Highlights of the 2026-1 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:

Supreme Court Decisions

In a unanimous opinion written by Justice Jackson in *Ames v. Ohio Department of Youth Services*, on June 5, 2025, the Supreme Court addressed the question whether, to satisfy its prima facie burden under *McDonnell* and *Burdine*, a plaintiff who is a member of a majority group must also show "background circumstances to support the suspicion that the defendant is that unusual employer who discriminates against the majority." It held that "this additional 'background circumstances' requirement is not consistent with Title VII's text or our case law construing the statute." It vacated the dismissal of the Title VII claims of a heterosexual woman who claimed she was denied a promotion and ultimately demoted because of her sexual orientation and remanded. **(§ 2:4)**

In *Waetzig v. Halliburton Energy Services, Inc.*, a terminated employee filed an age discrimination case under the ADEA against his former employer in federal court. The employer asserted that he was required to arbitrate. Waetzig acquiesced and then submitted his claim to arbitration. At that point, Waetzig could have asked the district court to stay his federal lawsuit pending the arbitration proceedings under 9 U.S.C.A. § 3. Waetzig had preserved his right to refile the same claims in the future.

Waetzig lost at arbitration. In Waetzig's view, however, the arbitrator failed to follow various procedural rules required by the parties' arbitration agreement. To remedy that alleged error, Waetzig turned back to federal court. Waetzig asserted that the district court could reopen the case under Fed. R. Civ. P. 60(b), which permits a court, "[o]n motion and just terms," to "relieve a party . . . from a final judgment, order, or proceeding." The question presented to the court was whether Rule 60(b) permits a court to "relieve a party . . . from a final judgment, order, or proceeding." It held that a Rule 41(a) voluntary dismissal without prejudice qualifies as a "final . . . proceeding" under Rule 60(b). Thus, the district court could reopen the case and exercise jurisdiction over Waetzig's motion to vacate the arbitration award. **(§ 13:70)**

In *Stanley v. City of Sanford, Fla.*, Justice Gorsuch, writing in part for the Court and a plurality, held that to prevail under Title I of the ADA, a plaintiff must plead and prove that she held or desired a job, and could perform its essential functions with or without reasonable accommodation, at the time of an employer's alleged act of disability-based discrimination. The question before the Court was whether a retired employee who does not hold or seek a job is a "qualified individual." The Court noted that the Eleventh, Sixth, Seventh, and Ninth Circuits had ruled that Title I's antidiscrimination provision "does not protect people who neither held nor desired a job with the defendant at the time of discrimination" whereas the Second and Third Circuits took a different view. To sum up, the Court held that, to prevail under 42 U.S.C.A. § 12112(a), a plaintiff must plead and prove that she held or desired a job, and could perform its essential functions with or without reasonable accommodation, at the time of an employer's alleged act of disability-based discrimination. Importantly, it noted that "a variety of suits involving retirement benefits might well proceed under that rule." **(§ 23:10)**

The Supreme Court in a 5–4 decision in *Medical Marijuana, Inc. v. Horn* held that a fired employee has a Racketeer Influenced and Corrupt Organizations Act (RICO) claim against seller of purportedly THC-free tincture. Douglas Horn was working as a commercial truck driver when he crashed his truck and injured his back and shoulder. Months later, he was still suffering from chronic pain, and neither physical therapy nor traditional medicine provided relief. While searching for a natural alternative, Horn came across "Dixie X," a tincture infused with cannabidiol—more commonly known as CBD. CBD, like its cannabis "cousin" tetrahydrocannabinol (THC), is a naturally occurring chemical compound found in the cannabis plant. Only THC, however, has the mind-altering properties associated with marijuana. Because a positive drug test could cost him his job, Horn was wary of any product that might contain THC. Horn bought a bottle and gave it a try. A few weeks later, Horn's employer selected him for a random drug screening. The test detected THC in his system. After Horn refused to complete a substance-abuse program—in his view, doing so would constitute "an admission to doing drugs," his employer fired him. Horn then sued the maker of the tincture under the RICO, which creates a cause of action for "[a]ny person injured in his business or property" by reason of a criminal RICO violation. The trial court denied his claim on the ground that his lost employment derived from a personal injury, and that a statute forecloses recovery not only for personal injuries, but also for business or property harms that result from such injuries. Although there can be no RICO claim for a personal injury itself, the Supreme Court held that a plaintiff may seek treble damages under RICO for business or property loss even if the loss resulted from a personal injury. **(§ 23:23)**

New Section

§ 23:63. Challenging the time it took the employer to offer an accommodation as unduly delaying the accommodation

