

# Employment Discrimination

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# Employment Discrimination

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*A Context and Practice Casebook*

FOURTH EDITION

**Sandra F. Sperino**

ELWOOD L. THOMAS PROFESSOR OF LAW  
UNIVERSITY OF MISSOURI SCHOOL OF LAW

**Jarod S. Gonzalez**

J. HADLEY AND HELEN EDGAR PROFESSOR OF LAW  
TEXAS TECH UNIVERSITY SCHOOL OF LAW



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# Contents

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Table of Principal Cases	xv
Series Editor's Preface	xix
Preface and Acknowledgments	xxi
<b>Chapter 1 • Introduction to Employment Discrimination Law</b>	<b>3</b>
Core Concept: At-Will Employment	4
<i>Howard v. Wolff Broadcasting Corp.</i>	4
Further Discussion	7
Core Concept: Putting the Federal Discrimination Statutes in Context	11
Core Concept: Practical Realities of Employment Discrimination Claims	13
Beyond the Basics: Statutory Interpretation and Administrative Deference	16
<b>Chapter 2 • Coverage of Statutes</b>	<b>19</b>
Core Concept: Protected Classes	19
Race and Color	22
<i>McDonald v. Santa Fe Trail Transportation Co.</i>	23
Notes	25
National Origin	25
<i>Saint Francis College v. Al-Khazraji</i>	26
Note	29
<i>Espinoza v. Farah Manufacturing Co.</i>	30
Notes	33
Religion	34
Sex	36
<i>City of Los Angeles, Dept. of Water &amp; Power v. Manhart</i>	36
Notes	42
Age	44
<i>Hazen Paper Co. v. Biggins</i>	45
Note	47
Core Concept: The Proper Defendant	47
Employment Agencies and Labor Organizations	48
Private Employers	48

Individual Supervisors and Co-Workers	50
Government Employers	50
Major Exceptions	51
Core Concept: Protected Individuals	52
<i>Hishon v. King &amp; Spalding</i>	54
<b>Chapter 3 • Disparate Treatment</b>	<b>61</b>
Core Concept: Individual Disparate Treatment	67
Core Concept: The McDonnell-Douglas Test	68
<i>McDonnell Douglas Corp. v. Green</i>	68
Subsequent Developments	71
<i>Reeves v. Sanderson Plumbing Products, Inc.</i>	76
Core Concept: Comparators — Similarly Situated Employees	
Outside of Plaintiff’s Protected Class	82
<i>O’Connor v. Consolidated Coin Caterers Corp.</i>	83
Further Discussion	85
Core Concept: Stray Remarks	86
Core Concept: Business Judgment	87
Core Concept: Same Decisionmaker and Same Class Inferences	87
Core Concept: Direct vs. Circumstantial Evidence	88
Core Concept: Adverse Actions	90
Core Concept: Mixed Motive	91
<i>Price Waterhouse v. Hopkins</i>	92
Subsequent Developments	104
<i>Desert Palace, Inc. v. Costa</i>	105
<i>Gross v. FBL Financial Services, Inc.</i>	110
Subsequent Developments	117
Beyond the Basics: Mixed Motive in the ADA Context	118
Beyond the Basics: Intersectionality	118
Beyond the Basics: The Intersection of Mixed-Motive and Single-Motive Cases	119
Core Concept: Pattern or Practice	121
<i>International Broth. of Teamsters v. U.S.</i>	122
<i>Hazelwood School Dist. v. U.S.</i>	134
Core Concept: Affirmative Action	140
Core Concept: BFOQ	140
<i>Western Air Lines, Inc. v. Criswell</i>	141
<i>Dothard v. Rawlinson</i>	150
<i>International Union, United Auto., Aerospace and Agr. Implement Workers of America, UAW v. Johnson Controls, Inc.</i>	156
Notes	166
Core Concept: After-Acquired Evidence	168
<i>McKennon v. Nashville Banner Pub. Co.</i>	169



