

Table of Contents

Volume 1

PART I. SUBSTANTIVE LAW

CHAPTER 1. INTRODUCTION TO WRONGFUL DISCHARGE CLAIMS

- § 1:1 Employment-at-will doctrine—Historical background
- § 1:2 Overview of wrongful discharge litigation
- § 1:3 Scope of the work

CHAPTER 2. STATUTORY PROTECTION

I. OVERVIEW OF STATUTORY PROTECTIONS FROM WRONGFUL DISCHARGE

- § 2:1 Scope of chapter

II. NATIONAL LABOR RELATIONS ACT

- § 2:2 NLRA—Substantive provisions
- § 2:3 —Procedures

III. TITLE VII OF CIVIL RIGHTS ACT OF 1964

A. GENERAL MATTERS

- § 2:4 Title VII—Introduction
- § 2:5 —Coverage
- § 2:6 — —Coverage of United States Senate, executive branch and state political appointees
- § 2:7 — —Coverage abroad

B. PROCEDURAL MATTERS

- § 2:8 Title VII—Filing a charge
- § 2:9 —Mandating alternative dispute resolution
- § 2:10 —Jury trial

LITIGATING WRONGFUL DISCHARGE CLAIMS

- § 2:11 —Government suits
- § 2:12 —Disparate treatment
- § 2:13 — —Single motive/mixed motive
- § 2:14 — —Methods of proof
- § 2:15 —Disparate impact
- § 2:16 — —Subjective facially neutral criteria
- § 2:17 — —Statistics
- § 2:18 —Retroactivity issue

C. REMEDIES

- § 2:19 Title VII—Damages
- § 2:20 — —Compensatory damages
- § 2:21 — —Punitive damages
- § 2:22 — —Expert witness fees

D. MISCELLANEOUS PROVISIONS OF THE CIVIL RIGHTS ACT OF 1991

- § 2:23 Civil Rights Act of 1991—Statute of limitations
period for seniority system challenges
- § 2:24 —Finality of consent process
- § 2:25 —Prohibition of discriminatory use of test scores
- § 2:26 —Other provisions

E. PROHIBITED DISCRIMINATION

1. Racial Discrimination

- § 2:27 Title VII—Racial discrimination—Racial
harassment
- § 2:28 — —Reverse discrimination

2. Sex Discrimination

- § 2:29 Title VII—Sex discrimination—Adverse
employment actions
- § 2:30 — —Pregnancy discrimination
- § 2:31 — —Marital/dating discrimination

3. Sexual Harassment

- § 2:32 Title VII—Sexual harassment
- § 2:33 — —Quid pro quo harassment
- § 2:34 — —Hostile environment harassment
- § 2:35 — —Same-sex harassment

TABLE OF CONTENTS

4. Religious Discrimination

- § 2:36 Title VII—Religious discrimination—Adverse employment actions and duty to accommodate

5. National Origin Discrimination

- § 2:37 Title VII—National origin discrimination—Adverse employment actions

IV. AGE DISCRIMINATION IN EMPLOYMENT ACT

- § 2:38 ADEA—Coverage
- § 2:39 —Filing a charge of discrimination
- § 2:40 — —Time limits
- § 2:41 —Judicial relief
- § 2:42 — —Collective actions
- § 2:43 — —The prima facie case
- § 2:44 — —Proof of pretext and burden of proof
- § 2:45 — —Methods of proof
- § 2:46 — —Remedies
- § 2:47 —Involuntary early retirement
- § 2:48 —Benefits discrimination

V. DISABILITY DISCRIMINATION

A. REHABILITATION ACT OF 1973

- § 2:49 Rehabilitation Act—Coverage
- § 2:50 —Elements of the cause of action
- § 2:51 —Definitions
- § 2:52 —Procedural and other issues

B. AMERICANS WITH DISABILITIES ACT

- § 2:53 ADA—Introduction
- § 2:54 —Disability defined
- § 2:55 —Essential functions of the job
- § 2:56 —Reasonable accommodation
- § 2:57 — —Undue hardship
- § 2:58 —Prehire inquiries: exams and testing
- § 2:59 —Impact on employee benefit plans
- § 2:60 —Interface with other laws

VI. OTHER CIVIL RIGHTS STATUTES

A. 42 U.S.C.A. § 1981

- § 2:61 Section 1981—Background

LITIGATING WRONGFUL DISCHARGE CLAIMS

- § 2:62 —Persons protected
- § 2:63 —Persons liable
- § 2:64 —Prohibited conduct
- § 2:65 —Elements of claim
- § 2:66 —Remedies

B. 42 U.S.C.A. § 1983

- § 2:67 Section 1983—Background
- § 2:68 —Statutory authority
- § 2:69 —Elements of cause of action
- § 2:70 — —Deprivation of federal right
- § 2:71 — —Color of state law
- § 2:72 —Defendants
- § 2:73 —Remedies

C. 42 U.S.C.A. § 1985

- § 2:74 Section 1985—Rights and remedies

VII. FEDERAL ANTI-RETALIATION STATUTES

- § 2:75 Federal prohibition on retaliation—Introduction
- § 2:76 —Age Discrimination in Employment Act
- § 2:77 —Americans with Disabilities Act
- § 2:78 —Rehabilitation Act
- § 2:79 —Title VII of Civil Rights Act of 1964
- § 2:80 —National Labor Relations Act
- § 2:81 —Fair Labor Standards Act
- § 2:82 —Federal Deposit Insurance Act
- § 2:83 —Occupational Safety and Health Act
- § 2:84 —Bankruptcy Act
- § 2:85 —Whistleblower Protection Act
- § 2:86 —False Claims Act qui tam suits and employee whistleblower protections
- § 2:87 —Family and Medical Leave Act
- § 2:88 —Other federal anti-retaliation statutes