Some litigants assert to support a failure to accommodate claim, that the employer failed to reasonably accommodate by unduly delaying in providing the accommodation. For example, in *Mullin v. Secretary, U.S. Department of Veterans Affairs*, Ms. Mullin argued that the Department failed to reasonably accommodate her by unduly delaying in providing her a full-time work-from-home accommodation in light of her known health conditions. Ms. Mullin argued that the Department unduly delayed in providing, in her view, the only reasonable accommodation for her medical conditions—a full-time work from home accommodation. The parties disputed the length of the alleged delay before Ms. Mullin received a full-time work-from-home accommodation. Although the Department argued—and the district court agreed—that there was only a three-month delay, if any, Ms. Mullin argued that the Department unreasonably delayed in providing her requested accommodation for 10 months. The Court of Appeals disagreed with Ms. Mullin's estimation of the delay. It found that the record reflected that Ms. Mullin was away from work on medical leave due to her cancer treatment during the latter half of 2012 and did not return to work until January 2013. Thus, it concluded Ms. Mullin cannot fairly cast the period in which she was away from work due to her cancer treatment as an unreasonable delay on the part of the Department. Thus, it ruled that the delay in granting Ms. Mullin the accommodation of full-time work from home was three months. Some courts have held that an unreasonable delay in providing an accommodation can violate the ADA or the Rehabilitation Act. In assessing claims of unreasonable delay, courts consider "the length of the delay, the reasons for the delay, whether the employer has offered any alternative accommodations while evaluating a particular request, and whether the employer has acted in good faith." The Fifth Circuit in *Strife v. Aldine Independent School District* held that unreasonable delays in accommodation process are sufficient to support failure to accommodate claim under ADA. Strife sued for disability law violations. Strife had physical and psychological disabilities which have been certified by the Veterans Administration (VA). The employer eventually granted Strife an accommodation after six months of back and forth which included disregarding communications from treating physicians for not having official letterhead or not having certain certifications. The circuit court found the employer had impermissibly delayed the ADA interactive process by requiring additional medical certifications and independent medical evaluations despite information provided by Strife and her doctors. Delay in providing an accommodation was found in this case to be indicative of a potential failure to engage in the ADA process in good faith. The Fifth Circuit noted that Strife's allegations did not merely concern delay; they intimated a lack of good faith from AISD to meaningfully evaluate her request in an appropriate and timely manner. **(§ 23:63)**

New Developments

Religion and Employer's Duty to Accommodate

Circuit reversed itself after Supreme Court's *Goff* decision concerning name of transgender students. The Seventh Circuit in *Kluge v. Brownsburg Community School Corp.* first ruled that the school was not required to accommodate teacher's religious objection to calling transgender students by their registered names versus birth names in affirming summary judgment for the school. After this opinion issued, the Supreme Court decided *Groff v. DeJoy*, where the Court clarified, for Title VII religious accommodation claims, what an employer must show to establish "undue hardship." On rehearing, the Seventh Circuit held that the school was not entitled to summary judgment based on undue hardship. The school did not produce undisputed facts demonstrating an "excessive" or "unjustifiable" hardship on its mission of "fostering a safe, inclusive learning environment for all." There was conflicting evidence whether calling students by their last names caused emotional distress. **(§ 3:5)**

Accommodating religious beard grooming. Third Circuit in *Smith v. City of Atlantic City* addressed whether Alexander Smith, a Christian who worked for the Atlantic City Fire Department, was discriminated against because of refused to shave off his beard. The City prohibited Smith from growing a beard of any length, contrary to his religious beliefs. After the City denied his accommodation, Smith sued alleging violations of the Free Exercise Clause, the Equal Protection Clause, and Title VII's accommodation and anti-retaliation provisions. The district court granted summary judgment for the City on all four claims. The Third Circuit vacated Smith's Title VII accommodation claim and free-exercise claim but affirmed on the equal protection claim and the Title VII retaliation claim. It ruled that the City had not undisputably shown that Smith's original request "to continue to wear [his] beard" would impose an undue hardship. **(§ 3:6)**

Accommodations based on refusal to be vaccinated. Circuit courts continue to allow plaintiffs denied reasonable accommodations from mandatory COVID-19 vaccination policies to proceed either to the summary judgment or trial stage. **Second Circuit—**In *Gardner-Alfred v. Federal Reserve Bank of New York*, the Second Circuit affirmed the district court's granting of summary judgment for one plaintiff and reversed and remanded the grant of summary judgment for the second plaintiff. The Second Circuit found that there was competing evidence in the record with respect to whether Diaz's sincerely held religious beliefs conflicted with the Federal Reserve's vaccination policy. On the one hand, Diaz claimed that she had a religious objection to the COVID-19 vaccines, based on her Catholic faith, because she believed that they were created using aborted fetal cells. On the other hand, there is evidence that Diaz also had secular objections to the COVID-19 vaccines, may have acted inconsistently with her professed religious beliefs in utilizing other medical products, and had been instructed by her Catholic pastor that the Church did not object to the COVID-19 vaccines. Moreover, the uncontradicted scientific evidence in the record was that mRNA COVID-19 vaccines do not contain and were not manufactured with aborted fetal cells. Summary judgment was affirmed against Gardner-Alfred. **Eighth Circuit—**In *Brokken v. Hennepin Cnty.*, Petra Brokken had religious objections to COVID-19 vaccinations and testing. She resigned after being told she would be terminated and would lose benefits, such as her banked vacation time, sick time, and comp time. The Eighth Circuit held that she plausibly pled constructive discharge. She satisfied her burden of pleading religious discrimination in violation of Title VII and the Minnesota Human Rights Act in that her alleged religious beliefs conflict with her employer's policy. She cannot recover under Minnesota's Refusal of Treatment statute because it does not create a private right of action. The Eight Circuit in *Conway v. Mercy Hospital St. Louis* found that Mercy Health was a religious organization exempt from Title VII. Conway sued alleging religious discrimination under Title VII related to her termination for noncompliance with a COVID vaccine mandate. The district court granted summary judgment for the employer. The Eighth Circuit affirmed. The court found that the employer, a religious hospital is a religious organization and therefor exempt from Title VII. Mercy Health was found by the court to be essentially an extension of the Catholic Church, and thus its work makes it a religious organization.

