

ASPEN CASEBOOK SERIES

ZIMMER
SULLIVAN
WHITE

Cases and Materials on
EMPLOYMENT
DISCRIMINATION

*Eighth
Edition*



Wolters Kluwer

Law & Business

ASPEN CASEBOOK SERIES



30809392

CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION

Eighth Edition

MICHAEL J. ZIMMER

Professor of Law

Loyola University of Chicago School of Law

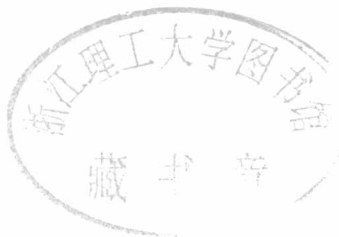
CHARLES A. SULLIVAN

Andrea J. Catania Endowed Professor of Law
Seton Hall University

REBECCA HANNER WHITE

Dean and

J. Alton Hosch Professor of Law
University of Georgia



Wolters Kluwer
Law & Business

Copyright © 2013 Michael J. Zimmer, Charles A. Sullivan, and Rebecca Hanner White.

Published by Wolters Kluwer Law & Business in New York.

Wolters Kluwer Law & Business serves customers worldwide with CCH, Aspen Publishers, and Kluwer Law International products. (www.wolterskluwerlb.com)

No part of this publication may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopy, recording, or utilized by any information storage or retrieval system, without written permission from the publisher. For information about permissions or to request permissions online, visit us at www.wolterskluwerlb.com, or a written request may be faxed to our permissions department at 212-771-0803.

To contact Customer Service, e-mail customer.service@wolterskluwer.com, call 1-800-234-1660, fax 1-800-901-9075, or mail correspondence to:

Wolters Kluwer Law & Business
Attn: Order Department
PO Box 990
Frederick, MD 21705

Printed in the United States of America.

1 2 3 4 5 6 7 8 9 0

ISBN 978-1-4548-1074-2

Library of Congress Cataloging-in-Publication Data

Zimmer, Michael J., 1942-

Cases and materials on employment discrimination / Michael J. Zimmer, Charles A. Sullivan, Rebecca Hanner White.

p. cm. — (Aspen casebook series)

Includes bibliographical references and index.

ISBN 978-1-4548-1074-2 (casebound : alk. paper)

1. Discrimination in employment — Law and legislation — United States — Cases. I. Sullivan, Charles A.
- II. White, Rebecca Hanner, 1954- III. Title.

KF3464.Z56 2013

344.7301'133—dc23

2012042696



SUSTAINABLE
FORESTRY
INITIATIVE

Certified Sourcing

www.sfiprogram.org

SFI-01234

SFI label applies to the text stock

About Wolters Kluwer Law & Business

Wolters Kluwer Law & Business is a leading global provider of intelligent information and digital solutions for legal and business professionals in key specialty areas, and respected educational resources for professors and law students. Wolters Kluwer Law & Business connects legal and business professionals as well as those in the education market with timely, specialized authoritative content and information-enabled solutions to support success through productivity, accuracy and mobility.

Serving customers worldwide, Wolters Kluwer Law & Business products include those under the Aspen Publishers, CCH, Kluwer Law International, Loislaw, Best Case, ftwilliam.com and MediRegs family of products.

CCH products have been a trusted resource since 1913, and are highly regarded resources for legal, securities, antitrust and trade regulation, government contracting, banking, pension, payroll, employment and labor, and healthcare reimbursement and compliance professionals.

Aspen Publishers products provide essential information to attorneys, business professionals and law students. Written by preeminent authorities, the product line offers analytical and practical information in a range of specialty practice areas from securities law and intellectual property to mergers and acquisitions and pension/benefits. Aspen's trusted legal education resources provide professors and students with high-quality, up-to-date and effective resources for successful instruction and study in all areas of the law.

Kluwer Law International products provide the global business community with reliable international legal information in English. Legal practitioners, corporate counsel and business executives around the world rely on Kluwer Law journals, looseleaves, books, and electronic products for comprehensive information in many areas of international legal practice.