VIII. MISCELLANEOUS FEDERAL STATUTES

- § 2:89 Uniformed Services Employment and Reemployment Rights Act
- § 2:90 Consumer Credit Protection Act
- § 2:91 Protection of juror's employment
- § 2:92 Transportation statutes: Railway Labor Act and Federal Railroad Safety Act

TABLE OF CONTENTS

§ 2:93	Racketeer Influenced and Corrupt Organizations Act
§ 2:94	Section 510 of the Employment Retirement Income Security Act
§ 2:95	Landrum-Griffin Act
§ 2:96	National Bank Act and other banking laws
§ 2:97	Immigration Reform and Control Act of 1986
§ 2:98	Antitrust statutes
§ 2:99	Title IX
§ 2:100	Religious Freedom Restoration Act
§ 2:101	Family and Medical Leave Act of 1993

IX. STATE STATUTES

§ 2:102	State statutes addressing discrimination— Introduction
§ 2:103	—Civil rights laws
§ 2:104	—Marital status and family responsibilities discrimination
§ 2:105	—Participation in abortions
§ 2:106	—Refusal to take polygraph examinations
§ 2:107	—Service letters
§ 2:108	—Blacklisting
§ 2:109	—Civil service statutes
§ 2:110	—Whistleblower protection statutes
§ 2:111	—Wrongful discharge statute
§ 2:112	—Miscellaneous statutes
§ 2:113	—Parties

CHAPTER 3. TRADITIONAL CONTRACT THEORIES

I. REMEDIES OF UNION EMPLOYEES UNDER LABOR AGREEMENTS

A. GENERAL MATTERS

§ 3:1	Suits for wrongful discharge in breach of a labor agreement
§ 3:2	Standards used and factors considered by arbitrators
§ 3:3	Vacating arbitration award

**B. REDRESS OF UNJUST DISCHARGE
UNDER GRIEVANCE ARBITRATION
PROCEDURES**

- § 3:4 Unjust discharge and union procedures
- § 3:5 Grievance procedure
- § 3:6 Arbitration procedure
- § 3:7 Role of private counsel

**C. SUITS WHERE THERE HAS BEEN UNFAIR
REPRESENTATION BY THE UNION**

- § 3:8 Unfair representation by the union
- § 3:9 Prerequisites to suit
- § 3:10 Failure to arbitrate
- § 3:11 Standards for duty of fair representation
- § 3:12 Internal union remedies
- § 3:13 Statute of limitations
- § 3:14 Jury trial
- § 3:15 Damages
- § 3:16 Litigating claims through other causes of action
- § 3:17 Conclusion

II. FIXED-TERM CONTRACTS

- § 3:18 Fixed-term contracts
- § 3:19 Insubordination
- § 3:20 Other grounds for terminating contracts
- § 3:21 Burden of proof
- § 3:22 Remedies

**CHAPTER 4. IMPLIED CONTRACTUAL
MODIFICATION OF AT-WILL STATUS**

I. OVERVIEW OF IMPLIED CONTRACTS

- § 4:1 Implied contracts

**II. CONTRACT TERMS ARISING FROM
PERSONNEL HANDBOOKS**

- § 4:2 Contract terms in personnel handbooks
- § 4:3 Unilateral and bilateral contract analysis
- § 4:4 Elements of contract formation in general
- § 4:5 Offer

TABLE OF CONTENTS

- § 4:6 —Clarity and definiteness
- § 4:7 —Communication to employee
- § 4:8 —Employee's expectations
- § 4:9 Acceptance
- § 4:10 Reliance
- § 4:11 Meeting of the minds
- § 4:12 Consideration
- § 4:13 Mutuality of obligation
- § 4:14 Express requirement of good cause for discharge
- § 4:15 Implied requirement of good cause for discharge
- § 4:16 —Application of good cause provision
- § 4:17 Progressive discipline policy
- § 4:18 Procedural protections
- § 4:19 Grievance and dispute resolution provisions as binding employee

III. CONTRACT TERMS ARISING FROM ORAL COMMUNICATIONS

- § 4:20 Contract terms in oral communications
- § 4:21 Promise of discharge only for good cause
- § 4:22 Promise of permanent employment
- § 4:23 Promise of employment for reasonable time
- § 4:24 Promise of employment until contingent occurrence
- § 4:25 Implied promise of employment for definite period
- § 4:26 Representations made during recruiting and hiring process
- § 4:27 Representations made to current employees

IV. FACTORS THAT CONSTITUTE INDEPENDENT CONSIDERATION WHERE REQUIRED

- § 4:28 Independent consideration
- § 4:29 Benefit to employer from improved employee relations
- § 4:30 Noncompetition covenants and other restrictions
- § 4:31 Relinquishment of previous position and relocation

V. DEFENSES

- § 4:32 Disclaimers
- § 4:33 —Clarity and conspicuousness

- § 4:34 —As only one factor in totality of circumstances
- § 4:35 —Subsequently added disclaimers
- § 4:36 Statute of frauds
- § 4:37 After-acquired evidence of misconduct

