

## ■ CONTENTS

<i>Preface</i>	<i>xix</i>
<i>Acknowledgments</i>	<i>xxiii</i>
<i>Practice and Procedural Tips</i>	<i>xxx</i>
<i>A Note About the Cases Included and Case Editing</i>	<i>xxxiii</i>

### PART ONE ■ INTRODUCTION & THE ADMINISTRATIVE PROCESS

---

<b>Chapter 1: Employment Discrimination</b>	<b>3</b>
<hr/>	
<b>A. Introduction</b>	<b>3</b>
<b>B. Current Debate—Theory Versus Procedure</b>	<b>5</b>
<b>C. Work and the Pandemic</b>	<b>6</b>
<b>D. Employment Statutes</b>	<b>7</b>
<b>E. Constitutional Claims</b>	<b>11</b>
<b>F. State and Local Claims</b>	<b>12</b>
<b>G. This Book and Employment Discrimination Law</b>	<b>12</b>
<hr/>	
<b>Chapter 2: The Administrative Process, Discovery, Summary Judgment, &amp; Trial</b>	<b>15</b>
<hr/>	
<b>A. Introduction</b>	<b>16</b>
<b>B. The Equal Employment Opportunity Commission and the Department of Justice</b>	<b>16</b>
<b>C. The Administrative Process</b>	<b>17</b>
<i>National Railroad Passenger Corp. v. Morgan</i>	<i>22</i>
<b>D. Standing and Coverage Requirements</b>	<b>29</b>
<i>Clackamas Gastroenterology Associates v. Wells</i>	<i>30</i>
<i>Mariotti v. Mariotti Building Products, Inc.</i>	<i>36</i>
<b>E. Filing the Complaint</b>	<b>42</b>
<i>Swierkiewicz v. Sorema N.A.</i>	<i>42</i>
<i>Ashcroft v. Iqbal</i>	<i>46</i>

<b>F. Discovery, E-Discovery, and Summary Judgment</b>	<b>55</b>
<i>EEOC v. Houston Funding II, Ltd.</i>	57
<b>G. Jury Trial</b>	<b>62</b>
<i>May v. Chrysler Group, LLC</i>	63
<b>H. Arbitration</b>	<b>69</b>
<i>Hooters of America, Inc. v. Phillips</i>	69
<b>I. Chapter-in-Review</b>	<b>76</b>

## PART TWO ■ ANALYTICAL FRAMEWORKS

---

### Chapter 3: Disparate Treatment 79

---

<b>A. Introduction</b>	<b>80</b>
<b>B. Circumstantial Evidence of Discrimination</b>	<b>80</b>
<i>McDonnell Douglas Corp. v. Green</i>	81
<i>Texas Department of Community Affairs v. Burdine</i>	88
<i>St. Mary's Honor Center v. Hicks</i>	92
<i>Reeves v. Sanderson Plumbing Products, Inc.</i>	97
<b>C. Direct Evidence of Discrimination</b>	<b>105</b>
<i>Price Waterhouse v. Hopkins</i>	106
<b>D. Mixed-Motives Analysis/Civil Rights Act of 1991</b>	<b>113</b>
<i>Desert Palace, Inc. v. Costa</i>	114
<i>Keelan v. Majesco Software, Inc.</i>	119
<b>E. After-Acquired Evidence</b>	<b>120</b>
<i>McKennon v. Nashville Banner Publishing Co.</i>	120
<b>F. Intentional Discrimination Framework: Summary Review</b>	<b>123</b>
<b>G. Systemic Litigation</b>	<b>125</b>
<i>Wal-Mart Stores, Inc. v. Dukes</i>	126
<i>In re Bemis Co.</i>	134
<b>H. Further Defining Discrimination</b>	<b>137</b>
<i>Ricci v. DeStefano</i>	137
<b>I. Retaliation</b>	<b>146</b>
1. Coverage	147
<i>Thompson v. North American Stainless, LP</i>	148
2. Protected Activity	150
a. Participation Clause	150
b. Opposition Clause	151

3. Adverse Action	153
<i>Burlington Northern &amp; Santa Fe Railway Co. v. White</i>	153
4. Causation	157
<i>University of Texas Southwestern Medical Center v. Nassar</i>	158
5. Completing the <i>McDonnell Douglas</i> Framework for Retaliation Claims	165
<b>J. Chapter-in-Review</b>	<b>166</b>

---

## Chapter 4: Disparate Impact 169

---

<b>A. Introduction</b>	<b>169</b>
<i>Griggs v. Duke Power Co.</i>	170
<i>Dothard v. Rawlinson</i>	176
<i>Wards Cove Packing Co. v. Atonio</i>	182
<b>B. Statutory Framework</b>	<b>190</b>
<b>C. Subjective Criteria</b>	<b>193</b>
<i>Watson v. Fort Worth Bank &amp; Trust</i>	193
<b>D. Defenses</b>	<b>198</b>
1. The Bottom-Line Defense	199
<i>Connecticut v. Teal</i>	199
2. Validation Studies as a Safe Harbor to Disparate Impact Claims	203
<b>E. Chapter-in-Review</b>	<b>204</b>

