SUMMARY TABLE OF CONTENTS

INTRODUCTION 1
AGE DISCRIMINATION 7
ALTERNATIVE DISPUTE RESOLUTION 25
ATTORNEY FEES 27
CLASS ACTIONS 89
COMPENSATORY DAMAGES 109
CONSTITUTIONAL ISSUES: EMPLOYMENT RELATED 257
CONSTRUCTIVE DISCHARGE/RETIREMENT 259
COURT PROCEDURES AND ISSUES 269
DISABILITY DISCRIMINATION 273
DISCIPLINE 429
DISPARATE IMPACT 435
EEO INVESTIGATIONS 441
EEOC APPELLATE REVIEW 461
EQUAL PAY ACT 467
EVIDENCE 477
GOVERNMENT EMPLOYEES RIGHTS ACT OF 1991 497
HARASSMENT (NOT SEXUAL) 499
HEARINGS (EEOC) AND AJ AUTHORITY 551
JOINT EMPLOYER 561
LABOR-RELATIONS AND EEO 569
LAWS, REGULATIONS, AND GUIDANCE 571
LEGITIMATE NONDISCRIMINATORY REASONS (INADEQUACY OF) 581
MIXED CASES 595
NATIONAL ORIGIN DISCRIMINATION 607
NONSELECTION CLAIMS 615
OFFICIAL TIME 661
PERFORMANCE-RELATED CASES 665
PROCEDURES 667
RACE DISCRIMINATION 773
RELIGIOUS DISCRIMINATION 793
REMEDIES AND OTHER RELIEF 805
REPRESENTATION 853
REPRISAL/RETALIATION 855
SANCTIONS 925
SECURITY CLEARANCES AND STATE SECRETS 961
SETTLEMENT 969
SEX (GENDER) DISCRIMINATION 1017
SEXUAL HARASSMENT 1035
SEXUAL ORIENTATION AND GENDER IDENTITY 1075
SUMMARY JUDGMENT 1083
TIMELINESS 1133
TABLE OF CASES 1197
INDEX 1255

TABLE OF CONTENTS

INTRODUCTION 1

I. HOW TO USE THIS BOOK 1
- A. LEGEND FOR CASE CITATIONS 1
- B. TERMS OF REFERENCE 2

II. SUMMARY OF RECENT TRENDS IN THE LAW 2
- A. ATTORNEY FEES 2
- B. COMPENSATORY DAMAGES 2
- C. DISABILITY DISCRIMINATION 3
- D. HARASSMENT (NOT SEXUAL) 3
- E. HEARINGS (EEOC) AND AJ AUTHORITY 3
- F. JOINT EMPLOYER 3
- G. RELIGIOUS DISCRIMINATION 4
- H. REMEDIES AND OTHER RELIEF 4
- I. REPRISAL/RETALIATION 4
- J. SECURITY CLEARANCES 4
- K. SEX (GENDER) DISCRIMINATION 4
- L. SUMMARY JUDGMENT 4
- M. TIMELINESS 4

AGE DISCRIMINATION 7

I. PROOF OF AGE DISCRIMINATION 7
- A. IN GENERAL 7
- B. AGE DIFFERENCE EVIDENCE 9
- C. DIRECT EVIDENCE OF AGE DISCRIMINATION/COMMENTS 9
- D. DISPARATE IMPACT 11
- E. DISPARATE TREATMENT 11
- F. LIQUIDATED DAMAGES 13
- G. TAX CONSEQUENCES OF A LUMP SUM PAYMENT 13

II. DISCRIMINATION WITHIN THE PROTECTED AGE GROUP GROUP—PREFERENCE FOR OLDER EMPLOYEES OVER YOUNGER EMPLOYEES WITHIN THE PROTECTED AGE GROUP 13

III. OLDER WORKERS BENEFIT PROTECTION ACT (OWBPA) 14
- A. ADEA REQUIREMENTS MET 14
- B. ADEA VIOLATED, REQUIREMENT NOT MET 14
- C. ADEA VIOLATION, EFFECT UPON OTHER BASES OF DISCRIMINATION 15