Loislaw is a comprehensive online legal research product providing legal content to law firm practitioners of various specializations. Loislaw provides attorneys with the ability to quickly and efficiently find the necessary legal information they need, when and where they need it, by facilitating access to primary law as well as state-specific law, records, forms and treatises.

Best Case Solutions is the leading bankruptcy software product to the bankruptcy industry. It provides software and workflow tools to flawlessly streamline petition preparation and the electronic filing process, while timely incorporating ever-changing court requirements.

ftwilliam.com offers employee benefits professionals the highest quality plan documents (retirement, welfare and non-qualified) and government forms (5500/PBGC, 1099 and IRS) software at highly competitive prices.

MediRegs products provide integrated health care compliance content and software solutions for professionals in healthcare, higher education and life sciences, including professionals in accounting, law and consulting.

Wolters Kluwer Law & Business, a division of Wolters Kluwer, is headquartered in New York. Wolters Kluwer is a market-leading global information services company focused on professionals.

To Margaret, Michael, and Lanier
M.J.Z.

To Leila, Meghan, Moira, the Marks,
and especially Jessica Leigh
C.A.S.

To Dan, Brendan, and Maren
R.H.W.

PREFACE

This Eighth Edition marks yet another set of dramatic developments. The law of individual disparate treatment continues to grow more complicated at the same time as the Supreme Court's decisions in *Ricci v. DeStefano* and *Wal-Mart Stores, Inc. v. Dukes* require a reassessment of both systemic disparate treatment and disparate impact. Nor have all the changes been in the courts, as Congress has radically changed the analysis of disability claims in the Americans with Disabilities Act Amendments Act and essentially eliminated any statute of limitations for those (as yet not clearly defined) cases that fall within the Lilly Ledbetter Fair Pay Act. In short, there's a lot of new law to learn, and old law to reconsider, and this Edition attempts to do both.

Perhaps as important, we have also sought to do so while reducing the size of the book substantially. Despite the addition of much new material, this edition is 50 pages shorter than its predecessor. Our goal is to remain as sophisticated as prior editions, both in terms of theoretical and practical perspectives, while being more accessible.

The most obvious organizational changes in the Seventh Edition are elimination of the "policy" Chapter 10 (although we will reproduce it in the Teachers Manual) and breaking out retaliation into a separate chapter (Chapter 6) in recognition of that area's increasing importance; indeed, retaliation is one of the few growth areas of discrimination law. Chapter 7, dealing with the ADA, while retaining its prior structure, attempts to incorporate as many of the just-emerging decisions interpreting the ADAAA as possible.

As before, the casebook begins with the three chapters analyzing each of the three basic theories of discrimination — individual disparate treatment, systemic disparate treatment, and disparate impact (Chapters 1, 2, and 3), followed by a chapter on the interrelation of those theories (Chapter 4). It then moves to "special problems" of discrimination law (Chapter 5), treating coverage, sex discrimination, religion, national origin discrimination, and age. There follows Chapter 6 dealing with retaliation. These chapters continue the prior editions' merger of the treatment of the Age Discrimination in Employment Act and the Reconstruction Civil Rights Acts, primarily 42 U.S.C. §1981, into the Title VII discussion. Pedagogically, the casebook reflects the statutory and common law unification of discrimination analysis under all three statutes although the significant differences are noted in the relevant chapters or collected in Chapter 5 on "special problems."

As we have suggested, those who used the Seventh Edition will find substantial changes in these core chapters. Chapter 1, in particular, attempts to meld newer cases and scholarship to achieve a more sophisticated understanding of individual disparate treatment law. In recognition of the suggestions of a number of our adopters, we have restored a more traditional organizational structure, starting with

McDonnell Douglas and proceeding through *Price Waterhouse* to *Desert Palace*. In the process, we have incorporated the Supreme Court's "cat's paw" decision, *Staub v. Proctor Hospital*, which is likely to cause radical changes in human resources practices across the nation. And we have highlighted *Gross v. FBL Financial Services, Inc.*'s resurrection of but-for causation for the ADEA and other claims. We have, we hope, also provided a more accessible approach to the question of unconscious (or implicit) bias, which continues to pose enormous conceptual and practical problems.

