Employment Law for Human Resource Practice

David J. Walsh

6E

EMPLOYMENT LIFE CYCLE APPROACH

Future managers and human resource professionals need to understand the employment life cycle: hiring, managing, and terminating. Employment law affects every stage of the cycle. This text shows how these laws apply to human resource practice.

Part 1

Introduction to Employment Law

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- The Employment Relationship
- Overview of Employment Discrimination

Part 2

The Hiring Process

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- Background Checks, References, and Verifying Employment Eligibility
- Employment Tests
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Managing a Diverse Workforce

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- Unions and Collective Bargaining
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- Privacy on the Job

Part 5

Terminating Employment

- Terminating Individual Employees
- Downsizing and Post-Termination Issues

Employment Law for Human Resource Practice

SIXTH EDITION

DAVID J. WALSH
Miami University

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Preface

This is a book about employment law—the set of legal requirements that govern the workplace. A distinction is often made between "employment law" and "labor law," with the latter describing laws related to unions and collective bargaining, but I will generally use the term "employment law" to refer to both. This book has two main objectives. The first is to *explain the major employment laws and types of legal claims faced by employers*. Which things are legal matters? What does the law say about those matters? How are cases decided? The second objective is to *explain what employment law means for human resources practice*. What is it that employers should be doing to comply with the law? What is the legal reasoning behind this practical advice?

Special Features of This Text

Unique Employment Life Cycle Approach

This dual purpose of understanding the substance of employment law and its implications for human resources practice accounts for the way this book is organized. The first three chapters provide broad overviews. The remainder of the book traces the steps in the employment process and addresses the particular legal issues associated with them. We start with issues that lead up to hiring and promotion, including recruitment, interviewing, background checks, references, and employment testing. We then turn to a range of issues that arise when a person is on the job, including harassment, reasonable accommodation of disability, compensation, benefits, performance appraisal, and occupational safety and health. The last two chapters of the book deal with issues related to the termination of employment. This structure is intended to highlight the legal issues that managers regularly confront.

> *The employee life cycle approach to this text offers students the ability to understand the employment process, from beginning to end, while considering the legal environment and its implications for business success. Walsh's personnel law book provides a solid foundation for students to successfully navigate the always changing and rarely certain areas of personnel law within an organization.*
>
> *Professor Sarah Sanders Smith, SPHR, Purdue University*

> *Of all of the texts that I reviewed, this one has the most practical and usable advice for soon-be-HR practitioners. The life cycle approach is strong and the writing easy to read.*
>
> *Nancy K. Lahmers, JD, The Ohio State University*

Practical Focus

This book is full of advice for carrying out human resource activities in a lawful manner. *These guidelines are general principles for sound human resources practice. They cannot be—and do not purport to be—specific legal advice for particular situations that you might encounter. Only a trained legal professional thoroughly familiar with the details of your case can provide the latter.*

> *This text offers a unique human resources perspective of employment law that is typically not afforded attention in other comparable texts.*
>
> *Dr. Kim LaFevor, Athens State University*

Interesting Features Included in Each Chapter

Clippings This feature consists of brief synopses of recent cases, events, or studies that illustrate the issues dealt with in each chapter. The clippings should pique your interest and begin to show how employment law relates to real things that are happening in the world around us.

> *I love the Clippings features—they are well chosen and give the students a great intro into why what we are covering is relevant to their businesses.*
>
> *Alexis C. Knapp, Houston Baptist University*

The Changing Workplace This feature adds a forward-looking flavor to the book by highlighting contemporary developments in the workplace, the workforce, and human resource practices that have particular implications for the law. The business world is nothing if not dynamic. Changes in the workplace raise new legal questions and point to the types of legal disputes that we can expect to see more of in the future.

Just the Facts This feature provides succinct statements of the facts from some interesting court decisions. You are not told the outcomes of the cases; instead, you are given the information needed to make your own determinations ("just the facts"). Thinking through these cases and arriving at decisions is a great way to test your grasp of legal concepts.

Practical Considerations Employers need to follow many rules to meet their legal obligations to employees. But legal compliance is not entirely cut-and-dried. Managers have many choices about how to comply with the law, and this feature highlights some of those choices.

Elements of a Claim In any situation that gives rise to a legal dispute, numerous facts might be considered. The facts that we deem most relevant and the order in which we consider them go a long way toward determining the outcome of our deliberations. When judges decide cases, they typically rely on established frameworks that spell out a methodology for deciding those cases. Who has the burden of proof? What must the plaintiff show? What must the defendant show? In which order should certain facts be considered? This feature lays out these frameworks—the "elements" of particular legal claims. Grasping this information gives us real insight into how cases are decided. Judges still exercise considerable discretion and judgment in applying these frameworks, but they make the process of arriving at decisions in legal disputes far more systematic and consistent than it would otherwise be.

Practical Implications of the Law Each chapter in this book contains many suggestions for carrying out human resources activities in a lawful manner. This advice appears in italics to make it stand out from the rest of the text. This advice should be considered in the context of the specific legal problems that it aims to help employers avoid. *It is important to know not only what to do but also the legal reasoning for why those things should be done.*

The law is a basic determinant of human resources practice and one that cannot be ignored. However, the law is best conceived of as providing a "floor," rather than a "ceiling," for such practices. In other words, it establishes minimum standards of acceptable treatment of employees, but often it is sensible for employers—based on motivational, pragmatic, or ethical considerations—to go well beyond the bare minimum legal requirements. Thus, our purpose in understanding what the law requires is not to identify "loopholes" that can be exploited or to advocate superficial measures that look good on paper but fail to realize the underlying purposes (e.g., equal employment opportunity) of the law. Instead, *this book encourages you to embrace the "spirit"—and not merely the "letter"—of the law. It invites you to consider how to achieve these important social purposes by implementing policies and practices that also make sense given the operational realities of the workplace.*

Practical Advice Summary For easy reference, the practical advice sprinkled liberally throughout chapters is collected at the end of each chapter. This summary can be used as a convenient "checklist" for legal compliance.

Legal Cases Each chapter contains three or four substantial excerpts from decisions in court cases. One of the things that is unusual (and admirable) about legal decision making is that the decision makers (e.g., judges) often set down in writing their rationales for the decisions they make in the cases that are brought before them. This gives us the opportunity to read firsthand accounts of legal disputes, to have the decision makers explain the relevant rules of law, and to see how those principles were applied to the facts of cases to arrive at decisions. I describe the law and other cases for you as well, but there is nothing like reading cases to get a real feel for the law. Getting comfortable with reading legal cases is a bit like learning a new language. It will take some doing, but with diligent effort and practice, it will pay off in terms of enhanced ability to access and understand the law.

The words in the case excerpts are the same as those you would find if you looked up the cases online or in print. However, to maximize readability, I have shortened the case decisions by focusing on a brief statement of the facts, the legal issue, and (at greatest length) the explanation of the decision maker's rationale. Where part of a sentence is removed, you will see three dots (. . .). Where more than part of a sentence is removed, you will see three stars (* * *). This marker alerts you that text that appears in the full case decision has been removed in this book. Legal decisions are replete with numerous footnotes and citations to previous cases that addressed similar questions. In most instances, I have removed the citations and footnotes from the case excerpts. Occasionally, I have included in brackets [ ] a brief explanation of a legal term.

What Is New in This Edition

This edition of *Employment Law for Human Resource Practice* retains the essential structure and focus of the previous editions. Linking a thorough understanding of principles of employment law to advice on how to conduct human resources practice remains the central aim of this book. Consistent with this aim, the book continues to be organized around stages in the employment process, from the formation of an employment relationship through the termination of that relationship. This sixth edition is the product of a thorough, line-by-line revision of the previous edition, aimed at enhancing clarity and ensuring that the material is as current as possible. I have streamlined the presentation of material in this edition by placing the most essential information regarding affirmative action, performance appraisals, and training within other chapters to which they apply, rather than having them appear as separate chapters.

Users of this text will find a significant number of new case excerpts. Indeed, more than half of the chapter cases are new to this edition. If, through a lapse in taste or judgment, I have eliminated one of your favorite cases from the previous edition, chances are the case still appears somewhere in this edition, perhaps as a new end-of-chapter question. I have also included a number of new case problems to puzzle over.

My hope is that both students who are reading this book for the first time and instructors who have used previous editions will find it engaging and informative.

Significant Revisions

Here are some highlights of the revised contents of this edition.

- **Chapter 1**: This chapter includes two new excerpted cases, *Dukowitz v. Hannon Security Services* (employment at will) and *Chavarria v. Ralphs Grocery Company* (enforceability of arbitration agreements). The issue of mandatory arbitration agreements receives updated and extended treatment.

