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# Labor and Employment Law Handbook

Third Edition

by Gordon E. Jackson

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*Labor and Employment Law Handbook* covers the numerous developments in the ever-changing labor and employment field. This two-volume reference guide to both federal and state substantive and procedural laws pertaining to labor and employment law addresses procedural guidelines, claims, and defenses. *Labor and Employment Law Handbook* is an invaluable reference that provides comprehensive coverage and insight into the trends in federal and state labor and employment laws.

## Highlights of the 2013 Supplement

The 2013 Supplement to the Third Edition brings you up to date on the latest case law, including:

- The latest Supreme Court cases in the labor and employment law field, such as:
  - The Court's refusal to review an Eleventh Circuit Court ruling that a supervisor's telephone message that the plaintiff's job was in jeopardy does not constitute an adverse employment action sufficient enough to support a retaliation claim under Title VII, even when the plaintiff was later terminated—in the case of *Howard v. Walgreen Co.* [Chapter 30]
  - The Court's refusal to review a lower court ruling that an employer did not violate Title VII for race discrimination when it issued an African-American a negative performance evaluation that did not change her pay or position,



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- and as a result, did not constitute a materially adverse employment action. The lower court concluded the employer provided legitimate, nondiscriminatory reasons for moving the plaintiff's managerial duties to a white employee during a reduction in force—in the case of *Epps v. FedEx Services* [Chapter 33]
- The Court's refusal to review a lower court ruling that a black female employee failed to establish a race and sex discrimination claim and a retaliation claim under Title VII because she was not similarly situated to white male and female employees who were promoted, and further, she could not demonstrate a causal connection between her protected activity of filing EEOC charges and the denial of a promotion—in the case of *Jackson v. UPS, Inc.* [Chapter 33]
  - The Court's holding that a plaintiff failed to show the privatization of a detention center and the discretion of the private entity to select a new superintendent, which led to her dismissal, was a pretext for sex discrimination—in the case of *Goree v. Lincoln Parish Detention Center* [Chapter 34]
  - The Court's ruling that a lower court erred in certifying a large sex discrimination class action against Wal-Mart on the basis that the female plaintiffs failed to satisfy the requirements of Rule 23(a) of the Federal Rules of Civil Procedure by their inability to show common questions of law or fact in their sex discrimination lawsuit under Title VII—in the case of *Wal-Mart Stores, Inc. v. Dukes* [Chapter 35]
  - The Court's refusal to review a Tenth Circuit Court ruling that a former eBay employee must arbitrate his age discrimination, sexual harassment, and retaliatory claims against the employer because a provision in the arbitration agreement to exclude disputes over proprietary information and inventions was not so unreasonable as to render the agreement unenforceable—in the case of *Kepas v eBay Inc.* [Chapter 36]
  - The Court's refusal to review appeals from the Eighth and Ninth Circuits involving employees whose positions were both military and civilian in nature, on the basis that the

*Feres* decision bars such a dual employee from suing the federal government under Title VII—in the cases of *Wetherill v. McHugh* and *Zuress v. Donley* [Chapter 36]

- The Court’s refusal to review a lower court ruling that an employee was bound to arbitrate her discrimination claim against her employer since she signed an employment agreement that contained arbitration provisions, irrespective of whether she actually saw the agreement. The Court found that any costs to her as a result of arbitration were not prohibitive—in the case of *Bauman v. Finish Line Inc.* [Chapter 36]
- The Court’s refusal to review a lower court decision that a company’s transition from a traditional retirement plan to a cash balance plan did not violate the ADEA because the Act requires discrimination in plan inputs, not outputs—in the case of *Tomlinson v. El Paso Corp.* [Chapter 40]
- The Court’s refusal to review an appeal from a decision holding that the plaintiff, who suffered from Asperger’s disorder, failed to show he could communicate sufficiently with the medical staff and patients to be considered qualified for a continuation of his residency program, with or without reasonable accommodations—in the case of *Jakubowski v. Christ Hospital* [Chapter 44]
- The Court’s refusal to hear an appeal from a case in which a former teacher failed to establish that the legitimate reasons proffered by the employer for its employment action were not a pretext, and, that a temporal proximity between a protected activity and an adverse action is insufficient by itself to support an ADA lawsuit—in the case of *Phillips v. Harrisburg School District* [Chapter 44]
- The Court’s refusal to review a lower court’s ruling that a teacher is entitled to qualified immunity from a student’s claim that the teacher’s disparaging remarks about Christianity, and religion generally, violated the Establishment Clause of the First Amendment—in the case of *C.F. v. Corbett* [Chapter 47]

