

SUMMARY TABLE OF CONTENTS

PREFACE.....	i
CHAPTER ONE: EEOC COMPLAINT PROCESS OVERVIEW	1
CHAPTER TWO: THEORIES OF DISCRIMINATION.....	25
CHAPTER THREE: CASE EVALUATION	87
CHAPTER FOUR: PREHEARING PRACTICE AND DISCOVERY	99
CHAPTER FIVE: SETTLEMENT	155
CHAPTER SIX: INDIVIDUAL COMPLAINT HEARING PRACTICE.....	171
CHAPTER SEVEN: CLASS ACTION PRACTICE.....	205
CHAPTER EIGHT: REMEDIES.....	217
CHAPTER NINE: DECISIONS, APPEALS, AND ENFORCEMENT.....	239
APPENDIX A: 29 CFR 1614	251
APPENDIX B: MD-110: CHAPTER 7—HEARINGS	277
APPENDIX C: EEOC HANDBOOK FOR ADMINISTRATIVE JUDGES	289
TABLE OF CASES.....	319

TABLE OF CONTENTS

PREFACE	i
CHAPTER ONE: EEOC COMPLAINT PROCESS OVERVIEW	1
I. INTRODUCTION	1
II. EEOC STATUTORY JURISDICTION	2
A. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964	2
1. Civil Rights Act of 1991	3
2. Same-Sex, Sexual Orientation and Transgender Discrimination	3
B. REHABILITATION ACT OF 1973	3
1. Civil Rights Act of 1991	3
2. Americans With Disabilities Act of 1990	4
3. ADA Amendments Act of 2008	4
C. AGE DISCRIMINATION IN EMPLOYMENT ACT	4
1. Exhaustion of Administrative Remedies	4
D. EQUAL PAY ACT	4
1. Exhaustion of Administrative Remedies.....	5
E. GENETIC INFORMATION NONDISCRIMINATION ACT.....	5
F. REPRISAL	5
III. EEOC INDIVIDUAL COMPLAINT PROCESS	5
A. EEO COUNSELING	5
B. ALTERNATIVE DISPUTE RESOLUTION	7
C. FORMAL COMPLAINT REQUIREMENTS	8
1. Amendment of Complaints	8
2. Consolidation	8
D. REGULATIONS REGARDING ACCEPTANCE AND DISMISSAL OF COMPLAINTS	9
1. Basis of Dismissal.....	12
2. Partial Dismissals	12
3. Agency Offers of Resolution	13
E. INVESTIGATION OF COMPLAINTS	13
F. REQUEST FOR HEARING	15
G. REQUEST FOR DECISION ON THE RECORD OR FINAL AGENCY DECISION	15
H. HEARINGS	15
1. Discovery	16
2. Summary Judgment	16
3. Decisions	16
4. Bench Decisions	17
I. FINAL AGENCY ACTION AND DECISIONS.....	17
1. Final Agency Actions.....	17
2. Final Agency Decisions	17
J. EEOC APPEALS	17
1. Agency Appeals	17
2. Complainant Appeals	18
3. EEOC Procedures	18
4. Requests for Reconsideration	18
K. CIVIL ACTIONS	19
IV. EEOC CLASS COMPLAINT PROCESS	19
A. EEO COUNSELING	19
B. FORMAL COMPLAINT REQUIREMENTS	20
C. AGENCY PROCESSING	20
D. PROCESSING BY ADMINISTRATIVE JUDGE	20
1. Notification of Class Members	21
2. Development of the Record	21
3. Resolution of Complaints	21
4. Hearings	22
5. Decisions	22

