2000 Supplement to

EMPLOYMENT DISCRIMINATION LAW

CASES AND MATERIALS ON EQUALITY IN THE WORKPLACE

Sixth Edition

Robert Belton
Dianne Avery
Maria L. Ontiveros

American Casebook Series®

The Labor Law Group

2000 SUPPLEMENT TO

EMPLOYMENT DISCRIMINATION LAW:

CASES AND MATERIALS ON EQUALITY IN THE WORKPLACE

Sixth Edition

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Part I

INTRODUCTION

Chapter 1

THE PROBLEM OF DISCRIMINATION: AN OVERVIEW

A. RACE OR COLOR

Page 8. Add at the end of Note 6.

See Laura M. Jordan, Note, *The Empathetic White Male: An Aggrieved Person Under Title VII?*, 55 Wash. U. J.Urb. & Contemp.L. 135 (1999)(exploring whether white males who were not targets of discrimination, but who were indirectly harmed by discrimination against blacks and women, have standing to sue under Title VII).

B. SEX

Page 14. Add at the end of Note 3.

The Report of the National Women of Color Work/Life Survey, *No More "Business as Usual": Women of Color in Corporate America* (Center for Women Policy Studies, March 1999), is a survey that questioned 1,562 women of color at sixteen Fortune 1,000 companies from December 1, 1997, to December 19, 1997. One of the findings of the survey was that women of color face inadequate opportunities for advancement, difficulty in balancing work and family responsibilities, and pressure to play down their race and gender at some of the top companies in the United States.

Chapter 2

LAWS PROHIBITING DISCRIMINATION IN EMPLOYMENT

B. SURVEY OF MAJOR FEDERAL LAWS ON EMPLOYMENT DISCRIMINATION

Page 35. Add the following Note after paragraph 15.

Note: The Eleventh Amendment as a Bar to Claims Against States

Congress has made states subject to a number of federal laws that prohibit discrimination in employment. These laws include, for example, Title VII, the ADA, the ADEA, and the Equal Pay Act. As discussed in *Note: ADEA Claims Against States*, at pages 643–44 (ADEA), and Note 3 (ADA), page 665 of the casebook, an issue that the courts are now addressing is whether Congress has the constitutional power to make states subject to these laws. The Supreme Court specifically addressed this issue in *Kimel v. Florida Board of Regents*, 528 U.S. ___, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000), with respect to the ADEA. The issue in *Kimel* was whether the Eleventh Amendment bars private suits in federal court brought by state employees against nonconsenting states for violations of the ADEA. In a 5–4 decision authored by Justice O'Connor, the Court held that state employees who are victims of age discrimination could not sue states under the ADEA because states are immune from private suits in federal court under the Eleventh Amendment. *Kimel* followed on the heels of several earlier Eleventh Amendment decisions of the Court. In *Alden v. Maine*, 527 U.S. 706, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999), the Court held that state employees may not sue states for damages in state courts for violation of the overtime provisions of the Fair Labor Standards Act. In *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996), not an employment case, the Court held that Congress does not have the authority under the Commerce Clause to abrogate a state's Eleventh Amendment immunity from suit in federal court. *Kimel* held that Congress lacks the power under § 5 of the Fourteenth Amendment to abrogate the states' Eleventh Amendment immunity in ADEA cases.

What are the implications of *Kimel* for other federal laws prohibiting discrimination in employment?

