

SUMMARY TABLE OF CONTENTS

PREFACE	i
GLOSSARY	iii
INTRODUCTION	1
CHAPTER 1: OVERVIEW.....	3
CHAPTER 2: THE PRECOMPLAINT PROCESS—COUNSELING.....	35
CHAPTER 3: FORMAL COMPLAINT PROCESS— ACCEPTANCE AND DISMISSAL.....	137
CHAPTER 4: INVESTIGATION OF COMPLAINTS.....	299
CHAPTER 5: SETTLEMENT OF COMPLAINTS.....	333
CHAPTER 6: EEO HEARINGS.....	437
CHAPTER 7: FINAL AGENCY ACTION	549
CHAPTER 8: EEOC APPEALS.....	563
CHAPTER 9: REPRESENTATIVES AND OFFICIAL TIME	645
CHAPTER 10: THEORIES OF DISCRIMINATION— INTENTIONAL DISCRIMINATION.....	681
CHAPTER 11: THEORIES OF DISCRIMINATION—ADVERSE IMPACT.....	777
CHAPTER 12: THEORIES OF DISCRIMINATION— HOSTILE ENVIRONMENT.....	799
CHAPTER 13: BASES OF DISCRIMINATION UNDER TITLE VII.....	967
CHAPTER 14: REHABILITATION ACT	1095
CHAPTER 15: REASONABLE ACCOMMODATION AND GINA.....	1261
CHAPTER 16: AGE DISCRIMINATION IN EMPLOYMENT ACT.....	1437
CHAPTER 17: REPRISAL	1471
CHAPTER 18: PERSONNEL ACTIONS.....	1551
CHAPTER 19: CLASS ACTION COMPLAINTS	1615
CHAPTER 20: EEO ALTERNATIVES	1663
CHAPTER 21: FORMS OF RELIEF	1697
CHAPTER 22: ATTORNEY FEES.....	1973
CIRCUIT COURT CASE CHART 2000–2022	2033
TABLE OF CASES	2035
INDEX	2101

TABLE OF CONTENTS

PREFACE	i
GLOSSARY	iii
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.....	7
B. EFFECT OF THE CIVIL SERVICE REFORM ACT	7
C. ORGANIZATION OF THE COMMISSION	7
D. JURISDICTION	8
1. Agencies Covered	8
2. Covered Actions	8
3. Employees Covered	8
4. Remedial Powers	9
5. Unions	9
E. CIVIL ACTIONS	10
II. AGENCY EEO PROGRAMS	11
A. ORGANIZATION OF PART 1614	11
B. AGENCY PROGRAMS	11
1. Affirmative Employment Under Part 1614	11
2. Management Directive 715	12
3. Commission Review of Agency Programs and Policies.....	17
III. PROCESSING EEO COMPLAINTS—PART 1614 AND MD-110	20
A. COMPLAINT COVERAGE	20
1. Department of Veterans Affairs	20
2. General Accounting Office	20
3. Legislative and Judicial Branches	20
4. Military Employees	21
5. Overseas Employees	21
B. AGENCY PROCESSING OF COMPLAINTS	21
1. Administrative Judge Decisions	21
2. Alternative Dispute Resolutions	21
3. Appeals to the EEOC	22
4. Complaint Processing Variances.....	22
5. Conflicts of Interest/Interference With Agency Counsel.....	23
6. Dismissal of Complaints	23
7. Disposition of Complaints	24
8. EEO Counselors and the Precomplaint Stage	25
9. EEO Directors	25
10. Final Agency Decisions and Actions	26
11. Formal Complaints	27
12. Hearings	27

13. Interim Relief	28
14. Investigations	28
15. Notice of Final Interview	30
16. Partial Dismissals	30
17. Requests for Reconsideration	30
IV. CLASS COMPLAINTS	30
A. EEO COUNSELING	31
B. FORMAL COMPLAINT REQUIREMENTS	31
C. AGENCY PROCESSING.....	31
D. PROCESSING BY ADMINISTRATIVE JUDGE	31
1. Notification of Class Members	31
2. Development of the Record	32
3. Resolution of Complaints	32
4. Hearings	32
5. Judges' Decisions	32
E. FINAL AGENCY ACTIONS	32
1. Individual Relief	33

CHAPTER 2: THE PRECOMPLAINT PROCESS—COUNSELING..... 35

I. THE 45-DAY TIME LIMIT	36
A. AGENCY BURDEN ON APPEAL	36
B. WAIVER OF PRECOMPLAINT COUNSELING	37
1. Delay by Agency	37
2. Denial of Counseling	37
3. Reopening Counseling.....	38
C. DETERMINING THE PERIOD FOR INITIATING COUNSELING	38
1. Events Not Constituting Personnel Actions	38
2. Events Occurring During Counseling	39
3. New Claims Raised After Counseling	39
4. Notification of Personnel Action	39
5. Personnel Actions	41
D. ESTABLISHING DATE OF COUNSELOR CONTACT	43
II. EXTENDING THE TIME PERIOD FOR INITIATING COUNSELING	43
A. TOLLING THE PERIOD FOR COUNSELING	44
1. Awareness Personnel Action Is Final	44
2. Disabled Employees	45
3. Evidence on Tolling	45
4. Language Barriers	45
5. Reasonable Suspicion Standard	46
6. Uncertainty of Law.....	50
B. NOTICE OF PROCEDURES AND TIME LIMITS	51
1. Age Discrimination	51
2. Agency's Burden.....	51
3. Constructive Notice	52
4. Posting Requirements	55
C. WAIVER OF TIME LIMIT	57
1. Agency Waiver of Time Limit.....	57
2. Amended Complaints	57
3. Circumstances Beyond Control.....	57
4. Complainants Who Are Attorneys.....	57
5. Counsel, Death of.....	57
6. COVID-19.....	58
7. Doctrine of Laches.....	58
8. Family Death or Illness	58
9. Fear of Retaliation	58
10. Independent Consultants and Contractors.....	59
11. Mental Duress or Physical Inability	59
12. Military Duty	61
13. Negotiated Grievance Procedure, Use of	61
14. New Employees and Applicants	62
15. Procedures Other Than EEO, Use of	63

16. Self-Incrimination Concerns.....	63
17. Status as Minor.....	63
D. ESTOPPEL	64
1. Advice by Third Parties	64
2. Agency Advice and Actions	64
3. Agency Inaction.....	70
4. Developing Record on Estoppel.....	70
5. Failure to Assert Timeliness	71
III. CONTINUING VIOLATIONS	72
A. THE SUPREME COURT’S VIEW— <i>MORGAN</i>	72
B. THE COMMISSION’S VIEW BEFORE <i>MORGAN</i> — <i>ANISMAN</i>	76
C. PRESENT VIABILITY OF CONTINUING VIOLATION CLAIMS	79
D. ELEMENTS OF SERIAL CONTINUING VIOLATION CLAIM	79
1. Personnel Actions	79
2. Nexus Requirement.....	80
3. Knew or Should Have Known Requirement	82
4. Standards of Proof	84
E. HOSTILE ENVIRONMENT CASES	84
F. SYSTEMIC OR RECURRING VIOLATIONS	91
1. Lilly Ledbetter Fair Pay Act of 2009.....	94
2. Reasonable Accommodation Cases	96
3. Health Insurance Benefit Cases.....	101
G. UNTIMELY FORMAL COMPLAINT	101
H. ISSUES OF RELIEF	101
I. PARTIAL DISMISSALS	102
1. Identical Complaints	102
IV. REQUESTS FOR COUNSELING	102
A. AMENDING PREVIOUS COMPLAINTS	102
B. ANONYMOUS CONTACTS.....	102
C. CONTACT BY REPRESENTATIVES	102
D. CONTACT DOCUMENTATION	103
E. CONTACT NOT INVOLVING COUNSELORS	103
1. “Logically Connected”/Wrong Agency Officials.....	103
2. Wrong Agency or Wrong Agency Component	106
3. Contact With EEOC	107
F. CONTENTS OF CONTACT	107
G. EMAIL CONTACT	108
H. EXTENDING THE COUNSELING PERIOD	108
I. MAIL CONTACT	108
J. MIXED CASE APPEALS.....	109
K. PHONE CONTACT.....	109
L. PREMATURE COMPLAINTS	109
V. DUTIES OF EEO COUNSELOR	109
A. ADVISING COMPLAINANTS ON PROCEDURES	110
1. ADEA and EPA Complaints.....	111
2. Alternative Dispute Resolution	112
3. Alternative Forums: MSPB & Grievances	112
4. Class Complaint Counseling	113
5. Counselor as Investigator.....	114
6. Initial Interview	114
B. DETERMINING CLAIMS	115
1. Definition of Claim.....	115
2. Definition of Issues	116
3. Definition of Evidence	116
4. Counselor’s Duty to Clarify	116
C. INQUIRIES AND RESOLUTION EFFORTS BY COUNSELORS	117
1. Limited Inquiry.....	118
2. Resolution Efforts.....	120
D. CHOICE OF COUNSELOR	122
E. ANONYMITY FOR COMPLAINANTS	122
VI. PROTECTION FOR COUNSELORS	122

A.	RESTRAINT BY COUNSELOR.....	123
VII.	EXCLUSION OF ALLEGATIONS	123
A.	SUFFICIENCY OF ALLEGATIONS	123
B.	DISMISSAL OF COMPLAINTS	123
C.	FAILURE TO PROSECUTE	124
D.	WITHDRAWAL OF ALLEGATIONS	125
VIII.	NOTICE OF FINAL INTERVIEW	126
A.	CONSTRUCTIVE RECEIPT OF NOTICE	129
IX.	EEO COUNSELOR'S REPORT	130
A.	RESPONDING MANAGEMENT OFFICIALS	130
X.	INCIDENTS OCCURRING AFTER PRECOMPLAINT COUNSELING	131
XI.	ALTERNATIVE DISPUTE RESOLUTION	131
A.	CORE PRINCIPLES	132
1.	Confidentiality.....	132
2.	Enforceability.....	133
3.	Neutrality.....	133
4.	Voluntariness	133
B.	TYPES OF ADR	133
1.	Facilitation	133
2.	Mediation	133
3.	Settlement Conferences	134
C.	DEVELOPING ADR PROGRAMS	134
1.	Factors to Consider	134
2.	Training	134
3.	Resources for Neutrals.....	135
D.	AGENCY ADMINISTRATION AND PROCESSING	135
1.	ADR and Complaint Processing	135
2.	Alternatives to ADR	135
3.	Attorney Fees.....	135
4.	Counseling Process and ADR.....	135
5.	EEO Counselor's Role	135
6.	Information About the Agency's ADR Program	136
7.	Notice of Rights and Responsibilities.....	136
8.	Requirements of Resolutions.....	136
9.	Time Frames.....	136
E.	ADR AFTER PRECOMPLAINT PROCESSING	136

CHAPTER 3: FORMAL COMPLAINT PROCESS— ACCEPTANCE AND DISMISSAL.....137

I.	REQUIREMENTS OF FORMAL COMPLAINT	137
A.	COMPLAINANT'S DUTY TO PROCEED/CHANGE IN REPRESENTATION OR ADDRESS.....	139
II.	AGENCY PROCESSING OF COMPLAINT	139
A.	ACKNOWLEDGMENT OF COMPLAINT	139
B.	DEFINING COMPLAINT CLAIMS	141
1.	Avoiding Fragmentation	143
2.	Spin-Off and Dissatisfaction With Process Complaints	146
C.	DISMISSAL PROCESS	148
1.	Partial Dismissals	148
2.	Termination of Agency Jurisdiction to Dismiss	149
D.	ALTERNATIVE DISPUTE RESOLUTION.....	149
E.	EFFECT OF HEARING REQUEST	149
III.	BASES FOR DISMISSAL OF COMPLAINTS	149
A.	UNTIMELY COMPLAINTS	150
1.	Active Military Duty	151
2.	Actual Receipt vs. Availability	152
3.	Bad Faith and Mistaken Advice by Agency	152
4.	Calendar Days	153
5.	Circumstances Beyond Complainant's Control	153
6.	Clarifying Allegations.....	153
7.	Complaint, Failure to Sign	153

8. Constructive Receipt.....	154
9. COVID-19.....	155
10. Death or Illness in Family	155
11. Email Filing	156
12. Failure to Provide Complaint Form.....	157
13. Formal Complaint, Failure to Include.....	157
14. Harm	157
15. In Person Filing.....	157
16. Incapacity, Mental, or Physical	157
17. Inter-Office Mail Filing.....	159
18. Laches	160
19. Language Barriers	161
20. Mail Filing	161
21. Official Time, Denial.....	162
22. Postmarks	162
23. Premature Complaints	163
24. Representative	163
25. Representative, Illness of	163
26. Representative Mistake.....	163
27. Serious Medical Condition.....	164
28. Service on Attorney Representative	164
29. Service on Non-Attorney Representative	165
30. Severity of the Harassment.....	165
31. Supporting Documentation.....	167
32. Telefax Filing	167
33. Training	167
34. Unavailability of Complainant.....	167
35. Unclear Filing Instructions by Agency.....	167
36. Wrong Agency	168
37. Wrong EEO Representative	168
B. STANDING: FAILURE TO STATE A CLAIM	169
1. Standard of Review.....	169
2. Injury in Fact.....	169
3. Injury Based on Protected Status	172
4. Standing in the Federal Courts.....	172
C. STANDING: FAILURE TO STATE A CLAIM—DEFINITION OF EMPLOYEE	174
1. Applicants for Employment	174
2. Compensated Work Therapy Program	176
3. Complaints on Behalf of Others	176
4. Current Employees	177
5. Deceased Employees	177
6. Foreign Nationals	178
7. Former Employees	178
8. Group Complaints.....	181
9. Independent Consultants and Contractors	181
10. Informants	195
11. Interns	196
12. Law Enforcement and Security Contractors.....	196
13. National Guard Technicians	197
14. Other Agency's Employees.....	201
15. Other Military/Civilian Positions.....	202
16. Peace Corps Volunteers	202
17. Prisoners	203
18. Public Health Service—Commissioned Officers	203
19. Reinstated Employees	203
20. Relatives of Employees.....	203
21. SEE Program	203
22. Temporary Appointees	203
23. Tribal Employees	203
24. Veterans	204
25. Volunteers	204

