UNDERSTANDING
EMPLOYMENT
DISCRIMINATION

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Part I

INTRODUCTION
Chapter 1

An Overview

§ 1.01 The Sources of Employment Discrimination Law

[A] The United States Constitution

As the fundamental law of the land, the United States Constitution imposes on public employers duties that limit their ability to make employment choices on the basis of certain characteristics — race, sex, national origin, religion, age, disability, citizenship, and others. The primary constitutional constraint is found in the Equal Protection Clause. The strength of the prohibition varies, however, depending on which so-called level of scrutiny the courts decide to use when reviewing a particular governmental decision. For example, the prohibition against race discrimination is perhaps the strongest, because the courts apply a strict scrutiny test to decisions that are racially based, while decisions based on disability are illegal only if they lack a rational basis.

Suits alleging a violation of a constitutional right are usually brought under § 1983 of the Civil Rights Act of 1866. Apart from the difficulty defining precisely what types of discrimination are constitutionally prohibited, this area of the law is also complicated by the existence of certain judicially created immunities that are available to public officials and, when the defendant is a state or state agency, by the Eleventh Amendment, which deprives federal courts of jurisdiction over some of these law suits.

[B] The Civil Rights Act of 1964

This is the flagship of federal employment discrimination law. It applies to most public agencies and private employers (with 15 or more employees), employment agencies, and labor unions. And, it encompasses virtually every aspect of the employment relationship. Title VII prohibits

discrimination on the basis of race, color, religion, national origin, and sex. It also includes an anti-retaliation provision that protects individuals who oppose illegal employment practices or who exercise their rights under the Act.

A person claiming a Title VII violation must first file a charge with either the federal Equal Employment Opportunity Commission or, in some jurisdictions, an appropriate state agency. Exhaustion of these administrative procedures, which are somewhat complicated, is mandatory. Once they are exhausted, however, Title VII may be enforced in court by either the person claiming discrimination or the EEOC on that person’s behalf. As a result of amendments adopted in the Civil Rights Act of 1991, a full range of remedies are now available to the victims of illegal Title VII discrimination. These include injunctive relief requiring that the plaintiff be hired, reinstated, promoted, or transferred, together with an award of retroactive seniority, back pay, compensatory damages, punitive damages in some situations, and an attorney’s fee.

[C] The Age Discrimination in Employment Act

In the year following enactment of the Civil Rights Act of 1964, Congress decided to also prohibit discrimination on the basis of age. But rather than simply adding this to the Title VII list, Congress chose to enact a separate statute. The ADEA applies to public and private employers (with 20 or more employees), employment agencies, and labor unions. The protection, however, only extends to individuals who are age 40 or older. Thus, age discrimination against younger workers is not illegal.

Like Title VII, the ADEA covers every type of employment decision. Because the substantive prohibitions of the ADEA and Title VII are so similar, differing only in the basis of the proscribed discrimination, many of the theories of discrimination and theories of proof that were developed under one statute have been readily transposed into the other. Nevertheless, important substantive differences do exist.

Although the ADEA originally incorporated a confusing mixture of remedies and enforcement mechanisms of both Title VII and the Fair Labor Standards Act, recent amendments now make the enforcement procedures almost identical to those of Title VII.


In terms of time-of-enactment, § 1981 is the earliest of the current federal anti-discrimination statutes. Section 1981, however, was not
recognized as creating a private cause of action until 1975.\textsuperscript{5} As construed by the courts, and as amended by the Civil Rights Act of 1991, § 1981 now prohibits race discrimination in the formation, terms, administration, and enforcement of all contracts. This includes employment contracts, but the section also applies to independent contractor relationships, making § 1981 unique in that regard among the other discrimination statutes.

Although limited to discrimination on the basis of race, the concept of race has been broadly construed to include certain ethnic characteristics that are closely related to national origin. Historically, the advantages of bringing a § 1981 action have been that it does not require the exhaustion of any administrative remedies. Moreover, it applies to employers regardless of the number of employees, plaintiffs are entitled to a trial by jury, and a prevailing plaintiff can recover compensatory and punitive damages. Since 1991, however, a jury trial and compensatory and punitive damages have also been available under Title VII,\textsuperscript{6} thus blunting the advantage of a § 1981 action somewhat. Nevertheless, § 1981 is commonly pled in any case involving race discrimination.