Title VII: In *Fitzpatrick v. Bitzer*, 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976), the Court held that Congress expressly abrogated states' Eleventh Amendment immunity under Title VII when its amended Title VII in 1992 to include states. *Fitzpatrick* may not, however, completely dispose of all of the Eleventh Amendment issues in Title VII cases against states because the majority in *Kimel* stated that Congress's power under § 5 of the Fourteenth Amendment can be used only to *enforce* not to *expand* rights created under the Equal Protection Clause. The Court noted, however, that there is only a fine line between enforcing and expanding constitutional rights. *See Kimel*, 120 S.Ct. at 644. The Court's distinction between enforcing and expanding constitutional rights raises the issue whether the disparate impact theory that is covered in Chapter 4 can be applied to states in cases brought solely under Title VII in view of *Washington v. Davis*, reproduced at page 240. In *Washington v. Davis* the Court held that the Equal Protection Clause protects only against intentional discrimination. The Eleventh Circuit held in *In Re Employment Discrimination Litigation*, 198 F.3d 1305 (11th Cir.1999), that Congress abrogated the states' Eleventh Amendment immunity with respect to the Title VII disparate impact theory. Another issue *Kimel* raises is whether the rule on employer liability for harassment the Court adopted in the Title VII cases of *Burlington Industries, Inc. v. Ellerth*, reproduced at page 441, and *Faragher v. City of Boca Raton*, reproduced at page 460, can be applied to states. The *Ellerth–Faragher* rule imposes vicarious liability on employers, but as a general rule states are not vicariously liable for the constitutional violations of their employees. *See, e.g.*, Monell v. New York City Department of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

Civil Rights Act of 1991: Congress made compensatory damages available in Title VII cases for the first time in the Civil Rights Act of 1991. In *Varner v. Illinois State University*, 150 F.3d 706 (7th Cir.1998), *vacated and remanded on other grounds*, ___ U.S. ___, 120 S.Ct. 928, 145 L.Ed.2d 806 (2000), the Seventh Circuit held that the Congress acted constitutionally in abrogating states' Eleventh Amendment immunity for compensatory damages in Title VII actions. Whether *Kimel* supports the decision is an open question.

ADA: After its decision in *Kimel*, the Supreme Court granted certiorari in two cases to resolve a split in the circuits over whether the Eleventh Amendment grants nonconsenting states immunity in federal court from claims brought under the ADA. Florida Department of Corrections v. Dickson, 139 F.3d 1426 (11th Cir.1998)(ADA a valid exercise of Congress's constitutional authority), *cert. granted*, ___ U.S. ___, 120 S.Ct. 976, 145 L.Ed.2d 926, *cert. dismissed*, ___ U.S. ___, 120 S.Ct. 1236, 145 L.Ed.2d 1131 (2000); Alsbrook v. Arkansas, 184 F.3d 999 (8th Cir.1999)(Congress exceeded its authority when it enacted Title II of the ADA by extending the law's nondiscriminatory provisions to states), *cert. granted*, ___ U.S. ___, 120 S.Ct. 1003, 145 L.Ed.2d 947, *cert. dismissed*, ___ U.S. ___, 120 S.Ct. 1265, ___ L.Ed.2d ___ (2000). The Court dismissed both cases after the parties settled. More recently, the Court granted certiorari in *Garrett v. University of Alabama*, 193 F.3d 1214 (11th Cir.1999), *cert. granted*, ___ U.S. ___, 120

S.Ct. 1669, 146 L.Ed.2d 479 (2000), limited to the question whether the Eleventh Amendment bars ADA actions by private citizens in federal court against nonconsenting states.

Section 1981: The lower courts are fairly unanimous that states cannot be sued in federal court under § 1981 because Congress has not waived their Eleventh Amendment immunity. *See* Demuren v. Old Dominion University, 33 F.Supp.2d 469 (E.D.Va.1999)(collecting cases).

Equal Pay Act: Of the eight cases the Court remanded to the lower courts for reconsideration in light of *Kimel*, two were Equal Pay Act cases. *Varner v. Illinois State University*, 150 F.3d 706 (7th Cir.1998), *vacated and remanded*, ___ U.S. ___, 120 S.Ct. 928, 145 L.Ed.2d 806 (2000); *Anderson v. State University of New York*, 169 F.3d 117 (2d Cir.1999), *vacated and remanded*, ___ U.S. ___, 120 S.Ct. 929, 145 L.Ed.2d 807 (2000). The courts in both cases had upheld the application of the Equal Pay Act to state employers under § 5 of the Equal Protection Clause. In a post-*Kimel* decision, the Eleventh Circuit, in a per curiam decision, held that the application of the Equal Pay Act to states was within the Congressional enforcement powers under the Fourteenth Amendment. *See* Hundertmark v. State of Florida Dep't of Transp., 205 F.3d 1272 (11th Cir.2000).

