

SUMMARY TABLE OF CONTENTS

PREFACE	i
INTRODUCTION	1
CHAPTER 1: OVERVIEW.....	3
CHAPTER 2: THE PRECOMPLAINT PROCESS—COUNSELING.....	31
CHAPTER 3: FORMAL COMPLAINT PROCESS— ACCEPTANCE AND DISMISSAL.....	133
CHAPTER 4: INVESTIGATION OF COMPLAINTS.....	273
CHAPTER 5: SETTLEMENT OF COMPLAINTS.....	305
CHAPTER 6: EEO HEARINGS.....	403
CHAPTER 7: FINAL AGENCY ACTION	505
CHAPTER 8: EEOC APPEALS.....	517
CHAPTER 9: REPRESENTATIVES AND OFFICIAL TIME	583
CHAPTER 10: THEORIES OF DISCRIMINATION— INTENTIONAL DISCRIMINATION.....	611
CHAPTER 11: THEORIES OF DISCRIMINATION—ADVERSE IMPACT.....	703
CHAPTER 12: THEORIES OF DISCRIMINATION— HOSTILE ENVIRONMENT.....	719
CHAPTER 13: BASES OF DISCRIMINATION UNDER TITLE VII.....	879
CHAPTER 14: REHABILITATION ACT AND GINA.....	979
CHAPTER 15: AGE DISCRIMINATION IN EMPLOYMENT ACT	1287
CHAPTER 16: REPRISAL	1315
CHAPTER 17: PERSONNEL ACTIONS.....	1383
CHAPTER 18: CLASS ACTION COMPLAINTS	1433
CHAPTER 19: EEO ALTERNATIVES	1477
CHAPTER 20: FORMS OF RELIEF	1511
CHAPTER 21: ATTORNEY FEES.....	1757
TABLE OF CASES	1815
INDEX	1885

TABLE OF CONTENTS

PREFACE	i
INTRODUCTION	1
I. ORGANIZATION OF THE <i>GUIDE</i>	1
A. RESEARCH FOR THE BOOK	2
B. OTHER REFERENCE SOURCES	2
CHAPTER 1: OVERVIEW	3
I. AUTHORITY AND JURISDICTION	3
A. STATUTORY AUTHORITY	3
1. Title VII of the 1964 Civil Rights Act	3
2. Rehabilitation Act of 1973	3
3. Americans With Disabilities Act Amendment Act of 2008	4
4. Age Discrimination in Employment Act	4
5. Equal Pay Act	4
6. Civil Rights Act of 1991	4
7. Congressional Accountability Act of 1995	5
8. No FEAR Act of 2002	5
9. Genetic Information Nondiscrimination Act of 2008	6
B. EFFECT OF THE CIVIL SERVICE REFORM ACT	6
C. ORGANIZATION OF THE COMMISSION	7
D. JURISDICTION	7
1. Covered Actions	7
2. Employees Covered	8
3. Agencies Covered	8
4. Unions	8
5. Remedial Powers	10
E. CIVIL ACTIONS	10
II. AGENCY EEO PROGRAMS	10
A. ORGANIZATION OF PART 1614	10
B. AGENCY PROGRAMS	11
1. Affirmative Employment Under Part 1614	11
2. Management Directive 715	12
III. PROCESSING EEO COMPLAINTS—PART 1614 AND MD-110	17
A. COMPLAINT COVERAGE	17
1. Legislative and Judicial Branches	17
2. Overseas Employees	18
3. Department of Veterans Affairs	18
4. Military Employees	18
5. General Accounting Office	18
B. AGENCY PROCESSING OF COMPLAINTS	18
1. Agency EEO Directors	18
2. Avoiding Conflicts of Interest	18
3. Complaint Processing Variances	19
4. EEO Counselors and the Precomplaint Stage	19
5. Alternative Dispute Resolutions	20
6. Notice of Final Interview	21
7. Formal Complaints	21
8. Dismissal of Complaints	22
9. Partial Dismissals	22
10. Investigations	22
11. Disposition of Complaints	24
12. Hearings	25
13. Administrative Judge Decisions	25
14. Final Agency Decisions and Actions	25
15. Appeals to the EEOC	26

16. Interim Relief	26
17. Requests for Reconsideration	27
IV. CLASS COMPLAINTS	27
A. EEO COUNSELING	27
B. FORMAL COMPLAINT REQUIREMENTS	27
C. AGENCY PROCESSING.....	27
D. PROCESSING BY ADMINISTRATIVE JUDGE	28
1. Notification of Class Members	28
2. Development of the Record	28
3. Resolution of Complaints	28
4. Hearings	29
5. Judges' Decisions	29
E. FINAL AGENCY ACTIONS	29
1. Individual Relief	29

CHAPTER 2: THE PRECOMPLAINT PROCESS—COUNSELING..... 31

I. THE 45-DAY TIME LIMIT	32
A. AGENCY BURDEN ON APPEAL	32
B. WAIVER OF PRECOMPLAINT COUNSELING	33
1. Denial of Counseling	33
2. Reopening Counseling.....	33
3. Delay by Agency	33
C. DETERMINING THE PERIOD FOR INITIATING COUNSELING	34
1. Personnel Actions	34
2. Notification of Personnel Action	36
3. Events Not Constituting Personnel Actions	37
4. Events Occurring During Counseling	37
5. New Claims Raised After Counseling	38
D. ESTABLISHING DATE OF COUNSELOR CONTACT	38
II. EXTENDING THE TIME PERIOD FOR INITIATING COUNSELING	39
A. TOLLING THE PERIOD FOR COUNSELING	39
1. Reasonable Suspicion Standard	39
2. Awareness Personnel Action Is Final	44
3. Evidence on Tolling	45
4. Uncertainty of Law.....	45
5. Disabled Employees	46
6. Language Barriers	46
B. NOTICE OF PROCEDURES AND TIME LIMITS	46
1. Posting Requirements	46
2. Constructive Notice	47
3. Constructive Notice—Applicants	50
4. Agency's Burden.....	51
5. Age Discrimination	52
C. WAIVER OF TIME LIMIT	52
1. Agency Waiver of Time Limit.....	52
2. Mental Duress or Physical Inability	52
3. Status as Minor.....	54
4. Death or Illness in Family	54
5. Death of Counsel.....	55
6. Military Duty	55
7. Self-Incrimination Concerns.....	55
8. Complainants Who Are Attorneys.....	55
9. Circumstances Beyond Control.....	55
10. Fear of Reprisal	55
11. Use of Procedures Other Than EEO	56
12. Use of Negotiated Grievance Procedure	57
13. New Employees and Applicants	57
14. Independent Consultants and Contractors.....	58
15. Amended Complaints	58
16. Doctrine of Laches.....	58
D. ESTOPPEL	58

1.	Failure to Assert Timeliness	59
2.	Reliance on Agency Advice and Actions	60
3.	Reliance on Agency Inaction	66
4.	Reliance on Advice by Third Parties	66
5.	Developing Record on Estoppel.....	66
III.	CONTINUING VIOLATIONS	67
A.	THE SUPREME COURT’S VIEW— <i>MORGAN</i>	67
B.	THE COMMISSION’S VIEW BEFORE <i>MORGAN</i> — <i>ANISMAN</i>	71
C.	PRESENT VIABILITY OF CONTINUING VIOLATION CLAIMS	73
D.	ELEMENTS OF SERIAL CONTINUING VIOLATION CLAIM	74
1.	Personnel Actions	74
2.	Nexus Requirement.....	75
3.	Knew or Should Have Known Requirement	76
4.	Standards of Proof	79
E.	HOSTILE ENVIRONMENT CASES	79
F.	SYSTEMIC OR RECURRING VIOLATIONS	86
1.	Lilly Ledbetter Fair Pay Act of 2009.....	89
2.	Reasonable Accommodation Cases	91
3.	Health Insurance Benefit Cases.....	95
G.	UNTIMELY FORMAL COMPLAINT	96
H.	ISSUES OF RELIEF	96
I.	PARTIAL DISMISSALS	96
1.	Identical Complaints	96
IV.	REQUESTS FOR COUNSELING	96
A.	DOCUMENTATION OF CONTACT	96
B.	PREMATURE COMPLAINTS	97
C.	CONTACT NOT INVOLVING COUNSELORS	97
1.	“Logically Connected”/Wrong Agency Officials.....	97
a.	Background Caselaw.....	97
b.	Employee and Human Relations Specialists.....	98
c.	Management Officials.....	98
d.	Employee Assistance Program Counselors.....	99
e.	EEO Assistants.....	99
f.	Internal Affairs/Inspector General	100
g.	Union Officials	100
h.	Reasonable Accommodation Coordinator.....	100
2.	Wrong Agency or Wrong Agency Component	100
3.	Contact With EEOC	101
D.	ANONYMOUS CONTACTS.....	101
E.	CONTACT BY MAIL	101
F.	CONTACT BY PHONE.....	101
G.	CONTACT BY EMAIL.....	102
H.	CONTENTS OF CONTACT	102
I.	CONTACT BY REPRESENTATIVES	102
J.	EXTENDING THE COUNSELING PERIOD	103
K.	AMENDING PREVIOUS COMPLAINTS	104
L.	MIXED CASE APPEALS.....	104
V.	DUTIES OF EEO COUNSELOR	104
A.	ADVISING COMPLAINANTS ON PROCEDURES	105
1.	Counselor as Investigator.....	106
2.	Initial Interview	106
3.	Alternative Dispute Resolution	107
4.	Class Complaint Counseling	107
5.	Alternative Forums: MSPB & Grievances	107
6.	ADEA and EPA Complaints.....	109
B.	DETERMINING CLAIMS	109
1.	Definition of Claim.....	110
2.	Definition of Issues	110
3.	Definition of Evidence	110
4.	Counselor’s Duty to Clarify	111
C.	INQUIRIES AND RESOLUTION EFFORTS BY COUNSELORS	112

1. Limited Inquiry.....	112
2. Resolution Efforts.....	114
D. CHOICE OF COUNSELOR	116
E. ANONYMITY FOR COMPLAINANTS	117
VI. PROTECTION FOR COUNSELORS	117
A. RESTRAINT BY COUNSELOR.....	117
VII. EXCLUSION OF ALLEGATIONS	118
A. SUFFICIENCY OF ALLEGATIONS	118
B. DISMISSAL OF COMPLAINTS	118
C. FAILURE TO PROSECUTE	119
D. WITHDRAWAL OF ALLEGATIONS	119
VIII. NOTICE OF FINAL INTERVIEW	120
A. CONSTRUCTIVE RECEIPT OF NOTICE	123
IX. EEO COUNSELOR'S REPORT	124
A. RESPONDING MANAGEMENT OFFICIALS	125
X. INCIDENTS OCCURRING AFTER PRECOMPLAINT COUNSELING	125
XI. ALTERNATIVE DISPUTE RESOLUTION	126
A. CORE PRINCIPLES	126
1. Voluntariness.....	126
2. Neutrality.....	126
3. Confidentiality.....	127
4. Enforceability.....	128
B. TYPES OF ADR	128
1. Mediation	128
2. Facilitation	128
3. Settlement Conferences	128
C. DEVELOPING ADR PROGRAMS	128
1. Factors to Consider	128
2. Training.....	129
3. Resources for Neutrals.....	129
D. AGENCY ADMINISTRATION AND PROCESSING	130
1. Time Frames.....	130
2. Alternatives to ADR	130
3. Counseling Process and ADR.....	130
4. ADR and Complaint Processing	130
5. Information About the Agency's ADR Program	130
6. Notice of Rights and Responsibilities.....	130
7. EEO Counselor's Role	130
8. Requirements of Resolutions.....	130
9. Attorney Fees.....	131
E. ADR AFTER PRECOMPLAINT PROCESSING	131

CHAPTER 3: FORMAL COMPLAINT PROCESS— ACCEPTANCE AND DISMISSAL.....133

I. REQUIREMENTS OF FORMAL COMPLAINT	133
A. COMPLAINANT'S DUTY TO PROCEED/CHANGE IN REPRESENTATION OR ADDRESS.....	135
II. AGENCY PROCESSING OF COMPLAINT	135
A. ACKNOWLEDGMENT OF COMPLAINT	135
B. DEFINING COMPLAINT CLAIMS	137
1. Avoiding Fragmentation	138
2. Spin-Off and Dissatisfaction With Process Complaints	141
C. DISMISSAL PROCESS	143
1. Partial Dismissals	144
2. Termination of Agency Jurisdiction to Dismiss	145
D. ALTERNATIVE DISPUTE RESOLUTION.....	145
E. EFFECT OF HEARING REQUEST	145
III. BASES FOR DISMISSAL OF COMPLAINTS	145
A. UNTIMELY COMPLAINTS	145
1. Constructive Receipt.....	147
2. Filing With EEO Counselor	147

