

## Highlights of the 2025-1 Edition

This treatise provides both a comprehensive analysis of workplace discrimination law and explores the full array of litigation issues, including pleadings, discovery, motions to dismiss and for summary judgment, conducting internal investigations, trial strategy and evidence, use of expert witnesses, damages and attorneys' fees, and tax and insurance considerations. The set covers Title VII (race, sex, religion, national origin), Age Discrimination in Employment Act (ADEA), Americans with Disabilities Act (ADA), Family Medical Leave Act (FMLA), actions against state and local governments under § 1983 and the Constitution, § 1981 (race), and Equal Pay Act (EPA). It gives you expert timely guidance on virtually every aspect of discrimination in the workplace

Merrick Rossein, an expert in this area, walks you through this particularly complex area of practice, providing insightful practical guidance while covering relevant topical areas.

### Highlights in this edition include:

#### New Sections

#### **§ 3:19. Application of state fair employment law against religious institutions challenged as a violation of the first amendment**

The applicability of state fair employment laws against religious institutions creates conflicts between state anti-discrimination laws prohibiting employment discrimination and the First Amendment. This issue has been raised, especially the clash between free expression of religion and LGBTQIA+ rights. The Supreme Court has yet to address this conflict. Both the Ninth and Sixth Circuits addressed the applicability of state fair employment laws against religious institutions. First, in the Ninth Circuit in *Seattle Pacific University v. Ferguson*, the court discussed whether a Washington State Attorney General's investigation into Seattle Pacific University ("SPU"), a religious university that prohibits employees from engaging in same-sex intercourse and marriage, may be enjoined before the Attorney General commences an enforcement action. The question presented was whether the district court had jurisdiction to hear this case. The district court granted the Attorney General's motion to dismiss. The Ninth Circuit affirmed in part and reversed in part, concluding that SPU had standing to bring certain claims.

In separate cases, a Catholic healthcare provider and a Catholic school brought declaratory judgment actions against Michigan Attorney General, alleging that Michigan's Elliot-Larsen Civil Rights Act (ELCRA) and Equal Accommodations Act (EAA) violated the First and Fourteenth Amendments both facially and as applied. In a third action, Catholic parish which operated a school asserted as-applied constitutional violations with regard to ELCRA. In these three related cases, Christian Healthcare Centers, a medical service ministry, Sacred Heart of Jesus, a Catholic school joined by several of the school's parents, and St. Joseph Parish St. Johns, a Catholic parish operating a school, challenged aspects of Michigan's antidiscrimination laws. They alleged that Michigan's laws chilled their speech and conduct in violation of the First and Fourteenth Amendments. The district court dismissed each case for want of standing, reasoning that no plaintiff had shown that Michigan's laws arguably proscribed its speech or conduct and that, in the alternative, there was no credible threat that Michigan would enforce its laws against any plaintiff. The Sixth Circuit agreed in part, but found that Michigan's laws arguably forbid several of plaintiffs' pleaded activities. It concluded that two plaintiffs, Christian Healthcare and Sacred Heart, plausibly established a credible threat that defendants will enforce against them at least some of the challenged provisions of Michigan's laws. It left to the district court the task of evaluating plaintiffs' requests for injunctive relief.

## **New Developments**

### ***Disparate Treatment***

**Comparators similarly situated in pay case.** In *Gamble v. Cnty. of Cook*, Tondalaya Gamble, a Black physician, sued, claiming she was paid less than similarly situated non-Black physicians. The Seventh Circuit upheld summary judgment for the employer. Gamble was unable to show that two white physicians were similarly situated. One of these was employed part time, had been practicing several years, had a different title, and was a subspecialist while Gamble was a generalist. The other was more experienced and performed different duties, having been hired to perform laparoscopic surgeries while Gamble had recently finished her urogynecology fellowship. (§ 2:9)

**Evaluating qualifications to judge pretext.** The Sixth Circuit in *Levine v. DeJoy* found that the employer's selection of a less qualified candidate for a supervisor position may have been mere pretext for racial discrimination. Levine sued the employer, alleging that it discriminated against her by failing to promote her based on race. Levine, an African-American woman, applied for the position of supervisor of customer services. The employer did not select Levine for the position. Instead, it hired a white

