Preface

- Must an employer provide breaks for a nursing mother to express milk, and a private place in which to do it?
- Must an employee allow time off to care for a sick child if the employee is gay and is raising a child not his own, with his partner of several years?
- If a disabled employee could perform the job requirements when hired, but the job has progressed and the employee is no longer able to perform, must the employer keep her on?
- Is an employer liable when a supervisor sexually harasses an employee, but the employer knew nothing of it?
- Is an employer liable for racial discrimination because she terminates a black male who refuses to abide by the "no-beard" rule?
- Can an employer be successfully sued for "reverse discrimination" by an employee who feels harmed by the employer's affirmative action plan?
- Can an employer institute a policy prohibiting Muslim women from wearing their hijab (head scarf)?
- If an employer has two equally qualified applicants from which to choose and prefers the white one to the black one, is it illegal discrimination for the employer to hire the white applicant, or must the employer hire the black one?
- Must an employer send to training the employee who is in line to attend, if that employee will retire shortly?
- Can an employer terminate a female employee because male employees find her pleasing shape too distracting?
- Is it a violation of wage and hour laws for an employer to hire his 13-year-old daughter to pick strawberries during the summer?
- Is an ex-employer liable for defamation if he gives a negative recommendation about an ex-employee to a potential employer who inquires?
- Must an employer disclose to employees that chemicals with which they work are potentially harmful?
- Can an employer stop employees from forming a union?

These types of questions, which are routinely decided in workplaces everyday, can have devastating financial and productivity consequences if mishandled by the employer. Yet few employers or their managers and supervisors are equipped to handle them well. That is why this textbook was created.

Between fiscal years 1970 when newly enacted job discrimination legislation cases started to rise and 2010, the number of federal discrimination suits grew from fewer than 350 per year to just shy of 100,000. A major factor in this statistic is that the groups protected by Title VII of the Civil Rights Act of 1964 and similar legislation, including minorities, women, and white males over 40, now constitute over 70 percent of the total workforce. Add to that number those

protected by laws addressing disability, genetic and family medical history, wages and hours, and unions, workplace environmental right-to-know laws, tort laws, and occupational safety and health laws, and the percentage increases even more. The U.S. Department of Labor alone administers more than 180 federal laws covering about 10 million employers and 125 million workers (http://www.dol.gov/opa/aboutdol/lawsprog.htm).

It is good that employers and employees alike are now getting the benefits derived from having a safer, fairer workplace and one more reflective of the population. However, this is not without its attendant challenges. One of those challenges is reflected in the statistics given above. With the advent of workplace regulation by the government, particularly the Civil Rights Act of 1964, there is more of an expectation by employees of certain basic rights in the workplace. When these expectations are not met, and the affected population constitutes more than 70 percent of the workforce, problems and their attendant litigation will be high.

Plaintiffs generally win nearly 50 percent of lawsuits brought for workplace discrimination. The median monetary damage award is $155,000 ("Civil Rights Complaints in U.S. District Courts, 2000," 7/1/2002 U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, http://www.bjs.ojp.usdoj.gov/content/pub/pdf/cicus00.pdf). As you will soon see, the good news is that the vast majority of the litigation and liability arising in the area covered by these statistics is completely avoidable. Many times the only difference between an employer being sued or not is a manager or supervisor who recognizes that the decision being made may lead to unnecessary litigation and thus avoids it.

When we first began this venture more than 15 years ago, we did not know if we would be able to sell enough copies of the textbook to justify even having a second edition. Luckily, we had a publisher who understood the situation and made a commitment to hang in there with us. The problem was that there was no established market for the text. There were so few classes in this area that they did not even show up as a blip on the radar screen. Actually, we only knew of two. But having worked in this area for years, we knew the need was there, even if the students, faculty, and even employers were not yet aware of it.

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

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

We cannot thank the publishers enough for being so committed to this textbook. Without their commitment, none of this would have happened. And we cannot thank professors and students enough for being there for us, supporting us, believing in the textbook and our voices, and trusting that we will honor the law and our commitment to bring the best to faculty and students.

We have seen what types of employment law problems are most prevalent in the workplace from our extensive experience in the classroom, in our research and writing, as well as in conducting over the years many employment seminars for managers, supervisors, business owners, equal employment opportunity officers, human resources personnel, general counsels, and others. We have seen how management most often strays from appropriate considerations and gets into avoidable legal trouble, exposing it to potential increased liability. We came to realize that many of the mistakes were based on ignorance rather than malice. Often employers simply did not know that a decision was being handled incorrectly.