3.	Filing Complaint With Wrong Agency	148
4.	Service on Attorney Representative	148
5.	Service on Non-Attorney Representative	149
6.	Failure to Provide Complaint Form.....	149
7.	Request to Clarify Allegations	150
8.	Removal of Harm	150
9.	Mental or Physical Incapacity	150
10.	Death or Illness in Family	152
11.	Serious Medical Condition.....	152
12.	Circumstances Beyond Complainant’s Control	153
13.	Unavailability of Complainant.....	153
14.	Failure to Sign Complaint	153
15.	Failure to Include Formal Complaint.....	153
16.	Calendar Days	154
17.	Premature Complaints	154
18.	Filing by Mail	154
19.	Postmarks	154
20.	Filing by Inter-Office Mail.....	156
21.	Filing by Telefax	156
22.	Filing by Email	156
23.	Filing in Person.....	157
24.	Failure to Find Counsel	157
25.	Illness of Counsel	157
26.	Absence of Counsel.....	157
27.	Mistake by Counsel.....	157
28.	Denial of Official Time.....	158
29.	Training.....	158
30.	Active Military Duty	158
31.	Doctrine of Laches	158
32.	Agency Bad Faith and Mistaken Advice	159
33.	Unclear Filing Instructions by Agency.....	160
34.	Need to Obtain Supporting Documentation.....	160
35.	Severity of the Harassment.....	160
B.	STANDING: FAILURE TO STATE A CLAIM	161
1.	Standard of Review.....	161
2.	Injury In Fact.....	161
a.	Alleging Harm and the Terms, Conditions and Privileges of Employment.....	162
b.	Disparate Treatment	163
c.	Like or Related Claims.....	164
3.	Injury Based on Protected Status	164
4.	Standing in the Federal Courts.....	164
C.	STANDING: FAILURE TO STATE A CLAIM—DEFINITION OF EMPLOYEE	166
1.	Current Employees	166
2.	Applicants for Employment	167
3.	Former Employees	167
4.	Deceased Employees	170
5.	Reinstated Employees	170
6.	Relatives of Employees.....	170
7.	Veterans	170
8.	Complaints on Behalf of Others	171
9.	Group Complaints.....	172
10.	Temporary Appointees	172
11.	National Guard Technicians	172
12.	Other Military/Civilian Positions.....	176
13.	Public Health Service—Commissioned Officers	176
14.	Independent Consultants and Contractors	176
a.	Degree of Control Test.....	176
b.	Power to Hire or Terminate	178
c.	Day to Day Activities; Performance; and Supervision	180
d.	Mission Critical Work	183
e.	Work Performed on Agency Premises and Equipment	184

f.	Length of Time Working at the Agency.....	184
g.	Method of Pay and Tax Withholdings.....	185
h.	Control Over Work Environment.....	185
i.	Interview Process.....	185
j.	Employment Recommendations.....	186
k.	Contract Employment Agreement.....	186
l.	Discriminatory Actions Committed by Independent Contractors or Consultants.....	187
m.	Alleged Wrongdoer.....	187
15.	Law Enforcement and Security Contractors.....	187
16.	Tribal Employees.....	189
17.	Compensated Work Therapy Program.....	189
18.	SEE Program.....	189
19.	Volunteers.....	189
20.	Informants.....	190
21.	Interns.....	190
22.	Prisoners.....	191
23.	Peace Corps Volunteers.....	191
24.	Foreign Nationals.....	191
D.	STANDING: FAILURE TO STATE A CLAIM—AGENCY JURISDICTION.....	191
1.	Collateral Attacks on Jurisdiction.....	194
2.	Executive Agencies.....	194
3.	Legislative and Judicial Employees.....	194
4.	Employees Working at Other Agency Locations.....	195
5.	Office of Personnel Management.....	196
6.	General Services Administration.....	198
7.	Auxiliary Agencies.....	198
8.	Military Departments.....	199
9.	Presidio Trust.....	202
10.	Advisory Councils.....	202
11.	Unions.....	202
12.	Employee Organizations.....	203
E.	FAILURE TO STATE A CLAIM: INVESTIGATIONS AND OTHER PROCEEDINGS—COLLATERAL ATTACKS.....	203
1.	Retaliation Exception to Collateral Attacks Rule.....	204
2.	Arbitration Awards and the Grievance Process.....	204
3.	Office of Inspector General.....	205
4.	EEO and Other Internal Agency Investigations.....	205
5.	Office of Workers Compensation Programs.....	207
6.	On-The-Job Injuries and Workers' Compensation.....	208
7.	Occupational Health and Safety Claims.....	208
8.	Debt Collection Act.....	208
9.	OPM Retirement Process.....	208
F.	STANDING: FAILURE TO STATE A CLAIM—SPECIFIC ACTIONS.....	209
1.	Proposed Actions and Preliminary Steps.....	209
2.	Future Actions.....	211
3.	Security Clearances.....	212
4.	Harassment Investigations.....	212
5.	Oral and Written Work Discussions.....	212
6.	Failure to Issue Performance Standards.....	212
7.	Change in Position Description—Work Duties.....	212
8.	Transfers.....	213
9.	Discretionary Duties.....	213
10.	Privileges of Employment.....	213
11.	Benefits of Employment.....	213
12.	Compensatory Damages.....	213
13.	Refusal to Discriminate.....	213
14.	Discriminatory Work Orders.....	214
15.	Failure to Discipline.....	214
16.	Upward Mobility.....	215
17.	Searches.....	215
18.	Continuing Vacancies.....	215
19.	Collateral Duties.....	215

20. Outside Activities	215
21. Union Activities	215
22. Training	216
23. Mental Evaluations	216
24. Medical Suitability Determinations	216
25. Drug and Alcohol Tests	216
26. EAP Referrals	216
27. Testimony and Statements in Proceedings	216
28. Disclosures to Counsel	217
29. Settlement Negotiations	217
30. Whistleblowing	218
31. Family and Medical Leave Act Claims	218
32. Complaints About Nonsupervisory Employees	218
33. Complaints About EEO Complaints	218
34. Dismissal on Merits	218
35. Failure to Allege Personal Harm.....	219
36. Reliance Upon Other Statutes—Privacy Act and FOIA.....	219
37. Failure to Allege Bases of Discrimination	220
38. Forced Leave	220
39. Cancelled Vacancy Announcements.....	221
40. Denial of Opportunity to Apply for Position	221
41. Letters of Warning.....	221
42. Letters of Counseling.....	221
43. Change in Schedule	221
44. Agency Organized Activities and Special Emphasis Programs	221
45. Actions Taken by Entities or Persons Other Than the Agency	222
46. Negative Recommendations	222
47. Claims for Reimbursement of Medical Expenses.....	222
48. Complaints on Behalf of Others.....	222
49. Service Conversions	222
G. STANDING: FAILURE TO STATE A CLAIM—HOSTILE ENVIRONMENT/HARASSMENT.....	222
1. Derogatory Remarks and Hostile Environment	222
2. Sexual Harassment	228
H. STANDING: FAILURE TO STATE A CLAIM—REPRISAL COMPLAINTS	228
1. Chilling Effect/Future Deterrent	229
2. Proposed Actions/Preliminary Steps to Action/Threats.....	230
3. Actions Taken Against Persons Other Than the Complainant	230
4. Actions Related to the EEO Process.....	230
5. Comments by Supervisors.....	231
6. Retaliatory Investigations.....	231
7. Security Clearance Investigations.....	232
8. Actions Related to Worker’s Compensation	232
9. Information Provided to Others.....	232
10. Leave Requests.....	232
11. Requests for Medical Information.....	232
12. Assessments Concerning “Participation in the EEO Process”	232
I. IDENTICAL COMPLAINTS	232
1. Identical Civil Actions	234
2. <i>Res Judicata</i> and Collateral Estoppel	236
3. Offensive Collateral Estoppel.....	238
4. Dismissal for Failure to Exhaust.....	238
5. Law of the Case Doctrine	239
J. PROCESSING DISSATISFACTION OR SPIN-OFF COMPLAINTS	239
K. FAILURE TO PROSECUTE OR COOPERATE	241
1. Precomplaint Counseling	243
2. Requests for Additional Information.....	243
3. Cooperation With Investigators	246
4. Inability to Locate Complainant.....	248
5. Settlement Negotiations	248
6. Adjudication on Record	248
7. Hearings	248

8. Delay by Agency	249
L. ABUSE OF PROCESS	249
1. Unclean Hands Doctrine.....	256
2. Agency Abuse of Process	256
3. Agency Conflict of Interest	256
M. OFFERS OF FULL RELIEF	256
1. Offer of Resolution	256
N. MOOTNESS	257
1. Relief Through Other Forums	258
2. Job Assignments	259
3. Cancellation of Vacancy Announcement	259
4. Allegations of Harassment.....	259
5. Subsequent Promotions	261
6. Constructive Discharge.....	261
7. Termination of Employment.....	261
8. Performance and Other Work Appraisals	262
9. Apologies.....	262
10. Discipline of RMO.....	262
11. Reasonable Accommodation	262
12. Compensatory Damages	262
13. Attorney Fees	263
14. Rescinded Disciplinary Actions.....	263
O. MATTERS NOT RAISED WITH COUNSELOR	264
1. Matters Raised and Not Included in Formal Complaint.....	264
P. ELECTION OF REMEDIES	264
1. Negotiated Grievance Procedure	265
2. MSPB Appeals	266
Q. EFFECT OF STATUTES AND REGULATIONS.....	266
R. CONTRACTUAL OBLIGATIONS	267
S. RELIEF REQUESTED	267
IV. AMENDMENT AND CONSOLIDATION OF COMPLAINTS	267
A. BASIS OF DISCRIMINATION	267
B. SUBSTANTIVE AMENDMENTS	268
1. Time Limits	270
2. MSPB Appeals.....	270
3. Amendment After Hearing Request.....	270
C. CONSOLIDATION	270
1. Time Limits	271
2. Amending Consolidated Complaints	271
3. Different Complainants.....	271
V. WITHDRAWAL OF COMPLAINTS	272
CHAPTER 4: INVESTIGATION OF COMPLAINTS.....	273
I. TRAINING FOR INVESTIGATORS	274
II. INVESTIGATIVE PROCEDURES	274
A. METHODS OF INVESTIGATION	275
B. TIMELINESS	276
III. ROLE OF THE INVESTIGATOR	276
A. GATHERING INFORMATION	277
B. RULES OF EVIDENCE.....	277
1. Characteristics of Evidence.....	277
2. Types of Evidence.....	278
3. Sources of Evidence	278
4. Evidence on Remedies	278
C. FACILITATING ADR	279
D. ROLE OF COMPLAINANT'S REPRESENTATIVE	279
IV. DISMISSAL OF ALLEGATIONS	279
A. UNCLEAR ALLEGATIONS.....	279
B. PARTIAL DISMISSAL OF CLAIMS	280
C. BAD FAITH ALLEGATIONS.....	280
D. <i>PRIMA FACIE</i> CASE	280

E.	RELIEF GRANTED	280
F.	PROCEDURAL ISSUES	280
G.	FAILURE TO GIVE AFFIDAVIT	280
V.	DEVELOPMENTS DURING INVESTIGATION.....	280
A.	EVIDENCE	280
B.	AMENDMENTS	281
C.	NEW CLAIMS	282
VI.	FAILURE TO INVESTIGATE CLAIMS	283
A.	DIFFERENT BASIS OF DISCRIMINATION	283
B.	INADEQUATE INVESTIGATIONS	283
1.	Decisions by Administrative Judges.....	283
2.	Final Agency Decisions	286
3.	Disability Discrimination Claims	290
4.	Evidence on Remedies	291
5.	Contract Investigators	291
C.	EX PARTE INVESTIGATIONS	291
VII.	INTERVIEW OF WITNESSES	291
A.	DISCLOSURE OF INFORMATION TO WITNESSES.....	291
B.	FAILURE TO INTERVIEW WITNESSES	292
C.	EMPLOYEE'S RIGHT TO INTERVIEW WITNESSES	292
D.	RESPONSIBLE MANAGEMENT OFFICIALS	292
E.	RIGHT TO UNION REPRESENTATION	293
VIII.	COMPLAINT FILE	293
A.	EVIDENCE	293
1.	Rejection of Evidence	293
2.	Completeness of Record.....	294
B.	COMPARATIVE ANALYSIS	294
C.	REQUIRED DOCUMENTS	294
1.	Retention of Records	294
2.	FOIA and Privacy Act Requirements	295
IX.	COOPERATION OF COMPLAINANT	296
A.	RIGHT TO IMPARTIAL INVESTIGATION	298
B.	UNTIMELY INVESTIGATIONS	300
C.	LOCATION OF INVESTIGATION	301
D.	SUPPLEMENTAL INVESTIGATIONS	301
X.	CONSOLIDATION	301
XI.	OFFICIAL TIME	301
A.	TRAVEL TIME	302
B.	TRAVEL EXPENSES	302
XII.	CONCLUSIONS OF INVESTIGATORS	302
A.	CREDIBILITY FINDINGS OF INVESTIGATOR.....	302
XIII.	NOTICE OF HEARING RIGHTS	302

CHAPTER 5: SETTLEMENT OF COMPLAINTS.....305

I.	SETTLEMENT POLICIES	305
A.	REGULATORY GUIDANCE	306
B.	CONFIDENTIALITY AND PRIVILEGE	306
C.	SETTLEMENT REMEDIES	307
D.	SETTLEMENT REQUIREMENTS	308
1.	Oral Agreements	308
2.	Knowing and Voluntary Agreements	311
3.	Intent of the Parties	314
4.	Signature of Agreement	316
5.	Consideration	321
6.	Responding Management Official.....	321
E.	EFFECT OF SETTLEMENT	321
II.	OFFERS OF RESOLUTION	322
A.	MODEL LANGUAGE FOR OFFER.....	323
B.	OFFERS OF FULL RELIEF	324
III.	INTERPRETATION OF AGREEMENTS	324
A.	PLAIN ENGLISH RULE	324

1. Use of Extrinsic Evidence.....	324
B. INTERPRETING LANGUAGE IN CONTEXT.....	325
C. CONSTRUING LANGUAGE AGAINST DRAFTER.....	325
D. WAIVER OF RIGHTS.....	325
1. ADEA Rights.....	328
E. VAGUE AGREEMENTS.....	328
F. SPECIFIC TERMS OF SETTLEMENT.....	330
1. Apologies.....	330
2. Terms of Art.....	330
3. Priority Consideration.....	330
4. Seniority.....	332
5. Back Pay.....	333
6. Lump Sum Payments and Taxes.....	334
7. Interest.....	335
8. Reinstatement.....	335
9. Supervisory Contact.....	336
10. Performance Appraisals.....	336
11. Restoration of Benefits.....	336
12. Fair Treatment.....	336
13. Transfers; Reassignments.....	337
14. Telework.....	337
15. Promotions.....	337
G. SELECTIVE INTERPRETATION.....	338
H. EXPUNGEMENT OF RECORDS—“CLEAN PAPER” AGREEMENTS.....	338
1. Employment References.....	340
I. TIME LIMITS ON AGREEMENTS.....	342
1. Duration of Agreement.....	342
2. Execution of Terms.....	344
J. ELEMENT OF GOOD FAITH.....	346
1. Bad Faith Negotiations.....	347
2. Bad Faith Execution.....	349
K. INTEGRATION OR ZIPPER CLAUSES.....	350
L. CONFIDENTIALITY CLAUSES.....	351
1. Disclosure of Settlements.....	353
2. Confidentiality of Settlement Process.....	354
M. SEVERABILITY CLAUSES.....	354
N. SUPERVISION CLAUSES.....	355
O. GENERAL RELEASES.....	355
P. MISREPRESENTATIONS IN THE SETTLEMENT PROCESS.....	356
Q. COLLECTIVE BARGAINING AGREEMENTS.....	356
R. AGENCY POLICIES AND PROCEDURES.....	359
IV. COMPENSATORY DAMAGES.....	359
V. COMPLIANCE WITH SETTLEMENT AGREEMENTS.....	361
A. ENFORCEMENT OF AGREEMENTS.....	361
1. Time Limits.....	361
2. Invalid Settlement Agreements.....	365
3. Compliance Through Prior Acts.....	365
4. Death of Complainant.....	365
5. Impossibility of Compliance.....	365
6. Bankruptcy.....	366
7. Agreements With More Than One Complainant.....	366
8. Agreements Reached After Decision.....	366
B. REMEDIES FOR FAILURE OF AGENCY TO COMPLY.....	366
1. Partial Compliance—Return to <i>Status Quo Ante</i>	367
2. Partial Compliance—Age Discrimination.....	370
3. Interest as Sanction.....	370
4. Attorney Fees.....	370
C. FAILURE OF EMPLOYEE TO COMPLY.....	370
1. Agency Compliance Petitions.....	371
D. SETTLEMENTS IN CIVIL ACTIONS.....	371
E. FILING OF NEW COMPLAINTS.....	371

