

Preface

This fifteenth edition of EQUAL EMPLOYMENT LAW UPDATE includes 1554 relevant cases through 363 F.3d. It includes all relevant Supreme Court cases through June 30, 2007, and decisions in the courts of appeals from March 1, 2002, through March 1, 2004.

Our goal in providing semi-annual editions is to keep you as abreast as possible of the rapidly evolving fair-employment case law handed down by the Federal appellate courts. This edition, for example, covers 400 cases with reported decisions or actions in 2002, 502 cases with reported decisions or actions in 2003, 134 cases with reported decisions or actions in 2004, and 205 cases with reported decisions or actions in 2005 or later. These totals include a total of 170 certiorari petitions and actions. We do not know of any other source with such intensive coverage of cases handed down so recently.

Complete coverage of the EQUAL EMPLOYMENT LAW UPDATE series requires using this SUMMER 2007 edition with the SPRING 2005 edition (March 1, 2000, through March 1, 2002), the SPRING 2000 edition (March 1, 1998, through March 1, 2000), the SPRING 1998 edition (March 1, 1996, through March 1, 1998) and the SUMMER 1996 edition (March 1, 1994, through March 1, 1996). Together, these editions cover ten years of unprecedented development of the fair employment laws, from 17 F.3d through 363 F.3d, and from March 1, 1994 through March 1, 2004, with earlier and later Supreme Court decisions to provide context.

While the current edition is intended as a take-along reference you can put into your briefcase and have available at a trial, deposition, mediation, or other place outside your office, this edition and the SPRING 2005, SPRING 2000, SPRING 1998, and SUMMER 1996 editions are a time-saving way to start your research on any issue, or to get current and stay current in any area of fair-employment law.

The first step in preparing an edition is the identification of the cases that may have holdings worth discussing. As we started to prepare this edition, we posted on BNA's Web site recent CLE papers updating the law even further. While some cases in the papers did not make the final cut, these materials told readers which late-breaking decisions were potentially relevant to the subject matter of each chapter. Go to the BNA Books Web site at <http://www.bnabooks.com>, click on "Publications," search for "Equal Employment Law Update," click on the book title, then click on "Seymour Update."

The rate at which new fair employment cases are being filed in Federal court had increased steadily since enactment of the Civil Rights Act of 1991, but is now declining. It is nonetheless an important proportion of the workload of the Federal courts. The following figures are taken from the Reports and unpublished statistics of the Administrative Office of the United States Courts:

Number of Employment Discrimination Cases Filed Across the Country in the Following Reporting Years

<u>Twelve-Month Period</u>	<u>Number of Employment Discrimination Cases Filed in These 12 Months</u>
1988 (12 mos. to 6/30/88)	8,563
1989 (12 mos. to 6/30/89)	8,993
1990 (12 mos. to 6/30/90)	8,413
1991 (12 mos. to 6/30/91)	8,140
1992 (12 mos. to 9/30/92)	10,771

1993 (12 mos. to 12/31/93)	13,650
1994 (12 mos. to 9/30/94)	15,965
1995 (12 mos. to 9/30/95)	19,059
1996 (12 mos. to 12/31/96)	23,037
1997 (12 mos. to 12/31/97)	24,174
1998 (12 mos. to 12/31/98)	23,299
1999 (12 mos. to 12/31/99)	22,412
2000 (12 mos. to 12/31/00)	21,111
2001 (12 mos. to 12/31/01)	21,062
2002 (12 mos. to 12/33/02)	20,972
2003 (12 mos. to 12/31/03)	20,040
2004 (12 mos. to 9/30/04)	19,746
2005 (12 mos. to 9/30/05)	16,930
2006 (12 mos. to 9/30/06)	14,353
2007 (12 mos. to 6/30/07)	13,608

There are no comparable figures available for filings in State courts.

There has been a 43.7% decline since 1997 in the number of new fair-employment cases filed in Federal district courts.

From the third calendar quarter of 2005 to the second calendar quarter of 2007, there has been a 7.4% increase in general civil filings but a 19.6% decrease in EEO filings in Federal courts.

