




Employment Law for Business

Eighth Edition

Dawn D. Bennett-Alexander | *Laura P. Hartman*

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Mc Graw Hill Education

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Dedication

To the countless, nameless, faceless millions in the civil rights movement who made this book, and me as an author, possible, you have my undying appreciation and gratitude. Thank you.

—The Honorable Julia Cooper Mack (1920–2014) for whom I was honored to be one of her two first law clerks as she broke the double barriers of race and gender by becoming the first African American female to be nominated by the president and confirmed by the Senate to a state equivalent court of last resort, the DC Court of Appeals. The invaluable lessons you taught me have been passed on to thousands. Thank you from all of us.

—To Professor Anita F. Hill, whose unfortunate sojourn into the national spotlight that fateful autumn in 1991 at least had the silver lining of being the basis for legal textbook publishers finally seeing the importance and urgency of Employment Law issues. You are a major part of not only the life of this text but also the entire discipline it created. I am sure as you fought your way through hordes of reporters, sat under the hot lights, glares, and grilling of the U.S. Senate, and gritted your teeth through your eloquent delivery of unbelievably

graphic Senate testimony, it never occurred to you that this text or discipline would be a by-product. Thank you so much for honoring that by autographing a third edition copy: "Dear Professor Bennett-Alexander: Thanks for all your great work and especially for this book. May it continue to be the standard for those pursuing equality under the law. Best regards, Anita F. Hill, thru [my BFF] linda harrison. 10/2006"

—And last but certainly not least, to Jere W. Morehead, 22nd president of the University of Georgia and my 26-year colleague. Thank you for not only remaining open to learning, but embracing it. You were born for this and UGA is lucky to have you.

D D B-A

To my mother, who has taught me by her own acts that fear is a mere annoyance, overcome easily; that loyalty and commitment are exceptional gifts to be cherished; that parking karma exists; that no matter how old I am, hers is the number I can always dial in the middle of the night if I have a question, and she always will pick up immediately; and that, when someone tells you that the odds are stacked against you, you tell them, "I'll beat the odds." And then you do. Love you, Ma.

L P H

About the Authors

Dawn D. Bennett-Alexander *University of Georgia*

Dawn D. Bennett-Alexander, Esq., is a multi-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 authors, with linda f. harrison, McGraw-Hill's groundbreaking text *The Legal, Ethical, and Regulatory Environment of Business in a Diverse Society,* published in 2011. 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 the U.S. Department of Justice, 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 and diversity 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 chapters in several other books including five employment law entries in Sage Publications' *Encyclopedia of Business Ethics and Society;* has been widely quoted on TV and radio, and in the print press, including *USA Today, The Wall Street Journal,* and *Fortune* magazine; and was founder of Practical Diversity, consultants on diversity and employment law issues. Among other accomplishments, Bennett-Alexander was invited to (and did) present a diversity paper for the 2014 Oxford Roundtable at Oxford University, Oxford, England, and was a 2000–2001 recipient of the Fulbright Senior Scholar Fellowship under which she taught at the Ghana School of Law in Ghana, West Africa, and conducted research on race and gender in employment. She has also taught in Budapest, Krakow, Austria, Prague, Australia, New Zealand, and Costa Rica. She is the recipient of the 2011 University of Georgia President's Martin Luther King, Jr., Fulfilling the Dream Award for her outstanding work in building bridges to understanding and unity, the 2010 recipient of the University of Georgia's Terry College of Business inaugural Diversity Award, and the 2009 recipient of the Ernst & Young Inclusive Excellence Award for Accounting and Business School faculty. She dedicates all her research and writing to her ancestors, three daughters, and two grandchildren.

Laura P. Hartman *DePaul University*

Laura Hartman is Vincent de Paul Professor of Business Ethics and Legal Studies in DePaul University's Driehaus College of Business. She has received the university's Excellence in Teaching Award, the Spirit of DePaul Award, the Woman of Spirit Award in honor of St. Louise de Marillac, the University Public Service Award, the College Outstanding Service Award, and numerous university competitive research grants. From 2009–2012, Hartman was Director of External Partnerships for Zynga.Org, through which Zynga players of FarmVille, Words with Friends, and other online games have contributed more than $14 million toward the both domestic and international social causes. Named one of Fast Company's Most Creative People in Business (2014), Hartman serves as an advisor to a number of start-ups and has consulted with multinational for-profits, non-profits, and educational institutions. She was invited to BAInnovate's inaugural UnGrounded lab and has been named to Fast Company's "League of Extraordinary Woman."

She cofounded and now serves as Board Chair of the School of Choice Education Organization, which established and now oversees L'Ecole de Choix, a unique tri-lingual elementary school in Haiti. From 2009–2011, she represented DePaul University on the Worldwide Vincentian Family's Vincentian Board for Haiti and was instrumental in the hands-on design and implementation of a micro-development, finance, and education system for people living in poverty in Haiti (including its online project, www.zafen.org). She was named to that effort after having served for a number of years as Associate Vice President for Academic Affairs for the university. In that capacity, she was responsible for, among other programs, the administration and adjudication of the Academic Integrity Policy across the entire university (24,000+ students). Hartman also chaired DePaul's Task Force on Speech and Expression Principles, among other service contributions.

Hartman's academic scholarship focuses on the alleviation of global poverty through profitable corporate partnerships as well as the ethics of the employment relationship with a primary emphasis on global labor conditions and standards, corporate governance and corporate culture, and the impact of technology on the employment relationship. Hartman has published over 80 books and cases and articles in, among other journals, *Business Ethics Quarterly, Business & Society Review, Business Ethics: A European Review,* and the *Journal of Business Ethics.* Her research and consulting efforts have also garnered national media attention by publications such as *Fortune Small Business,* where she was named one of the "Top 10 Minds for Small Business," as well as *The Wall Street Journal, BusinessWeek,* and *The New York Times*. She also has written or co-written a number of texts, including *Alleviating Poverty through Profitable Partnerships: Globalization, Markets & Economic Well-Being; Effective & Ethical Practices in Global Corporations; Rising above Sweatshops: Innovative Management Approaches to Global Labor Challenges; Employment Law for Business; Perspectives in Business Ethics;* and *Business Ethics.*

Hartman is past president of the Society for Business Ethics, presently cochairs its Committee on International Collaborations, and directs its Professional

Mentorship Program. She has served in a leadership role with the French CSR association ADERSE (in collaboration with SBE) and is cofounder and was cochair of the Employment and Labor Law Section of the Academy of Legal Studies in Business. In addition, she was coeditor 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.

Previously, Hartman has served as an invited professor at INSEAD (France), HEC (France), the Gourlay Professor at the Melbourne Business School/Trinity College at the University of Melbourne (2007–2008), the Université Paul Cezanne Aix Marseille III, and the Grenoble Graduate School of Business, among other universities. She has also held DePaul's Wicklander Chair in Professional Ethics and subsequently was named the Grainger Chair of Business Ethics at the University of Wisconsin–Madison School of Business, where she was identified as one of the top five professors of the year. She was also an adjunct professor of business law and ethics at Northwestern University's Kellogg Graduate School of Management, where she was placed on the Honor Roll for Excellence in Teaching.

Hartman graduated *magna cum laude* from Tufts University and received her law degree from the University of Chicago Law School. She lives in Chicago with her two daughters, Emma and Rachel.

Prelude to the 20th Anniversary Edition

As I write this, CNN is broadcasting live President Obama's speech from the steps of the Lincoln Memorial commemorating the 50th anniversary of the March on Washington for Jobs and Freedom.

It is ironic that I would be writing this on this particular day, since it is the March that led to the creation of such a substantial part of the basis for this textbook, Title VII of the Civil Rights Act of 1964, and this year marks the 20th anniversary of the book's publication.

On Wednesday August 28, 1963, 250,000 Americans from all races, religions, and parts of the country, the most ever to participate in a march on the seat of power in Washington, DC, came together to speak truth to power: separate and unequal was no longer acceptable in a country founded on the principal that "all men are created equal"; treating millions of people as if they were aliens in their own country, not worthy of even the most basic things we take for granted every day, such as access to housing, jobs, education, and voting was wrong; and that though slavery, which had been birthed in this country nearly as early as the country itself, had been abrogated after a bloody civil war fought 100 years before, the Jim Crow aftermath was still very much with us. Despite the fears openly expressed about the potential for violence, there was not one arrest that day. Hot, humid, crowded, uncomfortable—none of it mattered to those gathered in that hallowed place at the feet of President Lincoln's giant memorial in marble. What mattered, and what they would take back with them to every corner of the country and use as a basis for urging this country to move forward and live up to its founding promises, was that the status quo was no longer acceptable, and they would work to change it in whatever way they could in their daily lives.

Two weeks later, as if in answer to the March, four little black girls were killed as they donned their robes to sing a few moments later in Birmingham, AL Sixteenth Street Baptist Church choir. The country mourned the loss of four innocents being added to the long, unbroken line of lives lost to such a senseless cause: race. The Ku Klux Klan was found to have been behind the bombing, but prosecutions would come only decades later. One of those convicted remains in prison. The absurd and useless violence against four little black girls coming on the heels of the peaceful March of a quarter of a million people two weeks earlier was a stark contrast. The event became a turning point for the struggle for civil rights that could not be ignored. President Johnson signed the comprehensive civil rights bill into law on July 3, 1964, less than a year after the March. A year later, the Voting Rights Act was enacted. In May 2013, President Obama presented to the families of those four little girls, Addie Mae Collins, Denise McNair, Carole Robertson, and Cynthia Wesley, the Congressional Gold Medal for the victims' contribution of their lives to the struggle for equality in the United States.

In September 2013, the city of Birmingham held a week of commemorative events to mark the lives and sacrifice of the four.