Core Concept: Intent	173
<i>Staub v. Proctor Hosp.</i>	175
<b>Chapter 4 • Disparate Impact</b>	<b>185</b>
Core Concept: Disparate Impact, Its Theory and Structure	186
<i>Griggs v. Duke Power Co.</i>	186
Subsequent Developments	190
<i>Wards Cove Packing Co., Inc. v. Atonio</i>	191
Subsequent Developments	199
Core Concept: Defining Disparity	201
Bottom-Line Defense	202
Core Concept: The Correct Comparison	203
Core Concept: Job-Related and Consistent with Business Necessity	205
<i>Dothard v. Rawlinson</i>	206
Note	208
Further Exploration of “Job-Related” and “Consistent with Business Necessity”	209
Other Considerations	211
Core Concept: Disparate Impact — ADEA	213
<i>Smith v. City of Jackson, Miss.</i>	214
Subsequent Developments	220
Beyond the Basics: Disparate Impact and the ADA	223
Core Concept: Choices Made to Avoid Disparate Impact	
Liability May Lead to Disparate Treatment Claims	224
<i>Ricci v. DeStefano</i>	224
Core Concept: The Adequacy of the Frameworks	241
<i>Wal-Mart Stores, Inc. v. Dukes</i>	242
<b>Chapter 5 • Discriminatory Harassment</b>	<b>257</b>
Core Concept: Types of Harassment	257
Core Concept: Quid Pro Quo Harassment	258
Core Concept: Hostile Work Environment Harassment	260
<i>Meritor Savings Bank, FSB v. Vinson</i>	261
<i>Harris v. Forklift Systems, Inc.</i>	265
Further Discussion	267
Core Concept: Because of a Protected Trait	268
<i>Oncale v. Sundowner Offshore Services</i>	269
Notes	272
Core Concept: Unwelcomeness	272
Core Concept: Severe or Pervasive	275
<i>Tademy v. Union Pacific Corporation</i>	277
Core Concept: Motive vs. Content of Harassment	282
Core Concept: Employer Liability for Harassment	283
<i>Meritor Savings Bank, FSB v. Vinson</i>	284

Subsequent Developments	284
<i>Faragher v. City of Boca Raton</i>	285
Notes	294
<i>Vance v. Ball State University</i>	295
Note	307
<i>Lauderdale v. Texas Dept. of Criminal Justice</i>	308
Core Concept: Tangible Employment Action	312
Beyond the Basics: Harassment	314
<b>Chapter 6 • Retaliation</b>	<b>319</b>
Core Concept: Elements of the Statutory Claim for Retaliation	320
Core Concept: Protected Activity	321
<i>Crawford v. Nashville</i>	322
Notes	326
Core Concept: Reasonableness of Opposition Conduct	327
Core Concept: Reasonable Belief That the Act Has Been Violated	328
<i>Clark County School District v. Breeden</i>	329
Note	330
Core Concept: Materially Adverse Employment Action	330
<i>Burlington Northern &amp; Santa Fe Railway Co. v. White</i>	331
Notes	336
Core Concept: Causal Link	337
Clark County School District v. Breeden	338
<i>University of Texas Southwestern Medical Center v. Nassar</i>	340
Notes	351
Beyond the Basics: Third-Party Retaliation	352
<i>Thompson v. North American Stainless, LP.</i>	352
Notes	355
Beyond the Basics: Retaliation Protection under Section 1981	356
<i>CBOCS West, Inc. v. Humphries</i>	356
Beyond the Basics: Federal Employee Protections	360
<b>Chapter 7 • Religion and Accommodation</b>	<b>365</b>
Core Concept: The Differences of Religious Discrimination	365
Core Concept: Defining Religion	368
Core Concept: Proof Structures in Religion Cases	368
<i>Chalmers v. Tulon Company of Richmond</i>	369
<i>E.E.O.C. v. Abercrombie &amp; Fitch, Inc.</i>	371
Further Discussion	377
Core Concept: Reasonable Accommodation and Undue Hardship	378
<i>Groff v. DeJoy</i>	379
Further Discussion	388
<i>Ansonia Board of Education v. Philbrook</i>	389
Further Discussion	390

<i>Chalmers v. Tulon Company of Richmond</i>	392
Beyond the Basics: The Religious Employer Exemption	403
Beyond the Basics: The Ministerial Exception to Federal Anti-Discrimination Statutes	405
<i>Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC</i>	406
Further Discussion	415
Beyond the Basics: The Religious Freedom Restoration Act	417
<i>Braidwood Management v. EEOC</i>	418
Beyond the Basics: Religious Discrimination and Public Employers	421
<b>Chapter 8 • Disability Discrimination</b>	<b>423</b>
Core Concept: Disability, Individuals, and Social Policy	425
Core Concept: Definition of Disability	426
Core Concept: Actual Disability	427
<i>Sutton v. United Air Lines, Inc.</i>	428
Further Discussion	434
<i>Mazzeo v. Color Resolutions International, LLC</i>	438
Core Concept: Record of Disability	442
Core Concept: Regarded as Disabled	444
<i>Adair v. City of Muskogee</i>	445
Core Concept: Qualified Individual	449
<i>Hennagir v. Utah Department of Corrections</i>	450
Core Concept: Reasonable Accommodation	454
<i>Billups v. Emerald Coast Utilities Authority</i>	459
<i>Dewitt v. Southwestern Bell Telephone Co.</i>	466
Further Discussion	470
Core Concept: Proof Structures	473
Core Concept: Direct Threat Defense	474
<i>Chevron v. Echazabal</i>	475
Beyond the Basics: Drug and Alcohol Use	481
Beyond the Basics: Medical Examinations and Inquiries	482
EEOC Guidance on Medical Examinations	485
Other Sources of Obligations Related to Exams and Inquiries	486
Beyond the Basics: Burdens of Production and Persuasion in Disability Cases	489
<i>U.S. Airways v. Barnett</i>	490
Notes	495
<b>Chapter 9 • Protected Traits and Special Issues</b>	<b>499</b>
Core Concept: Affirmative Action	499
Legal Challenges to Affirmative Action	502
Constitutional Challenges to Affirmative Action	503
Voluntary Affirmative Action under Title VII	505
<i>Johnson v. Transportation Agency</i>	506

