

EMPLOYMENT DISCRIMINATION LAW

CASES AND MATERIALS ON EQUALITY
IN THE WORKPLACE

Seventh Edition

Robert Belton
Dianne Avery
Maria L. Ontiveros
Roberto L. Corrada

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The Labor Law Group

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CASES AND MATERIALS ON EQUALITY IN THE WORKPLACE

Seventh Edition

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*To Joy, Keith, and Alaina, and in memory of my
mother, Mary Lendon Belton.*

R.B.

For my mother and in memory of my father.

D.A.

*For Paul, Henry, and Clara, and in memory of
my father.*

M.L.O.

*For Theresa, Maximo, Amelia, and my dear
abuelas, Ana Maria and Carmen Luisa.*

R.L.C.

*

Foreword

The Labor Law Group is an association of law teachers, most of whom serve on faculties in the United States; others teach in Belgium, Canada, England, and Israel.

At the December 1946 meeting of the Labor Law Roundtable of the Association of American Law Schools, Professor W. Willard Wirtz (who became Secretary of Labor in 1962) delivered a compelling paper criticizing the labor law course books then available. His remarks so impressed those present that the Roundtable Council organized a general conference on the teaching of the subject. At the conference, held in Ann Arbor in 1947, some conferees agreed to exchange proposals for sections of a hoped-for new course book. The late Professor Robert E. Mathews served as coordinator. Beginning in 1948, a preliminary mimeographed version was used in seventeen schools; each user supplied comments and suggestions for change. In 1953, a hard-cover version was published under the title *Labor Relations and the Law*. The thirty-one "cooperating editors" were so convinced of the value of multi-campus collaboration that they gave up any individual claims to royalties. Instead, those royalties were paid to a trust fund to be used to develop and "provide the best possible materials" for training students in labor law and labor relations. The Declaration of Trust memorializing this agreement was executed November 4, 1953, and remains the Group's charter.

Cooperative ventures among legal scholars are often centered around ideological orthodoxies or common experiences or identities. In contrast, the Labor Law Group has tried to expand the scope of perceptions and experiences represented within its membership. Consistent with this goal, it has attained significant diversification in the racial, gender, national, and ideological composition of its participants and, additionally, has drawn its membership and leadership from institutions that are varied in size, styles, status, and geography.

The founding committee's hope that the initial collaboration would bear fruit has been fulfilled. Under Professor Mathews' continuing chairmanship, the Group's members produced *Readings on Labor Law* in 1955 and *The Employment Relation and the Law* in 1957, edited by Robert Mathews and Benjamin Aaron. A second edition of *Labor Relations and the Law* appeared in 1960, with Benjamin Aaron and Donald H. Wollett as co-chairmen, and a third edition was published in 1965, with Jerre Williams at the helm.

In June of 1969, the Group, now chaired by William P. Murphy, sponsored a conference to reexamine the labor law curriculum. The meeting, held at the University of Colorado, was attended by practitioners and by full-time teachers including nonmembers as well as members of the Group. The conference papers and discussion summaries were distributed to law school libraries and to participants. In meetings that followed the conference, the Group decided to reshape its work substantially. It restructured itself into ten task forces, each assigned a unit of no more than two

hundred pages on a discrete topic such as employment discrimination or union-member relations. An individual teacher could then choose two or three of these units as the material around which to build a particular course. This multi-unit approach dominated the Group's work throughout much of the 1970s under Professor Murphy and his successor as chairman, Herbert L. Sherman, Jr. As the decade progressed and teachers refined their views about what topics to include and how to address them, some units were dropped from the series while others increased in scope and length. Under Professor Sherman's chairmanship, the Group planned a new series of six enlarged books to cover the full range of topics taught by labor and employment law teachers.

Professor James E. Jones, Jr., was elected chairman in 1978 and shepherded to completion the promised set of six full-size, independent case-books. In addition, during this period supplements were published for some books. The Group continued to reevaluate its work and eventually decided that it was time to convene another conference of law teachers.

In 1984, the Group, now chaired by Robert Covington, sponsored another general conference to discuss developments in the substance and teaching of labor and employment law, this time at Park City, Utah. (The conference papers were distributed to law school libraries as well as participants.) Those discussions and a subsequent working session led to the conclusion that the Group should devote principal attention to three new conventional length course books, one devoted to employment discrimination, one to union-management relations, and one to the individual employment relationship. In addition, work was planned on more abbreviated course books to serve as successors to the Group's earlier works covering public employment bargaining and labor arbitration.

In 1989, with Alvin Goldman as Chair, the Group met in Breckenridge, Colorado, to assess its most recent effort and develop plans for the future. In addition to outlining new course book projects, the Group discussed ways to assist teachers of labor and employment law in their efforts to expand conceptual horizons and perspectives. In pursuit of the latter goals it co-sponsored, in 1992, a conference held at the University of Toronto Faculty of Law at which legal and nonlegal specialists examined alternative models of corporate governance and their impact on workers.