F.	REPRISAL	371
G.	DISCRIMINATORY SETTLEMENT AGREEMENTS	373
H.	SUBSEQUENT ACTS	374
VI.	VOIDING SETTLEMENT AGREEMENTS	375
A.	UNFORESEEN CIRCUMSTANCES	375
B.	BAD FAITH	376
1.	Coercive Agreements.....	377
2.	Rescinding of Agreement.....	377
C.	ADVICE OF REPRESENTATIVES	378
D.	DETRIMENTAL RELIANCE AND RATIFICATION	378
E.	LACK OF CONSIDERATION—ILLUSORY AGREEMENTS.....	380
1.	Mutual Mistake of Fact or Law	384
F.	WAIVER OF PROSPECTIVE EEO CLAIMS AND LAST CHANCE SETTLEMENTS	387
G.	LACK OF REPRESENTATIVE AUTHORITY	389
H.	OLDER WORKERS' BENEFIT PROTECTION ACT	389
1.	Reinstating the Complaint and Tender Back Provisions.....	391
2.	Remedial Effect of OWBPA Violations	391
3.	Broad Application and Scope of the OWBPA	391
4.	Time Limits for Breach Claims Under the OWBPA	393
5.	Court Decisions: Void vs. Voidable	393
I.	SUBSEQUENT AGREEMENTS	398
VII.	SETTLEMENTS REACHED THROUGH OTHER PROCEDURES	398
VIII.	RETIREMENT ISSUES	399
IX.	ATTORNEY FEE ISSUES	400
A.	FAILURE TO MENTION FEE ISSUE	401
B.	SEVERANCE OF FEE ISSUES	401
1.	Fee Determination by Judge.....	402
C.	DETERMINING REASONABLE FEES	402

CHAPTER 6: EEO HEARINGS.....403

I.	PREHEARING MATTERS	404
A.	POWERS OF THE ADMINISTRATIVE JUDGE.....	404
1.	Administrative Judges' Handbook	407
2.	Subpoenas	407
3.	Contract Administrative Judges	407
B.	RIGHT TO HEARING	407
1.	Request for Hearing	408
a.	Timing.....	408
b.	Method of Communicating Request for a Hearing.....	409
c.	Effect of Filing Hearing Request.....	409
d.	Constructive and Imputed Notice of Right to Request a Hearing	409
e.	Content of Notice of Right to a Hearing	410
f.	Content of the Request for a Hearing	410
g.	Filing Request With the Incorrect Entity or Office	410
h.	Effect of Waiving or Failure to Request a Hearing.....	411
2.	Service of Hearing Request	411
3.	Effect of Hearing Request.....	412
4.	Withdrawal of Request for Hearing	412
5.	Waiver of Hearing.....	412
6.	Failure to Attend Hearing	412
C.	AGENCY'S HEARING RESPONSIBILITIES	413
D.	RIGHT TO NEUTRAL ADMINISTRATIVE JUDGE	414
E.	VENUE	414
F.	REVIEW OF REPORT OF INVESTIGATION	415
1.	Sanctions for Nonhearing-Related Conduct	416
G.	DISMISSAL OF COMPLAINTS.....	418
1.	Review of Partial Dismissals.....	418
H.	PREHEARING ORDERS	419
1.	Docketing Order.....	419
2.	Acknowledgment and Order	419
3.	Scheduling Order	420

4.	Prehearing Conference	420
I.	WITNESS LISTS	420
1.	Unavailability of Witnesses	420
J.	SCHEDULING OF HEARING	421
1.	Notice of Remand	421
2.	Convenience to Parties	422
3.	Hearing Notice	422
K.	BIFURCATED DAMAGES HEARINGS	422
L.	POSTPONEMENT OR CONTINUANCE OF HEARING	423
M.	SETTLEMENT	424
1.	Conferences With Hearing Judge	424
2.	Conferences With Settlement Judge.....	425
3.	Alternative Dispute Resolution	425
4.	Settlement Agreements.....	425
N.	OFFERS OF FULL RELIEF	425
1.	Test for Full Relief.....	426
2.	Writing Requirement	427
3.	Time Limits	428
4.	<i>Poirrier</i> Settlements	428
5.	Final Action.....	428
6.	Elements of Full Relief	428
7.	Compensatory Damages	428
8.	Unconditional Relief.....	429
9.	Reinstatement.....	429
10.	Back Pay.....	429
11.	Interest	430
12.	Performance Ratings.....	430
13.	Reassignments	430
14.	Training.....	430
15.	Denial of Leave.....	430
16.	Retirement Issues.....	430
17.	Damage to Reputation.....	430
18.	Harassment.....	430
19.	Relief Through Other Procedures	430
20.	Admission of Discrimination.....	431
21.	Enforcement of Offers	431
O.	STIPULATIONS	431
P.	AGENCY REPRESENTATIVES	431
Q.	SPIN-OFF COMPLAINTS	431
R.	AMENDMENT AND CONSOLIDATION OF COMPLAINTS	432
1.	Amendments.....	432
2.	Consolidation	433
S.	DEFINITION OF CLAIMS	433
T.	RULINGS OF ADMINISTRATIVE JUDGE	433
1.	Nondispositive Rulings	433
2.	Motion Practice.....	434
3.	Motion to Reconsider	434
II.	SUMMARY JUDGMENT	434
A.	SUMMARY JUDGMENT STANDARDS.....	435
1.	Appellate Standards	438
B.	SUMMARY JUDGMENT PROCEDURES.....	438
1.	<i>Sua Sponte</i> Summary Judgment.....	438
2.	Motion by Party	439
3.	Oral Argument.....	439
4.	Failure to Respond to Motion.....	439
5.	Pending Discovery Issues.....	440
C.	DISPUTES OF MATERIAL FACT	441
D.	JUDGMENT AS A MATTER OF LAW	446
E.	PARTIAL SUMMARY JUDGMENT	446
III.	DISCOVERY	446
A.	DISCOVERY SCOPE AND PROCEDURES	447

1. Time Period Covered by Discovery	449
B. DISCOVERY DEVICES	449
1. Interrogatories	449
2. Production of Documents	450
3. Depositions	450
4. Requests for Admissions	452
5. Medical Examinations	452
6. Restrictions on Medical Records.....	453
7. Restrictions on Tax Records.....	453
8. Commission Guidance on Discovery	453
9. Discovery Costs.....	456
C. OBLIGATION TO PRODUCE EVIDENCE	456
1. Privacy Act Objections	456
2. <i>In Camera</i> Review	457
3. Tax Returns	457
4. Protective Orders	458
5. <i>Pro Se</i> Complainants.....	458
D. MOTIONS TO COMPEL DISCOVERY	459
E. DISCOVERY SANCTIONS	459
1. Justice Memo Halting Fees as Sanctions	461
2. Reinstatement of Fees as Sanctions	463
3. Good Faith Obligation.....	465
4. Sanctions Against Complainants	466
5. Sanction Procedures	467
6. Sanction Orders	468
F. PSYCHOTHERAPIST PRIVILEGE	468
IV. HEARING PROCEDURES	471
A. PRELIMINARY HEARING MATTERS.....	471
1. Persons Allowed at Hearing	471
2. Off-The-Record Discussions.....	471
3. Presentation of Evidence.....	471
4. Reasonable Accommodation of Complainant and Witnesses.....	471
5. Introductory and Opening Statements	471
B. EVIDENCE	472
1. Relevancy	472
2. Unduly Repetitious Evidence	472
3. Hearsay Evidence	472
4. Documentary Evidence	473
5. Use of "Private" Documents	474
6. Best Evidence.....	474
7. Destruction of Evidence	474
8. Failure to Produce Evidence	477
C. WITNESSES	477
1. Designation of Witnesses	478
2. Exclusion of Witnesses	478
3. Exclusion of Complainant	480
4. Alternative Means of Testimony	481
5. Telephonic Hearings and Testimony	481
6. Video Hearings and Testimony.....	484
7. Presence of Complainant	485
8. Representations of Counsel	485
9. Statement During Settlement	486
10. Witness Intimidation	486
11. Failure to Produce Witness	486
12. EEO Counselors	487
D. CREDIBILITY DETERMINATIONS	487
1. Rules of Deference	488
2. Demeanor	489
3. Findings Related to Motivation.....	490
4. Split Credibility Findings.....	491
5. Self-Serving Testimony.....	491

6. Relationship of Parties	491
7. Leading Questions	491
8. Plausibility of Testimony	491
9. Internally Inconsistent Testimony	492
10. Findings Based on Evidence of Record	492
11. Testimony and Findings in Other Proceedings	492
12. Corroboration Evidence	493
13. Impeachment Evidence	493
14. Findings Based on Assumptions.....	493
15. Refusal to Testify	493
16. Previous Credibility Findings	493
17. Scripted Testimony	494
18. Qualifications of Witness	494
19. Appeal of Credibility Findings	494
20. Credibility vs. Veracity.....	494
E. ALLEGATIONS RAISED AT HEARING	495
F. OBJECTIONS	495
G. OFFICIAL TIME	495
H. ROLE OF JUDGE	496
1. Regulating Conduct of Hearing	496
2. Developing the Record	497
3. Amended Complaints	497
I. RESPONSIBLE MANAGEMENT OFFICIAL	498
J. RECORD OF HEARING	498
K. CLOSING STATEMENTS	498
L. CONDUCT OF REPRESENTATIVES	499
1. <i>Ex Parte</i> Communications	499
M. CLOSING THE HEARING RECORD.....	499
V. POSTHEARING MATTERS	499
A. DECISIONS OF ADMINISTRATIVE JUDGE	499
1. Contents of Decision.....	500
2. Bench Decisions	500
3. Adopting Position of Parties	500
4. Delay in Decisions	501
5. Errata Decisions	501
6. Default Judgments	501
7. Directed Verdict	501
8. Decision by Judge Not Presiding.....	502
9. External Evidence.....	502
10. Relief	502
B. BIAS	502
CHAPTER 7: FINAL AGENCY ACTION	505
I. FINAL AGENCY ORDER AFTER HEARING	506
A. TIME LIMITS	506
B. PROCEDURAL ISSUES	507
II. FINAL AGENCY DECISION WITHOUT HEARING	507
A. COMPLAINANT'S CONSIDERATIONS.....	508
B. CONTENTS OF FINAL DECISION	509
1. Credibility Findings.....	509
C. ADOPTING FINDINGS OF INVESTIGATOR	510
D. REASONS ARTICULATED	510
E. DECIDING OFFICIAL	510
F. RESCINDING FINAL AGENCY DECISION	511
1. Draft Decisions.....	512
G. ADJUDICATION IN LIEU OF DISMISSAL	512
III. REQUIREMENTS OF FINAL AGENCY ACTION	512
A. APPEAL RIGHTS	513
1. Partial Dismissals	513
2. Failure to Issue Final Agency Action.....	513
B. ATTORNEY FEES	514

IV. FILING OF CIVIL ACTION	515
V. ENFORCEMENT OF FINAL AGENCY DECISIONS	516

CHAPTER 8: EEOC APPEALS.....517

I. APPEALABLE ACTIONS	517
A. FINAL AGENCY ACTIONS	517
1. Failure to Issue Final Agency Action.....	518
B. FINAL AGENCY DECISIONS	518
1. Failure to Issue Final Agency Decision.....	519
C. MSPB AND NEGOTIATED GRIEVANCE DECISIONS	519
II. PROCEDURES FOR APPEAL—COMPLAINANTS	519
A. TIME LIMITS	520
1. Dismissal by Administrative Judge	520
2. Computation of Time	521
3. Decisions Amended by Administrative Judge	522
4. Waiver of Time Limit	522
5. Filing With Wrong Agency	523
6. Filing by Telephone	524
B. SERVICE OF DOCUMENTS	524
III. PROCEDURES FOR APPEAL—AGENCIES	525
A. TIME LIMITS	525
B. SERVICE OF DOCUMENTS.....	526
C. INTERIM RELIEF	526
D. BRIEF IN SUPPORT OF APPEAL	526
IV. RECORD ON APPEAL	526
A. COMPLAINT FILE	527
B. IDENTIFICATION OF PARTIES.....	528
C. SUPPLEMENTATION OF RECORD	528
1. New Evidence	528
D. SUBMISSION OF EVIDENCE	529
E. DISMISSED CLAIMS	529
V. SCOPE OF REVIEW	530
A. JURISDICTIONAL ISSUES	530
B. PRESERVING ISSUES FOR APPEAL	530
1. Withdrawal of Hearing Request.....	530
2. Agency Implementation of Decision	530
C. HARMLESS ERROR	530
D. SELF-CORRECTION OF ERROR	530
1. Effect of Other Cases.....	530
E. MULTIPLE CLAIMS.....	531
F. NEW CLAIMS	531
1. Claims Not Raised by Parties	531
G. CONSOLIDATION OF APPEALS	531
VI. STANDARDS OF REVIEW	531
A. ADMINISTRATIVE JUDGE DECISIONS	532
1. Summary Judgment	532
2. Witness Credibility	533
3. Burdens of Persuasion	534
4. Prehearing and Hearing Rulings.....	534
5. Basis of Discrimination	534
6. Factual Errors	534
7. Attorney Fee Awards	534
B. FINAL AGENCY DECISIONS	534
1. Credibility Determinations	534
C. PROCESSING COMPLAINTS	535
D. <i>PRO SE</i> COMPLAINANTS.....	535
E. SHORT-FORM DECISIONS.....	535
F. PRECEDENTIAL VALUE OF EEOC DECISIONS	536
G. PRECEDENTIAL VALUE OF DECISIONS BY OTHER AGENCIES.....	536
H. INTERPRETATION OF COURT DECISIONS	536
VII. REVIEW OF SANCTIONS	537

A.	SANCTIONS AGAINST AGENCIES	540
1.	Failure to Timely Complete Investigation/Issue Final Agency Decision.....	540
2.	Failure to Produce or Destruction of Documents.....	540
3.	Failure to Produce or Destruction of Supervisory Notes	544
4.	Failure to Produce Witnesses	545
5.	Failure to Respond to Judge’s Orders.....	546
6.	Failure to Produce File on Appeal.....	547
7.	Failure to Produce Hearing Transcript	549
8.	Default Judgments	549
B.	ATTORNEY FEES AS SANCTIONS	559
1.	Fees as Sanctions Under ADEA.....	561
2.	Appointment of Attorney as Sanction	561
C.	SANCTIONS AGAINST COMPLAINANTS	562
1.	Threatening Conduct.....	567
D.	SANCTIONS AT APPELLATE LEVEL	568
1.	Sanctions on Procedural Dismissals.....	570
E.	EFFECT OF DISMISSAL ON SANCTIONS.....	570
VIII.	COMPLIANCE AND ENFORCEMENT	570
A.	ENFORCEMENT OF COMMISSION DECISIONS	571
1.	Remands.....	576
IX.	FILING OF CIVIL ACTION	576
A.	EFFECT OF FILING	576
B.	TIME FOR FILING.....	576
X.	REQUESTS FOR RECONSIDERATION	577
A.	PROCEDURES AND TIME LIMITS	577
B.	EFFECT OF REQUEST	578
C.	CRITERIA FOR RECONSIDERATION	578
1.	Clearly Erroneous Interpretation	579
2.	Substantial Impact.....	580
3.	New and Material Evidence	580
4.	Inconsequential Factual Error.....	581
5.	Commission’s Own Motion.....	581
XI.	REQUESTS FOR CLARIFICATION	581
A.	REQUESTS FOR ENFORCEMENT	582
XII.	APPEAL OF EEOC DECISIONS	582
A.	DELAY IN EEOC DECISIONS.....	582