Fair-employment filings represent a large but declining proportion of the civil workload of Federal district courts. A total of 272,067 new civil cases were filed in Federal courts during the twelve months ending June 30, 2007. EEO cases were therefore 5.0% of all civil filings in Federal court, compared with 6.7% nearly two years earlier. This is one of every 20 civil filings, compared to one of every 15 civil filings a year earlier. Federal-question EEO cases are 8.8% of all Federal-question cases, compared with 12.5% nearly two years earlier. These are one in every 11 Federal-question cases, compared with one in every 8.0 such cases nearly two years earlier.

At least for the present, the Administrative Office of the U.S. Courts has ceased to report class action filings by subject matter. The following figures are thus the latest available:

The number of EEO cases initially filed as class actions has declined 5.6% from 2000 to 2005, while the number of FLSA collective actions has increased by more than 77.5% in the same period.

New EEO Class Action Filings in 12 months ending Dec. 31, 2000:	89
New EEO Class Action Filings in 12 months ending Dec. 31, 2001:	77
New EEO Class Action Filings in 12 months ending Dec. 31, 2002:	60
New EEO Class Action Filings in 12 months ending Dec. 31, 2003:	82
New EEO Class Action Filings in 12 months ending Sept. 30, 2004:	96
New EEO Class Action Filings in 12 months ending June 30, 2005:	85
New FLSA Collective-Action Filings in 12 months ending Dec. 31, 2000:	71
New FLSA Collective-Action Filings in 12 months ending Dec. 31, 2001:	79
New FLSA Collective-Action Filings in 12 months ending Dec. 31, 2002:	91
New FLSA Collective-Action Filings in 12 months ending Dec. 31, 2003:	121
New FLSA Collective-Action Filings in 12 months ending Sept. 30, 2004:	133
New FLSA Collective-Action Filings in 12 months ending June 30, 2005:	126

Trials in civil cases are vanishing. According to the Administrative Office of the U.S. Courts Table 4.10, in the twelve months ending June 30, 2006, a total of 211,781 civil cases were terminated. Of these, only 2,415 were terminated by trial. Thus, only 1.3% of all terminated civil cases were terminated

by trial.

According to the Administrative Office of the U.S. Courts Table 6.4, a total of 5,121 civil cases were tried in this period. With Table 6.2 showing 678 authorized judgeships, that is about seven and a half civil trials per judge annually.

The pace of litigation is also declining in the Courts of Appeals. A total of 497 Federal-question EEO cases were decided after oral argument in the twelve months ending June 30, 2007, compared with 611 almost two years earlier. This is the category of cases most likely to result in published opinions. In the twelve months ending June 30, 2007, EEO cases were 16.3% of all civil Federal-question cases decided after oral argument, or one in every six civil Federal-question cases decided after oral argument.

Federal-question fair-employment cases are substantially more likely than general Federal-question civil cases to reach oral argument: 26.3% of EEO federal-question appeals filed during this period made it to oral argument, compared with only 15.3% of all civil Federal-question cases filed during this period.

The aggregate volume of published and unpublished decisions in the Courts of Appeals is impressive: 1,096 employment discrimination cases were decided on the merits in the twelve months ending June 30, 2007, and another 808 employment discrimination appeals were resolved on procedural grounds during that period. On June 30, 2007, a total of 1,720 Federal-question employment discrimination cases were pending action in the U.S. Courts of Appeals, down 90 cases from the prior year.

This flood of claims and new case law has made it more important to stay on top of legal developments just when the flood of decisions has made it more difficult to do so.

Each edition of this book is intended to address the needs of judges, attorneys, law teachers, and others who need to know quickly the direction in which the rapidly developing law of equal employment opportunity is heading, and need to have a ready guide to recent appellate cases. It covers the full range of Federal appellate case law in this field, and is intended to supplement any treatise the reader may be using. Many treatises are already some years out of date by the time they appear, and go for a substantial period without supplementation. In addition, treatises often do not focus on what can be subtle variations in the law of the Circuits.

