

Understanding Employment Discrimination Law

CAROLINA ACADEMIC PRESS UNDERSTANDING SERIES

- Understanding Administrative Law,
Sixth Edition**
William Fox, Jr.
- Understanding Alternative Dispute Resolution**
Kristen M. Blankley and Maureen A. Weston
- Understanding Animal Law**
Adam Karp
- Understanding Antitrust and Its Economic
Implications, Seventh Edition**
E. Thomas Sullivan and Jeffrey L. Harrison
- Understanding Bankruptcy, Fourth Edition**
Jeffrey Ferriell and Edward J. Janger
- Understanding California Community
Property Law**
Jo Carrillo
- Understanding Capital Punishment Law,
Fourth Edition**
Linda E. Carter, Ellen S. Kreitzberg,
and Scott W. Howe
- Understanding Civil Procedure, Sixth Edition**
Gene R. Shreve, Peter Raven-Hansen, and
Charles Gardner Geyh
- Understanding Civil Procedure:
The California Edition**
Walter W. Heiser, Gene R. Shreve,
Peter Raven-Hansen, and Charles Geyh
- Understanding Civil Rights Litigation,
Second Edition**
Howard M. Wasserman
- Understanding Conflict of Laws,
Fourth Edition**
William M. Richman, William L. Reynolds,
and Chris A. Whytock
- Understanding Constitutional Law,
Fifth Edition**
William D. Araiza
- Understanding Contracts, Fourth Edition**
Jeffrey Ferriell
- Understanding Copyright Law,
Seventh Edition**
Marshall A. Leaffer
- Understanding Corporate Law,
Fifth Edition**
Arthur R. Pinto and Douglas M. Branson
- Understanding Corporate Taxation,
Fourth Edition**
Leandra Lederman and Michelle Kwon
- Understanding Criminal Law,
Eighth Edition**
Joshua Dressler
- Understanding Criminal Procedure:
Vol. 1: Investigation, Seventh Edition**
Joshua Dressler, Alan C. Michaels,
and Ric Simmons
- Understanding Criminal Procedure:
Vol. 2: Adjudication, Fourth Edition**
Joshua Dressler and Alan C. Michaels
- Understanding Disability Law, Third Edition-**
Mark C. Weber
- Understanding Election Law
and Voting Rights**
Michael R. Dimino, Bradley A. Smith,
and Michael E. Solimine
- Understanding Employee Benefits Law
Second Edition**
Kathryn L. Moore
- Understanding Employment
Discrimination Law, Third Edition**
Thomas R. Haggard and Bruce N. Cameron
- Understanding Employment Law,
Third Edition**
Paul M. Secunda, Richard A. Bales,
and Jeffrey M. Hirsch
- Understanding Environmental Law,
Third Edition**
Philip Weinberg and Kevin A. Reilly
- Understanding Estate and Gift Taxation,
Second Edition**
Brant J. Hellwig and Robert T. Danforth
- Understanding Evidence, Fifth Edition**
Paul C. Giannelli
- Understanding Family Law, Fourth Edition**
John Gregory, Peter N. Swisher,
and Robin Wilson
- Understanding Federal and
California Evidence**
Paul C. Giannelli
- Understanding Federal Courts
and Jurisdiction, Second Edition**
Linda Mullenix, Martin H. Redish,
and Georgene Vairo
- Understanding Federal Income Taxation,
Sixth Edition**
J. Martin Burke and Michael K. Friel