D. STANDING: FAILURE TO STATE A CLAIM—AGENCY JURISDICTION	205
1. Advisory Councils.....	208
2. Auxiliary Agencies	208
3. Collateral Attacks on Jurisdiction	210
4. Employee Organizations	210
5. Employees Working at Other Agency Locations	210
6. Executive Agencies	211
7. General Services Administration	211
8. Legislative and Judicial Employees	211
9. Military Departments	212
10. Office of Personnel Management	215
11. Presidio Trust.....	216
12. Unions	216
E. FAILURE TO STATE A CLAIM: INVESTIGATIONS AND OTHER PROCEEDINGS—COLLATERAL ATTACKS	217
1. Arbitration Awards and the Grievance Process.....	218
2. Debt Collection Act	218
3. Drug Tests—Agency Imposed.....	218
4. EEO and Other Internal Agency Investigations.....	218
5. Occupational Health and Safety Claims.....	220
6. Offers of Reemployment	220
7. Office of Inspector General	221
8. Office of Workers Compensation Programs	222
9. On-The-Job Injuries and Workers' Compensation	223
10. OPM Retirement Process.....	223
11. Retaliation Exception to Collateral Attacks Rule.....	223
F. STANDING: FAILURE TO STATE A CLAIM—SPECIFIC ACTIONS	224
1. Actions Taken by Entities or Persons Other Than the Agency	224
2. Agency Organized Activities and Special Emphasis Programs	224
3. Bases of Discrimination Not Alleged.....	225
4. Benefits of Employment	225
5. Cancelled Vacancy Announcements.....	226
6. Change in Position Description—Work Duties	226
7. Change in Schedule	226
8. Collateral Duties	226
9. Compensatory Damages	226
10. Complaints on Behalf of Others.....	227
11. Continuing Vacancies	227
12. COVID-19	227
13. Denial of Opportunity to Apply for Position	228
14. Disclosures to Counsel	228
15. Discretionary Duties.....	228
16. Dismissal on Merits	228
17. Drug and Alcohol Tests	229
18. Duties, Performance.....	229
19. EAP Referrals	229
20. EEO Complaints, Complaints About.....	229
21. Failure to Discipline	230
22. Family and Medical Leave Act Claims	230
23. Forced Leave	230
24. Future Actions	231
25. Harassment Investigations	231
26. Letters of Counseling.....	231
27. Letters of Warning.....	231
28. Medical Suitability Determinations.....	232
29. Mental Evaluations	232
30. Negative Recommendations	232
31. Nonselection—Failure to Apply for Position.....	232
32. Nonsupervisory Employees, Complaints About	232
33. Oral and Written Work Discussions.....	233
34. Outside Activities	233
35. Performance Standards, Failure to Issue.....	233

36. Personal Harm Not Alleged	233
37. Premium Pay	233
38. Privileges of Employment	233
39. Proposed Actions and Preliminary Steps	234
40. Refusal to Discriminate	237
41. Reimbursement of Medical Expenses.....	238
42. Reliance Upon Other Statutes—Privacy Act and FOIA.....	238
43. Safety Concerns	238
44. Searches.....	238
45. Security Clearances/Suitability Determinations	238
46. Service Conversions	239
47. Settlement Negotiations	239
48. Temporary Agency Action	240
49. Testimony and Statements in Proceedings	240
50. Training	241
51. Transfers	241
52. Union Activities	241
53. Upward Mobility.....	241
54. Whistleblowing	241
55. Work Orders	242
G. STANDING: FAILURE TO STATE A CLAIM—HOSTILE ENVIRONMENT/HARASSMENT.....	242
1. Derogatory Remarks	242
2. Duties, Performance.....	246
3. Epithets vs. Derogatory Remarks.....	246
4. Harassment and Reasonable Accommodation.....	247
5. Physical Touching.....	247
6. Sexual Harassment	247
7. Subordinate-To-Supervisor Harassment.....	248
8. Threats of Violence.....	249
H. STANDING: FAILURE TO STATE A CLAIM—REPRISAL COMPLAINTS	249
1. Actions Taken Against Persons Other Than the Complainant	250
2. Actions Related to the EEO Process.....	251
3. Actions Related to Worker’s Compensation	252
4. Assessments Concerning “Participation in the EEO Process”	252
5. Chilling Effect/Future Deterrent	252
6. Comments by Supervisors.....	253
7. Duties, Modification	253
8. Information Provided to Others.....	253
9. Leave Requests.....	253
10. Proposed Actions/Preliminary Steps to Action/Threats.....	253
11. Requests for Medical Information.....	253
12. Retaliatory Investigations.....	253
13. Security Clearance Investigations.....	254
14. Supervisory Refusal to Meet With Complainant	254
I. IDENTICAL COMPLAINTS	255
1. Identical Civil Actions	256
2. <i>Res Judicata</i> and Collateral Estoppel	258
3. Offensive Collateral Estoppel.....	260
4. Dismissal for Failure to Exhaust.....	260
5. Law of the Case Doctrine	261
J. PROCESSING DISSATISFACTION OR SPIN-OFF COMPLAINTS	261
1. Spin-Off Complaints Processing	261
2. Investigations of Alleged Discrimination Outside EEO Complaints Process	262
3. Compensatory Damages Claims	262
4. Hearing Conduct	262
5. Reprisal Allegations.....	263
6. Conflict of Interest	264
7. Spin-Off Complaints.....	264
K. FAILURE TO PROSECUTE OR COOPERATE	265
1. Adjudication on Record	266
2. Cooperation With Investigators	266

3.	Delay by Agency	268
4.	Hearings	268
5.	Inability to Locate Complainant.....	268
6.	Precomplaint Counseling	268
7.	Requests for Additional Information.....	269
8.	Settlement Negotiations	273
L.	ABUSE OF PROCESS	273
1.	Unclean Hands Doctrine.....	281
2.	Agency Abuse of Process	281
3.	Agency Conflict of Interest	281
M.	OFFERS OF FULL RELIEF	282
1.	Offer of Resolution	282
N.	MOOTNESS	282
1.	Allegations of Harassment.....	284
2.	Apologies	285
3.	Attorney Fees	286
4.	Cancellation of Vacancy Announcement	286
5.	Compensatory Damages	286
6.	Constructive Discharge.....	287
7.	Discipline of RMO.....	287
8.	Job Assignments	287
9.	Performance and Other Work Appraisals	288
10.	Reasonable Accommodation	288
11.	Relief Through Other Forums	288
12.	Rescinded Disciplinary Actions.....	289
13.	Subsequent Promotions	289
14.	Termination of Employment.....	289
O.	MATTERS NOT RAISED WITH COUNSELOR	290
1.	Matters Raised and Not Included in Formal Complaint.....	290
P.	ELECTION OF REMEDIES	290
1.	Negotiated Grievance Procedure	290
2.	MSPB Appeals	291
Q.	EFFECT OF STATUTES AND REGULATIONS.....	292
R.	CONTRACTUAL OBLIGATIONS	292
S.	RELIEF REQUESTED	293
IV.	AMENDMENT AND CONSOLIDATION OF COMPLAINTS	293
A.	BASIS OF DISCRIMINATION	293
B.	SUBSTANTIVE AMENDMENTS	294
1.	Time Limits	295
2.	MSPB Appeals.....	296
3.	Amendment After Hearing Request.....	296
C.	CONSOLIDATION	296
1.	Time Limits	297
2.	Amending Consolidated Complaints	297
3.	Different Complainants.....	297
V.	WITHDRAWAL OF COMPLAINTS	298

CHAPTER 4: INVESTIGATION OF COMPLAINTS.....299

I.	TRAINING FOR INVESTIGATORS	300
II.	INVESTIGATIVE PROCEDURES	300
A.	METHODS OF INVESTIGATION	301
B.	TIMELINESS	302
III.	ROLE OF THE INVESTIGATOR	302
A.	GATHERING INFORMATION	303
B.	RULES OF EVIDENCE.....	303
1.	Characteristics of Evidence.....	303
2.	Types of Evidence.....	304
3.	Sources of Evidence	304
4.	Evidence on Remedies	304
C.	FACILITATING ADR	305
D.	ROLE OF AGENCY COUNSEL	305

E.	ROLE OF COMPLAINANT’S REPRESENTATIVE	305
IV.	DISMISSAL OF ALLEGATIONS	305
A.	UNCLEAR ALLEGATIONS	305
B.	PARTIAL DISMISSAL OF CLAIMS	306
C.	BAD FAITH ALLEGATIONS	306
D.	PRIMA FACIE CASE	306
E.	RELIEF GRANTED	306
F.	PROCEDURAL ISSUES	306
G.	FAILURE TO GIVE AFFIDAVIT	307
V.	DEVELOPMENTS DURING INVESTIGATION.....	307
A.	EVIDENCE	307
B.	AMENDMENTS	307
C.	NEW CLAIMS	308
VI.	FAILURE TO INVESTIGATE CLAIMS	309
A.	DIFFERENT BASIS OF DISCRIMINATION	309
B.	INADEQUATE INVESTIGATIONS	309
1.	Sanctions Against the Agency.....	309
2.	Adverse Inference	310
3.	Default Judgment.....	311
4.	Summary Judgment	313
5.	Remanding for Further Investigation After a Final Decision or Hearing.....	313
6.	Final Agency Decisions	314
7.	Disability Discrimination Claims.....	318
8.	Reasonable Accommodation Claims	318
9.	Evidence on Remedies	319
10.	Shortage of Investigators/Outsourcing Investigations	319
C.	EX PARTE INVESTIGATIONS.....	320
VII.	INTERVIEW OF WITNESSES	320
A.	DISCLOSURE OF INFORMATION TO WITNESSES.....	320
B.	FAILURE TO INTERVIEW WITNESSES	320
C.	EMPLOYEE’S RIGHT TO INTERVIEW WITNESSES	321
D.	RESPONSIBLE MANAGEMENT OFFICIALS	321
E.	RIGHT TO UNION REPRESENTATION	321
VIII.	COMPLAINT FILE	322
A.	EVIDENCE	322
1.	Rejection of Evidence	322
2.	Completeness of Record.....	322
B.	COMPARATIVE ANALYSIS	323
C.	REQUIRED DOCUMENTS	323
1.	Retention of Records	323
2.	FOIA and Privacy Act Requirements	324
IX.	COOPERATION OF COMPLAINANT	325
A.	RIGHT TO IMPARTIAL INVESTIGATION	327
B.	UNTIMELY INVESTIGATIONS	329
C.	LOCATION OF INVESTIGATION	329
D.	SUPPLEMENTAL INVESTIGATIONS	329
X.	CONSOLIDATION	329
XI.	OFFICIAL TIME	330
A.	TRAVEL TIME	330
B.	TRAVEL EXPENSES	330
XII.	CONCLUSIONS OF INVESTIGATORS	331
A.	CREDIBILITY FINDINGS OF INVESTIGATOR.....	331
XIII.	NOTICE OF HEARING RIGHTS	331

CHAPTER 5: SETTLEMENT OF COMPLAINTS.....333

I.	SETTLEMENT POLICIES	333
A.	REGULATORY GUIDANCE	333
B.	CONFIDENTIALITY AND PRIVILEGE	334
1.	Offers of Reemployment	335
C.	SETTLEMENT REMEDIES	335
D.	SETTLEMENT REQUIREMENTS	336

1.	Oral Agreements	336
2.	Knowing and Voluntary Agreements	339
3.	Intent of the Parties	342
4.	Signature of Agreement	344
5.	Consideration	349
6.	Responding Management Official.....	349
E.	EFFECT OF SETTLEMENT	349
II.	OFFERS OF RESOLUTION	350
A.	MODEL LANGUAGE FOR OFFER.....	351
B.	OFFERS OF FULL RELIEF	352
III.	INTERPRETATION OF AGREEMENTS	352
A.	PLAIN ENGLISH RULE	352
1.	Use of Extrinsic Evidence.....	352
B.	INTERPRETING LANGUAGE IN CONTEXT.....	353
C.	CONSTRUING LANGUAGE AGAINST DRAFTER	353
D.	WAIVER OF RIGHTS	353
1.	Waiving Prospective Rights	354
2.	Waiver as a Defense.....	356
3.	ADEA Rights	356
E.	VAGUE AGREEMENTS	357
F.	SPECIFIC TERMS OF SETTLEMENT.....	358
1.	Apologies.....	358
2.	Back Pay	359
3.	Fair Treatment.....	360
4.	Interest	360
5.	Lump Sum Payments and Taxes	360
6.	Performance Appraisals	361
7.	Priority Consideration.....	361
8.	Promotions	363
9.	Reinstatement.....	364
10.	Restoration of Benefits	365
11.	Seniority	365
12.	Supervisory Contact.....	366
13.	Telework	366
14.	Terms of Art	366
15.	Transfers; Reassignments	366
G.	SELECTIVE INTERPRETATION.....	367
H.	EXPUNGEMENT OF RECORDS—“CLEAN PAPER” AGREEMENTS	367
1.	Employment References	369
2.	Rescinded Trump-Era EO 13839.....	371
I.	TIME LIMITS ON AGREEMENTS	373
1.	Duration of Agreement.....	373
2.	Execution of Terms.....	376
J.	ELEMENT OF GOOD FAITH	378
1.	Bad Faith Negotiations	379
2.	Bad Faith Execution	381
K.	INTEGRATION OR ZIPPER CLAUSES	382
L.	CONFIDENTIALITY CLAUSES	383
1.	Disclosure of Settlements	386
2.	Confidentiality of Settlement Process	386
M.	SEVERABILITY CLAUSES	386
N.	SUPERVISION CLAUSES	387
O.	GENERAL RELEASES	387
P.	MISREPRESENTATIONS IN THE SETTLEMENT PROCESS	388
Q.	COLLECTIVE BARGAINING AGREEMENTS	389
R.	AGENCY POLICIES AND PROCEDURES.....	391
IV.	COMPENSATORY DAMAGES	392
V.	COMPLIANCE WITH SETTLEMENT AGREEMENTS	393
A.	ENFORCEMENT OF AGREEMENTS	393
1.	Agreements Reached After Decision	394
2.	Agreements With More Than One Complainant.....	394

3.	Bankruptcy	394
4.	Compliance Through Prior Acts	394
5.	Death of Complainant	394
6.	Impossibility of Compliance	394
7.	Invalid Settlement Agreements	395
8.	Time Limits	396
B.	REMEDIES FOR FAILURE OF AGENCY TO COMPLY	399
1.	Partial Compliance—Return to <i>Status Quo Ante</i>	400
2.	Partial Compliance—Age Discrimination	402
3.	Interest as Sanction	402
4.	Attorney Fees	403
C.	FAILURE OF EMPLOYEE TO COMPLY	403
1.	Agency Compliance Petitions	403
D.	SETTLEMENTS IN CIVIL ACTIONS	404
E.	FILING OF NEW COMPLAINTS	404
F.	REPRISAL	404
G.	DISCRIMINATORY SETTLEMENT AGREEMENTS	405
H.	SUBSEQUENT ACTS	407
VI.	VOIDING SETTLEMENT AGREEMENTS	407
A.	UNFORESEEN CIRCUMSTANCES	408
B.	BAD FAITH	408
1.	Coercive Agreements	409
2.	Rescinding of Agreement	410
C.	ADVICE OF REPRESENTATIVES	410
D.	DETRIMENTAL RELIANCE AND RATIFICATION	410
E.	LACK OF CONSIDERATION—ILLUSORY AGREEMENTS	413
1.	Benefits Already Incurred	413
2.	Discretionary Benefits	413
3.	Impossibility	413
4.	Legal Detriment Requirement	414
5.	Mutual Mistake of Fact or Law	415
6.	Promises to Grant Something to Which an Employee Is Already Entitled	419
7.	Promises to Not Break the Law	419
8.	Vague Provisions	421
F.	WAIVER OF PROSPECTIVE EEO CLAIMS AND LAST CHANCE SETTLEMENTS	421
G.	LACK OF REPRESENTATIVE AUTHORITY	422
H.	OLDER WORKERS' BENEFIT PROTECTION ACT	423
1.	Broad Application and Scope of the OWBPA	425
2.	Court Decisions: Void vs. Voidable	427
3.	Reinstating the Complaint and Tender Back Provisions	431
4.	Remedial Effect of OWBPA Violations	431
5.	Time Limits for Breach Claims Under the OWBPA	431
I.	SUBSEQUENT AGREEMENTS	431
VII.	SETTLEMENTS REACHED THROUGH OTHER PROCEDURES	432
VIII.	RETIREMENT ISSUES	433
IX.	ATTORNEY FEE ISSUES	434
A.	FAILURE TO MENTION FEE ISSUE	434
B.	SEVERANCE OF FEE ISSUES	435
1.	Fee Determination by Judge	435
C.	DETERMINING REASONABLE FEES	435