- **Chapter 2**: This chapter maintains the previous edition's focus on the misclassification of employees as independent contractors and includes a new case applying the economic realities test (*Kellar v. Miri Microsystems*). The discussion of the employment status of unpaid interns, graduate assistants, and student-athletes has been updated. The leading appeals court decision on the employment status of interns, *Glatt v. Fox Searchlight Pictures*, is included. The evolving question of joint employment is taken up in a new chapter case, *Salinas v. Commercial Interiors*.
- **Chapter 3**: Two of the three cases excerpted in this chapter are new to this edition. These new chapter cases are *Vasquez v. Express Ambulance Service* (subordinate bias theory of liability) and *DeMasters v. Carilion Clinic* (retaliation).
- **Chapter 4**: Legal issues surrounding the use of social media for recruiting are highlighted in a new "Changing Workplace" feature. A discussion of the role of affirmative action plans in recruitment is new to this edition. The discussion of temporary work visas for foreign nationals is updated.
- **Chapter 5**: Coverage of immigration, undocumented workers, and recent changes in the enforcement of immigration laws is expanded and updated. A new Fair Credit Reporting Act case is included (*Goode v. LexisNexis Risk & Information Analytics Group*).
- **Chapter 6**: A new case on requiring fitness-for-duty medical exams of current employees is included (*Wright v. Illinois Department of Children & Family Services*). The issue of sex-differentiated physical fitness standards is taken up in a new chapter case, *Bauer v. Lynch*.
- **Chapter 7**: The legality of using preferences in affirmative action is now addressed in this chapter. New chapter cases include *Shea v. Kerry* (affirmative action preferences under Title VII) and *Hilde v. City of Eveleth* (subjective judgment of interview performance).
- **Chapter 8**: The discussion of harassment is updated with "Clippings" features focusing on contemporary incidents and extended consideration of the role of training in addressing harassment.
- **Chapter 9**: The important issue of telecommuting as a reasonable accommodation for disabled employees is taken up in a new chapter case, *EEOC v. Ford Motor Co*. Accommodation of the religious beliefs and practices of employees in scheduling work is the topic of another new chapter case, *Davis v. Fort Bend County*.
- **Chapter 10**: This chapter's substantial coverage of the Family and Medical Leave Act is retained and updated. There is expanded coverage of pregnancy discrimination (*Young v. UPS*) and discrimination based on sexual orientation (*Hively v. Ivy Tech*).
- **Chapter 11**: Coverage of the minimum wage for tipped employees and compensable time under the Fair Labor Standards Act (FLSA) is updated. There is additional discussion of the use of salary history in making pay decisions. *Pippins v. KPMG* (FLSA exemption for professional employees) and *Riser v. QEP Energy* (Equal Pay Act) are new to this edition.
- **Chapter 12**: The ongoing legal challenges to the Patient Protection and Affordable Care Act are reviewed. The discussion of the fiduciary duties of employers with defined contribution plans is updated. Closer attention is given to multi-employer pension plans and legal issues surrounding wellness programs. New chapter cases are *Harrison v. Wells Fargo Bank, N.A.* (denial of benefits, abuse of discretion) and *Whitely v. BP* (stock-drop suits).
- **Chapter 13**: This chapter retains and expands its discussion of concerted activity in nonunion workplaces. The treatments of worker centers, agency fees, and right-to-work laws are updated. New chapter cases include *The Boeing Company* (facially neutral rules and concerted activity) and *AutoNation, Inc. v. NLRB* (employer threats, illegal opposition to union organizing).
- **Chapter 14**: This chapter includes a new discussion of the Occupational Safety and Health Administration's revised silica standard. New "Clippings" features include one that raises the issue of safety hazards posed by humans working alongside robots.

- **Chapter 15**: *Estrada v. Wal-Mart Stores* (interrogations) is a new chapter case.
- **Chapter 16**: The discussions of whistleblower protections for employees in the financial industry and of challenges to tenure are updated. New chapter cases include *Reynolds v. Gentry Finance* (employee handbooks and implied contracts), *Rhinehimer v. U.S. Bancorp Investments* (Sarbanes–Oxley Act), and *Monroe v. Central Bucks School District* (First Amendment speech rights applied to blog posts).
- **Chapter 17**: Noncompetition agreements are given more extended consideration and are the topic of a new "Changing Workplace" feature. New chapter cases are *Varela v. AE Liquidation* (unforeseen business circumstances exception under the WARN Act) and *NanoMech, Inc. v. Suresh* (appeals court decision in this case considering the enforceability of a noncompete agreement).

Instructor Resources

Instructor's Manual

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The Instructor's Manual for this edition of *Employment Law for Human Resource Practice* provides a succinct chapter outline, answers to questions raised in the "Just the Facts" and "Practical Considerations" features, answers to case questions following excerpted cases, answers to end-of-chapter questions, and suggestions for in-class exercises and discussions (including role-plays, practical exercises, and more). *Citations for the cases from which the "Just the Facts" and end-of-chapter questions are drawn can be found in the Instructor's Manual.* Donna J. Cunningham of Valdosta State University revised the Instructor's Manual for the sixth edition.

Test Bank

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The Test Bank questions for this edition not only test student comprehension of key concepts, but also focus on those concepts' business applications and ethical implications. The questions have been updated to reflect the new content and cases of the sixth edition and expanded to include hypothetical questions that ask what the student, as a human resources manager, should do in particular situations. Donna J. Cunningham of Valdosta State University edited and updated the Test Bank for the sixth edition.

PowerPoint Slides

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PowerPoint slides have been created to highlight the key learning objectives in each chapter—including case summaries and hyperlinks to relevant materials. In addition, "What Would You Do?" slides emphasize applying legal concepts to business situations (answers to these questions are provided in "Instructor's Note" slides at the end of the presentation). The PowerPoint slides were prepared by Donna J. Cunningham of Valdosta State University.

Note to the Instructor

Since I have been touting the contents of this book, it seems only fair to acknowledge material that is largely omitted. Beyond a glancing blow struck in Chapter 1, this book provides relatively little information about such matters as the legislative process, courtroom procedures, and the historical development of employment laws. These are all worthwhile topics, but they are not emphasized in this book because its focus is the current substance of employment law and the implications for human resources practice. The treatment of labor law in this book does not reach a number of the more specialized issues in this area, but I do attempt to show how labor law continues to be relevant to both unionized and nonunion workplaces. Additionally, while cross-national comparisons can enhance our understanding of U.S. law, a comparative perspective is beyond the scope of this book.

For Susan, "Gus," and "Dusty."

Acknowledgments

Thanks to the many faculty and students who have used *Employment Law for Human Resource Practice*. I hope that this edition will serve your needs even better. If you are not presently using this book, I hope that you will consider adopting it. Please do not hesitate to contact me regarding any questions you have about the book (and ancillary materials) or suggestions for improvement (walshdj@miamioh.edu).

Many thanks also to numerous others at Cengage and its business partners. Being an author provides a small glimpse of the "cast of thousands" who are needed to produce a work of this type.

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PART 1
Introduction to Employment Law

CHAPTER 1

Overview of Employment Law

The purpose of this first chapter is to present a big picture of the body of law that we will apply to particular human resources practices throughout this book. This chapter contains an overview of employment laws, the rights they confer on employees, and the processes involved in enforcing these laws. Special attention is given to the use of alternatives to litigation to resolve employment disputes.

Heard at the Staff Meeting

Congratulations on your new job as human resources manager! You pour a cup of coffee and settle into your seat to hear the following reports from staff members:

"We've lined up some interns from a local college to take the place of vacationing staff members this summer. We won't pay the interns, of course, but hopefully they will be self-starters who can make a real contribution."

"In the interest of security, we now have a firm that checks the backgrounds of our job candidates. Anyone with an arrest or conviction is immediately dropped from consideration for employment."

"Our employees' use of social media has gotten out of hand. To deal with this problem, we have developed a new company policy that strictly prohibits employees from airing criticisms of the company's employment practices or its managers via social media. We hope this will put an end to any disparaging comments."

"Do you remember the chemist that we hired recently? She's been doing a great job, but she mentioned the other day that she might have a problem regarding a noncompetition agreement that she had signed with her former employer. I told her that we did not intend to get involved in the matter, but I was confident that she would be able to work things out."

You get up to get another—large—cup of coffee and feel fortunate that you were paying attention during that employment law class you took.

Which legal issues emerged during this staff meeting? What should this company be doing differently to better comply with the law? Although you might not encounter this many legal problems in one sitting, employment law pervades virtually every aspect of human resources practice, and managers regularly confront employment law questions.

Clippings

Cities and counties have become more important as sources of employment law in recent years. They have enacted, or attempted to enact, laws providing for higher minimum wages, paid sick time, and expanded protection against discrimination, among other things. But there has also been a counter-trend of state legislatures acting to "preempt" these local initiatives. Just since 2011, 22 states have enacted laws prohibiting localities from adopting their own employment laws. In general, state governments have the authority to do so.

SOURCE: Jay-Anne B. Casuga and Michael Rose. "Are State Workplace Preemption Laws on the Rise?" *Labor Relations Week* 30 (July 20, 2016).

U.S. Employment Law Is a Fragmented Work in Progress

"Just tell me what the law is, and I'll follow it." Were matters only that simple! No single set of employment laws covers all workers in the United States. Instead, the employment law system is a patchwork of federal, state, and local laws. Whether and how laws apply also depend on such things as whether the employees work for the government or in the private sector, whether they have union representation, and the size of their employer. Our principal focus will be on federal laws because these reach most widely across U.S. workplaces and often serve as models for state and local laws. However, we will also mention significant variations in the employment laws of different states.

There is another problem with the idea of just learning the legal rules and adhering to them. Employment law is dynamic. New law is created and old law is reinterpreted continuously. Recent political changes and the prospect of a significant realignment of the U.S. Supreme Court have engendered more than the usual degree of uncertainty about what the law will be in the future. Changing workplace practices also pose new legal questions. At any point in time, there are "well-settled" legal questions on which there is consensus, other matters that are only partially settled (perhaps because only a few cases have arisen or because courts have issued conflicting decisions), and still other questions that have yet to be considered by the courts and other legal decision makers. Attaining a solid grasp of employment law principles will allow you to make informed judgments in most situations. You must be prepared to tolerate some ambiguity and keep learning, however, as the law of the workplace continues to develop.

Sources of Employment Law

What comes to mind when you think of the law? Judges deciding court cases? Congress legislating? The Constitution? All of these are parts of the law in general and employment law in particular. Legal rules governing the workplace are found in the U.S. Constitution and state constitutions, statutes enacted by legislatures, executive orders issued by presidents and governors, regulations created by administrative agencies, and judicially authored common law.