- Understanding the First Amendment,
Sixth Edition**
Russell L. Weaver
- Understanding Immigration Law,
Third Edition**
Kevin R. Johnson, Raquel Aldana,
Bill Ong Hing, Leticia M. Saucedo,
and Enid Trucios-Haynes
- Understanding Insurance Law,
Sixth Edition** Robert H. Jerry, II and Douglas
Richmond
- Understanding Intellectual Property Law,
Fourth Edition**
Tyler T. Ochoa, Shubha Ghosh,
and Mary LaFrance
- Understanding International Business
and Financial Transactions,
Fourth Edition**
Jerold A. Friedland
- Understanding International Criminal Law,
Third Edition**
Ellen S. Podgor and Roger S. Clark
- Understanding International Law,
Second Edition**
Stephen C. McCaffrey
- Understanding Jewish Law, Second Edition**
Steven H. Resnicoff
- Understanding Juvenile Law, Fifth Edition**
Martin Gardner
- Understanding Labor Law,
Fifth Edition**
Douglas E. Ray, Calvin William Sharpe,
and Robert N. Strassfeld
- Understanding the Law of Terrorism,
Second Edition**
Erik Luna and Wayne McCormack
- Understanding the Law of Zoning
and Land Use Controls, Third Edition**
Barlow Burke
- Understanding Lawyers' Ethics, Fifth Edition**
Monroe H. Freedman and Abbe Smith
- Understanding Local Government,
Second Edition**
Sandra Stevenson
- Understanding Modern Real Estate
Transactions, Fourth Edition**
Alex M. Johnson, Jr.
- Understanding Negotiable Instruments
and Payment Systems, Second Edition**
William H. Lawrence
- Understanding Nonprofit and Tax Exempt
Organizations, Second Edition**
Nicholas P. Cafardi and Jaclyn Fabean Cherry
- Understanding Partnership
and LLC Taxation, Fourth Edition**
Jerold A. Friedland
- Understanding Patent Law,
Third Edition**
Amy L. Landers
- Understanding Products Liability Law,
Second Edition**
Bruce L. Ottley, Rogelio A. Lasso,
and Terrence F. Kiely
- Understanding Property Law, Fourth Edition**
John G. Sprankling
- Understanding Remedies, Third Edition**
James M. Fischer
- Understanding Sales and Leases of Goods,
Third Edition**
William H. Henning, William H. Lawrence,
and Henry Deeb Gabriel
- Understanding Secured Transactions,
Fifth Edition**
William H. Lawrence, William H. Henning,
and R. Wilson Freyeremuth
- Understanding Securities Law,
Seventh Edition**
Marc I. Steinberg
- Understanding Taxation of Business Entities**
Walter D. Schwidetzky and Fred B. Brown
- Understanding Torts, Sixth Edition**
John L. Diamond, Lawrence C. Levine,
and Anita Bernstein
- Understanding Trade Secret Law**
John G. Sprankling, Thomas G. Sprankling
- Understanding Trademark Law,
Fourth Edition**
Mary LaFrance
- Understanding Trusts and Estates,
Sixth Edition** Roger W. Andersen
and Susan Gary
- Understanding White Collar Crime,
Fourth Edition**
J. Kelly Strader

Understanding Employment Discrimination Law

THIRD EDITION

Thomas R. Haggard

DISTINGUISHED PROFESSOR EMERITUS OF LAW
UNIVERSITY OF SOUTH CAROLINA SCHOOL OF LAW

Bruce N. Cameron

REED LARSON PROFESSOR OF LABOR LAW
REGENT UNIVERSITY SCHOOL OF LAW



CAROLINA ACADEMIC PRESS
Durham, North Carolina

Copyright © 2021
Carolina Academic Press, LLC
All Rights Reserved

Library of Congress Cataloging-in-Publication Data

Names: Haggard, Thomas R., author. | Cameron, Bruce N., author.
Title: Understanding employment discrimination law / by Thomas R. Haggard,
Bruce N. Cameron.
Description: Third edition. | Durham, North Carolina : Carolina Academic
Press, LLC, [2020] | Series: Understanding Series.
Identifiers: LCCN 2020026644 (print) | LCCN 2020026645 (ebook) | ISBN
9781531011772 (paperback) | ISBN 9781531011789 (ebook)
Subjects: LCSH: Discrimination in employment--Law and legislation--United
States.
Classification: LCC KF3464 .H34 2020 (print) | LCC KF3464 (ebook) | DDC
344.7301/133--dc23
LC record available at <https://lcn.loc.gov/2020026644>
LC ebook record available at <https://lcn.loc.gov/2020026645>

Carolina Academic Press
700 Kent Street
Durham, North Carolina 27701
Telephone (919) 489-7486
Fax (919) 493-5668
www.cap-press.com

Printed in the United States of America

Professor Haggard dedicates this edition to his wife of 58 years, Nell; his daughters Kathrine Hudgins and Julie Crowley; his grandchildren Danielle Crowley, Sarah Hudgins, Laura Nell Hudgins, and Ross Crowley; and our family's newest addition, his great granddaughter Luna Gray Crowley.

Professor Cameron dedicates this edition to the wife of his youth, Margaret Brennan Cameron, his two children, Christian Blake Cameron and Courtney Blair Cameron, and his three grandchildren, Elizabeth Ann Cameron, Alexandra Cameron Xifos, and William Harrison Cameron.

