CHAPTER 1

AN OVERVIEW

The field of employment discrimination law occupies a large part of the federal judicial landscape. The Administrative Office of the U.S. Courts reported that in 2011, 1 out of 17 civil cases filed in the federal district courts involved claims of employment discrimination.\(^1\) The Supreme Court has one or more such cases on its docket every term. And many such claims are litigated in state courts; at local, state, and federal administrative agencies; and before arbitrators and mediators. The nearly half-century of litigation since the passage of the first modern broad-scope civil rights legislation, Title VII of the Civil Rights Act of 1964,\(^2\) has generated a body of decisional law unprecedented in scope, volume, and depth among federal statutory causes of action.

The authors and editors—practitioners in the field of employment discrimination law on behalf of management, employees, unions, and the government, respectively, as well as professors of law in this field—produced this Fifth Edition of Employment Discrimination Law to update and organize the growing law, and to provide an ordered and balanced discourse on the numerous statutes, regulations, and leading cases that govern the day-to-day relations between employers and employees. This book focuses primarily on the law of Title VII, as amended by the Civil Rights Act of 1991;\(^3\)

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the Equal Pay Act (EPA); the Age Discrimination in Employment Act (ADEA); §§ 1981 and 1983 of the Civil Rights Act of 1866, as related to employment discrimination; the Americans with Disabilities Act (ADA), as amended by the Americans with Disabilities Act Amendments Act of 2008 (ADAAA); and the Rehabilitation Act. There are detours into other rules and statutes along the way, such as the Genetic Information Nondiscrimination Act of 2008 (GINA) and the Uniformed Services Employment and Reemployment Rights Act (USERRA), but claims under the above seven statutes account for the overwhelming majority of federal employment discrimination litigation.

The organization of this treatise substantially tracks that of the Fourth Edition, published in 2007, although there have been certain noteworthy changes. Some chapters—Chapters 25 (EEOC Administrative Process) and 39 (Federal Contractor Affirmative Action Compliance)—have been entirely rewritten. Chapters 3 and 4 have been rechristened using the term “Disparate Impact” (in place of the former “Adverse Impact”), and the same usage has been adopted throughout the text. The authors and editors also made a decision, beginning with this Fifth Edition, to emphasize in the footnotes published U.S. Court of Appeals decisions over U.S. District Court opinions, to avoid what we found to be often tediously cumulative (and space-consuming) citations. District court decisions have been retained in instances where they constitute an important part of the developing case law (such as under newer statutes) and in fields such as procedure and evidence where there is a natural paucity of appellate authority.

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12 Prior editions of this text also attempted to collect common law tort theories from state law—in a former chapter titled “Related Causes of Action”—but that chapter grew increasingly unwieldy and was jettisoned in the preparation of the Fourth Edition.
13 Although a respectable case may be made that “adverse impact” is a more apt term to describe this theory of liability, both Congress (in the 1991 Civil Rights Act) and the Supreme Court (in its decisional law) consistently use the “disparate impact” label. Thus, we have elected to adopt that usage in this edition.
There have also been significant developments in the law since the last edition. The Supreme Court decided the Title VII statute of limitations accrual date for pay discrimination claims in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*[^14] a decision that sparked passage of the Lilly Ledbetter Fair Pay Act of 2009[^15], the first act of Congress signed into law by President Barack Obama. The Supreme Court has also had several occasions to rule on claims of retaliation since the last edition of this book, and in each case it has opted to expand coverage under this important theory of liability[^16]. The Court had quite a bit to say about Title VII class actions in *Wal-Mart Stores, Inc. v. Dukes*[^17]. And three significant pieces of legislation—the Lilly Ledbetter Act, GINA, and the ADAAA—became law.

The treatise, as before, is organized into seven major headings. Leading off the book, in Part I (Theories of Discrimination), we present the fundamental theories of employment discrimination, which we divide into three categories: (1) disparate treatment against a member or members of a protected group[^18]; (2) policies or practices, not justified by business necessity, that cause a disparate impact on a protected group[^19]; and (3) failure to make a “reasonable accommodation”[^20] to the religious observances and practices of an

[^18]: Examples include an absolute refusal to consider African Americans for employment, deliberately paying a woman a lower wage than that paid a man for the same work, and discharging a Latino employee for an offense for which others are given lesser or no discipline. *See generally* Chapter 2 (Disparate Treatment).
[^19]: Examples include a written exam as a prerequisite for hire that disqualifies substantially more African Americans than whites, a minimum height or weight standard that discriminates against women, or a system of selection for promotion by male executives based on subjective criteria that results in qualified female employees not being promoted; in each case, the court would need to inquire further as to whether or not the practice was job-related and consistent with business necessity. The Supreme Court first recognized this theory of discrimination under Title VII in *Griggs v. Duke Power Co.*, 401 U.S. 424, 432, 3 FEP 175 (1971), and Congress codified it in the 1991 Civil Rights Act, 42 U.S.C. § 2000e-2(k). *See generally* Chapters 3 (Disparate Impact) and 4 (Application of Disparate Impact to Employment Decisions). Disparate impact as it relates to the ADEA receives special treatment in Chapter 12 (Age), Section X.C.
[^20]: *See generally* Chapter 5 (Failure to Provide a Reasonable Accommodation).
employee, to a qualified individual with a disability. Omitting a handful of specific reporting and notice requirements, and certain miscellaneous prohibitions contained in the above-cited statutes, virtually all cases of employment discrimination may be analyzed under at least one of these three theories.

