EMPLOYMENT LAW *for* BUSINESS

FOURTH EDITION

DAWN D. BENNETT-ALEXANDER
LAURA P. HARTMAN

Employment Law for Business

Fourth Edition

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To:
The victims, both here and gone, of the tragic events of September 11, 2001.

My *incredible* early mentors, Weldon H. Latham, Senior Partner, Corporate Diversity Counseling Group, Holland Knight, LLP, and Richard D. Parsons, Chairman and CEO of AOL-TimeWarner. *Many* thanks for your early investment of time, energy, and confidence in me. I hope you think it paid off.

My daughters Jenniffer Dawn Bennett Alexander and Anne Alexis Bennett-Alexander. Congratulations on your college graduations. You GO girls! ☺

D D B-A

To my family, and all others whom I hold dear.

L P H

About the Authors

Dawn D. Bennett-Alexander

University of Georgia

Dawn D. Bennett-Alexander, Esq., is an award-winning tenured associate professor of employment law and legal studies at the University of Georgia's Terry College of Business and an attorney admitted to practice in the District of Columbia and six federal jurisdictions. She is a cum laude graduate of the Howard University School of Law and a magna cum laude graduate of the Federal City College, now the University of the District of Columbia. She was cofounder and cochair, with her coauthor, of the Employment and Labor Law Section of the Academy of Legal Studies in Business and coeditor of the section's *Employment and Labor Law Quarterly;* past coeditor of the section's newsletter; and past president of the Southeastern Academy of Legal Studies in Business. Bennett-Alexander taught employment law in the University of North Florida's MBA program from 1982 to 1987 and has been conducting employment law seminars for managers and supervisors since 1985. Prior to teaching, Bennett-Alexander worked at the Federal Labor Relations Authority, the White House Domestic Council, the U.S. Federal Trade Commission, Antioch School of Law, and as law clerk to the Honorable Julia Cooper Mack at the highest court in the District of Columbia, the D.C. Court of Appeals. Bennett-Alexander publishes widely in the employment law area, is a noted expert on employment law issues, was asked to write the first-ever sexual harassment entry for *Grolier Encyclopedia,* edited the National Employee Rights Institute's definitive book on federal employment, has been widely quoted on TV, radio, and in the print press, including *USA Today,* the *Wall Street Journal,* and *Fortune* magazine, and is a founder of Practical Diversity, consultants on diversity and employment law issues. Bennett-Alexander was a 2000–2001 senior scholar recipient of the Fulbright Fellowship under which she taught law in Ghana, West Africa, and conducted research on race and gender in employment.

Laura P. Hartman

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Laura P. Hartman is associate vice president for academic affairs at DePaul University, where she is responsible for coordinating the development of new academic programs. She is also a professor of business ethics and legal studies in the Management Department in DePaul's College of Commerce.

Hartman's scholarship focuses on the ethics of the employment relationship, with a primary emphasis in the areas of global labor conditions and standards and the impact of technology on the employment relationship. Her research and consulting efforts have garnered national media attention by publications such as

the *Wall Street Journal, BusinessWeek,* the *New York Times,* and *Fortune Small Business* where she was recently named as one of the Top Ten Minds for Small Business. She has written numerous textbooks, including *Employment Law for Business* and *Perspectives in Business Ethics.* Her next book, *Rising above Sweatshops: Innovative Management Approaches to Global Labor Challenges,* will be published in 2003 by Greenwood Publishing.

Previously, Hartman held the Grainger Chair of Business Ethics at the University of Wisconsin–Madison School of Business. She has also served as an adjunct professor of business law and ethics at Northwestern's Kellogg Graduate School of Management.