We needed a much more up-to-date source of information, one that covers a reasonable period but is still small enough to keep on our desks and to slip into a briefcase to take to a hearing, a meeting with clients or opposing counsel, a mediation, or an arbitration. Neither of us likes to be caught flatfooted, so we wanted something that would enable us to come up quickly with an answer to an unexpected question from the court, a client, or opposing counsel, as well as provide a useful starting point for research. We also wanted to avoid the reduction in utility arising from simply listing the holdings in cases; we have tried to provide enough of the factual context—and sometimes even the language—of cases so that readers can quickly determine if a case is on all fours with the case they are litigating.

New cases and comments are indicated by a ✓ checkmark so that readers of the last edition will know immediately what is new. We are grateful to Kent Spriggs of Tallahassee, Florida, for this suggestion.

Our goal is a volume giving the greatest possible practical help to practitioners. Practitioners need to be able to find quickly the case law from a particular Circuit on a point of interest. To help achieve this goal, the court that decided a case is always indicated in boldface and the decisions in a topic are generally listed by order of Circuit. For the same reason, “short form” citations to a case previously cited in a chapter always include the page on which the case starts, and always show the boldface

identification of the court deciding the case.

You do not have to rely on our judgments to identify the hottest issues. Because the extent of our coverage is based on the number and complexity of decisions for each topic covered, the coverage is automatically adjusted as new issues become litigated more frequently and as old issues become more settled and less contentious. The length of a topic's coverage is a rough measure of how "hot" the issue has been in the appellate courts over the two years in question. Where there has been past activity in a topic, but no activity within the period of this edition, we have kept the topic heading to alert readers to the fact that there were cases under that heading in one or more earlier editions.

To cut down on production time and get this book in your hands as quickly as possible, we have had to take some rough and ready means. No copy editors have gone through this volume, and there may be some typographic errors we were unable to catch in time. This saved a couple of months. To allow the generation of a complete table of cases in less than a further couple of months, we are using a software program that recognizes case citations but imposes some limitations on us in listing "short form" citations. To get a quick, accurate, and useful table of authorities, we have had to adopt the special citation formats explained immediately after this Preface.

This book provides some context, and citations to older key Supreme Court decisions, within the size constraints of a desk and "take-along" edition needed for practitioners. This book is written by a plaintiff's attorney and a defense attorney, and is reviewed for balance and suggestions by a panel of attorneys representing plaintiffs, unions, and employers.

In this edition, we thought it would be interesting to compare the Circuits for their output of published decisions worth covering in this volume. Surprisingly, three powerhouse Circuits—the Seventh, Eighth, and Ninth—issue 41.1% of the published Circuit EEO decisions that the authors believe are worth covering:

Court	Number of Cases Covered in Book	Percent of All Circuit Cases Covered
D.C. Circuit	41	3.5%
Federal Circuit	11	0.9%
1st Circuit	99	8.4%
2d Circuit	87	7.4%
3d Circuit	44	3.7%
4th Circuit	39	3.3%
5th Circuit	109	9.2%
6th Circuit	109	9.2%
7th Circuit	180	15.2%
8th Circuit	178	15.1%
9th Circuit	128	10.8%
10th Circuit	76	6.4%
11th Circuit	81	6.9%
Total Circuit Decisions	1182	100.0%
Supreme Court	372	N.A.
Total Decisions	1554	

If the Fifth and Ninth Circuits are added to the Seventh, Eighth, and Ninth Circuits, just four of the thirteen Circuits account for almost 60% of the published EEO opinions of interest to practitioners.

Because of the topical breakdowns of this book, it is also possible to obtain a rough measure of the complexity of each Circuit's decisions. The following table shows the number of times a Circuit's decisions were cited in this edition. The count was based on the number of times the Circuit was identified in the standard citation format, *e.g.*, "1st Cir.," exclusive of "*id.*" citations. This happens within

this edition and within a chapter each time a case is cited under a new topic. The First, Seventh, Eighth, and Ninth Circuits were the most complex, in terms of being cited most often for discrete points:

Court	Number of Cites in this Edition to This Circuit's Decisions	Percent of All Cites	Average Cites Per Decision
D.C. Circuit	147	3.2%	3.6
Federal Circuit	24	0.5%	2.2
1st Circuit	423	9.3%	4.3
2d Circuit	281	6.2%	3.2
3d Circuit	151	3.3%	3.4
4th Circuit	180	4.0%	4.6
5th Circuit	385	8.5%	3.5
6th Circuit	386	8.5%	3.5
7th Circuit	783	17.3%	4.3
8th Circuit	732	16.1%	4.1
9th Circuit	452	10.0%	3.5
10th Circuit	322	7.1%	4.2
11th Circuit	268	5.9%	3.3
Total Circuit Citations	4534	100.0%	
Supreme Court	837	N.A.	2.3
Total Citations	5371		