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employee, named Peare, whom Levine alleged was significantly less qualified than her. On appeal, the court reviewed whether the employer provided a legitimate, nondiscriminatory reason for selecting Peare over Levine. (§ 2:15)

**Stray remarks.** The Fifth Circuit in *Price v. Valvoline, L.L.C.*, upheld a termination based on a valid, non-discriminatory attendance policy despite derogatory comments from supervisors determined to be stray remarks. Despite evidence that plant managers had used racial slurs in describing how some employees referred to each other and derogatory comments implicitly directed to Price's race, the district court did not find such evidence as being direct evidence of discrimination and granted summary judgment. The Fifth Circuit affirmed, reasoning that the comments were stray remarks and that Price's termination was based on a valid, non-discriminatory reason. (§ 2:23)

### ***Disparate Impact***

**An alternative test with a lesser disparate impact failed to serve the department's needs.** The Seventh Circuit in *Erdman v. City of Madison* ruled that the fire department's physical abilities test had a disparate impact on women but did not violate Title VII. The city's test had a prima facie disparate impact on women, yet Erdman conceded that it was job-related and served the city's legitimate needs. Erdman demonstrated that there was an alternative test—the IAFF test—in use by many fire departments, which had a lesser negative impact on women. However, the trial court found that the IAFF test would have resulted in significant cost and overtime expense and that “certain elements of the [city's test] were designed specifically for Madison, in light of characteristics of the city, the Department's equipment or other considerations, including safety.” Erdman could not show that the IAFF test would serve the department's legitimate needs as well as the city's test. (§ 2:45)

### ***Religion and Employer's Duty to Accommodate***

**Seven circuit courts found for plaintiffs who were denied requested reasonable accommodations from mandatory COVID-19 vaccination policies.** The First, Third, Fourth, Sixth, Seventh, Eighth, and Tenth Circuits found for plaintiffs who were denied requested reasonable accommodations from mandatory COVID-19 vaccination policies allowing the cases to proceed to summary judgment or trial stage. Almost all of these cases were appealed after a district court granted a motion to dismiss responding to a Fed. R. Civ. P. 12(b)(6) motion. A few circuit court decisions upheld dismissal of complaints of religious discrimination in cases where employees objected to employers' COVID-19 vaccination policies. (§ 3:7)

**Undue burden test announced by the Supreme Court in *Goff* applied.** The Washington State Supreme Court adopted the *Goff* substantial undue burden test to apply to its expansive state nondiscrimination law in *Suarez v. State*. The case highlighted the tension between Washington’s expansive anti-discrimination law and conflicting priorities employers must weigh when considering religious accommodations. Statutory and case law protections for religious leave are strong. However, the state law allows business a liability shield and provides a 10-factor test that includes the employer’s resources, how many other workers are requesting the same day off, financial impact, and whether leave requests conflict with another employee’s right or a bargaining agreement. Suarez’s refusal to work on the Sabbath can be considered an “undue hardship” for an employer if an accommodation conflicted with a collective bargaining agreement, the Washington Supreme Court ruled. (§ 3:9)

**References to religion contained in a investigation report not direct evidence.** In *Hittle v. City of Stockton, California*, the Ninth Circuit, in an amended decision denying an en banc hearing and affirming the district court’s grant of summary judgment for the employer, held that (1) the deputy city manager’s comments about the fire chief being part of “Christian coalition” and part of “church clique” did not constitute direct evidence of discriminatory animus; (2) the city’s removal notice did not demonstrate direct evidence of discrimination; and (3) the city’s decision to remove the chief for misconduct was not result of religious discrimination. Hittle was an at-will employee of the City of Stockton, California (the “City”) and served as the City’s Fire Chief. Hittle engaged in conduct that his employer found objectionable and led ultimately to his termination. The City hired an outside independent investigator to investigate various allegations of misconduct. In a 250-page report, the investigator sustained almost all of the allegations of misconduct against Hittle. Based on the independent findings and conclusions set forth in the report, the City removed Hittle from his position as Fire Chief. (§ 3:14)