Other circuit decisions affirmed dismissal of complaints. The **First Circuit** in *Rodrique v. Hearst Communications, Inc.* ruled that Title VII does not require the employe to prove efficacy of vaccine in religious discrimination case. Rodrique was denied a religious exemption to the employer's COVID-19 vaccine mandate and was terminated. The circuit court assumed, without deciding that Rodrique had articulated a religious belief, but affirmed the lower court's decision on undue hardship grounds. The employer argued on appeal that the costs of accommodating through regular testing would have been substantial. Rodrique did not contest whether the hardship was undue, but merely argued that there was no burden because the employer had not shown that the vaccine impacted the transmissibility of the virus. The court found that relying on objective evidence available, including the views of public health experts was sufficient proof to satisfy the employer's burden under Title VII. The **Second Circuit** in *Russo v. Patchogue-Medford School District* found that religious exemption from COVID-19 vaccination requirement would be an undue hardship. A school district put an employee on unpaid leave after refusing her claim to a religious exemption from a requirement to be vaccinated for COVID-19 or be tested weekly. The Second Circuit upheld summary judgment for the district because creating an exemption would have violated New York State's COVID-19 testing requirements (an undue hardship) and allowing remote work would not allow her to conduct the essential functions of her job. Also, placing her on leave was not retaliation under Title VII because the district's conduct involved enforcing the valid vaccination or testing requirements under state law. In the **Third Circuit** in *Bushra v. Main Line Health, Inc.*, Bushra worked in MLH's Lankenau Medical Center for more than 20 years, most recently as an attending physician and Campus Chief of the Emergency Department. His regular duties required him to work in-person in the emergency room and to interact with patients, including those with COVID-19. MLH adopted a mandatory vaccination policy that required its employees and staff to show proof of COVID-19 vaccination. Alternatively, MLH offered the opportunity to request medical or religious exemptions, but cautioned that "it is possible that there may not be a reasonable accommodation that will allow every person with such an exemption to continue to work onsite while unvaccinated." MLH approved "some" religious exemption requests, but the record did not indicate whether or how it accommodated those individuals. Dr. Bushra applied for a religious exemption to MLH's COVID-19 vaccination policy, which MLH denied. Dr. Bushra's arguments on appeal largely challenged the district court's determination that MLH established the undue hardship defense to his religious discrimination claims. The Third Circuit noted that to establish undue hardship, MLH must demonstrate a hardship that is "substantial in the context of [its] business." It found that MLH met this burden by showing, and Dr. Bushra admitting, that Dr. Bushra treated vulnerable patients in the normal course of his clinical duties and interacted with patients with COVID-19. Further, it provided evidence that hospital settings like Lankenau Medical Center facilitated COVID-19 transmission between patients and healthcare workers. MLH provided unrebutted expert testimony that unvaccinated healthcare workers, like Dr. Bushra, presented an increased risk of transmitting COVID-19 to others, particularly when they interacted with vulnerable groups. The Third Circuit ruled that this substantial, undisputed evidence established undue hardship. The **Ninth Circuit** in *Detwiler v. Mid-Columbia Medical Center* found that the religious belief underpinning the plaintiff's accommodation request to be secular in nature and thus not protected by Title VII. The Fourth Circuit in *Hall v. Sheppard Pratt Health System, Inc.* upheld summary judgment for an employer that terminated an employee rather than accommodating her request for a religious exemption from its COVID vaccination requirement. The employer served medically vulnerable hospital patients, and the employee's job involved greeting patients and their families in the lobby, making sure they completed intake paperwork, and answering any questions they had. This welcome process sometimes included a "long talk," especially if the patient was a minor accompanied by concerned parents. The court held that granting an exemption would impose an undue hardship on the employer. **(§ 3:7)**

