

THE LAW OF EMPLOYMENT DISCRIMINATION

CASES AND MATERIALS

FOURTH EDITION

JOEL WM. FRIEDMAN

GEORGE M. STRICKLER, JR.

UNIVERSITY CASEBOOK SERIES

CASES AND MATERIALS

THE LAW OF EMPLOYMENT DISCRIMINATION

FOURTH EDITION

by

JOEL WM. FRIEDMAN

Professor of Law
Tulane Law School

GEORGE M. STRICKLER, JR.

Professor of Law
Tulane Law School

WESTBURY, NEW YORK

THE FOUNDATION PRESS, INC.

1997

COPYRIGHT © 1983, 1987, 1993 THE FOUNDATION PRESS, INC.

COPYRIGHT © 1997

By

THE FOUNDATION PRESS, INC.

All rights reserved

ISBN 1-56662-483-5



TEXT IS PRINTED ON 10% POST
CONSUMER RECYCLED PAPER



UNIVERSITY CASEBOOK SERIES

EDITORIAL BOARD

DAVID L. SHAPIRO

DIRECTING EDITOR

Professor of Law, Harvard University

ROBERT C. CLARK

Dean of the School of Law, Harvard University

DANIEL A. FARBER

Professor of Law, University of Minnesota

OWEN M. FISS

Professor of Law, Yale Law School

GERALD GUNTHER

Professor of Law, Stanford University

THOMAS H. JACKSON

President, University of Rochester

HERMA HILL KAY

Dean of the School of Law, University of California, Berkeley

HAROLD HONGJU KOH

Professor of Law, Yale Law School

ROBERT L. RABIN

Professor of Law, Stanford University

CAROL M. ROSE

Professor of Law, Yale Law School

**TO
ALEXA ERICA FRIEDMAN
JWF
CAROLYN BOONE STRICKLER
GMS, Jr.**

PREFACE TO THE FOURTH EDITION

When the third edition of this casebook was published in 1992 the impact of the 1991 Civil Rights Act on employment discrimination litigation had not yet been felt. In the intervening years virtually all provisions of the new legislation have been the subject of judicial construction and academic comment. Because we produced the book in camera-ready form we have been able to incorporate decisions rendered through the middle of May 1997. The down side is that we can no longer blame the publisher for our mistakes.

One problem we (and we assume other teachers) have encountered in teaching the subject from the third edition is determining how much of the pre-1991 caselaw from the Supreme Court should be assigned to our classes. On the one hand we believe that students should understand the background to the 1991 provisions. On the other hand, spending large blocks of class time (and hundreds of pages of a casebook) on decisions which have been legislatively overruled, is difficult to justify, particularly in a one-semester course. We have tried to address this problem by judicious editing of principal cases and the use of additional text in which we have attempted to economically describe the caselaw developments which led to the 1991 Act. We have also reorganized and, hopefully, simplified the structure of Chapter 2.

J.W.F.
G.M.S.Jr.

New Orleans, La.
May, 1997

ACKNOWLEDGMENTS

We wish to thank the following authors and copyright holders for permitting the inclusion of portions of their publications in this book.

Fisher, Franklin M., "Multiple Regression in Legal Proceedings," *Columbia Law Review*, Vol. 80, pp. 702, 705-06 (1980). Reprinted with permission of the Columbia Law Review.

Kanowitz, Leo, "Sex Based Discrimination in American Law III," *Hastings Law Review*, Vol.20, pp. 305, 310-313 (1968); reprinted at L. KANOWITZ, *WOMEN AND THE LAW: THE UNFINISHED REVOLUTION* 103-105 (1969). Reprinted by permission of the publisher.

Reiss, Michael, "Requiem for an 'Independent Remedy': The Civil Rights Acts of 1866 and 1871 As Remedies for Employment Discrimination," *Southern California Law Review*, Vol. 50, pp. 961, 971-974 (1977). Reprinted with permission of the Southern California Law Review.

Preparation of this casebook in camera-ready form would not have been possible without the outstanding work of Camella Dimitri, Lynn Becnel and Toni Mochetta. Thanks also to our research assistants, Ruth Brewer, Tulane '99, Jason Napoleon Thelan, Tulane '99, and to our wives, Vivian Stoleru Friedman and Carolyn Boone Strickler.