IV. THE "SAME ACTOR" INFERENCE 15

V. ADMINISTRATIVE EXHAUSTION IN FEDERAL DISTRICT COURT 15

VI. NONSELECTION AGE CASES 16

VII. MANDATORY AGE LIMITS 21

VIII. REPRISAL BASED ON UNDERLYING AGE COMPLAINT 22

ALTERNATIVE DISPUTE RESOLUTION 25

ATTORNEY FEES 27

I. WHO IS AN ATTORNEY? 27

II. PREVAILING PARTY 27

III. HOURS CLAIMED 31

IV. RATE AND AMOUNT CLAIMED 39

V. DOCUMENTATION OF CLAIMS 50

VI. STANDARD FOR PAYMENT 53

VII. REDUCTIONS (LACK OF SUCCESS AND ACROSS-THE-BOARD) UPHELD OR REVERSED 54

VIII. FEE ENHANCEMENT 74

IX. ATTORNEY FEE AWARD UNWARRANTED 75

X. ATTORNEY FEES AS SANCTIONS 76

XI. OFFERS OF RESOLUTION/OFFER OF JUDGMENT 76

XII. AGE PLUS OTHER BASES OF DISCRIMINATION 77

XIII. NO FEES FOR PURSUIT OF A CRIMINAL ACTION AGAINST THE ALLEGED HARASSER 77
XIV. ATTORNEY CANNOT UNILATERALLY FILE AN APPEAL WITH THE COMMISSION 77
XV. NEED FOR TWO ATTORNEYS 78
XVI. TAXATION ISSUES 80
XVII. AUTHORITY TO AWARD FEES FOR COURT OR MSPB WORK 80
XVIII. OUT OF TOWN COUNSEL 81
XIX. OTHER 85

CLASS ACTIONS 89

I. CLASS CERTIFIED 89
II. CLASS NOT CERTIFIED 95
III. PROVISIONAL CERTIFICATION OF A CLASS 101
IV. CLASS DECERTIFIED 102
V. FAILURE TO PROVE CLASS CLAIMS 103
VI. NOTICE TO CLASS MEMBERS 103
VII. NO DISMISSAL FOR FAILURE TO STATE A CLAIM 104
VIII. SETTLEMENT OF CLASS ACTIONS 104
IX. TIMELINESS ISSUES 105
X. OTHER 106

COMPENSATORY DAMAGES 109

I. UP TO $5,000 109
II. $5,001 TO $10,000 129
III. $10,001 TO $50,000 146
IV. $50,001 TO $100,000 189
V. OVER $100,000 213
VI. COMPENSATORY DAMAGES DENIED 232
VII. EXCLUSIONS AND AVAILABILITY 236
VIII. COLLATERAL SOURCE RULE 237
IX. "GOOD FAITH" DISABILITY EXCLUSION 237
X. COMPENSATORY DAMAGES: MOOTNESS 239
XI. NO CLAIM FILED FOR COMPENSATORY DAMAGES OR NO EVIDENCE SUBMITTED TO SUPPORT A CLAIM 240
XII. PECUNIARY DAMAGES—PAST AND FUTURE 241
XIII. LARGE AWARDS WITHOUT MEDICAL EVIDENCE OF HARM 251
XIV. LOSS OF EARNING CAPACITY 252
XV. ADEQUACY OF CLAIM 254
XVI. *DE NOVO* COURT REVIEW OF AMOUNT 254
XVII. REDUCTION OF DAMAGES AS A SANCTION 254
XVIII. OTHER 254

CONSTITUTIONAL ISSUES: EMPLOYMENT RELATED 257

CONSTRUCTIVE DISCHARGE/RETIREMENT 259

COURT PROCEDURES AND ISSUES 269

DISABILITY DISCRIMINATION 273

I. NOTICE TO AGENCY OF NEED FOR ACCOMMODATION 273
II. INDIVIDUAL WITH A DISABILITY 274
A. THE ADA AMENDMENTS ACT OF 2008 274
1. Rejection of the "Reasoning" and "Demanding Standards" of Supreme Court and Lower Court Decisions and the EEOC's Disability Definition 274
2. Seeking to Assure the Broader Reinterpretation of the "Substantially Limits" Language 275
3. Expanding the Definition of "Major Life Activities" 275
4. Changes to the "Regarded as" Prong 275
5. Other Changes 276
B. MAJOR LIFE ACTIVITIES 276
1. The ADA Amendments Act of 2008 276
2. Cases 276