Disparate treatment. In *Damiano v. Grants Pass School District No. 7*, an assistant principal and teacher who were terminated and then reinstated in different positions after engaging in campaign in opposition to school district's policy on gender identity and use of preferred names and pronouns for transgender students brought action against district, superintendent, principal, and school board members, asserting alleging violations of First and Fourteenth Amendments under 1983 and Title VII as well as the Oregon Constitution. The district court granted summary judgment to the school district, which was reversed, in most part, by the Ninth Circuit. Plaintiffs Sager and Medart were employed by the School District. Medart began working as a science and health teacher and Sager joined as an assistant principal. Plaintiffs claimed that they had engaged in the expressive conduct that led to their terminations because of their views on subjects such as gender identity, parental rights, and education policy, which are based on their philosophical and Christian religious beliefs, as well as their understandings of scientific evidence. In addition to their constitutional claims, in terminating the plaintiffs, they asserted that the School District discriminated against them on the basis of their religion in violation of Title VII. The district court granted summary judgment to the School District on the Title VII claim because it concluded that the plaintiffs failed to raise triable issues regarding the first and fourth elements of their prima facie case. On the first element, the district court held that the plaintiffs were not members of a protected class because even "[a]ssuming that being a Christian is a protected class, Plaintiffs do not cite to any Bible passage or scripture to support the views expressed in their 'I Resolve' video." The Ninth Circuit ruled that this was an error because "[d]iscrimination on the basis of religious beliefs is discrimination on the basis of religion for purposes of Title VII." The Ninth Circuit vacated the district court's grant of summary judgment on the Title VII claim. **(§ 3:14)**

Ministerial exception. Courts relying on the Supreme Court's decision in *Our Lady of Guadalupe* examine whether the person in the position at issue is playing a vital part in carrying out the employers religious mission or is performing a number of important religious functions. For example, the Sixth Circuit in *Pulsifer v. Westshore Christian Academy* found that the ministerial exception bars suit by the terminated dean of students. Aaron Pulsifer was fired from his job as the dean of students and assistant principal at a private religious elementary school. He sued claiming race and sex discrimination. The Sixth Circuit upheld summary judgment for the school due to the ministerial exception. Pulsifer performed a number of important religious functions—leading the staff in religious devotions each morning, leading two religious youth programs, and leading religious services and ceremonies. The fact that his duties were not exclusively religious and involved other administrative tasks "typical of secular administrators" was insufficient to overcome the religious nature of his duties.

The Ninth Circuit held in *McMahon v. World Vision Inc.* held that the employment discrimination claims of a customer service representative (CSR) for World Vision Inc. were barred based on the ministerial exception because the record showed that CSRs performed key religious functions central to World Vision's mission. World Vision, Inc., extended a job offer to Aubry McMahon for a remote position as a CSR. After learning that

McMahon was in a same-sex marriage, World Vision revoked its job offer. McMahon sued in federal district court, alleging discrimination based on sex, sexual orientation, and marital status under Title VII of the Civil Rights Act of 1964 and the Washington Law Against Discrimination (WLAD). The Ninth Circuit held that the ministerial exception applied, finding that CSRs perform key religious functions central to World Vision's mission, including that CSRs are responsible for effectively communicating World Vision's worldwide ministries and projects to donors and supporters. Further, it found that CSRs engaged with donors in prayer and give them the opportunity to join World Vision's religious mission through financial contributions. Thus, relying on the "vital religious duties" language from *Our Lady of Guadalupe Sch.*, it noted that each of these duties lies at the core of World Vision's religious mission of "working with the poor and oppressed to promote human transformation, seek justice and bear witness to the good news of the Kingdom of God." **(§ 3:15)**

Sovereign immunity protects federal government from suits at law for damages. Sovereign immunity protects federal government from suits at law for damages from religious freedom violations under RFRA against officials in their official capacity. RFRA's waiver provides in relevant part that a "person whose religious exercise has been burdened in violation of" the Act may "obtain appropriate relief against a government." However, all the circuit courts of appeals considering whether claims seeking monetary damages have ruled that RFRA waives such claims because defendants, in their official capacities, fall within the Act's definition of a "government." RFRA permits damages claims against federal officials in their individual capacities. **(§ 3:20)**

Office of Personnel Management memorandum expands the presence of religion in the federal workforce. On July 28, 2025, the Office of Personnel Management published a memorandum titled "Protecting Religious Expression in the Federal Workplace." It expands the presence of religion in federal workplaces, giving employees wide latitude to express their beliefs. The memorandum indicates that federal government employees may display Bibles, rosary beads, and "other indica of religion" in their workspaces. Further, the memorandum announced that federal employees may pray at work and persuade colleagues to adopt their religious beliefs. That includes "attempting to persuade others of the correctness of their own religious views." Federal employees may also encourage colleagues to participate in religious expressions, as long as it does not turn into harassment. **(§ 3:20)**

Harassment

Definition of a supervisor. In a 4–3 decision, the Connecticut Supreme Court in *O'Reggio v. Commission on Human Rights and Opportunities* adopted the *Vance* guidelines for determining which supervisors' actions will result in employer liability. **(§ 5:44)**

Employer liability for off-site harassment. The Ninth Circuit in *Okonowsky v. Garland*, in reversing summary judgment in favor of the employer, "reject[ed] the notion that only conduct that occurs inside the physical workplace can be actionable, especially in light of the ubiquity of social media and the ready use of it to harass and bully both inside and outside of the physical workplace." Lindsay Okonowsky, a staff psychologist in a federal prison, discovered that a corrections Lieutenant with whom she worked, and who was responsible for overseeing the safety of guards, prison staff, and inmates in the unit where she worked, operated an Instagram account, which was followed by more than one hundred prison employees. She learned that the Lieutenant had posted sexually offensive content about work, and that she was a personal target. Okonowsky sued the Bureau of Prisons under Title VII, claiming that the Bureau failed to take adequate measures to address a hostile work environment at the prison.