Constitutions

Constitutions are the most basic source of law. **Constitutions** address the relationships between different levels of government (e.g., states and the federal government) and between governments and their citizens. A legal claim based on a constitution must generally assert

a violation of someone's constitutional rights by the government (in legal parlance, the element of "state action" must be present). In practical terms, this means that usually only employees of government agencies—and not employees of private corporations—can look to the U.S. Constitution or state constitutions for protection in the workplace. Constitutional protections available to government employees include speech rights, freedom of religion, protection from unreasonable search and seizure, equal protection under the law, and due process rights.

Statutes

In our system of government, voters elect representatives to legislative bodies such as the U.S. Congress. These bodies enact laws, or **statutes**, many of which affect the workplace. Among the many important statutes with implications for human resources practice are Title VII of the Civil Rights Act, the National Labor Relations Act, the Equal Pay Act, the Americans with Disabilities Act, the Family and Medical Leave Act, and the Employee Retirement Income Security Act.

Executive Orders

The executive branch of government has the power to issue executive orders that affect the employment practices of government agencies and companies that have contracts to provide goods and services to the government. **Executive orders** function much like statutes, although they reach fewer workplaces and can be overridden by the legislative branch. One important example of an executive order affecting employment is Executive Order (E.O.) 11246, which establishes affirmative action requirements for companies that do business with the federal government.

Regulations, Guidelines, and Administrative Decisions

When Congress enacts a statute, it often creates an agency, or authorizes an existing one, to administer and enforce that law. Legislators do not have the expertise (and sometimes do not have the political will) to fill in all the details necessary to put statutes into practice. For example, Congress mandated in the Occupational Safety and Health Act that employers provide safe workplaces but largely left it to the Occupational Safety and Health Administration (OSHA) to give content to that broad principle by creating safety standards governing particular workplace hazards. Formal **regulations** are put in place only after an elaborate set of requirements for public comment and review has been followed. Regulations are entitled to considerable deference from the courts (generally, they will be upheld when challenged), provided that the regulations are viewed as reasonable interpretations of the statutes on which they are based.[1] Agencies also contribute to the law through their decisions in individual cases that are brought before them and the guidance that they provide in complying with laws.

Common Law

Courts are sometimes asked to resolve disputes over matters that have not been objects of legislation or regulation. Over time, courts have recognized **common law** claims to enforce private agreements and to remedy certain types of harm. Common law is defined by state courts, but broad similarities exist across states. One branch of common law is the traditional role of the courts in interpreting and enforcing contracts. The other branch is recognition of various **tort** claims to compensate persons who have been harmed. Tort claims relevant to employment law include negligence, defamation, invasion of privacy, infliction of emotional distress, and wrongful discharge in violation of public policy.

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[1] *Chevron U.S.A., Inc. v. National Resources Defense Council*, 467 U.S. 837 (1984).

Substantive Rights under Employment Laws

Employment laws confer rights on employees and impose corresponding responsibilities on employers. Paradoxically, the starting point for understanding employee rights is a legal doctrine holding that employees do not have any right to be employed or to retain their employment. This doctrine, known as **employment at will**, holds that in the absence of a contract promising employment for a specified duration, the employment relationship can be severed at any time and for any reason not specifically prohibited by law. Statutory and other rights conferred on employees have significantly blunted the force of employment at will. Nevertheless, in the absence of any clear right that employees can assert not to be terminated, employment at will is the default rule that permits employers to terminate employment without needing to have "good" reasons for doing so.

Broadly speaking, employees have the following rights under employment laws.

Nondiscrimination and Equal Employment Opportunity

A central part of employment law is the set of protections for employees against discrimination based on their race, sex, age, and other grounds. Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Equal Pay Act, and the Americans with Disabilities Act are examples of federal laws that prohibit discrimination in employment and express the societal value of equal employment opportunity.

Freedom to Engage in Concerted Activity and Collective Bargaining

Another approach to protecting workers is to provide them with greater leverage in dealing with their employers and negotiating contractual standards of fair treatment. Labor laws exist to protect the rights of employees to join together to form labor unions and attempt to improve their terms and conditions of employment through collective bargaining with their employers. Important federal labor laws include the National Labor Relations Act, the Railway Labor Act, and the Civil Service Reform Act (covering collective bargaining by federal government employees).

Terms and Conditions of Employment That Meet Minimum Standards

Some employment laws protect workers in a more direct fashion by specifying minimum standards of pay, safety, and other aspects of employment. Federal laws exemplifying this approach include the Fair Labor Standards Act (minimum wage and overtime pay requirements), the Occupational Safety and Health Act (workplace safety standards), and the Family and Medical Leave Act (leave policy requirements).

Protection of Fundamental Rights

Some legal challenges to employer practices are based on broader civil liberties and rights. For example, a variety of privacy-related protections exist, including privacy torts, the Electronic Communications Privacy Act, the Employee Polygraph Protection Act, and the Fair Credit Reporting Act.

Compensation for Certain Types of Harm

Employees can take legal action to recover damages when, for example, they are the victims of employer negligence, are defamed, or have emotional distress inflicted upon them; their employment contract is breached; or they are wrongfully discharged.

In the *Dukowitz v. Hannon Security Services* case that follows, a terminated employee sued her former employer. Although one might sympathize with the employee under the facts of this case, it is apparent from this decision that *employment at will* still presents a large hurdle for terminated employees.

Dukowitz v. Hannon Security Services
841 N.W. 2d 147 (Minn. 2014)

OPINION BY JUSTICE STRAS:

Hannon hired Dukowitz as a security officer in November 2005 and assigned her to an evening position. In July 2008, Dukowitz learned about a temporary daytime position that would be available for the holiday season. Dukowitz's supervisor offered her the position, but required Dukowitz to sign a document acknowledging the possibility that the position would be unavailable beyond the holiday season. Dukowitz switched to the daytime position in September 2008. In early December, Dukowitz's supervisor informed her that the position would no longer be available after the end of December and that Hannon did not have any hours available for Dukowitz in the ensuing months. Dukowitz claims that she told her direct supervisor that she would need to apply for unemployment benefits "to make ends meet." According to Dukowitz, her supervisor then turned to another supervisor and asked, "should we term her?"—in other words, terminate her employment. Dukowitz claims that she begged her supervisor not to terminate her and asked that Hannon place her on a "floating shift" so that she could work when shifts became available.

Dukowitz applied for unemployment benefits on December 21, 2008. [Note: Under Minnesota law, employees can receive unemployment insurance when their hours are reduced below a specified number. They need not be completely unemployed.] Two days later, Dukowitz's daytime position became unavailable. Hannon ultimately terminated Dukowitz's employment on March 13, 2009. The parties dispute the reasons for Dukowitz's termination. Hannon asserts that Dukowitz was terminated because of her "poor work [for a client], her expressed unwillingness to work weekends or nights and the lack of Hannon opportunities for business in the St. Cloud area." Dukowitz contends that she received positive performance reviews and that she never refused to work weekends or nights.

In June 2010, Dukowitz commenced this action against Hannon for wrongful discharge. Dukowitz alleged in her complaint that Hannon violated the public policy of the State of Minnesota when it terminated her employment in retaliation for her application for unemployment benefits. The district court granted Hannon's motion for summary judgment based in part on its conclusion that "common law wrongful termination claims [are limited] to scenarios in which an employee was fired for his or her refusal to violate the law." * * *

The court of appeals affirmed. * * * We granted Dukowitz's petition for further review.

* * * The dispute in this case centers on the scope of the public-policy exception to the employment-at-will rule. Dukowitz argues that our decisions in [prior cases], establish a cause of action for wrongful discharge if an employee can identify a clear mandate of public policy that the employer violated when it discharged the employee. Dukowitz alternatively asserts that, even if the scope of the public-policy exception is more limited, we should now recognize a cause of action for wrongful discharge under the circumstances presented by this case. * * *

In Minnesota, the employer–employee relationship is generally at-will, which means that an employer may discharge an employee for "any reason or no reason" and that an employee is "under no obligation to remain on the job." . . . [W]e [have] recognized a narrow public-policy exception to the employment-at-will rule. "An employee may bring an action for wrongful discharge if that employee is discharged for refusing to participate in an activity that the employee, in good faith, believes violates any state or federal law or rule or regulation adopted pursuant to law." * * *

Because Dukowitz has not alleged that her termination resulted from a refusal to commit an act that she, in good faith, believed to be illegal, she has not stated a cause of action under . . . [Minnesota case law]. . . Dukowitz's claim survives only if we recognize a new cause of action for wrongful discharge for terminations resulting from an employee's application for unemployment benefits. We decline to do so for two reasons.

First, . . . this court "has generally been reluctant to undertake the task of determining public policy since this role is usually better performed by the legislature." * * * Our general reluctance to extend the legislatively declared public policy of the state applies with equal, if not greater, force here. Significantly, Dukowitz's argument requires us to depart from the traditional American common-law, employment-at-will rule. The employment-at-will rule—foundational in American employment law for well over a century—protects the freedom of the employer and employee to contract. Dukowitz does not provide us with a persuasive reason to depart from the common law. * * *

Second, we decline to expand the public-policy exception to the employment-at-will rule when the Legislature has already delineated the consequences for an employer that interferes with an employee's application for unemployment benefits. Under [Minnesota's unemployment insurance statute], an employer who "directly or *indirectly* . . . obstruct[s] or impede[s] an application or continued request for unemployment benefits" is guilty of a misdemeanor. * * * As numerous courts have recognized, adoption of a new cause of action is particularly inappropriate when the Legislature has already provided other remedies to vindicate the public policy of the state. * * * Under these circumstances, principles of judicial restraint reinforce our decision not to create a new remedy when the Legislature has already provided for one. * * *

Accordingly, we decline Dukowitz"s invitation to expand the scope of the public-policy exception to the employment-at-will rule to reach a termination resulting from an employee"s application for unemployment benefits. * * * [W]e affirm the decision of the court of appeals.