Other remedies for employment discrimination include:

Page 35. Add at the end of 1.

The efficacy of local legislation in protecting individuals from discrimination in the private sector is explored in Chad A. Readler, *Local Government Anti–Discrimination Laws: Do They Make A Difference?*, 31 U.Mich.J.Law Reform 777 (1998).

C. ENFORCEMENT SCHEMES

1. ADMINISTRATIVE EXHAUSTION

Page 39. Add after the last paragraph in a.

Section 706(b) of Title VII, 42 U.S.C. § 2000e–(5)(b), provides that a charge filed with the EEOC "shall be in writing under oath or affirmation." An EEOC regulation states that "a charge is sufficient when the [EEOC] receives from the person making the charge a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of." 29 C.F.R. § 1601.12(b). The regulation further provides that "[a] charge may be amended to cure technical defects or omissions, including the failure to verify the charge. * * * Such amendments * * * shall relate back to the date the charge was first received." *Id.* The circuits courts are in conflict over whether an unverified EEOC intake questionnaire that is timely filed but not verified within the 180 or 300 days filing period constitutes a timely filed charge. Some courts hold that an unverified EEOC intake questionnaire

cannot serves as an charge within the meaning of Title VII; other courts hold that a timely-filed intake questionnaire can serve as a charge if subsequently verified; still other courts hold that the doctrine of equitable tolling may support an unverified charge that is verified after the filing period has elapsed. The cases are collected in *Shempert v. Harwick Chemical Corp.*, 151 F.3d 793 (8th Cir.1998), *cert. denied*, 525 U.S. 1139, 119 S.Ct. 1028, 143 L.Ed.2d 38 (1999).

Page 43. Add at the end of 1.c.

A recent California case surveyed federal law on the continuing violation doctrine and suggested that the federal courts have endorsed at least three distinct theories: (1) cases in which an employer's decision making process takes place over a period of time, making it difficult to pinpoint the exact date on which the violation occurred; (2) cases in which the employer has an express policy that is discriminatory on its face and continues into the limitations period; and (3) cases in which the employer has engaged in a series of discriminatory acts emanating from the same discriminatory animus. Richards v. CH2M Hill, Inc., 94 Cal.Rptr.2d 228, 79 Cal.App.4th 570 (2000).

2. FEDERAL EMPLOYEES

Page 45. Add at the end of the paragraph.

The EEOC has issued changes in its regulations governing the procedure for federal employee discrimination complaints. The changes, published in the *Federal Register*, 64 F.R. 37643 (July 12, 1999), apply to federal employees, applicants for federal employment, and federal agencies. *See also* 29 C.F.R. § 1614.102.

3. JUDICIAL ENFORCEMENT

Page 46. Add at the end of the first paragraph in Note a.

The split in the circuits on the authority of the EEOC to issue a right-to-sue notice prior to the expiration of 180 days was reviewed in *Martini v. Federal National Mortgage Ass'n*, 178 F.3d 1336 (D.C.Cir. 1999), *cert. dismissed*, ___ U.S. ___, 120 S.Ct. 1155, 145 L.Ed.2d 1065 (2000). In *Martini* the Ninth Circuit held that the EEOC regulation that allows it to issue a notice-of-right-to-sue prior to the expiration of 180 days, if the EEOC determines that it will not be able to complete its administrative process within 180–days of the filing of a charge, is invalid.

The courts have adopted different rules on when the 90 days begin to run within which a complaint must be filed in court after the EEOC sends the notice-of-right-to-sue by certified mail, and the Post Office leaves a notice indicating a specified period of time in which the letter must be picked-up before it is returned to the EEOC. For example, the Seventh Circuit has adopted an actual notice rule, but the rule does not apply to a plaintiff who fails to receive actual notice through her own fault. *See* Houston v. Sidley & Austin, 185 F.3d 837 (7th Cir.1999)(citing

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