The First Circuit in *Caruso v. Delta Air Lines, Inc.* ruled that in harassment off site by coworker claim the employer must show reasonable actions taken upon knowledge of the act. Caruso, a flight attendant, was involved in an incident with a flight officer at a hotel while on layover. The court found that the officer was not Caruso's supervisor, and as such the employer would only be liable if the alleged harassment was causally connected to the employer's negligence. As such the employer's actions are evaluated for reasonableness. In this case there was only one incident, which the employer investigated—there was no conduct of which the employer knew or should have known upon which action could have been taken. It was further found that the employer's investigation of the allegation was reasonable, the employer continued to investigate the allegation after a police detective determined no grounds for criminal charges existed. **(§ 5:44)**

Aspersions from patients suffering severe mental impairment, insufficiently severe or pervasive for a racial harassment claim. The Seventh Circuit in *Equal Employment Opportunity Commission v. Village at Hamilton Pointe LLC* ruled against the Equal Employment Opportunity Commission, which sued Village at Hamilton Pointe LLC on behalf of several Black nurses and other staff. The appeals court upheld various lower court judgments and a jury verdict that mostly excused the assisted living facility operator from "third party" harassment liability for elderly residents' repeated use of the N-word and other epithets. **(§ 5:75)**

A district court held that "stand-alone" associational bias claims are viable under 42 U.S.C.A. § 1981. A district court in *Burnett v. Teton Prestress Concrete, LLC* held that "stand-alone" associational bias claims are viable under 42 U.S.C.A. § 1981 addressing a question not yet directly settled by the Ninth Circuit. Noteworthy, the court ruled that the racist comments cited by David Burnett, whose wife was Filipino and whose best friend was Black, was insufficient without more for a jury to find in his favor under § 1981, Title VII, or Idaho anti-bias law because the "abhorrent" behavior had started before the coworkers knew about Burnett's associations Instead, it was an incident in which a noose that hung above Burnett's workstation at Teton Prestress Concrete LLC was brought to his attention that might have made his workplace hostile to a reasonable White person. **(§ 5:76)**

White employee claimed racial harassment based on mandatory implicit bias training. The Second Circuit, in reversing summary judgment for the employer, ruled in *Chislett v. New York City Department of Education* that implicit bias trainings may have fostered a hostile work environment under 42 U.S.C.A. § 1983, relying primarily upon Title VII case law. The Second Circuit held that a former employee, Leslie Chislett, raised genuine disputes of material fact about whether the workplace was racially hostile and whether such hostility was the product of a municipal policy. This was based on extensive evidence of racist comments being expressed during mandatory implicit bias trainings, and outside of trainings, and management's knowledge of the racialized harassment but consistent failure to intervene. Importantly, the Second Circuit emphasized that it was not suggesting that the conduct of implicit bias trainings is per se racist. What matters for the court "is the way the trainings were conducted. When employment trainings discuss any race 'with a constant drumbeat of essentialist, deterministic, and negative language [about a particular race], they risk liability under federal law.' " Finally, the Court warned: "When a municipal agency consistently ignores the racial harassment of employees in both trainings and workplace interactions, it can be held liable." **(§ 5:77)**

The EEOC under President Trump opposed DEI policies, programs, or practices, noting in a brief statement, "What To Do If You Experience Discrimination Related to DEI at Work," that it may be unlawful if the employment action is motivated in whole or part by an employee's race, sex, or another protected characteristic. Among other things, the statement identifies "DEI-related discrimination" to include "[s]eparating employees into groups based on race, sex, or another protected characteristic when administering DEI or other trainings, or other privileges of employment, even if the separate groups receive the same programming content or amount of employer resources. Depending on the facts, DEI training may give rise to a colorable hostile work environment claim." **(§ 5:77)**

Arbitration

Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act. Three circuit rulings sided with employees over the reach of the EFAA. Another took an intermediate position. The **Second Circuit** in *Olivieri v. Stifel, Nicolaus & Company, Incorporated* ruled that the continuing violation doctrine applies to the EFAA. The Second Circuit upheld the trial court's denial of the employer's motion to compel arbitration. The court held that Olivieri's claims accrued before the effective date and then re-accrued with each successive act that was part of the single continuing course of conduct underlying the hostile work environment claims. The court also allowed her retaliation claims to stay in court because such claims fall within the definition of a "sexual harassment dispute."