Dissenting Opinion by Justice Wright

* * * I disagree with the majority's conclusion that appellant Jane Kay Dukowitz ("Dukowitz") . . . does not have a cognizable common-law cause of action for wrongful discharge against respondent Hannon Security Services . . . ("Hannon"). In my view, an employee who alleges that she was discharged from employment because she filed an application for unemployment benefits has a common-law cause of action for wrongful discharge under the public-policy exception to the employment-at-will rule. For that reason, I respectfully dissent.

* * * The majority first expresses a "general reluctance" to recognize a new cause of action unless "the Legislature intends for us to do so." Indeed, the Legislature plays a significant—even the most significant—role in formulating the public policy of the state. But the Legislature's role is not exclusive. As a common-law court, we have "the power to recognize and abolish common law doctrines." We have explained that the common law "is not composed of firmly fixed rules" and "[a]s society changes over time, the common law must also evolve." * * * When applied here, the majority's view—that any extension of public policy is better left to the Legislature—presents an overly narrow view of the common law and abdicates this court's responsibility for developing it.

* * * The question presented is not whether we should adopt a public-policy exception. We did so in . . . [a previous case]. Nor does *this* case call on us to elaborate the precise contours of the exception. Here, we are asked to decide only whether an employee who is discharged in retaliation for applying for partial unemployment benefits can maintain a cause of action under the public-policy exception to the employment-at-will rule.

* * * Under Minnesota law, an individual is considered unemployed, and therefore potentially eligible for unemployment benefits, if "(1) in any week that the applicant performs less than 32 hours of service in employment . . . and (2) any earnings with respect to that week are less than the applicant's weekly unemployment benefit amount." Thus, because an employee may qualify for unemployment benefits while still working a limited number of hours, it is possible for an employer to retaliate against an employee who applies for unemployment benefits by terminating the employee altogether. In this case, it is undisputed that Dukowitz was eligible for unemployment benefits at the time of her termination.

[The Minnesota unemployment insurance statute] sets forth the public policy underlying unemployment benefits in Minnesota:

> *The public purpose of this chapter is: Economic insecurity because of involuntary unemployment of workers in Minnesota is a subject of general concern that requires appropriate action by the legislature. The public good is promoted by providing workers who are unemployed through no fault of their own a temporary partial wage replacement to assist the unemployed worker to become reemployed. This program is the "Minnesota unemployment insurance program."*

* * * The statutory proscription against employer interference with an application or request for unemployment benefits, when read in conjunction with the clear statement of Legislative purpose, constitutes a clear mandate of public policy. The only remaining question is whether permitting employers to discharge employees in retaliation for filing an application for unemployment benefits jeopardizes that public policy. The answer to that question undoubtedly is yes. Permitting employers to discharge employees who seek unemployment benefits deters eligible, economically vulnerable individuals—including part-time workers, seasonal workers, or workers who have their hours reduced—from seeking unemployment benefits to which they are statutorily entitled. Moreover, permitting such terminations exacerbates the very problem that unemployment insurance is designed to remedy—economic insecurity.

Consequently, it is not surprising that the overwhelming majority of state courts that have specifically addressed this question have concluded that their unemployment insurance statutes—which are substantially similar to Minnesota's statutory scheme—provide a clear public-policy basis for a wrongful-discharge claim.

Because I conclude for the foregoing reasons that Dukowitz has a cognizable cause of action for wrongful discharge under the public-policy exception to the employment-at-will rule, I respectfully dissent. * * *

CASE QUESTIONS

1. What is the legal issue in this case? What did the Minnesota Supreme Court decide?
2. What is "employment at will"? What role does it play in this case?
3. Why does this court rule for the employer? Why does the dissenting judge (Justice Wright) believe that the employee should have been allowed to go to trial?
4. Do you agree with the court's decision in this case? Why or why not?

The foregoing excerpt from *Dukowitz v. Hannon Security Services* is the first of a number of employment law cases that you will have the opportunity to read in this text. The words are those of the judge who wrote the decision. The excerpt also includes a "dissenting opinion" written by one of the judges on the Minnesota Supreme Court who disagreed with the court's decision and felt strongly enough about it to put his reasons in writing. You would find the same words if you looked up the case—which you can easily do by using an online legal database and searching for either the names of the parties or the citation that appears below the names of the parties. The only difference is that we have shortened the case by selecting only the most essential details and by removing internal citations and footnotes. By seeing the law applied to particular factual circumstances and reading the judges' rationales for their decisions, you will gain a fuller understanding of the law.

When reading cases, it is important to pay attention to how the legal issues are framed. One might be tempted to say that the legal issue in the *Dukowitz* case was whether the security company had the right to terminate this employee because she had applied for unemployment insurance, or more generally, whether the termination was fair. But these statements do not get to the heart of the *legal* issue in this case. Under employment at will, employers do not have to justify their termination decisions. Instead, a termination is presumed to be lawful unless the terminated employee can prove that he or she had some specific right not to be terminated under the circumstances. Because it did not find protection under Minnesota's very limited public policy exception to employment at will for employees terminated because they claimed unemployment insurance benefits, the court fell back on the principle of employment at will. Whether the termination was necessary, wise, or fair was irrelevant to the issue of whether it was legally permissible.

Determining Which Employment Laws Apply

Because U.S. employment law is a patchwork of legal protections that apply to some groups of employees but not others, it is necessary to briefly elaborate on some of the key contextual factors that determine which, if any, employment laws apply in a given situation. You will need to consider these factors when presented with situations posing potential legal problems.

Public- or Private-Sector Employment

The legal environment differs substantially depending on whether **public sector** (i.e., government) employees or **private sector** employees are being considered. The terms "public sector" and "private sector" do not refer to whether a company trades its stock on the stock

market (i.e., publicly traded versus privately held companies), but rather to whether the employer is a government agency or a corporation (including private, nonprofit agencies). Public employees make up roughly 15 percent of the workforce. One reason that public employees are a different case has already been mentioned. In general, constitutional protections pertain only to public employees and not to private-sector employees. Beyond this, public employees are often covered by state or municipal civil service laws, collective bargaining agreements, and tenure provisions.

Not all comparisons favor public employees. Public employees are subject to restrictions on their political activities, excluded from coverage under the National Labor Relations Act and the Occupational Safety and Health Act, and limited in their ability to sue for violations of federal law. This last point should be underscored. A series of U.S. Supreme Court decisions has held, based on the Eleventh Amendment and the broad concept of state sovereignty, that state governments cannot be sued by their public employees, whether in state or federal court, for violations of such federal employment laws as the Fair Labor Standards Act and the Americans with Disabilities Act (however, the Court reached the opposite decision regarding certain suits brought under the Family and Medical Leave Act).[2] Thus, even though these federal laws still apply to state government employees, options for their enforcement are limited.

Unionized or Nonunion Workplace

When employees opt for union representation and negotiate a collective bargaining agreement with their employer, the employer is contractually committed to live up to the terms of the agreement. In contrast to the vast majority of employees who lack employment contracts, unionized employees have many of their terms and conditions of employment spelled out in enforceable labor agreements. These contractual terms typically go well beyond the minimum requirements of the law (e.g., by providing for daily overtime rather than the weekly overtime required by federal law). Employers in unionized workplaces are also more limited in their ability to make unilateral changes in workplace practices without first negotiating those changes with unions. Discipline or discharge of a unionized employee is contractually limited to situations where the employer can establish "just cause" for the discipline or discharge, which stands in stark contrast to the at-will employment of most non-union workers.

Employer Size

The legal environment also varies depending on the size of the employer. Size can be variously construed. For purposes of some statutes, including the Fair Labor Standards Act and the National Labor Relations Act, size is measured in financial terms and coverage is limited to employers that exceed a minimum level of revenue. More often, statutes specify a minimum employer size in terms of number of employees. For instance, both Title VII of the Civil Rights Act and the Americans with Disabilities Act limit coverage to companies that have fifteen or more employees, the Age Discrimination in Employment Act applies to employers with twenty or more employees, and the Family and Medical Leave Act applies only to employers with fifty or more employees.

These size limitations are not trivial. Table 1.1 shows that almost 90 percent of firms in the United States had fewer than twenty employees in 2014. This means that the vast majority of firms remain outside the reach of federal employment laws. There are two countervailing factors to consider, however. First, the minority of companies that are covered nonetheless employ most U.S. workers (because each larger company employs many more people). Thus,

[2] *Alden v. Maine*, 527 U.S. 706 (1999); *University of Alabama v. Garrett*, 531 U.S. 356 (2001); *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003); *Coleman v. Ct. of App. of Md.*, 132 S. Ct. 1327 (2012).