VI. PROMISSORY ESTOPPEL

- § 4:38 Promissory estoppel
- § 4:39 Adequacy of promise
- § 4:40 Reliance
- § 4:41 Effect of disclaimer on promissory estoppel claim

CHAPTER 5. “PUBLIC POLICY” TORT: RETALIATORY DISCHARGES THAT VIOLATE PUBLIC POLICY

I. OVERVIEW OF VIOLATIONS OF PUBLIC POLICY

- § 5:1 The “public policy” exception to at-will employment
- § 5:2 Historical development of the public policy
exception
- § 5:3 Current general acceptance and applicability
- § 5:4 Sufficiency of public policy basis

II. SPECIFIC PROHIBITED REASONS FOR DISCHARGE

A. DISCHARGE FOR WHISTLEBLOWING

- § 5:5 Whistleblowing
- § 5:6 —Necessity of report to outside authorities
- § 5:7 —Sufficiency of employee’s reasonable belief that
violation occurred
- § 5:8 —Preemption and exclusivity of statutory remedies

B. OTHER PROHIBITED REASONS FOR DISCHARGE

- § 5:9 Discharge for refusal to commit unlawful or
unethical act
- § 5:10 Discharge in retaliation for filing workers’
compensation claim
- § 5:11 Discharge for filing suit against employer
- § 5:12 Discharge for unionizing, free speech, and
political activities

TABLE OF CONTENTS

- § 5:13 Discharge for refusing polygraph or drug test
- § 5:14 Discharge for performing legal duty
- § 5:15 Discriminatory discharge
- § 5:16 Discharge for safety or health complaints

CHAPTER 6. ALTERNATIVE TORT REMEDIES

I. OVERVIEW OF ALTERNATIVE TORT REMEDIES FOR WRONGFUL DISCHARGE

- § 6:1 Scope of chapter

II. INTENTIONAL INTERFERENCE WITH CONTRACTUAL RELATIONS

- § 6:2 Interference with contractual relations—Elements of the tort
- § 6:3 —Liability of supervisor
- § 6:4 —Liability of employer for supervisor's interference
- § 6:5 —Examples of unjustified interference

III. TORT OF OUTRAGE OR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

- § 6:6 Emotional distress—Definition of intentional infliction of emotional distress
- § 6:7 —Factors determining outrage
- § 6:8 —Severity of distress
- § 6:9 —Intent and causation
- § 6:10 —Emotional distress caused by working conditions
- § 6:11 —Discharge and forced resignation
- § 6:12 —Racial abuse
- § 6:13 —Theft accusations
- § 6:14 —Sexual harassment
- § 6:15 —Victims of age, disability discrimination and benefit deprivation
- § 6:16 —Suit against employer and/or supervisor
- § 6:17 —Preemption of intentional infliction of emotional distress claims

IV. FRAUD

- § 6:18 Fraud

- § 6:19 —Misrepresentation as to future events
- § 6:20 —Present intent
- § 6:21 —Benefit to employer
- § 6:22 —Plaintiff's sophistication

V. DEFAMATION

- § 6:23 Defamation—Elements of defamation
- § 6:24 —Privilege
- § 6:25 —Abuse of privilege
- § 6:26 —Damages

VI. COVENANT OF GOOD FAITH AND FAIR DEALING

- § 6:27 The contract-tort controversy
- § 6:28 Scope of the implied covenant of good faith and fair dealing
- § 6:29 Massachusetts rule

VII. INVASION OF PRIVACY

A. GENERAL CONSIDERATIONS

- § 6:30 Invasion of privacy
- § 6:31 —Appropriation
- § 6:32 —Unreasonable intrusion
- § 6:33 —Public disclosure of private facts
- § 6:34 —False light
- § 6:35 —Union involvement
- § 6:36 —Damages

B. STATUTORY PROTECTION

- § 6:37 Statutory protections of privacy
- § 6:38 —Polygraph tests
- § 6:39 —Paper and pencil honesty tests
- § 6:40 —Fair credit provisions
- § 6:41 —Fingerprinting and surveillance
- § 6:42 —Wire and Electronic Communication Interception Act and similar state statutes
- § 6:43 —Stored Communications Act
- § 6:44 —Restrictions on types of information collected
- § 6:45 —Restrictions on use of information
- § 6:46 —Restrictions on disclosure of information

C. CONSTITUTIONAL PROTECTION

- § 6:47 Federal protection of privacy

TABLE OF CONTENTS

§ 6:48 State protection of privacy

VIII. NEGLIGENCE

§ 6:49 Negligence

§ 6:50 Negligent misrepresentation

§ 6:51 Negligent performance of the employment contract

§ 6:52 Negligent administration of medical examinations and medical records

§ 6:53 Negligent conduct of independent contractors

§ 6:54 Negligent failure to provide safe workplace and to warn employees of health hazards

§ 6:55 Negligent infliction of emotional distress

§ 6:56 Negligent hiring, supervision, and retention of co-employees and supervisors

