LITIGATING EMPLOYMENT DISCRIMINATION CASES

VOLUME ONE

by Andrew H. Friedman

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ABOUT THE AUTHOR

Andrew H. Friedman is a name partner in the law firm of Helmer • Friedman, LLP (www.helmerfriedman.com) in Los Angeles, California. He has practiced primarily in the area of employment law since completing his judicial clerkship with the Honorable John T. Nixon (United States District Court for the Middle District of Tennessee) in 1990.

Mr. Friedman graduated from Vanderbilt University, *cum laude*, in 1986 with a B.A. in History and Psychology. Mr. Friedman then graduated from Cornell Law School in 1989 where he was an Editor of the Cornell Law Review.

Mr. Friedman has litigated virtually every type of employment case (on behalf of management, individual defendants, individual plaintiffs and classes of plaintiffs) in the California state and federal courts, including the U.S. Supreme Court where he served as Counsel of Record in *Lightfoot v. Cendant Mortgage Corp. et. al.* (Case No. 10-56068) successfully convincing the Supreme Court to grant the petition for *certiorari* that he filed on behalf of his clients. In January 2017, the Supreme Court, in a unanimous decision authored by Justice Sotomayor, reversed the Ninth Circuit and ruled in favor of Mr. Friedman's clients. Mr. Friedman has also represented both employers and employees in administrative matters pending before numerous governmental agencies, including the Equal Employment Opportunity Commission ("EEOC"), the California Department of Fair Employment and Housing ("DFEH"), and the California Division of Labor Standards Enforcement ("DLSE").

Mr. Friedman is a frequent speaker for numerous human resource, legal, and business networking organizations, including the American Bar Association, the State Bar of California, the California Lawyers Association, Alameda County Bar Association, the Beverly Hills Bar Association, the Los Angeles County Bar Association, the Santa Monica Bar Association, the Santa Clara County Bar Association, the Employment Round Table of Southern California, the California Employment Lawyers Association, the National Employment Lawyers Association, and the Consumer Attorneys Association of Los Angeles. Mr. Friedman has also spoken about various labor and employment law issues on "Your Legal Rights," a San Francisco-based public radio program, produced and hosted by the late Chuck Finney.

Mr. Friedman has received the highest possible Martindale-Hubble rating ("AV"), indicating that he is ranked at the highest level of professional excellence with "very high to preeminent legal ability" and "very high" ethical standards as established by confidential opinions from members of the Bar. Law & Politics Magazine and the publishers of Los Angeles Magazine selected Mr. Friedman as a 2006-2020 Southern California "Super Lawyer" in the category of Labor and Employment Law. In 2019, LAWDRAGON selected Mr. Friedman as one of the Nation's leading plaintiff employment attorneys and Best Lawyers Magazine selected Andrew H. Friedman as one of the "Best Lawyers" in the category of Labor and Employment Law. In 2020, Super Lawyers named Andrew H. Friedman to its list of the Top 100 Super Lawyers in Southern California. The online legal referral service AVVO (www.avvo.com) rates Mr. Friedman a 10/10 (superb) as an employment/labor and class action attorney.

Mr. Friedman has also written the following law review articles: Andrew H. Friedman, *The Best And Worst Employment Case Law Developments Of 2019: A Brief Overview Of The Most Important Case Law Developments That Shaped The Year In Employment Law (With A Bit Of Color Commentary)*, Consumer Attorneys Association of Los Angeles ("CAALA") Advocate Magazine (May 2020); Andrew H. Friedman & Taylor Markey, *A Refresher on and Thoughts About Unconditional Offers of Reinstatement*, Cal. Lab. & Emp. L. R. Vol. 33, No. 1 (May 2019); Andrew H. Friedman, Ramit Mizrahi & Anthony J. Oncidi, *Top Employment Cases of 2018*, Cal. Lab. & Emp. L. R. Vol. 33, No. 1 (2019) Andrew H. Friedman, Ramit Mizrahi & Anthony J. Oncidi, *Top Employment Cases of 2017*, Cal. Lab. & Emp. L. R. Vol. 32, No. 1 (2018); Andrew H. Friedman, *California's Anti-SLAPP Act Was Not Intended To Thwart FEHA Claims*, Cal. Lab. & Emp. L. R. Vol. 31, No. 4 (June 2017); Andrew H. Friedman, *The Best and Worst Employment Cases of 2016*, Consumer Attorneys Association of Los Angeles ("CAALA") Advocate

Magazine (June 2017); Andrew H. Friedman, Ramit Mizrahi & Anthony J. Oncidi, *Top Employment Cases of 2016*, Cal. Lab. & Emp. L. R. Vol. 31, No. 1 (2017); Andrew H. Friedman, *The Best and Worst Employment Cases of 2015*, Cal. Lab. & Emp. L. R. Vol. 30, No. 1 (2016); Andrew H. Friedman, *Employment Law*, California Litigation Review (2015); Andrew H. Friedman, *Demurrers and Motions to Strike—They Aren't Just for Defendants Anymore*, Cal. Lab. & Emp. L. R., Vol. 29, No. 3 (2015); Andrew H. Friedman & Michael E. Whitaker, *When A Discharged Employee Claims Discrimination, Will The "Cat's Paw" Doctrine Overcome Evidence That The Decision-Maker Harbored No Discriminatory Bias*, Cal. Lab. &Emp. L. Rev., Vol.25, No.4 (2011); Andrew H. Friedman & Michael E. Whitaker, *Applying the Same-Actor Rule to Defend Against a Claim of Discrimination*, Cal. Lab. & Emp. L. Rev., Vol. 25, No. 1 (2011); Andrew H. Friedman, *Saints and Sinners in the Workplace: A Survey of Religious Accommodation Cases,* Cal. Lab. & Emp. L. Rev., Vol. 21, No. 4 (2007); Andrew H. Friedman, *Same-Sex Marriage and the Right to Privacy: Abandoning Scriptural, Canonical, and Natural Law Based Definitions of Marriage*, 35 Howard L.J. 173 (1992); Andrew H. Friedman, *Tison v. Arizona: The Death Penalty and the Non-Triggerman: The Scales of Justice are Broken*, 75 Cornell L. Rev. 123 (1989).

Mr. Friedman is a member of numerous legal organizations including: Vice Chair, Committee on Judicial Appointments of the Los Angeles County Bar Association (2019 – present); Member, Committee on Judicial Appointments of the Los Angeles County Bar Association (2013 – present); Fellow, The College of Labor and Employment Lawyers (2013 – present); Executive Committee of the Labor and Employment Law Section of the State Bar of California (Advisor, 2005-2015; Member, 2002 – 2005); Advisor, Executive Committee of the Labor and Employment Law Section of the California Lawyers Association (2019 – present); Executive Committee of the Labor and Employment Law Section of the Los Angeles County Bar Association (2003-Present); Member, Board of Directors of the Employment Round Table of Southern California (2007 – present); Chair, Board of Directors of the Employment Round Table of Southern California (2019 – 2020); Executive Committee of the Labor and Employment Law Section of the Beverly Hills Bar Association (1999-2003); Co-Chair of the Executive Committee of the Labor and Employment Law Section of the Beverly Hills Bar Association (2002-2003). Mr. Friedman is licensed to practice in California, Missouri, and the District of Columbia. He is an avid photographer, hiker and downhill and water skier.

DEDICATION

To my parents, Robert and Lois Friedman, who imbued me with an appreciation of, and love for, education, and to Judge John T. Nixon (United States District Court for the Middle District of Tennessee), whose sense of justice and fair play hopefully permeate throughout this book.

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IN MEMORIAM

By Andrew H. Friedman

JUDGE JOHN T. NIXON.

U.S. District Court Judge John Trice Nixon, who wrote the original Foreword to this treatise when it was originally published in 2005 and for whom the author of this work served as a judicial law clerk, passed away on December 19, 2019 at the age of 86.