TABLE 1.1 EMPLOYMENT SIZE OF FIRMS (2014)

EMPLOYMENT SIZE (NO. OF EMPLOYEES)	FIRMS		EMPLOYEES	
	N	%	*N*	%
0–4	3,598,185	61.8	5,940,248	4.9
5–9	998,953	17.1	6,570,776	5.4
10–19	608,502	10.4	8,176,519	6.8
20–99	513,179	8.8	20,121,588	16.6
100–499	87,563	1.5	17,085,461	14.1
500+	19,076	0.3	63,175,352	52.2
Total	5,825,458	99.9	121,069,944	100.0

Source: Adapted from U.S. Census Bureau, *2014 SUSB Annual Data Tables by Establishment Industry*, viewed June 30, 2017 (http://www.census.gov/).

the approximately 10 percent of all firms that had twenty or more employees in 2014 employed almost 83 percent of the workforce. The second important factor is that most states have enacted laws that mirror federal employment laws and that apply to smaller workplaces. For example, the Ohio Civil Rights Act covers employees whose employer has four or more employees.[3] Thus, in Ohio, employers with between four and fourteen employees would fall under state antidiscrimination law, but not federal law, whereas employers with fifteen or more employees would be subject to both federal law and state law. Only employers with fewer than four employees would not be subject to civil rights statutes.

There is another aspect to the size issue. Counting the number of employees that an employer has is more complex than it first appears. For one thing, employment levels can change rapidly. A smaller company could easily vacillate above and below the minimum number of employees specified in a statute. When must the employer have the requisite number of employees? At the time of the alleged violation? When the claim is filed? Over some longer period of time? Part-time employees present another complication. Should part-time employees be counted the same as full-time employees?

Congress addressed these questions partially in Title VII of the Civil Rights Act of 1964 (parallel language appears in other employment statutes). An employer is defined as someone "who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year. . . ."[4] "Current" calendar year refers to the year in which the alleged discrimination occurred. The Supreme Court has ruled that the proper method for counting employees is the **payroll method**. Under this method, an employee is counted for each full week between when she is hired and when she leaves employment, regardless of the number of days or hours the employee worked during those weeks.[5]

Geographic Location

An employee's rights are affected by where he happens to live. Some states and cities go much further than others, and also further than the federal government, in conferring rights on workers. States and cities have become increasingly important as sources of employment laws in recent years. The interrelationship between federal and state laws is a complex legal matter. At the risk of oversimplification, states are usually free to enact laws pertaining to issues not addressed by federal law. State laws also can match or exceed the protections

[3] O.R.C. Ann. § 4112.01(A)(2) (2017).
[4] 42 U.S.C.S. § 2000e(b) (2017).
[5] *Walters v. Metropolitan Educational Enterprises, Inc.*, 117 S. Ct. 660 (1997).

Practical Considerations How should employers that operate in different states and cities deal with lack of uniformity in employment laws?

available under federal laws dealing with the same matters, but they cannot reduce the rights that employees have under federal law. Thus, state laws are important not only because they reach smaller workplaces than federal employment laws, but also because they sometimes provide employees with rights not available under federal law. Examples of state laws that exceed federal law include higher minimum wages in some states, laws regulating the handling of personnel records, limitations placed on drug testing, and explicit prohibitions against discrimination based on sexual orientation.

Government Contracts

Federal, state, and local governments sometimes use the contracting process as leverage to get employers to implement desired workplace practices. Employers that contract to do business with the federal government (e.g., defense contractors, construction companies, and computer suppliers) and that meet certain other criteria are required to engage in affirmative action as a condition of their contracts. Likewise, both the Drug-Free Workplace Act (requiring that employers take certain actions to stop workplace drug use) and the Rehabilitation Act (prohibiting discrimination against and requiring affirmative action on behalf of disabled persons) apply to private employers based on their contracts with the federal government.

Industry and Occupation

Most employment laws apply to any industry, but some are more narrowly targeted. For example, the Omnibus Transportation Employees Testing Act of 1991 mandates extensive drug (and alcohol) testing, but only for employees in industries regulated by the Department of Transportation (e.g., airlines, railroads, and trucking companies). Likewise, employees in the historically dangerous mining industry are not covered under the Occupational Safety and Health Act, but instead under a separate statute, the Mine Safety and Health Act. Agricultural workers, despite their generally poor working conditions, are wholly or partly excluded from the protection of many employment laws, including the National Labor Relations Act, the Fair Labor Standards Act, and state workers' compensation statutes. An important example of an occupation-based distinction is the National Labor Relations Act's exclusion of supervisors and managers.

Historical Development of U.S. Employment Law

Detailing what the law said previously and how it has changed over time is beyond the scope of this book. However, you should have some sense of when employment laws came into existence. Figure 1.1 is a timeline of major employment laws (ignoring, for the most part, amendments to these laws).

At the turn of the twentieth century, employment law was virtually nonexistent in the United States. The first significant departure from an unregulated workplace was the adoption of state workers' compensation laws to deal with the severe problem of injured workers. A major breakthrough came in the 1930s, when the National Labor Relations Act and the Fair Labor Standards Act were enacted. Employment law took large strides forward in the 1960s with the passage of major antidiscrimination statutes, including Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, and the Equal Pay Act. Common law claims, particularly for wrongful discharge, came into vogue in the late 1970s and throughout the 1980s. Benefits have been the target of a number of employment laws since the 1970s, with health insurance, pensions, and leaves being at the center of recent legislative efforts.

Legislation does not emerge in a vacuum. Many of our employment laws reflect the work of **social movements**, organized efforts to create needed changes in workplaces and society.

Figure 1.1 Timeline of Major U.S. Employment Laws

1900	Workers' Compensation (most states between 1911 and 1920)
1920	Railway Labor Act (1926)
	National Labor Relations Act (Wagner Act) (1935)
	Social Security Act (1935)
	Fair Labor Standards Act (1938)
1940	Labor–Management Relations Act (Taft–Hartley Act) (1947)
1960	Equal Pay Act (1963)
	Title VII of the Civil Rights Act (1964)
	Executive Order 11246 (1965)
	Age Discrimination in Employment Act (1967)
1970	Occupational Safety and Health Act (1970)
	Rehabilitation Act (1973)
	Employee Retirement Income Security Act (1974)
	Pregnancy Discrimination Act (1978)
1980	Common Law Wrongful Discharge Claims (The majority of states adopted one or more of these laws from the late 1970s through the 1980s.)
	Consolidated Omnibus Budget Reconciliation Act (COBRA) (1985)
	Immigration Reform and Control Act (1986)
	Employee Polygraph Protection Act (1988)
	Worker Adjustment and Retraining Notification Act (1988)
1990	Americans with Disabilities Act (1990)
	Older Workers Benefit Protection Act (1990)
	Civil Rights Act of 1991 (1991)
	Family and Medical Leave Act (1993)
	Uniformed Services Employment and Reemployment Rights Act (1994)
	Health Insurance Portability and Accountability Act (1996)
2000	Pension Protection Act (2006)
	ADA Amendments Act (2008)
	Genetic Information Nondiscrimination Act (2008)
	Patient Protection and Affordable Care Act (2010)

The workers' compensation statutes adopted in the early part of the twentieth century were influenced by the progressive movement, which addressed the social problems of that time. The National Labor Relations Act was enacted in 1935 during the early part of the New Deal and in the depths of the Depression. The act both reflected and furthered the efforts of ordinary workers and their unions, joined together in the labor movement, to gain some control over their work lives. Likewise, the Civil Rights Act of 1964 was a crowning achievement of the civil rights movement. The civil rights movement had to overcome enormous opposition to obtain legislation protecting the basic civil rights of all people, and the struggle to realize this law's promise continues. Thus, although we will focus on the effects of employment laws on the human resources practices of companies, our employment laws mean much more than that: They are windows into important periods in our history, express basic societal values, and represent hard-won accomplishments that should not be taken for granted.

The timeline in Figure 1.1 covers more than a century, but most of the laws are clustered in the second half of this period. As a consequence, many interesting legal questions have yet to be resolved by the courts. Is there "too much" employment law now? Certainly, in comparison to the not-so-distant past, the workplace is far more regulated than it used to be. At the same time, U.S. employers enjoy considerably more freedom to make and carry out human resources decisions as they see fit than do employers in most of the other major industrialized nations in the world, particularly in Europe.

Procedures for Enforcing Employment Laws

Simply conferring rights on employees is not enough. Means of enforcing those rights must be available when employers do not live up to their legal responsibilities. TV lawyers get cases and emerge victorious in the space of a single episode. In the real world, the process of resolving employment disputes is anything but simple and quick. A wide variety of **enforcement procedures** exist for bringing and resolving claims related to violations of employment laws. The applicable procedure depends on the particular law that forms the basis for the claim. However, it is possible to convey some of the more typical ways in which employment law claims proceed.

What Does an Employee Decide to Do When She Believes That Her Rights Were Violated?

In a few situations, employment laws are enforced by government agencies at their own initiative, such as when OSHA elects to inspect a workplace based on the occurrence of a serious accident or because it operates in a particularly dangerous industry. However, as a general rule, both the courts and government agencies rely on employees to come forward with complaints before enforcement actions are undertaken. Thus, the decision of an employee to challenge some action of her employer is a key part of the enforcement process.

Although there are undoubtedly some frivolous claims brought against employers, it is a mistake to assume that most employee complaints are baseless and rooted in opportunism. Contesting one's employer in the legal system is an expensive, protracted, uncertain, and emotionally draining process.[6] Most likely, the cases that are brought are just the tip of the iceberg. Most employees who have their rights violated by their employers do something other than take legal action: They quit, join a union, withhold commitment and discretionary effort, just let it go, or talk it over with the employer and work things out. Ultimately, although no employer can be expected to like it, our system of employment law depends on employees being willing to come forward and assume the burden of taking legal action, both to remedy the harm that was done to them as individuals and to uphold public policy.[7]

How Long Does the Employee Have to Bring a Case?