D. RECORD OF A DISABILITY 279
E. ASSOCIATION WITH PERSONS WITH A DISABILITY 280
F. EXCLUSIONS FROM THE DEFINITION OF AN INDIVIDUAL WITH A DISABILITY 281
1. The Illegal Use of Drugs Exclusion 281
III. QUALIFIED INDIVIDUAL WITH A DISABILITY 281
A. IN GENERAL 281
B. QUALIFICATION STANDARDS / ESSENTIAL FUNCTIONS 287
IV. REASONABLE ACCOMMODATION 294
A. GENERAL 294
B. DELAY IN PROVIDING REASONABLE ACCOMMODATION 305
C. AN EMPLOYEE IS NOT ENTITLED TO THE ACCOMMODATION OF HIS OR HER CHOICE 311
D. UNDUE HARDSHIP 315
E. NEXUS BETWEEN DISABILITY AND REQUESTED ACCOMMODATION 318
F. THE INTERACTIVE PROCESS 320
G. SPECIFIC ACCOMMODATIONS 321
1. Absences—Lengthy or Indefinite Absence or Arriving at Work Whenever Complainant Is Able 321
2. A Chair—Ergonomic or Other 323
3. Job Coach 324
4. Light Duty/Limited Duty 324
5. Modified Job Assignments 328
6. No Contact With a Supervisor or Employee 329
7. Parking Space 329
8. Plastic Shield 332
9. Accommodations for Individuals With Sight Impairments 332
10. Reassignment 332
11. Modified Work Schedule 342
12. Smoke Free Work Environment 344
13. Supervisory Change (A New Supervisor) 344
14. Work at Home/Telecommuting 344
15. Working at a Different Agency Location 352
16. Workstation Close to a Restroom 353
17. Providing Interview Questions in Writing 354
18. Providing Interpreters or Relay Services for Employees With Hearing Impairments 354
H. FAILURE TO ACCOMMODATE AS A CONSTRUCTIVE DISCHARGE 357
I. GOOD FAITH EFFORTS AT REASONABLE ACCOMMODATION AS A DEFENSE TO PAYMENT OF COMPENSATORY DAMAGES 358
J. ADEQUACY OF AGENCY INVESTIGATION OF REASONABLE ACCOMMODATION 360
V. DISPARATE TREATMENT DISABILITY DISCRIMINATION 361
VI. PERFORMANCE AND CONDUCT STANDARDS 367
A. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION GUIDANCE 367
B. THE MISCONDUCT EXCLUSION 367
VII. DIRECT THREAT AND RISK OF HARM DEFENSES 370
VIII. DISABILITY-RELATED INQUIRIES/INQUIRY DISCRIMINATION 385
IX. REQUESTS FOR MEDICAL INFORMATION AND RECORDS 391
X. CONFIDENTIALITY OF MEDICAL INFORMATION AND RECORDS 396
XI. MEDICAL AND FITNESS-FOR-DUTY EXAMINATIONS 410
XII. CLASS ACTION CLAIMS 417
XIII. DISABILITY HARASSMENT CLAIMS 418
XIV. NONSELECTION BECAUSE OF DISABILITY CLAIMS 420
XV. RELATIONSHIP OF THE REHABILITATION ACT/ADA TO OWCP, DISABILITY RETIREMENT, LONG TERM CARE BENEFITS, AND HEALTH INSURANCE 423
A. OWCP (OFFICE OF WORKERS' COMPENSATION PROGRAMS) 424
B. DISABILITY RETIREMENT 425
C. LONG TERM CARE INSURANCE 425
D. HEALTH INSURANCE 426
XVI. ADEQUACY OF AGENCY INVESTIGATIONS—THE NEED TO ASK THE "RIGHT QUESTIONS" 426

DISCIPLINE 429

DISPARATE IMPACT 435

EEO INVESTIGATIONS 441
I. INADEQUATE INVESTIGATIONS 441
II. RIGHT OF UNION TO BE REPRESENTED 458
III. OTHER 458

EEOC APPELLATE REVIEW 461
I. REVIEW OF AJ DECISIONS 461
II. REVIEW OF FINAL AGENCY DECISIONS 462
III. REVIEW OF AGENCY FINAL ORDER 463
IV. REQUESTS FOR RECONSIDERATION OF OFO DECISIONS 464
V. REVIEW OF MSPB DECISIONS 464
VI. REVIEW OF PREHEARING AND HEARING RULINGS 465
VII. DISMISSAL OF APPEAL FOR FAILURE TO PROVIDE INTERIM RELIEF 466
VIII. INTERLOCUTORY APPEALS 466