CHAPTER 9: REPRESENTATIVES AND OFFICIAL TIME583

I.	RIGHT TO REPRESENTATION	583
II.	AGENCY REPRESENTATIVES	583
A.	ROLE OF AGENCY REPRESENTATIVE.....	583
1.	Definition of Agency Representative.....	583
2.	Role During Agency Processing of Complaint.....	583
3.	Attorney-Client Relationship	586
B.	SCOPE OF REPRESENTATION	586
C.	EEOC RESTRICTIONS ON AGENCY REPRESENTATIVES	586
D.	FLRA RESTRICTIONS ON AGENCY REPRESENTATIVES	587
1.	Disciplinary Meetings.....	588
2.	Formal Meetings.....	588
III.	COMPLAINANTS’ REPRESENTATIVES.....	591
A.	SCOPE OF REPRESENTATION	591
B.	DESIGNATION OF REPRESENTATIVE	591
C.	SERVICE OF DOCUMENTS	592
D.	UNION REPRESENTATIVES	592
E.	WITHDRAWAL FROM REPRESENTATION	592
F.	COMPLAINTS BY REPRESENTATIVES	593
IV.	EXCLUSION, DISQUALIFICATION, AND LIMITATIONS ON REPRESENTATIVES	593
A.	CONFLICTS OF INTEREST	593
1.	Official Time Restrictions	594
B.	EXCLUSION OF REPRESENTATIVES	594
1.	Exclusion Procedure.....	594

2.	Authority for Exclusion.....	595
3.	Standards for Exclusion.....	595
4.	Exclusion Through Settlement.....	596
C.	DISQUALIFICATION AND SUSPENSION.....	596
1.	Procedure for Disqualification and Suspension.....	596
2.	Standard for Disqualification and Suspension.....	597
3.	Referral to Bar.....	599
D.	USE OF SANCTIONS.....	600
V.	USE OF OFFICIAL TIME.....	600
A.	OFFICIAL TIME COMPLAINTS.....	600
B.	DEFINITION OF REASONABLE TIME.....	601
1.	Consultations With Representative.....	602
2.	EEO Counseling.....	602
3.	EEO Meetings.....	603
4.	EEOC Settlement Conferences.....	603
5.	Preparation Time.....	603
6.	Soliciting Evidence on Agency Time.....	603
7.	Official Time Policies.....	603
8.	Official Time Requests and Denials.....	603
9.	Duty Status of Employee.....	604
10.	Civil Actions.....	604
C.	REPRESENTATIVES AND OFFICIAL TIME.....	604
1.	Restrictions on Representatives' Time.....	604
2.	Official Time Complaints.....	605
3.	Representation of Applicants for Employment.....	607
4.	Representation of Former Employees.....	607
D.	TECHNICAL REPRESENTATIVES.....	607
E.	COMPENSATION AND BENEFIT ISSUES.....	608
1.	Overtime.....	608
2.	Restoration of Time.....	608
3.	Payment of Costs.....	608
VI.	USE OF AGENCY EQUIPMENT AND RESOURCES.....	609
VII.	PROCESSING OFFICIAL TIME COMPLAINTS.....	609

CHAPTER 10: THEORIES OF DISCRIMINATION— INTENTIONAL DISCRIMINATION.....611

I.	CIRCUMSTANTIAL EVIDENCE CASES.....	612
A.	EVOLUTION OF “DISPARATE TREATMENT” THEORY.....	612
1.	Elements of <i>Prima Facie</i> Case.....	614
2.	Penalties.....	616
3.	Effect of Regulations and Policies.....	616
4.	Discretionary Acts.....	616
5.	Performance Expectations.....	616
B.	BASIS FOR DISPARATE TREATMENT.....	617
1.	Comparison Employees.....	618
2.	No Comparison Employees.....	623
3.	Subjective Criteria.....	625
4.	Accuracy of Beliefs.....	625
C.	APPLICATION FOR POSITION.....	625
1.	Cancellation of Position.....	625
2.	Constructive Application.....	625
3.	Multiple Vacancies.....	625
D.	QUALIFICATION FOR POSITION.....	625
E.	ALLEGED DISCRIMINATING OFFICIALS.....	626
F.	ELEMENT OF INTENT.....	626
1.	Knowledge of Protected Group.....	627
2.	Genuine Mistakes.....	628
3.	Intent of Third Parties.....	630
G.	DISCRIMINATORY INFLUENCE OF OTHERS—THE “CAT’S PAW”.....	631
H.	DIRECT EVIDENCE OF DISCRIMINATION.....	635

II. AGENCY BURDEN OF PRODUCTION—CIRCUMSTANTIAL EVIDENCE.....	635
A. DISPARATE TREATMENT	636
1. Similarly Situated Employees; Meaningful Distinctions	639
2. Probationary Employees	640
3. Training	641
4. Leave Restrictions	641
5. Work Habits	641
6. Nonselections and Promotions	641
7. Past Discipline	643
8. Experience	644
9. <i>Post Hoc</i> Justifications.....	644
10. Best Interests of Agency	644
11. Natural Consequences of Discriminatory Acts	644
12. Mandatory Sanctions	645
13. Failure of Agency to Cooperate	645
14. Failure of Agency to Provide Reasons	645
B. WITNESS CREDIBILITY	647
C. AFFIRMATIVE ACTION PLANS	647
D. AVOIDING ADVERSE IMPACT LITIGATION.....	649
E. RELIANCE ON AGENCY REGULATIONS	650
F. RELIANCE ON COLLECTIVE BARGAINING AGREEMENT	651
G. RELIANCE ON STATE LAW	651
H. CORRECTING DISCRIMINATION BY NONSUPERVISORY PERSONNEL	651
III. PRETEXT—CIRCUMSTANTIAL EVIDENCE CASES	651
A. <i>HICKS</i> AND THE BURDEN OF PERSUASION	651
1. Commission Interpretation of <i>Hicks</i>	655
2. Agency’s Burden Under <i>Hicks</i>	659
3. Proof of Intent Under <i>Hicks</i>	660
4. <i>Hicks</i> in Jury Cases.....	662
5. Case Law Prior to <i>Hicks</i>	662
B. CAUSAL CONNECTION	663
1. Disciplinary Cases	663
2. Zero Tolerance Policies.....	665
3. Hiring Freezes	665
4. Light Duty	665
5. Preselection	666
6. Nonselection	666
7. Training	669
8. Qualifications	669
9. Test Results.....	669
10. Inadequate Resources.....	670
11. Work Environment	670
12. Receipt of Unemployment Compensation	670
C. PRIOR DISCRIMINATION	670
D. STATISTICAL EVIDENCE	670
E. PROCEDURAL IRREGULARITIES	671
F. COLLECTIVE BARGAINING AGREEMENTS	672
G. DEROGATORY COMMENTS	672
H. EVIDENCE OF BIAS	674
1. Past Statements and Actions	674
2. “Me Too” Evidence.....	675
I. TIMING OF AGENCY ACTION.....	675
J. CROSS EXAMINATION	676
1. Inconsistent Statements	676
K. EQUITABLE AND COLLATERAL ESTOPPEL.....	677
L. COURT ORDERS	677
M. ALTERNATIVE, NONDISCRIMINATORY REASONS	677
IV. DIRECT EVIDENCE AND “MIXED MOTIVE” CASES	677
A. THE <i>PRICE WATERHOUSE</i> ANALYSIS	678
B. CIVIL RIGHTS ACT OF 1991	683
1. ADEA.....	684

C.	DESERT PALACE, CIRCUMSTANTIAL EVIDENCE AND THE MIXED-MOTIVE ANALYSIS	684
D.	DEFINING DIRECT EVIDENCE	686
E.	MIXED MOTIVES IN HOSTILE ENVIRONMENT CASES	690
F.	REBUTTING MIXED MOTIVE EVIDENCE	691
V.	LIMITATIONS ON LIABILITY	694
A.	AFTER-ACQUIRED EVIDENCE DOCTRINE	694
B.	STANDARD OF PROOF	698
C.	THE "CLEAR AND CONVINCING" STANDARD	699

CHAPTER 11: THEORIES OF DISCRIMINATION—ADVERSE IMPACT.....703

I.	THE GRIGGS CASE	703
II.	THE WARDS COVE CASE	704
III.	THE CIVIL RIGHTS ACT OF 1991	706
A.	PRIMA FACIE CASE	707
1.	Agency's Investigatory Burden	708
B.	AGENCY'S BURDEN—BUSINESS NECESSITY	708
1.	Criminal Arrests	708
C.	ALTERNATIVE METHODS	709
D.	SUBJECTIVE SELECTION PRACTICES	709
E.	STATUTE OF LIMITATIONS	709
F.	AGE DISCRIMINATION IN EMPLOYMENT ACT	710
G.	PREGNANCY DISCRIMINATION ACT	710
IV.	UNIFORM GUIDELINES ON EMPLOYEE SELECTION PROCEDURES	710
A.	"BOTTOM LINE" CONCEPT	711
B.	VALIDITY STUDIES	713
C.	SUITABLE ALTERNATIVES	714
1.	Affirmative Action.....	714
V.	AFFIRMATIVE ACTION PROGRAMS	714
A.	RECRUITMENT	715
1.	Responsibilities of OPM	715
2.	Responsibilities of Agencies	716
B.	SELECTION AND ADVANCEMENT	716
1.	Conditions for Affirmative Action	717
2.	Establishing Affirmative Action Plans	717
3.	Effects of Adopting a Plan.....	717
4.	Using Plan as Affirmative Defense	717
5.	Training Programs.....	717
C.	VIOLATIONS OF AFFIRMATIVE ACTION PLANS	717
1.	Court Orders and Consent Decrees	718
2.	Special Emphasis Programs.....	718

CHAPTER 12: THEORIES OF DISCRIMINATION— HOSTILE ENVIRONMENT.....719

I.	TANGIBLE EMPLOYMENT ACTION: SEXUAL HARASSMENT	721
A.	DEFINITIONS	721
1.	Tangible Employment Action	721
2.	Supervisors	722
3.	Link With Hostile Environment.....	724
4.	Tangible Employment Actions on Bases Other Than Sex.....	724
B.	ELEMENTS OF A CLAIM	725
1.	Prima Facie Case	725
2.	Tangible Employment Actions	725
3.	Unwelcome Advances	725
4.	Preferential Treatment for Submission to Advances	725
5.	Threats of Tangible Employment Actions	727
6.	Knowledge of Agency	728
7.	Causal Connection With Gender.....	728
8.	Reprisal	729
9.	Violent Responses to Harassment	729
II.	HOSTILE ENVIRONMENT SEXUAL HARASSMENT	730

A.	MERITOR AND HARRIS	731
B.	BURDENS OF PROOF	732
1.	“Prima Facie” Case	732
2.	Agency’s Burden	733
C.	NATURE OF CONDUCT—PROTECTED BASIS	734
1.	Gender-Based Harassment	736
2.	Sexual Conduct	738
D.	UNWELCOME ADVANCES	743
1.	Consensual Conduct	747
2.	Harassment of Manager by Subordinate.....	748
E.	SEVERE OR PERVASIVE REQUIREMENT	748
1.	“Reasonable Person” vs. “Reasonable Woman”	749
2.	Severity and Frequency of Conduct—Sliding Scale	750
3.	Severity	751
4.	Isolated or One-Time Incidents	751
5.	Repeated Incidents.....	753
6.	Passage of Time Between Incidents	754
7.	Low-Level Harassment	755
8.	Context in Which the Alleged Harassment Occurred	756
9.	Trivial or Inconsequential Conduct—Sexual Harassment.....	757
10.	Work Performance and the “Hostility” Requirement.....	757
11.	Continuous Conduct or Presence of Harasser	758
12.	Name Calling.....	758
13.	Physical Contact or Conduct	759
14.	Offensive Looks.....	761
15.	Sexual Innuendo.....	761
16.	Physical Proximity	761
17.	Increased Work Scrutiny and Assignments.....	762
18.	Nature of Work	762
19.	Conduct Directed Toward Others.....	762
20.	Psychological Harm	763
21.	Subjective Test.....	766
22.	Use of Tangible Employment Actions	766
23.	Corroborative Evidence and Demeanor Evidence	768
24.	Harassment Outside of the Workplace	768
III.	SEX OF PERPETRATOR AND VICTIM	770
A.	HARASSMENT OF MALE EMPLOYEES	770
1.	Environment Hostile Toward Females	772
2.	Complaints by Alleged Harasser.....	774
B.	SAME-SEX HARASSMENT AND ONCALE	775
1.	Sexual Orientation and Gender Stereotyping	777
2.	Sexual Orientation Cases—Current State	784
3.	Gender Identification Cases—Current Status	787
4.	Gender Identification—Bathroom Usage	792
5.	Gender Identification, Transgender Status, and the Courts	793
6.	Prohibited Personnel Practice	797
7.	Office of Special Counsel.....	797
C.	HARASSMENT OF BOTH SEXES	797
IV.	OVERVIEW OF LIABILITY FOR HARASSMENT	799
A.	THE RULES OF AGENCY: THE MASTER-SERVANT RELATIONSHIP	800
B.	BASIC RULES OF LIABILITY	801
C.	TANGIBLE EMPLOYMENT ACTION HARASSMENT	801
1.	Supervisors.....	802
2.	Supervisors Who Lack Authority.....	802
D.	HOSTILE ENVIRONMENT HARASSMENT—SUPERVISORS	802
1.	Definition of Supervisor.....	803
2.	Knowledge of Agency	808
3.	Reasonable Care and the Affirmative Defense.....	808
4.	Harassment Policies	812
5.	Failure to Avoid Harm	813
6.	Harassment of Detailed Employees.....	814