This historic movement and legislation inspired others, including the women's liberation movement, the LGBT movement, and even the breaking of South African apartheid and the Arab spring. It continues to do so to this day where people seek respect, human dignity, and freedom.

In the omnipresent press coverage of the 50th anniversary of the March, one of the main questions has been whether the dream Dr. King spoke of in his historic speech on the Lincoln Memorial steps that hot day in August 1963 had been realized. As one who attended the March as a 12-year-old, and whose life's work has been to do what I could to make that dream a reality, I would love to say yes. I would love for there to no longer be a need for this textbook that teaches future managers, supervisors, and business owners how to avoid liability for violating Title VII of the Civil Rights Act of 1964 which prohibits discrimination in employment. I would gladly give up any benefit accruing to me from writing such a text if there were no longer a need to have it because the dream had been realized. Unfortunately, while we have made tremendous progress, we are not there yet. But, we keep up the work, keep writing new editions, keep training new generations about Title VII, in hopes that one day it will no longer be necessary. Until then, we'll be here, doing what we can.

Enjoy! As always, we are delighted to receive your feedback!

Dawn D. Bennett-Alexander
Athens, GA
August 28, 2013

With such gratitude to so many, most (though not all) of our students today come from home environments of political peace and stability. Unless there are significant changes in our climate between the time of this writing (Winter 2014) and our publication, we anticipate that this stability shall continue. Often, our students fall into a sense of complacency surrounding the issues that fill the front pages of newspapers today and do not share the passion represented so poignantly in Dawn's message, above. That is unfortunate because, without passion, there is inaction and apathy.

Personally, I admit that I was not present at the March. Trust me, I would have clamored to attend! But, I had a few months to go before I arrived on this earth. However, since that arrival, Dawn might agree that I have not been able to keep quiet in the face of injustice. The responsibility that we now have as educators—or even as mere information sources—is how to transfer not merely the information but also the empathy, the deeply held disquiet in the face of injustice, the grueling sense of indignity even when the affront is not against ourselves. Through this text and our work, we seek to equip others with a strength of voice so that those without a voice can be heard more clearly.

Twenty years may have passed since our first edition was published, and that edition came out a quarter of a century after Title VII had been passed. It may seem like a great deal of time, and perhaps much has changed, but not enough.

Whether one agrees with his politics or not, it seems fitting to begin our Twentieth Anniversary Edition with President Obama's words, "Change will not come if we wait for some other person, or if we wait for some other time. We are the ones we've been waiting for. We are the change that we seek."

Be the change.

Laura Pincus Hartman
Chicago, USA
February, 2014

Preface

- Must an employer provide breaks for a nursing mother to express milk, and a private place in which to do it?
- Must an employee allow time off to care for a sick child if the employee is gay and is raising a child not his own, with his partner of several years?
- 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?
- Can an employer institute a policy prohibiting Muslim women from wearing their hijab (head scarf)?
- 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?
- Can an employer terminate a female employee because male employees find her pleasing shape too distracting?
- 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 every day, 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 2010, the number of federal discrimination suits grew from fewer than 350 per year to its all time high of just shy of 100,000. 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 employees

over 40, now constitute over 70 percent of the total workforce. Add to that number those protected by laws addressing disability, genetic and family medical history, 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. The U.S. Department of Labor alone administers more than 180 federal laws covering about 10 million employers and 125 million workers.[1]

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. 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 constitutes more than 70 percent of the workforce, problems and their attendant litigation will not only arise, but are likely to be numerous.

Plaintiffs generally win nearly 50 percent of lawsuits brought for workplace discrimination. The median monetary damage award is $155,000.[2] As you will soon see, the good news is that the vast majority of the litigation and liability arising in the area covered by these statistics is completely 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.

When we first began this venture more than 20 years ago, we did not know if we would be able to sell enough copies of the textbook to justify even having a second edition. Luckily, we had a publisher who understood the situation and made a commitment to hang in there with us. The problem was that there was no established market for the text. There were so few classes in this area that they did not even show up as a blip on the radar screen. Actually, we only knew of two. But having worked in this area for years, we knew the need was there, even if the students, faculty, and even employers were not yet aware of it.

We convinced the publishers that "if you publish it, they will come."

And come they did. From the minute the book was first released, it was embraced. And just as we thought, classes were developed, students flooded in, and by the time the smoke cleared, the first edition had exceeded all the publisher's forecasts and expectations. The need that we knew was there really was there, and an entire discipline was created. The textbook spawned other such texts, but remains the leading textbook of its kind in the country.

We cannot thank the publishers enough for being so committed to this textbook. Without their commitment, none of this would have happened. And we cannot thank professors and students enough for being there for us, supporting us,

[1]http://www.dol.gov/opa/aboutdol/lawsprog.htm.

[2]"Civil Rights Complaints in U.S. District Courts, 2000," 7/1/2002, U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, http://www.bjs. ojp.usdoj.gov/content/pub/pdf/cicus00.pdf.

believing in the textbook and our voices, and trusting that we will honor the law and our commitment to bring the best to faculty and students.

We have seen what types of employment law problems are most prevalent in the workplace from our extensive experience in the classroom and 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 gets into avoidable legal trouble, exposing it to potential increased liability. We came to realize that many of the mistakes were based on ignorance rather than malice. Often employers simply did not know that a situation was being handled incorrectly.

Becoming more aware of potential liability does not mean the employer is not free to make legitimate workplace decisions it deems best. 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 gender discrimination claim. It does not mean the employer must retain her, despite her failure to adequately meet workplace requirements. Rather, it means 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 consistently have been treated the same way. The employer is free to make the management decisions necessary to run the business, but it simply does so correctly.

Knowing how to do so correctly does not 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 decision 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 a manager make

the correct choices in interpreting the law when making workplace decisions with no clear-cut answers. We have found over the years that so few people really understand what any of this is really about. They know they are not supposed to discriminate on the basis of, say, gender, but they don't always realize (1) when they are doing it, and (2) why the law prohibits it. Understanding the background behind the law can give extremely important insight into areas that help with both of these issues and allow the manager to make better decisions, particularly where no clear-cut answer may be apparent.

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 students 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. You may wonder why we ask questions such as whether you agree with the court's decision or what you would do in the situation. This is important in getting you to think about facts from your perspective as a potential manager or supervisor. Your thoughts matter just as much as anyone else's and you should begin to think like a manager if you are going to be one. Nothing magic happens once you step into the workplace. You bring an awful lot of your own thoughts, preconceived notions, and prejudgments with you. Sometimes these are at odds with the law, which can lead to liability for the employer. The questions are a way to ferret out your own thoughts, to explore what is in your own head that can serve as the basis of decisions you make in the workplace. You can then make any needed adjustments to avoid liability.

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.

You may notice that, while many of our cases are extremely timely and have a "ripped from the headlines" feel to them, others are somewhat older. There are two reasons why we include those older cases. First, some of them are called "seminal" cases that created the foundation for all of the legal decisions that came afterwards, so you need to be aware of them. The other reason is much more practical. Because our goal is to teach you to avoid liability in the workplace, part of our means of reaching the goal is to use fact patterns that we think do the best job of illustrating certain points. Most legal texts try to bring you *only* the latest cases. Of course, we also do that; but our primary goal is to use those cases that we think best illustrate our point. The clearest, most illustrative fact pattern might be an older case rather than a newer one. We will not include newer cases just because they are new. We provide cases that best illustrate our points for you and, if they happen to be older cases that are still good law, we will use them. We are interested in facts that will help you learn what you need to know, rather than case dates. We look at the cases that have come out between editions and, if none do the job of illustrating our point better, we go with what is best geared to show you how to think through an issue.

We have made the decision to limit the number of cases in each chapter to between three and five. Most chapters have three or four. Even though the subject matter from chapter to chapter may lend itself to different numbers of cases, we decided to try for consistency. Hopefully, the carefully chosen cases will still accomplish our purpose.

We also have included endnotes and boxed items from easily accessible media sources that you come across every day, such as *People* magazine, *The New York Times, The Wall Street Journal,* and *USA Today*. The intent is to demonstrate how the matters discussed are interesting and integrated into everyday life, yet they can have serious repercussions for employers. In earlier editions, we opted for reading continuity and thus did not include a lot of our research material as endnotes. We have made the conscious decision to include more sources as endnotes. Hopefully, what is lost in seeing the endnote callout as you read will be balanced out with the fact that you now have the resources to do further investigation on your own since you now have the resources to do so.

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 workplace lawsuits. Part of breaking this cycle is using language and terminology that more accurately reflects those considerations. We therefore, in writing the text, made a rather unorthodox move and took the offensive, creating a path, rather than following one.

For instance, the term *sex* is generally used in this text to mean sex only in a purely sexual sense—which means we do not use it very much. 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. The term is also confusing when a growing number of workplace discrimination claims have been brought by transgenders, for whom gender, sex, and sexuality intersect, and can cause confusion if language is not intentional, accurate, conscious, and thoughtful.

We are utterly delighted that for the first time in the 20-year history of the text, we are comfortably using the terms "homosexual" and "sexual orientation." We are ecstatic that society has come to a place where the negative connotations these terms once had are not as prevalent as they once were. Until this edition, we had written the following:

> *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 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. Being able to see society move so far in 20 years and pass laws of protection in this area that make it easier to deal with the LGBT community as full human beings is heartening.*

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 noted by some 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 despite their physical or mental condition.

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; and 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. Words are powerful. They convey 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 ones 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, 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 and readable—a resource to encourage critical and creative thinking about workplace issues and to sensitize you to the need for effective workplace management of these issues. 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.