IX. MISCELLANEOUS

§ 6:57 Prima facie tort

§ 6:58 False imprisonment

§ 6:59 Assault and battery

§ 6:60 Conspiracy

§ 6:61 Malicious prosecution

Volume 2

CHAPTER 7. SPECIAL ISSUES

I. INTRODUCTION TO SPECIAL ISSUES REGARDING EMPLOYEE RIGHTS AND COMPENSATION

§ 7:1 Scope of chapter

II. PRIVATE SECTOR EMPLOYEES

§ 7:2 Private employee defined

§ 7:3 —Probationary employees

§ 7:4 —Contingent employees

III. PUBLIC EMPLOYEES

§ 7:5 Public employees

§ 7:6 Public employee status

LITIGATING WRONGFUL DISCHARGE CLAIMS

- § 7:7 Federal and state civil service protection for public employees
- § 7:8 Determination of a public employee's constitutional protection from termination without due process
- § 7:9 Property interest of public employees
- § 7:10 Liberty interest of public employees
- § 7:11 Requirements of due process of law for public employees
- § 7:12 —Procedural due process
- § 7:13 —Substantive due process
- § 7:14 Remedies for due process violations for public employees
- § 7:15 First Amendment rights of public employees
- § 7:16 —Political patronage decisions
- § 7:17 Proper defendant in public employee suit
- § 7:18 Qualified immunity of public employers

IV. DRUG TESTING

- § 7:19 Introduction to drug testing
- § 7:20 Constitutional issues on drug testing
- § 7:21 Testing of particular employees—Employees with disabilities
- § 7:22 —Public employees
- § 7:23 —Private sector employees

V. RELEASES

- § 7:24 Introduction to releases
- § 7:25 Common law rules on releases
- § 7:26 Release of statutory rights
- § 7:27 ADEA waivers
- § 7:28 —Voluntary and knowing release
- § 7:29 Suggestions on drafting releases

VI. RES JUDICATA AND COLLATERAL ESTOPPEL

- § 7:30 Introduction to res judicata and collateral estoppel
- § 7:31 Res judicata and collateral estoppel defined
- § 7:32 Effect of prior arbitration and administrative proceedings
- § 7:33 Effect of unemployment compensation proceedings

TABLE OF CONTENTS

- § 7:34 Effect of agency discrimination determinations
- § 7:35 Miscellaneous administrative proceedings
- § 7:36 Effect of court actions

VII. COBRA HEALTH INSURANCE CONTINUATION

- § 7:37 Overview of COBRA
- § 7:38 Effective date of COBRA
- § 7:39 Covered employees under COBRA
- § 7:40 Group health plans under COBRA
- § 7:41 Qualifying events under COBRA
- § 7:42 Qualified beneficiaries under COBRA
- § 7:43 Obligations of employers and plan administrators
under COBRA
- § 7:44 Notices under COBRA—Initial notices
- § 7:45 —Notices following termination
- § 7:46 Obligations of qualified beneficiaries under
COBRA
- § 7:47 Coverage to be offered under COBRA
- § 7:48 Continued coverage period under COBRA
- § 7:49 COBRA election procedure and period
- § 7:50 COBRA premiums
- § 7:51 Notices of COBRA conversion rights
- § 7:52 Penalties under COBRA
- § 7:53 Statute of limitations under COBRA
- § 7:54 COBRA and the Family and Medical Leave Act of
1993
- § 7:55 COBRA and the Health Insurance Portability and
Accountability Act of 1996

VIII. WORKER ADJUSTMENT RETRAINING AND NOTIFICATION ACT

- § 7:56 Plant closings—WARN Act

IX. RESTRICTIVE COVENANTS

- § 7:57 Restrictive covenants and covenants not to
compete

X. PREEMPTION

- § 7:58 Introduction to preemption
- § 7:59 Preemption—Federal labor law
- § 7:60 —Workers' compensation

§ 7:61 —Other state and federal statutes

XI. OTHER MATTERS

- § 7:62 Constructive discharge
- § 7:63 —State court issues
- § 7:64 Administrative time limits
- § 7:65 Severance pay
- § 7:66 Unemployment insurance
- § 7:67 Rule 11
- § 7:68 Epidemic and pandemic illnesses—AIDS
- § 7:69 —COVID-19
- § 7:70 After-acquired evidence
- § 7:71 Eleventh Amendment immunity

CHAPTER 8. REMEDIES

I. INTRODUCTION TO REMEDIES FOR WRONGFUL TERMINATION

- § 8:1 Overview of remedies for wrongful termination
- § 8:2 Theories of recovery in contract actions
- § 8:3 Employment agreements
- § 8:4 Liquidated damages
- § 8:5 Emotional distress damages
- § 8:6 —In contract actions
- § 8:7 Equitable relief

II. BACK PAY

- § 8:8 Introduction to back pay
- § 8:9 Measuring the period of back pay liability
- § 8:10 Termination of back pay period of liability
- § 8:11 Calculating back pay and fringe benefits
- § 8:12 —Adjustments to back pay award
- § 8:13 Mitigation and back pay
- § 8:14 Set-offs and deductions from back pay
- § 8:15 Prejudgment and postjudgment interest

III. FRONT PAY AND PROSPECTIVE DAMAGES

- § 8:16 Introduction to front pay and prospective damages
- § 8:17 Front pay under fair employment practice statutes

TABLE OF CONTENTS

- § 8:18 Front pay in other contexts
- § 8:19 Calculating front pay and prospective damages

IV. PUNITIVE DAMAGES

- § 8:20 Introduction to punitive damages
- § 8:21 Purpose of punitive damages in wrongful discharge cases
- § 8:22 Nature and characteristics of punitive damages
- § 8:23 —In tort actions
- § 8:24 —In breach of employment contract actions
- § 8:25 —In federal statutory actions
- § 8:26 Punitive damages for supervisor's acts
- § 8:27 Determination of punitive damages amount

