NOTE TO STUDENTS

A. What You’ll Be Studying

This book is devoted to employment discrimination, one of the most important areas of legal regulation of the rights and responsibilities of employers and employees. This course is concerned with the question of “discrimination” in employment and is, therefore, limited to legal doctrines that fall within the definition of that term. Indeed, much of this book is devoted to the twin questions of how “discrimination” should be defined and how it is proven in the litigation context. As you will see, employment discrimination, on both the social and the legal levels, is a complex and controversial problem, affecting the rights of all workers in one way or another.

But however important the topic of employment discrimination, it is only a subset of the more general problem of legal regulation of the employment relationship. As you will learn, “employment discrimination” is usually limited to discrimination against employees on the basis of statutorily defined characteristics. These characteristics may be immutable — such as race, gender, age, or national origin — or subject to change — such as religion, alienage, or marital status — or of either kind — such as disability discrimination, which includes mental and physical disabilities without regard to their causes.

While these categories are the traditional domain of the law of employment discrimination, employers routinely “discriminate” (perhaps we should use the word “differentiate”) among employees or applicants in ways that have nothing to do with race, gender, age, or any of the other reasons prohibited by discrimination statutes. Further, employers may base their actions on rational reasons (hiring the best-qualified applicant); questionable reasons (promoting the daughter of an important customer over a better worker who lacks such “connections”); reasons that are eccentric but not necessarily legally wrong (choosing employees on the basis of astrological sign); or socially and morally unacceptable reasons (firing a “whistleblower” whose conduct had saved human lives).

The ultimate question, of course, is what, if any, limitations the law should place on the employer’s power to deal with employees. The antidiscrimination laws reflect one societal answer, but the broader question is taken up in courses titled “Employment Law” or “Individual Employment Rights.” See generally TIMOTHY P. GLYNNE, RACHEL ARNOW-RICHMAN & CHARLES A. SULLIVAN, EMPLOYMENT LAW: PRIVATE ORDERING AND ITS LIMITATIONS; MARK A. ROTHSTEIN, CHARLES B. CRAVER, ELINOR P. SCHROEDER & ELAINE W. SHOBEN, EMPLOYMENT LAW (3d ed 2005). It is also treated, albeit somewhat obliquely, in labor law.

As a discipline, employment law is a sprawling area that begins with a core commitment to private ordering through contracts. In employment, as in other areas of
contract law, policing the fairness of bargains is the exception, rather than the rule. Contract law purported to implement this approach to employment by adopting a general rule that prevailed in the United States for nearly a century: absent an express written contract for a specified term, the relationship between an employer and its employees was "at will." One court explained the rule and its rationale: "Generally speaking, a contract for permanent employment, for life employment, or for other terms purporting permanent employment, where the employee furnishes no consideration additional to the services incident to the employment, amounts to an indefinite general hiring terminable at the will of either party, and a discharge without cause does not constitute a breach of such contract justifying recovery of damages." Forer v. Sears, Roebuck & Co., 153 N.W.2d 587, 589 (Wis. 1967). While framed neutrally, in the sense that either party can terminate the relationship without liability to the other, the at-will doctrine in practice meant that the employer could discharge an employee "for good reason, bad reason, or no reason at all."

Because contract law provided few rights for most workers, numerous legislative interventions were designed to address deficiencies, or perceived deficiencies, of the at-will regime. The antidiscrimination statutes are a prime example, but employment law treats a huge variety of other interventions of greater or lesser legal and practical significance. On the federal level, these include:

- Leave policies: the Family and Medical Leave Act (FMLA)

These statutes vary greatly in terms of their protection and coverage. For example, EPPA covers essentially all private-sector employers in the United States, but WARN reaches only larger employers conducting "mass layoffs." Most federal statutes have state analogs, some of which provide substantially more employee rights than do their federal counterparts. Further, some areas of employment law, such as workers' compensation, are primarily state regimes, and, of course, state tort law provides limited but important protections, most notably the "public policy tort," which has been reinforced by broad "whistleblowing" statutes in a few states. E.g., N.J. Conscientious Employee Protection Act, N.J. Stat. Ann. §§34:191 et seq. Finally, some groups of employees have their own sources of protection — public-sector workers have constitutional rights, and civil servants and public school and college and university teachers have tenure systems.

A third group of workers with special protection consists of unionized workers under collective bargaining agreements. This regime is studied as labor law, which deals with unionization and collective bargaining. The core notion is that employees gain countervailing power vis-à-vis their employers by organizing and then bargaining collectively with their employers. While the origins of the union movement reach back well before the nineteenth century, unions did not become
legal, and respectable, until relatively recently. During the Great Depression, the federal government adopted what is now known as the National Labor Relations Act (NLRA), 29 U.S.C.S. §§ 151 et seq. (2007), which encourages unions by declaring it an unfair labor practice for employers to discriminate against workers seeking to unionize and by requiring the employer to bargain with unions that succeed in organizing that employer’s workforce. See generally Patrick Hardin Ed., The Developing Labor Law: The Board, The Courts, and the National Labor Relations Act (4th ed. 2002). While wages and hours are a prime area of concern, most unions also ensure job security for workers through seniority systems and requiring just cause for discharge. This legal regime, however, scarcely proved a panacea. While many unions succeeded in raising wages, improving working conditions, and providing increased job security for those they represented, large segments of the American workforce remained unorganized. By the turn of the 21st century, the proportion of the organized workforce had shrunk to less than that when the NLRA was passed, reaching about 8.5 percent of the private workforce in 2002 (Bureau of Labor Statistics News, USDL 03-88, February 25, 2003). Unions are, however, stronger in the public sector.