**Disparate treatment—Plausible allegations sufficient to survive motion to dismiss:** In *McNellis v. Douglas County School District*, Mr. McNellis brought a First Amendment retaliation claim under 42 U.S.C.A. § 1983 and religious discrimination and retaliation claims under Title VII and Colorado law. The district court dismissed the case. The Tenth Circuit reversed the dismissal of Mr. McNellis’ discrimination claims under Title VII and the Colorado Anti-Discrimination Act (CADA) and affirmed the dismissal of his First Amendment claim. McNellis was a former athletic director and assistant principal of a high school and

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expressed reservations about an extracurricular activity at the school, an upcoming performance of *The Laramie Project*, a play about the murder of a gay University of Wyoming student. McNellis offered to add a “Christian perspective” to the theatrical production. Shortly thereafter, he was placed on administrative leave, investigated, and ultimately terminated. The Tenth Circuit ruled that, while he failed to allege any direct evidence of discrimination, he plausibly made a prima facie case for circumstantial evidence of discrimination under the *McDonnell Douglas* paradigm, especially noting repeated references to his “religious comments.” (§ 3:14)

**Ministerial exception.** What is clear is that, when a claim is raised by an employee of a church or church institution, whether the ministerial exception applies to the specific employee is analyzed by a careful examination of the facts and that at least some discovery is essential to make out the contours. In *Hosanna-Tabor*, the Supreme Court expressly declined to adopt “a rigid formula for deciding when an employee qualifies as a minister” and instead considered “all the circumstances of [the plaintiff’s] employment.” And following in *Our Lady of Guadalupe School*, the Court emphasized that “[w]hat matters, at bottom is what an employee does.” The following decisions examine different facts.

The Ninth Circuit in *Behrend v. San Francisco Zen Center, Inc.*, in an ADA claim, held that the ministerial exception applies to employee who did mostly menial work. Although Behrend performed mostly menial work, the work itself was an essential component of Zen training, and he therefore played a role in carrying out the Center’s mission. The court rejected Behrend’s argument that the ministerial exception applies only to teachers and faith leaders. In contrast to *Behrend*, the Ninth Circuit in *Biel v. St. James School* ruled that the ministerial exception did not apply to a grade 5 teacher at Catholic school. (§ 3:15)

The Ninth Circuit in *Markel v. Union of Orthodox Jewish Congregations of America*, a wage and hour case, ruled that a kosher supervisor’s claims are categorically barred by the ministerial exception. (§ 3:15)

The Fourth Circuit in *Billard v. Charlotte Catholic High School* held that the ministerial exception applied to Catholic school’s termination of a same-sex teacher despite the fact that the defendant had waived the exception and instead relied upon Title VII’s religious exemption and Religious Freedom Restoration Act (RFRA). Billard, a teacher, sued Charlotte Catholic High School (“School”) for sex discrimination under Title VII after he was fired for his plans to marry his same-sex partner. The trial court denied the School’s motion for summary judgment and granted Billard’s motion for summary judgment. The Fourth Circuit reversed and remanded. The Fourth Circuit ruled that

Billard fell under Title VII's ministerial exception because he played a key role as a "messenger or teacher of the [School's] faith" and the trial court should have granted summary judgment in favor of the School. Further, the Fourth Circuit found that the School's educational mission was intertwined with the Catholic faith and teachers were expected to uphold faith in their teachings even if they were teaching non-religious subjects. (§ 3:15)

The Tenth Circuit in *Tucker v. Faith Bible Chapel International* held that the court lacked jurisdiction over denial of summary judgment on the ministerial exception defense because the fact-based inquiry left to the jury was not immediately appealable. The trial court denied summary judgment, finding a jury would have to resolve whether Tucker was a "minister." Faith Christian appealed, seeking to invoke the Tenth Circuit's jurisdiction under the collateral order doctrine permitting immediate appeal of the summary judgment order. The Tenth Circuit looked to the Supreme Court decisions to emphasize the fact based inquiry of whether the ministerial exception is met. First it noted that like the church autonomy doctrine, the "ministerial exception" "operates as an affirmative defense to an otherwise cognizable claim." The Tenth Circuit added that following those Supreme Court decisions, a number of circuit courts have also recognized the fact-intensive nature of this inquiry. (§ 3:15)