V. ATTORNEY'S FEES IN EMPLOYMENT CASES

- § 8:28 Introduction to attorney's fees
- § 8:29 Written attorney's fee agreement
- § 8:30 Statutory attorney's fees awards
- § 8:31 Factors determining attorney's fee
- § 8:32 —Upward adjustments of attorney's fee
- § 8:33 Expenses and costs
- § 8:34 Attorney's fee application
- § 8:35 Timing of attorney's fee negotiations

VI. TAXES ON WRONGFUL DISCHARGE DAMAGE AWARDS

- § 8:36 History of tax consequences of damage awards
- § 8:37 Taxable damages—IRS inclusion in gross income
- § 8:38 —Personal injury damages
- § 8:39 —Punitive and liquidated damages
- § 8:40 —Interest, attorney's fees and costs
- § 8:41 —Minimizing taxes on settlement

CHAPTER 9. DEFENSES TO WRONGFUL DISCHARGE CLAIMS

I. DEFENSES TO WRONGFUL DISCHARGE CLAIMS

A. GENERAL MATTERS

- § 9:1 Introduction to wrongful discharge defenses

LITIGATING WRONGFUL DISCHARGE CLAIMS

- § 9:2 Employment at-will
- § 9:3 Express at-will disclaimer

B. COMMON LAW BREACH OF CONTRACT DEFENSES

- § 9:4 Common law breach of contract defenses
- § 9:5 Lack of consideration
- § 9:6 Lack of mutuality of obligation
- § 9:7 Statute of Frauds

C. DEFENSES TO ALTERNATE TORT CLAIMS

- § 9:8 Defenses to alternate tort claims
- § 9:9 Intentional infliction of emotional distress
- § 9:10 Defamation
- § 9:11 Invasion of privacy
- § 9:12 Fraud
- § 9:13 Interference with contractual relations

D. PREEMPTION BY STATE OR FEDERAL LAWS

- § 9:14 Overview of preemption
- § 9:15 Preemption—Discrimination statutes generally
- § 9:16 —National Labor Relations Act
- § 9:17 —Section 301 of Labor Management Relations Act
- § 9:18 —ERISA
- § 9:19 —Railway Labor Act
- § 9:20 —National Bank Act
- § 9:21 —Occupational Safety and Health Act
- § 9:22 —Whistleblower statutes
- § 9:23 —Workers' compensation statutes

E. OTHER DEFENSES

- § 9:24 Statute of limitations
- § 9:25 Good cause for termination
- § 9:26 After-acquired evidence
- § 9:27 Release
- § 9:28 Failure to exhaust administrative remedy
- § 9:29 Res judicata and collateral estoppel
- § 9:30 Mitigation of damages

II. EMPLOYER COUNTERCLAIMS

- § 9:31 Counterclaims raised by employers

TABLE OF CONTENTS

**PART II. STRATEGY AND
LITIGATION**

**CHAPTER 10. PRELITIGATION
ACTIVITY**

I. OVERVIEW OF PRELITIGATION ACTIVITY

§ 10:1 Scope of chapter

II. THE CLIENT

- § 10:2 Psychological impact of termination
- § 10:3 Initial interview
- § 10:4 —Checklist
- § 10:5 Investigation
- § 10:6 Client's participation and assistance
- § 10:7 Follow-up investigation of nonclient sources
- § 10:8 Other prelitigation activities: Settlement,
hearings, counseling
- § 10:9 Evaluation of the case
- § 10:10 Factors to consider in initial evaluation
generally
- § 10:11 Merit evaluation; Available options
- § 10:12 Selecting goal for settlement
- § 10:13 Economic evaluation
- § 10:14 Commitment to represent
- § 10:15 Attorney-client fee agreement
- § 10:16 Explanation of litigation for potential litigant

**III. EEOC PRACTICE UNDER TITLE VII, ADEA,
ADA AND EPA**

§ 10:17 EEOC practice

IV. INITIAL DECISIONS AS TO LITIGATION

A. GENERAL CONSIDERATIONS

- § 10:18 Filing charge of discrimination
- § 10:19 Investigation of Title VII, ADEA and ADA claims
- § 10:20 Prelitigation resolution of Title VII, ADEA, and
ADA claims
- § 10:21 Access to EEOC charge files; admissibility of
EEOC findings

LITIGATING WRONGFUL DISCHARGE CLAIMS

§ 10:22 Client goals, risks, and client damages

B. WHERE TO SUE

§ 10:23 Forum shopping considerations

§ 10:24 Supplemental (pendent) jurisdiction

C. WHO CAN SUE

§ 10:25 Joint plaintiffs

§ 10:26 Right of consortium

§ 10:27 Right of estate of deceased plaintiff

§ 10:28 Class actions

§ 10:29 Potential defendants

§ 10:30 Parent liability for subsidiary

§ 10:31 Alter ego

§ 10:32 Joint employers

§ 10:33 Supervisors

§ 10:34 Conflict of laws principles

CHAPTER 11. PRETRIAL ACTIVITY

I. OVERVIEW OF PRETRIAL ACTIVITY

§ 11:1 Scope of chapter

II. EMPLOYEE'S PERSPECTIVE

§ 11:2 Complaint

§ 11:3 Defendant's answer; Counterclaims

§ 11:4 Plaintiff's discovery—Planning and timing

§ 11:5 —Depositions taken by plaintiff

§ 11:6 —Interrogatories and requests for documents

§ 11:7 —Electronic data and discovery

§ 11:8 Protective orders

§ 11:9 Ex parte contact

§ 11:10 Information obtained by plaintiff

§ 11:11 Special issues

§ 11:12 Retaining witnesses

§ 11:13 Defendant's deposition of plaintiff

§ 11:14 Plaintiff's reaction to defendant's discovery

§ 11:15 Medical records

III. EMPLOYER'S PERSPECTIVE

§ 11:16 Discovery from the employer's perspective

TABLE OF CONTENTS

- § 11:17 —“Internal” discovery
- § 11:18 —Discovery of plaintiff
- § 11:19 —Deposing plaintiff
- § 11:20 —Other depositions