While the systemic chapters (Chapters 2 and 3) will look familiar in structure, both consider the potentially radical changes wrought by *Wal-Mart*. Chapter 4, the interrelationship chapter, naturally devotes primary attention to *Ricci v. DeStefano*'s reconceptualization of the interaction of disparate treatment and disparate impact. Prior users will then find Chapter 5 essentially the same in structure (with the exception of moving retaliation to a new Chapter 6). The religion materials, of course, include *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, which recognized a "ministerial exception" to the antidiscrimination laws.

Most exciting for us is Chapter 7, dealing with disabilities. Prior editions tracked the creation, growth, and precipitous decline of the ADA as a result of hostile court decisions. Congress's effort in the ADAAA to revive the statute is beginning to bear fruit, although it too soon to be certain that the statute will have the transformative effects that many predicted when the ADA was originally enacted.

The remaining three chapters — Chapter 8, Procedures, Chapter 9, Remedies, and Chapter 10, Risk Management, try to treat in a concise way issues that, though critical for how employment discrimination is practiced "on the ground," often seem to be afterthoughts in many courses. To help cope with the problem of length, we have made the chapters shorter and more didactic.

Some professors who use this book have asked about coverage. None of the authors takes the same approach, and some of us vary depending on the semester. We all teach three-credit courses. While none of us tries to cover the entire book, all teach the four chapters that make up its core — Chapters 1 through 4. We also all teach most of Chapters 5 and 6, as the gender and retaliation materials are essential to a comprehensive course in employment discrimination. Given the ADA, we have all come increasingly to believe that Chapter 7 must be taught, although some of us omit more esoteric material in that chapter. The choice of the remaining material is a matter of individual instructor preference but, as we have suggested, in an environment that seems to prefer more "practice-ready" graduates, these three chapters are all candidates for inclusion.

As many of our users know, a website supports the teaching mission of the casebook. Visit us at <http://www.shulawconferences.com/discrimination/> Our aim, which has been achieved within normal limits of scholarly procrastination, is to reflect recent developments at least twice a semester. We do not attempt to track every judicial, legislative, or administrative change as there are services that do that far better than we can. Rather, our goal is to identify the more important developments and key them to the casebook while providing a resource that faculty and student can both use in a variety of ways. The webpage, for example, tries to keep track of faculty websites, reproduce professors' past examinations, suggest teaching ideas, and provide links to a variety of other resources. Please visit the website at

<http://law.shu.edu/discrimination/>. The site contains a “contact” button, but we can also be reached at:

Michael J. Zimmer: mzimmer4@luc.edu

Charles A. Sullivan: sullivch@shu.edu

Rebecca Hanner White: rhwhite@uga.edu

A final word about our editing of excerpted material: All omissions are indicated by ellipses or brackets, except that citations (including parentheticals), footnotes, and internal cross-references are deleted with no indication. Footnotes in extract retain their original numbers, while those added by us are indicated by asterisks and daggers.

*Michael J. Zimmer
Charles A. Sullivan
Rebecca Hanner White*

November 2012

ACKNOWLEDGMENTS

We acknowledge the insights of the many teachers who have used the earlier editions of this work and have shared their thoughts with us. Our deepest debts are to our former co-authors, Richard F. Richards and Deborah A. Calloway. Dick was one of the original authors and continued on the book through the fifth edition. His mark continues to reverberate throughout this work. He is the master of remedies, blazed the trail when the ADA was first passed, and tried (often unsuccessfully) to control his co-authors' idiosyncrasies. Deborah joined the team for the third, fourth, and fifth editions. She brought new energy and insights that still profoundly influence core portions of this effort. We give both our heartfelt thanks.