The **Eighth Circuit** in *Famuyide v. Chipotle Mexican Grill* addressed whether the dispute arose before or after the enactment date of the EFAA. Famuyide was sexually assaulted by a coworker in November of 2021. She retained legal counsel, which contacted the employer in February of 2022 notifying the employer to preserve relevant documentation or to meet to discuss out of court resolution of a possible claim. The employer asserted that the "dispute" arose when the transgression occurred, or alternately when the employer was contacted by Famuyide's lawyer to discuss a potential suit. Because the lawyer's communication stated that they were "investigating potential claims" and "considering" a lawsuit, and because they did not assert that Famuyide's rights had been violated nor demand compensation, the court ruled that a dispute that could have been submitted to arbitration had arisen at that time.

The **Sixth Circuit** in *Memmer v. United Wholesale Mortgage, LLC* found that employees who allege harassment before the statute's March 3, 2022, effective date can still avoid arbitration if they file a sexual harassment charge with a federal agency or a lawsuit in court after that date.

The **Third Circuit** in *Cornelius v. CVS Pharmacy Inc.* agreed in part with the Eighth Circuit and ruled that a " 'dispute . . . arises' when an employee registers disagreement—through an internal complaint, external complaint, or otherwise—with his or her employer, and the employer expressly or constructively opposes that position." This is an intermediate approach between the positions advanced by the parties. **(§ 13:17)**

A number of **district courts** addressed various issues concerning the meaning and reach of the terms in the statute, including whether "sexual" misconduct allegations are needed under the EFAA or if asserting a work environment hostile based on gender prohibited by more expansive state human rights laws is enough. Others addressed whether being a witness in a sexual harassment complaint allows the alleged target of retaliation to opt out of a contractual arbitration provision or whether harassment based on hostility to a post-birth employee breast pumping. **(§ 13:17)**

In *Smith v. Meta Platforms, Inc.*, Jeffrey Smith, a former employee of Meta Platforms, Inc. ("Meta"), sued, alleging that his supervisors retaliated against him for complaining about Meta's treatment of female employees by giving him poor reviews and diminishing his responsibilities. The court concluded that this case did not involve conduct that is alleged to constitute sexual harassment, so the EFAA does not preclude enforcement of the MAA. Meta's motion to compel arbitration and stay these proceedings was granted.

In *Puris v. TikTok Inc.*, Katie E. Puris, a former TikTok executive, alleged that she was sexually harassed by an employee from another company while attending a work event. She also expressed broader concerns about the work environment at the company and retaliation. TikTok fired Puris citing "performance reasons." Puris filed suit alleging claims for discrimination and retaliation under Title VII, the ADA, the FMLA, and the New York State Human Rights Law, and the New York City Human Rights Law. Puris asserted that she was fired in retaliation for her report of sexual harassment. Importantly, defendants argued that, even if the EFAA applied to Puris' retaliation claims, her other claims should be severed and sent to arbitration. Noteworthy, the district court ruled that the plain language of the EFAA prohibits the mandatory arbitration of a case, not a claim, that relates to a sexual harassment or sexual assault dispute. The court held that the arbitration agreement was unenforceable as to Puris' entire case.

A district court in *Newman v. Ambry Genetics Corporation* ruled that a terminated employee must arbitrate his case where he alleged that he was fired for cooperating with an investigation into whether a company vice president sexually harassed a coworker. The court noted that the EFAA allows workers to opt out of arbitration agreements in disputes involving sexual assault or sexual harassment allegations, but the dispute here fell outside the law's reach because the sexual harassment the employee pointed to allegedly happened to someone else.

A district court in *Harkins v. Hillstone Restaurant Group, Inc.* ruled a that a woman who alleged that she was harassed while expressing breast milk could not rely on the EFAA to opt out of arbitration, thus she could not pursue her sex, pregnancy, and retaliation claims in federal court. The court found that Harkins failed to plausibly assert a sexual harassment claim in her allegations that co-workers repeatedly barged into the equipment storage room designated for her to pump her breasts, requiring dismissal of those claims and arbitration of her other allegations. The defendant only challenged the fourth element of her hostile sexual harassment claim—that the conduct was severe or pervasive. The court ruled that "Five seemingly accidental and non-sexually oriented incidents" do not meet the high standard the Eleventh Circuit has set for plausibly alleging severe or pervasive sexual harassment under Title VII.

The district court in *Ding v. Structure Therapeutics, Inc.* addressed whether claims under both California and New York human rights law, both more expansive than the meaning of sexual harassment under Title VII, plausibly alleged sexual harassment, thus allowing the plaintiff to avoid mandatory arbitration under the EFAA and instead bring her claims to court. Dr. Ding Ding alleged defendants created a hostile work environment and terminated her employment because of her sex and status as a victim of domestic violence. The court previously denied defendants' motion to compel arbitration on the grounds the complaint is covered by the EFAA because Dr. Ding pled a plausible sexual harassment claim under California law. The court concluded that Dr. Ding also plausibly pled New York law sexual harassment claims covered by the EFAA. Dr. Ding alleged that the Structure Therapeutics CEO Raymond Stevens' "noted preference" for a male CFO and his sexist comments about Ding's aggressiveness suggested his conduct was based on her gender and created a hostile work environment under the New York City Human Rights Law ("NYCHRL").