---

## Chapter 5: Harassment 207

---

<b>A. Introduction</b>	<b>208</b>
<b>B. The #MeToo Movement</b>	<b>209</b>
<b>C. Protected Categories of Harassment</b>	<b>211</b>
<i>Shaver v. Independent Stave Co.</i>	212
<b>D. The Harassment Cause of Action</b>	<b>213</b>
1. Because of Sex	213
<i>Oncale v. Sundowner Offshore Services, Inc.</i>	213
<i>Ocheltree v. Scollon Productions, Inc.</i>	218
2. Unwelcome, and Severe or Pervasive	224
<i>Meritor Savings Bank, FSB v. Vinson</i>	225
<i>Harris v. Forklift Systems, Inc.</i>	233
<b>E. Imputing Liability</b>	<b>236</b>
<i>Burlington Industries, Inc. v. Ellerth</i>	236
<i>Faragher v. City of Boca Raton</i>	245

1. Supervisor Harassment	252
<i>Vance v. Ball State University</i>	252
2. Co-Worker Harassment	260
3. Constructive Discharge	262
<i>Pennsylvania State Police v. Suders</i>	263
<b>F. First Amendment Defense</b>	<b>268</b>
<i>Lyle v. Warner Bros. Television Productions</i>	269
<b>G. Chapter-in-Review</b>	<b>274</b>

## PART THREE ■ ENFORCEMENT BY PROTECTED CLASS

### Chapter 6: Race and Color Discrimination 279

<b>A. Introduction</b>	<b>280</b>
<b>B. EEOC Guidance</b>	<b>281</b>
<b>C. Discrimination—An Ongoing Problem</b>	<b>283</b>
<i>EEOC v. Pipefitters Ass’n Local Union 597</i>	284
<i>Henderson v. Irving Materials, Inc.</i>	289
<i>EEOC v. Catastrophe Management Solutions</i>	294
<b>D. Reverse Discrimination Claims</b>	<b>301</b>
<i>McDonald v. Santa Fe Trail Transportation Co.</i>	301
<b>E. Affirmative Action Plans</b>	<b>306</b>
<i>Johnson v. Transportation Agency, Santa Clara County</i>	306
<b>F. Chapter-in-Review</b>	<b>316</b>

### Chapter 7: Sex Discrimination 319

<b>A. Introduction</b>	<b>320</b>
<b>B. Pregnancy as a Form of Sex Discrimination</b>	<b>321</b>
<i>Ames v. Nationwide Mutual Insurance Co.</i>	323
<i>Young v. United Parcel Service, Inc.</i>	328
<b>C. The Family and Medical Leave Act</b>	<b>337</b>
<i>Makowski v. SmithAmundsen LLC</i>	339
<b>D. Sexual Orientation—A Protected Category?</b>	<b>342</b>
<i>Bostock v. Clayton County, Georgia</i>	343
<b>E. The Bona Fide Occupational Qualification Exception</b>	<b>356</b>

<i>Dothard v. Rawlinson</i>	358
<i>International Union, United Automobile Workers v. Johnson Controls, Inc.</i>	364
<b>F. Grooming and Appearance Standards</b>	<b>373</b>
<i>Jespersen v. Harrah's Operating Co.</i>	374
<b>G. The Equal Pay Act and the Lilly Ledbetter Fair Pay Act</b>	<b>380</b>
<i>Ledbetter v. Goodyear Tire &amp; Rubber Co.</i>	382
<i>King v. Acosta Sales &amp; Marketing, Inc.</i>	392
<b>H. Chapter-in-Review</b>	<b>398</b>

---

## Chapter 8: National Origin Discrimination 399

---

<b>A. Introduction</b>	<b>400</b>
<b>B. The Meaning of National Origin</b>	<b>401</b>
<i>Espinoza v. Farah Manufacturing Co.</i>	402
<b>C. English-Only Rules</b>	<b>407</b>
<i>Garcia v. Spun Steak Co.</i>	409
<i>Maldonado v. City of Altus</i>	420
<b>D. Accent Discrimination</b>	<b>430</b>
<i>Fragante v. City &amp; County of Honolulu</i>	431
<b>E. Undocumented Worker Status</b>	<b>438</b>
<i>Hoffman Plastic Compounds, Inc. v. NLRB</i>	438
<b>F. Chapter-in-Review</b>	<b>443</b>

---

## Chapter 9: Religious Discrimination 445

---

<b>A. Introduction</b>	<b>446</b>
<b>B. What Is Religion?</b>	<b>447</b>
<i>EEOC v. Red Robin Gourmet Burgers, Inc.</i>	448
<b>C. Disparate Treatment Cases</b>	<b>453</b>
<i>EEOC v. Preferred Management Corp.</i>	454
<i>Moranski v. General Motors Corp.</i>	461
<b>D. Failure to Accommodate Cases</b>	<b>466</b>
<i>Trans World Airlines, Inc. v. Hardison</i>	467
<i>Ansonia Board of Education v. Philbrook</i>	476
<i>EEOC v. Abercrombie &amp; Fitch Stores, Inc.</i>	482