EQUAL PAY ACT 467

EVIDENCE 477
I. COMMISSION DETERMINATION IN COURT 477
II. CREDIBILITY RULINGS 477
III. DIRECT EVIDENCE 479
IV. COMPARATOR EVIDENCE 480
V. EVIDENCE OF PRETEXT 481
VI. RACE OR SEX PLUS 482
VII. MIXED-MOTIVE 482
VIII. THE SAME ACTOR INFERENCE 490
IX. MEDICAL RECORDS 491
X. PRIVILEGE/CONFIDENTIAL 491
XI. "CAT'S PAW" OR "RUBBER STAMP" EVIDENCE 491
XII. "ME TOO" EVIDENCE 492
XIII. HEIGHTENED BURDEN IN "REVERSE DISCRIMINATION" CASES 493
XIV. STATISTICAL EVIDENCE 493
XV. EVIDENCE FROM OTHER PROCEEDINGS/AFTER ACQUIRED EVIDENCE 494

GOVERNMENT EMPLOYEES RIGHTS ACT OF 1991 497

HARASSMENT (NOT SEXUAL) 499
I. AGE HARASSMENT CLAIMS 499
II. DISABILITY HARASSMENT CLAIMS 500
III. NATIONAL ORIGIN HARASSMENT 506
IV. RACE HARASSMENT CLAIMS 509
V. RELIGIOUS HARASSMENT CLAIMS 519
VI. REPRISAL HARASSMENT CLAIMS 519
VII. SEX (GENDER) HARASSMENT CLAIMS 526
VIII. SAME SEX HARASSMENT 532
IX. PROOF OF DISCRIMINATION—SUFFICIENTLY SEVERE OR PERVASIVE 533
X. AFFIRMATIVE DEFENSES 538
XI. FRAGMENTATION OF HARASSMENT CLAIMS 545
A. REMEDY FOR IMPROPER FRAGMENTATION 546
XII. SUFFICIENT TO STATE A CLAIM 547
XIII. PROOF—BASED UPON A PROTECTED CLASS? 548
XIV. RUDE TO EVERYONE CLAIM 549

HEARINGS (EEOC) AND AJ AUTHORITY 551
I. AUTHORITY OF AJS 551
II. DISMISSALS FOR FAILURE TO STATE A CLAIM 553
III. VIDEO HEARINGS 553
IV. BIAS CLAIMS 555

V. REQUESTS FOR RECUSAL 556
VI. AUTHORITY TO ADD A BASIS OF DISCRIMINATION / MOTION TO AMEND 556
VII. REFRAMING OR INCLUDING ADDITIONAL ISSUES OR BASES 557
VIII. CREDIBILITY DETERMINATIONS 558
IX. WITNESSES 560
X. BIFURCATED HEARINGS 560