E.	FINAL AGENCY ACTION	22
1.	Individual Relief	23
CHAPTER TWO: THEORIES OF DISCRIMINATION.....		25
I.	THEORY OF INTENTIONAL DISCRIMINATION	25
A.	METHODS OF PROOF	26
B.	CIRCUMSTANTIAL EVIDENCE	26
1.	Significant Cases	26
a.	<i>McDonnell Douglas</i>	27
b.	<i>Furnco Construction Corp.</i>	28
c.	<i>Burdine</i>	28
d.	<i>Aikens</i>	29
e.	<i>Hicks</i>	30
f.	<i>Reeves</i>	30
C.	MIXED MOTIVE CASES—“MOTIVATING FACTOR” VS. “BUT FOR” TEST.....	31
D.	DIRECT EVIDENCE	32
E.	MIXED MOTIVE ANALYSIS.....	33
F.	SIGNIFICANT CASES.....	33
1.	<i>Price Waterhouse</i>	33
2.	1991 Civil Rights Act	36
G.	AFTER-ACQUIRED EVIDENCE DEFENSE	37
1.	Significant Case	37
a.	<i>McKennon v. Nashville Banner</i>	37
2.	Clear and Convincing Evidence	38
H.	COMMISSION'S INTENTIONAL DISCRIMINATION MODEL	39
I.	AGE DISCRIMINATION CASES	39
II.	THEORY OF DISPARATE IMPACT DISCRIMINATION	40
A.	METHOD OF PROOF	40
B.	SIGNIFICANT CASES	40
1.	<i>Griggs v. Duke Power</i>	40
2.	<i>Watson v. Fort Worth</i>	42
3.	<i>Wards Cove v. Atonio</i>	43
C.	CIVIL RIGHTS ACT OF 1991	45
D.	AGE DISCRIMINATION.....	45
III.	THEORY OF HARASSMENT	45
A.	METHODS OF PROOF.....	47
1.	Tangible Employment Actions	47
a.	Definition of Employment Action	48
b.	Definition of Supervisors.....	49
2.	Hostile Environment Harassment	50
B.	SIGNIFICANT CASES	51
1.	<i>Meritor Savings Bank</i>	51
2.	<i>Harris v. Forklift Systems</i>	52
3.	<i>Oncala v. Sundowner</i>	53
4.	<i>Burlington Industries and Faragher</i>	54
5.	<i>Vance v. Ball State University</i>	57
6.	<i>Macy v. Attorney General</i>	58
C.	COMMISSION GUIDANCE ON LIABILITY.....	61
D.	AVOIDING HARM.....	62
IV.	THEORY OF REASONABLE ACCOMMODATION	62
A.	DISABILITY ACCOMMODATION—STATUTORY BASIS	63
B.	DISABILITY ACCOMMODATION—REGULATORY BASIS	63
C.	DISABILITY ACCOMMODATION—OVERVIEW	63
1.	Disability Accommodation—Analytical Model	64
a.	Individual with Disability	64
b.	Impairment	64
c.	Major Life Activities	64
d.	Substantially Limited	65
e.	Qualified Individual With Disability	66
f.	Essential Functions	66

g.	Position in Question	67
h.	Request for Accommodation	67
i.	Reasonable Accommodation	67
j.	Undue Hardship	68
2.	Significant Cases	68
a.	<i>Nassau County v. Arline</i>	69
b.	<i>Cleveland v. Policy Management</i>	70
c.	<i>Sutton, Murphy and Albertsons</i>	71
d.	<i>Toyota v. Williams</i>	72
D.	ACCOMMODATION OF RELIGIOUS BELIEFS	73
V.	THEORY OF REPRISAL OR RETALIATION	74
A.	STATUTORY OVERVIEW	74
B.	REGULATORY OVERVIEW	74
C.	COMPLAINT PROCESSING	75
D.	METHODS OF PROOF	75
1.	Circumstantial Evidence	75
2.	Direct Evidence	76
E.	PROTECTED ACTIVITY	77
1.	Participation Clause	77
2.	Opposition Clause	78
a.	Balancing Test	79
F.	ADVERSE TREATMENT REQUIREMENT	79
1.	Former Employers	80
2.	Chilling Effect	80
G.	CAUSAL CONNECTION	80
H.	SIGNIFICANT CASES	80
1.	<i>Robinson v. Shell Oil Co.</i>	81
2.	<i>Burlington Northern v. White</i>	82
3.	<i>Crawford v. Nashville</i>	84
4.	<i>Thompson v. North American Stainless</i>	85
5.	<i>University of Texas v. Nassar</i>	86