SUMMARY OF CONTENTS

PREFACE	v
ACKNOWLEDGMENT	vii
TABLE OF CASES.....	xxix

PART I. EMPLOYMENT DISCRIMINATION LAW BEFORE THE MODERN ERA 2

Section

A. The Constitution	2
B. Federal Civil Rights Legislation and Executive Action	10
C. Federal Labor Statutes.....	13
D. State Law	23

PART II. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964..... 25

CHAPTER 1. An Overview of the Substantive Provisions.....25

Section

A. Covered Entities.....	25
1. Employers	26
2. Employment Agencies	36
3. Labor Organizations	39
4. “Individuals” vs. “Employees”	44
B. Covered Employment Decisions.....	53
C. Proscribed Bases of Classification.....	61
D. Exemptions	61

CHAPTER 2. Defining and Proving Discrimination.....84

Section

A. Introduction	84
B. Intentional Discrimination Against the Individual: Disparate Treatment	85
1. The Conceptual Framework.....	85
2. Proof of Causation.....	127
3. The Defendant’s Case	172
(a) General Rebuttal	172
(b) The Bona Fide Occupational Qualification	173
4. Discrimination by Unions	203
5. Retaliation	213

C.	Nonintentional Discrimination	230
1.	The Conceptual Framework	230
2.	The Plaintiff's Case	235
3.	The Defenses	263
	(a) Job Relatedness, Business Necessity, and 1991 Civil Rights Act.....	263
	(b) Bona Fide Seniority Systems	293
D.	Intentional Discrimination Against a Class: Pattern or Practice Litigation	320
 CHAPTER 3. The Prohibited Classifications:		
	Special Problems	357
Section		
A.	Religion and the Duty to Accommodate.....	357
B.	National Origin.....	387
C.	Race and Color	396
D.	Sex	398
1.	"Sex-Plus" Discrimination and Pregnancy	400
2.	Sexual Harassment.....	435
3.	Pension Funds.....	475
4.	Sexual Preference Discrimination.....	486
5.	"Protective" State Labor Legislation	506
 CHAPTER 4. Procedural Requirements for Private Sector Employees.....		
Section		
A.	Suits by Individuals	511
1.	The "Timeliness" Requirements of Title VII.....	511
2.	The Date of Discrimination: When Does the Period for Filing the Charge Begin To Run?	530
3.	The Relation Between the Substance of the EEOC Charge and Suit.....	558
4.	Res Judicata, Collateral Estoppel and the Impact of State Proceedings on Title VII Litigation.....	571
5.	The Effect of Compulsory Arbitration Agreements.....	576
B.	Suits By The EEOC.....	581

CHAPTER 5. Procedural Requirements For Public Sector Employees.....	604
Section	
A. Federal Government Employees	604
B. State and Local Government Employees	610
CHAPTER 6. Class Actions.....	612
Section	
A. The Scope of the Class and the Proper Class Representative	616
B. The Size of the Class	628
C. The Class Action and the Prerequisites to Title VII Litigation.....	631
D. Certification Under Rule 23(B)(2) and 23(B)(3): Notice to the Class and the Right To Opt Out.....	652
E. The Preclusive Effect of the Class Action Judgment on the Claims of Individual Class Members.....	657
F. Appealability of Class Certification Determinations.....	659
G. Class Actions and the EEOC	660
CHAPTER 7. Remedies.....	661
Section	
A. Monetary Relief.....	661
1. Backpay.....	661
2. Damages	705
3. Tax Consequences of Monetary Relief	725
B. Injunctive Relief.....	727
C. Attorney Fees	781
D. Class Relief	813
PART III. OTHER ANTI-DISCRIMINATION LEGISLATION.....	848
CHAPTER 8. The Reconstruction Civil Rights Act—42 U.S.C. §§1981,1983,1985(c)	848
Section	
A. The Civil Rights Act of 1866—42 U.S.C. §1981.....	848
B. The Civil Rights Act of 1871, Section One—42 U.S.C. §1983	868