CHAPTER 6: EEO HEARINGS.....437

I.	PREHEARING MATTERS	438
A.	POWERS OF THE ADMINISTRATIVE JUDGE	438
1.	Administrative Judges' Handbook	441
2.	Subpoenas	441
3.	Contract Administrative Judges	441
B.	RIGHT TO HEARING	441
1.	Request for Hearing	442
2.	Service of Hearing Request	445
3.	Effect of Hearing Request	446

4.	Withdrawal of Request for Hearing	446
5.	Waiver of Hearing.....	446
6.	Failure to Attend Hearing	447
C.	AGENCY'S HEARING RESPONSIBILITIES	448
D.	RIGHT TO NEUTRAL ADMINISTRATIVE JUDGE	448
E.	VENUE	448
F.	REVIEW OF REPORT OF INVESTIGATION	449
1.	Sanctions for Nonhearing-Related Conduct	450
G.	DISMISSAL OF COMPLAINTS.....	452
1.	Review of Partial Dismissals.....	452
H.	PREHEARING ORDERS	453
1.	Docketing Order.....	453
2.	Acknowledgment and Order	453
3.	Scheduling Order	454
4.	Prehearing Conference	454
I.	WITNESS LISTS	454
1.	Unavailability of Witnesses	455
J.	SCHEDULING OF HEARING	455
1.	Notice of Remand	456
2.	Convenience to Parties	456
3.	Hearing Notice	456
K.	BIFURCATED DAMAGES HEARINGS	457
L.	POSTPONEMENT OR CONTINUANCE OF HEARING	457
M.	SETTLEMENT	459
1.	Conferences With Hearing Judge.....	459
2.	Conferences With Settlement Judge.....	459
3.	Alternative Dispute Resolution	460
4.	Settlement Agreements.....	460
N.	OFFERS OF FULL RELIEF	460
1.	Admission of Discrimination.....	461
2.	Back Pay.....	461
3.	Compensatory Damages	461
4.	Enforcement of Offers	462
5.	Final Action.....	462
6.	Full Relief Elements	462
7.	Harassment.....	462
8.	Interest	463
9.	Leave Denial.....	463
10.	Performance Ratings.....	463
11.	<i>Poirrier</i> Settlements	463
12.	Reassignments.....	463
13.	Reinstatement.....	463
14.	Relief Through Other Procedures.....	464
15.	Reputational Damage.....	464
16.	Retirement Issues.....	464
17.	Test for Full Relief.....	464
18.	Time Limits	465
19.	Training.....	465
20.	Unconditional Relief.....	465
21.	Writing Requirement	465
O.	STIPULATIONS	465
P.	AGENCY REPRESENTATIVES	466
Q.	SPIN-OFF COMPLAINTS	466
R.	AMENDMENT AND CONSOLIDATION OF COMPLAINTS	466
1.	Amendments.....	466
2.	Consolidation	468
S.	DEFINITION OF CLAIMS	468
T.	RULINGS OF ADMINISTRATIVE JUDGE	468
1.	Nondispositive Rulings	468
2.	Motion Practice.....	468
3.	Motion to Reconsider	469

II. SUMMARY JUDGMENT	469
A. SUMMARY JUDGMENT STANDARDS.....	470
1. Appellate Standards	472
B. SUMMARY JUDGMENT PROCEDURES.....	473
1. <i>Sua Sponte</i> Summary Judgment.....	473
2. Motion by Party	473
3. Oral Argument.....	474
4. Failure to Respond to Motion	474
5. Pending Discovery Issues.....	475
C. DISPUTES OF MATERIAL FACT	475
1. Burden.....	476
2. Inferences.....	476
3. Credibility Issues.....	476
4. Extension of the Investigative Process	479
5. Evidence of Discrimination.....	480
6. Inadequate Investigation/Development of the Record.....	480
7. Summary Judgment as Sanction	481
8. Selection Cases	481
9. Harassment Cases	484
10. Disability/Reasonable Accommodation Cases.....	486
11. Comparators	487
D. JUDGMENT AS A MATTER OF LAW	488
E. PARTIAL SUMMARY JUDGMENT	488
III. DISCOVERY	488
A. DISCOVERY SCOPE AND PROCEDURES	489
1. Time Period Covered by Discovery	491
B. DISCOVERY DEVICES	491
1. Commission Guidance on Discovery	491
2. Depositions	494
3. Discovery Costs.....	495
4. Interrogatories	495
5. Medical Examinations	496
6. Production of Documents	497
7. Requests for Admissions	497
8. Restrictions on Medical Records.....	498
9. Restrictions on Tax Records.....	498
C. OBLIGATION TO PRODUCE EVIDENCE	498
1. <i>In Camera</i> Review	498
2. Privacy Act Objections	498
3. <i>Pro Se</i> Complainants.....	499
4. Protective Orders	499
5. Tax Returns	500
D. MOTIONS TO COMPEL DISCOVERY	501
E. DISCOVERY SANCTIONS	501
1. Justice Memo Halting Fees as Sanctions	503
2. Reinstatement of Fees as Sanctions	505
3. Good Faith Obligation.....	507
4. Sanctions Against Complainants	508
5. Sanction Procedures	509
6. Sanction Orders	510
F. PSYCHOTHERAPIST PRIVILEGE	510
IV. HEARING PROCEDURES	513
A. PRELIMINARY HEARING MATTERS.....	513
1. Persons Allowed at Hearing	513
2. Off-The-Record Discussions.....	514
3. Presentation of Evidence.....	514
4. Reasonable Accommodation of Complainant and Witnesses.....	514
5. Introductory and Opening Statements	514
B. EVIDENCE	514
1. Best Evidence.....	514
2. Destruction of Evidence	514

3.	Documentary Evidence	517
4.	Failure to Produce Evidence	518
5.	Hearsay Evidence	518
6.	Relevancy	519
7.	Unduly Repetitious Evidence	519
8.	Use of "Private" Documents	519
C.	WITNESSES	520
1.	Alternative Means of Testimony	520
2.	Designation of Witnesses	521
3.	EEO Counselors	521
4.	Exclusion of Complainant	521
5.	Exclusion of Witnesses	522
6.	Failure to Produce Witness	524
7.	Presence of Complainant	525
8.	Representations of Counsel	525
9.	Statement During Settlement	525
10.	Telephonic Hearings and Testimony	525
11.	Video Hearings and Testimony.....	528
12.	Witness Intimidation	529
D.	CREDIBILITY DETERMINATIONS	530
1.	Appeal of Credibility Findings	530
2.	Corroboration Evidence	531
3.	Credibility vs. Veracity.....	531
4.	Demeanor	531
5.	Findings Based on Assumptions.....	532
6.	Findings Based on Evidence of Record	533
7.	Findings Related to Motivation.....	533
8.	Impeachment Evidence	533
9.	Internally Inconsistent Testimony	534
10.	Leading Questions	534
11.	Plausibility of Testimony.....	535
12.	Previous Credibility Findings	535
13.	Qualifications of Witness	535
14.	Refusal to Testify	535
15.	Relationship of Parties.....	535
16.	Rules of Deference	535
17.	Scripted Testimony	536
18.	Self-Serving Testimony.....	537
19.	Split Credibility Findings.....	537
20.	Testimony and Findings in Other Proceedings	537
E.	ALLEGATIONS RAISED AT HEARING	537
F.	OBJECTIONS	538
G.	OFFICIAL TIME	538
H.	ROLE OF JUDGE	538
1.	Regulating Conduct of Hearing	538
2.	Developing the Record	539
3.	Amended Complaints	540
I.	RESPONSIBLE MANAGEMENT OFFICIAL	541
J.	RECORD OF HEARING	541
K.	CLOSING STATEMENTS	541
L.	CONDUCT OF REPRESENTATIVES	542
1.	<i>Ex Parte</i> Communications	542
M.	CLOSING THE HEARING RECORD.....	542
V.	POSTHEARING MATTERS	542
A.	DECISION OF ADMINISTRATIVE JUDGE	542
1.	Adopting Position of Parties	543
2.	Bench Decisions	543
3.	Contents of Decision.....	544
4.	Decision by Judge Not Presiding.....	544
5.	Default Judgments	544
6.	Delay in Decisions.....	545

7. Directed Verdict	545
8. Errata Decisions	546
9. External Evidence	546
10. Relief	546
B. BIAS	546

CHAPTER 7: FINAL AGENCY ACTION549

I. FINAL AGENCY ORDER AFTER HEARING	550
A. TIME LIMITS	550
B. PROCEDURAL ISSUES	551
II. FINAL AGENCY DECISION WITHOUT HEARING	551
A. COMPLAINANT’S CONSIDERATIONS.....	552
B. CONTENTS OF FINAL DECISION	553
1. Credibility Findings.....	553
C. ADOPTING FINDINGS OF INVESTIGATOR	554
D. REASONS ARTICULATED	554
E. DECIDING OFFICIAL	554
F. RESCINDING FINAL AGENCY DECISION	555
1. Draft Decisions.....	556
G. ADJUDICATION IN LIEU OF DISMISSAL	556
III. REQUIREMENTS OF FINAL AGENCY ACTION	556
A. APPEAL RIGHTS	557
1. Partial Dismissals	557
2. Failure to Issue Final Agency Action.....	557
B. ATTORNEY FEES	558
IV. FILING OF CIVIL ACTION	559
V. ENFORCEMENT OF FINAL AGENCY DECISIONS	560

CHAPTER 8: EEOC APPEALS.....563

I. APPEALABLE ACTIONS	563
A. FINAL AGENCY ACTIONS	563
1. Failure to Issue Final Agency Action.....	564
B. FINAL AGENCY DECISIONS	565
1. Failure to Issue Final Agency Decision.....	565
C. MSPB AND NEGOTIATED GRIEVANCE DECISIONS	566
II. PROCEDURES FOR APPEAL—COMPLAINANTS	566
A. TIME LIMITS	567
1. Dismissal by Administrative Judge	567
2. Computation of Time	567
3. Decisions Amended by Administrative Judge	568
4. Waiver of Time Limit	568
5. Agency Failure to Issue Final Decision/Order	570
6. Filing With Wrong Agency	571
7. Filing by Telephone	571
B. SERVICE OF DOCUMENTS	572
III. PROCEDURES FOR APPEAL—AGENCIES	572
A. TIME LIMITS	572
B. SERVICE OF DOCUMENTS.....	573
C. INTERIM RELIEF	573
D. BRIEF IN SUPPORT OF APPEAL	573
IV. RECORD ON APPEAL	573
A. COMPLAINT FILE	574
B. IDENTIFICATION OF PARTIES.....	575
C. SUPPLEMENTATION OF RECORD	575
1. New Evidence	576
D. SUBMISSION OF EVIDENCE	576
E. DISMISSED CLAIMS	577
V. SCOPE OF REVIEW	577
A. JURISDICTIONAL ISSUES	577
B. PRESERVING ISSUES FOR APPEAL	577
1. Withdrawal of Hearing Request.....	577

2. Agency Implementation of Decision	577
C. HARMLESS ERROR	577
D. SELF-CORRECTION OF ERROR	577
1. Effect of Other Cases	578
E. MULTIPLE CLAIMS	578
F. NEW CLAIMS	578
1. Claims Not Raised by Parties	578
G. CONSOLIDATION OF APPEALS	579
VI. STANDARDS OF REVIEW	579
A. ADMINISTRATIVE JUDGE DECISIONS	580
1. Summary Judgment	580
2. Witness Credibility	580
3. Burdens of Persuasion	581
4. Prehearing and Hearing Rulings.....	582
5. Basis of Discrimination	582
6. Factual Errors	582
7. Attorney Fee Awards	582
B. FINAL AGENCY DECISIONS	582
1. Credibility Determinations	582
C. PROCESSING COMPLAINTS	583
D. <i>PRO SE</i> COMPLAINANTS.....	583
E. SHORT-FORM DECISIONS.....	583
F. PRECEDENTIAL VALUE OF EEOC DECISIONS	584
G. PRECEDENTIAL VALUE OF DECISIONS BY OTHER AGENCIES	584
H. INTERPRETATION OF COURT DECISIONS	584
VII. REVIEW OF SANCTIONS	584
A. AJ RESPONSIBILITIES PRIOR TO ISSUING SANCTIONS.....	585
B. CONFUSING/BURDENSOME/ONEROUS AJ ORDERS	587
C. DEFAULT JUDGMENT.....	588
D. SANCTIONS AGAINST AGENCIES	588
1. Failure to Timely Complete Investigation/Issue Final Agency Decision.....	589
2. Failure to Produce or Destruction of Documents.....	590
3. Failure to Produce or Destruction of Supervisory Notes	594
4. Failure to Produce Witnesses or Secure Affidavits.....	595
5. Failure to Respond to Judge's Orders.....	596
6. Failure to Produce File on Appeal.....	598
7. Failure to Produce Hearing Transcript	599
8. Default Judgments	600
9. Intrusion by Agency Counsel in Case Processing	613
E. ATTORNEY FEES AS SANCTIONS	614
1. Fees as Sanctions Under ADEA.....	615
2. Appointment of Attorney as Sanction	616
F. SANCTIONS AGAINST COMPLAINANTS	616
1. Assessing Costs Against a Complainant	616
2. Attorney Fees Awards.....	616
3. Contumacious Conduct.....	616
4. Discovery Conduct	618
5. Failure to Appear at Hearing	619
6. Failure to Comply With AJ's Orders/Requests/Instructions.....	620
7. Imposing Settlement as a Form of Sanctions	624
8. Mutual Failures.....	624
9. Notice	624
10. Threatening Conduct.....	625
G. SANCTIONS AT APPELLATE LEVEL	625
1. Sanctions on Procedural Dismissals.....	627
H. EFFECT OF DISMISSAL ON SANCTIONS.....	627
VIII. COMPLIANCE AND ENFORCEMENT	628
A. ENFORCEMENT OF COMMISSION DECISIONS	628
1. Remands.....	633
B. PREVENTATIVE RELIEF	633
C. COMPLIANCE	635

IX. FILING OF CIVIL ACTION	636
A. EFFECT OF FILING	636
B. TIME FOR FILING.....	636
X. REQUESTS FOR RECONSIDERATION	637
A. PROCEDURES AND TIME LIMITS	637
B. EFFECT OF REQUEST	638
C. CRITERIA FOR RECONSIDERATION	638
1. Clearly Erroneous Interpretation	639
2. Substantial Impact.....	640
3. New and Material Evidence	640
4. Inconsequential Factual Error.....	641
5. Commission's Own Motion.....	641
XI. REQUESTS FOR CLARIFICATION	641
A. REQUESTS FOR ENFORCEMENT	642
XII. APPEAL OF EEOC DECISIONS	642
A. DELAY IN EEOC DECISIONS.....	642