IV. USE OF EXPERTS

- § 11:21 Expert witnesses
- § 11:22 Selecting and retaining experts
- § 11:23 Expert discovery
- § 11:24 Will experts survive under *Daubert*?
- § 11:25 Deposing opposing expert
- § 11:26 Considerations at trial

V. OTHER PRETRIAL MATTERS

- § 11:27 Miscellaneous pointers
- § 11:28 Control of expenses
- § 11:29 File management
- § 11:30 Document control system
- § 11:31 Client relations
- § 11:32 Response to defendant’s motion for summary judgment

VI. PRETRIAL SETTLEMENT

- § 11:33 Convincing plaintiff to settle; calculating settlement demand
- § 11:34 Negotiation strategy
- § 11:35 Mediation statement
- § 11:36 Components of settlement
- § 11:37 Offer of judgment

VII. ALTERNATIVE DISPUTE RESOLUTION

- § 11:38 Mediation
- § 11:39 Arbitration

CHAPTER 12. TRIAL

I. TRIAL FOR WRONGFUL DISCHARGE

- § 12:1 Scope of chapter

II. TRIAL PREPARATION

- § 12:2 Trial preparation checklist

- § 12:3 Battle plan
- § 12:4 Motions in limine
- § 12:5 Pretrial brief
- § 12:6 Jury selection (voir dire)

III. PLAINTIFF'S CASE IN CHIEF

- § 12:7 Opening statement
- § 12:8 Witness preparation
- § 12:9 Order of witnesses; examination tactics
- § 12:10 Sequestration of witnesses
- § 12:11 Hostile witnesses
- § 12:12 —Subject matter of testimony
- § 12:13 —Examination tactics
- § 12:14 Visual evidence

IV. CROSS-EXAMINATION

- § 12:15 Purpose of cross-examination
- § 12:16 Cross-examination strategy
- § 12:17 Sample lines of questioning
- § 12:18 Tips for questioning employer witnesses
- § 12:19 Sample testimony—Accountant expert witness
on damages
- § 12:20 —Supervisors

V. REBUTTAL AND CLOSING ARGUMENT

- § 12:21 Rebuttal
- § 12:22 Closing argument and rebuttal
- § 12:23 Closing argument—Sample closing argument

VI. POSTTRIAL MATTERS

- § 12:24 Posttrial motions
- § 12:25 Appeals

PART III. FORMS

CHAPTER 13. PRELITIGATION FORMS

I. OVERVIEW

- § 13:1 Scope of chapter

TABLE OF CONTENTS

II. INTERVIEWS, INVESTIGATION AND EVALUATION

- § 13:2 Client information sheet
- § 13:3 Client interview—In general
- § 13:4 —Promises of job security
- § 13:5 —Handbook cases
- § 13:6 —Public policy cases
- § 13:7 —Discrimination cases
- § 13:8 —Unfair representation cases
- § 13:9 —Defamation cases
- § 13:10 —Harassment cases in general
- § 13:11 Documents requested from client
- § 13:12 Client questionnaire

III. FEE AGREEMENTS

- § 13:13 Fee agreement for investigation and negotiation
- § 13:14 Simple flat fee agreement
- § 13:15 Simple hourly fee agreement
- § 13:16 Simple contingency fee agreement letter
- § 13:17 Simple contingency fee agreement—Alternative “A”
- § 13:18 —Alternative “B”
- § 13:19 Detailed contingency fee agreement
- § 13:20 Hybrid retainer/hourly/contingency agreement
- § 13:21 Group retainer/contingency agreement

IV. LETTERS

- § 13:22 Letter of inquiry
- § 13:23 Conciliatory demand letter
- § 13:24 Threatening demand letter
- § 13:25 Demand letter—Suggesting mediation
- § 13:26 —Advising of filing complaint
- § 13:27 Client engagement letter
- § 13:28 Client non-engagement letter

CHAPTER 14. COMPLAINT

I. OVERVIEW OF WRONGFUL DISCHARGE COMPLAINT

- § 14:1 Scope of chapter

II. STATE COURT COMPLAINTS

- § 14:2 Breach of contract; handbook claim

LITIGATING WRONGFUL DISCHARGE CLAIMS

- § 14:3 Public policy tort, handbook claim, and tort of outrage
- § 14:4 Defamation
- § 14:5 Breach of verbal hiring promise and promissory estoppel
- § 14:6 Public policy
- § 14:7 Interference with employment relationship, age bias, and defamation
- § 14:8 Multiple counts; drug testing case

III. FEDERAL COURT COMPLAINTS

- § 14:9 Short and plain statement of the claim in federal complaints
- § 14:10 Breach of contract, promissory estoppel, and fraud
- § 14:11 Breach of labor agreement and unfair representation
- § 14:12 Federal age discrimination claim; pendent state claims
- § 14:13 Four plaintiffs' claims under ADEA and ERISA; pendent state claims
- § 14:14 Hostile environment sexual harassment, discriminatory termination, and retaliatory termination
- § 14:15 Title VII and 42 U.S.C.A. § 1981
- § 14:16 42 U.S.C.A. §§ 1981 and 1983
- § 14:17 Title VII, Civil Rights Act of 1991, and ADA
- § 14:18 ADA and GINA
- § 14:19 GINA, ADA, and Title VII
- § 14:20 FMLA and ADA
- § 14:21 Rehabilitation Act
- § 14:22 ADA, Rehabilitation Act, and 42 U.S.C.A. § 1983
- § 14:23 ADAAA