CHAPTER THREE: CASE EVALUATION 87

I.	PREINVESTIGATION EVALUATION	87
A.	COMPLAINANT'S FACT GATHERING	88
1.	Interviews With Complainant	88
2.	Documents	88
3.	Interviews With Other Witnesses	89
4.	Corroborating Evidence	89
B.	AGENCY'S FACT GATHERING	89
1.	Interviews With Management Officials	90
2.	Documents	90
3.	Interviews With Agency Employees	91
4.	Credibility Assessments	91
C.	LEGAL RESEARCH	91
II.	POSTINVESTIGATION EVALUATION	92
A.	THE REPORT OF INVESTIGATION	92
1.	Investigation Standard	93
2.	The EEO Counselor's Report	93
3.	The Complaint and the Acceptance Letter	93
4.	The Investigation	94
B.	REMEDIES FOR INADEQUATE INVESTIGATION	95
1.	Complainant's Letter of Deficiencies	96
2.	Agency's Response to Deficiencies	96
III.	PROCEDURAL ISSUES	97
IV.	ASSESSING THE CASE	97

CHAPTER FOUR: PREHEARING PRACTICE AND DISCOVERY 99

I.	REQUEST FOR HEARING	99
A.	FORMAT OF HEARING REQUEST	100

1.	Designation of Representative	100
2.	Service on Agency	101
B.	CONSIDERATIONS IN ELECTING HEARING	101
C.	NOTICE OF DEFICIENCY	102
D.	AGENCY OBLIGATION UPON RECEIPT	102
II.	DOCKETING; ACKNOWLEDGMENT AND ORDER	103
A.	ORDER TO PRODUCE COMPLAINT FILE	103
B.	ACKNOWLEDGMENT AND ORDER	103
1.	Failure to Produce Complaint File	104
C.	ROLE OF ADMINISTRATIVE JUDGE	104
1.	Case Assessment	104
2.	Development of Record	105
3.	Subpoena Authority	106
4.	Sanctions in Lieu of Subpoena	106
5.	Authority of Administrative Judge	107
6.	Communications With Administrative Judge	107
D.	ENTRY OF APPEARANCE	108
III.	AMENDMENT AND CONSOLIDATION	108
A.	CONSOLIDATION OF COMPLAINTS	108
B.	AMENDMENT OF COMPLAINTS	109
IV.	RULINGS AND ORDERS	109
A.	NONDISPOSITIVE RULINGS	109
B.	DISPOSITIVE RULINGS	110
1.	Decisions on the Merits	110
2.	Orders of Dismissal	110
V.	GENERAL MOTION PRACTICE	110
A.	FORM OF MOTIONS	111
1.	Evidence in Support of Motion	112
B.	CONSULTATION WITH OPPOSING PARTY	112
C.	PROPOSED ORDERS	112
D.	FILING OF MOTIONS	113
E.	CERTIFICATES OF SERVICE	113
1.	Certified Mail	113
2.	Filing by Facsimile	113
3.	Filing by HECAPS	113
F.	ORAL ARGUMENT	114
VI.	PREDISCOVERY MOTIONS	114
A.	MOTIONS TO DISMISS	114
1.	Failure to State a Claim	115
2.	Complaint Pending or Adjudicated	116
3.	Untimely Complaints	117
4.	Identical Civil Actions	118
5.	Election of Non-EEO Remedy	118
6.	Moot Cases and Preliminary Actions	120
7.	Failure to Prosecute	120
8.	Spin-Off Complaints	121
9.	Abuse of Process	121
B.	MOTION FOR CHANGE OF VENUE	122
C.	MOTIONS TO AMEND/CONSOLIDATE/REFRAME ACCEPTED CLAIMS	123
VII.	DISCOVERY PRACTICE AND MOTIONS	123
A.	DISCOVERY RULE SOURCES	124
B.	SCOPE OF DISCOVERY	124
C.	TIME LIMITS ON DISCOVERY	125
1.	Discovery	125
2.	Discovery Instructions	126
D.	DISCOVERY PLANS	127
E.	DISCOVERY CONFERENCES	127
F.	DESCRIPTION OF DISCOVERY DEVICES	128
1.	Requests for Production of Documents	128
2.	Interrogatories	129