One of the ironies of employment law and employment discrimination is that the very definition of employer and employee draws on doctrines invented for a different purpose altogether — whether an employer was liable for the torts committed by its employees (or, as it would have more typically been phrased, whether a master was liable for the torts of his servants). The answer to this question at common law was found in the law of agency and depended on whether the tortfeasor was a servant (or employee) as opposed to an “independent contractor.” If the principal had sufficient “control” over the work of the agent, it was liable for the agent’s torts. The principal was then called a master or an employer, and the agent became a servant or an employee. If the degree of control was insufficient, the agent was labeled an “independent contractor,” and the principal was not liable for his torts.

B. The Organization of This Book

Antidiscrimination statutes have spawned complex legal theories defining discrimination and the methods used to prove it. Although the basic prohibitions enjoy broad support, the development of theories of proof and the enactment of statutory reforms expanding employer duties have generated considerable social controversy. Affirmative action, sexual harassment, discrimination on the basis of sexual orientation, and disparate impact liability are just a few of the issues that have tested the limits of discrimination theory.

This casebook undertakes a complete consideration of the federal antidiscrimination laws.

The enactment of Title VII as part of the Civil Rights Act of 1964 marked a legal watershed. Although the statute had state and federal precursors, they had proved insufficient to deal with the problem of employment discrimination. Title VII marked the first comprehensive national attack on the problem of employment discrimination.

In the wake of Title VII, a number of developments expanded the federal courts’ involvement with employment problems. First, Congress passed additional statutes, most notably the Age Discrimination in Employment Act of 1967 (ADEA), prohibiting discrimination against older workers, and the Americans with
Disabilities Act of 1990 (ADA), barring discrimination against individuals with disabilities. Second, the Supreme Court resuscitated civil rights statutes passed during the Reconstruction era following the Civil War. Sections 1981 and 1983 of Title 42 of the United States Code were among the laws passed to protect the newly freed slaves in the South by implementing the Thirteenth, Fourteenth, and Fifteenth Amendments. Although these statutes had been eviscerated by the Supreme Court in the years shortly after their enactment, the Warren Court revived the early statutes, creating a wide range of statutory tools to deal with employment discrimination. While the Supreme Court thereafter restricted both the modern civil rights laws and their Reconstruction era predecessors, Congress has reacted strongly on a number of occasions to restore the effectiveness of the antidiscrimination statutes. Most notably, the Pregnancy Discrimination Act in 1978 defined pregnancy discrimination as sex discrimination after the Supreme Court had held the contrary, and the Civil Rights Act of 1991 reversed or substantially modified a number of Supreme Court decisions limiting the effectiveness of Title VII and §1981.

This book considers all of these legislative and judicial efforts to address discrimination in employment, and it approaches the question through the lens of the three theories of liability the courts have developed — individual disparate treatment, systemic disparate treatment, and disparate impact. Some have questioned whether these understandings of discrimination adequately capture the underlying phenomenon, but they are obviously the place to start. To complicate matters, they apply somewhat differently across the four major statutes we will study — Title VII, the ADEA, 42 U.S.C. §1981, and the ADA.

Chapter 1 takes up the most basic concept, intentional discrimination against particular applicants or employees — individual disparate treatment discrimination. Chapter 2 then extends the intentional discrimination concept to broader patterns of such practices — systemic disparate treatment. Chapter 3 considers an alternative test of discrimination, disparate impact. Then Chapter 4 attempts to synthesize the approaches previously developed into a coherent theory of discrimination. Chapter 5 takes up special problems that arise when antidiscrimination law is applied to such issues as pregnancy, sexual harassment, sexual orientation, religion, national origin, age, and retaliation.

In Chapter 6, the casebook turns to a statute that approaches the question of discrimination somewhat differently. The Americans with Disabilities Act borrows discrimination concepts from the earlier statutes but applies them in unique ways to a form of discrimination that is itself very different from those studied previously.

Chapters 7 and 8 then turn to important but second-order questions that have arisen under the antidiscrimination statutes. Thus, Chapter 7 considers procedures focusing primarily on Title VII, which is the procedural paradigm for both the ADEA and the ADA. Chapter 8 then analyzes the remedies available to redress violations of all the statutes addressed in this book.

The remaining two chapters take a somewhat different tack. The centrality of the antidiscrimination statutes to employment in the United States has led to a number of "risk management" strategies by employers, and Chapter 9 undertakes a study of a few of the most important of these — the use of arbitration as an alternative to litigation to resolve discrimination disputes and the settlement and release of potential claims.

Finally, as a coda to the book, we explore the underlying policy justifications for the statutes in Chapter 10 and speculate as to the usefulness and limitations of the antidiscrimination project at this stage in our history.