Volume 3

CHAPTER 15. DISCOVERY FORMS

I. OVERVIEW OF DISCOVERY FORMS

- § 15:1 Scope of chapter

II. REQUESTS FOR PRODUCTION OF DOCUMENTS

- § 15:2 Long form

TABLE OF CONTENTS

- § 15:3 Short form
- § 15:4 Federal court form
- § 15:5 Municipal defendant
- § 15:6 Electronic discovery
- § 15:7 Generic compilation of questions
- § 15:8 Checklist for production of documents

III. INTERROGATORIES

- § 15:9 General form
- § 15:10 Discrimination based on age or national origin;
slander; breach of employment contract
- § 15:11 Age discrimination case
- § 15:12 Employment law—generally
- § 15:13 Statutorily protected activity
- § 15:14 Generic form

IV. DEPOSITIONS

- § 15:15 Handbook and discharge practices
- § 15:16 Excerpt of deposition in handbook case
- § 15:17 Deposition of personnel director concerning
merits
- § 15:18 Deposition of company witnesses

V. REQUESTS FOR ADMISSIONS

- § 15:19 Request for admissions

VI. DEPOSITION PREPARATION

- § 15:20 Notice of deposition and request for production
of documents
- § 15:21 Deposition notice
- § 15:22 Checklist for preparing client for deposition
- § 15:23 Memorandum to client regarding deposition
- § 15:24 Instructions to client regarding deposition

CHAPTER 16. MEMOS, AFFIDAVITS AND TRIAL FORMS

- § 16:1 Scope of chapter
- § 16:2 Plaintiff's brief in opposition to defendant's
motion for summary judgment
- § 16:3 —Argument against summary judgment; right
to jury trial

LITIGATING WRONGFUL DISCHARGE CLAIMS

- § 16:4 Memorandum supporting discovery of records of other employees
- § 16:5 Motion; memorandum for protective order and order regarding length of deposition
- § 16:6 Settlement agreement and release
- § 16:7 Alternative settlement agreement and release
- § 16:8 Short form release
- § 16:9 Settlement agreement and release in wage dispute case
- § 16:10 Settlement agreement; reinstatement of employee
- § 16:11 Guide for conducting witnesses' pretrial interview
- § 16:12 —Tips for witnesses
- § 16:13 Voir dire
- § 16:14 —Judge's questionnaire
- § 16:15 —Supplemental judge's questionnaire
- § 16:16 Statement of economist concerning damages
- § 16:17 Plaintiff counsel's affidavit in support of fee award
- § 16:18 Plaintiff counsel's affidavit in support of motion for supplemental award of attorney's fees
- § 16:19 Outline for memorandum in support of attorney's fee petition
- § 16:20 Notice of appeal

CHAPTER 17. INSTRUCTIONS

I. INTRODUCTION

- § 17:1 Scope of chapter

II. CONTRACT

A. IN GENERAL

- § 17:2 Contract formation
- § 17:3 Verbal promises
- § 17:4 Implied contract defined
- § 17:5 Contract implied from handbook
- § 17:6 Handbook part of contract
- § 17:7 —Manual, policies and practices
- § 17:8 Express provision in handbook
- § 17:9 Wrongful termination; promissory estoppel
- § 17:10 Limitations on termination-at-will implied from employer's code of ethics

TABLE OF CONTENTS

- § 17:11 Limitations on termination-at-will implied from employer's unwritten policy
- § 17:12 Agreement terminable for good cause
- § 17:13 Factors in determining just cause; arbitrator's test

B. BREACH OF CONTRACT

- § 17:14 Breach of contract
- § 17:15 —Oral fixed term contract
- § 17:16 —Specified term
- § 17:17 — —Justifiable discharge defense
- § 17:18 —Unspecified term
- § 17:19 — —Constructive discharge
- § 17:20 —Implied contract to discharge only for cause
- § 17:21 Good cause; misconduct

III. DUTY OF GOOD FAITH AND FAIR DEALING

- § 17:22 Good faith and fair dealing
- § 17:23 Good faith defined
- § 17:24 Duty implied in every contract
- § 17:25 Factors considered in determining good faith
- § 17:26 —Equal consideration to employee interests
- § 17:27 —Subjective bad faith not required
- § 17:28 Duty as limiting discretionary power
- § 17:29 Breach of duty; manner of termination
- § 17:30 Breach of duty; inadequate investigation
- § 17:31 Application to probationary employees

IV. PUBLIC POLICY TORT, WHISTLEBLOWING AND RETALIATION

A. PUBLIC POLICY TORT

- § 17:32 Wrongful discharge in violation of public policy

B. WHISTLEBLOWING

- § 17:33 Employee right to “blow whistle”; tort cause of action
- § 17:34 Retaliatory discharge for whistleblowing
- § 17:35 Whistleblowers' Protection Act—Elements of a reporting claim
- § 17:36 —Elements of a participation claim

