

# EMPLOYMENT DISCRIMINATION

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**EMPLOYMENT  
DISCRIMINATION**  
*A Context and Practice Casebook*

THIRD EDITION

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# Series Editor's Preface

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Welcome to a new type of casebook. Designed by leading experts in law school teaching and learning, Context and Practice casebooks assist law professors and their students to work together to learn, minimize stress, and prepare for the rigors and joys of practicing law. **Student learning and preparation for law practice are the guiding ethics of these books.**

Why would we depart from the tried and true? Why have we abandoned the legal education model by which we were trained? Because legal education can and must improve.

In Spring 2007, the Carnegie Foundation published *Educating Lawyers: Preparation for the Practice of Law* and the Clinical Legal Education Association published *Best Practices for Legal Education*. Both works reflect in-depth efforts to assess the effectiveness of modern legal education, and both conclude that legal education, as presently practiced, falls quite short of what it can and should be. Both works criticize law professors' rigid adherence to a single teaching technique, the inadequacies of law school assessment mechanisms, and the dearth of law school instruction aimed at teaching law practice skills and inculcating professional values. Finally, the authors of both books express concern that legal education may be harming law students. Recent studies show that law students, in comparison to all other graduate students, have the highest levels of depression, anxiety and substance abuse.

**The problems with traditional law school instruction begin with the textbooks law teachers use.** Law professors cannot implement *Educating Lawyers* and *Best Practices* using texts designed for the traditional model of legal education. Moreover, even though our understanding of how people learn has grown exponentially in the past 100 years, no law school text to date even purports to have been designed with educational research in mind.

The Context and Practice Series is an effort to offer a genuine alternative. Grounded in learning theory and instructional design and written with *Educating Lawyers* and *Best Practices* in mind, Context and Practice casebooks make it easy for law professors to change.

I welcome reactions, criticisms, and suggestions; my e-mail address is mschwartz@pacific.edu. Knowing the author(s) of these books, I know they, too, would appreciate your input; we share a common commitment to student learning. In fact, students, if your professor cares enough about your learning to have adopted this book, I bet s/he would welcome your input, too!

Michael Hunter Schwartz, Series Designer and Editor  
Consultant, Institute for Law Teaching and Learning  
Dean and Professor of Law, University of the Pacific,  
McGeorge School of Law



# Preface and Acknowledgments

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## The Context and Practice Series

This book is part of the Context and Practice (“CAP”) series, the mission of which is to support law professors’ goals of becoming more effective teachers and law students’ goals of becoming more effective at learning. An essential aspect of this mission is to engage students in active learning, challenging students to integrate doctrine, theory, and skills. The book uses the contextual learning emphasis of the Carnegie Foundation’s *EDUCATING LAWYERS* (2007) and the Clinical Legal Education Association’s *BEST PRACTICES IN LEGAL EDUCATION* (2007).

## Goals of This Casebook

This book combines traditional methodologies with an active learning approach. The traditional model of legal education centers on learning to think like a lawyer. The model tends to focus on a narrow skill set, having students derive rules of law and learn about legal reasoning by reading appellate court decisions. It is an effective approach—as far as it goes. Legal reading and analysis skills are essential to the competent lawyer, and this book, like other casebooks, challenges students to become experts at both.

At the same time, the book recognizes that students will be better prepared for professional life if they leave law school with a larger skill set, an ability to conceptualize legal theory, a sensitivity to the contexts in which legal rules operate and a concrete understanding of the lawyer’s role as a professional problem solver. The casebook has been designed to give students the tools they need to understand the law and the cases, providing background reading on the history, theory, policy, and practical considerations that may impact the law’s development and the outcome of particular cases. This background reading is important to help students place the cases and statutory language in their broader context. This text also reminds students that statutory interpretation is an important legal reasoning device and provides them with the tools to undertake such statutory interpretation.

The book’s exercises go beyond the realm of traditional legal reasoning, providing opportunities to see how lawyers might use concepts in practice. The book asks students to view legal problems through different lenses, from the perspective of a plaintiff’s lawyer, a judge, an in-house counsel, a defense attorney, a victim of

discrimination, a person accused of discrimination, a human resources professional, and an employer. It tries to help students gain an understanding of what each of these individuals might consider in resolving a legal problem.