Hartman serves on the board of directors of DePaul's Institute for Business and Professional Ethics, previously held DePaul's Wicklander Chair in Professional Ethics, and served as chair of the University's Public Service Council. She currently serves as president of the Society for Business Ethics and is cofounder and past cochair of the Employment and Labor Law Section of the Academy of Legal Studies in Business. In addition, she was co-editor of the Section's *Employment and Labor Law Quarterly* and served as president of the Midwest Academy of Legal Studies in Business for the 1994–1995 term.

Hartman graduated magna cum laude from Tufts University and received her law degree from the University of Chicago Law School.

Preface to the First Edition

- If a disabled employee could perform the job requirements when hired, but the job has progressed and the employee is no longer able to perform, must the employer keep her on?
- Is an employer liable when a supervisor sexually harasses an employee, but the employer knew nothing of it?
- Is an employer liable for racial discrimination because she terminates a black male who refuses to abide by the "no-beard" rule?
- Can an employer be successfully sued for "reverse discrimination" by an employee who feels harmed by the employer's affirmative action plan?
- How far can an employer go in instituting a dress code?
- If an employer has two equally qualified applicants from which to choose and prefers the white one to the black one, is it illegal discrimination for the employer to hire the white applicant, or must the employer hire the black one?
- Must an employer send to training the employee who is in line to attend, if that employee will retire shortly?
- Must an employer keep an employee known to be HIV-positive when other employees fear for their own health because of their exposure to the HIV-positive employee?
- Is it a violation of wage and hour laws for an employer to hire his 13-year-old daughter to pick strawberries during the summer?
- Is an ex-employer liable for defamation if he gives a negative recommendation about an ex-employee to a potential employer who inquires?
- Must an employer disclose to employees that chemicals with which they work are potentially harmful?
- Can an employer stop employees from forming a union?

These types of questions, which are routinely decided in workplaces everyday, can have devastating financial and productivity consequences if mishandled by the employer. Yet few employers or their managers and supervisors are equipped to handle them well. That is why this textbook was created.

Between fiscal years 1970 when newly enacted job discrimination legislation cases started to rise and 1983, the number of federal discrimination suits grew from fewer than 350 per year to around 9,000 per year. This is an astonishing 2,166 percent growth in the volume of discrimination suits, compared with only 125 percent growth in general federal civil cases for the same period. A major factor in this statistic is that the groups protected by Title VII of the Civil Rights Act of 1964 and similar legislation, including minorities, women, and white males over 40, now constitute over 70 percent of the total workforce. Add to that number those protected by laws addressing disability, wages and hours, and unions, workplace environmental right-to-know laws, tort laws, and occupational safety and health

laws, and the percentage increases even more. There was a 95.7 percent increase from 1969's 45.84 million such employees to 1989's 89.70 million employees.

It is good that employers and employees alike are now getting the benefits derived from having a safer, fairer workplace and one more reflective of the population's diversity. However, this is not without its attendant challenges. One of those challenges is reflected in the statistics given above. With the advent of workplace regulation by the government, particularly the Civil Rights Act of 1964, there is more of an expectation by employees of certain basic rights in the workplace. When these expectations are not met, and the affected population comprises more than 70 percent of the workforce, problems and their attendant litigation will be high.

Plaintiffs won 57 percent of lawsuits brought for wrongful termination based on race, gender, and disability discrimination in the seven-year period between 1988 and 1995. The median compensatory damage award was more than $100,000. Much of the litigation and liability arising in the area covered by these statistics is avoidable. Many times the only difference between an employer being sued or not is a manager or supervisor who recognizes that the decision being made may lead to unnecessary litigation and thus avoids it.

We have seen what types of employment law problems are most prevalent in the workplace from our extensive experience in the classroom, in our research and writing, as well as in conducting over the years many employment seminars for managers, supervisors, business owners, equal employment opportunity officers, human resources personnel, general counsels, and others. We have seen how management most often strays from appropriate considerations and treads on thin legal ice, exposing it to potential increased liability. We came to realize that many of the mistakes were based on ignorance rather than malice. Often it was simply not knowing that a decision was being handled incorrectly.