Notes	513
Because of Sex	515
Because of Sex: Pregnancy, Childbirth, or Related Medical Conditions	515
<i>Young v. United Parcel Service, Inc.</i>	517
Notes	530
<i>Back v. Hastings on Hudson Union Free School District</i>	533
Notes	536
Because of Sex: Sex-Based Pay Discrimination	538
Because of Sex: Comparable Worth	539
Because of Sex: Sexual Orientation or Transgender Status	540
<i>Bostock v. Clayton County, Georgia</i>	540
Because of Race/Color	558
What Constitutes Race?	559
<i>Rogers v. American Airlines, Inc.</i>	559
<i>EEOC v. Catastrophe Management Solutions</i>	561
Note	567
Color Discrimination	568
<i>Salas v. Wisconsin Dept. of Corrections</i>	568
Note	571
Race and Arrest Records	571
Because of Age	573
<i>General Dynamics Land Systems, Inc. v. Cline</i>	575
Grooming Codes	582
<i>Jespersen v. Harrah's Operating Company, Inc.</i>	583
Notes	590
Because of National Origin	591
Verification of Work Authorization Status and National Origin	
Discrimination	592
<i>Zamora v. Elite Logistics, Inc.</i>	593
Notes	604
Undocumented Workers and Discrimination	605
Workplace Communication and National Origin	606
<b>Chapter 10 • Administrative and Litigation Procedures</b>	<b>609</b>
The Administrative Process	610
Step 1: The employee files a charge with the EEOC.	610
What Constitutes a Charge under the Federal Anti-Discrimination Statutes?	610
<i>Federal Express Corp. v. Holowecki</i>	611
Notes	618
The Location for Filing a Charge with the EEOC	622
The Deadline for Filing the Charge with the EEOC	622
Commencing the Charge-Filing Period	622

Discrete Discriminatory Acts	623
Continuing Violations	623
Discriminatory Compensation Decisions	624
Disparate Impact Claims	625
<i>Lewis v. City of Chicago</i>	626
Consequences of Failing to File a Timely EEOC Charge	631
Step 2: The EEOC serves the notice of the charge on the employer.	632
Step 3: The EEOC investigates the charge.	634
Step 4: The EEOC makes a determination on the charge.	635
<i>EEOC v. Manville Sales Corp.</i>	636
Notes	637
Step 5: The EEOC issues a right-to-sue letter.	640
The Time Frame for the EEOC's Issuance of the Right-to-Sue Letter	641
The 90-Day Time Period to File a Lawsuit	642
Equitable Tolling, Estoppel, and Waiver	643
ADA, ADEA, and Section 1981 Claims and the Administrative Process	645
State Antidiscrimination Claims and the Administrative Process	649
Procedural Requirements for Public Sector Employees	651
The Court Process	654
Step 6: The plaintiff files the employment discrimination claim in court.	654
The Lawsuit	655
Pleadings	655
<i>Swierkiewicz v. Sorema</i>	656
Notes	659
Sample Complaint in an Employment Discrimination Case	665
Sample Answer in an Employment Discrimination Case	668
Discovery	671
Summary Judgment	671
Trial	672
Further Discussion	673
<b>Chapter 11 • Remedies</b>	<b>675</b>
Core Concept: Introduction to Remedies	676
Core Concept: Equitable v. Legal Remedies under Title VII	677
Enforcing the Historical Law and Equity Divide	677
Title VII Remedial Provision — Title VII § 706(g);	
42 U.S.C. § 2000e-5(g) [Equitable Relief]	679
Title VII Remedial Provision — 42 U.S.C. § 1981a [Legal Relief]	680
Core Concept: Purpose of Remedies	683
<i>Albemarle Paper Co. v. Moody</i>	683
Core Concept: Types of Title VII Remedies and Standards for	
Awarding Title VII Remedies	686
Back Pay	686