3.	Requests for Admissions	131
4.	Combining Admissions With Interrogatories	132
5.	Depositions	132
	a. Stipulations	135
	b. Objections	135
6.	Medical Examinations	136
G.	INFORMAL DISCOVERY DEVICES	137
	1. Investigation	137
	a. Agency Considerations	137
	b. Complainant Considerations	138
H.	DISCOVERY RESPONSES	138
	1. Compliance	139
	a. Form of Responses	140
	2. Opposition and Protective Orders	140
	a. Privilege and Information Protected by Law	141
	3. Stipulations	142
	4. <i>In Camera</i> Review	143
	5. Extensions of Time	143
I.	MOTIONS TO COMPEL DISCOVERY	143
	1. Time Limits	144
	2. Requirements	145
J.	MOTIONS FOR SANCTIONS	145
	1. Time Limits	146
	2. Requirements	146
	3. Incomplete Investigations	146
	4. AJ Guidance on Sanctions	147
VIII.	POSTDISCOVERY MOTIONS	148
	A. MOTIONS FOR SUMMARY JUDGMENT	148
	1. Uncontested Material Facts	149
	2. Legal Argument	150
	3. Exhibits	151
	4. Partial Summary Judgment	151
	5. Summary Judgment Procedures	152
	B. MOTIONS TO RECUSE, EXCLUDE, OR DISQUALIFY	152
	1. Motion to Recuse Judge	152
	2. Motions to Exclude or Disqualify	153
	CHAPTER FIVE: SETTLEMENT	155
I.	REASONS FOR SETTLEMENT	155
	A. EXPENSE OF LITIGATION	155
	B. UNCERTAINTY OF LITIGATION	156
	C. CONFINEMENT OF LEGAL REMEDIES	156
	D. PRESERVING WORK RELATIONSHIPS	157
II.	PREPARING THE CLIENT	157
III.	METHODS OF SETTLEMENT	158
	A. DIRECT NEGOTIATIONS	158
	1. Proposals	158
	B. SETTLEMENT CONFERENCES	159
	1. Neutral Settlement Judges	160
	2. Determining Whether to Use a Settlement Judge	161
	C. MEDIATION	161
	1. Sources for Mediators	162
	2. Rights Resolution vs. Interests Resolution	162
IV.	DRAFTING SETTLEMENT AGREEMENTS	162
	A. COMMISSION REQUIREMENTS	163
	1. Written Agreements	163
	2. Oral Agreements	163
	3. Knowing and Voluntary Requirement	164
	B. RULES OF INTERPRETATION	165
	1. Plain English Rule	165

2.	Terms of Art.....	165
3.	Intent of Parties	166
4.	Parol Evidence	166
5.	Confidentiality Clauses	167
C.	CONSIDERATION	167
1.	Dignity and Respect and Nonretaliation Clauses.....	167
D.	WAIVER OF RIGHTS	167
1.	Prospective Waivers	168
2.	ADEA and OWBPA Rights	168
V.	“UNSETTLING” SETTLEMENTS	168
A.	COMPENSATORY DAMAGES	168
B.	ATTORNEY FEES	169
VI.	SETTLEMENT DEVICES	169
A.	OFFERS OF FULL RELIEF	169
B.	OFFERS OF RESOLUTION	169
CHAPTER SIX: INDIVIDUAL COMPLAINT HEARING PRACTICE.....		171
I.	PREPARING FOR HEARING	171
A.	PURPOSE OF THE HEARING	172
B.	EVALUATING THE ADMINISTRATIVE JUDGE	172
C.	PREHEARING ORDERS	173
1.	Witness Lists	173
a.	Objections	175
2.	Exhibit Lists	175
a.	Objections	175
D.	PREHEARING CONFERENCES	175
1.	Exceptions to Rulings	177
E.	HEARING ARRANGEMENTS	177
1.	Continuances	177
F.	CASE PREPARATION	178
1.	Organizing the Case	178
a.	Trial Notebooks	178
2.	Witness Selection	178
3.	Exhibit Selection	179
a.	Discovery Responses	180
b.	Deposition Transcripts	180
4.	Witness Preparation	180
5.	Order of Witnesses	181
a.	Complainant’s Considerations	181
b.	Agency’s Considerations	182
c.	Other Considerations	183
d.	Judge’s Considerations	183
II.	THE HEARING	184
A.	PRELIMINARY MATTERS	184
1.	Persons Attending Hearing	184
2.	Off-the-Record Discussions	184
3.	Requests for Reconsideration	185
4.	Preservation of Objections	185
5.	Sequestration of Witnesses	185
6.	Settlement	185
B.	JUDGE’S INTRODUCTORY STATEMENT	185
C.	OPENING STATEMENTS	186
1.	Purposes of Statement	186
2.	Agency’s Opening Statement	186
D.	EXAMINATION OF WITNESSES	187
1.	Direct Examination	187
2.	Cross-Examination	190
3.	Redirect Examination	191
4.	Recross-Examination	192
5.	Deposition Testimony	192