Modifications to Eighth Edition

Throughout the text, we have, as necessary, updated statistics, and replaced in-text examples, end of chapter questions, and cases with the most current ones available. However, where a case represents the seminal case on a matter, we have chosen to leave that case since it is vital for students to be well-versed in the legal precedent. The same is true of chapter-end questions. If they were the best

to illustrate a point, we left them in. In addition to the updated statistics and figures throughout, the major changes include the following:

Chapter 1: Discusses

- In connection with the definition of employee, the financial and other implications of the U.S. Department of Labor's major Misclassification Initiative, which was launched in cooperation with the Internal Revenue Service, to reduce the incidence of employee misclassification and to improve compliance with federal labor laws.
- The impact of technology on the application process.
- The requirement to track applicants on the basis of race, gender, and ethnicity.
- The Seventh Circuit's seminal decision in *PepsiCo, Inc. v. Redmond* that illustrates how the advance of technology has caused the Uniform Trade Secrets Act to evolve.

Chapter 2: Includes a new section on retaliation.

Chapter 3: Contains updated information throughout, including:

- Mississippi's 2013 ratification of the amendment abolishing slavery.
- New peonage information and information on plantations still existing in the Mississippi Delta in 2013.
- EEOC extension of Title VII gender category to include discrimination on the basis of gender identity; revised EEOC enforcement guidance on employer use of arrest and conviction records for purposes of race and national origin discrimination; EEOC's Strategic Enforcement Plan for 2013–2016; and EEOC's new emphasis on discrimination via steering certain groups into certain types of jobs.

Chapter 4: Contains

- The latest data relating to the use of social media and technology in recruitment, selection, and related activities.
- The most recent statistics on testing and drug and alcohol usage and abuse, along with their case implications.
- A discussion of myriad assessment tools used by employers as part of the hiring process.
- A new section on criticisms surrounding drug testing.

Chapter 5: Modifications include

- Clarification of, and more background on, the connection between affirmative action background and present-day vestiges.
- The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010's requirement of Offices of Minority and Women's inclusion in the five agencies it covers and the businesses they regulate.
- The request that the NFL extend the Rooney Rule to cover most vacancies for offensive and defensive coordinator jobs.

Chapter 6: Includes discussion of the

- Impact of the Trayvon Martin case and many other recent events.
- Increase in Asian-American discrimination.
- Increase in hangman noose exhibition laws due to increased claims of their being displayed.

Chapter 7: Updated data includes

- The evolving law relating to English-only rules, presented in a comprehensive manner.
- Additional discussion and clarification on discrimination based on alienage or citizenship status.
- Discrimination since September 11, 2001.

Chapter 8: Contains new information on

- Gender from the 2014 State of the Union Address and on gender-neutral language.
- The impact of the economic recovery and of the Affordable Care Act on women in the workplace.
- Janet Yellin, Hillary Clinton, Christine Lagarde, Marissa Mayer.
- The opening of the Augusta National to women.
- The new Shriver report.
- Claims by women terminated because they were "too hot" and new concerted individual regional Walmart gender discrimination cases.
- New EEOC guidance on domestic violence and stalking victims and on family caretakers.
- Glass cliffs, glass escalators, 2012 repeal of Wisconsin's Equal Pay Enforcement Act, and additional Pregnancy Discrimination Act and lactation information.

Chapter 9: Contains

- Current cases such as *Ball State v. Vance.*
- Claims involving Red Lobster, Merchant Management Resources, Inc., Lakemont Homes Las Vegas real estate developer, International Profit Associates, Inc., Delta Airlines, Best Buy's Geek Squad, film producer Jon Peters, and New York "kingmaker" Assemblyman Vito Lopez.
- A discussion of the new Anita Hill documentary, "Anita."

Chapter 10: Contains updated discussions on sexual orientation and gender identity, including

- Change of the term "*affinity orientation*" from previous editions to "*sexual orientation.*"
- Information on the recent legislative, executive, and judicial LGBT issues including gay marriage and workplace inclusion and benefit policies.
- Extension of federal benefits to LGBTs.

- 2013 U.S. Supreme Court decisions striking down the Defense of Marriage Act (DOMA) and California's Proposition 8 banning gay marriage; and refusal of states attorneys general to enforce statutes banning gay marriage.
- EEOC's *Macy* decision extending to transgenders protection of Title VII based on gender.
- Recent polls on LGBT issues and the latest HRC Corporate Equality Index figures.
- Senate passage of the Employment Nondiscrimination Act of 2013.
- 9th Circuit's *SmithKlineBeecham Corp. v. Abbott Laboratories* case rejecting the use of peremptory challenges to strike LGBT jurors as a denial of Equal Protection.
- More information on understanding transgenders and their workplace issues.

Chapter 11: Contains

- New information on increasingly different manifestations of religious discrimination from requiring a vegan to take a mandatory workplace flu shot to the harassment of Muslim employees to the termination of a Catholic school teacher for in vitro fertilization by her and her husband.
- Discussion of legal cases such as the Disney Muslim hajib cases and firefighter and police officer beard and Sikh turban cases.

Chapter 12: Examines

- The perception of Silicon Valley and, in fact, the entire tech world as catering to and seeking a younger demographic of employees.
- On a circuit-by-circuit basis, the yet-to-be-settled question of whether state employees with age discrimination grievances have alternative claims to those provided by the ADEA.
- The EEOC's "Final Rule on Disparate Impact and Reasonable Factors Other than Age (RFOA)" and explores the yet-to-be-enacted Protecting Older Workers Against Discrimination Act (POWADA), which was introduced first in 2012 and reintroduced in 2013.
- The impact of the *Gross* decision in recent case law, where courts have ruled that the "but for" causation standard applies not only to adverse employment actions in ADEA cases but also to Title VII retaliation plaintiffs, as well.

Chapter 13: Examines

- The impact of the ADAAA.
- The question of the "bootstrap" theory of ADA coverage with regard to the definition of a "major life activity."
- The expansion of the definition of "substantial limitation" under the ADA to include a lower degree of impairment and the partial invalidation of the "mitigating measures" rule.
- Obesity discrimination, including references to new case law.

Chapter 14: Contains

- Extensive updates based on significant advances in technology, information gathering, social media, monitoring, privacy, and the law that have impacted our world, in general and the workplace, specifically.
- New case law, examples, end-of-chapter questions that allow the reader to have a current understanding of the environment and implications for the employment context.

Chapter 15: Discusses various labor issues such as

- Recent activity around the issue of increasing the minimum wage, including President Obama's executive order raising it for federal contractors, as well as the strikes for it across the country in fast-food and big-retailer industries.
- Boeing machinists' 2014 very close vote to make concessions to keep the manufacture of the 777X jet in Washington state.
- 2013 student movement to unionize the south.
- NLRB's refusal to find Facebook statements threatening strike nonsupporters as unfair labor practices.
- Michigan's 2012 contentious passage of the right-to-work law.

Chapter 16: Discusses wage and benefit issues such as

- The Oakland Raiders cheerleaders' suit for minimum wage violations, new minimum wage for federal contractors, 2013 U.S. Supreme Court "donning and doffing" case, *Sanifer v. U.S. Steel Corp.*, increased emphasis on making sure wage and hour laws are fully enforced, 2013 extension of minimum wage and overtime pay to direct care workers.
- Employee misclassification violations to avoid paying minimum wages and overtime pay.
- Unpaid internships, increased enforcement of lactation time for nursing mothers, FMLA leave challenges, and the HIPAA Omnibus Rules of 2013.

As we have done with other editions, in this eighth edition we have continued to make updates and improvements that we think will help students understand the material better. We have learning objectives for each chapter, new cases where appropriate, updated background and context information, new boxed information, up-to-the-minute legal issues, more insights, and a modified structure. We have kept the things you tell us you love, and added to them. For instance, a reader suggested that we address the issue of the redundancy of examining certain issues in each chapter where they are raised. Based on this excellent suggestion, which we had considered ourselves over the years, in this edition we now have a "Toolkit" that does this. In the Toolkit chapter, Chapter 2, "The Employment Law Toolkit: Resources for Understanding the Law and Recurring Legal Concepts," we introduce you to concepts that you will see throughout the text but, rather than repeat them in each chapter, we have added Toolkit icons instead. These icons will be an indication to you that the issue referred to was

included in the Toolkit chapter, and you can go back to that chapter and review the issue again if you would like a refresher.

As always, we *truly* welcome your feedback. We are the only textbook we know of that actually gets fan letters! Keep them coming! ☺ We urge you to email us about any thoughts you have about the text, good or bad, as well as suggestions, unclear items you don't understand, errata, or anything else you think would be helpful. Our contact information is

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And again as always, we hope you have as much fun reading the book as we did writing it. It really is a pleasure. Enjoy!

Dawn D. Bennett-Alexander, Esq.

Athens, GA

February 18, 2014

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

DDB-A

Hartman: This book would not exist without the passionate dedication of my co-author, Dawn D. Bennett-Alexander. She has been by my (metaphorical) side during many of the most gratifying times in my life. But it has been her stalwart commitment to our friendship during some of the more challenging times that

evidences the depth of her generosity of character. She represents—truly—the values that both of us hope to engender in our teaching and in our scholarship, and perhaps the original reason that we began the adventure of this text several decades ago. I cannot imagine what would have happened if I had sat down next to anyone else during that fateful review session coordinated by our friend Craig Beytien decades ago . . . Dawn-Karma.

A text is often the work not only of its original authors but also other contributors, and those who have supported us during the lengthy process that has brought the text into existence. This edition could not have been completed without the extraordinary support and assistance of all of the brains and stamina from those who contributed to it. Crina Archer, PhD, is just about the most extraordinary researcher I know. Not only is she better with punctuation than I am and will catch me in a split infinitive before I ever notice it, but she can pick through entire areas of case law to find the rule better than anyone. Some university will be privileged to receive her; but I will only encourage her if they promise to cherish her appropriately. All errors—and, *yes, we know* they are there, dear readers, so send them in—are completely our own. There are others, finally, who did not necessarily write a word for this text, but who simply exist on the earth and thereby make me happier that I do, as well. I thank you, each, all of my sibs: Susie and David, Mark and Ali, Anne and Dave, Jenna, Annie and Aaron, David and Sharone, Ma, Shelly, Sherri, David, Kathy and A, Carol, Ione, Née and Jenn, Leah and Dave, Suzy, Malcolm and Scott, Ray and Patricia, and, of course, Em and Ray.