Becoming more aware of potential liability does not mean the employer is not free to make legitimate workplace decisions. It simply means that those decisions are handled appropriately in ways that lessen or avoid liability. The problem does not lie in not being able to terminate the female who is chronically late for work, because the employer thinks she will sue for gender discrimination. Rather, the challenge lies in doing it in a way that precludes her from being able to file a successful claim. It does not mean the employer must retain her, despite her failure to adequately meet workplace expectations and requirements. It means simply that the employer must make certain the termination is beyond reproach. If the employee has performed in a way that results in termination, this should be documentable and, therefore, defensible.

Termination of the employee under such circumstances should present no problem, assuming similarly situated employees have been treated consistently in the same manner. The employer is free to make the management decisions necessary to run the business, but she or he simply does so correctly.

Knowing how to do so correctly doesn't just happen. It must be learned. We set out to create a textbook aimed at anyone who would, or presently does, manage people. Knowing what is in this book is a necessity. For those already in the workplace, your day is filled with one awkward situation after another—for which

you wish you had the answers. For those in school, you will soon be in the workplace, and in the not-too-distant future you will likely be in a position managing others. We cannot promise answers to every one of your questions, but we can promise that we will provide the information and basic considerations in most areas that will help you arrive at an informed, reasonable, and defensible answer about which you can feel more comfortable. You will not walk away feeling as if you rolled the dice when you made a workplace decision, and then wait with anxiety to see if the decision will backfire in some way.

In an effort to best inform employers of the reasoning behind legal requirements and to provide a basis for making decisions in "gray areas," we often provide background in relevant social or political movements, or both, as well as in legislative history and other relevant considerations. Law is not created in a vacuum, and this information gives the law context so the purpose is more easily understood. Often understanding why a law exists can help an employer make the correct choices in interpreting the law when making workplace decisions with no clear-cut answers.

Legal cases are used to illustrate important concepts; however, we realize that it is the managerial aspects of the concepts with which you must deal. Therefore, we took great pains to try to rid the cases of unnecessary "legalese" and procedural matters that would be more relevant to a lawyer or law student. We also follow each case with questions designed to aid in thinking critically about the issues involved from an employer's standpoint, rather than from a purely legal standpoint. We understand that *how* employers make their decisions has a great impact on the decisions made. Therefore, our case-end questions are designed as critical-thinking questions to get the student to go beyond the legal concepts and think critically about management issues. This process of learning to analyze and think critically about issues from different points of view will greatly enhance student decision-making abilities as future managers or business owners. Addressing the issues in the way they are likely to arise in life greatly enhances that ability.

It is one thing to know that the law prohibits gender discrimination in employment. It is quite another to recognize such discrimination when it occurs and govern oneself accordingly. For instance, a female employee says she cannot use a "filthy" toilet, which is the only one at the work site. The employer can dismiss the complaint and tell the employee she must use the toilet, and perhaps later be held liable for gender discrimination. Or the employer can think of what implications this may have, given that this is a female employee essentially being denied a right that male employees have in access to a usable toilet. The employer then realizes there may be a problem and is more likely to make the better decision.

This seemingly unlikely scenario is based on an actual case, which you will later read. It is a great example of how simple but unexpected decisions can create liability in surprising ways. Knowing the background and intent of a law often can help in situations where the answer to the problem may not be readily apparent. Including the law in your thinking can help the thought process for making well-founded decisions.

We also have included boxed items from easily accessible media sources that you come across every day, such as *People* magazine and the *USA Today* newspaper. The

intent is to demonstrate how the matters discussed are interesting and integrated into everyday life, yet they can have serious repercussions for employers.

Much of today's litigation results from workplace decisions arising from unfortunate ideas about various groups and from lack of awareness about what may result in litigation. We do not want to take away anyone's right to think whatever he or she wants about whomever he or she wants, but we do want to teach that those thoughts may result in legal trouble when they are acted on.