When Robert J. Rabin became Chair in 1996, the Group and a number of invited guests met in Tucson, Arizona, to celebrate the imminent fiftieth anniversary of the Group. The topics of discussion included the impact of the global economy and of changing forms of representation on the teaching of labor and employment law, and the impact of new technologies of electronic publishing on the preparation of teaching materials. The Group honored three of its members who had been present at the creation of the Group, Willard Wirtz, Ben Aaron, and Clyde Summers.

The Group next met in Scottsdale, Arizona in December, 1999, to discuss the production of materials that would more effectively bring emerging issues of labor and employment law into the classroom. Among the issues discussed were integration of international and comparative materials into the labor and employment curriculum and the pedagogical uses of the World Wide Web.

Laura J. Cooper became Chair of the Group in July, 2001. In June, 2003, the Group met in Alton, Ontario, Canada. The focus there was on

labor law on the edge—looking at doctrinal synergies between workplace law and other legal and social-science disciplines, and workers on the edge, exploring the legal issues of highly compensated technology workers, vulnerable immigrant employees, and unionized manufacturing employees threatened by foreign competition. The Group also heard a report from its study of the status of the teaching of labor and employment law in the nation's law schools and discussed the implications of the study for the Group's future projects.

In addition to this book on employment discrimination law, we presently have four other books in print, all published by West Group: *Labor and Employment Law: Problems, Cases and Materials in the Law of Work* (Third Edition), by Robert J. Rabin, Eileen Silverstein, George Schatzki, and Kenneth G. Dau-Schmidt; *ADR in the Workplace*, by Laura J. Cooper, Dennis R. Nolan, and Richard A. Bales (Second Edition forthcoming 2005); *Legal Protection for the Individual Employee* (Third Edition), by Matthew W. Finkin, Alvin L. Goldman, Clyde W. Summers, and Kenneth G. Dau-Schmidt; and *Public Sector Employment*, by Joseph R. Grodin, June M. Weisberger, and Martin H. Malin. The Group is also currently at work on two additional projects. We are creating, for Foundation Press, *Labor Law Stories*, a collection of historical essays about the most significant labor law decisions. We are also at work on an entirely new text on labor issues in the global economy.

At any one time, roughly twenty-five to thirty persons are actively engaged in the Group's work; this has proved a practical size, given problems of communication and logistics. Coordination and editorial review of the projects are the responsibility of the executive committee, whose members are the successor trustees of the Group. Governance is by consensus; votes are taken only to elect trustees and to determine whom to invite to join the Group. Since 1953, more than seventy persons have worked on Group projects; in keeping with the original agreement, none has ever received anything more than reimbursement of expenses.

Employment Discrimination Law: Cases and Materials on Equality in the Workplace is the seventh edition of the Labor Law Group's casebook on employment discrimination. The organizing theme of this edition, like the sixth edition, is an exploration of the laws enacted to make equality in the workplace a reality. The book emphasizes federal protection against discrimination in employment under the major antidiscrimination statutes, such as Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, and the Americans with Disabilities Act of 1990. Federal and state constitutional protections, federal regulatory interpretations, executive orders, and state laws on equality are included where appropriate. The materials explore the meaning of discrimination, theories and defenses, problems of proving or disproving claims of discrimination, and remedies. Like previous editions, the seventh edition contains numerous note problems and questions developed from employment discrimination cases. For the seventh edition, Roberto L. Corrada and Maria L. Ontiveros join the authors of the sixth edition, Dianne Avery and Robert Belton.

Robert Belton is Professor of Law at Vanderbilt University School of Law. He received his law degree from Boston University School of Law. Before entering law teaching, Professor Belton served as Assistant Coun-

sel with the NAACP Legal Defense and Educational Fund, Inc. ("Inc. Fund") where he had major responsibility for a national litigation project to enforce, on behalf of plaintiffs, laws prohibiting discrimination in employment. Also, prior to joining the Vanderbilt Law School faculty, he was a partner in one of the first racially integrated law firms in the South. He served as counsel or co-counsel for plaintiffs in a number of landmark employment discrimination cases, some of which are included in this book, e.g., *Griggs v. Duke Power Co.* (1971), *Albemarle Paper Co. v. Moody* (1975), and *Harris v. Forklift Systems* (1993). His scholarly and teaching interests are race and the law, employment discrimination, individual employee rights, and constitutional torts. Professor Belton has been a member of the Labor Law Group since 1984 and has been a co-author of the Group's employment discrimination books and supplements since 1987.