Becoming more aware of potential liability does not mean the employer is not free to make legitimate workplace decisions they deem best. It simply means that those decisions are handled appropriately in ways that lessen or avoid liability. The problem does not lie in not being able to terminate the female who is chronically late for work because the employer thinks she will sue for gender discrimination. Rather, the challenge lies in doing it in a way that precludes her from being able to file a successful gender discrimination claim. It does not mean the employer must retain her, despite her failure to adequately meet workplace requirements. Rather, it means that the employer must make certain the termination is beyond reproach. If the employee has performed in a way that results in termination, this should be documentable and, therefore, defensible. Termination of the employee under such circumstances should present no problem, assuming similarly situated employees consistently have been treated the same way. The employer is free to make the management decisions necessary to run the business, but she or he simply does so correctly.

Knowing how to do so correctly does not just happen. It must be learned. We set out to create a textbook aimed at anyone who would, or presently does, manage people. Knowing what is in this book is a necessity. For those already in the workplace, your day is filled with one awkward situation after another—for which you wish you had the answers. For those in school, you will soon be in the workplace, and in the not-too-distant future you will likely be in a position managing others. We cannot promise answers to every one of your questions, but we can promise that we will provide the information and basic considerations in most areas that will help you arrive at an informed, reasonable, and defensible answer about which you can feel more comfortable. You will not walk away feeling as if you rolled the dice when you made a workplace decision, and then wait with anxiety to see if the decision will backfire in some way.

In an effort to best inform employers of the reasoning behind legal requirements and to provide a basis for making decisions in "gray areas," we often provide background in relevant social or political movements, or both, as well as in legislative history and other relevant considerations. Law is not created in a vacuum, and this information gives the law context so the purpose is more easily understood. Often understanding why a law exists can help a manager make the correct choices in interpreting the law when making workplace decisions with no clear-cut answers. We have found over the years that so few people really understand what any of this is

really about. They know they are not supposed to discriminate on the basis of, say, gender, but they don't always realize (1) when they are doing it, and (2) why the law requires it. Understanding the background behind the law can give extremely important insight into areas that help with both of these issues and allow the manager to make better decisions, particularly where no clear-cut answer may be apparent.

Legal cases are used to illustrate important concepts; however, we realize that it is the managerial aspects of the concepts with which you must deal. Therefore, we took great pains to try to rid the cases of unnecessary "legalese" and procedural matters that would be more relevant to a lawyer or law student. We also follow each case with questions designed to aid in thinking critically about the issues involved from an employer's standpoint, rather than from a purely legal standpoint. We understand that *how* employers make their decisions has a great impact on the decisions made. Therefore, our case-end questions are designed as critical-thinking questions to get the student to go beyond the legal concepts and think critically about management issues. This process of learning to analyze and think critically about issues from different points of view will greatly enhance student decision-making abilities as future managers or business owners. Addressing the issues in the way they are likely to arise in life greatly enhances that ability. You may wonder why we ask questions such as whether you agree with the court's decision or what you would do in the situation. This is important in getting you to think about facts from your perspective as a potential manager or supervisor. Your thoughts matter just as much as anyone else's and you should begin to think like a manager if you are going to be one. Nothing magic happens once you step into the workplace. You bring an awful lot of your own thoughts, preconceived notions, and prejudgments with you. Sometimes these are at odds with the law, which can lead to liability for the employer. The questions are a way to ferret out your own thoughts, explore what is in your own head that can serve as the basis of decisions you make in the workplace. You can then make any needed adjustments to avoid liability.

It is one thing to know that the law prohibits gender discrimination in employment. It is quite another to recognize such discrimination when it occurs and govern oneself accordingly. For instance, a female employee says she cannot use a "filthy" toilet, which is the only one at the work site. The employer can dismiss the complaint and tell the employee she must use the toilet, and perhaps later be held liable for gender discrimination. Or the employer can think of what implications this may have, given that this is a female employee essentially being denied a right that male employees have in access to a usable toilet. The employer then realizes there may be a problem and is more likely to make the better decision.

This seemingly unlikely scenario is based on an actual case, which you will later read. It is a great example of how simple but unexpected decisions can create liability in surprising ways. Knowing the background and intent of a law often can help in situations where the answer to the problem may not be readily apparent. Including the law in your thinking can help the thought process for making well-founded decisions.