U.S. District Court Judge John T. Nixon & his law clerk, Andrew H. Friedman (circa 1989)

Judge Nixon was born on January 9, 1933 in New Orleans, Louisiana. Judge Nixon's father, Herman Clarence ("H.C.") Nixon, was a prolific author, a well-known professor, and a member of the Southern Agrarians. H.C. Nixon was one of 12 writers, including Donald Davidson, F.L. Owsley, and Robert Penn Warren, whose collection of essays, *I'll Take My Stand*, was published in 1930 and laid out the case for a major reevaluation of Southern history. In 1938, in his book *Forty Acres and Steel Mules*, H.C. Nixon went on to advocate "social and economic cooperation among small farmers" in the hopes of maintaining "something of the organic flavor" of the community. Three years later, H.C. Nixon published *Possum Trot*, in which he celebrated the rural lifestyle of his Alabama birthplace. Judge Nixon's mother, Anne Trice Nixon, was, as the Judge described her, a "free spirit"—a liberated woman long before women's liberation became popular who not only ran her own antique store but had no concerns about traveling Europe without her husband but with her two sons, John and Nicholas.

Judge Nixon earned his undergraduate degree at Harvard University in Cambridge, Massachusetts and served in the U.S. Army before earning his law degree at Vanderbilt University Law School in Nashville, Tennessee in 1960. After graduating from Vanderbilt, Judge Nixon returned to his father's roots in Possum Trot, Alabama, to practice law in nearby Anniston, Alabama. Judge Nixon practiced law in Anniston for two years and then, in 1962, became Anniston's City Attorney. In one of his first acts upon becoming City Attorney, Judge Nixon established a biracial commission and thereby came to the attention of the United States Attorney General Robert F. Kennedy who invited Judge Nixon to Washington, D.C., in 1963 to discuss civil rights. In 1964, after Judge Nixon prosecuted a local Ku Klux Klan leader for shooting into a black church, Judge Nixon was hired as a trial attorney for the Civil Rights Division of the United States Department of Justice and assigned to the Department's Selma, Alabama team. In his first six months on the job, Judge Nixon spent 125 days in Selma, working to ensure the safety of voting rights activists, most notably, the Rev. Martin Luther King, Jr. Later in his career, Judge Nixon served as a Tennessee Circuit Court judge from 1977 to 1978 and then as a judge in the Tennessee Court of General Sessions from 1978 to 1980 before he was nominated to be a U.S. District Court Judge in the Middle District of Tennessee in 1980 by President Jimmy Carter. Judge Nixon served as the District's Chief Judge from 1991 to 1998, when he took senior status. Judge Nixon took inactive senior status in 2016.

Through his work with the Civil Rights Division of the U.S. Department of Justice, Judge Nixon was a witness to "Bloody Sunday" on March 7, 1965, when some 600 civil rights marchers (including Hosea Lorenzo Williams and Representative John Robert Lewis who passed away on July 17, 2020) headed east out of Selma on U.S. Route 80 making it only as far as the Edmund Pettus Bridge six blocks away, where state troopers and local lawmen viciously attacked them with billy clubs and tear gas and drove them back into Selma. Judge Nixon was also present to witness the Selma to Montgomery March which took place a few weeks later when the Rev. Martin Luther King, Jr. led thousands of nonviolent demonstrators to the steps of the State's capitol in Montgomery, Alabama, after a 5-day, 54-mile march from Selma, Alabama. These events not only led directly to the passage of the Voting Rights Act of 1965 but they also fundamentally shaped Judge Nixon and forever transformed him into a champion of civil rights *for all people*. Indeed, those events were so important to Judge Nixon that he regularly took his law clerks on a pilgrimage to Selma to witness the yearly observance of Bloody Sunday. Judge Nixon's civil rights background was particularly evident not only in the joy that he took performing naturalization ceremonies for America's newest citizens, which were well-known for celebrating America's diversity, but also in his reluctance to impose the death

penalty and his concern for improving the confinement conditions of prisoners. Similarly, Judge Nixon recognized the importance of expanding civil rights for all citizens by officiating at same-sex commitment ceremonies in the 1990s.

The author of this treatise had the great privilege and honor of serving as a judicial law clerk for Judge Nixon. It was through this clerkship (working not just with the Judge but also his invaluable staff—including Courtroom Deputy Mary Conner—and several of his law clerks—including Waverly D. Crenshaw Jr., who went on to become Chief Judge of the U.S. District Court for the Middle District of Tennessee and Cyrus Mehri and Kelly M. Dermody who went on to become powerful advocates for consumers and employees at their respective law firms - Mehri & Skalet, PLLC and Lieff, Cabraser, Heimann & Bernstein, LLP) that the author gained a greater insight into and appreciation of not just the importance of true civil rights for all but also of the necessity of an independent judiciary to guarantee those rights. Indeed, concerning civil rights for all, Judge Nixon encouraged the author to complete a draft law review article that the author had begun writing at Cornell Law School advocating for the recognition of same-sex marriage as a constitutional right; that draft was eventually published in the Howard Law Journal - Andrew H. Friedman, *Same-Sex Marriage and the Right to Privacy: Abandoning Scriptural, Canonical, and Natural Law Based Definitions of Marriage*, 35 Howard L.J. 173 (1992), accessible at https://www.helmerfriedman.com/docs/Same-Sex-Marriage-right-to-privacy.pdf.

During the author's clerkship, Judge Nixon waxed eloquently about many topics, historical and contemporary, including the importance of the role that an independent judiciary plays in our society and, in doing so, he frequently referenced the Federalist Papers and other historical documents that expressed the sentiments articulated by the Country's founders regarding the necessity of lifetime appointments for federal judges:

> The complete independence of the courts of justice is peculiarly essential in a limited Constitution … If, then, the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty. This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.

See Alexander Hamilton, Federalist No. 78, in George W. Carey, The Federalist (Gideon ed.)(1818) accessible at https://oll.libertyfund.org/titles/carey-the-federalist-gideon-ed.

The words of the founders and Judge Nixon vis-à-vis the importance of an independent judiciary are particularly poignant at this moment in history when the Country has an (impeached & popular vote losing) President (Donald John Trump) who regularly assaults the courts and juries—the bulwarks of our Constitution and laws—by undermining their legitimacy, usually in strikingly personal terms, whenever they issue rulings/verdicts with which he disagrees and/or to cow them into issuing opinions/verdicts that he considers favorable. *See e.g.*, Garrett Epps, *Trump Is at War With the Whole Idea of an Independent Judiciary* (The Atlantic, March 4, 2020) accessible at https://www.theatlantic.com/ideas/archive/2020/03/trump-independent-judiciary/607375/; *In His Own Words: The President's Attacks On The Courts: Donald Trump Has Displayed A Troubling Pattern Of Attacking Judges And The Courts For Rulings He Disagrees With* (Brennan Center For Justice, February 14, 2020) accessible at https://www.brennancenter.org/our-work/research-reports/his-own-words-presidents-attacks-courts; C. Ryan Barber, *'This Is Not Normal': US Judge Denounces Trump's Attacks on Judiciary* (LAW.COM, November 7, 2019) accessible at https://www.law.com/nationallawjournal/2019/11/07/this-is-not-normal-us-judge-denounces-trumps-attacks-on-judiciary/; Kevin Judd and Keith Watters, *Trump's Attacks On Courts Undermine Judicial Independence* (ABA Journal, June 28, 2018) accessible at https://www.abajournal.com/news/article/trumps_attacks_on_courts_undermines_judicial_independence.

In a particularly memorable moment, Judge Nixon gave the author of this treatise a biography about the Judge's father (Sarah Newman Shouse, *Hillbilly Realist: Herman Clarence Nixon of Possum Trot* (The University of Alabama Press, 1986)) and spoke passionately about how society would be better if more people celebrated the "art of living" as opposed to the "art of making a living." Words which have taken on a heightened meaning as the COVID-19 pandemic ravages the world; words by which everyone, particularly attorneys, should live.

JUSTICE RUTHER BADER GINSBURG.

As the 2020 edition of *Litigating Employment Discrimination Cases* was going to press, Justice Ruth Bader Ginsburg—*aka* The Notorious RBG—passed away. While a more complete memorial will appear in the 2021 edition of this treatise, it is important to note that Justice Ginsburg had a profound impact on employment law, not only as a Justice on the Supreme Court, but also as an advocate arguing before the Court.

Sadly and hypocritically, it appears that the Republicans, who blocked President Obama from filling Justice Scalia's seat with Judge Merrick Brian Garland because, they said, Justice Scalia died in January of a presidential election year, will rapidly move to confirm whomever president Trump nominates, even though Justice Ginsburg passed away in September of a presidential election year. Undoubtedly, whomever replaces Justice Ginsburg will be far, far to her right and will likely solidify for a generation the most conservative Supreme Court since the *Lochner* era (1897 to 1937), when the court routinely struck down state and federal legislation intended to protect employees (*e.g.*, laws that limited weekly working hours, regulated child labor, and set minimum wages).