7. Prompt Remedial Action	815
8. "Alter Ego" Theory.....	815
9. Harassment of Manager by Subordinate.....	815
E. HOSTILE ENVIRONMENT HARASSMENT—COWORKERS.....	815
1. Knowledge of Agency	816
2. Agency's Duty to Investigate	817
3. Failure to Cooperate in Investigation.....	819
F. HOSTILE ENVIRONMENT HARASSMENT—SUPERVISORS AND COWORKERS	819
1. Prompt and Effective Corrective Action.....	820
2. Restoration of Employee Benefits.....	835
3. Duty to Make Follow-Up Inquiries	836
4. Past Harassment by Perpetrator	837
5. Cessation of Conduct	837
G. SUMMARY JUDGMENT	838
H. DISCIPLINE OF RMO	838
1. Harassers' Claims Over Discipline	840
I. AGENCY-WIDE CORRECTIVE MEASURES	841
J. HARASSMENT BY THIRD PARTIES	841
1. Employee Organizations	843
K. CONSTRUCTIVE ADVERSE ACTIONS	843
L. MOOTNESS	845
V. PROOF PROBLEMS	845
VI. OTHER BASES OF HARASSMENT	845
A. PROPOSED PART 1609.....	846
B. HARASSMENT BASED ON RELIGION	849
1. Tangible Employment Actions.....	849
2. Hostile Work Environment.....	850
C. HARASSMENT BASED ON RACE	854
1. Tangible Employment Actions.....	854
2. Racial Slurs.....	854
3. One-Time Incidents.....	858
4. Repeated Incidents.....	859
5. Incidents Occurring Outside of the Complainant's Presence.....	859
6. Increased Work Scrutiny and Assignments.....	859
7. Same Race Harassment.....	859
8. Racist Symbols.....	859
9. Conduct Directed Toward Others.....	863
10. Subjective Test.....	864
D. ETHNIC HARASSMENT AND SLURS	864
E. HARASSMENT BASED ON DISABILITIES	867
1. Comments Made Outside of the Complainant's Presence.....	874
2. Increased Scrutiny of Work and Assignments.....	874
F. HARASSMENT BASED ON AGE	874
G. HARASSMENT BASED ON REPRISAL	875
1. Harassment by Filing Civil Action.....	877

CHAPTER 13: BASES OF DISCRIMINATION UNDER TITLE VII879

I. RACE AND COLOR DISCRIMINATION	880
A. THE DIFFERENCE BETWEEN RACE AND COLOR	880
1. Same Race or Color.....	880
2. Racial Stereotyping	880
B. REVERSE DISCRIMINATION	881
1. Beneficent Discrimination	881
2. Remedial Discrimination	882
C. MARITAL STATUS AND OTHER ASSOCIATIONS	882
D. SICKLE CELL ANEMIA	882
E. CRIMINAL ARRESTS AND CONVICTIONS	882
F. POLITICAL STATEMENTS	885
G. GROOMING CODES	885
II. SEX DISCRIMINATION	885
A. <i>BONA FIDE</i> OCCUPATIONAL QUALIFICATION	886

B.	SENIORITY SYSTEMS	891
C.	MARITAL STATUS	891
D.	TRANSGENDER STATUS/SEXUAL ORIENTATION	891
E.	ASSOCIATIONAL DISCRIMINATION.....	892
F.	CAREGIVER RESPONSIBILITIES.....	893
G.	RECRUITMENT	894
H.	PREGNANCY DISCRIMINATION ACT	894
	1. Burdens of Proof	895
	2. Direct Evidence of Pregnancy Discrimination	899
	3. Disparate Treatment	900
	4. Past and Potential Pregnancy	902
	5. Remarks About Pregnancy	903
	6. Breast-Feeding	904
	7. Abortion and Contraception.....	905
	8. Marital Status	905
	9. Leave	905
	10. Light Duty	906
	11. BFOQ Defense	907
I.	GENDER-BASED SUBJECTIVE CRITERIA	907
J.	DRESS CODES AND GROOMING STANDARDS	907
K.	MEDICAL EXAMS.....	909
L.	COLLECTION OF GENDER INFORMATION.....	909
M.	EQUAL PAY ACT	909
	1. Regulatory Guidance	909
	2. EPA Analysis and Burdens of Proof/Substantially Equal Work	909
	3. Relationship to Title VII	913
	4. Liquidated Damages	914
N.	“SEX PLUS” DISCRIMINATION	914
III.	NATIONAL ORIGIN	914
A.	CITIZENSHIP	915
B.	SECURITY CLEARANCES	916
C.	MARITAL STATUS AND OTHER ASSOCIATIONS	916
	1. Client and Customer Preferences	916
D.	SELECTION PROCEDURES	916
	1. Bottom Line Concept	916
	2. Height and Weight Requirements	917
	3. Education	917
E.	LANGUAGE FLUENCY	917
	1. Accent Discrimination	918
	2. Foreign Languages/Bilingual Requirements	923
	3. “Speak English Only” Rule and Restrictive Language Policies	924
F.	MIXED NATIONALITY	929
G.	<i>BONA FIDE</i> OCCUPATIONAL QUALIFICATION	929
H.	NATIVE AMERICANS	929
IV.	RELIGION	930
A.	DEFINITION	930
	1. Nature and Sincerity of Belief	931
B.	INTENTIONAL DISCRIMINATION CASES.....	932
	1. Discrimination Within Religions.....	932
	2. Failure to Hold Belief	932
	3. Espousal of Beliefs	932
	4. Clothing and Religious Articles.....	936
	5. Observances on Agency Premises.....	936
	6. Same-Sex Marriage and Communications With LGBT Content.....	936
	7. National Security Interests.....	937
C.	ACCOMMODATION OF BELIEFS	937
	1. <i>Prima Facie</i> Case	937
	2. Request for Accommodation	938
	3. Privacy Act Considerations	939
	4. Accuracy of Employee’s Beliefs	939
	5. Practices Requiring Accommodation	939

6.	Choice of Accommodation	940
D.	ACCOMMODATION PROCEDURES AND ANALYSIS	940
E.	SPECIFIC ACCOMMODATIONS.....	942
1.	Work Schedules	942
2.	Break Schedules.....	944
3.	Teleworking.....	944
4.	Reassignments.....	944
5.	Dress and Grooming Standards	945
6.	Prayer and Proselytizing	946
7.	Health Effects of Religious Observances	947
8.	Personal Effects	947
9.	Personal Identification.....	948
10.	Optional Religious Activities	949
11.	Probationary Employees	950
12.	Cooperation in Agency Investigations	950
13.	Drug Rehabilitation Programs	950
14.	Agency Communications.....	951
F.	UNDUE HARDSHIP	951
1.	Work Schedules	952
2.	Overtime	956
3.	Collective Bargaining Agreements	956
4.	Selection Schedules	958
5.	Preemployment Inquiries	958
6.	Sex-Segregated Schools	958
7.	Postal Service Oath	959
8.	Photographs	959
9.	Espousing Religious Ideas	959
V.	WHITE HOUSE GUIDELINES ON RELIGION	960
A.	EXPRESSION IN WORKPLACE	960
1.	Private Work Areas.....	960
2.	Expression Among Employees.....	960
3.	Expression Directed at Employees.....	961
4.	Expression in Public Areas	961
B.	DISCRIMINATION BASED ON RELIGION	962
1.	Personnel Actions and Employment Conditions.....	962
2.	Hostile Environment	962
3.	<i>Bona Fide</i> Occupational Requirement	962
C.	RELIGIOUS ACCOMMODATION	963
VI.	CIVIL RIGHTS ACT OF 1991	963
A.	PURPOSE OF LEGISLATION	963
B.	DISCRIMINATION REMEDIES	964
1.	Intentional Discrimination	964
2.	Punitive Damages	964
3.	Compensatory Damages	964
4.	Expert Witness Fees	964
5.	Interest on Back Pay Awards	964
6.	Retroactivity of Remedies	965
7.	Jury Trials	968
C.	BURDENS OF PROOF	968
1.	Intentional Discrimination Cases.....	968
2.	Disparate or Adverse Impact Cases	968
3.	Seniority Systems	969
4.	Consent Orders and Decrees	969
D.	STATUTE OF LIMITATIONS	969
1.	Age Discrimination in Employment Act.....	969
E.	LEGISLATIVE BRANCH EMPLOYEES	969
1.	House of Representatives Employees	970
2.	U.S. Senate Employees	970
VII.	CONGRESSIONAL ACCOUNTABILITY ACT—LEGISLATIVE EMPLOYEES	973
A.	EMPLOYEES COVERED.....	973
B.	COVERAGE PROVIDED	973

- C. RIGHTS AND REMEDIES 973
- D. ATTORNEY FEES 974
- E. ENFORCEMENT 974
- F. ADMINISTRATIVE AND JUDICIAL PROCEDURES 976
 - 1. Counseling..... 976
 - 2. Mediation..... 976
- G. ELECTION OF REMEDIES 976
 - 1. Administrative Hearing..... 976
 - 2. Appeals 977
 - 3. Judicial Review 977
- H. CIVIL ACTIONS..... 977

CHAPTER 14: REHABILITATION ACT AND GINA.....979

- I. APPLICATION OF THE ACT 981
 - A. IMPACT OF THE ADA AMENDMENTS ACT OF 2008..... 981
 - 1. Effective Date..... 982
 - 2. ADAAA Regulations..... 982
 - B. QUALIFIED INDIVIDUALS 982
 - 1. Individuals Without Disabilities 983
 - 2. Drug and Alcohol Abuse 984
 - C. AGENCIES AND EMPLOYEES COVERED 984
 - 1. Legislative and Judicial Employees 984
 - 2. Probationary Employees 984
 - 3. Temporary Employees..... 985
 - 4. Association With Persons With Disabilities 985
 - 5. Disabled Veterans 987
 - D. THEORIES OF DISCRIMINATION 987
- II. DEFINING QUALIFIED INDIVIDUALS 987
 - A. PHYSICAL AND MENTAL IMPAIRMENTS 989
 - 1. Record of Impairment..... 989
 - 2. Regarded as Impairments 990
 - B. MAJOR LIFE ACTIVITIES 990
 - 1. *Toyota* and Major Life Activities 991
 - 2. Major Bodily Functions 992
 - 3. Working 993
 - C. SUBSTANTIAL LIMITATION UNDER THE ADA 993
 - 1. Substantial Limitation: The Commission’s Past View 993
 - 2. Substantial Limitation and the *Sutton* Trilogy 993
 - 3. *Toyota* and Substantial Limitation 999
 - D. SUBSTANTIAL LIMITATION UNDER THE ADAAA—RULES OF CONSTRUCTION..... 1003
 - 1. Broad and Inclusive Coverage 1004
 - 2. Most People Comparison 1004
 - 3. Extensive Analysis Not Required 1005
 - 4. Individualized Assessment 1005
 - 5. No Scientific or Medical Evidence Required..... 1006
 - 6. Mitigating Medications, Measures and Devices 1006
 - 7. Episodic Conditions; Conditions in Remission 1008
 - 8. Limitation of Major Life Activities..... 1010
 - 9. Transitory and Minor Impairments 1010
 - 10. A Common-Sense Approach..... 1012
 - 11. Substantial Limitation on Working 1012
 - 12. Predictable Assessments..... 1014
 - 13. Condition, Manner and Duration 1015
 - 14. Proving Substantial Limitation..... 1016
 - E. CASE LAW ANALYSIS UNDER THE ADAAA 1017
 - F. RECORD OF DISABILITIES 1020
 - G. REGARDED AS DISABILITIES 1020
 - 1. *Nassau County School Board v. Arline*..... 1021
 - 2. Regarded as Disabilities and Working 1023
 - 3. Regarded as and Other Major Life Activities..... 1029
 - H. DEMONSTRATION OF QUALIFIED 1031

1. Essential Job Functions, Generally	1031
2. Nexus Requirement	1032
3. Job Attendance—Current Conventions and Past Practice	1034
4. Job Attendance—Nexus	1036
5. Job Attendance—Essential Functions and Undue Hardship.....	1038
6. Job Attendance—Return to Work Requirement	1043
7. Job Attendance—Views of the Courts	1044
8. Job Attendance—Shifting Burdens of Proof.....	1044
9. Performance of Essential Job Functions	1045
10. How Essential Job Functions Are Performed	1048
11. Essential Job Functions and Production Standards.....	1049
12. Essential Job Functions and Position Descriptions.....	1050
13. Essential Job Functions and Performance Ratings	1050
14. Removing Essential Job Functions	1050
15. Reassignment and Modifying Essential Functions	1050
16. Essential Functions and Position Requirements	1051
17. Inability to Perform in Current Position	1052
18. Reasonable Accommodation	1052
19. Effect of Disability Retirement	1053
I. KNOWLEDGE OF DISABILITY	1053
1. Intentional Discrimination	1054
2. Reasonable Accommodation.....	1054
3. Constructive Knowledge	1055
J. REQUESTS FOR ACCOMMODATION	1057
K. MEDICAL EVIDENCE	1059
1. Reasonable Medical Documentation.....	1060
2. Updating Medical Information.....	1063
3. Agency’s Burden—Individualized Assessment.....	1064
III. SPECIFIC DISABILITIES	1064
A. PHYSICAL DISABILITIES	1064
1. Physical Characteristics	1064
2. Use of Limbs	1064
3. Walking and Standing	1064
4. Hearing Loss	1065
5. Vision Impairments	1065
6. Obesity	1066
7. Conditions Affecting Hygiene	1066
8. Allergies and Chemical Sensitivities	1066
9. Breathing Conditions.....	1067
10. Cardiac Conditions	1067
11. Cancer.....	1067
12. Cerebral Palsy	1068
13. Sickle Cell Anemia	1068
14. Diabetes	1068
15. Epilepsy.....	1071
16. Sleep Disorders	1072
17. HIV and AIDS	1072
18. Lifting Restrictions	1074
19. Reproduction	1075
20. Pregnancy-Related Disabilities	1075
21. Intellectual Disabilities	1075
B. DRUG AND ALCOHOL ABUSE	1076
1. Statutory Basis.....	1076
2. 1991 Civil Rights Act and ADA	1077
3. Evidence of Disability	1079
C. MENTAL DISABILITIES	1080
1. Physical Effects.....	1080
2. Violent Behavior	1080
3. Post-Traumatic Stress Disorder.....	1081
4. Individual Fears	1082
5. Depression	1082