JOINT EMPLOYER 561

LABOR-RELATIONS AND EEO 569

LAWS, REGULATIONS, AND GUIDANCE 571

I. THE PREGNANT WORKERS FAIRNESS ACT—PUB.L. 117-328, CODIFIED AT 42 USC 2000GG *ET SEQ.* 571
II. GENETIC INFORMATION NONDISCRIMINATION ACT OF 2008 (GINA)—PUB.L. 110-233, 122 STAT. 881, CODIFIED AT 42 USC 2000FF *ET SEQ.* 571
A. COVERAGE 571
B. IMPORTANT DEFINITION 571
C. PRACTICES PROHIBITED OR RESTRICTED 571
D. EXCEPTIONS AS TO ACQUISITION 572
E. RULES ON CONFIDENTIALITY AND LIMITED EXCEPTIONS TO DISCLOSURE 572
F. EFFECT ON OTHER LAWS 572
G. REMEDIES AND ENFORCEMENT 572
III. FINAL REGULATIONS TO IMPLEMENT GINA—29 CFR PART 1635 572
IV. THE LILLY LEDBETTER FAIR PAY ACT OF 2009 575
V. THE ADA AMENDMENTS ACT OF 2008 576
A. REJECTION OF THE "REASONING" AND "DEMANDING STANDARDS" OF SUPREME COURT AND LOWER COURT DECISIONS AND THE EEOC'S DISABILITY DEFINITION 576
B. SEEKING TO ASSURE THE BROADER REINTERPRETATION OF THE "SUBSTANTIALLY LIMITS" LANGUAGE 576
C. EXPANDING THE DEFINITION OF "MAJOR LIFE ACTIVITIES" 576
D. CHANGES TO THE "REGARDED AS" PRONG 576
E. OTHER CHANGES 577
VI. THE AMERICANS WITH DISABILITIES ACT: APPLYING PERFORMANCE AND CONDUCT STANDARDS TO EMPLOYEES WITH DISABILITIES (OCTOBER 14, 2008) 577
VII. COMPLIANCE MANUAL, SECTION 12, RELIGIOUS DISCRIMINATION, NO. 915.063 (JANUARY 15, 2021) 578
VIII. QUESTIONS AND ANSWERS: PROMOTING EMPLOYMENT OF INDIVIDUALS WITH DISABILITIES IN THE FEDERAL WORKFORCE (SEPTEMBER 30, 2008) 578
IX. EEOC ENFORCEMENT GUIDANCE: UNLAWFUL DISPARATE TREATMENT OF WORKERS WITH CAREGIVING RESPONSIBILITIES, NO. 915.002 (MAY 23, 2007) 579
A. TOPICS 579
B. DISPARATE TREATMENT 579
C. PREGNANCY-RELATED ISSUES 579
D. DISABILITY, HOSTILE WORK ENVIRONMENT AND REPRISAL 579
X. INSTRUCTIONS TO FEDERAL AGENCIES FOR EQUAL EMPLOYMENT OPPORTUNITY MANAGEMENT DIRECTIVE 715 (EEO MD-715) (JULY 20, 2004) 579
XI. EEOC ENFORCEMENT GUIDANCE ON PREGNANCY DISCRIMINATION AND RELATED ISSUES 580
XII. EEOC ENFORCEMENT GUIDANCE ON RETALIATION AND RELATED ISSUES 580
XIII. EEOC ENFORCEMENT GUIDANCE ON NATIONAL ORIGIN DISCRIMINATION 580
XIV. EEOC ENFORCEMENT GUIDANCE ON HARASSMENT IN THE WORKPLACE 580

LEGITIMATE NONDISCRIMINATORY REASONS (INADEQUACY OF) 581

MIXED CASES 595

I. "FIRMLY ENMESHED" IN THE EEO PROCESS 595
II. DISMISSAL 596
III. SPECIAL PANEL 598
IV. UNMIXED BY MSPB DECISION 598
V. EEOC'S REVIEW OF MSPB DECISION 599
VI. UNTIMELINESS 601
VII. IMPACT OF MSPB DECISION 602
VIII. RIGHT TO HEARING AT MSPB ON EEO ISSUES 602

IX. HOLDING EEO COMPLAINT IN ABEYANCE 603
X. NOTIFICATION OF MIXED CASE PROCESS 603
XI. APPEAL FROM GRIEVANCE-ARBITRATION 603
XII. MSPB MIXED CASE DISCRIMINATION FINDINGS 604
XIII. COURT-RELATED ISSUES 604

NATIONAL ORIGIN DISCRIMINATION 607

I. HOLIDAYS 607
II. DISPARATE TREATMENT 607
III. HOSTILE ENVIRONMENT 608
IV. FOREIGN ACCENT 609
V. "SPEAK ENGLISH ONLY" RULES 611
VI. NONSELECTION 612
VII. OTHER 612

NONSELECTION CLAIMS 615

I. CLAIMS OF NONSELECTION BECAUSE OF AGE 615
II. CLAIMS OF NONSELECTION BECAUSE OF DISABILITY 620
III. CLAIMS OF NONSELECTION BECAUSE OF NATIONAL ORIGIN 623
IV. CLAIMS OF NONSELECTION BECAUSE OF RACE 624
V. CLAIMS OF NONSELECTION BECAUSE OF REPRISAL 632
VI. CLAIMS OF NONSELECTION BECAUSE OF SEX 636
VII. MULTIPLE BASES 639
VIII. RACE PLUS 648
IX. ACCENT OR LANGUAGE ISSUES 649
X. FAILURE OF AGENCY TO ARTICULATE AN ADEQUATE REASON 649
XI. "CLEARLY BETTER QUALIFIED" 655
XII. NOT "CLEARLY BETTER QUALIFIED" 656
XIII. REQUIRED RETENTION OF RECORDS IN SELECTION CASES 657
XIV. DISABILITY INQUIRIES DURING SELECTION PROCESS 658
XV. DISCRIMINATION BUT NO POSITION RELIEF 658
XVI. OTHER 658