JUSTICE JOHN PAUL STEVENS.

Justice John Paul Stevens was appointed as an Associate Justice of the United States Supreme Court by President Gerald Ford. He took office on December 17, 1975, and he remained in that office until he retired on June 29, 2010. Justice Stevens' retirement opened a vacancy for President Barack Obama to fill and the President nominated Elena Kagan. In 2014, Justice Stevens published "*Six Amendments: How and Why We Should Change the Constitution.*" In that book he proposed constitutional amendments that would unambiguously define the federal government's power to, among other things, limit campaign contributions and prohibit election-district gerrymandering to give one party an advantage. Justice Stevens passed away on July 16, 2019.

During his more than 30 years on the Supreme Court, Justice Stevens authored, joined or concurred with the majority in a number of critically important employment decisions:

- *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399 (1986)—Justice Stevens was a key vote in this watershed decision in which the Supreme Court held that sexual harassment that creates a hostile or abusive work environment violates Title VII, and that plaintiffs did not need to establish economic or tangible discrimination to prove such a Title VII violation.
- *Johnson v. Transportation Agency, Santa Clara County, Cal.*, 480 U.S. 616, 107 S.Ct. 1442 (1987)—While the Court upheld voluntary affirmative action plans used by employers to improve the representation of women in fields where they had been historically underrepresented, Justice Stevens wrote a separate concurrence to emphasize that, consistent with Title VII's goal of protecting against discrimination, employers could permissibly take voluntary actions to diversify their workplace.
- *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775 (1989)—Justice Stevens joined the plurality opinion which held that the failure to promote a female employee based on her variation from prevalent stereotypes about women could constitute an actionable claim of sex discrimination under Title VII.
- *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 118 S.Ct. 998 (1998)—Justice Stevens joined the unanimous opinion of the Court which held that same-sex sexual harassment is actionable under Title VII.
- *Burlington Northern and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 126 S.Ct. 2405 (2006)—Justice Stevens joined in the majority opinion of the Court which held that employers can be held liable for taking actions that would discourage a reasonable employee from complaining of discrimination.
- *CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 128 S.Ct. 1951 (2008)—Justice Stevens joined in the majority opinion of the Court which held that individuals who complain of discrimination under 42 U.S.C. §1981 are protected against retaliation.
- *Gomez-Perez v. Potter*, 553 U.S. 474, 128 S.Ct. 1931 (2008)—Justice Stevens joined in the majority opinion of the Court which held that individuals who complain of discrimination under the Age Discrimination in Employment Act are protected against retaliation.
- *Crawford v. Metropolitan Government of Nashville and Davidson County, Tenn.*, 555 U.S. 271, 129 S.Ct. 846 (2009)—Justice Stevens joined in the majority opinion of the Court which held that employees are protected from being subject to retaliation for cooperating with an employer's internal investigation of discrimination.

In some ways, Justice Stevens' dissents are more memorable than the decisions he authored, joined or concurred in; indeed, he was referred to, in some circles, as The Dissenter. *See* Jeffrey Rosen, *The Dissenter, Justice John Paul Stevens*, N.Y.

TIMES MAGAZINE, Sept. 23, 2007, accessible at http://www.nytimes.com/2007/09/23/magazine/23stevens-t.html. Justice Stevens' first dissent of note actually took place in a decision issued while he served on the Seventh Circuit Court of Appeals. That dissent did not auger well for plaintiff employees as he was being considered for the Supreme Court. In *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194 (7th Cir. 1971), the Seventh Circuit was asked to decide whether a United Airline's policy requiring that stewardesses must be unmarried was lawful. While the majority held that United Airline's policy unlawfully discriminated on the basis of sex in violation of Title VII. Justice Stevens, then a Circuit Court of Appeals judge, dissented because, in his view, the female plaintiff was not the victim of sex discrimination since she failed to show that, if she were a member of the opposite sex, she would have had any greater employment opportunities as a stewardess—*i.e.*, no married man and no married woman was eligible for employment as a stewardess. Over the years, however, Justice Stevens took an increasingly progressive view on employment rights and frequently dissented when the majority curtailed protections for employees. For example, in *General Elec. Co. v. Gilbert*, 429 U.S. 125, 97 S.Ct. 401 (1976), Justice Stevens dissented from the Court's decision holding that a company did not violate Title VII when its disability benefits plan omitted coverage for pregnancy-related costs. The *Gilbert* decision led to the passage of the Pregnancy Discrimination Act of 1978. And, in *Newport News Shipbuilding and Dry Dock Co. v. E.E.O.C.*, 462 U.S. 669, 103 S.Ct. 2622 (1983), Justice Stevens authored the majority decision which held not only that Congress, by enacting the Pregnancy Discrimination Act, overturned the holding of Gilbert but also that an employer health plan that provided fewer benefits for the pregnant wives of male employees than for pregnant female employees violated the PDA. Similarly, in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 119 S.Ct. 2139 (1999), the United States Supreme Court was called upon to decide whether corrective and mitigating measures should be considered in determining whether individual is disabled under ADA. In an opinion authored by Justice O'Connor, the Supreme Court infamously held that corrective and mitigating measures should be considered in determining whether individual is disabled under ADA. In dissent, Justice Stevens examined the manner in which the ADA defined "disability" from a statutory construction perspective and via the Act's legislative history and concluded that "it is quite clear that the threshold question whether an individual is "disabled" within the meaning of the Act—and, therefore, is entitled to the basic assurances that the Act affords—focuses on her past or present physical condition without regard to mitigation that has resulted from rehabilitation, self-improvement, prosthetic devices, or medication." Id. at 495. Of course, Justice Stevens view of the ADA was accurate and Congress overruled Sutton when it enacted amendments to the ADA. See ADA Amendments Act of 2008, 2 USC §12101 et. seq. Additionally, Justice Stevens joined in Justice Ruth Bader Ginsburg's dissent from the Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618, 127 S.Ct. 2162 (2007), that ignored decades of lower court precedent and held that workers must file pay claims within 180 days of the initial pay-setting decision. Finally, Justice Stevens dissented from the Supreme Court's decision in *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 129 S.Ct. 2343 (2009), in which the Court limited the reach of the protections of the Age Discrimination in Employment Act.

More importantly than his decisions in employment cases are Justice Stevens' dissents in three cases that, had he been in the majority, would have likely changed the United States of America fundamentally for the better (at least insofar as the rights of individuals are concerned). In the first, *Bush v. Gore*, 531 U.S. 98, 127, 121 S.Ct. 525, 541 (2000), Justice Stevens lamented the fact that "the majority effectively order[ed] the disenfranchisement of an unknown number of voters whose ballots reveal[ed] their intent—and [were] therefore legal votes under state law—but were for some reason rejected by ballot-counting machines." But for the majority's hasty intervention to enshrine popular-vote loser George W. Bush as the Nation's 43rd President, we likely would not have embarked on several oversees wars that continue two decades later, we might have avoided a financial meltdown (caused by deregulation in the financial industry and corporate greed and malfeasance) from which large swaths of the populace have still not recovered, and we certainly would have avoided the appointments to the Supreme Court of John Glover Roberts Jr. and Samuel Alito (two Justices who have dramatically tilted the Supreme Court in favor of corporate rights over the rights of consumers and employees). Or, as Justice Stevens so eloquently wrote: "Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law." In the second, *Citizens United v. Federal Election Com'n,* 558 U.S. 310, 130 S.Ct. 876 (2010), Justice Stevens railed in dissent against the majority's decision to give corporations the same free speech rights as human beings, which he accurately predicted would "undermine the integrity of elected institutions across the Nation." In the third, *Bowers v. Hardwick*, 478 U.S. 186, 106 S.Ct. 2841 (1986), Justice Stevens dissented from the Supreme Court's 5-4 decision that a criminal anti-sodomy statute did not violate the right to privacy protected by the Fourteenth Amendment. Justice Stevens' dissent paved the way for the Supreme Court to do an about-face in *Lawrence v. Texas*, 539 U.S. 558, 123 S.Ct. 2472 (2003), overturn *Bowers*, and set the stage for the Supreme Court to recognize same-sex marriage as a constitutional right in *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015).