Dianne Avery is Professor of Law at the University at Buffalo Law School, where she served as Vice Dean for Academic Affairs from 1998 to 2002. She has degrees from Duke University, Wesleyan University, and the University at Buffalo Law School. Her scholarly and teaching interests are in labor and employment law—including labor history—property, and feminist legal theory. Professor Avery became a member of the Labor Law Group in 1990 and joined its Executive Committee in 1998.

Maria L. Ontiveros is Professor of Law at the University of San Francisco School of Law. She has earned degrees from the University of California, Harvard Law School, Cornell University, and Stanford Law School. Her research interests focus on workplace issues affecting women of color and organizing immigrant workers. Professor Ontiveros has been a member of the Labor Law Group since 1998 and was a co-author of the 2002 Supplement to the sixth edition of *Employment Discrimination Law*.

Roberto L. Corrada is Professor of Law at the University of Denver College of Law, where he is currently University Sturm Professor for Excellence in Teaching and Learning. He earned his undergraduate degree from George Washington University and his law degree from Catholic University of America's Columbus School of Law. His scholarship and teaching interests include labor and employment law, administrative law, the scholarship of teaching and learning, contracts, and LatCrit theory. He has been a member of the Labor Law Group since 2000.

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Preface

This is the seventh edition of the Labor Law Group's casebook on employment discrimination law, which was first published in 1971. The first through the fifth editions were published under the title *Discrimination in Employment: Unit Three of Labor Relations and Social Problems*. Beginning with the sixth edition, a new title, *Employment Discrimination Law: Cases and Materials on Equality in the Workplace*, was adopted to reflect the authors' approach to the materials.

A course on employment discrimination law can be approached from several different and overlapping perspectives: civil rights law, labor relations law, or employment law. Deciding how to treat employment discrimination thus poses a challenge to any author preparing a set of teaching materials.

A study of employment law generally begins with an exploration of the American common law doctrine of employment at will. Originating in the late nineteenth century, the employment-at-will doctrine, broadly interpreted, permits employers to dictate unilaterally the terms and conditions of employment for employees who are not covered by individual contracts or collective bargaining agreements. Since the 1960s, legislation prohibiting discrimination in employment has dramatically limited the traditional common law privileges of employers to discharge employees at will, and, consequently, has fundamentally reshaped the legal framework of the individual employment relationship. The incursions on the employment-at-will doctrine brought about by the antidiscrimination laws are related to a more general erosion of the underlying rationale of employment-at-will through changes in contract and tort doctrine governing the employment relationship, as well as through general employment statutes in many jurisdictions that address issues of procedural and substantive fairness in both public and private employment. These developments began in the 1970s and are ongoing still, but antidiscrimination laws are only a piece, albeit a significant one, of a broader revolution in employment law.

The body of public law that governs labor relations has developed within a framework of antidiscrimination principles that originated in race discrimination cases but ultimately are founded on broader principles of fairness. Thus, unions engaged in collective bargaining have a "duty of fair representation" that shapes their relationships with all of the employees in the bargaining units that they represent. But the concerns of unions and union organizers reach to many topics and many groups of employees; issues such as race and gender relations, or the rights of older or disabled workers, may come to the fore at various times, but they are not central to either the mandates of labor legislation or the social and political functions of labor unions.

On the other hand, statutes that prohibit discrimination in employment are an essential component of our civil rights laws. While employment discrimination law continues to be an important regulatory regime that affects and reflects both the law of individual employment relationships and the law of labor relations, there appears to be a general consensus that a fundamental purpose of laws prohibiting discrimination in employment because of race, color, sex, religion, national origin, age, and disability is to implement the national civil rights policy on equality in the workplace. The dominant theme of the seventh edition of this book is, therefore, equality in the workplace.

The title, *Employment Discrimination Law: Cases and Materials on Equality in the Workplace*, thus reflects the maturation, since the publication of the first edition, of employment discrimination law as a critical development in the broader goal of effectuating equality in society. The cases and materials in the book are organized around an examination of the reach and limits of laws designed to make workplace equality a reality. The book focuses primarily on the federal statutory protection against discrimination in employment, but, when appropriate, the role of constitutional provisions and state laws on equality are explored as well.

The book is divided into five parts. Part I consists of two chapters. Chapter 1 provides a framework for thinking about the problem of discrimination in employment and the various meanings of equality that are or might be embodied in legislative attempts to remedy discrimination. The second chapter surveys the major federal laws that prohibit discrimination in employment and briefly outlines the statutory procedures and enforcement schemes, as well as the statutory definitions of protected individuals or groups and covered entities.

Part II is the core of the book. With a primary focus on Title VII of the Civil Rights Act of 1964, as amended, Chapters 3 and 4 cover the basic theories of discrimination (or meanings of equality), the analytical paradigms for bringing disparate treatment and disparate impact claims, and available defenses. Chapter 5 provides a basis for comparing constitutional and statutory approaches to equality in the workplace through materials on equal protection doctrine and § 1981, the Civil Rights Act of 1866.