An important feature of any enforcement procedure is the length of time that an aggrieved person has to come forward with a complaint. This is the **limitations period**. Time limits for filing lawsuits or charges with administrative agencies vary. Unfair labor practice charges must be brought to the National Labor Relations Board within six months of their occurrence. In discrimination cases, employees generally have 300 days to file a charge with the Equal Employment Opportunity Commission (EEOC) (180 days in states that do not have their own state civil rights agencies), but only 90 days to file suit if the EEOC's efforts

[6] Deborah L. Rhode. "Litigating Discrimination: Lessons from the Front Lines." *Journal of Law & Policy* 20 (2012), 325.

[7] *McKennon v. Nashville Banner Publishing Co.*, 115 S. Ct. 879, 884 (1995).

to resolve the case conclude unsuccessfully. Wage and hour cases brought under the Fair Labor Standards Act can go back as far as three years. A major practical consequence is that *employers must be prepared to defend actions taken well in the past by individuals who might no longer work for their companies. The only way to do this is to maintain solid documentation regarding all human resources decisions*.

Employees who fail to bring charges in a timely fashion generally lose their right to pursue legal action. The clock usually starts ticking on the limitations period when the employee receives unequivocal written or oral notice of a decision (e.g., termination), rather than on the effective date of that decision (if these differ). However, if an employee is unaware of her rights because she was actively misled by her employer or the employer failed to meet its legal obligation to post information in the workplace, a court might excuse an untimely filing.[8] This is known as **equitable tolling**. This doctrine is applied sparingly and generally does not shield employees from the consequences of negligent legal representation. Thus, when an employee's religious discrimination lawsuit was filed late due to a clerical error made by her lawyer's office, the employee's suit was dismissed for lack of timeliness.[9] However, when an employee's legal representatives mistakenly filed a timely claim with the wrong federal enforcement agency and the mistake was not corrected until after the limitations period had expired, the employee's case was allowed to proceed. In deciding to toll the deadline for filing in this case, the court pointed to the facts that the employee's lawyers had exercised due diligence in pursuing her claim by promptly filing the charge and repeatedly contacting the agency—which, for its part, inexplicably failed to correct the error and merely informed the lawyers that it was still investigating the case.[10]

When applying limitations periods to discrimination cases, courts distinguish between "discrete acts" (such as nonhiring and termination) that occur at particular points in time and acts that recur and have a cumulative impact. Repeated acts of harassment that, over time, create a "hostile environment" are a prime example of the latter. Employees who claim that they were subjected to a hostile environment can challenge all of the harassing acts, even if these go back well beyond the limitations period, provided that at least one incident of harassment occurred during the limitations period.[11] Sometimes, employees claim that harassment or other discriminatory treatment leaves them with no option but to resign. An employee who quits under these circumstances is sometimes found to have been "constructively discharged" (see Chapter 16). The Supreme Court has said that the limitations period in such cases begins when the employee gives notice of her resignation, rather than on the date of the last discriminatory act that prompted the employee to quit.[12]

What about pay discrimination in this light? Is it a discrete act in which a decision is made at a particular point in time to pay an employee a discriminatorily low amount? Or is it an ongoing violation that recurs with each paycheck that is lower than it ought to be if discrimination had not occurred? The Supreme Court had said that it was the former,[13] but Congress subsequently enacted the **Lilly Ledbetter Fair Pay Act**, which established that each discriminatorily low paycheck is a separate violation that starts the limitations period anew.[14] An unlawful employment practice occurs "when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages [are] . . . paid."[15]

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[8] *Mercado v. The Ritz Carlton San Juan Hotel, Spa & Casino*, 410 F.3d 41 (1st Cir. 2005).
[9] *Harris v. Boyd Tunica Inc.*, 628 F.3d 237 (5th Cir. 2010).
[10] *Granger v. Aaron's Inc.*, 2011 U.S. App. LEXIS 5995, 10–12 (5th Cir.).
[11] *National Railroad Passenger Corporation v. Morgan*, 536 U.S. 101 (2002).
[12] *Green v. Brennan*, 136 S. Ct. 1769 (2016).
[13] *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007).
[14] Pub. L. No. 111–2, 123 Stat. 5 (2009).
[15] 42 U.S.C.S. § 2000e-5 (e)(3)(A) (2017).

JUST THE FACTS

A nurse's aide alleged that on August 22, 2012, she was attacked while cleaning a resident's room by a male coworker who attempted to rape her. She was able to escape and reported the attack to the nursing home's managers. However, following this incident, managers starting saying that she had fabricated the whole thing and her work hours were changed without notice. Coworkers also started to exhibit hostility toward her, saying that she was a "liar," refusing to work with her, and in one instance, spilling hot coffee on her. After her request for transfer to another unit was denied, the woman resigned on September 11, 2012. She filed a discrimination charge with the EEOC on July 3, 2013. When she later filed suit in federal court, the nursing home moved to have the case dismissed because her EEOC charge had not been timely. What should the court decide? Why?

Can a Lawsuit Be Brought? By Whom?

Most employment laws enable employees to enforce their rights through lawsuits against their employers. The Occupational Safety and Health Act is an exception in this regard. When an employee believes that a safety hazard exists in his workplace, he needs to contact OSHA and get an inspector to come. If the inspector does not agree that there is a problem and the employer is not cited, no course of legal action is available to the employee. Likewise, if the appropriate officials of the National Labor Relations Board decline to bring a complaint regarding an alleged unfair labor practice, the employee is out of luck. Suits in discrimination cases can be brought by individuals or the EEOC. However, because the EEOC goes to court in only a very small percentage of the cases it receives, the burden of taking legal action to enforce antidiscrimination laws falls mainly on individual employees. Finding an attorney willing to take an employment law case, particularly on a contingent fee basis (the attorney incurs most of the cost of litigation with the promise of a substantial share of any award if the litigation is successful), can be difficult. Employment lawyers accept only an estimated 5 percent of the employment discrimination cases brought to them. Lower-wage workers, for whom provable damages are relatively low, are particularly likely to have their cases turned away.[16]

A great deal happens between when a lawsuit is filed and when the case is actually heard in court (if it ever gets that far). Considerable managerial time is spent responding to requests for records, answering interrogatories (sets of questions), and giving sworn depositions (statements) regarding the facts of the case. If you are involved in making human resources decisions, you can expect to experience this part of the litigation process firsthand. *The best advice is to answer questions truthfully and succinctly and to have documentation to back you up*. Settlement negotiations are likely, both at this point and throughout the course of the litigation. **Settlements** are a common outcome of litigation.[17]

Employment law cases are brought in both state and federal courts. Where the case will end up depends on such factors as the legal basis for the claim, where the parties to the

[16] Elizabeth Hill. "Due Process at Low Cost: An Empirical Study of Employment Arbitration under the Auspices of the American Arbitration Association." *Ohio State Journal on Dispute Resolution*, 18 (2003), 777–783.

[17] Laura Beth Nielsen, Robert Nelson, and Ryon Lancaster. "Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States." *Journal of Empirical Legal Studies* 7, 2 (2010), 184–88.

case reside or are incorporated, and the strategic choices of the parties. A case that goes into the federal court system starts at the **district court** (trial court) level. The role of the district court is to establish the facts of the case and to reach a decision about the employee's claim(s). However, many cases filed against employers are dismissed without a trial (this is usually called granting **summary judgment**) because the court determines that even if the allegations of the **plaintiff** (the employee who is suing) are accepted as true, they are not sufficient to support a legal claim. Hence, there are no material facts in dispute that would warrant holding a trial. If a case does go to trial, the plaintiff bears the **burden of proof** to show, generally by a "preponderance" (the majority) of the evidence, that his rights were violated. Cases that go to trial are sometimes decided by juries (a jury trial) and other times by judges (a bench trial).

District court decisions can be appealed by either party to a federal **appeals court** (circuit court). Appeals courts typically accept the facts of cases as given and focus on whether the lower courts properly applied the law in deciding cases. Appeals court decisions can be appealed to the **U.S. Supreme Court**. However, because the Supreme Court exercises its discretion as to which cases it hears (when the court decides to hear a case, it issues a writ of **certiorari**), and it hears relatively few cases each year, rarely does a case go that far. Thus, although you will read about many U.S. Supreme Court decisions in this book, these cases are included because they raise important employment law issues and because the Court has decided them authoritatively, not because they are typical cases.

Judges enjoy considerable latitude in deciding cases. However, while courts sometimes change their minds about the law, they have a strong preference for adhering to prior decisions ("precedents")—or at least giving the appearance of doing so. This desire for consistency and stability in the law is captured by the Latin phrase **stare decisis** ("let the decision stand").

Class-Action Lawsuits

Most lawsuits are brought by one, or perhaps a few, named plaintiffs on behalf of themselves. In **class-action lawsuits**, plaintiffs sue on behalf of themselves and some larger group of persons. They claim that their rights and those of other class members were violated in essentially the same manner by the defendant. There are procedures for individuals to opt in or out of class-action lawsuits, and any award is shared by the class members.

Class-action lawsuits are controversial. Plaintiffs' counsels see them as an efficient means for pursuing the claims of many individuals who might not otherwise be able to take legal action, whereas corporate defendants tend to see them as collections of disparate allegations strung together by attorneys seeking to maximize their earnings. The class-action lawsuit is a potent weapon for plaintiffs. The prospect of facing a team of lawyers seeking substantial damages on behalf of a large group of plaintiffs is obviously of great concern to an employer. An employer that fails to obtain dismissal of a class-action suit has an especially strong incentive to settle the case rather than risk the outcome of a jury trial.