C. RETALIATION

- § 17:37 Retaliation
- § 17:38 —Refusal to take polygraph test
- § 17:39 —Perjury refusal
- § 17:40 —Filing workers' compensation claim
- § 17:41 —Filing unlawful discrimination claim
- § 17:42 — —Burden of proof
- § 17:43 —Proof of motive

V. DEFAMATION

- § 17:44 Introductory statement on defamation
- § 17:45 Defamation defined
- § 17:46 Publication defined
- § 17:47 Republication
- § 17:48 Slander per se
- § 17:49 Complete defamation instruction
- § 17:50 Truth as defense
- § 17:51 Burden of proof of defamation
- § 17:52 Qualified privilege
- § 17:53 —Abuse of privilege
- § 17:54 Damages for defamation

VI. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS (TORT OF OUTRAGE)

- § 17:55 Elements of intentional infliction of emotional distress
- § 17:56 Outrageous conduct defined
- § 17:57 “Emotional distress” and “severe emotional distress” defined
- § 17:58 Intent to inflict/reckless disregard
- § 17:59 Plaintiff's burden as to intentional infliction of emotional distress
- § 17:60 Loss of consortium
- § 17:61 —Definition
- § 17:62 Complete instruction; outrageous conduct causing emotional distress

VII. AGE DISCRIMINATION

- § 17:63 Age discrimination
- § 17:64 Age discrimination defined

TABLE OF CONTENTS

- § 17:65 Use of statistics in age discrimination case
- § 17:66 Forced retirement
- § 17:67 Age as the “but for” cause of discharge
- § 17:68 Burden of proof; constructive discharge ADEA case
- § 17:69 Damages for age discrimination
- § 17:70 —Back pay
- § 17:71 —Liquidated damages
- § 17:72 Special verdict for age discrimination

VIII. DISCRIMINATION UNDER TITLE VII AND THE AMERICANS WITH DISABILITIES ACT

A. TITLE VII

- § 17:73 Sex discrimination
- § 17:74 —Elements of sex discrimination
- § 17:75 Supervisor harassment without tangible employment action
- § 17:76 Supervisor sexual harassment with tangible employment action
- § 17:77 Elements of Title VII retaliation

B. AMERICANS WITH DISABILITIES ACT

- § 17:78 Disability discrimination
- § 17:79 —Complete instruction
- § 17:80 —Elements
- § 17:81 —Failure to accommodate
- § 17:82 —Retaliation

IX. OTHER CLAIMS

- § 17:83 Interference with contract
- § 17:84 Negligence
- § 17:85 Polygraph violation
- § 17:86 Fraud
- § 17:87 Breach of labor contract; unfair representation
- § 17:88 False imprisonment
- § 17:89 Protected speech under 42 U.S.C.A. § 1983
- § 17:90 Deprivation of constitutional right under 42 U.S.C.A. § 1983
- § 17:91 —Essential elements of plaintiff’s claim that defendant violated 42 U.S.C.A. § 1983

LITIGATING WRONGFUL DISCHARGE CLAIMS

- § 17:92 Defendant's violation of 42 U.S.C.A. § 1983;
nonrenewal of plaintiff's contract because of
protected speech
- § 17:93 Discrimination against member of military

X. AGENCY

- § 17:94 Liability of employer under agency theory
- § 17:95 Liability for acts of employee
- § 17:96 —Scope of employment
- § 17:97 Liability for torts of employee

XI. MISCELLANEOUS INSTRUCTIONS

- § 17:98 Basis of employer's liability
- § 17:99 Burden of proof
- § 17:100 Circumstantial evidence
- § 17:101 Constructive discharge
- § 17:102 Verdict elements

XII. DAMAGES

- § 17:103 Breach of contract damages
- § 17:104 Back pay; front pay
- § 17:105 —Front pay factors
- § 17:106 —Present value of lost earnings
- § 17:107 —Present cash value defined
- § 17:108 Public policy tort damages
- § 17:109 Emotional distress defined, as to damages
- § 17:110 —Section 1983 claim
- § 17:111 Damages for polygraph violation
- § 17:112 Life expectancy
- § 17:113 Mitigation of damages
- § 17:114 —Burden of proof
- § 17:115 —Duty to seek similar job
- § 17:116 Punitive damages
- § 17:117 Collateral source rule

APPENDICES

- Appendix A. State-By-State Compendiums of Leading
and Representative Decisions
- Appendix B. Age Discrimination in Employment Act,
Including Older Workers Benefit
Protection Act (29 U.S.C.A. §§ 621 to 634)

TABLE OF CONTENTS

Appendix C.	Civil Rights Act of 1866 (42 U.S.C.A § 1981)
Appendix D.	Civil Rights Act of 1991 (42 U.S.C.A § 1981a)
Appendix E.	Civil Rights Act of 1871 (42 U.S.C.A §§ 1983, 1985, 1986)
Appendix F.	Civil Rights Attorney's Fees Award Act of 1976 (42 U.S.C.A § 1988)
Appendix G.	Title VII of the Civil Rights Act of 1964 (42 U.S.C.A §§ 2000e to 2000e-17)
Appendix H.	Genetic Information Nondiscrimination Act of 2008 (42 U.S.C.A §§ 2000ff to 2000ff-11)
Appendix I.	Americans with Disabilities Act (42 U.S.C.A. §§ 12101 to 12213)
Appendix J.	Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act (29 C.F.R. Part 1630)
Appendix K.	Selected Federal Rules of Evidence
Appendix L.	Selected Federal Rules of Civil Procedure for the United States District Courts

Table of Cases

Index