Part III provides coverage of discrimination on the basis of specific categories: sex (Chapter 6), sex-based compensation schemes (Chapter 7), harassment (Chapter 8), sexual orientation (Chapter 9), religion (Chapter 10), national origin (Chapter 11), age (Chapter 12), and disability (Chapter 13). The materials on sexual harassment, sexual orientation, national origin, and disability have been extensively revised to reflect significant developments in the law since the sixth edition. The final two chapters in Part III cover the topics of union liability for discrimination (Chapter 14) and retaliation (Chapter 15). Where relevant, the cases and textual materials demonstrate how various laws prohibiting discrimination in employment overlap with other federal statutes affecting the employment relationship, such as the Family and Medical Leave Act, the Immigration Reform and Control Act, and the National Labor Relations Act. The scope

and depth of the coverage in Chapter 13 of the Americans with Disabilities Act, the most recent comprehensive federal civil rights law, is necessarily more limited than the coverage of some other subject areas. Many law schools now offer a separate course dealing with the complex and difficult issues that arise under disability law; the materials here are intended to serve as an introduction to a more comprehensive treatment of the subject in other courses.

Part IV on relief consists of two chapters. First, Chapter 16 provides an overview, primarily through textual material, of the forms of relief that discrimination plaintiffs may seek, such as back pay, front pay, reinstatement, and compensatory and punitive damages. The major portion of Chapter 17 examines the legality of affirmative action as a remedy under federal employment discrimination statutes, but materials on the legality of affirmative action under the Constitution are included for comparative purposes.

Part V, consisting of one chapter, explores the use of alternative dispute resolution (ADR) procedures and fora as a means of resolving claims of employment discrimination. In particular, this chapter highlights the legal consequences of predispute agreements in which employees waive their rights to bring federal discrimination claims in court.

A significant feature of the seventh edition, like the sixth edition, is the extensive use of scholarship drawn from the work of critical race theorists and feminist legal scholars, in addition to the more traditional pedagogical materials that form the core of the book. The cases and materials provide a firm grounding in the doctrinal developments of employment discrimination law and the theoretical approaches of rights-based scholarship. But conventional assumptions about the objectivity, neutrality, and universality of law are challenged by the feminist and critical race scholarship that we have incorporated throughout the book. In addition, we include some materials on the law and economics approach to issues in employment discrimination law. This extensive and significant body of scholarship, however, is somewhat less central to the approach we have taken, which focuses more on the ideals of equality of opportunity and fairness to individuals as the motivating purpose behind civil rights legislation in general and employment discrimination statutes in particular. Finally, at several points in the book we have included comparative materials from different societies and cultures to suggest alternative perspectives on the problems of discrimination in employment. Our goal has been to offer a number of different perspectives on the social and historical context in which employment discrimination law has developed, with an emphasis on the voices that have emerged from or been associated with traditionally disenfranchised and victimized groups such as women and people of color.

A word about our editing conventions. The cases and excerpted materials have been edited, sometimes extensively, to suit the requirements of space and our pedagogical purposes. In general, deleted material is indicated by ellipses, and original footnote numbers have been retained. Cita-

tions in cases, however, have been omitted without ellipses or parenthetical explanation, unless the context required clarification. Citations in some cases have been altered to conform to Bluebook style.

Our goal has been to produce a casebook that is a readable and teachable introduction to the law of employment discrimination; inevitably, we have produced a book that reflects our own teaching and research interests and strengths. We hope that somewhere between our desires and our abilities we have struck a balance that will suit the needs of many of our colleagues and their students.

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As with any project of this magnitude, a number of people whose names do not appear on the title page have made important contributions that we would like to acknowledge here.

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The sixth and seventh editions of this book have attempted to build on the pedagogical foundations laid by the authors of the previous five editions. A stalwart of the earlier editions is James E. Jones, Jr., Professor Emeritus at the University of Wisconsin Law School. Professor Jones was an author on each edition published between 1971 and 1987, as well as a 1990 supplement to the 1987 edition. Other editors of previous editions include Professors Robert N. Covington, Aaron A. Caghan, and William P. Murphy. We are indebted to their work.

Finally, we want to thank the members of the Labor Law Group Editorial Policy Committee—Laura Cooper, Lance Compa, Ken Dau-Schmidt, Deborah Malamud, Dennis Nolan, and Bob Rabin—who have provided comments and suggestions that have made this a better book. (The inevitable mistakes and omissions in a book of this size and complexity are our own.) Few people outside the Labor Law Group can fully appreciate the collaborative efforts that many members of the Group have dedicated, for over half a century, to the mission of producing classroom materials for teaching labor and employment law. It is a privilege to be able to carry that tradition forward in this new edition of *Employment Discrimination Law: Cases and Materials on Equality in the Workplace*.

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