Our colleagues over the years have also provided numerous useful insights. We thank especially Jake Barnes and Calvin Sharpe for reviewing portions of earlier editions of this book and steering us closer to the correct path. Our students have also been essential to keeping this work grounded and accessible even as the field of employment discrimination becomes increasingly complex and sophisticated. At Wolters Kluwer (formerly Little, Brown), we owe a special debt to Carol McGeehan (who copyedited the first edition) and who has gently nudged us through subsequent editions.

Our research assistants have kept us honest and this book accurate, not to mention making the professors' lives easier in innumerable other ways. We thank the following (all of Seton Hall unless otherwise identified):

- Justine Abrams, '14; Nicole Zito, Columbia '14;
- Ezra Alter, Jinkal Pujara, Allison Martin, Liana Nobile, & Kaitlyn Stone, '13
- Mark Heftler, Temi Kolarova, Renee Levine, & Caitlin Petry, '12, Hillary Miller, '12 Georgia
- Mariel Belanger, Anthony Marroney Noto, & Daniel McGrady, '11; Rachel Hinckley, Georgia '11
- Elizabeth Losey, '10; Amy Smith, Georgia '10
- Nathan Brown, Kaitlin Kennedy, Katherine Planer, & Tara Touloumis, '09
- Christina Bae, Joseph Fanning, & Angela Kopolovich, '08
- Lauren DeWitt, '07; Wright Frank, Georgetown '07; Merritt McAlister, Georgia '07; Lindsay Leonard, Fordham '07;
- M. J. Blakely, Georgia, '06
- Lauren Walter, '05, Kira Fonteneau, Georgia, '05; Brendan Krasinzki, Georgia, '05
- Stefania DiTrollo, Sonia Middlebrooks, Mara Timourian & Dawn Woodruff, '04; Caroline Castle, Georgia, '04
- Jenny Kramer & Amanda Dowd, '01

- Jonathan Green, Richard Kielbania, Chantal Kopp, & Shannon Philpott, '00
- Tara Schillari, '99;
- Kim Essaf, Jessica Lerner, Michael MacManus, Jason Marx & Colleen Walsh, '98;
- Victoria Melillo, '97;
- Jessica Stein & Thomas Crino, '96;
- Dena Epstein, Wendy Whitbeck, Claudine Leone, & Thomas Sarno, '95;
- Susan Farrell, '89;
- Rosanne Maraziti, Linda Biancardi, Nancy Johnson, & Julie Murray, '88;
- Laurie Fierro & Lorrie Van de Castle, '83.

To these must be added the dedicated support staff at Seton Hall, especially Beth Krauzlis, Latisha Porter-Vaughn, Jo Ann Maldonado, Gwen Davis, and Silvia Cardoso. Ana Santos, Seton Hall's Web Coordinator, deserves special mention for her work in creating and updating the webpage supporting this casebook. Finally, we thank Moira Sullivan for dedicated proofreading.

NOTE TO STUDENTS

A. What You'll Be Studying

This book is devoted to employment discrimination, one of the most important areas of legal regulation of the rights and responsibilities of employers and employees. This course is concerned with the question of “discrimination” in employment and is, therefore, limited to legal doctrines that fall within the definition of that term. Indeed, much of this book is devoted to the twin questions of how “discrimination” should be defined and how it is proven in the litigation context. As you will see, employment discrimination, on both the social and the legal levels, is a complex and controversial problem, affecting the rights of all workers in one way or another.

But however important the topic of employment discrimination is, it is only a subset of the more general problem of legal regulation of the employment relationship. As you will learn, “employment discrimination” is usually limited to discrimination against employees on the basis of statutorily-defined characteristics. These characteristics may be immutable — such as race, gender, age, or national origin — or subject to change — such as religion, alienage, or marital status — or of either kind — such as disability discrimination, which includes mental and physical disabilities without regard to their causes.