### ***Harassment***

**White employees claimed retaliation or violation of First Amendment rights because of mandatory unconscious bias training.** The Seventh Circuit in *Vavra v. Honeywell International, Inc.* addressed a retaliation claim of an employee who refused to take a DEI training program addressing unconscious bias. The court ruled that refusal to take DEI training is not protected activity under Title VII. Vavra sued for retaliation under Title VII after he was terminated for refusing to take the training. The court found that Vavra's refusal to watch the video was not protected activity under Title VII. The statute requires that the employee must have an objectively reasonable belief that the activity the employee opposes violates the law, and from this the employee must have some knowledge of the conduct the employee is opposing for the belief to be reasonable. Because Vavra had not watched the video in question, he had no basis of knowledge to make his belief reasonable. (§ 5:77)

**White employee claimed harassment and retaliation because of mandatory DEI training and other conduct.** A district court in Oregon ruled in a motion to dismiss that the plaintiff's claims were plausible where she alleged a series of facts creating an allegedly hostile work environment that were

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racially discriminatory based on her employer’s diversity, equity, and inclusion (DEI) policies and materials. The plaintiff alleged, among other things that the DEQ (1) segregated employees based on race by giving non-white employees one paid hour a week to enter “safe spaces” that were only available for non-white employees; (2) engaged an outside DEI firm and instructed employees to prioritize the views of non-white employees during meetings; (3) leadership clarified that this instruction was “serious, and not to be taken lightly”; (4) assigned reading materials that ascribed negative, stereotypical characteristics and attributes to whiteness and endorsed the statement “‘witness is a death sentence’ ”; and (5) in June and July 2023, distributed an organizational assessment that it required all employees to read materials that included negative statements based on race, specifically negative statements about “whiteness” or “white folks” that DEQ leadership adopted as the official view and policy of DEQ. She alleged that mandatory trainings that “aggressively promoted” anti-white concepts caused Plaintiff significant mental and personal stress. (§ 5:77)

**DEI training—Lacked standing.** In *Henderson v. Springfield R-12 School District*, two public school employees sued under 42 U.S.C.A. § 1983, claiming that during an equity training session the school compelled them to speak as private citizens on matters of public concern and engaged in viewpoint discrimination in violation of the First and Fourteenth Amendments. School officials instructed the attendees on how to become “Anti-Racist educators, leaders and staff members.” One employee was told her views were “confused” and “wrong,” and another was told she “was born into white privilege.” Both stopped talking for fear of being asked to leave. The court held that these employees lacked standing because there was no injury-in-fact. They were not punished or disciplined and received full pay and professional-development credit for attending the training. (§ 5:77)

## **ADEA**

**Application of *McDonnell Douglas* paradigm in summary judgment.** In *Dabbasi v. Motiva Enterprises, L.L.C.*, the Fifth Circuit held in deciding a motion for summary judgment under the *McDonnell Douglas* paradigm that multiple claims of discrimination must be evaluated collectively, not in isolation. The court found that the trial court improperly evaluated each individual event in isolation when Dabbasi was arguing that the events collectively proved pretext for discrimination. (§ 21:23)

**Sex-plus age discrimination.** The Eleventh Circuit in *McCreight v. AuburnBank* recognized sex-plus-age discrimination, noting that “the basis for the alleged discrimination is *sex*; the *age* factor’s work is in defining the subgroup in which the alleged

sex discrimination occurred.” (§ 21:30 and § 8:28)

**Hostile environment age harassment.** The Sixth Circuit in *McNeal v. City of Blue Ash, Ohio* reversed summary judgment on the hostile environment claim. The court ruled that McNeal demonstrated a genuine dispute of material fact as to the existence of an age-based hostile work environment. The evidence supporting a hostile-work-environment claim was not the unfavorable assignment itself, but the fact that the Department allegedly engaged in conduct designed to (1) frustrate, demean, and embarrass him in front of his coworkers; (2) justify more disciplinary action against him when he inevitably fell short of the unreasonable expectations; and (3) force him further under the microscope by requiring him to report to two supervisors on his progress weekly. The Sixth Circuit framed its holding through the lens of Supreme Court precedent, including *National R.R. Passenger Corp. v. Morgan* and *Muldrow v. City of St. Louis*. (§ 21:40)