Contents

Preface to the Second Edition	xxiii
Preface to the Third Edition	xxvii

Part I · Introduction

Chapter 1 · An Overview	3
Synopsis	3
§ 1.01 The Sources of Employment Discrimination Law	3
[A] The United States Constitution	3
[B] The Civil Rights Act of 1964	4
[C] The Age Discrimination in Employment Act	4
[D] The Civil Rights Act of 1866, Section 1981	5
[E] Civil Rights Act of 1871, Section 1983	5
[F] The Civil Rights Act of 1871, Section 1985(3)	5
[G] The Equal Pay Act of 1963 & Lilly Ledbetter Fair Pay Act of 2009	6
[H] Executive Order 11246	6
[I] The Americans with Disabilities Act	6
[J] Administrative Regulations	7
[K] State and Local Anti-Discrimination Laws	7
[L] Contract and Tort Theories	8
§ 1.02 Reconciling the Various Sources of Law	8
§ 1.03 Statutory Interpretation	9
[A] Legislative Intent	10
[B] Interpretive Guidelines	10
§ 1.04 Chapter Highlights	11

Part II · Constitutional Prohibitions

Chapter 2 · The Proscribed Bases	15
Synopsis	15
§ 2.01 Constitutional Sources	15
[A] The Equal Protection Clause	15
[B] Other Constitutional Provisions	17
§ 2.02 Discrimination on the Basis of Race	17
[A] The General Rule	17
[B] Affirmative Action	18

[1] Introduction	18
[2] The Test	18
[3] <i>Compelling</i> State Interests	18
[4] Relationship with Title VII	19
§ 2.03 Discrimination on the Basis of National Origin	20
§ 2.04 Discrimination on the Basis of Sex	20
§ 2.05 Discrimination on the Basis of Sexual Orientation	21
§ 2.06 Discrimination on the Basis of Age	23
§ 2.07 Discrimination on the Basis of Disability	24
§ 2.08 Discrimination on the Basis of State Residence	24
§ 2.09 Discrimination on the Basis of Citizenship	25
§ 2.10 Discrimination on the Basis of Religion	26
§ 2.11 Discrimination on the Basis of the Exercise of Other First Amendment Rights	28
[A] Speech	28
[B] Association	29
§ 2.12 Chapter Highlights	30
Chapter 3 · The Eleventh Amendment	31
Synopsis	31
§ 3.01 Introduction	31
§ 3.02 The State for Eleventh Amendment Purposes	32
§ 3.03 State Officials and <i>Ex parte Young</i>	34
§ 3.04 State Waiver of Immunity	35
§ 3.05 Congressional Abrogation of State Immunity	35
§ 3.06 Chapter Highlights	39
Part III · The Civil Rights Act of 1964	
Chapter 4 · The Civil Rights Act — An Overview	43
Synopsis	43
§ 4.01 Introduction	44
§ 4.02 The Prohibited Bases of the Conduct	44
[A] The Limited Statutory Definitions	44
[B] Proxy Analysis	45
§ 4.03 Entities Subject to the Prohibition	46
[A] Employers	46
[1] Liability of Supervisors and Other Corporate-Related Individuals	47
[2] The Aggregation of Nominally Separate Entities	47
[3] Employers Who Discriminate against Employees of Other Employers	48
[4] Provider and Client Employers of Leased or Contingent Employees	48
[5] Employer Exclusions	49