While these categories are the traditional domain of the law of employment discrimination, employers routinely “discriminate” (perhaps we should use the word “differentiate”) among employees or applicants in ways that have nothing to do with race, gender, age, or any of the other reasons prohibited by discrimination statutes. Further, employers may base their actions on rational reasons (hiring the best-qualified applicant); questionable reasons (promoting the daughter of an important customer over a better worker who lacks such “connections”); reasons that are eccentric but not necessarily legally wrong (choosing employees on the basis of astrological sign); or socially and morally unacceptable reasons (firing a “whistleblower” whose conduct had saved human lives).

The ultimate question, of course, is what, if any, limitations the law should place on the employer's power to deal with employees. The antidiscrimination laws reflect one societal answer, but the broader question is taken up in courses titled “Employment Law” or “Individual Employment Rights.” See *generally* TIMOTHY P. GLYNN, RACHEL ARNOW-RICHMAN & CHARLES A. SULLIVAN, *EMPLOYMENT LAW: PRIVATE ORDERING AND ITS LIMITATIONS* (2d ed. 2012). It is also treated, albeit somewhat obliquely, in labor law.

As a discipline, employment law is a sprawling area that begins with a core commitment to private ordering through contracts. In employment, as in other areas of contract law, policing the fairness of bargains is the exception, rather than the rule.

Contract law purported to implement this approach to employment by adopting a general rule that prevailed in the United States for nearly a century: absent an express written contract for a specified term, the relationship between an employer and its employees was “at will.” One court explained the rule and its rationale: “Generally speaking, a contract for permanent employment, for life employment, or for other terms purporting permanent employment, where the employee furnishes no consideration additional to the services incident to the employment, amounts to an indefinite general hiring terminable at the will of either party, and a discharge without cause does not constitute a breach of such contract justifying recovery of damages.” *Forrer v. Sears, Roebuck & Co.*, 153 N.W.2d 587, 589 (Wis. 1967). While framed neutrally, in the sense that either party can terminate the relationship without liability to the other, the at-will doctrine in practice meant that the employer could discharge an employee “for good reason, bad reason, or no reason at all.”

Because contract law provided few rights for most workers, numerous legislative interventions were designed to address deficiencies, or perceived deficiencies, of the at-will regime. The antidiscrimination statutes are a prime example, but employment law treats a huge variety of other interventions of greater or lesser legal and practical significance. On the federal level, these include:

- Leave policies: The Family and Medical Leave Act (FMLA)
- Wage and hour laws: The Fair Labor Standards Act (FLSA), 29 U.S.C. §§201 et seq.
- Workplace safety: The Occupational Safety and Health Act (OSHA), 29 U.S.C. §651 et seq.
- Pension and fringe benefits: The Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§1002 et seq.
- Privacy protection: The Employee Polygraph Protection Act (EPPA), 29 U.S.C. §2002, and the Genetic Information Nondiscrimination Act, 42 U.S.C. §2000ff et seq.
- Layoff: The Workers Adjustment and Retraining Notification Act (WARN), 29 U.S.C. §2101 et seq.
- Whistleblower protection: The False Claims Act, 31 U.S.C. §3729 et seq.; Sarbanes-Oxley, 18 U.S.C. § 1514A

These statutes vary greatly in terms of their protection and coverage. For example, EPPA covers essentially all private-sector employers in the United States, but WARN reaches only larger employers conducting “mass layoffs.” Most federal statutes have state analogs, some of which provide substantially more employee rights than do their federal counterparts. Further, some areas of employment law, such as workers’ compensation, are primarily state regimes, and, of course, state tort law provides limited but important protections, most notably the “public policy tort,” which has been reinforced by broad “whistleblowing” statutes in a few states. *E.g.*, N.J. Conscientious Employee Protection Act, N.J. Stat. Ann. §§34:191 et seq. Finally, some groups of employees have their own sources of protection — public-sector workers have constitutional rights, and civil servants and public school and college and university teachers have tenure systems.