## ADA

**State university has Eleventh Amendment immunity from suit under the ADA.** The Sixth Circuit in *Stanley v. Western Michigan University* (WMU) held that Stanley’s federal claims under the ADEA should be dismissed for lack of subject-matter jurisdiction based on Eleventh Amendment immunity. (§ 23:8)

**New Jersey cannabis statute not applicable to job applicant who failed drug test.** The Third Circuit in *Zanetich v. Wal-Mart Stores East, Inc.* ruled that the New Jersey cannabis statute has no implied remedy for job applicants who fail drug tests. (§ 23:23)

**A request for a “do-over” is not a reasonable accommodation.** The Seventh Circuit in *Schoper v. Board of Trustees of W. Ill. Univ.* addressed whether Schoper’s straightforward request for more time to achieve tenure was a reasonable accommodation. The Seventh Circuit ruled that what Schoper requested was not a reasonable accommodation; instead, it found that she effectively requested a “do-over.” This the court rejected. The court noted that the Seventh Circuit previously held that requesting a “second chance is not a reasonable accommodation when it does not request that the employer change anything, but rather simply requests an opportunity for the employee to change their behavior.” (§ 23:45(2) and § 9:16)

**Employer need not make lesser accommodation than prescribed by employee’s doctor.** The Seventh Circuit ruled that where the employee’s doctor’s prescribed restrictions make accommodation unreasonable, an employer is not required to provide lesser reasonable accommodation at employees request.

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### (§ 23:45(3))

**Assigning employee to lower-paid position.** The Sixth Circuit in *Cooper v. Dolgencorp, LLC* held that reassigning employee to a different position with less pay is a reasonable accommodation under the ADA when no comparable positions are available. (§ 23:45(4))

**Whether telecommuting from home is a reasonable accommodation.** Not everyone desires to work at home, and, in a twist of the cases seeking work at home as a reasonable accommodation, the D.C. Circuit ruled in *Ali v. Regan* that an employer may not require an employee to telework from home as a reasonable accommodation for the employee’s disability when the employee would rather work in person. (§ 23:46)

**Employer’s work analysis teams finding accorded deference in determining essential functions of the job.** The Eighth Circuit in *Goosen v. Minnesota Dept of Transportation* found the employer’s work analysis team’s evaluation of the job should be accorded deference. The court found that the employer’s assessment of the essential functions of the job was deserving of deference. The descriptions of the essential functions of the job from the job posting were found to not be controlling with regard to whether Goosen’s restrictions put him within or outside the scope of the job’s requirements. (§ 23:49)

**Punitive damages upheld.** The Seventh Circuit *EEOC v. Wal-Mart* upheld compensatory and punitive damages verdict for Down’s syndrome employee was upheld. The Seventh Circuit affirmed the verdict and remanded to reconsider the denial of an injunction. The Seventh Circuit found that the verdict for punitive damages was consistent with the employer being recklessly indifferent to the employee’s statutory rights. (§ 23:64)

### ***Compound Discrimination—Intersectionality of Protected Categories***

**Chapter 29 updated noting the difficulty of proving the intersectionality of multiple claims of discrimination.** Around the same time when this chapter was written focusing on the term compound discrimination as the intersection of race and gender, Professor Kimberlé Crenshaw’s groundbreaking article *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics* was published, which introduced the concept of intersectionality to legal theory. More recently in 2024, Circuit Judge Abudu in *McCreight v. AuburnBank*, in a “sex-plus” case, offered some perspective with respect to the “sex-plus” dilemma plaintiffs who are members of multiple protected groups face when trying to assert and prove their discrimination claims.