OFFICIAL TIME 661

PERFORMANCE-RELATED CASES 665

PROCEDURES 667

I. DISMISSALS OF COMPLAINTS 667
A. FAILURE TO STATE A CLAIM/GENERALLY (1614.107(A)(1)) 667
B. PREVIOUSLY FILED CLAIM (1614.107(A)(1)) 689
C. FAILURE TO STATE A CLAIM/HOSTILE ENVIRONMENT (1614.107(A)(1)) 691
D. FAILURE TO STATE A CLAIM/REPRISAL (1614.107(A)(1)) 711
E. FAILURE TO STATE A CLAIM/DRESS AND APPEARANCE ISSUES (1614.107(A)(1)) 724
F. FAILURE TO STATE A CLAIM/NO AVAILABLE REMEDY OR NOT WITHIN PURVIEW (1614.107(A)(1)) 725
G. FAILURE TO STATE A CLAIM/COLLATERAL ATTACK (1614.107(A)(1)) 726
H. MOOT AND PREMATURE COMPLAINTS (1614.107(A)(5)) 731
I. PREMATURE/PRELIMINARY STEP COMPLAINTS (1614.107(A)(5)) 736
J. FAILURE TO LOCATE COMPLAINANT (1614.107(A)(6)) 738
K. PENDING CIVIL ACTION (1614.107(A)(3)) 738
L. ABUSE OF PROCESS (1614.107(A)(9)) 740
M. ELECTION OF REMEDIES (1614.107(A)(4)) 743
N. FAILURE TO PROSECUTE (1614.107(A)(7)) 746
O. SPIN-OFF COMPLAINTS (1614.107(A)(8)) 751
II. LIKE OR RELATED CLAIMS 752
III. FRAGMENTATION 753
IV. CONSOLIDATION 756
V. JOINDER OF AGENCY PARTIES 756
VI. AMENDMENT OF COMPLAINT 757

VII. STANDING 758
VIII. EEO COUNSELOR/EEO OFFICE ERROR 766
IX. REPRESENTATIVE/ATTORNEY ERROR 767
X. AGENCY ERROR 768
XI. OFFICIAL TIME ISSUES 769
XII. INTENT TO WITHDRAW COMPLAINT 769
XIII. NO COMMISSION JURISDICTION FOR SOME OFF-DUTY CONDUCT BY COWORKER 769
XIV. IMPROPER SERVICE OF HEARING REQUEST 769
XV. LAST CHANCE AGREEMENT WAIVERS 770
XVI. OTHER 770

RACE DISCRIMINATION 773

I. DISMISSAL 773
II. NONSELECTION 774
III. HARASSMENT/HOSTILE WORK ENVIRONMENT 776
IV. CLASS ACTION 782
V. DISPARATE TREATMENT 782
VI. DENIAL OF OVERTIME 785
VII. DISCIPLINE 785
VIII. TRAINING AND PROMOTIONAL OPPORTUNITIES 789
IX. REASSIGNMENT 789
X. SETTLEMENT 790
XI. DISPARATE IMPACT 790

RELIGIOUS DISCRIMINATION 793

I. RELIGIOUS ACCOMMODATIONS 793
II. UNDUE HARDSHIP 799
III. OBSERVANCE AT WORK 800
IV. HOSTILE WORK ENVIRONMENT 801
V. DISCIPLINE 802
VI. MIXED CASES 802
VII. DISPARATE TREATMENT/MIXED MOTIVE 803
VIII. DISMISSAL 804

REMEDIES AND OTHER RELIEF 805

I. REINSTATEMENT 805
II. PLACEMENT IN POSITION SOUGHT 811
III. OFFER OF THE POSITION DENIED OR A SUBSTANTIALLY EQUIVALENT POSITION 814
IV. RETROACTIVE PROMOTION, PERFORMANCE OR OTHER AWARDS 815
V. FRONT PAY AWARDS 816
VI. BACK PAY AWARDS/MITIGATION 820
VII. TRAINING AND OTHER RELIEF 837
VIII. ADJUSTMENT FOR INCREASED TAXES 842
IX. DAMAGES PAYABLE TO THE ESTATE 844
X. ALTERING EMPLOYMENT PRACTICES 844
XI. DISCRIMINATION BUT NO POSITION RELIEF 844
XII. INTERIM RELIEF 845
XIII. RESTORATION OF LEAVE 845
XIV. POSTING OF NOTICE 846
XV. OTHER REMEDIES 846