C.	The Civil Rights Act of 1871, Sec. 2—42	
	U.S.C. §1985(C)	894
D.	The Applicable Statutes of Limitation	909
E.	The Role of Res Judicata and Collateral Estoppel	912
F.	Remedies	914
	1. Monetary Relief	914
	2. Injunctive Relief	926
	3. Attorney Fees and Costs	927
CHAPTER 9.	The Equal Pay Act	931
CHAPTER 10.	The Age Discrimination In Employment Act	970
	Section	
A.	Overview of Statutory Provisions	970
B.	Substantive Provisions	974
C.	Procedural Requirements	1015
CHAPTER 11.	The Statutory Response To Disability-Based Discrimination	1033
	Section	
A.	The Americans With Disabilities Act	1033
B.	The Rehabilitation Act	1063
PART IV.	AFFIRMATIVE ACTION	1108
APPENDIX		1234
INDEX		1333

TABLE OF CONTENTS

PREFACE	v
ACKNOWLEDGMENT.....	vii
TABLE OF CASES.....	xxix

PART I. EMPLOYMENT DISCRIMINATION LAW BEFORE THE MODERN ERA.....2

Section

A. The Constitution	2
Kerr v. Enoch Pratt Free Library of Baltimore	2
B. Federal Civil Rights Legislation and Executive Action	10
C. Federal Labor Statutes.....	13
Steele v. Louisville & Nashville Railroad Co.	13
Brotherhood of Railroad Trainmen v. Howard	20
Conley v. Gibson	21
D. State Law	23
Railway Mail Ass'n v. Corsi	24

PART II. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964.....25

CHAPTER 1. An Overview of the Substantive Provisions.....25

Section

A. Covered Entities.....	25
1. Employers	26
EEOC v. Rinella & Rinella	26
Walters v. Metropolitan Educational Enterprises, Inc.....	31
Miller v. Maxwell's International	33
Freemon v. Foley.....	33
Garcia v. Copenhaver, Bell & Associates, MD's.....	35
2. Employment Agencies	36
Greenfield v. Field Enterprises, Inc.....	36
3. Labor Organizations	39
Local No. 293 of IATSE v. Local No. 293-A	
of IATSE.....	40
Berger v. Iron Workers Reinforced Rodmen Local 201	42
EEOC v. California Teachers' Ass'n	43
EEOC v. Local 638	44
4. "Individuals" vs. "Employees"	44
Alexander v. Rush North Shore Medical Center	44
Graves v. Women's Professional Rodeo Ass'n, Inc.	50
Baker v. McNeil Island Corrections Center	52

	Williams v. Meese	52
B.	Covered Employment Decisions	53
	Hishon v. King & Spalding	53
	Lucido v. Cravath, Swain & Moore	59
	Heart of Atlanta Motel, Inc. v. U.S.	59
	Village of Belle Terre v. Boraas	59
	Moore v. City of East Cleveland	59
C.	Proscribed Bases of Classification	61
D.	Exemptions	61
	EEOC v. Mississippi College	61
	Corp. of Presiding Bishop of Church of Jesus Christ of Latter Day Saints v. Amos	70
	Dodge v. The Salvation Army	72
	Allegheney County v. ACLU, Greater Pittsburgh	73
	Rayburn v. Seventh-Day Adventists	73
	EEOC v. Catholic University of America	74
	Maguire v. Marquette University	74
	EEOC v. Fremont Christian School	76
	Dayton Christian Schools, Inc. v. Ohio Civil Rights Commission	76
	Vigars v. Valley Christian Center	77
	Little v. Wuerl	78
	EEOC v. Kamehameha Schools	79
	MacNamara v. Korean Air Lines	80
	EEOC v. Arabian American Oil Co.	81

CHAPTER 2. Defining and Proving Discrimination.....84

Section

A.	Introduction	84
B.	Intentional Discrimination Against the Individual: Disparate Treatment	85
1.	The Conceptual Framework	85
	Texas Dep't of Community Affairs v. Burdine	85
	O'Connor v. Consolidated Coin Caterers Corp.	90
	Carson v. Bethlehem Steel Corp.	90
	Hill v. Mississippi State Employment Service	92
	Hargett v. National Westminster Bank, USA	93
	Int'l B'hood of Teamsters v. U.S.	94
	U.S. Postal Service Board of Governors v. Aikens	96
	St. Mary's Honor Center v. Hicks	97
	Rhodes v. Guiberson Oil Tools	119
	Foster v. Dalton	120
	Gilligan v. Dep't of Labor	126
2.	Proof of Causation	127
	Price Waterhouse v. Hopkins	127
	Tyler v. Bethlehem Steel Corp.	156