Retroactive Seniority Relief	686
Reinstatement	686
Front Pay	687
<i>Donlin v. Philips Lighting North America Corp.</i>	688
Note	690
Declaratory and Injunctive Relief	691
<i>EEOC v. DCP Midstream L.P.</i>	693
Notes	698
Compensatory Damages	700
Punitive Damages	701
Core Concept: Title VII's Compensatory and Punitive Damages Cap	703
Core Concept: Mitigation of Damages	705
<i>Richardson v. Tricom Pictures &amp; Productions, Inc.</i>	706
Notes	712
Core Concept: Damages under the ADA	713
ADA Remedial Provision — ADA § 107(a); 42 U.S.C. § 12117(a)	713
Core Concept: Damages under the PFWA	714
PFWA Remedial Provision — PFWA § 104;	
42 U.S.C. § 2000gg-2	714
Core Concept: Damages under the ADEA	714
ADEA Remedial Provisions — ADEA § 7; 29 U.S.C. § 626	714
FLSA Remedies Provision — 29 U.S.C. § 216 — Applicable to	
ADEA Remedies	715
Core Concept: Damages under Section 1981	717
Core Concept: Recovery of Attorney's Fees	718
Beyond the Basics: Affirmative Action as a Remedy	719
Beyond the Basics: Job Offers as a Remedy	720
Beyond the Basics: Damages and Civil Procedure	721
Pleadings	721
Discovery	724
The Trial	725
Jury Instructions Example on Damages	725
<b>Chapter 12 • Capstone Experience</b>	<b>731</b>
<b>Index</b>	<b>737</b>

# Table of Principal Cases

---

- Adair v. City of Muskogee, 823 F.3d 1297 (10th Cir. 2016), 445
- Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), 683
- Ansonia Board of Education v. Philbrook, 479 U.S. 60 (1986), 389
- Back v. Hastings on Hudson Union Free School District, 365 F.3d 107 (2d Cir. 2004), 533
- Billups v. Emerald Coast Utilities Authority, 714 Fed. Appx. 929 (11th Cir. 2017), 459
- Bostock v. Clayton County, Georgia, 140 S.Ct. 1731 (U.S. 2020), 540
- Braidwood Management v. EEOC, 2023 U.S. App. LEXIS 15378 (5th Cir. 2023), 418
- Burlington Northern & Santa Fe Railway Co. v. White, 548 U.S. 53 (2006), 331
- CBOCS West, Inc. v. Humphries, 553 U.S. 442 (2008), 356
- Chalmers v. Tulon Company of Richmond, 101 F.3d 1012 (4th Cir. 1996), 369, 392
- Chevron v. Echazabal, 536 U.S. 73 (2002), 475
- City of Los Angeles, Dept. of Water & Power v. Manhart, 435 U.S. 702 (1978), 36
- Clark County School District v. Breeden, 532 U.S. 268 (2001), 329, 338
- Crawford v. Nashville, 555 U.S. 271 (2009), 322
- Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003), 105
- Dewitt v. Southwestern Bell Telephone Co., 845 F.3d 1299 (10th Cir. 2017), 466
- Donlin v. Philips Lighting North America Corp., 564 F.3d 207 (3rd Cir. 2009), 688
- Dothard v. Rawlinson, 433 U.S. 321 (1977), 150, 206
- EEOC v. Abercrombie & Fitch, Inc., 135 S.Ct. 2028 (2015), 371
- EEOC v. Catastrophe Management Solutions, 876 F.3d 1273 (11th Cir. 2017), 561
- EEOC v. DCP Midstream L.P., 608 F. Supp. 2d 107 (D. Maine 2009), 693
- EEOC v. Manville Sales Corp., 27 F.3d 1089 (5th Cir. 1994), 636
- Espinoza v. Farah Manufacturing Co., 414 U.S. 86 (1973), 30
- Faragher v. City of Boca Raton, 524 U.S. 775 (1998), 285
- Federal Express Corp. v. Holowecki, 552 U.S. 389 (2008), 611
- General Dynamics Land Systems, Inc. v. Cline, 540 U.S. 581 (2004), 575
- Griggs v. Duke Power Co., 401 U.S. 424 (1971), 186