JUSTICE ANTONIN GREGORY SCALIA.

Justice Antonin Gregory Scalia was appointed as an Associate Justice of the United States Supreme Court by President Ronald Reagan. Justice Scalia took office on September 26, 1986 and he remained in that office until he passed away on February 13, 2016. During his nearly thirty year tenure on the Supreme Court, Justice Scalia had a profound impact on nearly every area of the law but particularly in employment law where, with some exceptions, he led the charge to narrow (and, some might say, eviscerate) employee rights. Justice Scalia's hostility to employee (and consumer) rights was most evident in his decisions regarding class actions and arbitration. For example, Justice Scalia's 5–4 opinion in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 131 S. Ct. 2541 (2011), not only raised the bar necessary to satisfy Rule 23's "commonality" requirement for class action certification but also admonished the lower courts to perform a "rigorous analysis" in determining whether the prerequisites of Rule 23(a) have been satisfied. Many in the employment defense bar correctly predicted that *Wal-Mart Stores v. Dukes* would make class certification significantly more difficult. Similarly, in his 5–4 opinion in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 131 S. Ct. 1740 (2011) and his 5-3 decision in *Am. Exp. Co. v. Italian Colors Rest*., 133 S. Ct. 2304, 2312 (2013), interpreting the Federal Arbitration Act, Justice Scalia drastically limited the states' abilities to create prophylactic rules prohibiting class action waivers, and paved the way for employers (and others) to insert class action waivers into their arbitration agreements. These two legacies of Justice Scalia—forced arbitration and the dramatic curtailment of class actions—have the very real potential, if fully realized, to undercut all of the protections for which various Presidents and legislators of both political parties have fought including the Norris-LaGuardia Act of 1932, the National Labor Relations Act of 1935, the Fair Labor Standards Act of 1938, Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, the Pregnancy Discrimination Act of 1978, the Americans With Disabilities Act of 1990, the Family and Medical Leave Act of 1993, and the ADA Amendments Act of 2008.

Outside of the forced arbitration and class action contexts, Justice Scalia has a decidedly mixed record with regard to the Nation's employment laws. With respect to employment laws protecting the disabled, Justice Scalia agreed with the majority in *Sutton v. United Air Lines, Inc*., 527 U.S. 471,119 S. Ct. 2139 (1999), and joined the Court in its unanimous decision in *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184, 122 S. Ct. 681 (2002), to effectively gut the Americans With Disabilities Act for nearly a decade until Congress enacted the ADA Amendments Act of 2008 to overrule those decisions. Justice Scalia has a more nuanced record with respect to harassment, discrimination, and retaliation cases. For example, in *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2257 (1998), Justice Scalia dissented from the majority opinion, arguing that a supervisor's harassing conduct should not be automatically attributed to the employer even if a supervisor created a sexually hostile workplace. Rather, Justice Scalia believed that if a supervisor created a sexually hostile work environment, the employer should be liable only if the plaintiff proves that the employer was negligent in permitting the supervisor's conduct to occur. However, in *Oncale v. Sundowner Offshore Servs., Inc*., 523 U.S. 75, 118 S. Ct. 998 (1998), Justice Scalia wrote for a unanimous Court holding that sex discrimination consisting of same-sex sexual harassment is actionable under Title VII. In *E.E.O.C. v. Abercrombie & Fitch Stores, Inc*., --- U.S. ----, 135 S. Ct. 2028 (2015), Justice Scalia wrote a pro-employee decision for the Court holding that a job applicant seeking to prove a Title VII disparate treatment claim need only show that the need for a religious accommodation was a motivating factor in the prospective employer's adverse decision, and need not show that the employer actually knew that the applicant's practice was a religious practice that required an accommodation. In the eleven retaliation cases decided during his tenure on the Supreme Court, Justice Scalia nearly split evenly between plaintiff employees (deciding in their favor five times) and defendant employers (deciding in their favor six times): *Jackson v. Birmingham Bd. of Educ*., 544 U.S. 167, 174, 125 S. Ct. 1497, 1504 (2005)(Justice Scalia dissenting)(Supreme Court held Title IX of the Education Amendments of 1972, 20 U.S.C. §1681—which prohibits sex discrimination by recipients of federal education funding and which does not contain an explicit anti-retaliation provision—nonetheless prohibits retaliation); *Garcetti v. Ceballos*, 547 U.S. 410, 126 S.Ct. 1951, 1960 (2006) (Justice Scalia in majority)(holding that when public employees make statements pursuant to their official duties, the employees lack protection from retaliation under the First Amendment); *Burlington Northern and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 126 S.Ct. 2405 (2006)(Justice Scalia in majority)(Supreme Court expansively interpreted Title VII's anti-retaliation provision and held that a plaintiff could prove retaliation if a reasonable employee would have found the challenged action materially adverse—i.e., would the allegedly retaliatory conduct have dissuaded a reasonable worker from making or supporting a charge of discrimination); *CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 128 S.Ct. 1951 (2008) (Justice Scalia dissenting)(Supreme Court held 42 USC Section 1981 encompasses retaliation claims even though it does not contain an express anti- retaliation provision) and *Gomez-Perez v. Potter*, 553 U.S. 474, 128

S.Ct. 1931 (2008)(Justice Scalia dissenting) (Supreme Court held Age Discrimination in Employment Act prohibits retaliation against a federal employee who complains of age discrimination even though there is no explicit anti-retaliation clause applicable to public employees and there is an ADEA provision specifically prohibiting retaliation against individuals complaining about private- sector age discrimination); *Crawford v. Metropolitan Government of Nashville and Davidson County*, 555 U.S. 271, 129 S.Ct. 846 (2009) (Justice Scalia in the majority) (Supreme Court reversed the Sixth Circuit and held that the "Opposition Clause" of Title VII's anti-retaliation provision's protection extends to an employee who speaks out about discrimination not on her own initiative, but in answering questions during an employer's internal investigation); *Thompson v. North American Stainless, LP*, 562 U.S. 170, 131 S. Ct. 863 (2011)(Justice Scalia writing for the majority)(Supreme Court expansively interpreted Title VII's anti-retaliation provision holding that it creates a cause of action for third-party retaliation for persons who did not themselves engage in protected activity); *Kasten v. Saint-Gobain Performance Plastics Corp*., 563 U.S. 1, 131 S. Ct. 1325 (2011)(Justice Scalia dissenting)(Supreme Court held that the FLSA's anti-retaliation provision that prohibits employers from discharging an employee because he or she has "filed" a complaint alleging a violation of the FLSA includes oral, as well as written, complaints); *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (2013)(Justice Scalia in majority)(Supreme Court holding that Title VII retaliation claims must be proved according to traditional principles of but-for causation); *Lawson v. FMR LLC*, 134 S. Ct. 1158 (2014)(Justice Scalia concurring)(Supreme Court held that whistleblower protection under Sarbanes–Oxley extended to employees of private contractors and subcontractors serving public companies); *Dep't of Homeland Sec. v. MacLean*, 135 S. Ct. 913 (2015)(Justice Scalia in the majority)(Supreme Court ruled in favor of a federal air marshal who argued that his removal by the Transportation Security Administration, Department of Homeland Security, for his unauthorized disclosure of sensitive security information constituted unlawful retaliation due to his protected whistle-blowing).

Regardless of one's views about Justice Scalia's record on employment (and other civil rights) cases, his colorful, blunt, and oftentimes scathing dissents will almost certainly render future Supreme Court decisions boring in comparison. The following quotes illustrate Justice Scalia's wit and unrivaled ability to turn a phrase:

> The majority's opinion is "pure applesauce" … to reach it, the majority engaged in "interpretive jiggery-pokery" and rewrites [ObamaCare] so that we "should start calling it SCOTUScare."
>
> To reach its decision, the majority engaged in "somersaults of statutory interpretation" revealing "the discouraging truth that the Supreme Court of the United States favors some laws over others, and is prepared to do whatever it takes to uphold and assist its favorites."

King v. Burwell, 135 S. Ct. 2480 (2015)(Scalia, J. dissenting).

> "The Supreme Court of the United States has descended from the disciplined legal reasoning of John Marshall and Joseph Story to the mystical aphorisms of the fortune cookie."