He first noted that “these identity constructions are more nuanced and merit further attention.” Further, he stated that individuals who are members of multiple protected classes face a heightened risk of discrimination. Lastly, he noted, “Despite this increased risk of discrimination, the legal landscape is often unreceptive to subgroup discrimination claims.” (§ 29:1)

### **FMLA**

**Notice to employer inadequate.** The Fifth Circuit in *Cerda v. Blue Cube Operations, L.L.C.* examined whether an employee who informed her supervisor of her plan to care for her ailing father during lunch breaks but did not indicate a need for additional time outside the half-hour lunch period gave adequate notice to her employer. Several months after she began this practice, her supervisor suggested she contact human resources to inquire about FMLA leave. The employee informed a human resources employee, with whom she happened to cross paths in a hallway, that she might explore “possibly getting FMLA,” but she never followed up with human resources to begin the formal process of requesting FMLA leave nor requested FMLA paperwork as required by the employer’s procedures. She knew about the procedures because she previously had taken FMLA leave. The Fifth Circuit held that these actions were insufficient to put her employer on notice that she actually intended to take FMLA leave.

The First Circuit in *Garland-Gonzalez v. Universal Group, Inc* ruled that employee’s notice to employer was inadequate where she requested that she be allowed to work remotely, and while working remotely received her normal salary and did not burn any accrued leave. The district court properly held that such a request was not a request for protected leave under the FMLA. Garland presented an email that she claimed invoked FMLA rights. The court found the email was ambiguous, and plausibly supportive of her request for remote work such that no issue of fact could be said to exist. (§ 30:39)

**Non-medical evidence may be used to refute a medical certification of an FMLA qualifying condition.** Employers who question the validity of a medical certification submitted are not limited to seeking recertification through a different doctor. The Ninth Circuit ruled in *Perez v. Barrick Goldstrike Mines, Inc.* that the FMLA does not require an employer to provide contrary medical evidence if it doubts the validity of the original certification. It upheld the trial court’s jury instructions to consider the non-medical video and investigator’s evidence that Barrick offered at trial in support of its argument that Perez did not have a serious health condition within the meaning of the FMLA. (§ 30:44)

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**Circuit split whether to apply the “but-for” or motivating factor standard to retaliation claim.** There is a circuit split over the proper causation standard for retaliation claims under the FMLA. The Eleventh Circuit in *Lapham v. Walgreen Co.* joined the Fourth Circuit and held that the “but for” legal standard applies retaliation claims under the FMLA. The Second and Third Circuits follow the motivating factor standard. (§ 30:44)

**Honest belief rule applied where issue not raised on appeal and in other decision upheld without requiring surveillance.** The Fourth Circuit in *Shipton v. Baltimore Gas and Electric Company* upheld an employer win in an FMLA case based on its honest belief that the employee was misusing leave. The court noted that the Fourth Circuit has not adopted the honest belief doctrine, but did apply it in this case because the issue of whether the doctrine applies was not preserved for appeal. The Seventh Circuit in *Juday v. FCA US LLC* addressed whether an employer’s investigation that husband and wife employees who frequently took overlapping FMLA leave violated the FMLA based on an honest suspicion without conducting surveillance. The Seventh Circuit affirmed summary judgment for the employer, finding the evidence was sufficient to support the employer’s honest suspicion of FMLA abuse, and held an employer does not need surveillance evidence in order to have an honest suspicion of FMLA abuse. (§ 30:44)

**Discouragement without denial of FMLA leave is a violation, but remote work is not FMLA leave.** The Second Circuit in *Kemp v. Regeneron Pharmaceuticals, Inc.* held that an employer can violate the FMLA merely by interfering with the employee’s benefits under the FMLA without actually denying the employee’s request for those benefits. The court found that, where an employer merely discourages but does not deny FMLA rights, a violation has nevertheless occurred. Kemp had a need to care for a sick child. The employer only agreed to allowing Kemp one day a week of remote work even though similarly situated employees were able to work remotely more often. The Second Circuit articulated an important difference between remote work and FMLA leave. Kemp asserted that Regeneron substantially limited her remote workdays and punished her for working remotely. The Second Circuit found that this argument misunderstands the nature of the benefits conferred by the FMLA. It stated that the FMLA does not entitle employees to work remotely or make it unlawful for an employer to punish an employee who works remotely. (§ 30:44)