6. Job-Related Stress	1082
7. Thinking and Concentrating	1083
8. Learning Disabilities	1083
9. Inability to Interact	1083
IV. PROCESSING COMPLAINTS UNDER REHABILITATION ACT	1083
A. INITIATION OF COMPLAINT	1083
1. Requests for Accommodation	1083
2. Reasonable Accommodation Analysis	1085
3. Combination With Title VII Bases	1085
B. COMPLAINT STAGE	1085
1. Investigations	1085
C. INTENTIONAL DISCRIMINATION CASES	1085
1. Temporary Appointments	1087
2. Reductions-In-Force	1087
3. Misconduct and Performance Cases	1087
4. Agency-Induced Misconduct	1088
5. Selection and Promotion	1089
6. Reassignments	1089
7. Fear for Safety of Others	1089
8. Requiring Acceptance of Accommodation	1090
9. Overtime	1090
10. Medical Insurance Benefits.....	1090
11. Alternative Discrimination Theories.....	1092
D. DISPARATE IMPACT CASES	1092
E. HOSTILE WORK ENVIRONMENT	1092
F. HEARING STAGE.....	1093
V. HIRING, PLACEMENT AND ADVANCEMENT	1094
A. PREFERENTIAL TREATMENT	1094
1. Affirmative Action Plans and Goals	1095
2. Targeted Disabilities.....	1095
3. Veterans Preference	1095
4. Executive Order 13163	1096
B. SCHEDULE A APPOINTMENTS	1096
C. JOB INTERVIEWS	1097
1. Reasonable Accommodation.....	1097
D. EMPLOYMENT CRITERIA AND QUALIFICATION STANDARDS	1097
1. Requiring a Disability.....	1101
2. Applicants for Employment.....	1101
3. Uncorrected Vision Standards	1102
4. Aviation and Transportation Security Act	1107
E. CLASS ACTIONS	1109
VI. MEDICAL INQUIRIES AND EXAMINATIONS	1109
A. PREEMPLOYMENT INQUIRIES	1110
1. OPM Inquiries	1114
2. Conditional Offers of Employment.....	1114
3. Drug Tests	1115
4. Disabled Veterans.....	1116
5. Polygraph Examinations.....	1116
6. Relief for Violations	1116
B. POSTAPPOINTMENT INQUIRIES	1119
1. Fitness-For-Duty Examinations: Performing Essential Functions and Direct Threat	1119
2. Fitness-For-Duty Exams and the MSPB.....	1126
3. Documentation of Continuing Absence or Accommodation.....	1127
4. Clearance to Return to Work	1127
5. Requests for Updated Medical Information	1129
6. Medical Inquiries and <i>Giglio</i>	1131
7. Annual Hearing Tests	1131
8. Bid Positions.....	1132
9. Employee Assistance Programs	1132
10. Disability Retirement	1132
11. Medical Inquiries by Supervisors to Other Agency Components	1132

C.	MEDICAL DISCLOSURES AND CONFIDENTIALITY OF MEDICAL INFORMATION	1132
1.	Disclosure in EEO Investigations.....	1136
2.	Disclosure by Agency Counsel	1137
3.	Subpoena of Medical Information	1137
D.	CONFIDENTIALITY OF MEDICAL DOCUMENTS	1138
VII.	PERFORMANCE AND CONDUCT ISSUES	1139
A.	ADOPTING PERFORMANCE AND CONDUCT STANDARDS	1140
B.	PERFORMANCE STANDARDS	1140
1.	Performance Evaluations.....	1141
C.	CONDUCT STANDARDS.....	1142
1.	Source of Rules.....	1142
2.	Disciplinary Actions.....	1143
D.	DISCUSSION OF DISABILITY	1144
VIII.	OVERVIEW OF REASONABLE ACCOMMODATION AND UNDUE HARDSHIP	1145
A.	DEFINITION OF REASONABLE ACCOMMODATION	1147
1.	Nexus Requirement.....	1148
2.	Acceptance or Rejection of Accommodation	1148
3.	Constructive Discharge	1149
4.	Balancing Test.....	1149
5.	Presumption of Reasonableness	1149
6.	Temporary Accommodations	1150
7.	Preference of Employee	1151
8.	Good Faith Accommodation Efforts	1153
9.	Rights of Other Employees	1155
10.	Discipline as Accommodation	1155
IX.	DEFENSES TO REASONABLE ACCOMMODATION	1156
A.	UNDUE HARDSHIP	1156
1.	Proving Undue Hardship	1156
B.	“DIRECT THREAT” OR “ELEVATED RISK” DEFENSE	1160
1.	Requirements of Direct Threat Defense.....	1162
2.	Direct Threat and Medical Exams and Inquiries.....	1174
3.	Inherently Dangerous Positions.....	1175
X.	PROCESSING REASONABLE ACCOMMODATION REQUESTS	1178
A.	KNOWLEDGE OF ACCOMMODATION NEED	1179
B.	FORM OF ACCOMMODATION REQUESTS	1180
1.	Timing of Request.....	1182
2.	Timing of Submission of Medical Information	1183
3.	Failure to Request	1183
C.	INDIVIDUALIZED INQUIRIES ON DISABILITIES	1184
1.	Reasonable Documentation	1184
2.	Health Providers	1184
3.	Accuracy of Agency Information.....	1185
4.	Comparative Evidence	1185
5.	What Constitutes an Individualized Inquiry.....	1185
D.	IDENTIFYING POSSIBLE ACCOMMODATIONS	1185
1.	Failure of Complainant to Cooperate.....	1187
2.	Effect of OWCP Considerations	1189
E.	TIMELINESS OF REASONABLE ACCOMMODATION	1189
F.	FAILURE TO ENGAGE IN THE INTERACTIVE PROCESS.....	1193
XI.	REASONABLE ACCOMMODATION AND THE FAMILY AND MEDICAL LEAVE ACT.....	1194
XII.	REPRISAL FOR REQUESTING A REASONABLE ACCOMMODATION.....	1195
XIII.	TYPES OF REASONABLE ACCOMMODATION	1196
A.	JOB ANALYSIS	1196
B.	JOB RESTRUCTURING	1196
C.	INTERPRETERS AND READING ASSISTANTS	1197
1.	Interpreters and Signers	1197
2.	TTY and TDD Devices.....	1203
3.	Management Cooperation in Use of Assistive Devices.....	1203
4.	Reading Assistants.....	1204
D.	PERSONAL EQUIPMENT	1205
1.	Assistive Animals	1206

2. Hearing Devices.....	1207
E. PRIVATE SPACE	1207
F. REQUESTS FOR ASSISTANCE	1207
1. Single-Day Accommodations.....	1207
G. LEAVE USAGE	1207
1. Leave Offenses	1211
2. Denial of Leave as Retaliation.....	1212
3. Family and Medical Leave Act	1212
4. Separation for Medical Reasons.....	1213
H. WORK HOUR MODIFICATIONS	1213
1. Shift Changes and Work Schedules.....	1213
2. Training.....	1217
3. Breaks	1217
4. Overtime Assignments	1218
I. WORK LOCATION MODIFICATIONS AND TELEWORKING	1219
1. Teleworking Policies in General	1219
2. Teleworking as an Accommodation.....	1219
3. Telework Policies	1224
4. Foreign Service Assignments.....	1225
5. Privacy Accommodations.....	1226
J. BUILDING AND WORKSPACE ACCOMMODATIONS	1226
K. MOBILITY ACCOMMODATIONS.....	1226
L. TRANSPORTATION	1226
1. Parking Spaces	1228
2. Travel Requirements	1229
3. Transfer for Medical Treatment	1229
M. TRAINING AS AN ACCOMMODATION	1229
N. ACCOMMODATIONS FOR TRAINING	1230
O. TRAVEL FOR TRAINING.....	1230
P. BENEFITS AND PRIVILEGES OF EMPLOYMENT	1231
Q. VOLUNTARY DUTIES	1231
R. MEDICAL QUALIFICATIONS	1232
1. Physical Qualifications.....	1232
S. MENTAL ILLNESS	1233
1. Stress-Related Conditions	1233
2. Resignations and Constructive Discharges	1233
3. Supervisory Changes.....	1235
T. SMOKE AND FRAGRANCE-FREE ENVIRONMENT	1235
U. PREVENTIVE HEALTH CARE	1238
V. ALCOHOL AND SUBSTANCE DEPENDENCY	1238
1. The MSPB and EEOC—Causal Connection and Punishment	1239
2. Pretreatment Offenses	1244
3. Attendance Problems	1245
4. Relapses	1245
5. Programs With Religious Affiliations	1246
W. DISCRIMINATION IN ACCOMMODATION	1246
1. Changes in Accommodations.....	1247
2. Employee Assistance Programs	1247
X. AGGRAVATION OF EXISTING CONDITION.....	1247
Y. COLLECTIVE BARGAINING AGREEMENTS	1247
1. Union Duties.....	1249
Z. AGENCY REGULATIONS	1249
AA. SETTLEMENT AGREEMENTS	1249
BB. REASSIGNMENT, PROMOTIONS AND DEMOTIONS	1249
1. <i>Ignacio v. USPS</i>	1250
2. Reassignment Under Part 1614	1251
3. Reassignment Under the ADA	1254
4. Position in Question.....	1260
5. Accommodation in Reassignment Position	1260
6. Ceiling on Advancement.....	1261
7. Promotion as Accommodation	1261

8. Reassignment to Previous Position	1262
9. Reassignment to Special Needs Position.....	1263
10. Job Modification in Lieu of Reassignment.....	1263
11. Applicants for Employment.....	1265
12. Probationary Employees	1265
13. Light or Limited Duty	1265
14. Work-Related Injuries	1267
15. Collective Bargaining Agreements	1268
16. Reassignment to Different Supervisor	1272
17. Conditions Attached to Reassignment	1272
CC. AFFIRMATIVE ACTION	1272
DD. DISABILITY RETIREMENT	1273
1. Constructive Discharge.....	1273
EE. WORKERS' COMPENSATION	1273
1. Restoration of Employment	1275
2. Modified Duty Positions	1276
3. OWCP and Reasonable Accommodation.....	1276
FF. SECURITY CLEARANCES	1277
GG. REMEDIES	1277
HH. BACK PAY	1277
1. Resignation or Retirement.....	1277
2. Good Faith Exception to Damages	1277
XIV. THE GENETIC INFORMATION NONDISCRIMINATION ACT—OVERVIEW	1277
A. GINA-SPECIFIC DEFINITIONS	1278
1. Genetic Information Generally.....	1278
2. Genetic Tests	1278
3. Genetic Monitoring.....	1278
4. Genetic Services	1278
5. Manifested Disease or Disorder	1279
B. EMPLOYEES AND AGENCIES COVERED.....	1279
1. Family Members	1280
2. Family Medical History	1280
C. PROHIBITED EMPLOYMENT PRACTICES.....	1281
1. Employment Actions and Terms of Employment.....	1281
2. Segregating and Classifying Employees.....	1281
3. Retaliation for Protected Activity	1281
4. Acquisition of Genetic Information	1282
5. Confidentiality of Collected Information.....	1284
D. REMEDIES	1285

CHAPTER 15: AGE DISCRIMINATION IN EMPLOYMENT ACT 1287

I. STRUCTURE OF THE ACT	1287
A. PROHIBITED ACTIVITIES	1287
1. Reprisal	1287
2. Older Workers Benefits Act	1290
B. LAWFUL ACTIVITIES	1290
1. <i>Bona Fide</i> Occupational Requirements	1290
2. Benefit Plans	1290
3. Law Enforcement Officers	1291
4. Mandatory Retirement Age	1292
C. PROCEDURES FOR FILING ADMINISTRATIVE ADEA COMPLAINTS	1292
1. Exhaustion of Administrative Remedies	1292
D. PROCEDURES FOR FILING IN U.S. DISTRICT COURT	1293
1. Proper Defendants	1293
2. Statute of Limitations	1293
3. Part 1614 Statute of Limitations	1296
4. Jury Trials	1298
II. AGE DISCRIMINATION ANALYSIS	1298
A. CIRCUMSTANTIAL EVIDENCE	1298
1. Discrimination Against Persons Under 40	1298
2. Discrimination Within Protected Group	1299

3. Reverse Age Discrimination	1299
4. Rehired Annuitants.....	1301
5. "Age Plus" Discrimination	1301
6. Direct Evidence of Discrimination	1301
B. DISPARATE IMPACT	1301
1. <i>Bona Fide</i> Occupational Qualification	1302
2. Bottom Line Concept	1303
3. Preemployment Inquiries	1303
4. Experience	1303
C. HOSTILE ENVIRONMENT	1303
D. PAY SCALES.....	1303
E. ACCOMMODATION	1303
III. THE AGENCY'S BURDEN.....	1304
A. INTENTIONAL DISCRIMINATION	1304
1. Recency of Experience	1304
2. Recency of Education	1305
3. Length of Service.....	1305
4. Career Goals	1305
5. Tests.....	1306
B. DISPARATE IMPACT	1306
1. <i>Bona Fide</i> Occupational Qualification	1306
2. Factors Other Than Age	1306
3. Education	1307
4. Recruitment.....	1307
5. Training	1307
6. Physical Requirements	1307
IV. ESTABLISHING PRETEXT	1307
A. DISCRIMINATORY STATEMENTS	1307
B. ECONOMIC FACTORS	1309
C. AGE AS DETERMINATIVE FACTOR	1309
1. Element of Intent	1314
D. RETIREMENT ELIGIBILITY	1314
E. FORCED RETIREMENT	1314
V. COMPENSATORY AND LIQUIDATED DAMAGES	1314
VI. ATTORNEY FEES	1314

CHAPTER 16: REPRISAL 1315

I. INITIATING COMPLAINTS OF REPRISAL.....	1316
A. PROCESSING COMPLAINTS OF REPRISAL	1316
1. Filing Reprisal Complaints.....	1316
2. Amendment and Consolidation	1316
3. Expedited Complaints of Reprisal.....	1316
4. Processing Delays	1316
5. Settlement Agreements	1316
II. PROTECTED ACTIVITY—PARTICIPATION CLAUSE	1316
A. EEO COUNSELING	1317
B. EEO EMPLOYEES	1318
C. MANAGEMENT EMPLOYEES	1319
D. WITNESSES	1320
E. REPRESENTATIVES	1320
F. AGENCY REPRESENTATIVES	1320
G. RESPONSIBLE MANAGEMENT OFFICIALS	1321
H. GRIEVANCES	1321
I. MSPB APPEALS	1321
J. SETTLEMENT	1321
K. FITNESS FOR DUTY	1321
L. AFFIRMATIVE ACTION	1321
M. REASONABLE ACCOMMODATION REQUESTS	1322
N. HARASSMENT COMPLAINTS	1322
O. WHISTLEBLOWING	1323
P. ADMINISTRATIVE DECISIONS.....	1323