Obergefell v. Hodges, 135 S. Ct. 2584, 2630 (2015)(Scalia, J. dissenting).

> "'The operation was a success, but the patient died.' What such a procedure is to medicine, the Court's opinion in this case is to law."

Natl. Endowment for the Arts v. Finley, 524 U.S. 569, 590, 118 S. Ct. 2168, 2180 (1998) (Scalia, J. concurring).

> "Instead of clarifying the law, the Court makes itself the obfuscator of last resort."

Michigan v. Bryant, 562 U.S. 344, 380, 131 S. Ct. 1143, 1168 (2011) (Scalia, J., dissenting).

> "Today's opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct."

Lawrence v. Texas, 539 U.S. 558, 602, 123 S. Ct. 2472, 2496 (2003).

> "What secret knowledge, one must wonder, is breathed into lawyers when they become Justices of this Court, that enables them to discern that a practice which the text of the Constitution does not clearly proscribe, and which our people have regarded as constitutional for 200 years, is in fact unconstitutional?"

Bd. of Cty. Comm'rs, Wabaunsee Cty., Kan. v. Umbehr, 518 U.S. 668, 688-89, 116 S. Ct. 2361, 2363 (1996).

> "Faced with two conceivable readings of the Pregnancy Discrimination Act, the Court chooses neither. It crafts instead a new law that is splendidly unconnected with the text and even the legislative history of the Act."

Young v. United Parcel Serv., Inc., 135 S. Ct. 1338, 1361 (2015) (Scalia, J. dissenting).

> "To tell the truth, I found this approach refreshingly honest. One who asks us to invent a constitutional right out of whole cloth should spare himself and us the pretense of tying it to some words of the Constitution."

National Aeronautics and Space Admin. v. Nelson, 562 U.S. 134, 160, 131 S.Ct. 746, 764 (2011) (Scalia, J. dissenting).

REMEMBERING JUSTICE SCALIA

By Anthony J. Oncidi

I was fortunate enough to have known Justice Antonin Scalia personally. He was one of my professors at the University of Chicago Law School where he taught me the law of contracts; he also was my law school faculty advisor. As has been widely reported and echoed by his best friend on the Supreme Court (Justice Ruth Bader Ginsburg), he was genuinely warm and funny and had a razor-sharp wit. He had a way of cutting through layers of legalese and judicial exposition to reveal the nuts and bolts of what was really at stake in a legal dispute. I recall that whenever we studied a case from the court of claims involving some administrative screw-up, he would inevitably quip, "Close enough for government work!"

It was an exciting time to be at the Law School. President Reagan was raiding the faculty and appointing many of our professors to judicial positions around the country. By the time Professor Scalia taught our contracts class in the Winter of 1982, he already had been offered (and declined) a position on the United States Court of Appeals for the Seventh Circuit—he preferred to wait for the next open position on the District of Columbia Circuit Court of Appeals, which came later that same year.

Over the years, I had several opportunities to chat privately with Justice Scalia (usually before or after he spoke at a legal conference). I remember one time a dozen or so years ago in Santa Monica when I asked him whether he thought he would ever be appointed Chief Justice. He laughed and answered my question with a question: "Do you happen to know what the vote was for my confirmation to the Supreme Court?" I told him I didn't recall offhand. He said, "The vote was 98-to-zero, and the only reason it wasn't unanimous was because Barry Goldwater and Jake Garn weren't on the Senate floor that day." He continued, "That means that Teddy Kennedy and Howard Metzenbaum and all of the other liberal senators voted for me, but that would never happen today. In those days, in order to get appointed to the Supreme Court, you had to be a good lawyer. Today, you've got to be a good lawyer who will vote the president's way."

In the decade or so since Justice Scalia lamented the politicization of the Supreme Court, which everyone recognizes but no one seems to know how to fix, things have only gotten worse. Indeed, some would criticize Justice Scalia himself for having exacerbated that phenomenon. In any event, upon Justice Scalia's passing in February of 2016, the President and the Senate immediately crossed swords over his replacement with the Senate vowing not to confirm or even have a hearing on the President's appointee, Judge Merrick Garland.

Not in our lifetimes has any Supreme Court justice been as well known (and evoked such extreme emotions, pro and con) as Justice Scalia. During his nearly three decades on the Court he was a lightning rod for controversy, having long since become the intellectual leader of the conservative wing of the Court.

But I think it's too easy (and inaccurate) to label him merely a right-wing ideologue and leave it at that. There's a qualitative difference between the kind of "judicial activism" from the left that results in aggregating more power to oneself and the Scalia-style "activism" that sought to eschew it. In short, Justice Scalia deferred to the democratically elected branches of government rather than to the current opinion of nine (really, five) "unelected lawyers" whom he viewed to be Ivy-league elitists, largely out of touch with mainstream American mores and values.

It was this abiding anti-elitist suspicion that animated Justice Scalia's embrace of the judicial philosophy known as "Originalism." Originalists such as Justices Scalia and Thomas believe that the interpretation of a written constitution or statute should be based on what reasonable persons living at the time of its adoption would have understood the ordinary meaning of the text to be. Justice Scalia readily admitted that "originalism is not perfect, but it beats the alternatives," especially the judicial philosophy that interprets constitutional and statutory provisions by whatever strikes a modern jurist as "fair." As Justice Scalia was fond of saying, "lawyers are not trained to be moral philosophers" so determining the most momentous issues of the day should not be left to such free-wheeling decisionmaking.

It is particularly true in the area of employment law that Justice Scalia defied convention. Yes, he was skeptical about the use of class action litigation in the employment discrimination context (*Wal-Mart v. Dukes*) and a fierce defender of the Federal Arbitration Act, which he believed preempted efforts by state legislatures to limit arbitration (*AT&T Mobility v. Concepcion*). However, time and again (as Andrew Friedman acknowledges in his comments above), Justice Scalia joined or authored opinions that favored employees. I can think of numerous judges and justices who have unblemished records of consistently voting pro-employee, pro-union or pro-employer and never "crossing the aisle" to vote the other way. That cannot be said of Justice Scalia.

Known for his ferocious intellect and highly engaging personality, he experienced in his life a full and complete realization of his potential and, so, seems to have been one of those lucky few (less than 1% of the adult population says Maslow) like Einstein and Thoreau who were "self-actualized." His impact on American law will not be forgotten and his opinions, which now belong to the ages, will continue to inspire, amuse and outrage those who read them forever after.

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Mr. Cohen also represents plaintiffs and defendants in civil cases, including employment discrimination actions, when a party has filed bankruptcy. He works closely with plaintiff and defense employment counsel in navigating clients through the minefield of bankruptcy. He also assists plaintiffs in negotiating settlements when the employer may be on the brink of bankruptcy.

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In 2004, Ms. Klerman was honored with the Alternative Dispute Resolution Achievement Award in recognition for her outstanding ADR services to the Los Angeles Superior Court. That same year, Ms. Klerman was named a Southern California Super Lawyer Rising Star, recognized as one of the top 2.5% employment attorneys in Southern California, and given Martindale-Hubbell's highest rating ("AV") for professional excellence and ethical standards.

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Mr. Oncidi is the author of the treatise titled Employment Discrimination Depositions (Juris Pub'g 2012; www.jurispub.com), co-author of Proskauer on Privacy (PLI 2012) and, since 1990, has been a regular columnist for the official publication of the Labor and Employment Law Section of the State Bar of California, as well as the Los Angeles Daily Journal.

Mr. Oncidi is recognized as a leading lawyer by such highly respected publications and organizations as the Los Angeles Daily Journal, The Hollywood Reporter, and Chambers USA, which gives him the highest possible rating ("Band 1") for Labor & Employment and ranks him as a leading lawyer in his field who is "credible and confident" and who provides "spot-on service" with "know-how and the ability to get to the point quickly." He is ranked as one of the "Nation's Top 100 Most Powerful Employment Attorneys" (Human Resource Executive) and one of the "Top 10" employment defense attorneys in California/"Top 5" in Los Angeles, "Top 100 lawyers in California" (Daily Journal) and one of the top 100 "power lawyers" (The Hollywood Reporter). He was selected by his peers throughout the United States to be a Fellow in the prestigious College of Labor and Employment Lawyers. Additionally, he has received the highest Martindale-Hubbell rating ("AV"), indicating "very high to preeminent legal ability and very high ethical standards as established by confidential opinions from members of the Bar."