A key initial determination that must be made in these cases is whether multiple persons have claims that are sufficiently similar to justify their certification as a "class." In 2011, the Supreme Court was presented with the question of whether a class-action sex discrimination suit brought on behalf of more than a million current and former Wal-Mart employees could go forward. The Court ruled that the plaintiffs had failed to meet the criteria for certifying a class under the applicable Federal Rules of Civil Procedure.[18] The details of these rules go beyond the scope of this book, but in general they require plaintiffs to show that all members of the proposed class suffered the same legal injury, that it is not practical to directly involve so many plaintiffs and their own lawyers in the litigation, that all class members will be

[18] *Wal-Mart Stores v. Dukes*, 131 S. Ct. 2541 (2011).

adequately represented, and that the types of damages sought and underlying legal claims are consistent with class-based litigation. As the Supreme Court put it in the Wal-Mart case, "[t]he crux of this case is commonality."[19] When the requisite commonality is present, determination of the truth or falsity of some aspect of a given class member's case "will resolve an issue that is central to the validity of each one of the claims in one stroke."[20] The Wal-Mart plaintiffs' argument that they were victims of the same "policy" in the form of decentralized decision making that allowed store managers to indulge in stereotyping and discrimination when making pay and promotion decisions failed to impress the Court. The many different ways in which managers might have used their discretion when making employment decisions was "the opposite of a uniform employment practice that would provide the commonality needed for a class action."[21] Importantly, although this case decided only the issue of class certification, the Court indicated that determining the commonality of claims often overlaps with consideration of the merits of those claims, requiring judges—rather than juries—to make early assessments of whether discriminatory practices are affecting all members of proposed classes. Lastly, the Court found fault with the plaintiffs' attempt to use class-based litigation to obtain individualized monetary damages and not simply a court order or other relief that would necessarily apply to employees as a group.

The Supreme Court's resounding rejection of the Wal-Mart plaintiffs' effort to achieve class standing sent a strong message that future class-action lawsuits would be more closely scrutinized and classes less likely to be certified, particularly in the realm of discrimination cases where the circumstances of individual plaintiffs are apt to vary. Plaintiffs in subsequent cases have, in fact, encountered difficulty advancing class-based discrimination lawsuits.[22] Such claims appear to have a much better chance of achieving class certification if they involve smaller numbers of employees employed by the same establishment.[23] Indeed, even the sex discrimination case against Wal-Mart has continued to be pressed by smaller, less geographically dispersed groups of Wal-Mart employees.[24] Class-based wage and hour claims have been very prominent in recent years, but also stand to be limited by the Supreme Court's *Wal-Mart* decision.[25] The practical effect of these technical legal issues is quite real: While class-action lawsuits are still being brought in significant numbers, the ability of employees to effectively challenge the policies and practices of large corporations has been diminished.

Is There an Administrative Prerequisite to a Lawsuit?

Some employment laws require that a charge be filed with an administrative agency (e.g., the EEOC or the Wage and Hour Division of the Department of Labor) and that the agency be given the chance to resolve the matter before an employee can go to court. In discrimination cases, an employee usually starts by filing a charge with either the EEOC or a state fair employment practice agency. The EEOC takes a number of steps in regard to the cases it receives, including investigating to determine whether there is "reasonable cause" to believe that discrimination has occurred. If the EEOC finds that discrimination likely occurred, it is not empowered to fine employers or require that they remedy their discrimination. Instead, the agency undertakes a **conciliation** process in which it becomes a party to

[19] *Wal-Mart Stores*, 2550–2551.
[20] *Wal-Mart Stores*, 2551.
[21] *Wal-Mart Stores*, 2554.
[22] *Ealy v. Pinkerton Government Services*, 2013 U.S. App. LEXIS 5122 (4th Cir.); *Davis v. Cintas*, 2013 U.S. App. LEXIS 10856 (6th Cir.)
[23] *Brown v. Nucor Corp.*, 785 F.3d 895 (4th Cir. 2015).
[24] *Phipps v. Wal-Mart Stores*, 792 F.3d 637 (6th Cir. 2015), *cert. denied*, 2016 U.S. LEXIS 1499.
[25] *Aburto v. Verizon California*, 2012 U.S. Dist. LEXIS 329 (C.D. Cal.); *Leyva v. Medline Industries*, 2013 U.S. App. LEXIS 10649 (9th Cir.).

settlement negotiations with the employer. The EEOC has considerable discretion in how it goes about conciliating and in deciding whether to accept settlement offers, but its statutory duty to conciliate requires at a minimum that it inform employers of its finding of discrimination, offer to conciliate, and give the employer an opportunity to remedy the alleged discriminatory practice.[26]

If the EEOC dismisses a case or fails to achieve conciliation between the parties, it issues a **right to sue letter** to the employee alleging discrimination. Only then is the employee able to commence a lawsuit. Other types of legal claims, such as breach of contract or negligence, can proceed directly to court.

Must the Employee Exhaust Internal Dispute Resolution Mechanisms Before Proceeding?

If an employer has a complaint or grievance procedure, the employee does not usually have to use the internal procedure before taking the case to an enforcement agency or court. However, this is an area of the law where profound changes are occurring. The Supreme Court has held that an employer may be able to escape liability for harassment engaged in by a supervisor when an employee unreasonably refuses to avail herself of the employer's complaint procedure.[27] An even more fundamental change has been the rise of alternative dispute resolution procedures intended to take the place of lawsuits (see "The Changing Workplace" feature).

THE CHANGING WORKPLACE

Alternative Dispute Resolution Procedures

There is great interest in **alternative dispute resolution (ADR)** procedures in all areas of the law. Alternative dispute resolution procedures are alternatives to going to court to resolve disputes. Enthusiasm for ADR stems from the belief that these procedures are less expensive, quicker, more private, and less damaging to relationships than litigation. Two of the most frequently used types of ADR are mediation and arbitration. In **mediation**, a neutral third party (the mediator) facilitates negotiations between the disputing parties to help them reach an agreement, but does not have the authority to decide the dispute or impose a settlement. In **arbitration**, a neutral third party (the arbitrator) functions more like a private judge. Arbitrators hear disputes and render decisions that are almost always final and binding on the parties.

The EEOC encourages the parties to discrimination charges to use mediation. Rather than decide whether there has been a violation of the law, the mediator (a trained EEOC staff member or contractor) focuses on helping the parties "jointly explore and reconcile their differences." Typically undertaken prior to EEOC investigation of a charge, mediation is voluntary and confidential. If it proves unsuccessful, the case reverts to the typical EEOC enforcement procedure of investigation, conciliation, and possible litigation. The EEOC's mediation program achieved a 76.6 percent settlement rate in fiscal year 2012, resolving discrimination charges in 8,714 of the 11,376 mediations conducted in that year.[1] Cases that went through mediation in 2012 were resolved in an average of 101 days, compared to the average of 200 days consumed by the EEOC's investigative process.[2]

Arbitration has, for decades, been the principal means of enforcing employee rights under collective bargaining agreements in unionized workplaces. This use of arbitration essentially establishes, through collective bargaining, a private system for resolving disputes about violations of private contractual agreements. What has changed is that many nonunion employers are now requiring arbitration agreements as a condition of employment and arbitration is being used to resolve all employment law disputes—not simply contractual

[26] *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1655–1656 (2015).
[27] *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

ones. To get (or keep) their jobs, employees have to surrender the ability to go to court to vindicate their rights as employees, and they have to do so prior to any disputes arising.

Precise, current estimates of the extent of ADR use in the workplace are lacking. A 2008 survey of corporate counsel found that some 25 percent of firms required arbitration agreements with their nonunion employees.[3] But a more recent study based on a national survey of private sector businesses found that more than half (53.9 percent) of the surveyed establishments required their employees to arbitrate any disputes with them.[4] Extrapolating from the survey results to the entire workforce, the researchers estimated that some 60 million workers no longer have access to the courts and are limited to using arbitration instead.[5] Overall, it is clear that the use of arbitration agreements with private sector, nonunion employees has increased substantially over the past several decades and is now fairly widespread.

Whether the ability of employees to vindicate their rights is enhanced or diminished by the use of arbitration agreements is a disputed matter.[6] One important study of the effects of arbitration agreements in employment found that cases were resolved considerably more quickly than in litigation, but that employee win rates and awards were lower than those found in some prior studies of litigation outcomes.[7] Research has also provided evidence of a "repeat-player" advantage for employers that fared better due to prior experience with the arbitration process and particular arbitrators.[8] Overall, it appears that the use of mandatory arbitration agreements disadvantages employees in some respects, although reliance on the courts has its own problems.

[1] U.S. Equal Employment Opportunity Commission. "EEOC Mediation Statistics FY 1999 through FY 2012." Viewed June 27, 2013 (http://www1.eeoc.gov/mediation/mediation_stats.cfm).

[2] U.S. Equal Employment Opportunity Commission. "Questions and Answers about Mediation." Viewed June 27, 2013 (http://www.eeoc.gov/eeoc/mediation/qanda.cfm).

[3] Charles D. Coleman. "Is Mandatory Arbitration Living up to Its Expectations? A View from the Employer's Perspective." *ABA Journal of Labor & Employment Law* 25, 2 (2010), 227–239.

[4] Alexander J.S. Colvin. *The Growing Use of Mandatory Arbitration*. Report for the Economic Policy Institute (September 27, 2017).

[5] Colvin (2017).

[6] David Schwartz. "Mandatory Arbitration and Fairness." 84 *Notre Dame Law Rev*. 1247 (2009).

[7] Alexander J. S. Colvin. "An Empirical Study of Employment Arbitration: Case Outcomes and Processes." *Journal of Empirical Legal Studies* 8, 1 (2011), 5.

[8] Alexander J. S. Colvin and Mark D. Gough. "Individual Employment Rights Arbitration in the United States: Actors and Outcomes." *Industrial & Labor Relations Review* 68, 5 (2015), 1019–1042.