[B] Labor Organizations	49
[C] Employment Agencies	50
§ 4.04 Protected Persons	50
[A] Employees	51
[1] Employee versus Independent Contractor	51
[2] Partners as <i>Employees</i> of the Partnership	52
[3] Directors and Stockholders as <i>Employees</i> of a Professional Corporation	52
[4] Elected Officials, Personal Staff, and Policy Advisors	53
[5] Miscellaneous	54
[B] Union Members, Applicants, and Others with a Union Connection	54
[C] Employment Agency Clients	54
§ 4.05 The Prohibited Conduct	54
[A] The Basic Terms of the Statute	54
[1] Employer Conduct	54
[2] Employment Agency Conduct	55
[3] Labor Organization Conduct	55
[B] The Discriminatory Nature of the Conduct	56
[C] The State-of-Mind and Causation Requirements	57
§ 4.06 Remedies and Enforcement Mechanisms	58
§ 4.07 A Bird’s-Eye View of the Materials	58
§ 4.08 Chapter Highlights	60
Chapter 5 · Individual Disparate Treatment	63
Synopsis	63
§ 5.01 Introduction	63
§ 5.02 The Discriminatory State-of-Mind Requirement	64
§ 5.03 Proof of Causation	65
[A] Logical Theories of Causation	66
[B] Title VII Causation	66
§ 5.04 Single versus Mixed-Motive Decisions	67
§ 5.05 Some Simple Paradigms of Proof	68
[A] Model I	69
[B] Model II	69
[C] Model III	70
§ 5.06 Model I — Evidentiary Issues	71
[A] Statements and Documents Admitting Discriminatory Intent	71
[B] Evidence Comparing the Treatment of Specific Individuals	71
[C] Epithets, Derogatory Remarks, Demeaning Jokes and Comments, and Expressions of Stereotypical Views	73
[D] Evidence Relating to the <i>Same Actor</i> Defense	74
§ 5.07 Model II — The Prima Facie Case Method of Proof	75
[A] Plaintiff Proves the Elements of the Prima Facie Case	75
[B] Defendant Articulates a “Legitimate Nondiscriminatory Reason”	78

[C] Plaintiff Proves Pretext	80
§ 5.08 Model III.A — Establishing a Bona Fide Occupational Qualification Defense	84
§ 5.09 Model III.B — Mixed-Motive Employment Decisions	86
§ 5.10 Model III.C — The After-Acquired Evidence Defense	90
§ 5.11 The Affirmative Action Defense	92
§ 5.12 Chapter Highlights	93
Chapter 6 · Systemic Disparate Treatment	97
Synopsis	97
§ 6.01 Introduction	97
§ 6.02 The Scheme of Proof	98
[A] Stage I	98
[B] Stage II	100
§ 6.03 Chapter Highlights	101
Chapter 7 · Disparate Impact	103
Synopsis	103
§ 7.01 The Origin of the Theory	104
§ 7.02 The <i>Griggs/Albemarle</i> Model	105
[A] A Statistically Significant Disparate Impact	105
[B] Business Necessity	107
[C] Pretext	109
§ 7.03 The <i>Wards Cove</i> Reformulation of the Test	109
§ 7.04 The Civil Rights Act of 1991	112
§ 7.05 The Section 703(h) Exceptions	115
[A] Professionally Developed Tests	115
[B] Seniority Systems	117
[C] Merit and Piecework	118
§ 7.06 The Emergence of a Potential Conflict between Disparate Treatment and Disparate Impact Forms of Discrimination	118
[A] <i>Ricci v. DeStefano</i>	119
[B] Post- <i>Ricci</i> Developments	122
[C] Conclusion	123
§ 7.07 Chapter Highlights	124
Chapter 8 · Special Problems Relating to Race Discrimination	127
Synopsis	127
§ 8.01 The Meaning of “Race”	127
§ 8.02 Forms of Discrimination	128
§ 8.03 Miscellaneous Race Discrimination Issues	128
[A] Proxy Analysis	128
[B] Association	129
[C] Race-Plus Discrimination	129
[D] Dress and Grooming Codes	129
§ 8.04 Justifications and Defenses	130

§ 8.05 Racial Harassment	130
§ 8.06 Chapter Highlights	130
Chapter 9 · Special Problems Relating to Sex Discrimination	133
Synopsis	133
§ 9.01 History	134
§ 9.02 Pregnancy Discrimination	134
[A] Introduction	134
[B] More Favorable Treatment	135
[C] Pregnancy Benefits for Spouses	136
[D] The Absence of Any Medical or Leave Benefits	136
[E] Fetal Vulnerability	137
[F] Non-Pregnancy as a BFOQ	137
[G] Questions about Marital Status and Child-Bearing Plans	138
§ 9.03 Sexual Harassment	138
[A] Quid Pro Quo Harassment	138
[1] Proof	139
[2] The Quid Pro Quo Implication of Consensual Office Affairs	140
[B] Hostile Environment Sexual Harassment	140
[1] Satisfying the Literal Language and Requirements of the Statute	141
[2] Unwelcomeness	141
[3] Severe or Pervasive	142
[C] Third-Party Claims	143
[D] Same-Sex Harassment	144
[E] Employer Liability	145
[F] The First Amendment Defense	146
§ 9.04 Sexual Orientation and Identity	147
§ 9.05 Compensation Discrimination	147
[A] The Equal Pay Act and the Bennett Amendment	147
[B] Proof of Intent	148
§ 9.06 Dress and Grooming Codes	149
§ 9.07 Discriminatory Advertisements	150
§ 9.08 Chapter Highlights	150
Chapter 10 · Special Problems Relating to National Origin Discrimination	153
Synopsis	153
§ 10.01 Definition of “National Origin”	153
§ 10.02 Proof of a Violation	154
§ 10.03 Language Discrimination	154
[A] Accent Discrimination	154
[B] Fluency Requirements	155
[C] English-Only Rules	155
§ 10.04 Chapter Highlights	156