CHAPTER 9: REPRESENTATIVES AND OFFICIAL TIME645

I. RIGHT TO REPRESENTATION	645
II. AGENCY REPRESENTATIVES	645
A. ROLE OF AGENCY REPRESENTATIVE.....	645
1. Definition of Agency Representative.....	645
2. Role During Agency Processing of Complaint; Intrusion/Interference Complaints	645
3. Attorney-Client Relationship	652
B. SCOPE OF REPRESENTATION	653
C. EEOC RESTRICTIONS ON AGENCY REPRESENTATIVES	653
D. FLRA RESTRICTIONS ON AGENCY REPRESENTATIVES	654
1. Disciplinary Meetings.....	654
2. Formal Meetings.....	654
III. COMPLAINANTS' REPRESENTATIVES.....	657
A. SCOPE OF REPRESENTATION	657
B. DESIGNATION OF REPRESENTATIVE	658
C. SERVICE OF DOCUMENTS	659
D. UNION REPRESENTATIVES	659
E. WITHDRAWAL FROM REPRESENTATION	659
F. COMPLAINTS BY REPRESENTATIVES	659
IV. WAIVER OF ATTORNEY-CLIENT PRIVILEGE OR WORK PRODUCT; AGENCY DELIBERATIVE PROCESS	659
V. EXCLUSION, DISQUALIFICATION, AND LIMITATIONS ON REPRESENTATIVES	660
A. CONFLICTS OF INTEREST	660
1. Official Time Restrictions	661
B. EXCLUSION OF REPRESENTATIVES	661
1. Exclusion Procedure.....	661
2. Authority for Exclusion.....	662
3. Standards for Exclusion.....	662
4. Exclusion Through Settlement.....	664
C. DISQUALIFICATION AND SUSPENSION	665
1. Procedure for Disqualification and Suspension.....	665
2. Standard for Disqualification and Suspension	666
3. Referral to Bar	668
D. USE OF SANCTIONS	669
VI. USE OF OFFICIAL TIME	669
A. OFFICIAL TIME COMPLAINTS	669
B. DEFINITION OF REASONABLE TIME	670
1. Consultations With Representative	671
2. EEO Counseling	671
3. EEO Meetings.....	672
4. EEOC Settlement Conferences	672
5. Preparation Time	672
6. Soliciting Evidence on Agency Time	672
7. Official Time Policies.....	672
8. Official Time Requests and Denials	672

9. Duty Status of Employee	673
10. Civil Actions	673
C. REPRESENTATIVES AND OFFICIAL TIME	673
1. Restrictions on Representatives' Time	673
2. Official Time Complaints	674
3. Representation of Applicants for Employment	676
4. Representation of Former Employees	676
D. TECHNICAL REPRESENTATIVES	676
E. COMPENSATION AND BENEFIT ISSUES.....	677
1. Overtime	677
2. Restoration of Time.....	677
3. Payment of Costs	677
VII. USE OF AGENCY EQUIPMENT AND RESOURCES	678
VIII. PROCESSING OFFICIAL TIME COMPLAINTS	678

CHAPTER 10: THEORIES OF DISCRIMINATION— INTENTIONAL DISCRIMINATION.....681

I. CIRCUMSTANTIAL EVIDENCE CASES	682
A. EVOLUTION OF “DISPARATE TREATMENT” THEORY	682
1. Elements of <i>Prima Facie</i> Case	684
2. Penalties	686
3. Effect of Regulations and Policies	686
4. Discretionary Acts	686
5. Performance Expectations	686
B. BASIS FOR DISPARATE TREATMENT	687
1. Comparison Employees	688
2. No Comparison Employees	693
3. Subjective Criteria	695
4. Accuracy of Beliefs	696
C. APPLICATION FOR POSITION	696
1. Cancellation of Position	696
2. Constructive Application.....	696
3. Multiple Vacancies	696
D. QUALIFICATION FOR POSITION	696
E. ALLEGED DISCRIMINATING OFFICIALS.....	696
F. ELEMENT OF INTENT	697
1. Knowledge of Protected Group	698
2. Genuine Mistakes.....	699
3. Intent of Third Parties	701
G. DISCRIMINATORY INFLUENCE OF OTHERS—THE “CAT’S PAW”	702
H. DIRECT EVIDENCE OF DISCRIMINATION	706
II. AGENCY BURDEN OF PRODUCTION—CIRCUMSTANTIAL EVIDENCE.....	706
A. DISPARATE TREATMENT	707
1. Best Interests of Agency	710
2. Experience	710
3. Failure of Agency to Cooperate	710
4. Failure of Agency to Provide Reasons	710
5. Leave Restrictions	712
6. Mandatory Sanctions	712
7. Natural Consequences of Discriminatory Acts	712
8. Nonselections and Promotions	712
9. Past Discipline	715
10. <i>Post Hoc</i> Justifications.....	715
11. Probationary Employees	715
12. Similarly Situated Employees; Meaningful Distinctions	716
13. Training.....	717
14. Work Habits.....	718
B. WITNESS CREDIBILITY	718
C. AFFIRMATIVE ACTION PLANS	719
D. AVOIDING ADVERSE IMPACT LITIGATION.....	720

E.	RELIANCE ON AGENCY REGULATIONS	721
F.	RELIANCE ON COLLECTIVE BARGAINING AGREEMENT	722
G.	RELIANCE ON STATE LAW	722
H.	CORRECTING DISCRIMINATION BY NONSUPERVISORY PERSONNEL	722
III.	PRETEXT—CIRCUMSTANTIAL EVIDENCE CASES	722
A.	<i>HICKS</i> AND THE BURDEN OF PERSUASION	723
1.	Commission Interpretation of <i>Hicks</i>	727
2.	Agency’s Burden Under <i>Hicks</i>	730
3.	Proof of Intent Under <i>Hicks</i>	731
4.	<i>Hicks</i> in Jury Cases.....	733
5.	Case Law Prior to <i>Hicks</i>	733
B.	CAUSAL CONNECTION	734
1.	Disciplinary Cases	735
2.	Hiring Freezes	736
3.	Inadequate Resources	737
4.	Light Duty	737
5.	Nonselection	737
6.	Preselection	740
7.	Qualifications	741
8.	Receipt of Unemployment Compensation	741
9.	Test Results	741
10.	Training	741
11.	Work Environment	742
12.	Zero Tolerance Policies.....	742
C.	INCONSISTENT EVIDENCE/TESTIMONY	743
D.	PRIOR DISCRIMINATION	744
E.	STATISTICAL EVIDENCE	744
F.	PROCEDURAL IRREGULARITIES	745
G.	COLLECTIVE BARGAINING AGREEMENTS	746
H.	DEROGATORY COMMENTS	746
I.	EVIDENCE OF BIAS	747
1.	Past Statements and Actions	748
2.	“Me Too” Evidence.....	748
J.	TIMING OF AGENCY ACTION.....	749
K.	CROSS EXAMINATION	749
1.	Inconsistent Statements	749
L.	EQUITABLE AND COLLATERAL ESTOPPEL.....	750
M.	COURT ORDERS	750
N.	ALTERNATIVE, NONDISCRIMINATORY REASONS	750
IV.	DIRECT EVIDENCE AND “MIXED MOTIVE” CASES	751
A.	THE <i>PRICE WATERHOUSE</i> ANALYSIS	752
B.	CIVIL RIGHTS ACT OF 1991	756
1.	ADEA.....	757
C.	<i>DESERT PALACE</i> , CIRCUMSTANTIAL EVIDENCE AND THE MIXED-MOTIVE ANALYSIS	757
D.	DEFINING DIRECT EVIDENCE	760
E.	MIXED MOTIVES IN HOSTILE ENVIRONMENT CASES	764
F.	REBUTTING MIXED MOTIVE EVIDENCE	765
V.	LIMITATIONS ON LIABILITY	768
A.	AFTER-ACQUIRED EVIDENCE DOCTRINE	768
B.	STANDARD OF PROOF	771
C.	THE “CLEAR AND CONVINCING” STANDARD	773

CHAPTER 11: THEORIES OF DISCRIMINATION—ADVERSE IMPACT777

I.	THE <i>GRIGGS</i> CASE	777
II.	THE <i>WARDS COVE</i> CASE	778
III.	THE CIVIL RIGHTS ACT OF 1991	780
A.	<i>PRIMA FACIE</i> CASE	781
1.	Agency’s Investigatory Burden	782
B.	AGENCY’S BURDEN—BUSINESS NECESSITY	782
1.	Personal Protective Equipment.....	782
2.	Criminal Arrests	783

C.	ALTERNATIVE METHODS	786
D.	SUBJECTIVE SELECTION PRACTICES	786
E.	STATUTE OF LIMITATIONS	786
F.	AGE DISCRIMINATION IN EMPLOYMENT ACT	786
G.	PREGNANCY DISCRIMINATION ACT	787
IV.	UNCONSCIOUS/IMPLICIT BIAS	787
V.	UNIFORM GUIDELINES ON EMPLOYEE SELECTION PROCEDURES	789
A.	“BOTTOM LINE” CONCEPT	789
B.	VALIDITY STUDIES	792
C.	SUITABLE ALTERNATIVES	792
1.	Affirmative Action	793
VI.	AFFIRMATIVE ACTION PROGRAMS	793
A.	RECRUITMENT	794
1.	Responsibilities of OPM	794
2.	Responsibilities of Agencies	794
B.	SELECTION AND ADVANCEMENT	795
1.	Conditions for Affirmative Action	796
2.	Establishing Affirmative Action Plans	796
3.	Effects of Adopting a Plan.....	796
4.	Using Plan as Affirmative Defense	796
5.	Training Programs.....	796
C.	VIOLATIONS OF AFFIRMATIVE ACTION PLANS	796
1.	Court Orders and Consent Decrees	797
2.	Special Emphasis Programs.....	797

CHAPTER 12: THEORIES OF DISCRIMINATION— HOSTILE ENVIRONMENT.....799

I.	TANGIBLE EMPLOYMENT ACTION: SEXUAL HARASSMENT	801
A.	DEFINITIONS	801
1.	Link With Hostile Environment.....	801
2.	Supervisors	802
3.	Tangible Employment Action	803
4.	Tangible Employment Actions on Bases Other Than Sex.....	804
B.	ELEMENTS OF A CLAIM	805
1.	Causal Connection With Gender.....	805
2.	Knowledge of Agency	806
3.	Preferential Treatment for Submission to Advances	806
4.	<i>Prima Facie</i> Case	808
5.	Reprisal	808
6.	Tangible Employment Actions	809
7.	Threats of Tangible Employment Actions	809
8.	Unwelcome Advances	810
9.	Violent Responses to Harassment	810
II.	HOSTILE ENVIRONMENT/HARASSMENT, GENERALLY	811
A.	<i>MERITOR</i> AND <i>HARRIS</i>	811
B.	BURDENS OF PROOF	813
1.	“ <i>Prima Facie</i> ” Case	813
2.	Agency’s Burden	813
C.	FRAGMENTED OR PIECEMEAL ANALYSIS.....	814
III.	HOSTILE ENVIRONMENT SEXUAL HARASSMENT	816
A.	NATURE OF CONDUCT—PROTECTED BASIS	816
1.	Gender-Based Harassment	817
2.	Sexual Conduct	820
B.	UNWELCOME ADVANCES	825
1.	Consensual Conduct	830
2.	Harassment of Manager by Subordinate.....	831
C.	SEVERE OR PERVASIVE REQUIREMENT	831
1.	By Supervisor.....	832
2.	Comments and Rumors.....	832
3.	Conduct Directed Toward Others.....	833

4.	Context in Which the Alleged Harassment Occurred	834
5.	Continuous Conduct or Presence of Harasser	834
6.	Corroborative Evidence and Demeanor Evidence	834
7.	Harassment Outside of the Workplace	835
8.	Isolated or One-Time Incidents	837
9.	Low-Level Harassment	839
10.	Name Calling.....	840
11.	Nature of Work	840
12.	Offensive Looks.....	841
13.	Passage of Time Between Incidents	841
14.	Physical Contact or Conduct	843
15.	Physical Proximity	845
16.	Pronoun Usage.....	845
17.	Psychological Harm	845
18.	“Reasonable Person” vs. “Reasonable Woman”	848
19.	Repeated Incidents.....	849
20.	Routine Work Assignments.....	850
21.	Rumors	850
22.	Severity	851
23.	Severity and Frequency of Conduct—Sliding Scale	851
24.	Sexual Innuendo.....	852
25.	Subjective Test.....	852
26.	Tangible Employment Actions	853
27.	Trivial or Inconsequential Conduct—Sexual Harassment.....	854
28.	Verbal Abuse	855
29.	Work Performance and the “Hostility” Requirement	855
30.	Work Scrutiny and Increased Assignments	855
IV.	SEX OF PERPETRATOR AND VICTIM	856
A.	HARASSMENT OF MALE EMPLOYEES	856
1.	Environment Hostile Toward Females	858
2.	Complaints by Alleged Harasser.....	860
B.	SAME-SEX HARASSMENT AND <i>ONCALE</i>	860
C.	<i>ONCALE</i> —ESTABLISHING SAME-SEX HARASSMENT AS A CLAIM.....	861
1.	Gender Stereotyping	862
2.	Commission Cases	862
D.	HARASSMENT OF BOTH SEXES	866
V.	OVERVIEW OF LIABILITY FOR HARASSMENT	868
A.	THE RULES OF AGENCY: THE MASTER-SERVANT RELATIONSHIP	869
B.	BASIC RULES OF LIABILITY	869
C.	TANGIBLE EMPLOYMENT ACTION HARASSMENT	870
1.	Supervisors	870
2.	Supervisors Who Lack Authority.....	870
D.	HOSTILE ENVIRONMENT HARASSMENT—SUPERVISORS AND COWORKERS	871
1.	Prompt and Effective Corrective Action.....	871
2.	Restoration of Employee Benefits	888
3.	Duty to Make Follow-Up Inquiries	889
4.	Past Harassment by Perpetrator	890
5.	Cessation of Conduct	890
E.	HOSTILE ENVIRONMENT HARASSMENT—SUPERVISORS TO SUBORDINATE EMPLOYEES.....	891
1.	Definition of Supervisor	892
2.	Knowledge of Agency	897
3.	Reasonable Care and the Affirmative Defense	897
4.	Harassment Policies	901
5.	Failure to Avoid Harm	901
6.	Harassment of Detailed Employees.....	903
7.	Prompt Remedial Action	904
8.	“Alter Ego” Theory.....	904
F.	HOSTILE ENVIRONMENT HARASSMENT—COWORKER TO COWORKER	904
1.	Knowledge of Agency	904
2.	Agency’s Duty to Investigate	906
3.	Failure to Cooperate in Investigation.....	908