I just have to mention that the last thing I did before submitting this preface to the publisher was to remove from the list at the end of the previous paragraph the inclusion of a thanks to my pop. After 20 years, things change and, as Dawn and I noted earlier, change is not only good but necessary for growth and progress. Change is also part of the life cycle. My father was always proud of my legal training (so proud that he often forgot I was a professor and introduced me as a lawyer, even decades after I made the switch). He died since the last edition. I thank him, for his past support, and his often overwhelming displays of pride.

LPH

Text Organization

Part 1 gives the foundations for employment law, covering introductory topics and cases to set the stage for later coverage. This initial section now includes more material to give students a more thorough grounding.

Chapter 1 provides an introduction to the employment environment, explains the freedom to contract and the current regulatory environment for employment. It now includes an expanded discussion of employment-at-will and showcases a recent case, *Estrada v. FedEx.*

Chapter 2 is the Toolkit chapter that provides information on several topics that run throughout the text. Chapters thereafter that mention these issues will use a toolkit icon to notify the reader to go back to the Toolkit chapter if a refresher is needed.

Chapter 3 covers Title VII of the Civil Rights Act in order to illustrate the foundational nature this groundbreaking legislation has for employment law.

Chapter 4 introduces the reader to the regulation of the employment process, such as recruitment, selection, and hiring. In examining the variety of methods of information gathering through testing and other media, it also explores the issue of employers' access to extraordinary amounts of information via evolving technology. The chapter has been extensively updated with illustrative and supporting empirical data integrated throughout the chapter, including information relating to corporate use of employee referral programs, workplace violence., employer use of online sources for background investigation, corporate use of personality and integrity tests in the hiring process and recent legislation regulating genetic testing in employment.

Part 2 covers various types of discrimination in employment, with each chapter revised to reflect recent changes.

Chapter 5 includes a discussion on recent revisions to affirmative action regulations and misuse of affirmative action, including the famous U.S. Supreme Court decision on the firefighters in New Haven, Connecticut.

Chapter 6 presents a historical overview of racism in the United States, giving students a deeper understanding of how prevalent racial discrimination still is, so managers can better recognize potential liability as it arises. In addition, contemporary race issues and racial harassment are addressed.

Chapter 7 directly follows Chapter 6 in order to link and distinguish the concepts of race and national origin in U.S. laws and culture.

Chapter 8 features coverage of how gender impacts the workplace, including gender discrimination, pregnancy discrimination, gender stereotyping, workplace grooming codes, fetal protection policies, lactation break requirements, and comparable worth.

Employment Law for Business, 8e, has been revised and updated to maintain its currency amid a rapidly changing landscape in the area of employment law. Some of its content has also been streamlined to provide a more realistic opportunity for instructors to cover key concepts in one semester. Learning objectives at the start of each chapter alert instructor and students to key concepts within. Cases are found at the end of the chapter to facilitate a smoother read, with case icons inserted into the text where references are appropriate.

Chapter 9 explores the law relating to sexual harassment, clearly explaining the difference between quid pro quo and hostile environment sexual harassment as well as how to avoid employer liability in this important area.

Chapter 10 discusses developments in affinity orientation discrimination and gender identity issues and offers management tips on how to handle this quickly evolving topic.

Chapter 11 gives students up-to-date considerations on the many aspects of religious discrimination, including explanations of the legal definition of religion, points on the employer's duty to reasonably accommodate employees, and information on the correct usage of religion as a BFOQ. Issues of increasing frequency such as Muslim employee workplace conflicts are discussed and methods provided for how to handle these matters.

Chapter 12 provides a comprehensive review of age discrimination laws in the workplace and has been updated with current statistical information with regard to age discrimination and also includes comparisons of perceptions of age in the United States and other countries. Additional updates include state age discrimination laws and the legal standard prohibiting an employer from engaging in retaliatory behavior in response to an age discrimination filing.

Chapter 13 offers a complete analysis of the legal environment with regard to workers with disabilities with an expanded discussion of the legal history of protection against discrimination on the basis of disability. The chapter is comprehensive in its coverage of both the recent Genetic Information Non-Discrimination Act and the Americans with Disabilities Amendments Act (ADAAA) and offers examples to managers of ways to create more inclusive working environments.

Part 3 lays out additional regulatory processes and dilemmas in employment. Several chapters on various regulatory issues have been merged to form the final chapter.

Chapter 14 examines the roles of both the employer and the employee in connection with privacy in the workplace and has been thoroughly updated to keep step with the practically daily changes in technology and how they affect employee privacy. These developments include reference to blogging, social media, RFIDs, GPS, and expanded legal frameworks, both domestic and global; the chapter also includes discussion of new cases such as *U.S. v. Ziegler*.

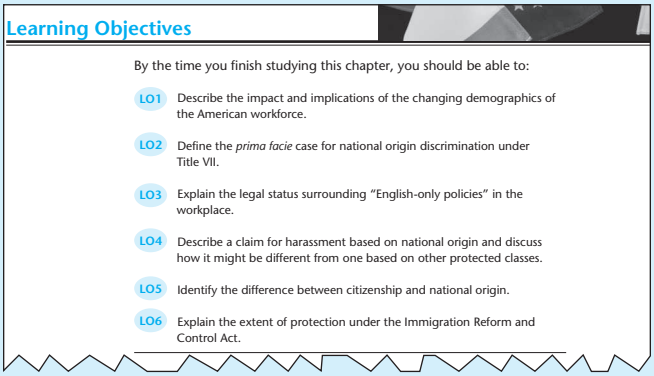
Chapter 15 addresses collective bargaining and unions in a chapter on labor law.

Chapter 16 combines the Fair Labor Standards Act (FLSA), the Family Medical Leave Act (FMLA), including the newly enacted amendments for military families preparing for active duty or injured in active duty, the Occupational Safety and Health Act (OSHA), and the Employee Retirement Income Security Act (ERISA) into a chapter on selected additional employment laws and regulations.

Key Features for the Eighth Edition

Learning Objectives

Each chapter has active learning objectives, posted before addressing the subject matter, that give a clear picture of specifically what readers should know when they finish studying the chapter. In addition, the learning objectives are noted at the place in the chapter in which the information appears.



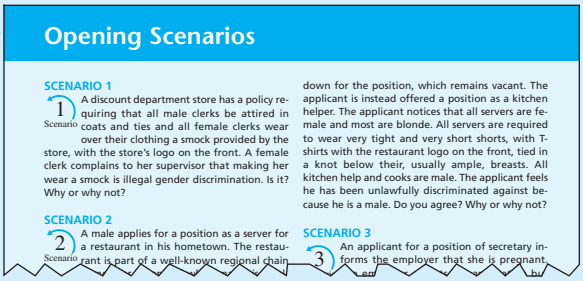
Learning Objectives

By the time you finish studying this chapter, you should be able to:

- LO1 Describe the impact and implications of the changing demographics of the American workforce.
- LO2 Define the *prima facie* case for national origin discrimination under Title VII.
- LO3 Explain the legal status surrounding "English-only policies" in the workplace.
- LO4 Describe a claim for harassment based on national origin and discuss how it might be different from one based on other protected classes.
- LO5 Identify the difference between citizenship and national origin.
- LO6 Explain the extent of protection under the Immigration Reform and Control Act.

Opening Scenarios

Based on real cases and situations, chapter-opening scenarios introduce topics and material that illustrate the need for chapter concepts. Scenarios are then revisited throughout the chapter text as material pertinent to the opening scenario is discussed. When you encounter the scenario icon in the chapter body, return to the corresponding opening scenario to see if you can now articulate the correct way to solve the problem.



Opening Scenarios

SCENARIO 1

Scenario 1 A discount department store has a policy requiring that all male clerks be attired in coats and ties and all female clerks wear over their clothing a smock provided by the store, with the store's logo on the front. A female clerk complains to her supervisor that making her wear a smock is illegal gender discrimination. Is it? Why or why not?

SCENARIO 2

Scenario 2 A male applies for a position as a server for a restaurant in his hometown. The restaurant is part of a well-known regional chain

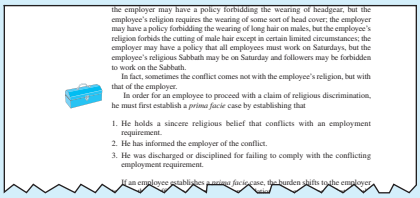
down for the position, which remains vacant. The applicant is instead offered a position as a kitchen helper. The applicant notices that all servers are female and most are blonde. All servers are required to wear very tight and very short shorts, with T-shirts with the restaurant logo on the front, tied in a knot below their, usually ample, breasts. All kitchen help and cooks are male. The applicant feels he has been unlawfully discriminated against because he is a male. Do you agree? Why or why not?

SCENARIO 3

Scenario 3 An applicant for a position of secretary informs the employer that she is pregnant.

Toolkit Icons

Key concepts used in several different chapters have been combined into one chapter to prevent redundancy. That chapter is Chapter 2, "The Employment Law Toolkit: Resources for Understanding the Law and Recurring Legal Concepts." Where a toolkit chapter concept arises in a subsequent chapter a notation is made that it can be found in the Toolkit chapter, with an icon placed in the margin.



the employer may have a policy forbidding the wearing of headgear, but the employee's religion requires the wearing of some sort of head cover; the employer may have a policy forbidding the wearing of long hair on males, but the employee's religion forbids the cutting of male hair except in certain limited circumstances; the employer may have a policy that all employees must work on Saturdays, but the employee's religious Sabbath may be on Saturday and followers may be forbidden to work on the Sabbath.