In creating the exercises for this text, special consideration was given to the skill set that a new employment discrimination attorney should possess. The authors of the book, in consultation with practitioners and professors, developed a list of skills critical to attorneys within the employment discrimination field. The following is a list highlighting those skills and identifying the exercises within the book designed to develop them:

- **Initial Case Evaluation**—Exercises 1.1, 2.4, 3.5, 5.3, 5.6, 5.9, Capstone Exercises 1 & 2
- **Client counseling**—Exercises 1.1, 1.3, 2.3, 5.8, 5.9, 5.10, 6.2, 7.4, Capstone Exercises 1 & 2
- **Forum choice**—Exercise 10.3, Capstone Exercise 1
- **Drafting a complaint or answer**—Exercises 3.8, 3.9
- **Discovery and evidence development**—Exercises 3.9, 3.12, 5.7, Capstone Exercise 3
- **Recognizing problems with statistical evidence**—Exercises 4.2, 4.3
- **Summary judgment**—Capstone Exercise 4
- **Mediation/determining value of claim**—Exercises 11.1, 11.2, 11.3, 11.4
- **Predicting the likely outcome of cases**—Exercises 3.3, 3.4, 3.5, 3.6, 4.5, 5.9, 5.10, 6.1
- **Jury instructions**—Exercises 10.1, 10.4
- **Drafting and evaluating policies**—Exercises 1.3, 2.3, 4.4, 5.11, 9.4
- **Resolution of employee complaints, employee requests, and client questions**—Exercises 1.3, 2.2, 5.8, 5.11, 7.3, 7.4, 8.5, 8.6, 8.10, Capstone Exercise 5
- **Engagement in the ADA accommodation interactive process**—Capstone Exercise 5
- **Providing training**—Exercises 5.1, 5.12, 6.3
- **Statutory Construction**—Exercise 3.1
- **Ethics**—Exercise 1.1 (Rule 11, lawyer as advisor), Exercise 2.3 (lawyer as advisor), Exercise 3.9 (Rule 11), Exercise 3.11, Capstone Exercises 1 & 2 (lawyer as advisor, speaking with represented parties, lawyer as a witness).

The exercises' fact patterns involve both litigation and transactional contexts to help students understand the multi-faceted roles of employment discrimination attorneys. When a particular exercise requires knowledge of another substantive or procedural area, the exercise provides appropriate information and direction to allow the student to practice the required skills.

Certain exercises also try to help students think about how best to learn the law. These exercises ask students to think about how they can organize material so that it is useful to them, both as students and in practice. These exercises also challenge students to synthesize material and to conceptualize it in different ways than the way the material was originally presented. The following exercises are explicitly de-

signed to engage students in this way: Exercises 1.2, 3.2, 3.15, 4.6, 6.4, 8.13, 11.4, and 11.5.

Perhaps most importantly, this book also tries to help students understand how the policy and theory underlying discrimination law affect the doctrine. The book contains numerous problems challenging students to question the underlying theory of American employment discrimination law and to consider how the law might work differently if it were based on a different set of theoretical assumptions.

The following theoretical and policy discussions are included in Exercises:

- **Whether the employment discrimination statutes should promote race-neutral decisionmaking**— Exercise 2.1
- **Formal v. substantive equality**— Exercise 3.1
- **Intersectionality**— Exercise 3.7
- **Whether intent should be required to prove discrimination**— Exercise 3.13
- **Unconscious bias**— Exercise 3.14
- **Affirmative action**— Exercises 9.1, 9.2
- **Right of personality**— Exercise 9.3
- **Conception of race**— Exercise 9.3
- **Theory of religious discrimination**— Exercise 7.1
- **Structural discrimination**— Capstone Exercise 1.

One of the highlights of the text is the Capstone Experience. The Capstone Experience gives students an opportunity to combine the theoretical, doctrinal, historical, and practical knowledge they have gained throughout the casebook and to use that knowledge to resolve real-world problems. The Capstone Experience provides five different exercises, each focusing on a different skill set. The skills covered in the Capstone Experience are: (1) initial case evaluation from the plaintiff's attorney's perspective; (2) initial case evaluation from the defendant's attorney's perspective; (3) discovery; (4) summary judgment; and (5) resolution of employee complaints and requests.

## Learning Outcomes

Admittedly, this book has a lofty set of goals. At the end of the course, students should be able to identify the employment discrimination law issues implicated by a set of facts, articulate the relevant legal rules and the rationales supporting those rules, develop arguments that reasonable lawyers would make respecting a legal problem, and predict how a court might address a particular issue. Students should understand the history, policy, theory, and practical considerations relevant to employment discrimination cases, and be able to demonstrate competence in a variety of practical contexts. Further, students should develop a rich understanding of how theory molds discrimination law. At the end of the course, students should be able to use the skills taught in this course to identify gaps in the existing structure of employment discrimination law and to advocate for changes or further development of the law.

## Book Organization and Editing

The book is organized to assist students in reaching the course goals. The book uses two types of headings to do this: Core Concepts and Beyond the Basics. Here is what those headings mean.

- ◆ Core Concepts—describes foundational concepts that are required for a basic understanding of employment discrimination law.
- Beyond the Basics—describes concepts that are important, but not required, for a basic understanding of employment discrimination law.

All of the Chapters other than the Protected Traits and Special Issues Chapter (Chapter 9) and the Procedure Chapter (Chapter 10) use these headings.

Most of the cases are preceded by Focus Questions to help students identify key issues presented by the case. As described above, exercises are contained in each Chapter to test knowledge of concepts, to teach skills, and to stimulate discussion regarding theory.

To aid student reading, some internal citations within cases are omitted without notation, including citations to the case's record or the lower court's decisions.

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