G. HOSTILE ENVIRONMENT HARASSMENT—SUBORDINATE EMPLOYEES TO SUPERVISORS.....	908
H. HOSTILE ENVIRONMENT HARASSMENT—NON-EMPLOYEES TO EMPLOYEES	910
1. Employee Organizations	912
2. Hospitals/Veterans Affairs	912
I. SUMMARY JUDGMENT	914
J. DISCIPLINE OF RMO	915
1. Harassers' Claims Over Discipline	916
K. AGENCY-WIDE CORRECTIVE MEASURES	917
L. CONSTRUCTIVE ADVERSE ACTIONS	917
M. MOOTNESS	919
VI. PROOF PROBLEMS	919
VII. OTHER BASES OF HARASSMENT	920
A. PROPOSED PART 1609.....	920
B. INTERSECTION OF TWO OR MORE PROTECTED BASES.....	923
C. RELIGION-BASED HARASSMENT	925
1. Tangible Employment Actions	925
2. Hostile Work Environment	925
3. Anti-Harassment and Proselytizing	930
4. Liability.....	931
D. RACE-BASED HARASSMENT	931
1. Tangible Employment Actions	932
2. Racial Slurs.....	932
3. One-Time Incidents	936
4. Repeated Incidents.....	937
5. Incidents Occurring Outside of the Complainant's Presence.....	938
6. Increased Work Scrutiny and Assignments.....	939
7. Same Race Harassment.....	940
8. Racist Symbols.....	940
9. Microaggressions	944
10. Inferiority/Intelligence/Cultural References	946
11. Conduct Directed Toward Others.....	946
12. Subjective Test.....	947
E. NATIONAL ORIGIN-BASED HARASSMENT	947
1. Severe or Pervasive Analysis	948
2. Slurs.....	949
3. Liability.....	950
F. DISABILITY-BASED HARASSMENT	950
1. Comments Made Outside of the Complainant's Presence.....	957
2. Increased Scrutiny of Work and Assignments.....	957
3. Failure to Accommodate	958
G. AGE-BASED HARASSMENT	959
H. REPRISAL-BASED HARASSMENT	960
1. Harassment by Filing Civil Action.....	962
VIII. SOCIAL MEDIA AND ONLINE HARASSMENT	963
A. CLAIMS OF HARASSMENT VIA SOCIAL MEDIA	963
B. LINK TO THE WORKPLACE/AGENCY INVOLVEMENT	964
C. DISCIPLINING SOCIAL MEDIA HARASSERS	966
D. PRIVACY VIOLATIONS RELATED TO SOCIAL MEDIA POSTS.....	966

CHAPTER 13: BASES OF DISCRIMINATION UNDER TITLE VII967

I. RACE AND COLOR DISCRIMINATION	968
A. THE DIFFERENCE BETWEEN RACE AND COLOR	968
1. Same Race or Color.....	969
2. Racial Stereotyping	969
B. REVERSE DISCRIMINATION	969
1. Beneficent Discrimination	970
2. Remedial Discrimination	970
C. MARITAL STATUS AND OTHER ASSOCIATIONS	970
D. SICKLE CELL ANEMIA	971
E. CRIMINAL ARRESTS AND CONVICTIONS	971
F. POLITICAL STATEMENTS	974

G.	GROOMING CODES	974
II.	SEX DISCRIMINATION	975
A.	<i>BONA FIDE</i> OCCUPATIONAL QUALIFICATION	975
B.	SENIORITY SYSTEMS	981
C.	MARITAL STATUS	981
D.	SEXUAL ORIENTATION; TRANSGENDER STATUS/GENDER IDENTIFICATION.....	981
1.	<i>Bostock v. Clayton</i> : Recognizing Sexual Orientation and Gender Identity Under Title VII.....	981
2.	Gender Stereotyping	984
3.	History of Commission Cases on Transgender Status and Sexual Orientation.....	985
4.	Post- <i>Bostock</i> Commission Decisions.....	992
5.	Gender Identification—Bathroom Usage	994
6.	Religious Objections	995
7.	Sexual Orientation, Transgender Status, and the Courts.....	996
8.	Prohibited Personnel Practice	999
9.	Office of Special Counsel.....	1000
E.	ASSOCIATIONAL DISCRIMINATION.....	1000
F.	CAREGIVER RESPONSIBILITIES.....	1001
G.	FALSE ALLEGATIONS OF SEXUAL HARASSMENT	1002
H.	RECRUITMENT	1003
I.	PREGNANCY DISCRIMINATION ACT	1003
1.	Burdens of Proof	1004
2.	Direct Evidence of Pregnancy Discrimination	1009
3.	Disparate Treatment	1010
4.	Past and Potential Pregnancy.....	1012
5.	Remarks About Pregnancy	1013
6.	Breast-Feeding	1014
7.	Abortion and Contraception.....	1015
8.	Marital Status	1015
9.	Leave	1015
10.	Light Duty	1016
11.	BFOQ Defense	1017
J.	GENDER-BASED SUBJECTIVE CRITERIA	1017
K.	DRESS CODES AND GROOMING STANDARDS	1017
L.	MEDICAL EXAMS.....	1019
M.	COLLECTION OF GENDER INFORMATION.....	1019
N.	EQUAL PAY ACT	1019
1.	Regulatory Guidance	1019
2.	EPA Analysis and Burdens of Proof/Substantially Equal Work	1019
3.	Relationship to Title VII	1026
4.	Liquidated Damages	1026
O.	“SEX PLUS” DISCRIMINATION	1026
III.	NATIONAL ORIGIN	1026
A.	CITIZENSHIP	1028
B.	SECURITY CLEARANCES	1029
C.	MARITAL STATUS AND OTHER ASSOCIATIONS	1029
1.	Client and Customer Preferences.....	1029
D.	SELECTION PROCEDURES	1029
1.	Bottom Line Concept	1029
2.	Height and Weight Requirements	1029
3.	Education	1029
E.	LANGUAGE FLUENCY	1030
1.	Accent Discrimination	1031
2.	Foreign Languages/Bilingual Requirements	1036
3.	“Speak English Only” Rule and Restrictive Language Policies	1036
F.	MIXED NATIONALITY	1042
G.	<i>BONA FIDE</i> OCCUPATIONAL QUALIFICATION	1042
H.	NATIVE AMERICANS	1042
IV.	RELIGION	1042
A.	2020 ENFORCEMENT GUIDANCE REVISIONS	1043
B.	DEFINITION	1043
1.	Nature and Sincerity of Belief	1045

C.	INTENTIONAL DISCRIMINATION CASES.....	1046
1.	Discrimination Within Religions.....	1046
2.	Failure to Hold Belief	1046
3.	Espousal of Beliefs	1046
4.	Clothing and Religious Articles.....	1050
5.	Observances on Agency Premises.....	1050
6.	Same-Sex Marriage and Communications With LGBTQ Content	1050
7.	National Security Interests.....	1051
D.	ACCOMMODATION OF BELIEFS	1051
1.	<i>Prima Facie</i> Case	1052
2.	Request for Accommodation	1052
3.	Privacy Act Considerations	1053
4.	Accuracy of Employee's Beliefs	1053
5.	Practices Requiring Accommodation	1054
6.	Choice of Accommodation.....	1054
E.	ACCOMMODATION PROCEDURES AND ANALYSIS	1055
F.	SPECIFIC ACCOMMODATIONS.....	1057
1.	Agency Communications.....	1057
2.	Agency Investigations, Cooperation in	1057
3.	Assignments of Work	1058
4.	COVID-19.....	1058
5.	Dress and Grooming Standards	1058
6.	Drug Rehabilitation Programs	1060
7.	Health Effects of Religious Observances	1060
8.	Optional Religious Activities	1060
9.	Personal Effects	1062
10.	Personal Identification.....	1063
11.	Prayer and Proselytizing	1063
12.	Probationary Employees	1064
13.	Reassignments.....	1064
14.	"Requirements of the Job"	1064
15.	Schedules	1064
16.	Teleworking.....	1067
17.	Use of Agency Facilities.....	1067
G.	UNDUE HARDSHIP	1067
1.	Collective Bargaining Agreements	1068
2.	Espousing Religious Ideas	1070
3.	Overtime	1071
4.	Photographs	1071
5.	Postal Service Oath	1071
6.	Preemployment Inquiries	1072
7.	Selection Schedules	1072
8.	Sex-Segregated Schools	1072
9.	Work Schedules	1072
V.	WHITE HOUSE GUIDELINES ON RELIGION	1077
A.	EXPRESSION IN WORKPLACE	1077
1.	Private Work Areas.....	1077
2.	Expression Among Employees.....	1077
3.	Expression Directed at Employees.....	1077
4.	Expression in Public Areas	1078
B.	DISCRIMINATION BASED ON RELIGION	1078
1.	Personnel Actions and Employment Conditions.....	1078
2.	Hostile Environment	1079
3.	<i>Bona Fide</i> Occupational Requirement	1079
C.	RELIGIOUS ACCOMMODATION	1080
VI.	CIVIL RIGHTS ACT OF 1991	1080
A.	PURPOSE OF LEGISLATION	1080
B.	DISCRIMINATION REMEDIES	1081
1.	Intentional Discrimination	1081
2.	Punitive Damages	1081
3.	Compensatory Damages	1081

4. Expert Witness Fees	1081
5. Interest on Back Pay Awards	1081
6. Retroactivity of Remedies	1081
7. Jury Trials	1085
C. BURDENS OF PROOF	1085
1. Intentional Discrimination Cases.....	1085
2. Disparate or Adverse Impact Cases	1085
3. Seniority Systems	1086
4. Consent Orders and Decrees	1086
D. STATUTE OF LIMITATIONS	1086
1. Age Discrimination in Employment Act.....	1086
E. LEGISLATIVE BRANCH EMPLOYEES	1086
1. House of Representatives Employees	1086
2. U.S. Senate Employees	1087
VII. CONGRESSIONAL ACCOUNTABILITY ACT—LEGISLATIVE EMPLOYEES	1090
A. EMPLOYEES COVERED.....	1090
B. COVERAGE PROVIDED	1090
C. RIGHTS AND REMEDIES	1090
D. ATTORNEY FEES.....	1091
E. ENFORCEMENT	1091
F. ADMINISTRATIVE AND JUDICIAL PROCEDURES	1092
1. Counseling.....	1092
2. Mediation.....	1093
G. ELECTION OF REMEDIES	1093
1. Administrative Hearing.....	1093
2. Appeals.....	1094
3. Judicial Review.....	1094
H. CIVIL ACTIONS.....	1094

CHAPTER 14: REHABILITATION ACT 1095

I. COVERAGE UNDER THE REHABILITATION ACT	1097
A. IMPACT OF THE ADA AMENDMENTS ACT OF 2008.....	1097
1. Effective Date.....	1098
2. ADAAA Regulations.....	1098
B. QUALIFIED INDIVIDUALS	1098
1. Individuals Without Disabilities	1099
2. Drug and Alcohol Abuse	1100
C. AGENCIES AND EMPLOYEES COVERED	1100
1. Legislative and Judicial Employees	1100
2. Probationary Employees	1100
3. Temporary Employees.....	1101
4. Association With Persons With Disabilities	1101
5. Disabled Veterans	1103
D. THEORIES OF DISCRIMINATION	1103
II. DEFINING QUALIFIED INDIVIDUALS	1103
A. PHYSICAL AND MENTAL IMPAIRMENTS	1105
1. Record of Impairment.....	1105
2. Regarded as Impairments	1106
B. MAJOR LIFE ACTIVITIES	1106
1. <i>Toyota</i> and Major Life Activities	1107
2. Major Bodily Functions	1108
3. Working	1109
C. SUBSTANTIAL LIMITATION UNDER THE ADA	1109
1. Substantial Limitation: Commission's Past View	1109
2. Substantial Limitation and the <i>Sutton</i> Trilogy	1110
3. <i>Toyota</i> and Substantial Limitation	1112
D. SUBSTANTIAL LIMITATION UNDER THE ADAAA—RULES OF CONSTRUCTION	1116
1. Broad and Inclusive Coverage	1117
2. Most People Comparison	1117
3. Extensive Analysis Not Required	1118
4. Individualized Assessment	1119

5. No Scientific or Medical Evidence Required.....	1119
6. Mitigating Medications, Measures and Devices	1119
7. Episodic Conditions; Conditions in Remission	1121
8. Limitation of Major Life Activities.....	1123
9. Transitory or Temporary and Minor Impairments	1124
10. COVID-19.....	1127
11. A Common-Sense Approach.....	1127
12. Substantial Limitation on Working	1127
13. Predictable Assessments.....	1130
14. Condition, Manner and Duration	1131
15. Proving Substantial Limitation.....	1132
E. CASE LAW ANALYSIS UNDER THE ADAAA	1133
F. RECORD OF DISABILITIES	1138
G. REGARDED AS DISABILITIES.....	1139
1. <i>Nassau County School Board v. Arline</i>	1139
2. Regarded as Disabilities and Working	1143
3. Regarded as and Other Major Life Activities	1148
H. DEMONSTRATION OF QUALIFIED	1150
1. The “Relevant Position”.....	1151
2. Agency Efforts to Reasonably Accommodate in Determining “Qualified”.....	1152
3. Essential Job Functions, Generally.....	1153
4. Nexus Requirement	1154
5. Job Attendance.....	1156
6. Performance of Essential Job Functions.....	1167
7. How Essential Job Functions Are Performed	1170
8. Essential Job Functions and Production Standards.....	1171
9. Essential Job Functions and Position Descriptions.....	1172
10. Essential Job Functions and Performance Ratings	1172
11. Removing Essential Job Functions	1172
12. Reassignment and Modifying Essential Functions	1173
13. Essential Functions and Position Requirements	1174
14. Inability to Perform in Current Position	1174
15. Reasonable Accommodation	1175
16. Effect of Disability Retirement	1176
I. KNOWLEDGE OF DISABILITY.....	1177
1. Intentional Discrimination.....	1178
2. Constructive Knowledge.....	1178
J. REQUESTS FOR ACCOMMODATION	1180
K. MEDICAL EVIDENCE	1182
1. Reasonable Medical Documentation.....	1183
2. Updating Medical Information.....	1186
3. Agency’s Burden—Individualized Assessment.....	1187
III. SPECIFIC DISABILITIES.....	1187
A. DRUG AND ALCOHOL ABUSE	1187
1. Statutory Basis.....	1188
2. 1991 Civil Rights Act and ADA	1188
3. Evidence of Disability	1190
IV. PROCESSING COMPLAINTS UNDER REHABILITATION ACT	1191
A. INITIATION OF COMPLAINT	1191
1. Combination With Title VII Bases	1191
B. COMPLAINT STAGE	1191
1. Investigations	1192
V. ANALYZING DISPARATE TREATMENT COMPLAINTS UNDER REHABILITATION ACT.....	1192
A. INTENTIONAL DISCRIMINATION CASES: ANALYSIS	1192
1. <i>Prima Facie</i> Case.....	1192
2. Burden Shifting.....	1193
B. INTENTIONAL DISCRIMINATION CASES BASED ON DISABILITY.....	1193
1. Agency Imposed Job Requirements.....	1193
2. Forced to Work in Excess of Medical Restrictions.....	1193
3. Temporary Appointments	1194
4. Reductions-In-Force	1194