Chapter 11 · Special Problems Relating to Religious Discrimination	157
Synopsis	157
§ 11.01 The Definition of “Religion”	158
§ 11.02 Disparate Treatment	159
§ 11.03 Disparate Impact	160
§ 11.04 The Development of Protected Religious Practice	161
[A] History	161
[B] The Analytical Model	162
[C] The Meaning of <i>Undue Hardship</i>	162
[D] Recurring Accommodation Situations	164
[1] Religious Holidays and Work Schedules	164
[2] Dress and Grooming Codes	165
[3] Union Membership	165
[4] Mandatory Devotional Services	166
[5] Mandatory Diversity Statements	166
[6] Miscellaneous	166
§ 11.05 Religious Harassment	167
§ 11.06 Religious Employers	168
[A] Introduction	168
[B] Statutory Exemptions	169
[1] Section 702	169
[2] Section 703	169
[3] Religion as a BFOQ	170
[C] Constitutional Protections	170
[1] Introduction	170
[2] The Ministerial Exemption	171
[D] Statutory Protections for Secular Employers	174
[1] Religious Freedom Restoration Act	174
[2] Title VII	174
[E] Testing the Exemptions	175
[1] The Accommodation Duty	176
§ 11.07 Chapter Highlights	176
Chapter 12 · Retaliation	179
Synopsis	179
§ 12.01 Coverage	180
§ 12.02 The Nature of the Prohibited Retaliatory Conduct	180
§ 12.03 Standard of Causation and Mixed-Motive Analysis	182
§ 12.04 Proof of a Violation	183
§ 12.05 The Opposition Clause	183
[A] What Constitutes “Opposition”	183
[1] Crossing the Threshold	183
[2] Going <i>Beyond the Pale</i>	184

[B] The Meaning of “An Unlawful Practice”	185
§ 12.06 The Participation Clause	185
§ 12.07 Opposition/Participation by Management	186
§ 12.08 Chapter Highlights	187
Chapter 13 · Discrimination by Labor Unions	189
Synopsis	189
§ 13.01 The Nature of the Proscribed Discrimination	189
[A] Membership	190
[B] Hiring Halls and Union Referral Arrangements	190
[C] Apprenticeship Programs	191
[D] Causing an Employer to Discriminate	191
[E] Representational Matters	192
[1] Handling Grievances	192
[2] Collective Bargaining	193
[F] Religious Accommodation	193
§ 13.02 Liability Issues	194
[A] Liability for Acts of Officers	194
[B] Liability of Higher Union Organizations	194
[C] Joint Union-Employer Liability	194
§ 13.03 Chapter Highlights	195
Chapter 14 · Discrimination by Employment Agencies	197
Synopsis	197
§ 14.01 The Prohibited Discrimination	197
§ 14.02 Discrimination in Processing and Classification	198
§ 14.03 Accepting Discriminatory Job Orders	198
§ 14.04 The BFOQ Defense	199
§ 14.05 Refusing to Refer	199
§ 14.06 Discriminatory Advertising	199
§ 14.07 Remedies	200
§ 14.08 Chapter Highlights	200
Chapter 15 · Title VII Procedure — An Overview	201
Synopsis	201
§ 15.01 Introduction	201
§ 15.02 The Equal Employment Opportunity Commission	202
§ 15.03 Three Procedural/Enforcement Models for Private and State Employees	202
[A] The Basic Model	202
[B] Procedure in Deferral States	203
[C] Worksharing Agreements	203
§ 15.04 Chapter Highlights	204