In fact, sometimes the conflict comes not with the employee's religion, but with that of the employer.

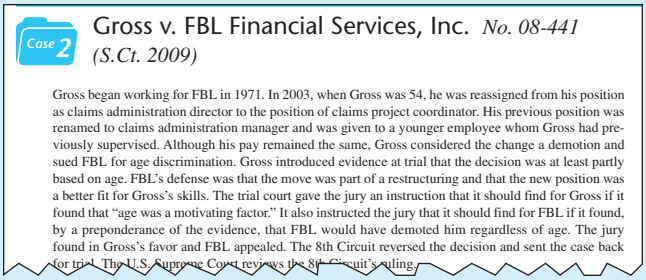
In order for an employee to proceed with a claim of religious discrimination, he must first establish a *prima facie* case by establishing that

1. He holds a sincere religious belief that conflicts with an employment requirement.
2. He has informed the employer of the conflict.
3. He was discharged or disciplined for failing to comply with the conflicting employment requirement.

If an employee establishes a *prima facie* case, the burden shifts to the employer

Cases

Excerpted cases are placed at the end of the chapter rather than throughout so that reading can be accomplished without interruption. There are reference icons in the chapter when a case is discussed. There is a minimum of legalese and only facts relevant to the employment law issues are included. Each digested case has a short introductory paragraph to explain the facts and issues in the case and is followed by three critical thinking questions created to build and strengthen managerial liability-avoidance skills.

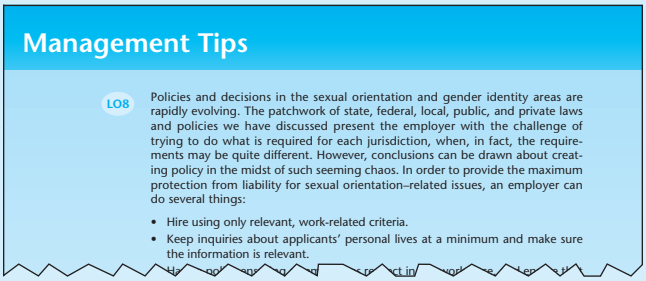

Case 2

Gross v. FBL Financial Services, Inc. *No. 08-441 (S.Ct. 2009)*

Gross began working for FBL in 1971. In 2003, when Gross was 54, he was reassigned from his position as claims administration director to the position of claims project coordinator. His previous position was renamed to claims administration manager and was given to a younger employee whom Gross had previously supervised. Although his pay remained the same, Gross considered the change a demotion and sued FBL for age discrimination. Gross introduced evidence at trial that the decision was at least partly based on age. FBL's defense was that the move was part of a restructuring and that the new position was a better fit for Gross's skills. The trial court gave the jury an instruction that it should find for Gross if it found that "age was a motivating factor." It also instructed the jury that it should find for FBL if it found, by a preponderance of the evidence, that FBL would have demoted him regardless of age. The jury found in Gross's favor and FBL appealed. The 8th Circuit reversed the decision and sent the case back for trial. The U.S. Supreme Court reviews the 8th Circuit's ruling.

Management Tips

These boxes, included near the conclusion of each chapter, encapsulate how key concepts relate to managerial concerns. The authors offer concise tips on how to put chapter material into practice in the real world.


Management Tips

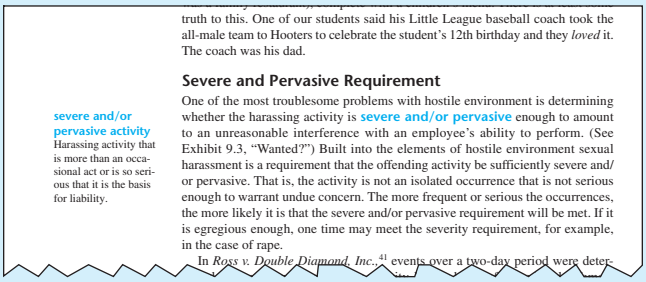
LO8

Policies and decisions in the sexual orientation and gender identity areas are rapidly evolving. The patchwork of state, federal, local, public, and private laws and policies we have discussed present the employer with the challenge of trying to do what is required for each jurisdiction, when, in fact, the requirements may be quite different. However, conclusions can be drawn about creating policy in the midst of such seeming chaos. In order to provide the maximum protection from liability for sexual orientation–related issues, an employer can do several things:

- Hire using only relevant, work-related criteria.
- Keep inquiries about applicants' personal lives at a minimum and make sure the information is relevant.

Key Terms

Key terms are printed larger, in boldface with alternate color, and defined in the margin during early usage. The terms are also listed in the Glossary at the end of the book for quick reference.


truth to this. One of our students said his Little League baseball coach took the all-male team to Hooters to celebrate the student's 12th birthday and they *loved* it. The coach was his dad.

Severe and Pervasive Requirement

severe and/or pervasive activity
Harassing activity that is more than an occasional act or is so serious that it is the basis for liability.

One of the most troublesome problems with hostile environment is determining whether the harassing activity is **severe and/or pervasive** enough to amount to an unreasonable interference with an employee's ability to perform. (See Exhibit 9.3, "Wanted?") Built into the elements of hostile environment sexual harassment is a requirement that the offending activity be sufficiently severe and/or pervasive. That is, the activity is not an isolated occurrence that is not serious enough to warrant undue concern. The more frequent or serious the occurrences, the more likely it is that the severe and/or pervasive requirement will be met. If it is egregious enough, one time may meet the severity requirement, for example, in the case of rape.

In *Ross v. Double Diamond, Inc.*,[41] events over a two-day period were deter-

Exhibits

Numerous exhibits are included throughout the text to reinforce concepts visually and to provide students with essential background information.

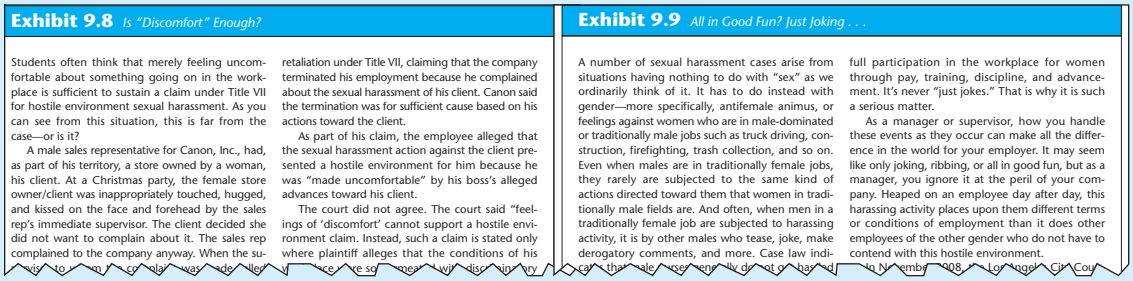


Exhibit 9.8 *Is "Discomfort" Enough?*

Students often think that merely feeling uncomfortable about something going on in the workplace is sufficient to sustain a claim under Title VII for hostile environment sexual harassment. As you can see from this situation, this is far from the case—or is it?

A male sales representative for Canon, Inc., had, as part of his territory, a store owned by a woman, his client. At a Christmas party, the female store owner/client was inappropriately touched, hugged, and kissed on the face and forehead by the sales rep's immediate supervisor. The client decided she did not want to complain about it. The sales rep complained to the company anyway. When the su-

retaliation under Title VII, claiming that the company terminated his employment because he complained about the sexual harassment of his client. Canon said the termination was for sufficient cause based on his actions toward the client.

As part of his claim, the employee alleged that the sexual harassment action against the client presented a hostile environment for him because he was "made uncomfortable" by his boss's alleged advances toward his client.

The court did not agree. The court said "feelings of 'discomfort' cannot support a hostile environment claim. Instead, such a claim is stated only where plaintiff alleges that the conditions of his

Exhibit 9.9 *All in Good Fun? Just Joking . . .*

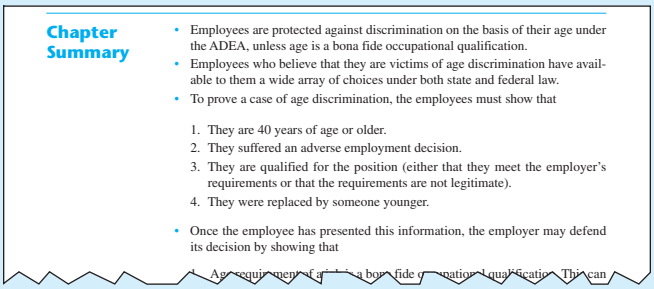
A number of sexual harassment cases arise from situations having nothing to do with "sex" as we ordinarily think of it. It has to do instead with gender—more specifically, antifemale animus, or feelings against women who are in male-dominated or traditionally male jobs such as truck driving, construction, firefighting, trash collection, and so on. Even when males are in traditionally female jobs, they rarely are subjected to the same kind of actions directed toward them that women in traditionally male fields are. And often, when men in a traditionally female job are subjected to harassing activity, it is by other males who tease, joke, make derogatory comments, and more. Case law indi-

full participation in the workplace for women through pay, training, discipline, and advancement. It's never "just jokes." That is why it is such a serious matter.

As a manager or supervisor, how you handle these events as they occur can make all the difference in the world for your employer. It may seem like only joking, ribbing, or all in good fun, but as a manager, you ignore it at the peril of your company. Heaped on an employee day after day, this harassing activity places upon them different terms or conditions of employment than it does other employees of the other gender who do not have to contend with this hostile environment.

Chapter Summaries

Each chapter closes with a summary section, giving students and instructors a tool for checking comprehension. Use this bulleted list as an aide in retaining key chapter points.