5. Misconduct and Performance Cases	1194
6. Agency-Induced Misconduct	1195
7. Selection and Promotion	1196
8. Reassignments	1196
9. Fear for Safety of Others	1196
10. Requiring Acceptance of Accommodation	1197
11. Overtime	1197
12. Medical Insurance Benefits.....	1197
13. Alternative Discrimination Theories.....	1200
C. DISPARATE IMPACT CASES	1200
D. HOSTILE WORK ENVIRONMENT	1200
E. HEARING STAGE.....	1201
VI. HIRING, PLACEMENT AND ADVANCEMENT	1201
A. PREFERENTIAL TREATMENT	1202
1. Affirmative Action Plans and Goals	1203
2. Targeted Disabilities.....	1203
3. Veterans Preference	1203
4. Executive Order 13163	1203
B. SCHEDULE A APPOINTMENTS	1203
C. JOB INTERVIEWS	1205
1. Reasonable Accommodation.....	1205
D. EMPLOYMENT CRITERIA AND QUALIFICATION STANDARDS	1205
1. Requiring a Disability.....	1210
2. Applicants for Employment.....	1210
3. Uncorrected Vision Standards.....	1211
4. Aviation and Transportation Security Act	1216
E. CLASS ACTIONS	1218
VII. MEDICAL INQUIRIES AND EXAMINATIONS	1218
A. PREEMPLOYMENT INQUIRIES	1219
1. OPM Inquiries	1224
2. Conditional Offers of Employment.....	1224
3. Drug Tests	1225
4. Disabled Veterans.....	1225
5. Polygraph Examinations.....	1225
6. Relief for Violations	1225
B. POSTAPPOINTMENT INQUIRIES	1228
1. Fitness-For-Duty Examinations: Performing Essential Functions and Direct Threat	1229
2. Fitness-For-Duty Exams and the MSPB.....	1238
3. Documentation of Continuing Absence or Accommodation.....	1238
4. Clearance to Return to Work	1238
5. Requests for Updated Medical Information	1240
6. Medical Inquiries and <i>Giglio</i>	1242
7. Annual Hearing Tests	1243
8. Bid Positions.....	1243
9. Employee Assistance Programs	1243
10. Disability Retirement	1243
11. Medical Inquiries by Supervisors to Other Agency Components	1244
12. Obvious Disabilities.....	1244
13. <i>Per Se</i> Violations	1244
C. MEDICAL DISCLOSURES AND CONFIDENTIALITY OF MEDICAL INFORMATION	1244
1. Disclosure in EEO Investigations.....	1249
2. Disclosure by Agency Counsel	1249
3. Subpoena of Medical Information	1250
4. Waiver of Confidentiality	1250
D. CONFIDENTIALITY OF MEDICAL DOCUMENTS	1251
VIII. PERFORMANCE AND CONDUCT ISSUES	1252
A. ADOPTING PERFORMANCE AND CONDUCT STANDARDS	1253
B. PERFORMANCE STANDARDS	1253
1. Performance Evaluations.....	1254
C. PERFORMANCE PROBLEMS CAUSED BY A DISABILITY	1255
D. CONDUCT STANDARDS.....	1256

1. Source of Rules.....	1257
2. Disciplinary Actions.....	1257
E. DISCUSSION OF DISABILITY	1259

CHAPTER 15: REASONABLE ACCOMMODATION AND GINA..... 1261

I. OVERVIEW OF REASONABLE ACCOMMODATION AND UNDUE HARDSHIP	1261
A. <i>PRIMA FACIE</i> CASE	1261
B. BURDEN SHIFTING ANALYSIS.....	1262
1. Medical Documentation and Examinations.....	1264
C. AGENCY KNOWLEDGE OF DISABILITY	1265
1. Constructive Knowledge.....	1266
D. DEFINITION OF REASONABLE ACCOMMODATION	1267
1. Nexus Requirement.....	1268
2. Acceptance or Rejection of Accommodation	1268
3. Constructive Discharge	1269
4. Balancing Test.....	1269
5. Presumption of Reasonableness	1269
6. Temporary Accommodations	1269
7. Preference of Employee	1271
8. Good Faith Accommodation Efforts	1273
9. Rights of Other Employees	1276
10. Discipline as Accommodation	1276
II. DEFENSES TO REASONABLE ACCOMMODATION	1277
A. UNDUE HARDSHIP	1277
1. Proving Undue Hardship	1278
B. “DIRECT THREAT” OR “ELEVATED RISK” DEFENSE	1282
1. Requirements of Direct Threat Defense.....	1284
2. Drivers	1287
3. Epileptic Seizures; Diabetics.....	1288
4. “Elevated Risk” Standard.....	1289
5. “Regarded As” Disabled and Substantially Limited.....	1290
6. Hearing Impairments.....	1292
7. HIV-Status.....	1292
8. Threatening or Violent Behavior.....	1293
9. Psychiatric Illnesses	1293
10. Intermittent Symptoms	1295
11. Liability Concerns of the Agency.....	1295
12. Agency Knew of Disability and Allowed Employee to Work.....	1295
13. Agency Failure to Accommodate.....	1296
14. Medical Exams and Inquiries	1296
15. Personal Protective Equipment.....	1298
16. Inherently Dangerous Positions.....	1300
17. Agency Policy	1303
III. INTERACTIVE PROCESS AND REASONABLE ACCOMMODATION REQUESTS	1303
A. KNOWLEDGE OF ACCOMMODATION NEED	1304
B. FORM OF ACCOMMODATION REQUESTS	1305
1. Timing of Request.....	1307
2. Timing of Submission of Medical Information	1308
3. Failure to Request	1308
4. Agency Policy Regarding Request Procedures.....	1309
C. INDIVIDUALIZED INQUIRIES ON DISABILITIES	1309
1. Reasonable Documentation	1309
2. Health Providers	1310
3. Accuracy of Agency Information.....	1310
4. Comparative Evidence	1310
5. What Constitutes an Individualized Inquiry.....	1310
D. IDENTIFYING POSSIBLE ACCOMMODATIONS	1311
1. Failure of Complainant to Cooperate.....	1312
2. Effect of OWCP Considerations	1314
E. HALTING THE INTERACTIVE PROCESS	1314
F. INTERIM ACCOMMODATIONS.....	1316

G.	TIMELINESS OF REASONABLE ACCOMMODATION	1318
H.	FAILURE TO ENGAGE IN THE INTERACTIVE PROCESS	1323
I.	TRIAL PERIODS FOR ACCOMMODATIONS	1324
J.	MODIFYING EXISTING ACCOMMODATIONS.....	1325
IV.	FAMILY AND MEDICAL LEAVE ACT AND REASONABLE ACCOMMODATION.....	1326
V.	REPRISAL FOR REQUESTING A REASONABLE ACCOMMODATION.....	1327
VI.	TYPES OF REASONABLE ACCOMMODATION	1328
A.	AFFIRMATIVE ACTION	1328
B.	AGENCY REGULATIONS.....	1328
C.	AGGRAVATION OF EXISTING CONDITION.....	1328
D.	ALCOHOL AND DRUG DEPENDENCY	1329
1.	The MSPB and EEOC—Causal Connection and Punishment	1329
2.	Pretreatment Offenses	1334
3.	Attendance Problems	1335
4.	Relapses	1336
5.	Programs With Religious Affiliations	1336
6.	Offers of Employment	1337
E.	BENEFITS AND PRIVILEGES OF EMPLOYMENT.....	1337
F.	BUILDING AND WORKSPACE ACCOMMODATIONS	1338
G.	CAREER DEVELOPMENT	1338
H.	COLLECTIVE BARGAINING AGREEMENTS	1339
1.	Union Duties.....	1340
I.	COVID-19 CONSIDERATIONS.....	1340
1.	EEOC'S Technical Assistance on Reasonable Accommodations	1340
J.	DISABILITY RETIREMENT	1342
1.	Constructive Discharge.....	1343
K.	DISCRIMINATION IN ACCOMMODATION	1343
1.	Changes in Accommodations.....	1343
2.	Employee Assistance Programs	1343
L.	DRUG AND ALCOHOL TESTS	1344
M.	INTERPRETERS AND READING ASSISTANTS	1344
1.	Interpreters and Signers	1345
2.	Lip Readers	1345
3.	Agency Good Faith.....	1345
4.	Devices as a Reasonable Accommodation	1346
5.	Interpreters.....	1346
6.	Video Remote Interpreting.....	1350
7.	TTY and TDD Devices.....	1350
8.	Management Cooperation in Use of Assistive Devices.....	1351
9.	Reading Assistants.....	1351
N.	JOB ANALYSIS	1353
O.	JOB RESTRUCTURING	1353
P.	LEAVE USAGE	1354
1.	Forced Leave	1358
2.	Leave Offenses	1358
3.	Denial of Leave as Retaliation.....	1358
4.	Family and Medical Leave Act	1358
5.	Separation for Medical Reasons.....	1359
Q.	MEDICAL QUALIFICATIONS	1360
1.	Physical Qualifications.....	1360
R.	MENTAL ILLNESS	1361
1.	Stress-Related Conditions	1361
2.	Resignations and Constructive Discharges	1361
3.	Supervisory Changes.....	1363
S.	MOBILITY ACCOMMODATIONS.....	1363
T.	PERSONAL EQUIPMENT	1363
1.	Hearing Devices.....	1364
U.	PREVENTIVE HEALTH CARE	1365
V.	PRIVATE SPACE	1365
W.	REASSIGNMENT, PROMOTIONS, AND DEMOTIONS	1365
1.	<i>Ignacio v. USPS</i>	1366

2.	Reassignment Under Part 1614	1367
3.	Reassignment Under the ADA	1369
4.	Search for a Vacant, Funded Positions	1374
5.	Position in Question	1375
6.	Accommodation in Reassignment Position	1376
7.	Ceiling on Advancement	1377
8.	Promotion as Accommodation	1377
9.	Reassignment to Previous Position	1378
10.	Reassignment to Special Needs Position	1378
11.	Job Modification in Lieu of Reassignment	1379
12.	Applicants for Employment	1381
13.	Probationary Employees	1381
14.	Light or Limited Duty	1382
15.	Work-Related Injuries	1383
16.	Collective Bargaining Agreements	1384
17.	Reassignment to Different Supervisor	1388
18.	Conditions Attached to Reassignment	1388
19.	Never Qualified for Position Held	1389
20.	Requests to Remain in Current Position in Lieu of Reassignment	1390
X.	REMEDIES	1391
Y.	REQUESTS FOR ASSISTANCE	1391
1.	Single-Day Accommodations	1392
Z.	RESPIRATORY CONDITIONS	1392
1.	Chemical/Fragrance/"Smell"-Free Environments	1392
2.	Pungent Food	1394
3.	Smoke-Free Environments	1395
AA.	SANITARY WORKING CONDITIONS	1396
BB.	SECURITY CLEARANCES	1397
CC.	SERVICE ANIMALS	1397
DD.	SETTLEMENT AGREEMENTS	1401
EE.	TRAINING AS AN ACCOMMODATION	1401
1.	Accommodations for Training	1402
2.	Travel for Training	1402
FF.	TRANSPORTATION	1402
1.	Parking Spaces	1404
2.	Travel Requirements	1405
3.	Transfer for Medical Treatment	1405
GG.	VOLUNTARY DUTIES	1405
HH.	WORK HOUR MODIFICATIONS	1406
1.	Shift Changes and Work Schedules	1407
2.	Training	1410
3.	Breaks	1410
4.	Overtime Assignments	1411
5.	Bidding for Schedules	1412
II.	TELEWORKING AND WORK LOCATION MODIFICATION	1413
1.	Teleworking Policies in General	1413
2.	Teleworking as an Accommodation	1413
3.	Telework Policies	1421
4.	Foreign Service Assignments	1423
5.	Privacy Accommodations	1423
JJ.	WORKERS' COMPENSATION	1424
1.	Restoration of Employment	1426
2.	Modified Duty Positions	1426
3.	OWCP and Reasonable Accommodation	1427
VII.	WORKPLACE POLICIES	1427
VIII.	BACK PAY	1428
A.	RESIGNATION OR RETIREMENT	1428
B.	GOOD FAITH EXCEPTION TO DAMAGES	1428
IX.	THE GENETIC INFORMATION NONDISCRIMINATION ACT—OVERVIEW	1428
A.	GINA-SPECIFIC DEFINITIONS	1428
1.	Genetic Information Generally	1428

2. Genetic Tests	1429
3. Genetic Monitoring	1429
4. Genetic Services	1429
5. Manifested Disease or Disorder	1429
B. EMPLOYEES AND AGENCIES COVERED	1430
1. Family Members	1430
2. Family Medical History	1431
C. PROHIBITED EMPLOYMENT PRACTICES	1431
1. Employment Actions and Terms of Employment	1432
2. Segregating and Classifying Employees	1432
3. Retaliation for Protected Activity	1432
4. Acquisition of Genetic Information	1432
5. Confidentiality of Collected Information	1435
D. REMEDIES	1436

CHAPTER 16: AGE DISCRIMINATION IN EMPLOYMENT ACT 1437

I. STRUCTURE OF THE ACT	1437
A. PROHIBITED ACTIVITIES	1437
1. Reprisal	1438
2. Older Workers Benefits Act	1440
B. LAWFUL ACTIVITIES	1440
1. <i>Bona Fide</i> Occupational Requirements	1440
2. Benefit Plans	1440
3. Maximum Entry Age Limits—Law Enforcement Officers and Firefighters	1442
4. Mandatory Retirement Age	1442
C. PROCEDURES FOR FILING ADMINISTRATIVE ADEA COMPLAINTS	1443
1. Exhaustion of Administrative Remedies	1443
D. PROCEDURES FOR FILING IN U.S. DISTRICT COURT	1443
1. Proper Defendants	1444
2. Statute of Limitations	1444
3. Part 1614 Statute of Limitations	1447
4. Jury Trials	1448
II. AGE DISCRIMINATION ANALYSIS	1448
A. <i>BABB V. WILKIE</i>	1448
B. CIRCUMSTANTIAL EVIDENCE	1450
1. Discrimination Against Persons Under 40	1450
2. Discrimination Within Protected Group	1450
3. Reverse Age Discrimination	1451
4. Rehired Annuitants.....	1452
5. “Age Plus” Discrimination	1453
6. Direct Evidence of Discrimination	1453
C. DISPARATE IMPACT	1453
1. Court Opinions on the ADEA and Disparate Impact.....	1453
2. Commission on ADEA and Disparate Impact.....	1455
3. <i>Bona Fide</i> Occupational Qualification	1456
4. Bottom Line Concept	1456
5. Preemployment Inquiries	1456
6. Experience	1457
D. HOSTILE ENVIRONMENT	1457
E. PAY SCALES.....	1457
F. ACCOMMODATION	1457
III. THE AGENCY’S BURDEN.....	1457
A. INTENTIONAL DISCRIMINATION	1457
1. Recency of Experience	1458
2. Recency of Education	1458
3. Length of Service.....	1459
4. Career Goals	1459
5. Tests.....	1459
B. DISPARATE IMPACT	1460
1. <i>Bona Fide</i> Occupational Qualification	1460
2. Factors Other Than Age	1460

3. Education	1460
4. Recruitment.....	1461
5. Training.....	1461
6. Physical Requirements	1461
IV. ESTABLISHING PRETEXT	1461
A. DISCRIMINATORY STATEMENTS	1461
B. ECONOMIC FACTORS	1462
C. AGE AS DETERMINATIVE FACTOR	1463
1. Element of Intent	1468
D. RETIREMENT ELIGIBILITY	1468
E. FORCED RETIREMENT	1468
V. COMPENSATORY AND LIQUIDATED DAMAGES	1468
VI. ATTORNEY FEES	1469