Q. WORKERS' COMPENSATION CLAIMS	1323
R. TAKING CONFIDENTIAL DOCUMENTS.....	1323
1. Use of Confidential Documents at Hearing.....	1324
S. DENIAL OF OFFICIAL TIME	1324
T. COMPLAINTS BEYOND EEO PURVIEW.....	1324
U. COMPLAINTS BY OTHERS—ASSOCIATION COMPLAINTS	1324
1. Participation in Proceedings Involving Others	1326
2. Soliciting Complaints.....	1327
V. CONTACTS OUTSIDE EEO PROCESS	1327
W. PUBLICATION OF EEO ACTIVITIES	1328
III. PROTECTED ACTIVITY—OPPOSITION CLAUSE	1328
A. BASIS OF OPPOSITION.....	1330
1. Association With Opponents	1330
2. Discrimination Against Others.....	1331
B. BALANCING TEST	1331
C. THREATS TO FILE COMPLAINTS	1332
1. Requests to Withdraw Complaint	1333
D. GRIEVANCES	1333
E. INTERNAL HARASSMENT INVESTIGATIONS	1333
IV. PROOF IN REPRISAL CASES	1334
A. NASSAR AND THE “BUT FOR” TEST.....	1335
B. PRIMA FACIE CASE	1339
1. Good Faith Belief	1340
C. ADVERSE TREATMENT REQUIREMENT	1341
1. The History of the Adverse Treatment Requirement.....	1341
2. <i>Burlington Northern</i> and Beyond	1342
3. Types of Materially Adverse Actions.....	1345
4. Proposed Actions and Preliminary Steps.....	1346
5. Former Employers and Employees	1346
6. Actions by Non-Employers	1348
7. Chilling Effect and the Reasonably Likely to Deter Standard	1348
a. Questions or Comments Made Pertaining to EEO Complaints.....	1349
b. Agency Actions Involving an EEO Complaint/Interference With EEO Activity.....	1351
c. Work Performance Critiques.....	1354
d. Threats and Proposed Agency Actions.....	1354
e. Agency Failure to Act	1354
f. Former Employee Claims.....	1355
g. Acts of Aggression.....	1355
h. Referral to an EAP Counselor.....	1355
i. Actions Affecting Pay	1355
j. Public Disclosure of EEO Complaints	1355
k. Actions Against Persons Other Than Complainant	1355
l. Limits on the Chilling Effect Doctrine	1355
m. EEO Process.....	1355
n. Defamation Actions—Threatened Civil Actions	1357
D. CAUSAL CONNECTION	1358
E. LEGITIMATE REASONS	1359
F. CIRCUMSTANTIAL EVIDENCE AND PRETEXT	1362
1. Proximity in Time	1363
2. Knowledge Requirement	1367
3. Other Factors	1368
4. Nexus With Personnel Actions.....	1372
G. DIRECT EVIDENCE OF REPRISAL	1373
H. MIXED MOTIVE CASES.....	1375
I. STATEMENTS MADE DURING TESTIMONY	1375
V. RESTRAINT AND INTERFERENCE WITH PROCESS: <i>PER SE</i> VIOLATIONS	1376

CHAPTER 17: PERSONNEL ACTIONS..... 1383

I. DISCIPLINARY ACTIONS	1383
A. PROPOSED DISCIPLINARY ACTIONS	1383
1. Work Discussions	1384

2. Written Work Criticisms.....	1385
3. Monitoring Work Behavior.....	1386
B. CONSTRUCTIVE DISCHARGE	1386
1. Competitive Service Employees	1391
2. Agency Bad Faith.....	1392
C. CONSTRUCTIVE SUSPENSION	1392
D. OTHER CONSTRUCTIVE ACTIONS.....	1392
E. PROBATIONARY EMPLOYEES	1393
F. CONSISTENCY OF DISCIPLINE	1393
1. Problem Employees.....	1394
2. Progressive Discipline	1394
3. Supervisory Orders.....	1394
G. HARASSMENT AS DEFENSE TO DISCIPLINE	1394
H. FITNESS-FOR-DUTY EXAMINATION	1394
I. CRIMINAL OFFENSES	1395
1. Criminal Investigations	1395
2. Non-Criminal Investigations	1395
J. ACTS OCCURRING IN CONTEXT OF PERSONNEL ACTION.....	1395
K. BASIS OF CHARGE	1395
L. RECORDS OF DISCIPLINARY ACTION	1395
II. NONSELECTION: PROMOTIONS AND APPOINTMENTS	1396
A. <i>PRIMA FACIE</i> CASE	1397
B. BEST QUALIFIED LISTS	1398
1. Unqualified Candidates	1398
2. Ranking Candidates	1398
3. Failure to Apply for Position.....	1399
4. Superior Qualifications— <i>Ash v. Tyson Foods</i>	1399
C. SELECTION CRITERIA	1401
1. Subjective vs. Objective.....	1401
2. Interviews	1403
3. Temporary Appointments	1405
4. Selection Certificates	1405
5. Selection Panels and Recommending Officials	1405
6. Education and Licenses	1405
7. Supervisory Appraisals	1406
8. Past Experience	1406
9. Training	1407
10. EEO Activity	1407
11. Criminal Convictions	1407
12. Failure to Disclose Criteria.....	1407
D. FAILURE TO FOLLOW PROCEDURES	1408
1. Rule of Three	1408
E. AGENCY’S BURDEN	1408
F. NONCOMPETITIVE SELECTIONS	1409
1. Conversions	1409
2. Accretion of Duties	1409
G. RECOMMENDING OFFICIALS	1410
H. PRESELECTION	1410
1. Unfair Advantages in Selection Process.....	1411
I. POSTSELECTION PERFORMANCE.....	1412
J. BIDDING FOR FUTURE VACANCIES.....	1412
K. RECRUITMENT	1412
L. RESCISSION OF VACANCY ANNOUNCEMENT	1412
1. Priority Referrals	1414
2. Failure to Post Vacancy.....	1414
M. FALSIFIED APPLICATIONS	1414
N. COMMUNICATION OF DECISION	1415
O. REASONS FOR DECISION	1415
III. PERFORMANCE-BASED ACTIONS	1415
A. <i>PRIMA FACIE</i> CASE	1415
1. Midyear Reviews	1416

B.	NOTICE OF POOR PERFORMANCE	1416
1.	Documentation of Poor Performance	1416
C.	OPPORTUNITY TO IMPROVE	1416
D.	SUBJECTIVE APPRAISAL CRITERIA	1416
E.	PERFORMANCE EVALUATIONS	1416
1.	Past Performance Ratings	1417
F.	PERSONNEL ACTIONS BASED ON PERFORMANCE	1418
G.	SCRUTINY OF WORK	1418
H.	EMPLOYMENT REFERENCES	1418
IV.	REDUCTION-IN-FORCE	1418
A.	SEVERANCE PAY VS. RETIREMENT ANNUITY	1418
B.	PERFORMANCE CREDITS.....	1418
C.	REASSIGNMENTS	1419
V.	TERMS AND CONDITIONS OF EMPLOYMENT	1419
A.	WORK ENVIRONMENT	1419
1.	Smoking Policies	1420
B.	USE OF AGENCY FACILITIES.....	1420
C.	WORK HOURS.....	1420
D.	OVERTIME COMPENSATION	1420
1.	Assignment of Work Hours	1420
E.	DRESS CODES	1420
F.	POSITION CLASSIFICATION	1421
G.	POSITION TITLES AND WORK DUTIES.....	1421
H.	REORGANIZATIONS	1421
I.	DEROGATORY COMMENTS AND ACTIONS	1421
1.	Release of Information on Employee	1421
2.	FOIA and Privacy Act Requests	1422
J.	LEAVE.....	1422
K.	HEALTH BENEFITS	1422
L.	COMPLIANCE WITH REGULATIONS	1423
M.	TEMPORARY ASSIGNMENTS	1423
N.	SECURITY CLEARANCES	1423
1.	Relief Available.....	1428
2.	Security Clearances and the Rehabilitation Act	1429
O.	EMPLOYEE SEARCHES	1430
P.	UNION ACTIVITIES	1430
1.	Collective Bargaining Agreements	1430
2.	Union Representation	1430
Q.	OUTSIDE CONTRACTS	1430
R.	ACTIVITIES OUTSIDE WORKPLACE.....	1431
S.	GARNISHMENT OF WAGES	1431
T.	DISABILITY RETIREMENT	1431
U.	UNEMPLOYMENT COMPENSATION	1431
V.	WORKERS' COMPENSATION	1431
W.	PARTICIPATION IN EEO PROCESS.....	1432
X.	COMMON WORKPLACE OCCURRENCES.....	1432
Y.	PREDECISIONAL ACTIONS.....	1432

CHAPTER 18: CLASS ACTION COMPLAINTS 1433

I.	FILING A CLASS COMPLAINT	1433
A.	DEFINITION OF CLASS	1433
B.	REQUIREMENTS OF A CLASS COMPLAINT	1433
C.	CLASS COMPLAINT COUNSELING	1434
1.	Time Frame for Counseling	1434
2.	EEO Counselors	1434
3.	Individual Complaints	1434
4.	Exception to Mandatory Counseling	1434
5.	Notice of Final Interview	1435
D.	FORMAL COMPLAINT	1435
1.	Effect of Filing on Individuals	1435
E.	ASSIGNMENT OF ADMINISTRATIVE JUDGE	1436

II. CERTIFICATION STAGE	1436
A. DISMISSAL OF COMPLAINT	1436
1. Lack of Specificity and Detail	1437
2. Dismissal Under 1614.107	1437
3. Timeliness of Complaint	1437
4. Issues Not Raised in Counseling	1437
5. Identical Complaints	1438
6. Failure to Prosecute	1438
7. Failure to Meet Class Prerequisites	1438
8. Delay in Seeking Certification	1438
9. Settlement Prior to Certification	1439
10. Notification of Dismissal	1439
B. CLASS PREREQUISITES	1439
1. Numerosity	1440
2. Commonality and Typicality	1442
3. Adequacy of Representation	1452
4. Waiver of Requirements	1454
C. EFFECT OF WITHDRAWAL OR DISMISSAL	1455
1. Individual Civil Actions	1455
D. ABEYANCE OF INDIVIDUAL COMPLAINTS	1455
E. CERTIFICATION DECISION	1455
1. Notification of Acceptance	1456
2. Conditional Certification and Modification of Certification	1456
3. Final Agency Action	1456
4. Opting Out	1456
III. POST-CERTIFICATION PROCESSING	1457
A. DEVELOPMENT OF RECORD: DISCOVERY	1457
B. SETTLEMENT OR INFORMAL RESOLUTION OF CLASS ACTIONS	1458
1. Settlement Orders	1460
C. SUMMARY JUDGMENT	1460
D. HEARING	1460
1. Official Time	1461
2. Mixed Cases	1461
E. DECISION	1461
F. FINAL AGENCY ACTION	1461
1. Notifying Class Members of Decision	1461
2. Individual Claims for Relief	1462
G. APPEAL STANDARDS	1462
1. Agency Appeals	1462
2. Complainant Appeals	1462
H. REQUESTS TO REOPEN	1462
I. ATTORNEY FEES	1462
IV. CLASS ACTION THEORIES	1463
A. INTENTIONAL DISCRIMINATION	1463
1. <i>Prima Facie</i> Case	1463
2. Disparate Treatment Analysis	1463
B. ADVERSE IMPACT	1465
1. Use of Statistical Evidence	1465
2. Use of Anecdotal Evidence	1466
C. HOSTILE WORK ENVIRONMENT	1466
D. REPRISAL	1468
E. DISABILITY DISCRIMINATION AND REASONABLE ACCOMMODATION	1468
F. VIOLATION OF CONSENT DECREES	1475
V. CLASS ACTION RELIEF	1475
A. ESTABLISHING INDIVIDUAL RELIEF	1475
B. CLASS RELIEF	1475

CHAPTER 19: EEO ALTERNATIVES 1477

I. NEGOTIATED GRIEVANCE PROCEDURES	1477
A. EMPLOYEES AND AGENCIES COVERED	1478
1. U.S. Postal Service	1478

2.	Other Exempt Agencies	1479
B.	ELECTING THE FORUM	1479
1.	Electing Both Forums	1480
2.	Union Election	1480
3.	Unsuccessful Election	1480
4.	Withdrawal of Grievance	1481
5.	Adjudication of Grievance	1481
6.	Failure to Raise Discrimination Allegation	1481
7.	Unfair Labor Practice Complaints	1481
8.	Subsequent Actions	1481
C.	EFFECTS OF ELECTION	1482
1.	Application of Law	1482
2.	Preservation of Grievance Rights	1482
D.	KNOWLEDGE OF DISCRIMINATION	1482
E.	ABSENCE OF DISCRIMINATION PROVISION IN AGREEMENT	1482
1.	Expiration of Agreement	1482
F.	DISCRIMINATION IN GRIEVANCE PROCEDURE	1482
1.	Inadequate Representation.....	1483
G.	EFFECT OF ARBITRATION DECISION	1483
H.	REVIEW BY EEOC	1483
1.	Arbitrability	1484
2.	Failure to Address Discrimination Allegations.....	1484
3.	Enforcement of Arbitration Awards	1484
II.	MIXED CASES BEFORE THE MERIT SYSTEMS PROTECTION BOARD	1484
A.	DEFINITION OF MIXED CASES AND APPEALS	1485
B.	JURISDICTION OF THE MSPB	1485
1.	Purpose of Mixed Case Legislation	1486
2.	Matters Clearly Within Board Jurisdiction	1486
3.	Matters Not Within Board Jurisdiction	1487
4.	Multiple Personnel Actions or Claims	1489
5.	Constructive Adverse Actions.....	1493
6.	Probationary Employees	1495
7.	Failure to Give Hearing Rights	1495
8.	Incorrect Appeal Rights	1496
9.	Whistleblower Complaints.....	1496
C.	ELECTION OF FORUM	1496
1.	Notice of Election Rights	1497
2.	Filing With Wrong Agency	1498
3.	Withdrawal of Appeal	1498
D.	EFFECTS OF ELECTION	1498
1.	Election of MSPB.....	1498
2.	Election of EEO Procedure	1499
3.	Effect of Final Agency Decision	1499
4.	Breach of Settlement Allegations	1499
5.	Last Chance Settlement Agreements	1500
E.	DUAL FILING PROCEDURES	1500
F.	REVIEW OF MSPB DECISIONS BY EEOC	1501
1.	Contents of Petition for Review	1501
2.	Consideration by EEOC	1501
3.	Failure to Raise Allegations of Discrimination	1502
4.	Failure of Board to Consider Allegations	1502
5.	Failure of Board to Consider Evidence.....	1505
G.	REFERRAL TO THE MSPB	1505
1.	Remand for Additional Evidence.....	1505
H.	REFERRAL TO SPECIAL PANEL	1505
I.	PARTIAL RELIEF	1506
1.	Relief Through Settlement	1506
J.	ALLEGATIONS RELATED TO BOARD PROCEEDINGS	1506
1.	Board-Ordered Relief.....	1506
K.	APPEAL OF DECISION TO DISMISS MIXED CASE	1506
L.	EFFECT OF DECISIONS BY OTHER AGENCIES	1506