\textbf{[E] The Equal Pay Act of 1963}\textsuperscript{7}

The Equal Pay Act, which was enacted in 1963 as an amendment to the Fair Labor Standards Act of 1938, requires the payment of equal wages to male and female employees within the same establishment who are performing “equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.” Coverage extends to all individuals employed in an enterprise engaged in interstate commerce, which includes virtually everyone. The Act also prohibits unions from attempting to cause an EPA violation.

The linchpin of an EPA claim is proof that the jobs in question are substantially equal, not merely comparable. EPA cases thus tend to involve a great deal of complex, industry-specific, factual and statistical analysis, but rather uncomplicated legal analysis.

\textbf{[F] The Immigration Reform & Control Act of 1986}\textsuperscript{8}

This Act duplicates (and extends to a broader class of employers) the Title VII prohibition against discrimination on the basis of national origin. Additionally, in some instances it also prohibits discrimination on the basis of citizenship, something that Title VII does not do.

\textsuperscript{5}Johnson v. Railway Express agency, 421 U.S. 454 (1975).
\textsuperscript{6}42 U.S.C. § 1981A.
\textsuperscript{7}29 U.S.C. § 206(d) (part of the Fair Labor Standards Act).
\textsuperscript{8}8 U.S.C. § 1324B.
[G] Executive Order 11,264

Employers who do business with the federal government and their employees have an additional source of rights and duties relating to employment discrimination. Under Executive Order 11,264, as a condition of contracting with the government, employers are required to agree to anti-discrimination obligations that go significantly beyond those imposed by statutes of general application. In large part, these additional obligations involve gathering information about the racial, ethnic, and sexual composition of the workforce and the population from which the workforce is drawn; identifying disparities between the workforce and population statistics; and creating programs to eliminate any existing disparities. The Executive Order is administered by the Office of Federal Contract Compliance Programs, a part of the Department of Labor.

[H] The Americans With Disabilities Act

Prior to 1990, disability discrimination in employment was dealt with primarily by several limited-coverage federal statutes and state laws. In 1990, Congress enacted the comprehensive Americans With Disabilities Act, which covers public and private employers (with 15 or more employees), employment agencies, and labor unions.

The ADA bears little similarity to other federal anti-discrimination statutes. For example, under Title VII, the EPA, and the ADEA, few questions arise over who is protected by the prohibition against discrimination on a particular basis. Everyone has a race and sex and is either age 40 or older or not. The ADA, on the other hand, only protects a “qualified individual with a disability.” Whether one falls within this category is the primary if not exclusive issue in a large percentage of the litigated cases. Moreover, while the other statutes operate mainly by way of prohibition of conduct, the ADA also imposes an affirmative duty of “reasonable accommodation” — the meaning of which is also extensively litigated.

Rather than attempting to create its own set of procedures and remedies, the ADA simply incorporates the relevant provisions of Title VII in this regard.

[I] Administrative Regulations

Unlike some federal administrative agencies, the EEOC’s authority to exercise any true delegated legislative power by issuing regulations that have the force of law is uncertain. Title VII only empowers the EEOC to adopt “procedural regulations.” On the other hand, the ADEA and the

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10 42 U.S.C. §§ 12101 to 12213.
ADA both authorize the EEOC to “issue such rules and regulations as it may consider necessary or appropriate for carrying out of this Act, and may establish such reasonable exemptions to and from any or all provisions of this Act as it may find necessary and proper in the public interest.” It is unclear what binding force such regulations might have.

[J] State and Local Anti-Discrimination Laws

The states were the first to enact employment discrimination statutes, with New York’s law being a particularly influential example. When Congress enacted the Civil Rights Act of 1964, it recognized the role state and local government should play in dealing with this social problem. Thus, Congress not only waived the normal preemption effect that a federal law has on a state law dealing with the same matter, it required that a complainant resort to state law when it was available.