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Mr. Barber has extensive employment-related class action experience, with a particular emphasis on wage and hour, discrimination and harassment litigation. Over the last decade, Mr. Barber has defended employers in numerous class action lawsuits against private litigants and the EEOC, and has specifically defeated class certification and/or resolved cases favorably in each instance. His experience also includes anticipating potential class action lawsuits and preparing a defense before the lawsuit has been filed.

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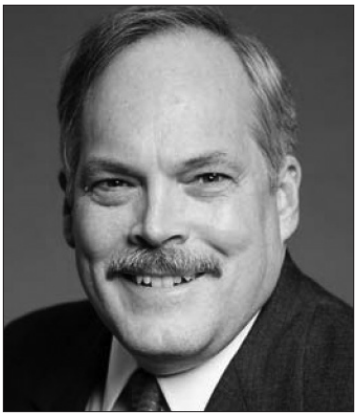
Mr. Barber co-authored Chapter 12, Insurance Issues in Employment Litigation, with Gordon Calhoun and Erin Hiley.



Gordon J. Calhoun serves as Chair of the firm-wide insurance regulatory and reinsurance department of Lewis Brisbois Bisgaard & Smith LLP. For the last 30 years, Mr. Calhoun's practice has focused on the representation of insurance companies, including personal, commercial and specialty lines carriers on first and third party issues. In addition, he has represented workers' compensation carriers against claims involving reserve and dividend practices. He represents each type of insurer in a variety of political drafting, coverage, breach of contract, bad faith, insurance fraud, and regulatory matters. These representations have involved both civil and criminal proceedings. He also represents cedents and reinsurers in contract drafting, coverage disputes and arbitrations.

Mr. Calhoun has given numerous lectures and seminars to attorneys and members of the risk industry on a variety of topics, particularly bad faith,

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Prior to joining the firm, she was Senior Vice President of the Burton Blatt Institute at Syracuse University (in the Washington, DC office), where she was responsible for the Institute's Americans with Disabilities Act (ADA), disability civil rights, and communications work. Ms. Hill also supervised research activities, as well as the Southeast ADA Center (DBTAC), which provides technical assistance and training on the ADA, and the Southeast Technical Assistance and Continuing Education Center (TACE), which provides technical assistance to improve vocational rehabilitation services for individuals with disabilities. Previously, Ms. Hill was the founding Director of the Washington DC Office of Disability Rights, a Cabinet-level DC government agency dedicated to improving access for people with disabilities to government programs and making the District a model of accessibility.

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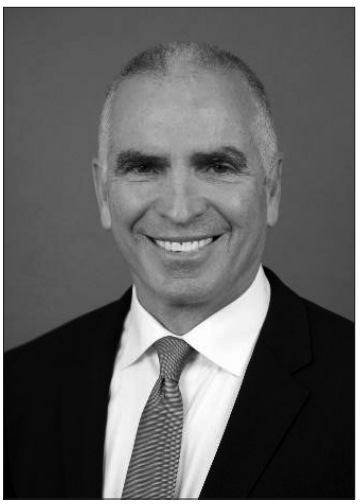

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Mark teaches functional mindfulness practices including meditation, breath work, emotional intelligence and yoga in companies, professional service firms and to individuals. Mark completed yoga teacher training with Max Strom in 2010 and meditation teacher training with Dr. Loren Roche in 2014. In 2016 Mark completed mindfulness-based emotional intelligence teacher training with the Search Inside Yourself Leadership Institute, the successor to Google's in-house program.

Mark's recreational passions include surfing, mountain biking and snowboarding.

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PREFACE TO THE FIFTEENTH ANNUAL UPDATE

I remain very proud to be the author of *Litigating Employment Discrimination Cases* as this, the Fifteenth Annual, Update of the book, goes to print. Originally published in 2005, *Litigating Employment Discrimination Cases* was designed to serve not only as a comprehensive treatise on federal employment discrimination law (including harassment, retaliation, and accommodation) but also, more importantly, as a practical "step-by-step" litigation guide for the employment practitioner—whether novice or expert and whether representing plaintiff employees, defendant employers, or those serving as neutrals (judges, arbitrators, mediators, and workplace investigators). In the fifteen years since it was first published, my Contributing Authors and I have worked hard to keep the treatise current with the latest statutes, regulations and cases and to enlarge its scope to include information not only about other federal employment laws and law firm practice management issues relevant to the employment practitioner but to also incorporate important information about legal ethics where relevant to employment law and to address the need for lawyers and law firms to remain vigilant against discrimination (both overt and implicit) in the practice of employment law.

Just as the breadth of this work has evolved over time, so too has the employment law landscape. In many ways, this evolution has largely benefited employees (and society) by expanding workplace protections for employees:

- In 2006, Congress passed and President George W. Bush signed into law the Mine Improvement and New Emergency Response ("MINER") Act of 2006 which amended the Federal Mine Safety and Health Act of 1977 to provide greater protections for underground coal miners and improve emergency preparedness.
- In 2008, Congress passed and President George W. Bush signed into law the ADA Amendments Act of 2008 ("ADAAA") which amended the Americans with Disabilities Act of 1990 ("ADA") and other disability discrimination laws at the federal level. The ADAAA effectively reversed a number of decisions issued by the Supreme Court that limited the rights of persons with disabilities.
- In 2009, in a decision authored by Justice David H. Souter in *Crawford v. Metropolitan Government of Nashville and Davidson County, Tenn.,* 555 U.S. 271 (2009), the Supreme Court held that held that the protection of the opposition clause of the anti-retaliation provision of Title VII extended to an employee who spoke out about sexual harassment, not on her own initiative, but in answering questions during employer's investigation of coworker's complaints.
- In 2009, Congress passed and President Barack Hussein Obama signed into law the Lilly Ledbetter Fair Pay Act. This new law overturned the Supreme Court's 5-4 decision in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618 (2007), which severely limited the ability of employees to obtain damages in pay discrimination claims.
- In 2010, Congress passed and President Barack Hussein Obama signed into law the Patient Protection and Affordable Care Act, also known as the Affordable Care Act ("ACA") or colloquially as "Obamacare." Among many other things, Obamacare: (1) contains an "employer mandate" which encourages employers of fifty or more people to offer health insurance to their employees or face an additional tax; and (2) prohibits employers and health insurance companies from denying health insurance to individuals with preexisting conditions.
- In 2010, Congress passed and President Barack Hussein Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act which, among many other things, protects from retaliation whistleblowers who report misconduct to the Securities and Exchange Commission.
- In 2011, in a decision authored by Justice Stephen G. Breyer in *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1 (2011), the Supreme Court held that held that the anti-retaliation provision of FLSA protects oral as well as written complaints.
- In 2011, in a decision authored by Justice Antonin Scalia in *Thompson v. North American Stainless, LP*, 562 U.S. 170 (2011), the Supreme Court held that an employer's alleged act of firing an employee in retaliation against the employee's fiancée, if proven, constituted unlawful retaliation in violation of Title VII.
- In 2011, in a decision authored by Justice Stephen G. Breyer in *Staub v. Proctor Hosp.,* 562 U.S. 411 (2011), the Supreme Court held that "if a supervisor performs an act motivated by antimilitary animus that is intended by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable under USERRA."
- In 2012, Congress passed and President Barack Hussein Obama signed into law the Whistleblower Protection Enhancement Act of 2012 ("WPEA") which strengthened the protections for federal employees who disclose evidence of waste, fraud, or abuse.