From the SUMMER 1996 edition to the present, it has seemed to the authors that some Circuits were far more active than others in deciding cases based on the *McDonnell Douglas / Burdine / Hicks* inferential model. We did the same analysis for the citations in Chapter 14 of this edition, and found that the powerhouse role of the Sixth, Seventh, and Eighth Circuits was even stronger. Their cases made up 49.0% of all citations. Moreover, there are major differences among the Circuits in terms of the proportion of all their citations which are citations explaining or applying the inferential model:

Court	Total Citations in Chapter 14	Percent of All Circuit Citations in Chapter 14	Citations in Chapter 14 as a Percentage of This Circuit's Total Citations in Book
D.C. Circuit	34	3.9%	23.1%
Federal Circuit	2	0.2%	8.3%
1st Circuit	61	6.9%	14.4%
2d Circuit	49	5.6%	17.4%
3d Circuit	21	2.4%	13.9%
4th Circuit	46	5.2%	25.6%
5th Circuit	72	8.2%	18.7%
6th Circuit	102	11.6%	26.4%
7th Circuit	176	20.0%	22.5%
8th Circuit	153	17.4%	20.9%
9th Circuit	76	8.6%	16.8%
10th Circuit	52	5.9%	16.1%
11th Circuit	36	4.1%	13.4%
Total Circuit Citations in Chapter 14	880	100.0%	19.4%

Questions under the inferential model seem to arise much less frequently in reported EEO decisions of

the Federal and District of Columbia Circuits than they do in the reported EEO decisions of the other Circuits.

We are interested in all ideas for improving the book. If you have a suggestion, or if you would like to submit a brief signed comment that you would like the authors to consider for the next volume, please contact the principal drafter of the chapter in which you would like the comment to appear. Richard Seymour is the principal drafter of Chapters 1, 2, 4, 5, 13 through 20, 23, 26, 27, 29, 31 through 34, 36, 39, 41, 44 through 47, 51, 52, and 55 through 61. John F. Aslin is now the principal drafter of Chapters 3, 6 through 12, 21, 22, 24, 25, 28, 30, 35, 37, 38, 40, 42, 43, 48 through 50, 53, and 54. The authors of comments will have to execute an ABA copyright waiver form. The authors will decide which comments to use, and where they will be placed. Brevity and clarity are important. The ideal size of a comment is six or seven lines. Comments may include perceptions of a recent appellate decision, observations on the direction in which the law seems to be developing, tactical ideas, recommended advice to clients, and practice tips. If possible, the comments should be submitted on diskette as well as on paper, so that they do not have to be retyped. Comments can also be sent over the Internet to the authors. Richard Seymour can be reached at rick@rickseymourlaw.net. John Aslin can be reached at aslij@perkinscoie.com.

We are grateful to the American Bar Association's Section of Labor and Employment Law for its sponsorship of the book. We have for many years been active in the Section's Equal Employment Opportunity Committee, and are grateful for its review of this work. The Labor and Employment Law Section is the only forum in the country in which attorneys representing all sides in labor and employment cases are equally welcome. Its members gain professionally and personally by improving their understanding of the perspectives of the "other sides." The Section publishes numerous books on aspects of labor and employment law, all of which present a balanced view reflecting the perspectives and insights of each of the competing interests. Similarly, the Section presents numerous Continuing Legal Education programs, all of which also present a balanced view. We invite you to join the Section to enjoy these benefits yourself at a significantly reduced cost.

While we represent both sides in fair employment litigation, this series is a joint work reflecting our combined personal views. It does not represent the views of the American Bar Association, of the reviewers, of the commenters except as to their own comments, of our clients, of the Law Office of Richard T. Seymour, P.L.L.C., or of Perkins Coie. It does not reflect many colorable positions that we argue on behalf of our clients.

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