	Stacks v. Southwestern Bell Yellow Pages, Inc.....	156
	Miller v. CIGNA Corp.	157
	McKennon v. Nashville Banner Publishing Co.	160
	O'Day v. McDonnell Douglas Helicopter Co.	166
	Wallace v. Dunn Construction Co.	167
	Carr v. Woodbury County Juvenile Detention Center	167
	Findings of Fact and Appellate Review	169
	Anderson v. City of Bessemer	169
	Pullman-Standard v. Swint	171
3.	The Defendant's Case	172
	(a) General Rebuttal	172
	(b) The Bona Fide Occupational Qualification	173
	Int'l Union, UAW v. Johnson	
	Controls, Inc.	173
	EEOC v. Kamehameha Schools	188
	Wilson v. Southwest Airlines Co.	189
	Wilson v. Southwest Airlines: A	
	Reprise (Hooters')	196
	Kern v. Dynalectron Corp.	198
	Torres v. Wisconsin Dep't of Health and	
	Social Services	199
	Dothard v. Rawlinson	200
	Johnson v. Transportation Agency	202
4.	Discrimination by Unions	203
	Goodman v. Lukens Steel Co.	203
5.	Retaliation	213
	Payne v. McLemore's Wholesale & Retail	
	Stores	214
	Kachmar v. Sungard Data Systems, Inc.	225
	Robinson v. Shell Oil Co.	226
	Hudson v. Moore Business Forms, Inc.	228
C.	Nonintentional Discrimination	230
1.	The Conceptual Framework	230
	Griggs v. Duke Power Co.	230
2.	The Plaintiff's Case	235
	Connecticut v. Teal	236
	Chaney v. Southern Railway Co.	248
	Livingston v. Roadway Express, Inc.	249
	Wards Cove Packing Co., Inc. v. Atonio	250
	Civil Rights Act of 1991	261
	Atonio v. Wards Cove Packing	262
	EEOC v. Steamship Clerk's Union, Local 1066	263
3.	The Defenses	263
	(a) Job Relatedness, Business Necessity,	
	and 1991 Civil Rights Act	263
	Wards Cove Packing Co. v. Atonio	264
	Civil Rights Act of 1991	265
	Interpretive Memorandum	266

	Fitzpatrick v. City of Atlanta	268
	Bradley v. Pizzaco of Nebraska, Inc.	276
	Walker v. Jefferson County Home	277
	United States v. Town of Cicero	277
	Kilgo v. Bowman Transportation Co.	278
	Albemarle Paper Co. v. Moody	279
	Zamlen v. City of Cleveland	284
	Legault v. Arusso	290
	Edwards v. City of Houston	292
	Officers for Justice v. Civil Service Commission of San Francisco	292
(b)	Bona Fide Seniority Systems	293
	Int'l B'hood of Teamsters v. U.S.	293
	Pullman-Standard v. Swint	306
	Larkin v. Pullman-Standard Division	307
	California Brewers Ass'n v. Bryant	307
D.	Intentional Discrimination Against a Class:	
	Pattern or Practice Litigation	320
	Hazelwood School District v. U.S.	320
	Cooper v. Federal Reserve Bank	327
	Johnson v. Transportation Agency	331
	EEOC v. Olson's Dairy Queens, Inc.	333
	Other Statistical Models	339
	Bazemore v. Friday	341
	Ottaviani v. University of New York at New Paltz	341
	Smith v. Virginia Commonwealth University	353

CHAPTER 3. The Prohibited Classifications: Special Problems.....357

Section

A.	Religion and the Duty to Accommodate	357
	Trans World Airlines v. Hardison	358
	Drazewki v. Waukegan Development Center	369
	Frazee v. Ill. Dep't of Employment Security	370
	Ansonia Board of Education v. Philbrook	371
	U.S. v. Board of Educ. for the School Dist. of Philadelphia	372
	EEOC v. Reads	373
	Tooley v. Martin-Marietta Corp.	375
	Wilson v. NLRB	379
	Communications Workers of America v. Beck	380
	Lehnert v. Ferris Faculty Ass'n	380
	Cummins v. Parker Seal Co.	381
	Estate of Thornton v. Caldor, Inc.	384
	Rankins v. Comm'n on Professional Competence	385
	Goldman v. Weinberger	385
	Hobbie v. Unemployment Appeals Comm'n of Florida	385