a.	Refreshing Recollections	193
b.	Impeaching Testimony	193
6.	Rebuttal Witnesses	193
7.	Expert Witnesses	194
a.	Complainant's Physician	194
b.	Direct Examination of the Expert	195
c.	Cross-Examination of the Expert	196
d.	Reports of Experts	197
8.	Telephonic and Video Testimony and Hearings	197
III.	INTRODUCTION OF DOCUMENTS	198
A.	THE COMPLAINT FILE	198
B.	MARKING OF EXHIBITS	199
C.	IDENTIFICATION AND AUTHENTICATION	199
D.	QUESTIONING OF WITNESSES	199
E.	ADMISSION OF EXHIBITS.....	200
F.	REJECTED EXHIBITS	200
IV.	OBJECTIONS	201
A.	TIMING OF OBJECTIONS	201
B.	ARGUING OBJECTIONS	202
C.	STANDING OBJECTIONS	202
V.	CLOSING ARGUMENTS	202
A.	PURPOSE	202
B.	ORAL VS. WRITTEN	202
VI.	BIFURCATED HEARINGS	203
A.	DISCOVERY	203
B.	SUBMISSIONS IN LIEU OF HEARING.....	203

CHAPTER SEVEN: CLASS ACTION PRACTICE..... 205

I.	CLASS CERTIFICATION	206
A.	FORMAL COMPLAINT	206
B.	DISMISSAL BY ADMINISTRATIVE JUDGE	207
1.	Dismissals under Section 1614.107	207
2.	Specificity and Detail	207
3.	Undue Delay	208
C.	CERTIFICATION BY ADMINISTRATIVE JUDGE	208
1.	Burden of Proof	208
2.	Elements of Class Certification	209
a.	Numerosity	209
b.	Commonality and Typicality	209
c.	Adequacy of Representation	210
3.	Certification Decision	210
a.	Conditional Certification	210
4.	Notification of the Class	211
5.	Opting Out	211
II.	CLASS ACTION HEARINGS—LIABILITY	211
A.	DISCOVERY IN CLASS ACTIONS	211
1.	Limits on Discovery	212
B.	CHANGE OF VENUE	212
C.	HEARINGS	212
D.	CLASS ACTION DECISIONS	213
E.	IMPACT ON INDIVIDUAL CLASS MEMBERS	213
F.	NOTIFICATION OF CLASS MEMBERS	213
III.	PROCEEDINGS ON REMEDIES	213
A.	CLAIMS OF INDIVIDUAL RELIEF	214
B.	STANDARD OF PROOF	214
C.	AGENCY REMEDY DECISIONS	214
D.	ROLE OF ADMINISTRATIVE JUDGE	215
IV.	SETTLING CLASS ACTIONS	215
A.	PRE-RESOLUTION NOTIFICATION	215
B.	REVIEW OF PROPOSED SETTLEMENT	216