REPRESENTATION 853

I. SANCTIONS/SUSPENSION 853
II. CONFLICT OF INTEREST 853
III. NONATTORNEY REPRESENTATIVES 854
IV. FILING COMPLAINTS 854

REPRISAL/RETALIATION 855

I. *PRIMA FACIE* CASE/NEXUS 855

II. KNOWLEDGE OF PROTECTED ACTIVITY 859
III. OPPOSITION REPRISAL 860
IV. PARTICIPATION REPRISAL 865
V. NONSELECTION REPRISAL 869
VI. FITNESS FOR DUTY AS REPRISAL 873
VII. DISCIPLINE OR PERFORMANCE REASONS AS REPRISAL 873
VIII. AWARDS AS REPRISAL 887
IX. JOB REFERENCES AS REPRISAL 887
X. REASSIGNMENT AS REPRISAL 889
XI. LEAVE-RELATED REASON AS REPRISAL 892
XII. MIXED MOTIVE 893
XIII. REASONABLY LIKELY TO DETER/DIRECT EVIDENCE/*PER SE* 894
XIV. DISABILITY RETALIATION 916
XV. ADEA RETALIATION 917
XVI. REPRISAL HARASSMENT CLAIMS 917
XVII. CREDIBILITY-BASED FINDINGS 921
XVIII. EVIDENCE/CAT'S PAW 923
XIX. ASSOCIATION REPRISAL 923

SANCTIONS 925

I. SANCTIONS AGAINST AGENCIES 925
A. DEFAULT JUDGMENTS 925
B. ADVERSE INFERENCE/EXCLUSION OF EVIDENCE 933
C. MONEY SANCTIONS 939
D. FAILURE TO ISSUE FAD OR DELAY IN ISSUING FAD 942
II. IMPROPER INTRUSION BY AGENCY INTO INVESTIGATION 943
III. SANCTIONS AGAINST COMPLAINANTS 945
A. DISMISSAL OF COMPLAINT 945
B. ADVERSE INFERENCES 946
C. SUSPENSION OR OTHER ACTIONS AGAINST REPRESENTATIVES 947
D. EXCLUSION OF EVIDENCE/BARRING TESTIMONY 947
E. DENIAL OF HEARING REVERSED 948
F. DENIAL OF HEARING UPHELD 951
IV. SANCTIONS ISSUED BY OFO 957

SECURITY CLEARANCES AND STATE SECRETS 961

SETTLEMENT 969

I. COURT JURISDICTION IN BREACH CLAIMS 969
II. GENERAL PRINCIPLES 969
A. SETTLEMENT AS A CONTRACT 969
B. ADEQUACY OF CONSIDERATION 969
C. "MEETING OF THE MINDS" 978
D. RATIFICATION OF AN AGREEMENT 980
E. TYPICALLY LIMITING INTERPRETATION TO FOUR CORNERS 981
F. VAGUENESS 981
III. DISMISSALS 983
IV. AGENCY BURDEN TO PROVIDE EVIDENCE OF COMPLIANCE 984
V. SPECIFIC PROVISIONS 984
A. PRIORITY CONSIDERATION 984
B. CONFIDENTIALITY 985
C. THE OLDER WORKERS' BENEFIT PROTECTION ACT 986
D. EXPUNGEMENT OF RECORDS 990
E. NEUTRAL REFERENCES 992
VI. BREACH OF A SETTLEMENT AGREEMENT 993
VII. NO BREACH OF SETTLEMENT AGREEMENT 1002
VIII. CHANGE IN CIRCUMSTANCES AS VOIDING THE AGREEMENT 1006
IX. CLAIMS OF COERCION, MISREPRESENTATION AND MISTAKE, INCOMPETENCY 1007

X. LACHES AS A DEFENSE TO AN ALLEGATION OF BREACH 1009
XI. COMPENSATORY DAMAGES NOT AVAILABLE FOR BREACH 1009
XII. UNENFORCEABLE/UNAUTHORIZED AGREEMENTS 1009
XIII. TAX CONSEQUENCES 1013
XIV. SUBSEQUENT ACTS OF DISCRIMINATION/REPRISAL AS SEPARATE COMPLAINTS 1013
XV. CONFIDENTIALITY OF SETTLEMENT NEGOTIATIONS 1014
XVI. ATTORNEY FEES 1014
XVII. TIMELINESS 1015
XVIII. RETURN OF BENEFITS 1015