Although the duplicate prohibition aspect of federal/state law has been resolved almost totally in favor of the federal prohibition, with few state-law cases on the books, the additional discrimination prohibitions of state and local law continue to be of significance. For example, Title VII’s prohibition against discrimination on the basis of sex does not include discrimination on the basis of sexual orientation. Yet, this is a proscribed basis of discrimination under some state and local laws. Similarly, apparel, grooming, physical appearance, tobacco use, and domestic arrangement discrimination is banned in other jurisdictions, in a manner that goes quite beyond the prohibitions of Title VII.

[K] Contract and Tort Theories

Collective bargaining agreements between an employer and a union, which provide the substantive terms of each employee’s contract, often contain provisions prohibiting discrimination on all the bases covered by federal statutory law. Individual contracts sometimes contain similar provisions. Collective bargaining agreements are nearly always enforced through arbitration, and this is also true of some individual contacts. Whether these contractual enforcement mechanisms replace or merely supplement the statutory provisions is currently a matter of great uncertainty in employment discrimination law.

Another potential source of employee rights are employer manuals and handbooks containing assurances of nondiscriminatory treatment, which are often construed as legally binding. Even if an express contract or handbook is silent with respect to discrimination, treating an employee unfavorably on a proscribed basis might well breach an implied covenant of good faith and fair dealing.

In addition to the various contract remedies, in some jurisdictions a discriminatory discharge has been found to be in violation of public policy, which is a tort entitling a successful plaintiff to punitive as well as
compensatory damages. Finally, the manner in which a discriminatory termination is handled may give rise to a cause of action for the intentional infliction of emotional distress. Title VII race and sexual harassment cases also frequently include this as a claim.

§ 1.02 Reconciling the Various Sources of Law

Whenever the same activity is subject to regulation from multiple sources, jurisdictional priorities must sometimes be established and conflicts resolved. This is clearly true of employment discrimination.

As the fundamental law of the land, the United States Constitution trumps anything that is inconsistent with its provisions. Thus, a federal employment discrimination law that exceeded the congressional power to legislate would simply be invalid. A statute, for example, that went beyond even the far reach of the Commerce Clause would be unconstitutional. A federal anti-discrimination statute imposing monetary damages on states and state agencies that was not enacted under the aegis of the Fourteenth Amendment could not be enforced in federal courts because of the Eleventh Amendment. Even if so enacted, if the substantive prohibition of the statute exceeded the substantive prohibition of the Amendment itself, it might still be unenforceable. To the extent that a prohibition against sex discrimination encompasses a prohibition against the creation of a sexually hostile work environment, and to the extent that this is construed as prohibiting certain forms of speech, the prohibition may be a violation of the First Amendment and thus invalid. To the extent that the Constitution prohibits certain forms of racially or sexually sensitive affirmative action, any statutory or regulatory requirements to the contrary must be disregarded.

When state and federal law directly conflict, federal law prevails. State laws prohibiting women from working in certain occupations or at specified times of day are therefore invalid because of the federal prohibition against such sex discrimination. The conflict variant of the preemption doctrine remains a viable theory for attacking state laws that affirmatively require discrimination, but the same cannot be said of the occupancy-of-the-field theory. Although Title VII provides a pervasive scheme of regulation, to the extent that it would be construed as totally preempting all state regulation in the area, the statute itself disclaims having such an effect. The Civil Rights Act of 1964 expressly states that it shall not be construed “as indicating an intent on the part of Congress to occupy the field in which any . . . title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof.” Indeed, a preference for state-law resolution of

employment discrimination claims was an integral part of the compromise that made Title VII possible.