Chapter Summary

- Employees are protected against discrimination on the basis of their age under the ADEA, unless age is a bona fide occupational qualification.
- Employees who believe that they are victims of age discrimination have available to them a wide array of choices under both state and federal law.
- To prove a case of age discrimination, the employees must show that

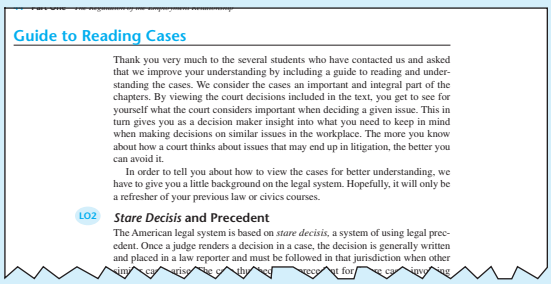
  1. They are 40 years of age or older.
  2. They suffered an adverse employment decision.
  3. They are qualified for the position (either that they meet the employer's requirements or that the requirements are not legitimate).
  4. They were replaced by someone younger.

- Once the employee has presented this information, the employer may defend its decision by showing that

1. An requirement of a is a bona fide occupational qualification. This can

Guide to Reading Cases

This guide gives succinct direction on how to get the most out of text cases. Terminology definitions, case citation explanations, and a walk-through of the trial process are all included to help facilitate student comprehension.



Guide to Reading Cases

Thank you very much to the several students who have contacted us and asked that we improve your understanding by including a guide to reading and understanding the cases. We consider the cases an important and integral part of the chapters. By viewing the court decisions included in the text, you get to see for yourself what the court considers important when deciding a given issue. This in turn gives you as a decision maker insight into what you need to keep in mind when making decisions on similar issues in the workplace. The more you know about how a court thinks about issues that may end up in litigation, the better you can avoid it.

In order to tell you about how to view the cases for better understanding, we have to give you a little background on the legal system. Hopefully, it will only be a refresher of your previous law or civics courses.

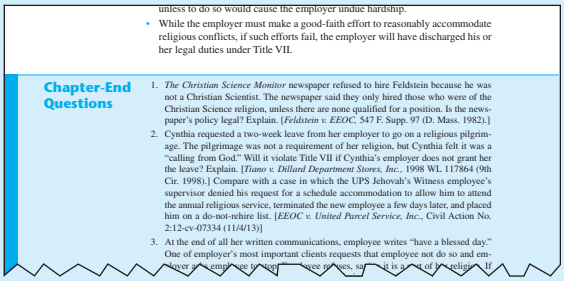
LO2

Stare Decisis and Precedent

The American legal system is based on *stare decisis,* a system of using legal precedent. Once a judge renders a decision in a case, the decision is generally written and placed in a law reporter and must be followed in that jurisdiction when other similar cases arise. The [illegible] precedent for [illegible]

End of Chapter Material

Included at the end of each chapter is a complete set of questions incorporating chapter concepts. Use these as tools to assess your understanding of chapter material.



unless to do so would cause the employer undue hardship.

- While the employer must make a good-faith effort to reasonably accommodate religious conflicts, if such efforts fail, the employer will have discharged his or her legal duties under Title VII.

Chapter-End Questions

1. *The Christian Science Monitor* newspaper refused to hire Feldstein because he was not a Christian Scientist. The newspaper said they only hired those who were of the Christian Science religion, unless there are none qualified for a position. Is the newspaper's policy legal? Explain. [*Feldstein v. EEOC*, 547 F. Supp. 97 (D. Mass. 1982).]
2. Cynthia requested a two-week leave from her employer to go on a religious pilgrimage. The pilgrimage was not a requirement of her religion, but Cynthia felt it was a "calling from God." Will it violate Title VII if Cynthia's employer does not grant her the leave? Explain. [*Tiano v. Dillard Department Stores, Inc.*, 1998 WL 117864 (9th Cir. 1998).] Compare with a case in which the UPS Jehovah's Witness employee's supervisor denied his request for a schedule accommodation to allow him to attend the annual religious service, terminated the new employee a few days later, and placed him on a do-not-rehire list. [*EEOC v. United Parcel Service, Inc.*, Civil Action No. 2:12-cv-07334 (11/4/13)]
3. At the end of all her written communications, employee writes "have a blessed day." One of employer's most important clients requests that employee not do so and em-

ployer asks employee to stop. Employee refuses, saying it is a part of her religion. If

Online Learning Center

The Online Learning Center for this text gives a complete overview of its organization, features, and supplements. Instructors using the OLC can view all student materials as well as gain access to exclusive instructor resources, including teaching notes, class discussion starters, PowerPoint presentations, solutions to chapter-end questions, and a comprehensive Test Bank in document and computerized formats.

Brief Contents

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Guide to Reading Cases

Thank you very much to the several students who have contacted us and asked that we improve your understanding by including a guide to reading and understanding the cases. We consider the cases an important and integral part of the chapters. By viewing the court decisions included in the text, you get to see for yourself what the court considers important when deciding a given issue. This in turn gives you as a decision maker insight into what you need to keep in mind when making decisions on similar issues in the workplace. The more you know about how a court thinks about issues that may end up in litigation, the better you can avoid it.

We provide the following in order to help you better understand the cases so that you can use them to their fullest. In order to tell you about how to view the cases, we have to give you a little background on the legal system. Hopefully, it will only be a refresher of your previous law or civics courses.

Stare Decisis and Precedent

The American legal system is based on *stare decisis,* a system of using legal precedent. Once a judge renders a decision in a case, the decision is generally written and placed in a *law reporter* and must be followed in that jurisdiction when other similar cases arise. The case thus becomes precedent for future cases.

Most of the decisions in the chapters are from federal courts since most of the topics we discuss are based on federal law. Federal courts consist of trial courts (called the "U.S. District Court" for a particular district), courts of appeal (called the "U.S. Circuit Court" for a particular circuit), and the U.S. Supreme Court. U.S. Supreme Court decisions apply to all jurisdictions, and once there is a U.S. Supreme Court decision, all courts must follow the precedent. Circuit court decisions are mandatory precedent only for the circuit in which the decision is issued. All courts in that circuit must follow the U.S. Circuit Court precedents. District court decisions (precedent) are applicable only to the district in which they were made. When courts that are not in the jurisdiction are faced with a novel issue they have not decided before, they can look to other jurisdictions to see how they handled the issue. If such a court likes the other jurisdiction's decision, it can use the approach taken by that jurisdiction's court. However, it is not bound to follow the other court's decision if that court is not in its jurisdiction.

Understanding the Case Information

With this in mind, let's take a look at a typical case included in this book. Each of the cases is an actual decision written by a judge. The first thing you will see is the *case name.* This is derived from the parties involved—the one suing (called *plaintiff* at the district court level) and the one being sued (called *defendant* at the district court level). At the court of appeals or Supreme Court level, the first name

generally reflects who appealed the case to that court. It may or may not be the party who initially brought the case at the district court level. At the court of appeals level, the person who appealed the case to the court of appeals is known as the *appellant* and the other party is known as the *appellee*. At the Supreme Court level they are known as the *petitioner* and the *respondent*.

Under the case name, the next line will have several numbers and a few letters. This is called a *case citation.* A case citation is the means by which the full case can be located in a law reporter if you want to find the case for yourself in a law library or a legal database such as LEXIS/NEXIS or Westlaw. Reporters are books in which judges' case decisions are kept for later retrieval by lawyers, law students, judges, and others. Law reporters can be found in any law library, and many cases can be found on the Internet for free on Web sites such as Public Library of Law (plol.org) or FindLaw.com.

Take a minute and turn to one of the cases in the text. Any case will do. A typical citation would be "72 U.S. 544 (2002)." This means that you can find the decision in volume 72 of the *U.S. Supreme Court Reporter* at page 544 and that it is a 2002 decision. The U.S. reporters contain U.S. Supreme Court decisions. Reporters have different names based on the court decisions contained in them; thus, their citations are different.

The citation "43 F.3d 762 (9th Cir. 2002)" means that you can find the case decision in volume 43 of the *Federal Reporter* third series, at page 762 and that the decision came out of the U.S. Circuit Court of Appeals for the Ninth Circuit in the year 2002. The federal reporters contain the cases of the U.S. Circuit Courts of Appeal from across the country.

Similarly, the citation "750 F. Supp. 234 (S.D. N.Y. 2002)" means that you can find the case decision in volume 750 of the *Federal Supplement Reporters,* which contain U.S. district court cases, at page 234. The case was decided in the year 2002 by the U.S. District Court in the Southern District of New York.

In looking at the chapter cases, after the citation we include a short blurb on the case to let you know before you read it what the case is about, what the main issues are, and what the court decided. This is designed to give you a "heads up," rather than just dumping you into the case cold, with no background on what you are about to read.

The next line you see will have a last name and then a comma followed by "J." This is the name of the judge who wrote the decision you are reading. The "J" stands for "judge" or "justice." Judges oversee lower courts, while the term for them used in higher courts is "justices." "C. J." stands for "chief justice."

The next thing you see in looking at the chapter case is the body of the decision. Judges write for lawyers and judges, not for the public at large. As such, they use a lot of legal terms (which we call "legalese") that can make the decisions difficult for a nonlawyer to read. There are also many procedural issues included in cases, which have little or nothing to do with the issues we are providing the case to illustrate. There also may be many other issues in the case that are not relevant for our purposes. Therefore, rather than give you the entire decision of the court, we instead usually give you a shortened, excerpted version of the case containing only the information relevant for the issue being discussed. If you want to see the entire case for yourself,

you can find it by using the citation provided just below the name of the case, as explained above. By not bogging you down in legalese, procedural matters, and other issues irrelevant to our point, we make the cases more accessible and understandable and much less confusing, while still giving you all you need to illustrate our point.