Something new and innovative must be done if we are to break the cycle of insensitivity and myopia that results in spiraling numbers of unnecessary lawsuits. Part of breaking this cycle is language and using terminology that more accurately reflects those considerations. We have, therefore, in a rather unorthodox move, taken the offensive and created a path, rather than followed one.

For instance, the term "sex" is used in this text to mean sex only in a purely sexual sense. The term "gender" is used to distinguish males from females. With the increasing use of sexual harassment as a cause of action, it became confusing to continue to speak of "sex" as meaning gender, particularly when it adds to the confusion to understand that sex need *not* be present in a sexual harassment claim but gender differences *are* required. For instance, to say that a claim must be based on "a difference in treatment based on sex" leaves it unclear as to whether it means gender or sexual activity. Since it actually means gender, we have made such clarifications. Also, use of the term "sex" in connection with gender discrimination cases, the majority of which are brought by women, continues to inject sexuality into the equation of women and work. This, in turn, contributes to keeping women and sexuality connected in an inappropriate setting (employment). Further, it does so at a time when there is an attempt to decrease such connections and, instead, concentrate on the applicant's qualifications for the job.

So, too, with the term "homosexuality." In this text, the term "affinity orientation" is used instead. The traditional term emphasizes, for one group and not others, the highly personal yet generally irrelevant issue of the employee's sexuality. The use of the term sets up those within that group for consideration as different (usually interpreted to be "less than"), when they may well be qualified for the job and otherwise acceptable. With sexuality being highlighted in referring to them, it becomes difficult to think of them in any other light. The term also continues to pander to the historically more sensational or titillating aspects of the applicant's personal life choices and uses it to color her or his entire life when all that should be of interest is ability to do the job. Using more appropriate terminology will hopefully keep the focus on that ability.

The term "disabled" is used, rather than "handicapped," to conform to the more enlightened view taken by the Americans with Disabilities Act of 1990. It gets away from the old notion that those who were differently abled went "cap in hand" looking for handouts. Rather, it recognizes the importance of including in employment these 43 million Americans who can contribute to the workplace.

There is also a diligent effort to use gender-inclusive or neutral terminology—for example, police officers, rather than policemen; firefighters, rather than firemen; servers, rather than waiters or waitresses; flight attendants, rather than stewards or

stewardesses. We urge you to add to the list and use such language in your conversations. To use different terminology for males and females performing the same job reflects a gender difference when there is no need to do so. If, as the law requires, it is irrelevant because it is the job itself on which we wish to focus, then our language should reflect this.

It is not simply a matter of terminology. Terminology is powerful. It conveys ideas to us about the matter spoken of. To the extent we change our language to be more neutral when referring to employees, it will be easier to change our ingrained notions of the "appropriateness" of traditional employment roles based on gender, sexuality, or other largely irrelevant criteria and make employment discrimination laws more effective.

This conscious choice of language also is not a reflection of temporal "political correctness" considerations. It goes far beyond what terming something "politically correct" tends to do. These changes in terminology are substantive and nontrivial changes that attempt to have language reflect reality, rather than have our reality shaped and limited by the language we use. Being sensitive to the matter of language can help make us more sensitive to what stands behind the words. That is an important aid in avoiding liability and obeying the law.

The best way to determine what an employer must do to avoid liability for employment decisions is to look at cases to see what courts have used to determine previous liability. This is why we have provided many and varied cases for you to consider. Much care has been taken to make the cases not only relevant, informative, and illustrative but also interesting, up to date, and easy to read. There is a good mix of new cases, along with the old "standards" that still define an area. We have assiduously tried to avoid legalese and intricate legal consideration. Instead, we emphasize the legal managerial aspects of cases—that is, what does the case mean that management should or should not do to be best protected from violating the law?

