior decision.

- Sixth, Congress has not been hesitant to legislatively overrule the Supreme Court decisions it disagrees with. And from a purely drafting perspective, its handiwork often leaves much to be desired. These legislative overrulings then take the courts back to the drawing board to begin anew the case-by-case process of working out the details of the law.

- Seventh, even when some degree of precision and certainty is attained on a particular issue, the result is an onion-like body of law, with layer upon layer of rules, subordinate rules, exceptions to the rules, and exceptions to the exceptions.

- Eighth, the language of employment discrimination law is ripe with terms of art, jargon, acronyms, and case-name substitutes for the more descriptive names of various

doctrines, theories, and methods of proof. Although this book has tried to minimize the confusing impact of this — with terms of art, for example, often being printed in italics — the practitioner of this art must, perforce, learn its language.

- And ninth, whatever the law is today, it is likely to be different tomorrow.

In sum, employment discrimination law is like a huge jigsaw puzzle — albeit one with many missing, mismatched, and constantly changing pieces. It can also be put together in a variety of ways at any given time, depending on one's vision — and even then the total picture is a matter of interpretation.

What can the student and beginning practitioner do? First, there are some fundamental concepts, principles, doctrines, and theories that do endure from season to season. They are the relatively stable foundation upon which the superstructure of employment discrimination law is being built — and constantly rebuilt. The primary purpose of this book is to help with the achievement of that level of understanding. Second, anyone studying or working in this field should also have at least a general grasp of what the superstructure looks like at the moment. A knowledge of the major legal rules, and of the fact that differences exist with respect to their specific details, is necessary in order to understand the significance and meaning of the changes as they occur. Although writing at that level is like shooting at a rapidly moving target, the second purpose of this book is to summarize those rules as they currently exist — as I understand them, and this too may be subject to disagreement by others also well-versed in the field.

I extend my thanks to the many people who contributed, directly or indirectly, to this undertaking My students over the last 25 years, who expected me to provide them with some degree of *understanding* rather than leaving them in a state of puzzlement, forced me to grapple with legal issues that would have been easier to gloss over or ignore. And the honest give-and-take of our classroom discussions enriched my appreciation for the diversity of legal conclusions that might flow from a common set of premises.

The practicing lawyers who I worked with as Of Counsel to several law firms provided me with invaluable insights about how the law can be used effectively to resolve or forestall actual discrimination disputes in the workplace. And they taught me to appreciate the difference between matters that are of practical significance and those that are purely academic interest, causing me to focus this book on the former rather than the latter.

The authors of the many fine casebooks and treatises have significantly enhanced my understanding of the law, have been instructive on the various ways in which the materials can be organized, and have provided enlightenment of which cases and topics deserve coverage in this book — which is intended to supplement, not supplant, those more comprehensive sources of information.

Finally, two former students, who are now enormously successful practitioners, have contributed in a more literal and significant sense. Tracey C. Green is Special Counsel with Willoughby and Hoefer, P.A., of Columbia, South Carolina. His expertise in the procedural device through which the constitutional protections are enforced, Section 1893, and knowledge of the confusing limitations of the Eleventh Amendment have provided an enormous depth to this book. Leigh Nason, Shareholder with Ogletree,

PREFACE

Deakins, Nash, Smoak & Stewart, PC, in the Columbia, South Carolina office, has likewise provided an in-depth coverage of the special nondiscrimination duties of government contractors, Executive Order 11246, and of the atypical nondiscrimination precepts of the Americans With Disabilities Act. I am proud to have worked with them on the book.

To all the readers of this book: I wish you success, happiness, and a fulfilling career in the law. And as you continue your reading and study of the law, remember . . .

Of making many books, there is no end, and much study is a weariness of the flesh.

Ecclesiastes 12:12

Thomas R. Haggard
Columbia, South Carolina
May 2008

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