The last thing you will see in the chapter cases is the final decision of the court itself. If the case is a trial court decision by the district court, it will provide relief either for the plaintiff bringing the case or for the defendant against whom the case is brought.

If a defendant makes a *motion to dismiss,* the court will decide that issue and say either that the motion to dismiss is *granted* or that it is *denied.* A defendant will make a motion to dismiss when he or she thinks there is not enough evidence to constitute a violation of law. If the motion to dismiss is granted, the decision favors the defendant in that the court throws the case out. If the motion to dismiss is denied, it means the plaintiff's case can proceed to trial.

The parties also may ask the court to grant a *motion for summary judgment.* This essentially requests that the court take a look at the documentary information submitted by the parties and make a judgment based on that, as there is allegedly no issue that needs to be determined by a jury. Again, the court will either grant the motion for summary judgment or deny it. If the court grants a motion for summary judgment, it also will determine the issues and grant a judgment in favor of one of the parties. If the court dismisses a motion for summary judgment, the case proceeds to trial.

If the case is in the appellate court, it means that one of the parties did not like the trial court's decision. This party appeals the case to the appellate court, seeking to overturn the decision based on what it alleges are errors of law committed by the court below. Cases cannot be appealed simply because one of the parties did not like the facts found by the lower court. After the appellate court reviews the lower court's decision, the court of appeals will either *affirm* the lower court's decision, which means the decision is allowed to stand, or it will *reverse* the lower court's decision, which means the lower court's decision is overturned. If there is work still to be done on the case, the appellate court also will order *remand.* Remand is an order by the court of appeals to the lower court telling it to take the case back and do what needs to be done based on the court's decision.

It is also possible that the appellate court will issue a *per curiam* decision. This is merely a brief decision by the court, rather than a long one.

Following the court's decision is a set of questions that are intended to translate what you have read in the case into issues that you would likely have to think about as a business owner, manager, or supervisor. The questions generally are included to make you think about what you read in the case and how it would impact your decisions as a manager. They are provided as a way to make you think critically and learn how to ask yourself the important questions that you will need to deal with each time you make an employment decision.

The opening scenarios, chapter cases, and case-end questions are important tools for you to use to learn to think like a manager or supervisor. Reading the courts' language and thinking about the issues in the opening scenarios and case-end questions will greatly assist you in making solid, defensible workplace decisions as a manager or supervisor.

Part 1

The Regulation of the Employment Relationship

Chapter 1

The Regulation of Employment

Learning Objectives

When you complete this chapter, you should be able to:

- **LO1** Describe the balance between the freedom to contract and the current regulatory environment for employment.
- **LO2** Identify who is subject to which employment laws and understand the implication of each of these laws for both the employer and employee.
- **LO3** Delineate the risks to the employer caused by employee misclassification.
- **LO4** Explain the difference between an employee and an independent contractor and the tests that help us in that determination.
- **LO5** Articulate the various ways in which the concept "employer" is defined by the various employment-related regulations.
- **LO6** Describe the permissible parameters of non-compete agreements.

Opening Scenarios

SCENARIO 1

Nan works for an industrial products firm as an outside sales representative. Of the firm's 1,200 clients across several states in the northeast United States, Nan is responsible for 60, spread throughout the firm's region. She visits these customers on a regular basis and maintains very close relationships with them. She is the only connection that most of these customers have with the firm, and they might not even have an idea of how else to reach the firm except through Nan. When she joined the firm, she signed a non-compete agreement that stipulated that, if she were to cease her relationship with the firm, she would not engage in any business of any kind with any customer of the firm for a period of one year. Because of her success in building client relationships, Nan is courted by a competing firm that does business in the same region and she accepts an offer. She begins to call on both her original customers as well as other customers of her previous employer. When her previous employer files a cause of action for breach of the non-compete, Nan defends. What are her strongest arguments?

SCENARIO 2

Serafine worked as a secretary for Creole Construction Corp. (CCC). Gustave was her supervisor. Gustave subjected her to sexual harassment whenever both were at their job site. The harassment consisted of unwanted physical contact, including touching Serafine's body parts and kissing her, as well as other sexual advances and comments. Gustave also made an uninvited visit to Serafine's home. When Serafine rejected Gustave's advances, he retaliated by criticizing her work performance. Serafine complained to CCC's Human Resources department, initially asking the department to keep her complaint confidential. However, she later informed the department that she could no longer work with Gustave. CCC investigated her complaint and subsequently suspended Gustave. Serafine appreciates CCC's action but remains frustrated that Gustave is simply suspended and finds that she really has no remedy against Gustave through CCC; so she files a complaint against him with the Equal Employment Opportunity Commission. Will the EEOC case be successful?

SCENARIO 3

Ariana worked on a contract basis as a tax accountant for the clients of a small accounting firm. Whenever there was too much work for the employees of the firm, Ariana would receive a call and be assigned by the firm to a particular client for a specific job. When the job was completed, she was paid a commission for her work based on the amount paid by that client to the accounting firm. This commission was established in the contract Ariana was offered when she accepted the position. During the time she was working, she was paid weekly, was free to use office space within the accounting firm's office, and also could use whatever equipment and supplies were necessary to complete the job. In order to ensure a consistent quality among all of its workers, as well as to be sure that it complied with all regulations that might govern the job, the firm asked Ariana to submit her work through a supervisor, who then sent it on to the client. This process also ensured that clients saw all of the firm's workers as equivalent quality. Ariana is laid off in the middle of a job and she files for unemployment compensation. The firm defends the claim, arguing that she was not an employee. Was Ariana an employee or an independent contractor?

Introduction to the Regulatory Environment

How is the employer regulated? To what extent can Congress or the courts tell an employer how to run its business, whom it should hire or fire, or how it should treat its employees?

Exhibit 1.1 *Realities about the Regulation of Employment*

1. Generally, you do not have a right to your job.
2. This means that, once you are hired, your employer may choose to fire you, even for reasons that seem unjustified, as long as the termination is not in violation of a contract or for one of the few bases discussed in this textbook. But, basically, there are far more reasons a boss can fire you than not.
3. As an employer, you may fire someone for a good reason, for a bad reason, or even for no reason, just not for an illegal reason.
4. You may terminate someone simply because you do not get along with them. However, you must ensure that bias or perception, which might serve as the basis of a discrimination claim, is not interfering with judgment.

If an employer wants to hire someone to work every other hour every other week, it should be allowed to do that, as long as it can locate an employee who wants that type of job. Or, if an employer requires that all employees wear a purple chicken costume throughout the workday, there is no reason why that requirement could not be enforced, as long as the employer can find employees to accept that agreement.

The freedom to contract is crucial to freedom of the market; an employee may choose to work or not to work for a given employer, and an employer may choose to hire or not to hire a given applicant.

LO1

As a result, though the employment relationship is regulated in some important ways, Congress tries to avoid telling employers how to manage their employees or whom the employer should or should not hire. It is unlikely that Congress would enact legislation that would require employers to hire certain individuals or groups of individuals (like a pure quota system) or that would prevent employers and employees from freely negotiating the responsibilities of a given job. (See Exhibit 1.1, "Realities about the Regulation of Employment.")

Employers historically have had the right to discharge an employee whenever they wished to do so. In one clear example, after the Chicago Bears football team lost to the Green Bay Packers in January 2010 and thereby failed to clinch a spot in that year's Super Bowl, John Stone wore a Packers tie to his job at a Chicago car dealership to honor his grandmother, a Packers fan who had recently died. When he was asked by the general manager to remove the tie, he thought the guy was joking and returned to work. He was later fired. While the lesson learned is that Title VII (or any other statute, for that matter) does not protect on the basis of team allegiances, Mr. Stone was offered a job at a competing dealership that very day.[1]

However, Congress has passed employment-related laws when it believes that there is some imbalance of power between the employee and the employer. For example, Congress has passed laws that require employers to pay minimum wages and avoid using certain criteria such as race or gender in reaching specific employment decisions. These laws reflect the reality that employers stand in a position of power in the employment relationship. Legal protections granted to

employees seek to make the "power relationship" between employer and employee one that is fair and equitable.

Is Regulation Necessary?

There are scholars who do not believe that regulation of discrimination and other areas of the employment relationship is necessary. Proponents of this view believe that the market will work to encourage employers' rational, nonbiased behavior. For example, one of the main subjects of this textbook—Title VII of the Civil Rights Act of 1964 (Title VII)—prohibits discrimination based on race and gender, among other characteristics. (For detailed discussion of Title VII, see Chapter 3.) Some economists have argued that rational individuals interested in profit maximization will never hesitate to hire the most qualified applicants, regardless of their race. Decisions that are dependent on race or gender would be inefficient, they argue, since they are based on the (generally) incorrect belief that members of one class are less worthy of a job than those of another. The employers who are blind to gender or race, for instance, know that, if they were to allow their prejudices to govern or to influence their employment decisions, they may overlook the most qualified applicant because that applicant was African-American or a woman. Therefore, they will not let prejudices cause them to hire less qualified individuals and employ a less efficient workforce.

However, opponents of this position contend that discrimination continues because often employers are faced with the choice of two *equally* qualified applicants for a position. In that case, the prejudiced employer suffers no decrease in efficiency of her or his firm as a result of choosing the white or male applicant over the minority or female applicant. In addition, human beings do not always act rationally or in ways that society might deem to be in the best interests of society, as a whole. As Judge Richard Posner of the Seventh Circuit explained, "[t]he pluralism of our society is mirrored in the workplace, creating endless occasions for offense. Civilized people refrain from words and conduct that offend the people around them, but not all workers are civilized all the time."[2] Finally, given the composition of the work force, if a biased firm chooses only from the stock of white males, it still might have a pretty qualified stock from which to choose; so it can remain awfully competitive. Therefore, economic forces do not afford absolute protection against employment discrimination where the discrimination is based on race, gender, national origin, or other protected categories.