- The Court’s refusal to review a lower court ruling that illegal alien employees are covered under the FLSA and thus entitled to bring an action under the Act for unpaid wages irrespective of the *Hoffman Plastic Compounds* decision that held that undocumented workers are ineligible for back pay under the National Labor Relations Act. The lower court stated that *Hoffman* involved NLRA claims for employees being unlawfully deprived of a job whereas the instant case involved claims relating to work already performed—in the case of *N&D Insurance Corp. v. Goldames* [Chapter 48]
- The Court’s ruling that time spent donning and doffing protective gear during meal breaks is not compensable under the Fair Labor Standards Act—in the case of *Mountaire Farms v. Perez* [Chapter 49]
- The Court’s refusal to review a lower court’s ruling that a California hospital did not violate the overtime provisions of the Fair Labor Standards Act by using different base hour rates to calculate regular rates of pay depending on whether a nurse chose to work on an eight-hour or 12-hour shift, since such arrangement was intended to provide employees the 12-hour option as was memorialized in a collective bargaining agreement—in the case of *Parth v. Pomona Valley Medical Center* [Chapter 51]
- The Court’s refusal to review a Tenth Circuit decision holding that an employer’s cash balance retirement plan did not discriminate against older employees or unlawfully backload benefits in violation of ERISA because there was no evidence that demonstrated the company ceased or reduced the rate of an employee’s benefits accrued because of age—in the case of *Tomlinson v. El Paso Corp.* [Chapter 61]
- The Court’s ruling that a federal district court erred when it ordered an employer to reform its cash balance retirement plan to remedy its violations of ERISA because there is nothing in the Act that allows courts to change or reform the terms of such a plan—in the case of *CIGNA Corp. of America* [Chapter 63]

- The NLRB's ruling that a group of orchestra musicians are employees not independent contractors under the definition of the Act because they are free to accept or reject offers to play in seasonal programs, but once they accept the engagement their rehearsals and performance are under the extensive control of the orchestra—in the case of *Lancaster v. Symphony Orchestra* [Chapter 3]
- The NLRB's ruling that a hospital's ban on registered nurses wearing pro-union ribbons in patient care areas while allowing other nurses to wear hospital endorsed ribbons in such areas violated the Act—in the case of *Saint John's Health Center* [Chapter 5]
- The NLRB's ruling that a nonprofit organization violated the Act by terminating five employees because one of the five posted critical comments about working conditions on her Facebook page and the other four commented on her page. The Board found their dismissal interfered with their rights to engage in concerted activities for mutual aid or protection—in the case of *Hispanics United of Buffalo, Inc.* [Chapter 8]
- The NLRB's ruling that the Teamsters Union violated the Act by entering into and enforcing a labor contract in which a highway construction contractor was prohibited from subcontracting certain ready-mix concrete work to two individual firms that did not have a labor agreement with the Teamsters—in the case of *International Brotherhood of Teamsters, Local 251 (Material Sand and Stone Corp)* [Chapter 8]
- The Sixth Circuit Court's ruling that the Board properly awarded reinstatement and back pay to an x-ray technician who was discharged 11 years earlier despite post-termination misconduct. Both the Board and the court rejected the employer's argument that a post-termination felony conviction terminated the employee's right to back pay and reinstatement—in the case of *NLRB v. Jackson Memorial Hospital Corp. d/b/a Ky. River Medical Center* [Chapter 11]
- The NLRB's ruling that a shareholder and owner of a now-dissolved company is personally liable for back pay and interest to 200 employees who were not reinstated to their jobs after an unfair

labor practice strike. the Board found there was more than sufficient evidence to justify a piercing of the corporate veil of the defunct company—in the case of *Domsey Trading Corp.* [Chapter 18]

- The First Circuit Court’s holding that in determining damages caps under Title VII, the time period of the alleged discrimination rather than the time period in which a verdict is entered is the controlling period—in the case of *Hernandez-Miranda v. Empresas Diaz Masso, Inc.* [Chapter 18]
- The Fifth Circuit Court’s ruling that the damages cap under Title VII applies to each plaintiff, not to each claim, even if he or she has multiple claims under the Act—in the case of *Black v. Pan Am. Labs, LLC* [Chapter 31]
- The Eleventh Circuit Court’s holding that an employee does not have grounds to go forward with her religious discrimination claims on the basis that she was laid off by her employer after she remarked to a client in a same-sex relationship that she could not counsel her because of her “personal values”—in the case of *Walden v. Centers for Disease Control & Prevention* [Chapter 33]
- The Fourth Circuit Court’s finding that an employee who was subjected to co-workers repeatedly referring to her in demeaning terms, including the use of the “C” and “B” words, the display of nude and scantily clad women, and discussions about sexual activity, could proceed with her sexual harassment claims because a reasonable jury could conclude that she was harassed on the basis of her sex, and the harassment was severe and pervasive enough to interfere with her work—in the case of *Harris v. Baltimore* [Chapter 34]
- The Eighth Circuit Court’s holding that a racial and sexual harassment claim brought by five employees against their employer may not go forward because they unreasonably delayed giving notification of the misconduct to the employer, and the employer responded timely and effectively once the complaints were received—in the case of *Crawford v. BNSF Ry. Co.* [Chapter 34]
- The Sixth Circuit Court’s ruling that a plaintiff in a racial and military discrimination suit is not required to demonstrate an exact correlation between himself and other similarly situated employees in order to proceed with his claim, but instead only has to show that he and his proposed comparators were similar in all relevant

respects, and that they engaged in acts of comparable seriousness—in the case of *Bobo v. UPS, Inc.* [Chapter 35]