In *Singh v. Meetup LLC (Singh I)*, the court determined that because the EFAA only applies to "sexual harassment dispute[s]" and the NYCHRL does not distinguish between gender discrimination and sexual harassment, the court would have to distinguish between the two to decide whether the EFAA is triggered. The court then reviewed NYCHRL sexual harassment cases and found "successful plaintiffs have alleged conduct or language of the same kind of romantic, sexual, or lewd nature that the [New York City Commission on Human Rights] has described in its guidance materials." Because the plaintiff there did not plead romantic, sexual, or lewd conduct, the court held she did not properly plead a sexual harassment claim under the NYCHRL, the EFAA was not triggered, and thus the court compelled arbitration. The court held it could not "collapse the difference between 'gender discrimination' and 'sexual harassment,' . . . absent contrary guidance from the state courts."

Affirmative Relief

60-year-old Exec. Order No. 11246 enforced by 10 Presidents revoked. Exec. Order No. 11246 was revoked on January 21, 2025, by Exec. Order No. 14173 (J21 Order). After implementation and enforcement for 6o years by five Democratic and five Republican Presidents, President Donald J. Trump revoked Exec. Order No. 11246 by promulgation of Exec. Order No. 14173, titled "Ending Illegal Discrimination and Restoring Merit-Based Opportunity." This executive order eliminated the affirmative action requirements of federal contractors and a second executive order declared illegal DEI programs. The day before, on January 20, 2025, President Trump also issued another order (J20 Order), titled "Ending Radical and Wasteful Government DEI Programs and Preferencing," focused on ending DEI programs within the federal government. **(§ 19:7)**

Critically important to public companies was the directive that, as part of the deterrence plan to "further inform and advise [the President] so that [his] Administration may formulate appropriate and effective civil-rights policy," each agency "shall identify to up to nine potential civil compliance investigations of publicly traded corporations," as well as large nonprofit organizations and foundations, state and local bar and medical associations, and higher-education institutions with endowments in excess of $1 billion.

In a February 5, 2025, U.S. Department of Justice memorandum, the U.S. Attorney General warned that public companies could face criminal investigations relating to DEI programs or policies. The term "DEI," is shorthand for "diversity, equity, and inclusion."

The **J20 Order was challenged in two lawsuits** and both district courts issued preliminary injunctions against its enforcement. A district court in *National Association of Diversity Officers in Higher Education v. Trump* issued preliminary injunction against enforcement finding that the plaintiffs showed both irreparable harm and were likely to prove the Termination and Enforcement Threat Provisions are unconstitutionally vague on their face and that the plaintiffs could demonstrate that the challenged provisions are unconstitutional abridgement of freedom of speech.

In another case, *Chicago Women in Trades v. Trump*, the district court issued a preliminary injunction against the enforcement. The Chicago Women in Trades ("CWIT") is a nonprofit organization dedicated "to promoting diversity, equity, and inclusion within the skilled trades industry." **(§ 19:7)**

ADA

Employers—Claims against public employers are barred are barred by sovereign immunity. The Second Circuit in *Yerdon v. Poitras* held that employees Title I and Title V ADA claims are barred by sovereign immunity against the New York State Department of Motor Vehicles ("DMV") and two supervisors in their official and individual capacities for employment discrimination under Title I and retaliation under Title V of the ADA. **(§ 23:8)**

Transportation Safety Administration immunity from disability discrimination claims was abrogated by Whistleblower Protection Enhancement Act. The Eleventh Circuit in *Simone v. Secretary of Homeland Security, United States Department of Homeland Security* held that the Transportation Safety Administration immunity from disability discrimination claims was abrogated by Whistleblower Protection Enhancement Act. **(§ 23:8)**

Regard as. In *Meza v. Union Pacific Railroad Co.*, a railway employee sued claiming he was suspended because his employer considered him to be disabled. After the employee had a brain hemorrhage, his physician cleared him to return to his regular work. But the employer's medical examiner feared that his brain injury could cause unpredictable seizures. The trial court granted summary judgment for the employer. The Eighth Circuit reversed. The court said the employer's "stated reason for sidelining him—the possibility that he would suffer seizures following a traumatic brain injury—was all but an admission by the company that it kept him out of work because it regarded him as disabled. Under a regarded-as theory, a belief is enough." **(§ 23:20)**

Dishonesty in post-hire physical exam questionnaire supports termination. In *Sigley v. ND Fairmont LLC*, the Fourth Circuit affirmed that a plaintiff's discharge was due to dishonesty, not disability. It upheld summary judgment for the employer on a former employee's claim that he was discharged due to his disability. He lied on his post-hire Health History Questionnaire, saying he had never had a back injury. The employer discharged him when he later disclosed that he had undergone three back surgeries in the past two years and had a metal rod in his back. **(§ 23:28)**