SEX (GENDER) DISCRIMINATION 1017

I. PREGNANCY-RELATED DISCRIMINATION 1017
II. DIRECT EVIDENCE 1022
III. DISPARATE TREATMENT 1023
IV. NONSELECTION 1026
V. TRANSFER OR REASSIGNMENT 1027
VI. *BONA FIDE* OCCUPATIONAL QUALIFICATION (BFOQ) CLAIMS 1029
VII. SEX (GENDER) HARASSMENT CLAIMS 1030

SEXUAL HARASSMENT 1035

I. DISMISSALS 1035
II. UNWELCOMENESS 1036
III. SEVERE OR PERVASIVE 1040
IV. BECAUSE OF SEX 1051
V. AFFIRMATIVE DEFENSE: COWORKER OR CLIENT HARASSMENT 1053
VI. AFFIRMATIVE DEFENSE: SUPERVISOR HARASSMENT 1061
VII. DEFENSE NOT AVAILABLE/TANGIBLE EMPLOYMENT ACTION 1068
VIII. EEO COMPLAINTS BY INDIVIDUALS ACCUSED OF SEXUAL HARASSMENT (OR BECAUSE OF SEXUAL HARASSMENT INVESTIGATIONS) 1070
IX. CREDIBILITY ISSUES AND WHETHER CONDUCT OCCURRED 1071

SEXUAL ORIENTATION AND GENDER IDENTITY 1075

I. SEXUAL ORIENTATION 1075
II. GENDER IDENTITY/TRANSGENDER DISCRIMINATION 1078

SUMMARY JUDGMENT 1083

I. THE EEOC STANDARDS 1083
II. IMPROPERLY MAKING CREDIBILITY DETERMINATIONS/RESOLVING CONFLICTS/NOT DEVELOPING RECORD 1086
III. GRANTING SUMMARY JUDGMENT TO THE NON-MOVING PARTY 1106
IV. IMPROPERLY FRAGMENTING CLAIMS 1106
V. DECISION ON THE RECORD 1107
VI. CASES BY BASIS 1107
A. DISABILITY 1107
B. SEX 1114
C. RACE 1116
D. NATIONAL ORIGIN 1118
E. RETALIATION 1118
F. AGE 1120
G. EQUAL PAY ACT 1122
H. RELIGION 1122
VII. CASES BY ISSUE 1122
A. TRANSFER/REASSIGNMENT 1122
B. TERMINATION OF APPOINTMENT 1123
C. DISCIPLINE/PERFORMANCE 1123
D. HARASSMENT 1124
E. NONSELECTION 1126
F. ASSIGNMENT OF WORK 1129
VIII. OTHER 1129

TIMELINESS 1133

I. BURDEN OF PROOF 1133
II. START OF TIME PERIOD 1140
III. ACTUAL OR CONSTRUCTIVE KNOWLEDGE 1145
IV. CLAIMS OF MISINFORMATION/CONFUSION 1151
V. "REASONABLE SUSPICION" OF DISCRIMINATION 1156
VI. CONTACT BUT NO INTENT TO FILE 1162
VII. PLACE OR METHOD OF CONTACTING 1163
VIII. SERVICE ON ATTORNEY/REPRESENTATIVE 1168
IX. UNREASONABLE DELAY (AND LACHES)/DUE DILIGENCE 1169
X. CLAIMS OF INCAPACITATION/COERCION/ABSENCE/EMERGENCY/DISABILITY 1171
XI. SOMEONE IN THE HOUSEHOLD AT FAULT 1177
XII. ACTIVE MILITARY DUTY 1178
XIII. FEAR OF REPRISAL TO JUSTIFY AN UNTIMELY EEO COMPLAINT 1178
XIV. CONTINUING OR RECURRING VIOLATIONS/LIKE OR RELATED 1179
XV. ATTEMPT TO RESOLVE THROUGH MANAGEMENT DOES NOT TOLL TIME PERIOD 1188
XVI. DENIAL OF OFFICIAL TIME NOT AN EXCUSE 1189
XVII. MAILING PRESUMPTION 1189
XVIII. EQUITABLE TOLLING/LACHES 1191
XIX. OTHER (TIMELINESS IN REQUESTS FOR RECONSIDERATION, APPEALS TO COMMISSION, APPEALS FROM FAD, ETC.) 1194

TABLE OF CASES 1197

INDEX 1255