Who Is Subject to Regulation?

LO2

The issue of whether someone is an employer or employee is a critical one when it comes to regulation, but like many areas of the law, it is not one with an easy answer. (See Exhibit 1.2, "Realities about Who Is an Employee and Who Is Not.") Business decisions made in one context, for instance, may give rise to liability when there may be no liability in another (depending on factors such as the size of the business organization). In addition, defining an individual as an employee allows that person to pursue a claim that an independent contractor might not have.

Exhibit 1.2 *Realities about Who Is an Employee and Who Is Not*

1. You are not an employee simply because you are paid to work.
2. Choosing how to perform your job is not a clear indicator of independent contractor status.
3. Just because you hire a worker does not mean that you are necessarily liable for anything that the employee does in the course of his or her employment.
4. If you are an employee under one statute, you are not always considered an employee under all employment-related statutes.
5. If you are considered an employer for purposes of one statute, you are not always considered an employer for all statutes.
6. It is not always better to hire someone as an independent contractor rather than as an employee.
7. A mistake in the categorization of a business's workers can be catastrophic to that business from a financial and other perspectives.

In this section, we will examine who is considered to be an employer and an employee and how it is decided. These definitions are not just the concern of the employer's lawyer and accountant. Instead, concepts such as temporary help, leased workers, independent contractors, vendors, outsourcing, and staffing firms have become common elements of the employment landscape. While employers might not consider some of these workers to be employees, mere labels will not stop a court or agency from determining that the worker has been misclassified and that an employment relationship exists.[3]

Origins in Agency Law

The law relating to the employment relationship is based on the traditional law called *master and servant,* which evolved into the law of agency. It may be helpful to briefly review the fundamentals of the law of agency in order to gain a better perspective on the legal regulation of the employment relationship that follows.

In an agency relationship, one person acts on behalf of another. The actor is called the *agent,* and the party for whom the agent acts and from whom that agent derives authority to act is called the *principal.* The agent is basically a substitute appointed by the principal with power to do certain things. In the employment context, an employee is the agent of the employer, the principal. For example, if Alex hires Emma as an employee to work in his store selling paintings on his behalf, Alex would be the principal and employer, and Emma would be his agent and employee.

In an employment–agency relationship, the employee–agent is under a specific duty to the principal to act only as *authorized.* As a rule, if an agent goes beyond her authority or places the property of the principal at risk without authority, the principal is now responsible to the third party for all loss or damage naturally resulting from the agent's unauthorized acts (while the agent remains liable to the

principal for the same amount). In other words, if Alex told Emma that one of the paintings in the store should be priced at $100, and she sells it instead for $80, she would be acting without authority. Emma would be liable to Alex for his losses up to the amount authorized, $20, but Alex would still be required to sell the painting for the lower price because a customer in the store would reasonably believe the prices as marked. In addition, an agent has a duty to properly conduct herself when representing the principal and is liable for injuries resulting to the principal from her unwarranted misconduct. So, if Emma oversleeps and misses an appointment at which someone intended to purchase the painting, again she would be liable.

Throughout the entire relationship, the principal/employer has the obligation toward the agent to exercise good faith in their relationship, and the principal has to use care to prevent the agent from coming to any harm during the agency relationship. This requirement translates into the employer's responsibility to provide a safe and healthy working environment for the workers.

In addition to creating these implied duties for the employment relationship, the principal–agent characterization is important to the working relationship for other reasons, explained in the next section.

Why Is It Important to Determine Whether a Worker Is an Employee?

independent contractor
Generally, a person who contracts with a principal to perform a task according to her or his own methods, and who is not under the principal's control regarding the physical details of the work.

You just received a job offer. How do you know if you are being hired as an employee or as an **independent contractor**? While some workers may have no doubt about their classification, the actual answer may vary, depending on the statute, case law, or other analysis to be applied. The courts, employers, and the government are unable to agree on one definition of "employee" and "employer," so it varies, depending on the situation and the law being used. In addition, some statutes do not give effective guidance. For instance, the Employee Retirement Income Security Act (ERISA, discussed in detail in Chapter 12) defines employee as "any individual employed by an employer." But, as one court chastised the legislators who wrote it, this nominal definition is "completely circular and explains nothing." The distinction, however, is significant for tax law compliance and categorization, for benefit plans, for cost reduction plans, and for discrimination claims. For instance, Title VII applies to employers and prohibits them from discriminating against employees. It does not, however, cover discrimination against independent contractors. In addition, employers will not be liable for most torts committed by an independent contractor within the scope of the working relationship.

The definition of employee is all the more important as companies hire supplemental or contingent workers on an independent-contractor basis to cut costs. Generally, an employer's responsibilities increase when someone is an employee. This section of the chapter will discuss the varied implications of this characterization and why it is important to determine whether a worker is an employee. A later section in this chapter—"The Definition of Employee"—will present the different ways to figure it out.

Employer Payroll Deductions

An employer paying an employee is subject to requirements different from those for paying an independent contractor. An employer who maintains employees has the responsibility to pay Social Security (FICA), the FICA excise tax, Railroad Retirement Tax Act (RRTA) withholding amounts, federal unemployment compensation (FUTA), IRS federal income tax withholdings, Medicare, and state taxes. In addition, it is the employer's responsibility to withhold a certain percentage of the employee's wages for federal income tax purposes.

On the other hand, an independent contractor has to pay all of these taxes on his or her own. This is usually considered to be a benefit for the employer because it is able to avoid the tax expenses and bookkeeping costs associated with such withholdings.

Benefits

When you have taken jobs in the past, were you offered a certain number of paid vacation or sick days, a retirement plan, a parking spot, a medical or dental plan? These are known as *benefits,* and they cost the employer money outside of the wages the employer must pay the employee. In an effort to attract and retain superior personnel, employers offer employees a range of benefits that generally are not required to be offered such as dental, medical, pension, and profit-sharing plans. Independent contractors have no access to these benefits.

We will discuss the Fair Labor Standards Act of 1938 (FLSA) in detail in Chapter 16 but introduce it here merely to identify it as another vital reason to ensure correct classification of workers. The FLSA was enacted to establish standards for minimum wages, overtime pay, employer record keeping, and child labor. Where a worker is considered an employee, the FLSA regulates the amount of money an employee must be paid per hour and overtime compensation. Employers may intentionally misclassify employees in order to avoid these and other costs and liabilities. A willful misclassification under FLSA may result in imprisonment and up to a $10,000 fine, imposed by the Department of Labor.

Discrimination and Affirmative Action

As you will learn in Chapter 3, Title VII and other related antidiscrimination statutes only protect *employees* from discrimination by employers; therefore, an independent contractor cannot hold an employer liable for discrimination on this basis and employers are protected from some forms of discrimination and wrongful discharge claims where the worker is an independent contractor. (Coverage of employers by various statutes is discussed later in the chapter.)

However, as will be explored throughout this chapter, merely labeling a worker as an "independent contractor" does not protect against liability under federal antidiscrimination statutes such as Title VII. Courts and the EEOC will examine a variety of factors to determine the true meaning of the relationship between the worker and the organization. If the worker is more appropriately classified as an employee, then the label will be peeled off, allowing for antidiscrimination statutes to apply.

Additionally, the National Labor Relations Act of 1935 (NLRA) protects only employees and not independent contractors from unfair labor practices. Note, however, that independent contractors may be considered to be *employers;* so they may be subject to these regulations from the other side of the fence.

Cost Reductions

It would seem to be a safe statement that an objective of some, if not most, employers is to reduce cost and to increase profit. The regulations previously discussed require greater expenditures on behalf of employees, as does the necessity of hiring others to maintain records of the employees. In addition to avoiding those costs, hiring independent contractors also avoids the cost of overtime (the federal wage and hour laws do not apply to independent contractors) and the employer is able to avoid any work-related expenses such as tools, training, or traveling. The employer is also guaranteed satisfactory performance of the job for which the contractor was hired because it is the contractor's contractual obligation to adequately perform the contract with the employer, while the employee is generally able to quit without incurring liability (the at-will doctrine). If there is a breach of the agreement between the employer and the independent contractor, the independent contractor not only stands to lose the job but also may be liable for resulting damages. An employee is usually compensated for work completed with less liability for failure to perfectly perform. Some managers also contend that independent contractors are more motivated and, as a result, have a higher level of performance as a consequence of their freedom to control their own work and futures.

vicarious liability
The imposition of liability on one party for the wrongs of another. Liability may extend from an employee to the employer on this basis if the employee is acting within the scope of her or his employment at the time the liability arose.

In addition, the employee may actually cause the employer to have greater liability exposure. An employer has **vicarious liability** if the employee causes harm to a third party while the employee is in the course of employment. For instance, if an employee is driving a company car from one company plant to another and, in the course of that trip, sideswipes another vehicle, the employer may be liable to the owner of the other vehicle. While the employee may be required to reimburse the employer if the employer has to pay for the damages, generally the third party goes after the employer because the employee does not have the funds to pay the liability. The employer could of course seek repayment from the employee but, more likely, will write it off as an expense of doing business.

Questions might arise in connection with whether the worker is actually an employee of the employer and, therefore, whether the employer is liable at all, a question examined later in this chapter. For instance, if a hospital is sued for the malpractice of one of its doctors, the question of the hospital's vicarious liability will be determined based on whether the doctor is an employee or an independent contractor of the hospital. However, in certain situations, businesses will be liable for the acts of their independent contractors, including when those contractors are involved in "inherently dangerous activities."[4]

In some situations, notwithstanding the decrease in the amount of benefits that the employer must provide, independent contractors may still be more expensive to employ. This situation may exist where the employer finds that it is cheaper to