Chapter 16 · Filing and Processing Charges	205
Synopsis	205
§ 16.01 Content and Formal Requirements	205
§ 16.02 Identity of the Charging Party	206
[A] Person Aggrieved	206
[B] On Behalf of a Person Aggrieved	208
[C] Commissioner Charges	209
§ 16.03 Time Limits	209
§ 16.04 Determining When a Discriminatory Act Occurs	210
[A] The <i>Perpetuation</i> or <i>Present Effects of Prior</i> <i>Discrimination</i> Theory	210
[B] Disparate Impact Claims	213
[C] The <i>Notice of Decision</i> Rule	213
[D] Continuing Violations	215
[E] Waiver, Estoppel, and Equitable Tolling	216
§ 16.05 EEOC Procedures	217
§ 16.06 EEOC Files and Determination Letters	218
§ 16.07 Chapter Highlights	219
Chapter 17 · Litigation	221
Synopsis	221
§ 17.01 Exhaustion Requirements	221
§ 17.02 Mandatory Arbitration of Claims	222
§ 17.03 The Preclusive Effect of Prior Adjudications	224
§ 17.04 Time and Filing Requirements	224
§ 17.05 Private Party Suits	226
§ 17.06 EEOC and Justice Department Litigation	226
§ 17.07 Class Actions	227
[A] The Basic Requirements	227
[1] Rule 23(a) — Numerosity, Commonality, Typicality, and Adequacy	227
[2] Rule 23(b) — The Suitability of the Case for Class Action Treatment	229
[B] The Effect of the 1991 Amendments	229
§ 17.08 Party Defendants	230
§ 17.09 Scope of the Suit	230
§ 17.10 Chapter Highlights	232
Chapter 18 · Remedies	233
Synopsis	233
§ 18.01 Introduction	233
§ 18.02 Injunctive and Affirmative Relief	234
[A] Ending and Curing the Discrimination	234
[B] Race/Gender-Conscious Affirmative Relief	235
[C] Prospective, Class-Wide Remedies	236

§ 18.03 Monetary Compensation	237
[A] Back Pay and Other Lost Benefits	237
[1] The Presumption	237
[2] Calculation	237
[3] Period Covered	237
[B] Front Pay	238
[C] Compensatory and Punitive Damages	238
[1] Compensatory Damages	238
[2] Punitive Damages	239
[3] Limits on Compensatory and Punitive Damages	241
[4] Jury Trial	241
§ 18.04 Attorney's Fees and Costs	242
[A] Attorney's Fees	242
[1] The Test	242
[2] The Meaning of "Prevailing"	243
[3] Calculation	244
[B] Costs	245
§ 18.05 Chapter Highlights	245

Part IV · The Age Discrimination in Employment Act

Chapter 19 · Coverage and Jurisdiction	249
Synopsis	249
§ 19.01 The Proscribed Basis of Discrimination	249
§ 19.02 Entities Subject to the Prohibition	250
§ 19.03 The Protected Class	250
§ 19.04 Chapter Highlights	251
Chapter 20 · Types of Violations and Their Proof	253
Synopsis	253
§ 20.01 Individual, Single-Motive Disparate Treatment	254
[A] Open Admission of Age Motivations and Policies Expressly Using an Age Criterion	254
[B] Ageist Comments and <i>Code Words</i>	255
[C] Use of Comparators	256
[D] Proving Discrimination through the <i>McDonnell Douglas</i> Method	256
§ 20.02 After-Acquired Evidence	258
§ 20.03 Individual, Mixed-Motive Disparate Treatment	258
§ 20.04 Systemic Disparate Treatment	259
§ 20.05 Disparate Impact	259
§ 20.06 Defenses and Exceptions	261
[A] "Reasonable Factors Other than Age" and "Good Cause"	261
[B] BFOQ	261
[C] Foreign Law	262
[D] Bona Fide Seniority System	262