	<i>EEOC v. Unión Independiente de la Autoridad de Acueductos y Alcantarillados de Puerto Rico</i>	486
<b>E.</b>	<b>Exceptions to Religious Discrimination Claims</b>	<b>489</b>
1.	The Educational Exception	489
2.	The Religious Employer Exception	490
3.	The Bona Fide Occupation Qualification (BFOQ)	491
4.	The Ministerial Exception	492
	<i>Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC</i>	493
<b>F.</b>	<b>Chapter-in-Review</b>	<b>503</b>
<hr/>		
<b>Chapter 10:</b>	<b>Disability Discrimination</b>	<b>507</b>
<hr/>		
<b>A.</b>	<b>Introduction</b>	<b>508</b>
1.	Elements of the Cause of Action	509
2.	Disability and Qualified Defined	510
<b>B.</b>	<b>Actual, Perceived, and Record of a Disability</b>	<b>511</b>
	<i>Sutton v. United Air Lines, Inc.</i>	511
	<i>EEOC v. Heartway Corp.</i>	520
	<i>Graham v. St. John's United Methodist Church</i>	526
<b>C.</b>	<b>History of a Disability</b>	<b>529</b>
	<i>Shaver v. Independent Stave Co.</i>	529
<b>D.</b>	<b>Accommodation Requirement and the Interactive Process</b>	<b>533</b>
	<i>U.S. Airways, Inc. v. Barnett</i>	534
	<i>Rauen v. U.S. Tobacco Manufacturing Ltd. Partnership</i>	542
<b>E.</b>	<b>Direct Threat Defense and Qualification Standards</b>	<b>549</b>
	<i>Chevron U.S.A., Inc. v. Echazabal</i>	549
<b>F.</b>	<b>Disparate Impact Claims</b>	<b>553</b>
<b>G.</b>	<b>Unlawful Medical Inquiries and Examinations</b>	<b>554</b>
<b>H.</b>	<b>The Genetic Information Nondiscrimination Act</b>	<b>556</b>
<b>I.</b>	<b>Chapter-in-Review</b>	<b>557</b>
<hr/>		
<b>Chapter 11:</b>	<b>Age Discrimination</b>	<b>559</b>
<hr/>		
<b>A.</b>	<b>Introduction</b>	<b>560</b>
<b>B.</b>	<b>Disparate Treatment Claims</b>	<b>562</b>
	<i>Hazen Paper Co. v. Biggins</i>	562
	<i>Palasota v. Hagggar Clothing Co.</i>	567

<i>Dediol v. Best Chevrolet, Inc.</i>	572
<b>C. The Meaning of “Age”</b>	<b>578</b>
<i>General Dynamics Land Systems, Inc. v. Cline</i>	578
<i>Gross v. FBL Financial Services, Inc.</i>	586
<b>D. RFOA Defense and a Note About the BFOQ</b>	<b>589</b>
<b>E. Disparate Impact Claims</b>	<b>590</b>
<b>F. Exceptions for Police and Firefighters</b>	<b>592</b>
<b>G. Damages</b>	<b>593</b>
<b>H. Chapter-in-Review</b>	<b>595</b>

## PART FOUR ■ REMEDIES

### Chapter 12: Relief in Discrimination Cases 599

<b>A. Introduction</b>	<b>600</b>
<b>B. Reinstatement</b>	<b>600</b>
<b>C. Front Pay</b>	<b>602</b>
<b>D. Backpay</b>	<b>604</b>
<i>EEOC v. E.I. DuPont de Nemours &amp; Co.</i>	604
<b>E. Compensatory Damages</b>	<b>610</b>
<i>Whitten v. Cross Garage Corp.</i>	610
<b>F. Punitive Damages</b>	<b>615</b>
<i>Kolstad v. American Dental Ass’n</i>	617
<b>G. Other Damages</b>	<b>625</b>
<b>H. Liquidated Damages and the ADEA</b>	<b>625</b>
<b>I. Attorneys’ Fees</b>	<b>626</b>
<b>J. Chapter-in-Review</b>	<b>628</b>

## PART FIVE ■ BEST PRACTICES

### Chapter 13: Handling Employment Discrimination Claims: Best Practices 631

<b>A. Introduction</b>	<b>632</b>
<b>B. The Employee</b>	<b>633</b>

1. When to Complain of Discrimination	633
<i>Jordan v. Alternative Resources Corp.</i>	634
2. How and Where to Complain of Discrimination	643
3. Drafting the Complaint	644
<i>Mangum v. Town of Holly Springs</i>	645
4. Protecting Against Retaliation	651
<b>C. The Employer</b>	<b>653</b>
1. Effective Employer Policies	653
a. Dating Policies	654
b. Computer/Electronic Device Policies	655
c. Antidiscrimination Policies	657
d. Anti-Bullying Policies	660
e. Responding to Reference Requests	661
f. Caregiving Responsibilities	662
2. Training Employees on Discrimination	664
3. Documentation, Discipline, and Investigations	665
<b>D. Chapter-in-Review</b>	<b>669</b>
<b>Table of Authors</b>	<b>671</b>
<b>Table of Cases</b>	<b>675</b>
<b>Index</b>	<b>679</b>