CHAPTER EIGHT: REMEDIES..... 217

I. TYPES OF RELIEF217

A. TAKING OR RESCINDING PERSONNEL ACTION218

 1. Displacement of Innocent Beneficiary219

 2. Subsequent Promotions219

 3. Probation219

B. BACK PAY220

 1. Deductions220

 2. Mitigation of Damages220

 3. Overtime221

 4. Interest221

C. FRONT PAY221

D. BENEFITS221

 1. Leave221

 2. Health Care222

 3. Thrift Savings Plan222

 4. Retirement Contributions and Credit222

E. COMPENSATORY DAMAGES222

 1. Past Pecuniary Damages222

 a. Collateral Source Rule223

 2. Future Pecuniary Damages.....223

 3. Nonpecuniary Damages223

 a. Causation224

 b. Taxes224

 c. Interest224

F. ATTORNEY FEES AND COSTS224

 1. Standards for Fee Awards224

 2. Reasonable Hourly Rates225

 3. Hours Reasonably Expended225

G. OTHER TYPES OF RELIEF225

 1. Remedial Training225

 2. Posting of Notice225

 3. Consideration of Discipline225

II. HEARING PRACTICES226

A. TRADITIONAL MAKE-WHOLE RELIEF226

 1. Mitigation of Damages226

 2. Overtime227

 3. After-Acquired Evidence228

B. COMPENSATORY DAMAGES228

 1. Evidence of Damages229

 a. Past Pecuniary Damages229

 b. Future Pecuniary Damages229

 c. Nonpecuniary Damages230

 2. Hearing Strategy Considerations231

 a. Complainant’s Considerations231

 b. Agency’s Considerations231

 3. Research232

C. ATTORNEYS’ FEES AND COSTS233

 1. Fee Award Procedures.....233

 2. Verified Statement of Fees234

 3. Agency’s Opposition to Fee Request235

 a. Reasonable Hourly Rate235

 b. Hours Reasonably Expended235

III. REMEDY PROCEDURES235

A. RELIEF ORDERED BY ADMINISTRATIVE JUDGE236

B. RELIEF ORDERED BY AGENCY236

 1. Final Agency Decisions237

 2. Interim Relief237

C. RELIEF ORDERED BY OFO237

CHAPTER NINE: DECISIONS, APPEALS, AND ENFORCEMENT	239
I. ADMINISTRATIVE JUDGE'S DECISION	239
A. REQUIREMENTS OF DECISION	239
B. BENCH DECISIONS	240
C. BIFURCATED HEARINGS	241
II. FINAL AGENCY ACTION	242
A. TIME LIMITS	242
B. CONTENT OF AGENCY'S FINAL ACTION	243
1. Judge's Decision Implemented	243
a. Appeal Rights	243
b. Civil Action Rights	243
2. Judge's Decision Not Implemented	243
a. Appeal Rights	244
b. Civil Action Rights	244
III. FINAL AGENCY DECISIONS	244
A. TIME LIMITS FOR DECISION	244
B. CONTENTS OF FINAL AGENCY DECISION	245
C. APPEAL AND CIVIL ACTION RIGHTS	245
IV. EEOC APPEALS PROCEDURES	245
A. NOTICE OF APPEAL	245
B. AGENCY'S SUBMISSION OF COMPLAINT FILE	245
C. SUPPLEMENTATION OF RECORD	246
V. APPELLATE STANDARDS OF REVIEW	246
A. SUBSTANTIAL EVIDENCE STANDARD	246
B. <i>DE NOVO</i> STANDARD	247
C. NEW EVIDENCE ON APPEAL	247
D. BURDENS OF PERSUASION	247
E. APPELLATE BRIEFS	248
F. SANCTIONS	248
VI. REQUESTS FOR RECONSIDERATION	248
VII. COMPLIANCE AND ENFORCEMENT	248
A. AVOIDING ENFORCEMENT ISSUES	249
B. PETITIONS FOR ENFORCEMENT	249
APPENDIX A: 29 CFR 1614	251
APPENDIX B: MD-110: CHAPTER 7—HEARINGS	277
APPENDIX C: EEOC HANDBOOK FOR ADMINISTRATIVE JUDGES	289
TABLE OF CASES.....	319