B.	National Origin	387
	Espinoza v. Farah Mfg. Co.	387
	Immigration Reform and Control Act of 1986	393
	Omnibus Consolidated Appropriations Act of 1996	393
	Fragrante v. City and County of Honolulu	395
C.	Race and Color	396
	McDonald v. Santa Fe Trail Transportation Co.	396
	Morton v. Mancari	398
D.	Sex	398
	Kanowitz, Sex-Based Discrimination In American Law	398
1.	“Sex-Plus” Discrimination and Pregnancy	400
	Phillips v. Martin Marietta Corp.	401
	Willingham v. Macon Telegraph	
	Publishing Co.	403
	General Electric v. Gilbert	409
	Nashville Gas Co. v. Satty.....	409
	Pregnancy Discrimination Act of 1978.....	410
	Newport News Shipbuilding and Dry Dock	
	Co. v. EEOC	411
	EEOC v. Warshawsky & Co.....	423
	Family and Medical Leave Act of 1993	424
	Seidle v. Provident Mutual Life Ins. Co.....	424
	Bauer v. Dayton-Walther Corp.....	424
	Brannon v. Oshkosh B’Gosh, Inc.....	425
	Krauel v. Iowa Methodist Medical Center.....	427
	Doe v. First National Bank	427
	Turic v. Holland Hospitality, Inc.	428
	California Federal Savings and Loan Ass’n v. Guerra	429
	Schafer v. Board of Public Educ. of School Dist. of Pitt.....	432
	Employee Retirement Income Security Act of 1974	432
	Shaw v. Delta Air Lines, Inc.	433
	Geduldig v. Aiello.....	433
	Cleveland v. Board of Education v. LaFleur	434
2.	Sexual Harassment.....	435
	Meritor Savings Bank, FSB v. Vinson	435
	Vance v. Southern Bell Tel. & Tel. Co.....	447
	Garvey v. Dickinson College	448
	Heyne v. Caruso	448
	Ellison v. Brady	449
	Harris v. Forklift Systems	449
	DeAngelis v. El Paso Police Officers Ass’n	454
	Faragher v. City of Boca Raton.....	455
	Ellison v. Brady	456
	Nichols v. Frank	457
	Spain v. Gallegos.....	457
	Paroline v. Unisys Corp.....	461
	Fuller v. City of Oakland	462
	Bouton v. BMW of North America, Inc.	462

	Miller v. Maxwell's International	463
	Violent Crime Control and Law Enforcement Act of 1994.....	464
	Karibian v. Columbia University	464
	McWilliams v. Fairfax County Bd. of Supervisors.....	466
	Wrightson v. Pizza Hut	466
	Yeary v. Goodwill Industries-Knoxville	466
	Fox v. Sierra Development Co.	467
	Robinson v. Jacksonville Shipyards, Inc.....	469
	Huebschen v. Dep't of Health and Social Services.....	472
	Keppler v. Hindsdale Tp. School District	473
	Babcock v. Frank.....	473
	Johnson v. County of Los Angeles	474
3.	Pension Funds	475
	City of Los Angeles, Dep't of Water and Power v. Manhart	475
	Arizona Governing Committee v. Norris	482
	Long v. State of Florida	483
	Florida v. Long	484
4.	Sexual Preference Discrimination.....	486
	DeSantis v. Pacific Telephone & Telegraph Co.	486
	National Gay Task Force v. Board of Education of Oklahoma City.....	490
	Ben-Shalom v. Marsh	491
	Sec.571, National Defense Authorization Act for 1994	492
	Able v. U.S.	493
	Thorne v. Dep't of Defense	495
	Thomasson v. Perry	497
	Bowers v. Hardwick.....	497
	Padula v. Webster	498
	Steffan v. Perry	500
	Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati	501
	Romer v. Evans	502
	Meinhold v. U.S. Department of Defense	502
	Shahar v. Bowers	504
	Steffan v. Aspin	504
5.	"Protective" State Labor Legislation	506
	Rosenfeld v. Southern Pacific Co.	506

CHAPTER 4. Procedural Requirements for Private Sector Employees.....511

Section

A.	Suits by Individuals	511
1.	The "Timeliness" Requirements of Title VII	511