A third group of workers with special protection consists of unionized workers under collective bargaining agreements. This regime is studied as labor law, which deals with unionization and collective bargaining. The core notion is that employees gain countervailing power vis-à-vis their employers by organizing and then bargaining

collectively with their employers. While the origins of the union movement reach back well before the nineteenth century, unions did not become legal, and respectable, until relatively recently. During the Great Depression, the federal government adopted what is now known as the National Labor Relations Act (NLRA), 29 U.S.C.S. §§151 et seq. (2012), which encourages unions by declaring it an unfair labor practice for employers to discriminate against workers seeking to unionize and by requiring the employer to bargain with unions that succeed in organizing that employer's workforce. *See generally* THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT (4th ed. 2001) (Patrick Hardin, et al. eds.), While wages and hours are a prime area of concern, most unions also ensure job security for workers through seniority systems and requiring just cause for discharge. This legal regime, however, scarcely proved a panacea. While many unions succeeded in raising wages, improving working conditions, and providing increased job security for those they represented, large segments of the American workforce remained unorganized. By the turn of the twenty-first century, the proportion of the organized workforce had shrunk to less than that when the NLRA was passed, hovering around 7 percent of the private workforce as this is written. Bureau of Labor Statistics News, USDL 11-0063, News Release: Union Members (Jan. 21, 2011). Unions are, however, stronger in the public sector, although even here the Great Recession has caused inroads. Matthew Dimick, *Compensation, Employment Security, and the Economics of Public Sector Labor Law*, 43 U. TOL. L. REV. 533 (2012).

One of the ironies of employment law and employment discrimination is that the very definition of employer and employee draws on doctrines invented for a different purpose altogether — whether an employer was liable for the torts committed by its employees (or, as it would have more typically been phrased, whether a master was liable for the torts of his servants). The answer to this question at common law was found in the law of agency and depended on whether the tortfeasor was a servant (or employee) as opposed to an “independent contractor.” If the principal had sufficient “control” over the work of the agent, it was liable for the agent's torts. The principal was then called a master or an employer, and the agent became a servant or an employee. If the degree of control was insufficient, the agent was labeled an “independent contractor,” and the principal was not liable for his torts.

B. The Organization of This Book

Antidiscrimination statutes have spawned complex legal theories defining discrimination and the methods used to prove it. Although the basic prohibitions enjoy broad support, the development of theories of proof and the enactment of statutory reforms expanding employer duties have generated considerable social controversy. Affirmative action, sexual harassment, discrimination on the basis of sexual orientation, and disparate impact liability are just a few of the issues that have tested the limits of discrimination theory.

This casebook undertakes a complete consideration of the federal antidiscrimination laws.

The enactment of Title VII as part of the Civil Rights Act of 1964 marked a legal watershed. Although the statute had state and federal precursors, they had proved insufficient to deal with the phenomenon. Title VII marked the first comprehensive national attack on the problem of employment discrimination.

In the wake of Title VII, a number of developments expanded the federal courts' involvement with employment. First, Congress passed additional statutes, most notably the Age Discrimination in Employment Act of 1967 (ADEA), prohibiting discrimination against older workers, and the Americans with Disabilities Act of 1990 (ADA), barring discrimination against individuals with disabilities. Second, the Supreme Court resuscitated civil rights statutes passed during the Reconstruction era following the Civil War. Sections 1981 and 1983 of Title 42 of the United States Code were among the laws passed to protect the newly freed slaves in the South by implementing the Thirteenth, Fourteenth, and Fifteenth Amendments. Although these statutes had been eviscerated by the Supreme Court in the years shortly after their enactment, the Warren Court revived the early statutes, creating a wide range of statutory tools to deal with employment discrimination. While the Supreme Court thereafter restricted both the modern civil rights laws and their Reconstruction era predecessors, Congress reacted strongly on a number of occasions to restore the effectiveness of the antidiscrimination statutes. Most notably, the Pregnancy Discrimination Act in 1978 defined pregnancy discrimination as sex discrimination after the Supreme Court had held to the contrary, and the Civil Rights Act of 1991 reversed or substantially modified a number of Supreme Court decisions limiting the effectiveness of Title VII and §1981. And more recently, Congress acted to overturn restrictive judicial interpretations in both the Americans with Disabilities Act Amendments Act of 2008 and the Lilly Ledbetter Fair Pay Act, passed in 2009.