- In 2014, in a decision authored by Justice Ruth Bader Ginsburg in *Lawson v. FMR LLC*, 571 U.S. 429 (2014), the Supreme Court held that whistleblower protections under Sarbanes–Oxley extended to employees of private contractors and subcontractors serving public companies.
- In 2016, in a decision authored by Justice Sonia Sotomayor in *Lane v. Franks*, 573 U.S. 228 (2014), the Supreme Court held that a public employee's sworn testimony outside the scope of his ordinary job duties is entitled to First Amendment protection.
- In 2015, in a decision authored by Justice Antonin Scalia in *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768 (2015), the Supreme Court held that Title VII prohibits a prospective employer from refusing to hire an applicant in order to avoid accommodating the applicant's suspected religious practice that it could accommodate without undue hardship.
- In 2016, in a decision authored by Justice Stephen G. Breyer in *Heffernan v. City of Paterson, N.J.,* 136 S.Ct. 1412 (2016), the Supreme Court held that it is unconstitutional for a governmental entity demote a public employee based on the mistaken assumption that the employee had engaged in political activity.
- In 2018, in a decision authored by Justice Ruth Bader Ginsburg in *Artis v. District of Columbia,* 138 S.Ct. 594 (2018), the Supreme Court held that 28 U.S.C. §1367(d)'s instruction to "toll" a state limitations period means to hold it in abeyance—*i.e.,* to stop the clock.
- In 2020, the Supreme Court, in a 6-3 decision authored by Justice Neil McGill Gorsuch in *Bostock v. Clayton County, Georgia*, 2020 WL 3146686 (2020), the Supreme Court—rejecting arguments to the contrary from the Trump administration—held that Title VII prohibits employers from discriminating against employees "simply for being homosexual or transgender."

Fifteen years ago, some of my friends suggested that it was a waste of my time to spend my nights and weekends writing a treatise on employment discrimination law as they believed (or hoped) that our society was rapidly progressing to the point where discrimination would soon be, for the most part, relegated to the "ash heap of history." Sadly, the last few years have demonstrated that discrimination remains endemic in our society.

In October 2017, the Me Too (or #MeToo) movement went viral and revealed to the world that sexual assault and sexual harassment in the workplace is still prevalent (just hidden from public view by non-disclosure agreements, confidentiality clauses, and secret trials in forced arbitrations).

Then, in May 2020, the 8 minute and approximately 46 second slow-motion videotaped killing of George Floyd combined with the killings of …

Atatiana Jefferson …
Ahmaud Arbery …
Rayshard Brooks …
Breonna Taylor …
Botham Jean …
Stephon Clark …
Philando Castille …
Alton Sterling …
Jamar Clark …
Freddie Gray …
Walter Scott …
Tamir Rice …
Laquan McDonald …
Michael Brown …
Tanisha Anderson …
Eric Garner …
Rekia Boyd …
Trayvon Martin …
Kendra James …
Aiyana Mo'Nay Stanley-Jones …
Dr. Martin Luther King, Jr …
Samuel Ephesians Hammond Jr., Delano Herman Middleton and Henry Ezekial Smith …

Benjamin Brown …
Wharlest Jackson …
Clarence Triggs …
Ben Chester White …
Vernon Ferdinand Dahmer …
Samuel Leamon Younge Jr …
Willie Brewster …
Oneal Moore …
Jimmie Lee Jackson …
Lt. Col. Lemuel Penn …
James Earl Chaney (Andrew Goodman & Michael Henry Schwerner) …
Henry Hezekiah Dee and Charles Eddie Moore …
Johnnie Mae Chappell …
Louis Allen …
Virgil Lamar Ware …
Addie Mae Collins, Denise McNair, Carole Robertson and Cynthia Wesley …
Medgar Evers …
Cpl. Roman Ducksworth Jr. …
Herbert Lee …
Mack Charles Parker …
Willie Edwards Jr. …
John Earl Reese …
Emmett Louis Till …
Lamar Smith …
Rev. George Lee …
300 Black souls during the Tulsa Greenwood Massacre (whose names white officials erased from history) …
Mary Turner …
and too many other Black Americans to name,

not only demonstrated to all Americans (and the world) the poignancy of the Black Lives Matter movement (founded in 2013 by three Black women, Patrisse Khan-Cullors, Alicia Garza and Opal Tometi, after the acquittal of Trayvon Martin's killer) but also laid bare the ugly truth that systemic discrimination (particularly against Black Americans, other people of color, and indigenous peoples) remains very much alive and well in our Country.

Unfortunately, with an impeached and popular vote losing president (Donald John Trump) who campaigns on nativist sentiments directed against nonwhite immigrants, praises white supremacists and anti-Semites as "very fine people," and retweets a video of one of his supporters proudly exclaiming "white power!" whom Trump called "great people," it is clear that leadership to end our Country's systemic race/gender and other forms of discrimination will not come from the top. Barring a change in leadership, any hope to eradicate systemic race/gender and other forms of discrimination will have to come from a bottom-up grassroots movement of the people informing the direction of the Country. Fortunately, however, there has been a groundswell of support—in the form of the Me Too, Black Lives Matter, and related social/progressive movements—to end systemic race (and gender) discrimination. It is my fervent hope that these movements will finally cause real change in our society—change that, once and for all, will actualize the American dream such that anyone, regardless of where they were born or the circumstances in which they live (including, for example, their class, race, color, ancestry, religion, age, disability, gender, sexual orientation, or gender identity/expression) can attain their own version of success in a society where equal opportunity for upward mobility is finally possible for everyone. A large part of being able to achieve the American dream is the ability to work: (1) unhindered by discrimination, harassment and retaliation; (2) with reasonable accommodations for disabilities and religious beliefs/practices; (3) free from oppressive forced arbitration agreements and draconian confidentiality/non-disparagement provisions; (4) as employees, rather than as "independent contractors" with no rights; and (5) as union members, if desired, without interference from employers or hindrance by the government. It is to these ends, that this treatise is re-dedicated.

July 2020 Andrew H. Friedman

Los Angeles, California

FOREWORD TO THE FIFTEENTH ANNUAL UPDATE

On March 4, 2005, then Senior District Judge John T. Nixon for the Middle District of Tennessee, penned the inaugural Foreword for Andrew's first publication of *Litigating Employment Discrimination Cases*. Judge Nixon set the tone by recalling that: "In the Summer of 1963, one hundred years after Gettysburg, a bill was before Congress whose purpose was to dismantle the caste system that still existed in the states of the old Confederacy." In the summer of 2020, our nation is at war against the COVID-19 virus that is currently responsible for over 140,000 deaths nationwide and over 600,000 deaths worldwide, as of July 20, 2020. Sparked by the death of George Floyd on Memorial Day weekend 2020, our nation is also engulfed in protests over systemic historical racial discrimination toward Black Americans that has spread worldwide with protests in over 60 countries and all but one continent. Fifteen years after Judge Nixon's Foreword, Andrew has deepened his analysis of the statutory cornerstones prohibiting employment discrimination and the judicial interpretations that breathe life in the words selected by Congress. In so doing, he offers a framework for new challenges in employment discrimination law arising after the summer of 2020.

Andrew's presentation of the basic theories of discrimination is an excellent starting point for modern employment discrimination claims. For example, thousands of diverse Americans have openly protested on city streets and social media the historic mistreatment of Black Americans. Their First Amendment expressions constitute protected activity that could be the basis for employment related retaliation claims. Likewise, corporations could face reverse discrimination challenges arising from their desire to develop a more inclusive corporate culture to address historic racial oversights in business. And, even more likely, employers will want to know whether applicants or existing employees who tested positive for COVID-19 are covered by the Americans With Disabilities Act and, if so, what reasonable accommodations are required. To resolve these and other questions, Andrew's chapter on the three basic theories of discrimination—disparate impact, disparate treatment and the present effects of past discrimination will inform the legal analysis.

Regardless of how the future unfolds, motions for summary judgment will continue to be important. Employers rely greatly on a summary judgment motion to narrow or dismiss employees' claims. Conversely, employees understand that surviving a summary judgment motion will make settlement much more likely because an employer typically doesn't want a jury to decide liability or award damages. Andrew's discussion of summary judgment practice and procedure is valuable to every practitioner. This is because he presents this topic from the perspective of the employee and the employer.

Having decided many employment related motions for summary judgment since assuming office in April 2016, I encourage you to head Andrew's solid advise to tell the Court whether the motion is based "solely" or "in-part" on the employee's testimony; to tell the Court directly your argument on pretext with valid citations; and to tell your story, after all judges enjoy a good story. My observations prompt a recommendation to Andrew for his next update, include in the summary judgment practice section a new chapter: Summary Judgment Practice—Judges' Perspective.

As practitioners move forward after the summer of 2020, I join Judge Nixon in his observation that Andrew's book still provides "practical and invaluable advice" on litigation basics, such as case acceptance, pleadings and preparation. As new and novel claims emerge from COVID-19 with its new working norms and the existing racial tensions, Andrew offers a roadmap to identify good cases, while avoiding potentially problematic ones. This applies to both employee and employer practitioners because exercising good judgment in case acceptance, pleadings and preparation is essential to cases being fairly presented for resolution.