- The Fourth Circuit Court’s holding that an employer that prevails in a Title VII action may not seek attorney’s fees under the Equal Access to Justice Act, but instead must show that the plaintiff’s case was frivolous, unreasonable, and groundless under the Act’s fee-shifting provision, which the employer failed to do in this case—in the case of *EEOC v. Great Steaks, Inc.* [Chapter 35]
- The D.C. Circuit Court’s holding that a police captain was ineligible to receive a jury award of \$180,000 on his discrimination claim because he was awarded \$90,000 on each of his legal theories, one based on Title VII claims and the other based on the D.C. Human Rights Act. The court stated that in the absence of punitive damages, a plaintiff may not recover more than the loss actually suffered—in the case of *Medina v. District of Columbia* [Chapter 35]
- The Eighth Circuit Court’s holding that a Cuban born branch manager who was terminated for creating a fearful work environment among co-workers, and who failed to acknowledge his deficiencies, may not go forward with his race and national origin discrimination claims since he failed to identify similarly situated non-Hispanic branch managers who were treated more favorably—in the case of *Martinez v. W.W. Granger Inc.* [Chapter 36]
- The Tenth Circuit Court’s holding that a registered nurse must fail on her First Amendment claim that she was removed from a specialized heart team after she complained about a male surgeon hitting her with a patient’s heart tissue. The court found that such complaint was not one of public concern—in the case of *Morris v. Colorado Springs* [Chapter 38]
- The Eleventh Circuit Court’s holding that a pre-eligible employee may proceed with an FMLA claim if an employer terminates such employee as a means to avoid having to provide leave once he or she becomes eligible—in the case of *Pereda v. Brookdale Senior Living Cmtys., Inc.* [Chapter 45]
- The Eleventh Circuit Court’s ruling that an employer is not entitled to wage credits under the FLSA for providing free housing to migrant workers if such workers were hired through the H-2A visa program—in the case of *Ramos-Barrientos* [Chapter 49]

- The Fifth Circuit Court’s holding that an arbitration clause that permits an employer to change its terms and conditions at its discretion is unenforceable and invalid under Texas contract law, and therefore does not prevent an employee from proceeding with her FLSA lawsuit—in the case of *Carey v. Hour Fitness USA, Inc.* [Chapter 51]
- The D.C. Circuit Court’s ruling that a DEA agent failed to establish his privacy claim based on the disclosure of a video of him accidentally shooting himself with an agency firearm during a community center presentation because the video contained no private facts, and the incident was a matter of public concern—in the case of *Paige v. DEA* [Chapter 67]
- The First Circuit Court’s ruling that the Sarbanes-Oxley Act protects only employees of public companies, and employees of private companies that are contractors or subcontractors of a public company are not covered by the Act—in the case of *Lawson v. FMR, LLC* [Chapter 67]
- The Alaska Supreme Court’s holding that it would not enforce an arbitration award that would violate an explicit public policy of the state, although it determined in the case at hand that the public policy exception to the at-will doctrine did not apply—in the case of *State v. Public Safety Employees Association* [Chapter 73]
- The Kansas Supreme Court’s ruling that an employee who was terminated for exercising his rights under the Kansas Wage Payment Act has a common law retaliatory discharge action against his employer because such a termination of employment is a violation of the state’s public policy—in the case of *Campbell v. Husky Hogs, LLC* [Chapter 88]
- The Minnesota Supreme Court’s holding that the marital status provisions of the Minnesota Human Right Act extend to employment discrimination based on the identity of the beliefs and actions of an employee’s spouse—in the case of *Taylor v. LSI Corporation of America* [Chapter 95]
- The Oklahoma Supreme Court’s ruling that the Oklahoma Protection of Labor Act provides a private cause of action for unclassified state employees to recover unpaid wages, but they are not entitled to recover liquidated damages on unpaid wages—in the case of *Hammick v. State* [Chapter 108]

- Oklahoma Supreme Court's ruling that a former employee of McDonald's Restaurant may proceed with his intentional infliction of emotional distress action because there was sufficient evidence that his supervisor cursed at him while denying his request to take anti-seizure medication, and the denial of the request caused him to fear he would suffer a seizure at work. The court further found that his claim was not barred by a federal district court's dismissal of his ADA claim—in the case of *Durham v. McDonald's Restaurants of Oklahoma, Inc.* [Chapter 108]

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