CHAPTER 17: REPRISAL 1471

I. INITIATING COMPLAINTS OF REPRISAL.....	1472
A. PROCESSING COMPLAINTS OF REPRISAL	1472
1. Filing Reprisal Complaints.....	1472
2. Amendment and Consolidation	1472
3. Expedited Complaints of Reprisal.....	1472
4. Processing Delays	1472
5. Settlement Agreements	1472
II. PROTECTED ACTIVITY—PARTICIPATION CLAUSE	1472
A. ADMINISTRATIVE DECISIONS.....	1473
B. AFFIRMATIVE ACTION	1474
C. AGENCY REPRESENTATIVES.....	1474
D. COMPLAINTS BEYOND EEO PURVIEW.....	1474
E. COMPLAINTS BY OTHERS—ASSOCIATION COMPLAINTS	1474
1. Participation in Proceedings Involving Others	1477
2. Soliciting Complaints.....	1478
F. CONTACTS OUTSIDE EEO PROCESS	1478
G. DENIAL OF OFFICIAL TIME	1478
H. EEO COUNSELING	1478
I. EEO EMPLOYEES	1479
J. FITNESS FOR DUTY	1480
K. GRIEVANCES	1480
L. HARASSMENT COMPLAINTS	1481
M. MANAGEMENT EMPLOYEES	1481
N. MSPB APPEALS	1481
O. PUBLICATION OF EEO ACTIVITIES.....	1481
P. REASONABLE ACCOMMODATION REQUESTS	1482
Q. REPRESENTATIVES	1483
R. RESPONSIBLE MANAGEMENT OFFICIALS	1483
S. SETTLEMENT	1483
T. TAKING CONFIDENTIAL DOCUMENTS.....	1483
1. Use of Confidential Documents at Hearing.....	1484
U. WHISTLEBLOWING	1484
V. WITNESSES	1486
W. WORKERS' COMPENSATION CLAIMS	1486
III. PROTECTED ACTIVITY—OPPOSITION CLAUSE	1486
A. BASIS OF OPPOSITION.....	1488
1. Association With Opponents	1488
2. Discrimination Against Others.....	1489
B. BALANCING TEST	1489
C. THREATS TO FILE COMPLAINTS	1491
1. Requests to Withdraw Complaint	1491
D. GRIEVANCES	1491
E. INTERNAL HARASSMENT INVESTIGATIONS.....	1492
IV. PROOF IN REPRISAL CASES	1492
A. NASSAR AND THE "BUT FOR" TEST.....	1494
B. PRIMA FACIE CASE	1498

1. Good Faith Belief	1498
C. ADVERSE TREATMENT REQUIREMENT	1499
1. The History of the Adverse Treatment Requirement.....	1499
2. <i>Burlington Northern</i> and Beyond	1500
3. Types of Materially Adverse Actions.....	1503
4. Proposed Actions and Preliminary Steps.....	1505
5. Former Employers and Employees	1505
6. Actions by Non-Employers	1506
7. Chilling Effect and the Reasonably Likely to Deter Standard	1506
D. CAUSAL CONNECTION	1521
E. LEGITIMATE REASONS	1522
F. CIRCUMSTANTIAL EVIDENCE AND PRETEXT	1525
1. Agency Failure to Follow Regulations	1526
2. Agency Failure to Substantiate Its Legitimate Nondiscriminatory Reason.....	1526
3. Behavior Towards the Complainant	1527
4. Blaming the Victim of Harassment.....	1527
5. Changes to Manner of Work, Work Assignments, Duties, and Performance Assessments	1529
6. Disparate Treatment.....	1531
7. Implausible and Illogical Results	1531
8. Knowledge Gained During Settlement Discussions	1532
9. Knowledge Requirement	1532
10. Nexus With Personnel Actions.....	1533
11. Nonselections.....	1535
12. Patterns of Reprisal.....	1535
13. Proximity in Time	1535
G. DIRECT EVIDENCE OF REPRISAL	1540
H. MIXED MOTIVE CASES.....	1542
I. STATEMENTS MADE DURING TESTIMONY	1543
V. RESTRAINT AND INTERFERENCE WITH PROCESS: <i>PER SE</i> VIOLATIONS	1543

CHAPTER 18: PERSONNEL ACTIONS..... 1551

I. DISCIPLINARY ACTIONS	1551
A. PROPOSED DISCIPLINARY ACTIONS	1551
1. Work Discussions	1552
2. Written Work Criticisms.....	1553
3. Monitoring Work Behavior.....	1554
B. CONSTRUCTIVE DISCHARGE	1554
1. Competitive Service Employees	1560
2. Agency Bad Faith.....	1561
C. CONSTRUCTIVE SUSPENSION	1561
D. OTHER CONSTRUCTIVE ACTIONS.....	1561
E. PROBATIONARY EMPLOYEES	1561
F. CONSISTENCY OF DISCIPLINE	1561
1. Problem Employees.....	1562
2. Progressive Discipline	1562
3. Supervisory Orders	1563
G. HARASSMENT AS DEFENSE TO DISCIPLINE	1563
H. SOCIAL MEDIA/ONLINE HARASSMENT AS BASIS FOR DISCIPLINE	1563
I. FITNESS FOR DUTY EXAMINATION	1563
J. CRIMINAL OFFENSES	1564
1. Criminal Investigations	1564
2. Non-Criminal Investigations	1564
K. ACTS OCCURRING IN CONTEXT OF PERSONNEL ACTION.....	1564
L. BASIS OF CHARGE	1565
M. RECORDS OF DISCIPLINARY ACTION	1565
II. NONSELECTION: PROMOTIONS AND APPOINTMENTS	1566
A. <i>PRIMA FACIE</i> CASE	1566
B. BEST QUALIFIED LISTS	1568
1. Unqualified Candidates	1568
2. Ranking Candidates	1568
3. Failure to Apply for Position	1568

4. Superior Qualifications— <i>Ash v. Tyson Foods</i>	1569
C. SELECTION CRITERIA	1571
1. Criminal Convictions	1571
2. Education and Licenses	1572
3. EEO Activity	1572
4. Failure to Disclose Criteria.....	1572
5. Interviews	1573
6. Past Experience	1574
7. References.....	1575
8. Selection Certificates	1575
9. Selection Panels and Recommending Officials	1575
10. Subjective vs. Objective.....	1577
11. Supervisory Appraisals	1579
12. Temporary Appointments	1579
13. Tests and Assessments	1579
14. Training	1580
D. FAILURE TO FOLLOW PROCEDURES	1581
1. Rule of Three	1582
E. AGENCY'S BURDEN	1582
F. NONCOMPETITIVE SELECTIONS	1584
1. Conversions	1584
2. Accretion of Duties	1585
G. RECOMMENDING OFFICIALS	1585
H. PRESELECTION	1585
1. Unfair Advantages in Selection Process.....	1586
I. POSTSELECTION PERFORMANCE.....	1587
J. BIDDING FOR FUTURE VACANCIES.....	1587
K. RECRUITMENT	1587
L. RESCISSION OF VACANCY ANNOUNCEMENT	1588
1. Priority Referrals	1589
2. Failure to Post Vacancy.....	1589
M. FALSIFIED APPLICATIONS	1590
N. COMMUNICATION OF DECISION	1590
O. REASONS FOR DECISION	1590
P. OFFERS OF EMPLOYMENT: RESCINDED.....	1591
III. PERFORMANCE-BASED ACTIONS	1591
A. <i>PRIMA FACIE</i> CASE	1591
1. Midyear Reviews	1591
B. NOTICE OF POOR PERFORMANCE	1592
1. Documentation of Poor Performance	1592
C. OPPORTUNITY TO IMPROVE	1592
D. SUBJECTIVE APPRAISAL CRITERIA	1592
E. PERFORMANCE EVALUATIONS	1592
1. Past Performance Ratings	1593
F. PERSONNEL ACTIONS BASED ON PERFORMANCE	1593
G. SCRUTINY OF WORK	1594
H. EMPLOYMENT REFERENCES	1594
IV. REDUCTION-IN-FORCE	1594
A. SEVERANCE PAY VS. RETIREMENT ANNUITY.....	1594
B. PERFORMANCE CREDITS.....	1594
C. REASSIGNMENTS	1595
V. TERMS AND CONDITIONS OF EMPLOYMENT	1595
A. ACTIVITIES OUTSIDE WORKPLACE.....	1595
B. AGENCY FACILITIES, USE OF.....	1595
C. COMMON WORKPLACE OCCURRENCES.....	1596
D. CONDITIONS OF EMPLOYMENT, FAILURE TO MAINTAIN	1597
E. DEROGATORY COMMENTS AND ACTIONS	1597
1. Release of Information on Employee	1598
2. FOIA and Privacy Act Requests	1598
F. DISABILITY RETIREMENT	1598
G. DRESS CODES	1598

H.	EMPLOYEE SEARCHES	1598
I.	GARNISHMENT OF WAGES	1599
J.	HEALTH BENEFITS	1599
K.	LEAVE	1600
L.	OUTSIDE CONTRACTS	1600
M.	OVERTIME COMPENSATION	1600
	1. Assignment of Work Hours	1601
N.	PARTICIPATION IN EEO PROCESS.....	1601
O.	POSITION CLASSIFICATION	1601
P.	POSITION TITLES AND WORK DUTIES.....	1601
Q.	PREDECISIONAL ACTIONS.....	1601
R.	REGULATIONS COMPLIANCE	1601
S.	REORGANIZATIONS	1601
T.	SECURITY CLEARANCES	1601
	1. Scope of Review.....	1601
	2. Remedial Authority	1603
	3. Burden of Proof.....	1604
	4. Distinguishing Between Underlying Actions and Merits of a Security Clearance Decision	1606
	5. Initiating a Security Clearance Review	1608
	6. Initiating a Security Clearance Review: Court Opinions	1610
	7. Examining Agency Policies and Regulations	1610
	8. Security Clearances and the Rehabilitation Act	1611
U.	TEMPORARY ASSIGNMENTS	1611
V.	UNEMPLOYMENT COMPENSATION	1612
W.	UNION ACTIVITIES	1612
	1. Collective Bargaining Agreements	1612
	2. Union Representation	1612
X.	WORK ENVIRONMENT	1612
	1. Smoking Policies	1613
Y.	WORK HOURS	1613
Z.	WORKERS' COMPENSATION	1613

CHAPTER 19: CLASS ACTION COMPLAINTS 1615

I.	FILING A CLASS COMPLAINT	1615
	A. DEFINITION OF CLASS	1615
	B. REQUIREMENTS OF A CLASS COMPLAINT	1615
	C. CLASS COMPLAINT COUNSELING	1616
	1. Time Frame for Counseling	1616
	2. EEO Counselors	1616
	3. Individual Complaints	1616
	4. Mandatory Counseling.....	1616
	5. Exception to Mandatory Counseling	1617
	6. Notice of Final Interview	1617
	D. FORMAL COMPLAINT	1617
	1. Effect of Filing on Individuals; Subsumed Claims	1617
	E. ASSIGNMENT OF ADMINISTRATIVE JUDGE	1619
II.	CERTIFICATION STAGE	1619
	A. DISMISSAL OF COMPLAINT	1619
	1. Lack of Specificity and Detail	1619
	2. Dismissal Under 1614.107	1620
	3. Timeliness of Complaint	1620
	4. Issues Not Raised in Counseling	1620
	5. Identical Complaints	1620
	6. Failure to Prosecute.....	1621
	7. Failure to Meet Class Prerequisites	1621
	8. Delay in Seeking Certification	1621
	9. Settlement Prior to Certification.....	1622
	10. Notification of Dismissal	1622
	B. CLASS PREREQUISITES	1622
	1. Numerosity	1623
	2. Commonality and Typicality	1624

3. Adequacy of Representation	1635
4. Waiver of Requirements	1638
C. EFFECT OF WITHDRAWAL OR DISMISSAL	1639
1. Individual Civil Actions	1639
D. ABEYANCE OF INDIVIDUAL COMPLAINTS	1639
E. CERTIFICATION DECISION	1639
1. Notification of Acceptance	1640
2. Conditional Certification and Modification of Certification	1640
3. Final Agency Action	1640
4. Opting Out	1640
III. POST-CERTIFICATION PROCESSING.....	1641
A. DEVELOPMENT OF RECORD: DISCOVERY	1641
B. SETTLEMENT OR INFORMAL RESOLUTION OF CLASS ACTIONS	1642
1. Settlement Orders.....	1644
C. SUMMARY JUDGMENT	1644
D. HEARING	1644
1. Official Time	1645
2. Mixed Cases	1645
E. DECISION	1645
F. FINAL AGENCY ACTION	1646
1. Notifying Class Members of Decision	1646
2. Individual Claims for Relief	1646
G. APPEAL STANDARDS	1647
1. Agency Appeals.....	1647
2. Complainant Appeals.....	1647
H. REQUESTS TO REOPEN	1647
I. ATTORNEY FEES	1647
IV. CLASS ACTION THEORIES	1647
A. INTENTIONAL DISCRIMINATION	1648
1. <i>Prima Facie</i> Case	1648
2. Disparate Treatment Analysis	1648
B. ADVERSE IMPACT	1649
1. Use of Statistical Evidence	1649
2. Use of Anecdotal Evidence	1652
C. HOSTILE WORK ENVIRONMENT.....	1652
D. REPRISAL	1654
E. DISABILITY DISCRIMINATION AND REASONABLE ACCOMMODATION	1654
F. VIOLATION OF CONSENT DECREES	1661
V. CLASS ACTION RELIEF	1661
A. ESTABLISHING INDIVIDUAL RELIEF	1661
B. CLASS RELIEF	1662

CHAPTER 20: EEO ALTERNATIVES 1663

I. NEGOTIATED GRIEVANCE PROCEDURES	1663
A. EMPLOYEES AND AGENCIES COVERED	1664
1. U.S. Postal Service	1664
2. Other Exempt Agencies	1665
B. ELECTING THE FORUM	1665
1. Electing Both Forums	1666
2. Union Election	1666
3. Unsuccessful Election.....	1666
4. Withdrawal of Grievance	1667
5. Adjudication of Grievance	1667
6. Failure to Raise Discrimination Allegation	1667
7. Unfair Labor Practice Complaints	1667
8. Subsequent Actions.....	1667
C. EFFECTS OF ELECTION	1668
1. Application of Law	1668
2. Preservation of Grievance Rights	1668
D. KNOWLEDGE OF DISCRIMINATION	1668
E. ABSENCE OF DISCRIMINATION PROVISION IN AGREEMENT	1668