Let me close by reflecting on what Andrew and I have in common: we clerked for Judge Nixon. Like his other law clerks, we mourn his December 2019 death. However, we all still value the unique opportunity and the fun it was to serve in his chambers. What we remember most is his passion for the South and Civil Rights during the 1960's. Judge Nixon was on the frontline as a Civil Rights Attorney in the U.S. Department of Justice. Thanks to Judge Nixon's daughters, I proudly possess the chapter from his unpublished memoir where he wrote about serving in Selma, Alabama in 1964 and 1965. Here, are his words about Selma:

My involvement in the Selma area terminated in July 1965. I left the Justice Department five years later and returned to Nashville. Last winter, however, I read that John Lewis was organizing a tenth anniversary commemoration of the march over the Pettus Bridge. I decided to return to Selma.

It was a chilly March day when I drove out of Nashville, headed South on the interstate. When I reached the Black Belt, four hours later, the temperature was warm, the pastures were green, and the azaleas were in full bloom. The town looked about the same, except that the Albert Hotel, main architectural landmark, had been demolished, and a civic center was going up in its place.

My first stop was at the Sheriff's office where Wilson Baker is serving his third term. Baker looks a little greyer, suffers now from a heart condition, but continues to have a robust, optimistic outlook. We had a long, friendly talk about the old days and about the changes that have taken place. The Sheriff's force and the police department are, of course, integrated, and the city council has five whites and five blacks. Joe Smitherman is still mayor and as presiding officer casts the tie-breaking vote. Baker said issues were often drawn on racial lines, but this was often for economic and geographic reasons. School integration, he said, had progressed smoothly. At first many whites had left the public-school system, but after the first few years began returning. The high school is about 50-50 black and white. Because of the size of the town, busing is not a problem. During the course of our conversation Baker generally indicated that Selma's problems still centered on race, but racial tension had been largely replaced with the give-and-take of the political arena. I asked him if the white people of Selma and Dallas County had the choice; would they return to the old days of segregation. He laughed rather heartily and replied: "You know, some white people here still want to return to slavery." But added: "I really believe that the big majority of the whites would choose not to go back."

As our Nation endures and eventually overcomes the deadly impact of COVID-19 and decides how to remedy systematic historic racial discrimination, I am confident that the "big majority" of people want to go forward. In the area of employment discrimination, Andrew's book is a solid resource. Let us use it to create a workplace that allows every worker to succeed and every employer to thrive.

July 20, 2020

Waverly D. Crenshaw, Jr.

Chief United States District Judge

Middle District of Tennessee

FOREWORD

In the summer of 1963, one hundred years after Gettysburg, a bill was before Congress whose purpose was to dismantle the caste system that still existed in the states of the old Confederacy. That caste system barred the descendants of slaves from eating at the same restaurants, staying at the same hotels and motels, using the same public restrooms, and attending the same public schools as did the members of the "master class." It also kept blacks from working alongside whites in equal jobs, and generally relegated them to lower paying jobs with little chance of advancement.

The legislation had been skillfully crafted by the Kennedy Justice Department. It was based on the Commerce Clause, rather than the Fourteenth Amendment, giving it greater scope and also allowing it to avoid the Senate Judiciary Committee, which was chaired by an arch segregationist from Mississippi. The bill also provided for injunctive relief and no unliquidated damages. Jury pools in the U.S. District Courts of the Deep South were largely composed of white males, who were unlikely to unanimously award unliquidated damages to a black plaintiff.

When this bill came before a House Committee chaired by an Old South Virginian, he belittled the employment discrimination title and sarcastically asked why it did not include women. (It was a strange echo of the battle cry of Southern suffragists: "If black men have the right to vote, why don't white women?") Supporters of the bill picked up the gauntlet, amended it, and now Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based not only on race but also on sex, religion, and national origin. A statute barring age discrimination was passed a few years later. What began as a remedy for a century of regional racism ended with an effect on our American free enterprise society that is surpassed only by the abolition of slavery.

The initial Title VII litigation pursued the original purpose of the statute: overt discrimination by southern employers. The issues and the case preparation were comparatively simple. I was on a team of Justice Department lawyers that prosecuted the first Title VII case brought by the United States. The defendant was a small steel company in Birmingham. That city was then the "Pittsburgh of the South" and its heavy industry utilized both blacks and whites who had fled the collapsed cotton economy of Alabama. The defendant, like other employers in the city, was organized on racial lines. The whites were in the departments with the higher paying jobs and the blacks in the departments with the lower paying ones, although some of the tasks were very similar. The trial preparation was fairly simple—we deposed the personnel manager for several days, obtained documents, and interviewed employees. Because of my Southern accent and Alabama roots, I was assigned the task of interviewing some of the white steel workers. The proof was not that all whites were paid higher wages than all blacks, but that of workers with the same level of seniority almost all whites were paid more than almost all blacks even though the requirements of their jobs were similar. The case took a week to try.

Twelve years later when I went on the District Court bench in Nashville as a new judge, I was assigned a class action case brought on behalf of black employees at a Middle Tennessee industrial plant. The case had already been thoroughly prepared. It took five weeks to try and came down to a battle of experts with charts who testified about standard deviations. One of the most painful experiences I have had as a judge was listening to the cross-examination of a statistician: "Doctor X, let's go through that bell curve one more time." Obviously, the preparation and proof in class action cases had become far more complex in the intervening years.

Systemic discrimination has diminished, but does continue to exist. One of my former law clerks was involved in a case against a major corporation that settled when the evidence revealed racist attitudes on the part of some top management. The settlement changed the corporate culture. Another former clerk was second chair in a suit against another large corporation that had a "glass ceiling" for women. That case also settled. However, most of the cases that I now see are brought by individual plaintiffs usually alleging denial of promotion because of gender or termination because of age. With the growing ethnic diversity of the district, I anticipate that I will see Hispanic and Muslim plaintiffs coming through the courthouse doors, perhaps alleging denial of initial employment because of national origin or religion. For those lawyers who expect to try these types of cases, Andrew Friedman's two volume manual, *Litigating Employment Discrimination Cases* should be kept handy. Friedman has had ample

experience representing both plaintiffs and defendants in such cases, possesses a keen analytical mind, has an intellectual interest in the law, and a trial lawyer's feel for human nature.

Friedman begins with a thorough review of the pertinent statutes from the Civil Rights Act of 1964 through the Family and Medical Leave Act of 1993. He gives factual examples of violations of each prohibited activity with citations to cases. He then proceeds to plaintiff's theories of the case and shifting burdens of proof, giving examples from actual cases.

The remainder of the manual is practical and invaluable advice on how to accept, plead, prepare, anticipate defenses and win, settle, or mediate an employment discrimination case, and file for attorney's fees. Not every member of a protected class who is denied a promotion has a meritorious claim any more than does every individual injured in an automobile accident. Human nature being what it is, it is often difficult for hardworking, loyal employees to accept that they were passed over for promotion because the successful applicants were better qualified. If the disappointed applicant is a member of a protected class and the better qualified successful applicant is not, she or he may honestly believe there was discrimination. Conversely, if the better qualified woman or ethnic minority is chosen, the rejected white male may claim reverse discrimination. Friedman's discussion of the initial telephone interview, follow-up office interview, if any, and evaluation of the case prior to discovery is based on common sense and experience. He also tells the reader how to reject the case, keeping in mind the statute of limitations.

Likewise, the chapter on discovery not only outlines the best scheduling of the techniques of discovery, but Friedman, the veteran gladiator, also tells the apprentice some of defense counsel's tricks of the trade, how to anticipate them, and how to avoid the traps.

Those are just a few examples that illustrate the depth, breadth, and quality of this book. Mr. Friedman has written it in a straightforward, declaratory, dispassionate and very readable style. This work of Andrew Friedman took considerable effort and will be of great use for the experienced litigator; and from it, the newcomer can learn step by step how to become an experienced litigator.

A United States District Judge often sees his law clerks as surrogate sons and daughters. I am very proud of Andy.

March 4, 2005

The Honorable John T. Nixon

Senior District Judge

United States District Court for the Middle District of Tennessee