M. JUDICIAL REVIEW IN MIXED CASES	1506
III. OTHER FORUMS	1508
A. ADMINISTRATIVE GRIEVANCE PROCEDURES	1508
B. WORKERS' COMPENSATION	1508
C. ALTERNATIVE DISPUTE RESOLUTION	1508

CHAPTER 20: FORMS OF RELIEF 1511

I. ELEMENTS OF EQUITABLE RELIEF	1511
A. COMMISSION REGULATIONS ON RELIEF	1512
B. NOTICE OF VIOLATION	1512
C. RELIEF FOR INDIVIDUALS	1513
1. Default Judgment	1513
D. PUNITIVE RELIEF	1513
E. CORRECTIVE RELIEF	1514
F. COMPENSATORY DAMAGES	1514
G. ESCAPING LIABILITY FOR DISCRIMINATION	1514
II. PERSONS ELIGIBLE FOR RELIEF	1515
A. RELIEF FOR APPLICANTS	1515
B. RELIEF FOR EMPLOYEES	1516
1. Displacement of Beneficiaries of Discrimination/"Bumping"	1516
2. Conditional Relief	1518
3. Interim Relief	1518
4. Reinstatement	1519
5. Partial Remedies	1520
6. Relief Following Default Judgment	1522
7. Scope of Relief	1523
C. RELIEF FOR THIRD PARTIES	1523
D. RELIEF FOR CONTRACTORS	1523
III. TYPES OF EQUITABLE RELIEF	1523
A. BACK PAY—GENERAL	1524
1. Ready, Willing, and Able to Work	1526
2. Loss of Pay by Spouse	1527
B. DEDUCTIONS FROM BACK PAY	1528
1. Duty to Mitigate Damages	1528
2. Corresponding Personnel Actions	1535
3. Unemployment Compensation	1536
4. Workers Compensation	1537
5. Self-Employment Income	1538
6. Health Insurance Premiums	1539
7. Retirement Benefits	1540
8. Debt to Agency	1541
9. Voluntary Separation Incentive Pay	1542
10. Union Dues	1542
C. CALCULATING BACK PAY	1542
1. Level of Back Pay	1542
2. Period of Back Pay	1543
3. Pay Steps	1544
4. Overtime	1545
5. Premium Pay	1546
6. SES Positions	1547
7. Thrift Savings and 401(k) Plans	1547
D. BACK PAY—U.S. POSTAL SERVICE	1548
E. BACK PAY—NONAPPROPRIATED FUND AGENCIES	1548
F. BACK PAY—CONTRACT EMPLOYEES	1549
G. ADJUSTMENT OF RETIREMENT BENEFITS	1550
H. INTEREST ON BACK PAY	1550
1. Age Discrimination in Employment Act	1554
2. U.S. Postal Service	1554
I. TAX CONSEQUENCES OF BACK PAY AND DAMAGES	1554
1. Taxability of Back Pay and Damages	1554
2. Tax Consequences	1558

J.	ENTITLEMENT TO POSITIONS	1559
1.	Substantially Equivalent Positions	1561
2.	Geographic Location.....	1563
3.	Subsequent Promotions—"Job Skipping"	1564
4.	Probation	1567
5.	Temporary Appointments.....	1568
6.	Priority Consideration	1568
7.	Noncompetitive Selections	1570
8.	Failure to Qualify.....	1570
9.	Multiple Victims of Discrimination	1570
10.	Limited Liability Defense	1573
K.	OTHER FORMS OF EQUITABLE RELIEF	1573
1.	Front Pay	1573
2.	Restoration of Leave and Benefits	1578
3.	Seniority	1579
4.	Medical Expenses	1580
5.	Transfer or Reassignment	1580
6.	Relief Requested	1581
7.	Speculative Relief	1581
8.	Performance Evaluations	1582
9.	Performance-Based Awards	1582
10.	Remand v. Relief	1582
11.	Effect of Resignation or Retirement	1582
a.	Constructive Discharge	1583
12.	Declaratory and Injunctive Relief	1586
13.	Certifications and Background Checks.....	1586
14.	Apologies	1586
15.	Remedial and Preventive Training	1586
16.	Systemic Relief	1589
17.	Travel Expenses	1589
18.	Loss of Vehicle	1589
19.	Housing Expenses	1590
20.	Cost of Living Allowances	1590
21.	Recruitment.....	1590
L.	RELIEF IN HOSTILE ENVIRONMENT CASES	1590
IV.	RELIEF UNDER THE ADEA AND EPA	1590
A.	LIQUIDATED DAMAGES	1590
V.	COMPENSATORY DAMAGES	1591
A.	AUTHORITY TO AWARD	1591
1.	Adverse Impact Cases	1599
2.	Unintentional Discrimination Cases.....	1599
B.	DEFINITION OF COMPENSATORY DAMAGES	1599
1.	Damages vs. Equitable Relief.....	1600
2.	Past Pecuniary Damages	1601
3.	Future Pecuniary Damages	1601
4.	Nonpecuniary Damages	1603
5.	Causation	1603
6.	Findings of Administrative Judge	1604
C.	DAMAGES UNDER REHABILITATION ACT	1605
1.	Good Faith Exception	1605
D.	DAMAGES UNDER ADEA.....	1607
E.	DAMAGES UNDER EPA	1607
F.	SEVERANCE OF DAMAGE ISSUES	1607
1.	Offers of Full Relief	1607
G.	TIME FOR ASSERTING DAMAGES	1608
1.	Sufficiency of Claim	1609
2.	Damages Hearings	1610
H.	COMMISSION TRILOGY ON DAMAGES	1611
I.	MOOTNESS	1621
J.	PECUNIARY DAMAGE AWARD STANDARDS	1621
1.	Medical Expenses.....	1623

2.	Nominal Damages	1623
3.	Housing Expenses	1623
4.	Mortgage Foreclosure	1624
5.	Outside Earnings	1624
6.	Attorney Fees	1624
7.	Computer Equipment.....	1624
8.	Back Pay as Pecuniary Damages.....	1624
K.	FUTURE PECUNIARY DAMAGES	1624
L.	CALCULATING NONPECUNIARY DAMAGES	1627
1.	Evidence Required	1629
2.	Credibility Determinations	1630
3.	Presumption of Harm	1630
4.	Failure to Produce Evidence.....	1630
5.	Statutory Cap	1631
6.	Monetary Awards—Introduction.....	1632
7.	Present-Day Value of Comparable Past Awards	1632
8.	Monetary Awards—\$5,000 and Less.....	1632
9.	Monetary Awards—\$5,001–\$10,000	1639
10.	Monetary Awards—\$10,001–\$15,000	1645
11.	Monetary Awards—\$15,001–\$20,000	1650
12.	Monetary Awards—\$20,001–\$25,000	1655
13.	Monetary Awards—\$25,001–\$30,000	1659
14.	Monetary Awards—\$30,001–\$35,000	1660
15.	Monetary Awards—\$35,001–\$40,000	1665
16.	Monetary Awards—\$40,001–\$50,000	1667
17.	Monetary Awards—\$50,001–\$60,000	1678
18.	Monetary Awards—\$60,001–\$70,000	1683
19.	Monetary Awards—\$70,001–\$75,000	1685
20.	Monetary Awards—\$75,001–\$80,000	1691
21.	Monetary Awards—\$80,001–\$90,000	1695
22.	Monetary Awards—\$90,001–\$100,000.....	1698
23.	Monetary Awards—\$100,001–\$125,000	1706
24.	Monetary Awards—\$125,001–\$150,000	1711
25.	Monetary Awards—\$150,001–\$200,000	1718
26.	Monetary Awards—\$200,001 and Above	1725
M.	SPECIFIC DAMAGE ISSUES.....	1726
1.	Previous Physical or Mental Illness	1726
2.	Discovery of Psychiatric Evidence	1731
3.	Physical Injuries.....	1731
4.	Other External Factors	1731
5.	Preexisting Fears.....	1734
6.	Mitigation of Damages	1734
7.	Termination of Employment	1734
8.	Inability to Find Employment	1734
9.	Loss of Outside Employment.....	1734
10.	Harm to Others	1734
11.	Couples Therapy	1735
12.	Low Resistance Due to Stress or Fatigue	1735
13.	Previous Rape	1735
14.	Lack of Expert or Medical Testimony	1735
15.	Pre-Act Conduct	1736
16.	Retaliation Claims	1736
17.	Breach of Settlement Agreements.....	1736
18.	Effects of Litigation	1736
19.	Multiple Victims of Discrimination.....	1737
20.	Multiple Claims of Discrimination.....	1737
21.	Age Discrimination Claims.....	1737
22.	Partially Prevailing Complainants.....	1737
23.	Conduct Outside Workplace	1738
24.	Health Insurance and Medical Expenses	1738
25.	Health Care Travel Expenses.....	1739

26. FECA Claims	1739
27. Loans, Interest, and Penalties.....	1739
28. Job Search Expenses	1740
29. Travel Expenses	1740
30. Moving and Housing Expenses and Loss on Sale of Home	1740
31. Foreclosure Costs	1741
32. Housekeeping Expenses.....	1741
33. Loss of Rental Income	1742
34. Chiropractor Expenses	1742
35. Massage Therapy.....	1742
36. Pet Care.....	1742
37. Auto Accidents.....	1742
38. Repossession of Auto.....	1742
39. Undisputed Amounts	1742
40. Collateral Source Rule	1742
N. ISSUANCE OF DAMAGE DECISIONS.....	1743
1. Appellate Decisions.....	1743
O. INTEREST ON COMPENSATORY DAMAGES	1743
P. TAXES ON COMPENSATORY DAMAGES	1743
Q. PUNITIVE DAMAGES	1745
R. DAMAGES IN OTHER FORUMS.....	1749
1. Merit Systems Protection Board	1749
2. Arbitration	1749
VI. DISCIPLINARY AND CORRECTIVE ACTION	1749
A. OFFICE OF SPECIAL COUNSEL	1751
B. MERIT SYSTEMS PROTECTION BOARD	1751
VII. ENFORCEMENT OF REMEDIES	1752
A. PETITIONS FOR ENFORCEMENT	1753
B. ENFORCEMENT BY COMMISSION.....	1753
1. Sanctions for Noncompliance	1754
VIII. TIMING OF RELIEF	1754
A. DOCTRINE OF LACHES	1754

CHAPTER 21: ATTORNEY FEES..... 1757

I. PROCEDURES FOR SUBMITTING FEE REQUEST	1758
A. REQUIREMENTS OF FEE PETITION	1759
1. Proper Party	1759
B. EXTENSIONS OF TIME	1759
C. FILING WITH WRONG AGENCY	1760
D. FAILURE TO ISSUE FEE DECISION	1760
E. MSPB CASES	1760
II. PREVAILING PARTIES	1760
A. PRESUMPTION OF ENTITLEMENT.....	1766
B. REVIEW STANDARD FOR AJ AWARDS	1766
C. PREVAILING THROUGH SETTLEMENT	1766
1. Breach of Settlement Agreements	1768
2. Compliance and Enforcement Petitions	1768
D. PREVAILING ON PROCEDURAL ISSUES	1768
1. Fees as Sanctions	1769
2. Fees Against Employees	1770
3. Official Time Complaints	1770
4. <i>Per Se</i> Regulatory Violations	1770
E. PREVAILING THROUGH GRIEVANCE PROCEDURE	1771
F. ACTIONS OUTSIDE TITLE VII.....	1772
G. OFFERS OF RESOLUTION	1772
H. MOOT CASES	1772
I. UNJUST AWARDS	1773
III. THE "LODESTAR"	1773
A. REASONABLE HOURLY RATE	1776
1. Prevailing Market Rate and Nonlocal Counsel	1777
2. Applicable Time Period	1779

3.	<i>Laffey</i> Matrix	1779
4.	Customary Rate	1779
5.	Contractual Rate	1780
6.	Discount Rates	1781
7.	Rates in MSPB Cases	1782
8.	Excise Taxes	1782
9.	Contingency Agreements	1783
B.	ADJUSTMENTS TO HOURLY RATES	1783
1.	Downward Adjustments	1783
2.	Fee Enhancements	1783
3.	Experience of Counsel.....	1786
C.	HOURS REASONABLY EXPENDED	1787
1.	Claims Not Raised in Complaint.....	1788
2.	Fees in Counseling Stage	1788
3.	Preparation of Complaint.....	1788
4.	Partial and Fractionable Fees	1788
5.	Frivolous Claims.....	1792
6.	Contact With Clients	1792
7.	File Updates.....	1793
8.	Clerical Work	1793
9.	Ascertaining Case Status	1793
10.	Settlement Negotiations	1793
11.	Legal Research	1793
12.	Review of Documents.....	1794
13.	Preparation of Discovery Materials.....	1794
14.	Investigation Preparation	1794
15.	Investigation by Counsel.....	1794
16.	Hearing Preparation	1794
17.	Summary Judgment Motions.....	1794
18.	Review of Decisions.....	1794
19.	Related Actions	1794
20.	Time Records	1795
21.	Experience of Counsel.....	1796
22.	Work on Appeal	1796
23.	Fee Petitions	1797
D.	TAXES ON FEE AWARDS	1797
E.	INTEREST ON FEE AWARDS	1799
F.	FAILURE OF COUNSEL TO REIMBURSE COMPLAINANT	1799
1.	Attorney Fee Liens	1799
G.	MIXED MOTIVE CASES	1800
H.	BAR STATUS OF COUNSEL	1802
I.	SERVICES RENDERED BY OTHERS	1802
1.	Multiple Attorneys	1802
2.	Change in Counsel.....	1804
3.	Paralegals	1805
4.	Investigators.....	1805
J.	COMPENSATORY DAMAGES.....	1805
K.	AGE DISCRIMINATION	1805
1.	Reprisal	1805
2.	Mixed Cases	1806
3.	Civil Actions	1806
4.	Fees as Sanctions.....	1807
L.	ADA INQUIRY AND EXAMINATION VIOLATIONS.....	1807
M.	NOTICE OF REPRESENTATION	1807
N.	DEFENSE OF FEE AWARDS	1808
1.	Standard of Review.....	1808
O.	UNION AND NON-PROFIT LEGAL REPRESENTATIVES	1808
P.	FEDERAL EMPLOYEE REPRESENTATIVES	1809
Q.	LAYMAN REPRESENTATIVES	1809
R.	BURDENS OF PROOF	1809
S.	ENFORCEMENT ACTIONS	1809

T. FEDERAL COURT WORK	1810
U. TRAVEL TIME	1810
V. AFFIRMATIVE DEFENSES FOR AGENCIES	1810
W. COSTS	1810
1. Witness Fees	1812
2. Expert Witness Fees	1812
3. Out-Of-Town Attorneys	1813
4. Business Equipment.....	1813
5. Interest	1813
6. Taxes	1813
7. Reasonable Accommodation Expenses.....	1813

TABLE OF CASES	1815
----------------------	------

INDEX	1885
-------------	------