[E] Bona Fide Employment Benefit Plan	262
[F] Bona Fide Executive Exception	263
[G] Early Retirement Incentive Plans	263
§ 20.07 Waiver and Release	263
§ 20.08 Chapter Highlights	264
Chapter 21 · Procedure and Remedies	267
Synopsis	267
§ 21.01 Administrative Prerequisites	267
§ 21.02 Lawsuits	268
§ 21.03 Remedies	268
§ 21.04 Chapter Highlights	269
Part V · Post-Civil War Civil Rights Acts	
Chapter 22 · Section 1981	273
Synopsis	273
§ 22.01 Persons Subject to Section 1981	273
[A] State and Local Governments	273
[B] Private Employers	274
§ 22.02 The Protected Class	274
§ 22.03 The Proscribed Basis of Discrimination	275
§ 22.04 Contract-Based Discrimination	275
§ 22.05 The Nature and Proof of Discrimination	276
§ 22.06 Procedure	277
§ 22.07 Remedies	277
§ 22.08 Chapter Highlights	278
Chapter 23 · Section 1983	279
Synopsis	279
§ 23.01 Introduction	279
§ 23.02 The Meaning of “Person”	280
§ 23.03 The Meaning of “Under Color of State Law”	283
[A] Public Officials	283
[B] Private Parties	283
§ 23.04 The “Deprivation of Rights” Requirement	285
§ 23.05 Remedies	286
§ 23.06 Defenses	287
[A] Immunity	287
[1] Absolute Immunity	287
[2] Qualified Immunity	288
[3] Interlocutory Appeal	289
[B] Statute of Limitations	289
[C] Sovereign Immunity	290
§ 23.07 The Liability of Federal Officials	290
§ 23.08 Chapter Highlights	291

Chapter 24 · Section 1985(3)	293
Synopsis	293
§ 24.01 Nature of the Offense	293
§ 24.02 Party Defendants	294
§ 24.03 The Conspiracy Requirement	294
§ 24.04 The Protected Class	294
§ 24.05 The Nature of the Protected Rights	295
§ 24.06 The State Action Requirement	295
§ 24.07 Chapter Highlights	296
Part VI · Equal Pay Act	
Chapter 25 · Equal Pay Act—Introduction	299
Synopsis	299
§ 25.01 History	299
§ 25.02 Covered Employers	300
§ 25.03 An Overview	300
[A] The Elements of a Violation	300
[B] Defenses	301
§ 25.04 Relationship with Title VII	301
§ 25.05 Chapter Highlights	302
Chapter 26 · The Elements of a Violation	305
Synopsis	305
§ 26.01 Different Wages	305
§ 26.02 Employees of the Opposite Sex	306
§ 26.03 Within the Same Establishment	307
§ 26.04 Equal Work	308
[A] Skill	309
[B] Effort	309
[C] Responsibility	309
[D] Similar Working Conditions	309
§ 26.05 Chapter Highlights	310
Chapter 27 · Defenses	311
Synopsis	311
§ 27.01 Seniority	312
§ 27.02 Merit Systems	312
§ 27.03 Quantity or Quality of Production	312
§ 27.04 A Factor Other than Sex	313
[A] Training Programs	313
[B] <i>Red Circle</i> Rates	314
[C] Economic Benefit	314
[D] Market Forces	315
[E] Prior Salary	315
§ 27.05 Chapter Highlights	315

Chapter 28 · Enforcement	317
Synopsis	317
§ 28.01 Voluntary Compliance	317
§ 28.02 Government Enforcement	318
§ 28.03 Private Enforcement	318
§ 28.04 Limitations Period	318
§ 28.05 Remedies	319
§ 28.06 Chapter Highlights	319
Part VII · Obligations of Government Contractors	
Chapter 29 · Executive Order 11246	323
Synopsis	323
§ 29.01 Contractors Subject to the EO	323
§ 29.02 The Protected Bases	324
§ 29.03 The Contractor’s Obligations	325
[A] Nondiscrimination	325
[B] Affirmative Action	325
[C] Other Requirements	327
§ 29.04 Enforcement	327
§ 29.05 Chapter Highlights	328
Part VIII · Disability Discrimination	
Chapter 30 · An Overview of the Coverage and Enforcement of Federal Statutes	331
Synopsis	331
§ 30.01 The Rehabilitation Act of 1973	332
[A] Covered Employers	332
[B] Enforcement	333
§ 30.02 The Americans with Disabilities Act	333
[A] Covered Employers	333
[B] Enforcement	333
§ 30.03 Chapter Highlights	334
Chapter 31 · The Protected Class	335
Synopsis	335
§ 31.01 The Base Definitions	335
§ 31.02 The Meaning of “Mental or Physical Impairment”	337
[A] Actual Physical Impairments	337
[B] Actual Mental Impairments	338
[C] Having a Record of Impairment	339
[D] Regarded as Impairments	339
§ 31.03 The Meaning of “Substantially Limits” a “Major Life Activity”	340
[A] The Meaning of “Major Life Activity”	340
[B] The Meaning of “Substantially Limits”	341