We wanted the textbook to be informative, readable, and a resource, to encourage critical and creative thinking about workplace problems, and to sensitize you to the need for effective workplace management. We think we have accomplished our goal. We hope the text is as interesting and informative for you to read and use as it was exciting and challenging for us to write.

We *sincerely* would like to know what you think. We urge you to write and let us know—good or bad—your thoughts.

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Preface to the Fourth Edition

Wow! Who would have thought when we started out with this project of a first-of-its-kind employment law text for business students, first published in 1995, we'd now be going into our fourth edition! In many ways that is wonderful. For us, this book has always been a true labor of love. We believe in the premise of the book: that business students who will one day be managers and supervisors can learn what they need to avoid workplace liability for unnecessary acts and can do so in a way that is informative and interesting (a novel concept for a textbook!). We believe that exposing students to what they will need to know can actually mean less liability for the employer, less embarrassing negative publicity, more money kept in the coffers of business, and more productivity and less embarrassment, humiliation, and ill will felt by employees. Our belief in that has been first and foremost in our minds as we wrote every word of the text.

We were lucky to have chosen our publishers well. They believed as much as we did that "if we write it, they will come." The book outstripped all of their projections and has been growing and gaining a following ever since. Once there was a text to use, the courses came and people finally understood how incredibly important this subject matter is to anyone managing people today.

As we stand at the beginning of a new century, our nation's population continues to become more and more diverse. In the wake of the tragedy of September 11, 2001, we and many others realized, as a country, that we have to do more than pay lip service to issues of diversity and differences among us. We have to put it into action. In an instant, we realized that we are more inextricably woven into each other's lives than we ever imagined and that, if business as we know it is to continue, it must understand, appreciate, and embrace this interconnectedness.

Even though we are totally grounded in reality, the truth is that we'd love for there to no longer be a need for what this book teaches. We would love for employers to have moved past the point where discrimination would seem to be a viable option in the workplace, or at least get to the point where they recognize it and it is quickly curtailed. But as you will see from the chapters, such is not the case. We aren't there yet. Not even close.

Just in the past couple of years since publication of the third edition in 2000, there have been several important employment law–related issues that received a good deal of attention. National origin and religious discrimination and harassment in the wake of September 11, 2001, increased dramatically, and the distress of legendary companies and figures like Enron, WorldCom, and even Martha Stewart have all taken their toll on the business world. There has been at least the appearance of a resurgence in sexual harassment claims, race discrimination claims, gender claims, and issues surrounding gay and lesbian rights in the workplace,

disability issues, and increasingly sophisticated moves to thwart unions' attempts to organize. We have incorporated these into the fourth edition, as appropriate.

As with prior editions, we have listened to your much appreciated suggestions, which we continue to encourage, and have incorporated them as we think appropriate. Thank you for taking the time to give us feedback. We really, really appreciate it. In addition to updating the material, in the fourth edition we have added pedagogical tools that we think will be even more helpful in using the textbook, including:

- A guide to understanding the cases.
- More information available online.
- More case-based chapter-end questions.

So, until Americans are, as a country, where they need to be with the issues in employment law, we will keep writing, and we hope students will keep learning, and hopefully we will continue to get the absolutely appreciated loyalty and support that we receive from our students, faculty, and others who use this textbook. We have heard your kudos, and they are wonderful and make it all worthwhile. Thank you. Enjoy the fourth edition!

Dawn D. Bennett-Alexander, Esq.
Athens, Georgia
September 11, 2002

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This text is immeasurably richer for having the contributions of *each* of you.

DDB-A

Hartman: I am grateful for the assistance of so many individuals who have helped to bring this fourth edition to press. First, I am always and eternally grateful for the existence on this earth of my coauthor, Dawn (and her willingness to continue to work alongside me). I would never have the interest in continuing if I did not have the warmth, compassion, and acceptance on which I have learned to rely from Dawn. We are both grateful for the continued support of our editor, Andy Winston, and his staff.

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LPH

Brief Contents

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