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

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

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

Much of today's litigation results from workplace decisions arising from unfortunate ideas about various groups and from lack of awareness about what may result in litigation. We do not want to take away anyone's right to think whatever he or she wants about whomever he or she wants, but we do want to teach that those thoughts may result in legal trouble when they are acted on.

Something new and innovative must be done if we are to break the cycle of insensitivity and myopia that results in spiraling numbers of unnecessary workplace lawsuits. Part of breaking this cycle is language and using terminology that more accurately reflects those considerations. We therefore, in writing the text, took a rather unorthodox move and took the offensive, creating a path, rather than following one.

For instance, the term *sex* is generally used in this text to mean sex only in a purely sexual sense—which means we do not use it very much. The term *gender*

is used to distinguish males from females. With the increasing use of sexual harassment as a cause of action, it became confusing to continue to speak of sex as meaning gender, particularly when it adds to the confusion to understand that sex need *not* be present in a sexual harassment claim but gender differences *are* required. For instance, to say that a claim must be based on "a difference in treatment based on sex" leaves it unclear as to whether it means gender or sexual activity. Since it actually means gender, we have made such clarifications. Also, use of the term *sex* in connection with gender discrimination cases, the majority of which are brought by women, continues to inject sexuality into the equation of women and work. This, in turn, contributes to keeping women and sexuality connected in an inappropriate setting (employment). Further, it does so at a time when there is an attempt to decrease such connections and, instead, concentrate on the applicant's qualifications for the job. The term is also confusing when a growing number of workplace discrimination claims have been brought by transgenders, for whom gender, sex, and sexuality intersect and can cause confusion if language is not intentional, accurate, conscious, and thoughtful.

So, too, with the term *homosexuality*. In this text, the term *affinity orientation* is used instead. The traditional term emphasizes, for one group and not others, the highly personal yet generally irrelevant issue of the employee's sexuality. The use of the term sets up those within that group for consideration as different (usually interpreted to be "less than"), when they may well be qualified for the job and otherwise acceptable. With sexuality being highlighted in referring to them, it becomes difficult to think of them in any other light. The term also continues to pander to the historically more sensational or titillating aspects of the applicant's personal life and uses it to color her or his entire life when all that should be of interest is ability to do the job. Using more appropriate terminology will hopefully keep the focus on that ability.

The term *disabled* is used rather than *handicapped* to conform to the more enlightened view taken by the Americans with Disabilities Act of 1990. It gets away from the old notion noted by some that those who were differently abled went "cap in hand" looking for handouts. Rather, it recognizes the importance of including in employment these 43 million Americans who can contribute to the workplace despite their physical or mental condition.

There is also a diligent effort to use gender-inclusive or neutral terminology—for example, police officers, rather than policemen; firefighters, rather than firemen; servers, rather than waiters or waitresses; flight attendants, rather than stewards or stewardesses. We urge you to add to the list and use such language in your conversations. To use different terminology for males and females performing the same job reflects a gender difference when there is no need to do so. If, as the law requires, it is irrelevant because it is the job itself on which we wish to focus, then our language should reflect this.

It is not simply a matter of terminology. Terminology is powerful. It conveys ideas to us about the matter spoken of. To the extent we change our language to be more neutral when referring to employees, it will be easier to change our ingrained notions of the "appropriateness" of traditional employment roles based on

gender, sexuality, or other largely irrelevant criteria and make employment discrimination laws more effective.

This conscious choice of language also is not a reflection of temporal "political correctness" considerations. It goes far beyond what terming something *politically correct* tends to do. These changes in terminology are substantive and nontrivial changes that attempt to have language reflect reality, rather than have our reality shaped and limited by the language we use. Being sensitive to the matter of language can help make us more sensitive to what stands behind the words. That is an important aid in avoiding liability and obeying the law.

The best way to determine what an employer must do to avoid liability for employment decisions is to look at cases to see what courts have used to determine previous liability. This is why we have provided many and varied cases for you to consider. Much care has been taken to make the cases not only relevant, informative, and illustrative but also interesting, up to date, and easy to read. There is a good mix of new cases, along with the old standards that still define an area. We have assiduously tried to avoid legalese and intricate legal consideration. Instead, we emphasize the legal managerial aspects of cases—that is, what does the case mean that management should or should not do to be best protected from violating the law?

We wanted the textbook to be informative and readable—a resource to encourage critical and creative thinking about workplace issues and to sensitize you to the need for effective workplace management of these issues. We think we have accomplished our goal. We hope the text is as interesting and informative for you to read and use as it was exciting and challenging for us to write.

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

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

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

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