This book considers all of these legislative and judicial efforts to address discrimination in employment, and it approaches the question through the lens of the three theories of liability the courts have developed — individual disparate treatment, systemic disparate treatment, and disparate impact. Some have questioned whether these understandings of discrimination adequately capture the underlying phenomenon, but they are obviously the place to start. To complicate matters, they apply somewhat differently across the four major statutes we will study — Title VII, the ADEA, 42 U.S.C. §1981, and the ADA.

Chapter 1 takes up the most basic concept, intentional discrimination against particular applicants or employees — individual disparate treatment discrimination. Chapter 2 then extends the intentional discrimination concept to broader patterns of such practices — systemic disparate treatment. Chapter 3 considers an alternative test of discrimination, disparate impact. Then Chapter 4 attempts to synthesize the approaches previously developed into a coherent theory of discrimination. Chapter 5 takes up special problems that arise when antidiscrimination law is applied to such issues as pregnancy, sexual harassment, sexual orientation, religion, national origin, and age. Chapter 6 then considers an issue that can arise in connection with all of the antidiscrimination statutes — retaliation for opposing discrimination or participating in proceedings under the various laws.

In Chapter 7, the casebook turns to a statute that approaches the question of discrimination somewhat differently. The Americans with Disabilities Act borrows discrimination concepts from the earlier statutes but applies them in unique ways to a form of discrimination that is itself very different from those studied previously. The ADA has recently been reinvigorated with the passage of the Americans with Disabilities Act Amendments Act of 2008.

Chapters 8 and 9 then turn to important but second-order questions that have arisen under the antidiscrimination statutes. Thus, Chapter 8 considers procedures focusing primarily on Title VII, which is the procedural paradigm for both the ADEA

and the ADA. Chapter 9 then analyzes the remedies available to redress violations of all the statutes addressed in this book.

The remaining chapter takes a somewhat different tack. The centrality of the anti-discrimination statutes to employment in the United States has led to a number of “risk management” strategies by employers, and Chapter 10 undertakes a study of two of the most important of these — the use of arbitration as an alternative to litigation to resolve discrimination disputes and the settlement and release of potential claims.

**CASES AND MATERIALS ON
EMPLOYMENT DISCRIMINATION**

CONTENTS

Preface	xxi
Acknowledgments	xxv
Note to Students	xxvii

Chapter 1

Individual Disparate Treatment Discrimination	1
A. Introduction	1
B. Proving Discrimination	2
1. What Is Discrimination, How Can It Be Proved?	2
<i>Slack v. Havens</i>	2
Notes	4
Note on the Extent of Workplace Discrimination	8
Note on Cognitive Bias	9
<i>Hazen Paper Co. v. Biggins</i>	11
Notes	14
<i>McDonnell Douglas Corp. v. Green</i>	16
Notes	20
<i>Reeves v. Sanderson Plumbing Products, Inc.</i>	27
Notes	33
Note on Litigating Individual Disparate Treatment Cases	37
2. Everyone Is Protected by Title VII	39
<i>McDonald v. Santa Fe Trail Transportation Co.</i>	39
Notes	41
Note on "Reverse" Discrimination	46
Note on Preferences for Older Workers	48
3. The Scope of Surrebuttal to Prove Pretext	48
<i>Patterson v. McLean Credit Union</i>	48
<i>Ash v. Tyson Foods, Inc.</i>	50
Notes	50
4. For Whose Actions Is the Employer Liable?	54
<i>Staub v. Proctor Hospital</i>	54
Notes	59
C. Employment Terms, Conditions, Privileges of Employment, and Employment Practices	61
<i>Hishon v. King & Spalding</i>	61
Notes	63
<i>Minor v. Centocor, Inc.</i>	64
Notes	65