

Preface

Employment Discrimination Law and Litigation is intended as a comprehensive analysis of federal employment discrimination law, with special emphasis on the provisions of Title VII of the 1964 Civil Rights Act. In addition to Title VII, the treatise covers the Age Discrimination in Employment Act, the Equal Pay Act, the Reconstruction Era Civil Rights Statutes such as 42 U.S.C.A. § 1981, the Americans with Disabilities Act, the antidiscrimination provisions of the Immigration Reform and Control Act, and the Family and Medical Leave Act. It also covers insurance law concerning employment discrimination. Many of these statutes contain parallel or similar substantive and/or procedural provisions derived from Title VII, and the courts interpreting these statutes frequently look to Title VII case law for guidance. The treatise uses a systematic examination of case law development together with a litigation format to explore and evaluate the basic theories and laws of employment discrimination and the litigation process, including pre-trial motions, discovery, evidence, and the trial.

Judge Posner accurately conveyed the fact that federal employment discrimination has become exceedingly complex when he wrote: “How many plaintiffs can successfully negotiate the treacherous and shifting shoals of present-day federal employment discrimination law?” Judge Posner was responding to some of the many 1988-1989 term decisions of the Supreme Court, which turned on their head longstanding doctrines such as the burden of proof in a disparate impact case.

Congress reversed in whole or part eight Supreme Court decisions that cumulatively had severely limited the vitality of the civil rights laws prohibiting discrimination in the workplace. After a contentious two-year struggle that often focused on issues of race, Congress passed the Civil Rights Act of 1991. The reversal of these decisions was a strong message to the Supreme Court that Congress rejected their narrow interpretation of the civil rights laws and that it understood the need to expand the scope of the laws to provide adequate protection to victims of discrimination. The Act, § 1745, amended Title VII, § 1981 of the Civil Rights Act of 1866, the Attorney’s Fee’s Award Act of 1976, the Americans with Disabilities Act of 1990, and the Age Discrimination in Employment Act of 1967.

Significantly, it provides for compensatory and punitive damages and jury trials in cases of intentional discrimination. The availability of jury trials, in particular, had an enormous impact

on the litigation of these cases. The Act also restored the burden and standard of proof under the disparate impact theory, once again made actionable posthiring employment actions in race cases, limited challenges to affirmative action plans, liberalized the timeliness of challenges to seniority systems, codified the standard of proof in a mixed-motive case, extended the extraterritoriality reach of Title VII and the Americans with Disabilities Act, provided for expert witness fees, extended the filing time in actions against the federal government and the filing time in age cases filed with the EEOC and prohibited “race-norming” of tests.

The 1990 legislative initiatives also contributed to the turbulent changes. First, Congress passed the Civil Rights Act of 1990, which proposed to reverse a series of Supreme Court decisions, most notably *Wards Cove Packing Co. v. Atonjo* and *Patterson v. McLean Credit Union*. President Bush vetoed the Act, asserting that his opposition was based on his belief that the Act would cause employers to establish “quotas.” The Senate failed by one vote to override the veto, and President Bush became the third president in United States history to veto a civil rights bill. In response, the first bill introduced into the 102d Congress was H-1, the Civil Rights Act of 1991. Second, the Americans with Disabilities Act signed by President Bush on July 26, 1990, profoundly broadened the scope of employment antidiscrimination protection available to the disabled. Third, Congress reversed the Supreme Court’s decision in *Public Employees Retirement System of Ohio v. Betts* by enacting the Older Workers Benefit Protection Act amendment to the Age Discrimination in Employment Act.

The Supreme Court decision in the 1991 term in *Gilmer v. Interstate/Johnson Lane Corp.* and its decision in *Circuit City Stores, Inc. v. Adams* in 2001 might significantly change in the way employment discrimination disputes are decided. The Court held in an Age Discrimination in Employment Act case that a preemployment agreement to arbitrate disputes was valid. Also, Congress encouraged the use of alternative means of dispute resolution in the Civil Rights Act of 1991.

The employment rights of lesbians and gays became a foremost civil rights struggle in 1993 when President Clinton announced that he intended to end the ban on their service in the military forces. Legislation was introduced to add “sexual orientation” as a protected group under Title VII and in 1996 failed by one vote in the Senate. While federal action is pending, eleven states, the District of Columbia, and scores of cities enacted legislation prohibiting discrimination based on sexual orientation.

The treatise is divided into six parts. Part A, Categories of Discrimination, examines two principal theories of employment

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discrimination law: disparate impact and disparate treatment. Other theories of discrimination, as well as legislation protecting against discrimination, are examined, including religious discrimination.

Part B, *The Employment Process*, explores the full range of activities within the realm of employment. Forms of discrimination against protected group members under Title VII are discussed, including those involving the creation of an applicant pool, decisions concerning wages and benefits, and retaliation for exercising protected rights. Special attention is paid to the forms of discrimination that affect particular groups, including pregnant women, single women, and racial and ethnic minorities. Sexual harassment law is covered extensively, including the use of mental health experts, evidentiary issues such as Federal Rule of Evidence 412, and the employers' obligation to provide a meaningful complaint system.

Part C, *Litigation*, examines the litigation of a discrimination claim. Coverage includes the procedures established under Title VII including filing requirements, and also focuses on the EEOC administrative process, available relief, and pitfalls to avoid. Defendants' motions to dismiss are explored especially the challenges and defenses to employers - promulgated mandatory arbitration raised when employers move to dismiss and compel arbitration of a plaintiff's claim of discrimination filed in court. Discovery strategy and issues are discussed, including ethical considerations. Statistical proof and validation of selection criteria are carefully examined. The trial of an employment discrimination case, especially before juries, is discussed as well as the myriad of evidentiary issues that frequently surface before and during the trial. Lastly, available relief, including backpay, compensatory and punitive damages, affirmative action, and attorney's fees are explored.

Part D, *Other Legislation Protecting Against Discrimination*, examines the substantive and procedural provisions of the Age Discrimination in Employment Act, the Americans with Disabilities Act, the antidiscrimination provisions of the Immigration Reform and Control Act, the Reconstruction Era Civil Rights statutes including 42 U.S.C.A. §§ 1981, 1983 and 1985(3), and the Equal Pay Act. Since these Acts contain many parallel provisions derived from Title VII, appropriate cross references are provided. Sexual orientation discrimination is explored, focusing on state laws and the limited protection available under Title VII.

Part E, *Special Problems of Protected Groups*, examines issues unique to protected groups including national origin, alienage discrimination, language and accent discrimination, and "compound" discrimination, focusing on race plus gender.

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Part F, Related Legislation, examines the Family and Medical Leave Act of 1993 and Insurance Coverage of Discrimination Claims. Valuable practice aids, including sample interrogatories and key sections of the relevant laws, are also included.

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