[1] The Baseline for Measurement	341
[2] The Meaning of “Substantial”	341
§ 31.04 The Meaning of “Qualified Individual”	342
[A] Establishing “Qualification”	342
[B] The Meaning of “Essential Functions of the Job”	343
[C] The “Direct Threat” Limitation	343
[D] The Meaning of “Reasonable Accommodation”	345
§ 31.05 Chapter Highlights	345
Chapter 32 · The Proscribed Forms of Discrimination and Other Prohibited Conduct	347
Synopsis	347
§ 32.01 Adverse Limitations, Segregation, or Classifications	348
§ 32.02 Illegal Contractual Arrangements	348
§ 32.03 Discriminatory Tests, Standards, and Selection Criteria	349
§ 32.04 Relationship or Association with a Disabled Person	350
§ 32.05 Failure to Make Reasonable Accommodation	351
§ 32.06 Discriminatory Benefit Plans	354
§ 32.07 Medical Examinations and Inquiries	354
§ 32.08 Retaliation	355
§ 32.09 Chapter Highlights	355
Chapter 33 · Proof and Defenses	357
Synopsis	357
§ 33.01 Individual Disparate Treatment	357
§ 33.02 Indirect Proof	359
§ 33.03 Systemic Disparate Treatment	360
§ 33.04 Disparate Impact	360
§ 33.05 Chapter Highlights	361
About the Authors	363
Table of Cases	365
Index	381

Preface to the Second Edition

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 Hofer, 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, 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

Preface to the Third Edition

Even as the ink was still wet on copies of the prior edition of this book, the seeds of a need for a third edition were beginning to germinate. In the time between manuscript submission and publication, judicial decisions and legislative changes had already begun nibbling at the edges of the text's currency. And so it has continued, unabated, for the past 12 years.

The new publisher, Carolina Academic Press, thus decided that it was past time for a new edition to come out. But entreaties to Professor Haggard were unavailing. He had long since turned his attentions from the hoary pursuits of the law toward the more pleasant, to him, endeavors of gardening, chess, photography, leisure reading, and the study of theology. He indicated a willingness, however, to work as a *senior advisor* of sorts with someone willing to undertake the massive task of updating and revising the book while leaving its general structure and approach mostly intact. Professor Cameron, who was already using the book in his employment discrimination course, indicated an interest in doing this. And Professor Haggard was delighted and honored when he learned of this, for he had known Professor Cameron by reputation for several years. The joint venture was thus undertaken, and it has been completed. We have become dear friends.

The observations made in the preface to the second edition concerning the nature of the law of employment discrimination warrant consideration by the readers of this edition as well. Professors Haggard and Cameron, however, would like to add this final observation to the points made there: We fear that when teachers, students, and even judges deal with legal cases, whether it is to study or decide them, the people in these cases (sometimes even without the honor of having a name) become mere objects, like stick figures drawn on the blackboard to illustrate some professor's far-fetched hypothetical—merely pieces in a complex puzzle we are all trying to fit together.

This is wrong. We must all remember that these are stories about real flesh-and-blood people like you and me. What happened to them may be “interesting” to us or considered a “critical fact” to a judge. But to them it is often a tale of hurt, disappointment, hopes dashed, fears materialized, jobs and income lost, families broken, work-related friendships shattered, and lives permanently altered. In addition, whether these people win or lose their cases, they experience what is to them an intimidating, incomprehensible, lengthy, and expensive ordeal of meetings with lawyers, depositions, trials, and interminable appeals. Months and even years of their lives are invested in that cold, impersonal *Statement of Facts* with which we start a brief.

As professors and students, we are not directly involved with this harsh reality; and for now, there may be little or nothing we can do to change it. But we should also never forget it, become hardened to it, or fail to be saddened by it. We must always allow the intellectual joy and challenge we find in the law to be tempered by a sensitivity to the human element.

Finally, the authors would like to thank Elisabeth (Biz) Ebben, our editor, Susan Trimble, our production associate, at Carolina Academic Press, and Kaitlyn Shepherd and Melissa Terrell, students at Regent University School of Law, for all their work in reviewing our submissions and their careful attention to the page proofs.

Thomas R. Haggard
Columbia, South Carolina

Bruce N. Cameron
Virginia Beach, Virginia