The federal statutes sometimes recognize and attempt to ameliorate the overlap and potential conflict that they are creating. Title VII, for example, declares that it is not a violation of Title VII for an employer to “differentiate upon the basis of sex in determining the amount of wages or compensation . . . to be paid to employees of such employer if such differentiation is authorized by the [Equal Pay Act.]” 12 Unfortunately, it required a Supreme Court decision to resolve the meaning of that cryptic legislative command. Similarly, when the Civil Rights Act of 1991 added compensatory and punitive damages to the available Title VII remedies, it specifically excluded the possibility of double recovery of these damages under a parallel § 1981 lawsuit. Unfortunately, the wording of the statute left it open to the interpretation that if these damages were available under § 1981, then you recovered them under that section, or not at all — an interpretation ultimately rejected by the courts. In sum, the ad hoc congressional attempt at reconciliation of the various federal statutes has not been particularly successful, at least in the sense of avoiding litigation. Other inter-statutory references will be discussed elsewhere in the text.

§ 1.03 Statutory Interpretation

Because most employment discrimination law has a statutory source, the rules and techniques of statutory interpretation have played an important role in discrimination litigation. The majority and dissenting opinions of many Supreme Court cases illustrate, however, that the so-called canons of statutory interpretation can produce divergent results.

[A] Legislative Intent

The ultimate objective, of course, is to determine the intent of Congress. The perceived intent of the 1866 Congress heavily influenced the Supreme Court’s determination that § 1981 did not prohibit the non-intentional or disparate impact form of racial discrimination. Contrariwise, the perceived intent of the 1964 Congress to address all the consequences of discrimination, intended or otherwise, led the Court to recognize this as a form of prohibited conduct under Title VII. On the ever controversial affirmative action issue, the Court went beyond the normal indicia of intent and purported to divine the motivating “spirit” of the legislation. However, in nearly all cases in which deference to congressional intent appeared to play a pivotal role in the decision, dissenting opinions marshaled evidence of congressional intent that pointed in the diametrically opposite direction.

Perhaps the most radically different expressions of congressional intent occurred during the enactment of the Civil Rights Act of 1991, especially in regard to the meaning of the *business necessity* defense to disparate impact discrimination. Congress, thus, finally took the unprecedented step of identifying the legislative history on which the courts could rely and limiting it to one fairly innocuous but inconclusive interpretative memorandum.\(^{13}\)

[B] Interpretative Guidelines

One canon of interpretation that has played an important role in employment discrimination litigation is that, within limits, a court should defer to the interpretation given that statute by the administrative agency charged with its enforcement. Although they lack the force of law that a true administrative regulation possesses, the EEOC's *Interpretative Guidelines* provide extensive discussion of almost every aspect of federal anti-discrimination law. Whether the ADEA and ADA *carrying out* regulations truly have the force of law or not, they at least have the same weight as the EEOC's Title VII *Guidelines*. Although the Supreme Court has given these *Guidelines* almost statute-like deference in some cases, it has treated them as merely persuasive authority in others. Nevertheless, these agency interpretations do play an important role in the day-to-day practice of advising clients in employment discrimination matters.

§ 1.04 Chapter Highlights

1. The employment discrimination lawyer must be familiar with the following legal authorities: The United States Constitution; the Civil Rights Act of 1964; the Age Discrimination in Employment Act; § 1981 of the Civil Rights Act of 1866; the Equal Pay Act; the Immigration Reform and Control Act; Executive Order 11,264; the Americans With Disabilities Act; administrative regulations; state and local anti-discrimination law; and various contract and tort law theories. (§ 1.01)

2. Among these sources of law, the United States Constitution controls. It provides and limits the authority of Congress to act. It also guarantees individuals certain substantive and procedural rights that neither Congress nor the states may encroach upon. Although in the normal case extensive federal legislation would have a preemptive effect on state laws dealing with the same matter, federal employment discrimination law expressly contemplates resort to state laws and disclaims having a preemptive effect unless the state law requires conduct the federal law prohibits or prohibits conduct the federal law requires. (§ 1.02)

§ 1.04

3. Statutory interpretation plays an important role in employment discrimination litigation. Because they are complex and sometimes poorly drafted, employment discrimination statutes can often be interpreted in several ways, thus forcing the courts to attempt to determine congressional intent from the legislative history. The legislative history, however, is also sometimes obscure and conflicting. In addition, the courts often consult the interpretative guidelines promulgated by the administrative agencies charged with the responsibility for enforcing these laws. (§ 1.03)