Failure to accommodate even where employee can perform the essentials functions. The Second Circuit in *Tudor v. Whitehall Central School District* held that a failure to accommodate claim is valid even when an employee can perform the essential functions of the job without an accommodation. Tudor had stated that she was able to perform the essential functions of her regardless of the denial of the requested accommodation. The district court held this to mean that she was not entitled to a reasonable accommodation. The district court interpreted the third element of a prima facie failure to accommodate claim to only apply to employees that require an accommodation to perform their job. The circuit court found that the proper criteria is that the plaintiff is otherwise qualified to perform the essential functions of their job with or without a reasonable accommodation. The court found this interpretation to follow the literal text of the ADA. **(§ 23:49)**

Accommodation preference of individual not required. The Seventh Circuit ruled in *Bourke v. Collins* that a refusal of disability accommodation was fatal to a Rehabilitation Act claim. Bourke had a mobility scooter which was kept locked up at work. The employer had provided him a special parking space where could access the locked scooter each day before entering the workplace through another entrance. During the pandemic, the employer restricted which doors would be open, and Bourke was no longer able to access the locked room where he had stored his scooter. The employer offered Bourke a different parking space near a place in another building where other employees stored scooters. Bourke declined this accommodation because the new storage space did not lock. The court found that no jury could find, based on the evidence, that the employer had failed to provide a reasonable accommodation. The Seventh Circuit noted that "an employer is not required to provide the particular accommodation that an employee requests." It stated: "An employer must only provide a reasonable accommodation, not a perfect one." **(§ 23:60)**

Proof of adverse action in a failure to accommodate case impacted by Supreme Court's decision in *Muldrow v. City of St. Louis*. In a case where during discussions of an accommodation for her disability, an employee was reassigned, she claimed this was not a reasonable accommodation and that it was in retaliation for pursuing EEO remedies. The new position had the same pay but was less prestigious. The district court granted summary judgment to the defendant The court reasoned, in part, that the employee could not show the adverse employment action required for her discrimination and retaliation claims because her reassignment did not work a "significant" change in her employment status. The Fourth Circuit in *Herkert v. Bisignano* noted that since the district court ruling, the Supreme Court in *Muldrow v. City of St. Louis* clarified that a plaintiff like Herkert, challenging a job transfer as discriminatory, need not show a "significant" change in working conditions to establish an adverse employment action. Thus, in light of *Muldrow*, the court could not conclude, as a matter of law, that Herkert's reassignment was insufficiently "adverse" to support her claims. Further, noting that although the district court also relied on the purportedly "voluntary" nature of Herkert's reassignment to reject her claims, it found that genuine factual disputes preclude summary judgment on that issue, too. Accordingly, the court vacated the judgment of the district court and remanded for further proceedings. The *Muldrow* decision will cause a major reexamination of the standard to show adverse action and litigants should follow the guidance set out in that decision. **(§ 23:67)**

COVID-19 vaccination accommodations. COVID-19 vaccination requirements during the height of the pandemic and post-pandemic raised issues with respect to both disability and religious belief accommodation requests. The EEOC recognizes that the availability of COVID-19 vaccinations raises questions under the federal equal employment opportunity laws and offers some guidance in its EEOC's Technical Assistance Questions and Answers. The Fourth Circuit in *Tarquinio v. Johns Hopkins University Applied Physics Lab* ruled that there was no duty to accommodate an employee who never explained why her disability made COVID-19 vaccination risky. Tarquinio asked for a medical exemption from having a COVID-19 vaccination, but the employer denied that after several attempts to learn why her condition required the accommodations that she asked for. She disclosed her disability (Lyme-induced immune dysregulation) and her requested accommodation (an exemption from the COVID-19 vaccination requirement). She described many of her symptoms. But she never explained, beyond opaque references to "immune dysregulation," why her disability made COVID-19 vaccination risky. Because Tarquinio prevented the employer from learning why her condition required the accommodations that she asked for, the court held she failed to demonstrate that the employer had a duty to accommodate. **(§ 23:70)**

Employee never claimed to be disabled nevertheless entitled to back pay for medical inquiry and examination provision of ADA. The Seventh Circuit in *Nawara v. Cook Cnty.* ruled that employers may be liable for monetary damages and other relief for violating the ADA's medical inquiry and examination limitations even if the employee subjected to the medical inquiry or examination does not have a disability or perceived disability. **(§ 23:75)**

Employee not a qualified individual under the ADA for failure of eye test mandated by federal regulations. The Fifth Circuit in *Turner v. BNSF Railway Company* (2–1) ruled that a railway conductor who failed three vision tests mandated by federal regulations is not a qualified individual under the ADA. If an applicant fails two vision tests and is not certified by a medical examiner, the railway has no option but to decline certification under federal law. Thus, he is not a qualified individual under the ADA. The Fifth Circuit noted that it refused "to force employers into a choice between the rock of ADA liability and the hard place of regulatory violation." **(§ 23:81)**