- Groff v. DeJoy, 143 S. Ct. 2279 (2023), 379
- Gross v. FBL Financial Services, Inc., 557 U.S. 167 (2009), 110
- Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993), 265
- Hazelwood School Dist. v. U.S., 433 U.S. 299 (1977), 134
- Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993), 45
- Hennagir v. Utah Department of Corrections, 587 F.3d 1255 (10th Cir. 2009), 450
- Hishon v. King & Spalding, 467 U.S. 69 (1984), 54
- Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 565 U.S. 171 (2012), 406
- Howard v. Wolf Broadcasting Corp., 611 So. 2d 307 (Ala. 1992), 4
- International Broth. of Teamsters v. U.S., 431 U.S. 324 (1977), 122
- International Union, United Auto., Aerospace and Agr. Implement Workers of America, UAW v. Johnson Controls, Inc., 499 U.S. 187 (1991), 156
- Jespersen v. Harrah's Operating Company, Inc., 444 F.3d 1104 (9th Cir. 2006), 583
- Johnson v. Transportation Agency, 480 U.S. 616 (1987), 506
- Lauderdale v. Texas Dept. of Criminal Justice, 512 F.3d 157 (5th Cir. 2007), 308
- Lewis v. City of Chicago, 560 U.S. 205 (2010), 626
- Mazzeo v. Color Resolutions International, LLC, 746 F.3d 1264 (11th Cir. 2014), 438
- McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976), 23
- McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), 68
- McKennon v. Nashville Banner Pub. Co., 513 U.S. 352 (1995), 169
- Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986), 261, 284
- O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308 (1996), 83
- Oncale v. Sundowner Offshore Services, 523 U.S. 75 (1998), 269
- Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), 92
- Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000), 76
- Ricci v. DeStefano, 557 U.S. 557 (2009), 224
- Richardson v. Tricom Pictures & Productions, Inc., 344 F. Supp. 2d 1303 (S.D. Fla. 2004), 706
- Rogers v. American Airlines, Inc., 527 F. Supp. 229 (D.C.N.Y. 1981), 559
- Saint Francis College v. Al-Khazraji, 481 U.S. 604 (1987), 26
- Salas v. Wisconsin Dept. of Corrections, 2006 U.S. Dist. LEXIS 21140 (W.D. Wis. April 17, 2006), 568
- Smith v. City of Jackson, Miss., 544 U.S. 228 (2005), 214
- Staub v. Proctor Hosp., 562 U.S. 411 (2011), 175
- Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999), 428
- Swierkiewicz v. Sorema, 534 U.S. 506 (2002), 656



- Tademy v. Union Pacific Corporation,  
520 F.3d 1149 (10th Cir. 2008), 277
- Thompson v. North American Stain-  
less, L.P., 562 U.S. 170 (2011), 352
- Trans World Airlines, Inc. v. Hardison,  
432 U.S. 63 (1977), 369, 379, 494
- U.S. Airways v. Barnett, 535 U.S. 391  
(2002), 490
- University of Texas Southwestern  
Medical Center v. Nassar, 570 U.S.  
338 (2013), 340
- Vance v. Ball State University, 570 U.S.  
421 (2013), 295
- Wal-Mart Stores, Inc. v. Dukes, 564  
U.S. 338 (2011), 242
- Wards Cove Packing Co., Inc. v.  
Atonio, 490 U.S. 642 (1989), 191
- Western Air Lines, Inc. v. Criswell, 472  
U.S. 400 (1985), 141
- Young v. United Parcel Service, Inc.,  
575 U.S. 206 (2015), 517
- Zamora v. Elite Logistics, Inc., 478 F.3d  
1160 (10th Cir. 2007) (en banc), 593



# 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.

More recently, the NextGen Bar Exam reflects a genuine effort to dramatically increase the focus on assessing more than mere knowledge, on assessing law practice skills. "Set to debut in July 2026, the NextGen bar exam will test a broad range of foundational lawyering skills, utilizing a focused set of clearly identified fundamental legal concepts and principles needed in today's practice of law." *About the NextGen Bar Exam*, NextGen: The Bar Exam of the Future, <https://nextgenbarexam.ncbex.org>.

**The problems with traditional law school instruction begin with the textbooks law teachers use.** Law professors cannot implement *Educating Lawyers* and *Best Practices* or prepare students for the NextGen Bar Exam 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, authored by teaching and learning experts who believe in practice-focused legal education, and written with *Educating Lawyers* and *Best Practices* (and now the NextGen Bar Exam) in mind, Context and Practice casebooks make it easy for law professors to modernize their law school classrooms.

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

MICHAEL HUNTER SCHWARTZ

Series Designer and Editor

Consultant, Institute for Law Teaching and Learning

Dean and Professor of Law, McGeorge School of Law, University of the Pacific

# 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 designed 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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