1. Expiration of Agreement	1668
F. DISCRIMINATION IN GRIEVANCE PROCEDURE	1668
1. Inadequate Representation.....	1669
G. EFFECT OF ARBITRATION DECISION	1669
H. REVIEW BY EEOC	1669
1. Arbitrability	1670
2. Failure to Address Discrimination Allegations.....	1670
3. Enforcement of Arbitration Awards	1670
II. MIXED CASES BEFORE THE MERIT SYSTEMS PROTECTION BOARD	1670
A. DEFINITION OF MIXED CASES AND APPEALS	1671
B. JURISDICTION OF THE MSPB	1671
1. Purpose of Mixed Case Legislation	1672
2. Matters Clearly Within Board Jurisdiction	1672
3. Matters Not Within Board Jurisdiction	1673
4. Multiple Personnel Actions or Claims	1675
5. Constructive Adverse Actions.....	1678
6. Probationary Employees	1681
7. Failure to Give Hearing Rights	1681
8. Incorrect Appeal Rights	1681
9. Whistleblower Complaints.....	1681
C. ELECTION OF FORUM	1681
1. Notice of Election Rights	1682
2. Filing With Wrong Agency	1683
3. Withdrawal of Appeal	1683
D. EFFECTS OF ELECTION	1683
1. Election of MSPB.....	1684
2. Election of EEO Procedure	1684
3. Effect of Final Agency Decision	1685
4. Breach of Settlement Allegations	1685
5. Last Chance Settlement Agreements	1685
E. DUAL FILING PROCEDURES	1685
F. REVIEW OF MSPB DECISIONS BY EEOC	1686
1. Contents of Petition for Review	1687
2. Consideration by EEOC	1687
3. Failure to Raise Allegations of Discrimination	1687
4. Failure of Board to Consider Allegations	1687
5. Failure of Board to Consider Evidence.....	1690
G. REFERRAL TO THE MSPB	1690
1. Remand for Additional Evidence.....	1690
H. REFERRAL TO SPECIAL PANEL	1691
I. PARTIAL RELIEF	1691
1. Relief Through Settlement	1691
J. ALLEGATIONS RELATED TO BOARD PROCEEDINGS	1691
1. Board-Ordered Relief.....	1691
K. APPEAL OF DECISION TO DISMISS MIXED CASE	1691
L. EFFECT OF DECISIONS BY OTHER AGENCIES	1692
M. JUDICIAL REVIEW IN MIXED CASES.....	1692
III. OTHER FORUMS	1693
A. ADMINISTRATIVE GRIEVANCE PROCEDURES	1693
B. WORKERS' COMPENSATION	1693
C. ALTERNATIVE DISPUTE RESOLUTION	1694

CHAPTER 21: FORMS OF RELIEF 1697

I. ELEMENTS OF EQUITABLE RELIEF	1697
A. COMMISSION REGULATIONS ON RELIEF	1698
B. NOTICE OF VIOLATION	1698
C. RELIEF FOR INDIVIDUALS	1699
1. Default Judgment.....	1699
D. PUNITIVE RELIEF	1699
E. CORRECTIVE RELIEF	1700
F. COMPENSATORY DAMAGES	1700

G.	ESCAPING LIABILITY FOR DISCRIMINATION	1700
H.	EFFECT OF BANKRUPTCY ON ENTITLEMENT TO RELIEF	1701
II.	PERSONS ELIGIBLE FOR RELIEF	1702
A.	RELIEF FOR APPLICANTS	1702
B.	RELIEF FOR EMPLOYEES	1703
1.	Displacement of Beneficiaries of Discrimination/"Bumping"	1703
2.	Conditional Relief	1705
3.	Interim Relief	1705
4.	Reinstatement	1706
5.	Partial Remedies	1707
6.	Relief Following Default Judgment	1709
7.	Scope of Relief	1710
C.	RELIEF FOR THIRD PARTIES	1710
D.	RELIEF FOR CONTRACTORS	1711
III.	TYPES OF EQUITABLE RELIEF	1711
A.	BACK PAY	1711
1.	Ready, Willing, and Able to Work	1714
2.	Loss of Pay by Spouse	1715
3.	Calculating Back Pay	1715
4.	Contract Employees	1722
5.	Deductions From Back Pay	1723
6.	Interest on Back Pay	1737
7.	<i>Ford</i> Offer of Reemployment	1741
8.	Nonappropriated Fund Agencies	1742
9.	Tax Consequences of Back Pay and Damages	1742
10.	U.S. Postal Service	1748
B.	ENTITLEMENT TO POSITIONS	1748
1.	Substantially Equivalent Positions	1750
2.	Geographic Location	1755
3.	Subsequent Promotions—"Job Skipping"	1756
4.	Probation	1759
5.	Temporary Appointments	1759
6.	Priority Consideration	1760
7.	Noncompetitive Selections	1761
8.	Failure to Qualify	1761
9.	Multiple Victims of Discrimination	1762
10.	Limited Liability Defense	1764
C.	OTHER FORMS OF EQUITABLE RELIEF	1765
1.	Apologies	1765
2.	Certifications and Background Checks	1765
3.	Cost of Living Allowances	1765
4.	Declaratory and Injunctive Relief	1765
5.	Front Pay	1766
6.	Housing Expenses	1771
7.	Leave and Benefits Restoration	1771
8.	Medical Expenses	1772
9.	Performance-Based Awards	1773
10.	Performance Evaluations	1773
11.	Reassignment or Transfer	1773
12.	Recruitment	1774
13.	Relief Requested	1775
14.	Remand vs. Relief	1775
15.	Resignation or Retirement, Effect of	1775
16.	Seniority	1778
17.	Speculative Relief	1779
18.	Systemic Relief	1779
19.	Taxes, Reimbursement	1780
20.	Training, Remedial and Preventive	1780
21.	Travel Expenses	1783
22.	Vehicle, Loss of	1783
D.	RELIEF IN HOSTILE ENVIRONMENT CASES	1783

E. RETIREMENT BENEFITS, ADJUSTMENT	1784
IV. RELIEF UNDER THE ADEA AND EPA	1784
A. LIQUIDATED DAMAGES	1784
V. COMPENSATORY DAMAGES	1784
A. AUTHORITY TO AWARD	1785
1. Adverse Impact Cases	1793
2. Unintentional Discrimination Cases.....	1793
B. DEFINITION OF COMPENSATORY DAMAGES	1793
1. Damages vs. Equitable Relief.....	1794
2. Past Pecuniary Damages	1794
3. Future Pecuniary Damages	1795
4. Nonpecuniary Damages	1797
5. Causation	1797
6. Findings of Administrative Judge	1798
C. DAMAGES UNDER REHABILITATION ACT	1798
1. Good Faith Exception	1799
D. DAMAGES UNDER ADEA.....	1802
E. DAMAGES UNDER EPA	1803
F. SEVERANCE OF DAMAGE ISSUES	1803
1. Offers of Full Relief	1803
G. TIME FOR ASSERTING DAMAGES	1803
1. Sufficiency of Claim	1804
2. Damages Hearings	1806
H. COMMISSION TRILOGY ON DAMAGES	1806
I. MOOTNESS	1817
J. PECUNIARY DAMAGE AWARD STANDARDS	1817
1. Attorney Fees	1818
2. Back Pay as Pecuniary Damages.....	1818
3. Computer Equipment.....	1818
4. Documenting/Proving Out of Pocket Expenses	1818
5. Dog-Walking Expenses	1819
6. Housing Expenses.....	1819
7. Medical Expenses.....	1819
8. Mortgage Foreclosure	1821
9. Nominal Damages	1821
10. Outside Earnings.....	1821
K. FUTURE PECUNIARY DAMAGES	1821
L. CALCULATING NONPECUNIARY DAMAGES	1825
1. Using Commission Case Law to Determine Damage Amounts	1825
2. Credibility Determinations	1827
3. Evidence	1827
4. Length of Discrimination.....	1828
5. "Intuitively Obvious" Harm.....	1829
6. Temporal Scope	1829
7. Monetary Awards.....	1830
8. Presumption of Harm	1939
9. Statutory Cap	1939
M. SPECIFIC DAMAGE ISSUES.....	1940
1. Age Discrimination Claims.....	1941
2. Auto Accidents.....	1941
3. Breach of Settlement Agreements.....	1941
4. Chiropractor Expenses	1941
5. Collateral Source Rule	1941
6. Conduct Outside Workplace	1942
7. Couples Therapy.....	1942
8. Exacerbation of Preexisting Conditions.....	1942
9. Expert or Medical Testimony, Lack of	1944
10. External Factors	1944
11. FECA Claims	1946
12. Foreclosure Costs	1947
13. Harm to Others	1947

14. Health Care Travel Expenses.....	1947
15. Health Insurance and Medical Expenses	1947
16. Housekeeping Expenses.....	1948
17. Inability to Find Employment	1948
18. Job Search Expenses	1948
19. Litigation Effects	1948
20. Loans.....	1949
21. Interest and Penalties	1949
22. Loss of Outside Employment.....	1950
23. Low Resistance Due to Stress or Fatigue	1950
24. Massage Therapy.....	1951
25. Mitigation of Damages	1951
26. Moving and Housing Expenses and Loss on Sale of Home	1951
27. Multiple Claims of Discrimination.....	1952
28. Multiple Victims of Discrimination.....	1952
29. Partially Prevailing Complainants.....	1952
30. Pet Care.....	1953
31. Physical Injuries.....	1953
32. Pre-Act Conduct	1953
33. Preexisting Fears.....	1953
34. Previous Physical or Mental Illness	1953
35. Previous Rape	1959
36. Psychiatric Evidence	1959
37. Rental Income, Loss of	1959
38. Repossession of Auto.....	1959
39. Retaliation Claims	1959
40. Termination of Employment	1959
41. Travel Expenses	1960
42. Undisputed Amounts	1960
N. ISSUANCE OF DAMAGE DECISIONS.....	1960
1. Appellate Decisions.....	1960
O. INTEREST ON COMPENSATORY DAMAGES	1960
P. TAXES ON COMPENSATORY DAMAGES	1961
1. Jurisdiction Over Complaints Related to Taxes	1962
Q. PUNITIVE DAMAGES	1962
R. DAMAGES IN OTHER FORUMS.....	1966
1. Merit Systems Protection Board	1966
2. Arbitration	1967
VI. DISCIPLINARY AND CORRECTIVE ACTION	1967
A. OFFICE OF SPECIAL COUNSEL	1968
B. MERIT SYSTEMS PROTECTION BOARD	1969
VII. ENFORCEMENT OF REMEDIES	1970
A. PETITIONS FOR ENFORCEMENT	1970
B. ENFORCEMENT BY COMMISSION.....	1971
1. Sanctions for Noncompliance	1971
VIII. TIMING OF RELIEF.....	1971
A. DOCTRINE OF LACHES	1972
CHAPTER 22: ATTORNEY FEES.....	1973
I. PROCEDURES FOR SUBMITTING FEE REQUEST	1974
A. REQUIREMENTS OF FEE PETITION	1975
1. Proper Party	1975
B. EXTENSIONS OF TIME	1975
C. FILING WITH WRONG AGENCY	1976
D. FAILURE TO ISSUE FEE DECISION	1976
E. MSPB CASES	1976
II. PREVAILING PARTIES	1976
A. PRESUMPTION OF ENTITLEMENT.....	1982
B. REVIEW STANDARD FOR AJ AWARDS.....	1982
C. PREVAILING THROUGH SETTLEMENT	1982
1. Breach of Settlement Agreements	1984

2.	Compliance and Enforcement Petitions	1984
D.	PREVAILING ON PROCEDURAL ISSUES	1984
1.	Fees as Sanctions	1985
2.	Fees Against Employees	1986
3.	Official Time Complaints	1986
4.	<i>Per Se</i> Regulatory Violations	1986
E.	PREVAILING THROUGH GRIEVANCE PROCEDURE	1987
F.	ACTIONS OUTSIDE TITLE VII.....	1988
G.	OFFERS OF RESOLUTION	1988
H.	MOOT CASES	1988
I.	UNJUST AWARDS	1989
III.	THE “LODESTAR”	1989
A.	REASONABLE HOURLY RATE	1992
1.	Prevailing Market Rate and Nonlocal Counsel	1993
2.	Applicable Time Period	1995
3.	<i>Laffey</i> Matrix	1995
4.	Customary Rate	1995
5.	Contractual Rate	1996
6.	Discount Rates	1997
7.	Rates in MSPB Cases	1999
8.	Excise Taxes	1999
9.	Journals and Other Law Based Articles.....	1999
10.	Contingency Agreements	1999
11.	Hybrid Agreements	2000
B.	ADJUSTMENTS TO HOURLY RATES	2000
1.	Downward Adjustments	2000
2.	Fee Enhancements	2000
3.	Experience of Counsel.....	2004
C.	HOURS REASONABLY EXPENDED	2004
1.	Ascertaining Case Status	2005
2.	Claims Not Raised in Complaint.....	2005
3.	Clerical Work	2005
4.	Contact With Clients	2005
5.	Description of Work Performed	2005
6.	Experience of Counsel.....	2005
7.	Fee Petitions	2006
8.	Fees in Counseling Stage	2007
9.	File Updates.....	2007
10.	Frivolous Claims.....	2007
11.	Hearing Preparation	2008
12.	Hearing Pursuit or Withdraw.....	2008
13.	Investigation by Counsel.....	2008
14.	Investigation Preparation	2008
15.	Legal Research	2008
16.	Partial and Fractionable Fees	2009
17.	Preparation of Complaint.....	2013
18.	Preparation of Discovery Materials.....	2013
19.	Related Actions.....	2013
20.	Review of Decisions.....	2013
21.	Review of Documents.....	2013
22.	Settlement Negotiations	2013
23.	Summary Judgment Motions.....	2013
24.	Time Records	2013
25.	“Vigorous Litigation”	2015
26.	Work on Appeal	2015
D.	TAXES ON FEE AWARDS	2015
E.	INTEREST ON FEE AWARDS	2017
F.	FAILURE OF COUNSEL TO REIMBURSE COMPLAINANT	2017
1.	Attorney Fee Liens	2017
G.	MIXED MOTIVE CASES	2017
H.	BAR STATUS OF COUNSEL	2020

- I. SERVICES RENDERED BY OTHERS2020
 - 1. Multiple Attorneys2020
 - 2. Change in Counsel.....2023
 - 3. Paralegals2023
 - 4. Investigators.....2024
- J. COMPENSATORY DAMAGES2024
- K. AGE DISCRIMINATION2024
 - 1. Reprisal2024
 - 2. Mixed Cases2025
 - 3. Civil Actions2025
 - 4. Fees as Sanctions.....2025
- L. ADA INQUIRY AND EXAMINATION VIOLATIONS2026
- M. NOTICE OF REPRESENTATION2026
- N. DEFENSE OF FEE AWARDS2027
 - 1. Standard of Review.....2027
- O. UNION AND NON-PROFIT LEGAL REPRESENTATIVES2027
- P. FEDERAL EMPLOYEE REPRESENTATIVES2027
- Q. LAYMAN REPRESENTATIVES2027
- R. BURDENS OF PROOF2028
- S. ENFORCEMENT ACTIONS2028
- T. FEDERAL COURT WORK2029
- U. TRAVEL TIME2029
- V. AFFIRMATIVE DEFENSES FOR AGENCIES2029
- W. COSTS2029
 - 1. Witness Fees2031
 - 2. Expert Witness Fees2031
 - 3. Out-Of-Town Attorneys2031
 - 4. Business Equipment.....2032
 - 5. Interest2032
 - 6. Taxes2032
 - 7. Reasonable Accommodation Expenses.....2032

CIRCUIT COURT CASE CHART 2000–2022 2033

TABLE OF CASES 2035

INDEX 2101