In Part II (Prohibited Bases of Discrimination) we devote a chapter each to specific issues pertaining to alleged discrimination against various groups or characteristics protected under the federal statutes: race or color; national origin; Native Americans; religion; sex and pregnancy; age; and disability, along with retaliation against persons who oppose or participate in proceedings challenging such alleged discriminatory practices. Although sexual orientation is not expressly protected by federal statute, we devote a chapter to the burgeoning case law on that subject, as well as to various state and local initiatives providing such protection. We also discuss the implications of GINA, which prohibits discrimination in employment, insurance, and health care on the basis of genetic information, to employment law.

Part III (Employment Actions) delineates some of the more common forms of employment activity challenged in employment discrimination suits, often termed “adverse employment actions.” Separate chapters are devoted to alleged discrimination in

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21 See generally Chapter 9 (Religion). For example, an employer may fail to make a reasonable accommodation when it discharges a Sabbatarian for refusing to work on the Sabbath even though under the particular circumstances rescheduling the employee’s work would not cause an undue hardship to the employer.

22 See generally Chapter 13 (Disability). For example, an employer may fail to make a reasonable accommodation when it terminates a person with a vision impairment for poor work performance even though, on the record in question, performance could have been brought up to par without undue hardship to the employer by moving the person’s work station to a location with better lighting.

23 See generally Chapter 6 (Race and Color).

24 See generally Chapter 7 (National Origin and Citizenship).

25 See generally Chapter 8 (Native Americans).

26 See generally Chapter 9 (Religion).

27 See generally Chapter 10 (Sex).

28 See generally Chapter 12 (Age).

29 See generally Chapter 13 (Disability).

30 See generally Chapter 15 (Retaliation).

31 See generally Chapter 11 (Sexual Orientation and Gender Identity). These state and local protections cover many of the most populous states (including California, Illinois, and New York).

32 See generally Chapter 14 (Genetic Information).
hiring, promotion, seniority, compensation, harassment, and discharge.

Part IV (The Parties) addresses those entities that may be sued under the federal statutes (employers, unions, and employment agencies) and those who may assert such claims.

Next, in Part V (Procedural Issues), is a group of 10 chapters devoted to the many recurring procedural issues that arise under the various statutes. Under Title VII, the ADA, and the ADEA, a charge of discrimination must be filed and processed by the Equal Employment Opportunity Commission (EEOC) as a prerequisite to suit. Both the charge and the subsequent lawsuit must be timely filed. Courts sometimes apply doctrines of standing or preclusion to limit or bar employment discrimination actions. Other chapters describe special procedures governing employment discrimination suits, litigation by federal government agencies, and unique rules governing actions by federal employees. Finally, we examine within the particular context of employment discrimination litigation various rules of procedure and evidence that are applicable generally in federal civil litigation.

The book closes with Part VI (Other Sources of Protection), dealing with several other sources of federal statutory and executive protection against employment discrimination, and Part VII

33 See generally Chapter 16 (Hiring).
34 See generally Chapter 17 (Promotion, Advancement, and Reclassification).
35 See generally Chapter 18 (Seniority).
36 See generally Chapter 19 (Compensation).
37 See generally Chapter 20 (Sexual and Other Forms of Harassment).
38 See generally Chapter 21 (Discharge and Reduction in Force).
39 See generally Chapter 22 (Employers).
40 See generally Chapter 23 (Unions).
41 See generally Chapter 24 (Employment Agencies).
42 See generally Chapter 25 (Charging Parties and Plaintiffs).
43 See generally Chapter 26 (EEOC Administrative Process).
44 See generally Chapter 27 (Timeliness).
45 See generally Chapter 28 (Jurisprudential Bars to Action).
46 See generally Chapter 29 (Title VII Litigation Procedure).
47 See generally Chapters 30 (EEOC Litigation) and 31 (Justice Department Litigation).
48 See generally Chapter 32 (Federal Employee Litigation).
49 See generally Chapters 33 (Class Actions), 34 (Discovery), and 35 (Statistical and Other Expert Proof).
Employment Discrimination Law (Remedies and Resolution), describing issues pertaining to the various types of remedies available in employment discrimination actions and to resolution of such actions without a federal court trial.\textsuperscript{51}

We complete this overview with a few final words about our methods. We have endeavored, with respect to each chapter, to update developments by addressing all Supreme Court decisions through June 30, 2012, as well as selected appellate (and some district) court decisions through June 30, 2011.\textsuperscript{52} We anticipate that supplements will follow seasonably (as they have in the past) to make the Fifth Edition of \textit{Employment Discrimination Law} a current and valuable resource to practitioners in the field. We have made a particular point of flagging, wherever relevant, conflicts in the circuits that remain unresolved. Finally, as the publication of the Fifth Edition is a bipartisan project of the Equal Employment Opportunity Law Committee of the ABA Section of Labor and Employment Law, we employed multiple editors and reviewers drawn from all quarters of the employment discrimination field, seeking to ensure that the chapters would be as comprehensive and balanced as our format allows. These individuals are identified and thanked in the section of the book identifying the Fifth Edition Board of Editors.

\textsuperscript{51}See generally Chapters 40 (Injunctive and Affirmative Relief), 41 (Monetary Relief), 42 (Attorney’s Fees), 43 (Alternative Dispute Resolution), and 44 (Settlement).

\textsuperscript{52}Two aspects of the editorial process merit a quick note. First, during the course of our final edits of the various chapters, we incorporated references to certain noteworthy appellate decisions handed down after June 30, 2011, but we made no systematic global effort to address cases decided after that date. Second, in order to conserve a surprisingly large amount of space, we included in the footnote case citations references to a denial of certiorari by the U.S. Supreme Court only where that denial occurred in 2010 or later.