Enforceability of Arbitration Agreements

It is clear that agreements requiring employees to use arbitration rather than the courts as the means of resolving employment law claims are generally enforceable. In a case involving an arbitration agreement between a broker and the New York Stock Exchange (NYSE), the Supreme Court ruled that the broker would have to use the NYSE's arbitration procedure rather than the courts to pursue an age discrimination claim against his employer. Quoting an earlier case, the Court minimized the differences between arbitration and litigation: "by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."[28] In a subsequent case that specifically considered employees, the Supreme Court decided that arbitration agreements between employers and employees are covered under the **Federal Arbitration Act (FAA)** and thus generally enforceable (but not when transportation workers are involved, owing to exclusionary language included in the statute).[29] The FAA, enacted by Congress in 1925, requires courts to enforce most written arbitration agreements. The Court's evident enthusiasm for arbitration does not mean that arbitration agreements will always be enforced. In a case involving a disability discrimination suit brought by the EEOC on behalf of an employee who had signed an arbitration agreement, the Supreme Court

[28] *Gilmer v. Interstate/Johnson Lane Corporation*, 500 U.S. 20, 26 (1991).

[29] *Circuit City Stores v. Adams*, 121 S. Ct. 1302 (2001).

Clippings

Tara Zoumer was fired when she refused to sign an arbitration agreement required by her employer, WeWork, a rapidly growing start-up firm that rents office space to entrepreneurs. In its embrace of arbitration, WeWork joined Uber, Lyft, and numerous other tech start-up firms. WeWork contends that arbitration is part of a multistep dispute resolution process that is more collaborative than litigation and fully consistent with the company's principles. San Francisco–based employment lawyer Cliff Palefsky has a decidedly less positive view, observing that these firms "give their young workers Ping-Pong tables and take away their constitutional rights."

SOURCE: Jessica Silver-Greenberg and Michael Corkery. "Start-ups Turn to Arbitration in Workplace." *New York Times* (May 15, 2016), A1.

decided that the agency's suit was not barred by the agreement and that it could seek to recover victim-specific remedies, including back pay and reinstatement.[30] Thus, even with a signed arbitration agreement in hand, an employer is still subject to administrative proceedings and possibly a lawsuit brought on behalf of an employee by an administrative agency. Another issue is that arbitration provisions in the collective bargaining agreements of unionized employees will not bar litigation over violations of individuals' legal rights unless the contract language "clearly and unmistakably" requires arbitration of both legal and contractual disputes.[31] To meet this standard, a collective bargaining agreement "must, at the very least, identify the specific statutes the agreement purports to incorporate or include an arbitration clause that specifically refers to statutory claims."[32]

There are additional limitations on the enforceability of mandatory arbitration agreements. Fundamentally, arbitration agreements are contracts. Courts decline to enforce contracts when fraud is involved, the contract was entered into under extreme duress, or the contract is unconscionable. Contracts are **unconscionable** when the process of contract formation essentially involves a "take it or leave it" offer of an agreement drafted by a more powerful party (a "contract of adhesion") *and* when the contents of the agreement unreasonably favor the more powerful party. Arbitration agreements have *sometimes* not been enforced by courts (i.e., the employee was allowed to go to court despite the existence of the agreement) on the grounds that they are unconscionable. *Chavarria v. Ralphs Grocery Company* is one such case.

Some courts require more than a contract drafted by a more powerful party and offered on a take-it-or-leave-it basis to establish that an agreement is *procedurally* unconscionable. Courts may also inquire into the education and legal sophistication of the employee, and whether details of the agreement were adequately explained or hidden away amidst copious fine print.[33] But in any event, the question of enforceability most often turns on the contents of these agreements (i.e., whether they are also *substantively* unconscionable). As in the *Chavarria* case, one area of particular concern is the procedure for selecting an arbitrator. An essential requirement for a fair arbitration is neutrality. Arrangements that give the employer effective control over who can arbitrate a case or require the use of arbitrators with business ties to the employer are unlikely to be enforced.[34] Also consistent with the Chavarria

[30] *Equal Employment Opportunity Commission v. Waffle House, Inc.*, 534 U.S. 279 (2002).
[31] *14 Penn Plaza LLC v. Pyett*, 129 S.Ct. 1456 (2009).
[32] *Ibarra v. UPS*, 695 F.3d 354, 360 (5th Cir. 2012).
[33] *Morrison v. Wal-Mart Stores*, 317 F.3d 646, 666–67 (6th Cir. 2003).
[34] *McMullen v. Meijer*, 355 F.3d 485 (6th Cir. 2004); *Rodriguez v. Windermere Real Estate/Wall Street, Inc.*, 2008 Wash. App. LEXIS 214 (Div. One), *review denied*, 164 Wn.2d 1017 (2008).

Chavarria v. Ralphs Grocery Company
773 F. 3d 916 (9th Cir. 2013)

OPINION BY CIRCUIT JUDGE CLIFTON:

* * * I. Background

Plaintiff Zenia Chavarria completed an employment application seeking work with Defendant Ralphs Grocery Company. Chavarria obtained a position as a deli clerk with Ralphs and worked in that capacity for roughly six months. After leaving her employment with Ralphs, Chavarria filed this action, alleging on behalf of herself and all similarly situated employees that Ralphs violated various provisions of the California Labor Code and California Business and Professions Code. Ralphs moved to compel arbitration of her individual claim pursuant to an arbitration policy incorporated into the employment application. Chavarria opposed the motion, arguing that the arbitration agreement was unconscionable under California law.

By completing an employment application with Ralphs, all potential employees agree to be bound by Ralphs' arbitration policy. The application contains an acknowledgment that the terms of the mandatory and binding arbitration policy have been provided for the applicant's review. Ralphs' policy contains several provisions central to this appeal.

Paragraph 7 governs the selection of the single arbitrator who will decide the dispute. It provides that, unless the parties agree otherwise, the arbitrator must be a retired state or federal judge. It explicitly prohibits the use of an administrator from either the American Arbitration Association ("AAA") or the Judicial Arbitration and Mediation Service ("JAMS").

If the parties do not agree on an arbitrator, the policy provides for the following procedure:

(1) Each party proposes a list of three arbitrators;
(2) The parties alternate striking one name from the other party's list of arbitrators until only one name remains;
(3) The party "who has not demanded arbitration" makes the first strike from the respective lists; and
(4) The lone remaining arbitrator decides the claims.

In practice, the arbitrator selected through this process will invariably be one of the three candidates nominated by the party that did not demand arbitration.

Paragraph 10 concerns attorney and arbitration fees and costs. It specifies that each party must pay its own attorney fees, subject to a later claim for reimbursement under applicable law. The provision regarding arbitration fees, including the amount to be paid to the arbitrator, is more than a little convoluted. Ultimately, it provides that the arbitrator's fees must be apportioned at the outset of the arbitration and must be split evenly between Ralphs and the employee unless a decision of the U.S. Supreme Court directly addressing the issue requires that they be apportioned differently.

Paragraph 13 of the policy permits Ralphs to unilaterally modify the policy without notice to the employee. The employee's continued employment constitutes acceptance of any modification.

The district court held that Ralphs' arbitration policy was unconscionable under California law, and it accordingly denied Ralphs' motion to compel arbitration. Ralphs appeals the district court's denial under [the Federal Arbitration Act].

II. Discussion

* * * The FAA provides that any contract to settle a dispute by arbitration shall be valid and enforceable, "save upon such grounds as exist at law or in equity for the revocation of any contract." This provision reflects both that (a) arbitration is fundamentally a matter of contract, and (b) Congress expressed a "liberal federal policy favoring arbitration." Arbitration agreements, therefore, must be placed on equal footing with other contracts.

Like other contracts, arbitration agreements can be invalidated for fraud, duress, or unconscionability. A defense such as unconscionability, however, cannot justify invalidating an arbitration agreement if the defense applies "only to arbitration or [derives its] meaning from the fact that an agreement to arbitrate is at issue." * * * No single rule of unconscionability uniquely applicable to arbitration is at issue in this case. We must therefore apply California's general principle of contract unconscionability. * * *

A. Unconscionability under California Law

Under California law, a contract must be both procedurally and substantively unconscionable to be rendered invalid. California law utilizes a sliding scale

to determine unconscionability—greater substantive unconscionability may compensate for lesser procedural unconscionability. * * *

1. Procedural Unconscionability

Procedural unconscionability concerns the manner in which the contract was negotiated and the respective circumstances of the parties at that time, focusing on the level of oppression and surprise involved in the agreement. Oppression addresses the weaker party's absence of choice and unequal bargaining power that results in "no real negotiation." Surprise involves the extent to which the contract clearly discloses its terms as well as the reasonable expectations of the weaker party.

The district court held that Ralphs' arbitration policy was procedurally unconscionable for several reasons. The court found that agreeing to Ralphs' policy was a condition of applying for employment and that the policy was presented on a "take it or leave it" basis with no opportunity for Chavarria to negotiate its terms. It further found that the terms of the policy were not provided to Chavarria until three weeks after she had agreed to be bound by it. This additional defect, the court held, multiplied the degree of procedural unconscionability. Ralphs argues that the policy is not procedurally unconscionable because Chavarria was not even required to agree to its terms. Ralphs bases this contention on a provision in the employment application that provides, "Please sign and date the employment application . . . to acknowledge you have read, understand & agree to the following statements." The word "please," Ralphs contends, belies any suggestion of a requirement. Ralphs argues that Chavarria could have been hired without signing the agreement.

Ralphs' argument ignores the terms of the policy itself, which bound Chavarria regardless of whether she signed the application. The policy provides that "[n]o signature by an Employee or the Company is required for this Arbitration Policy to apply to Covered Disputes." That Ralphs asked nicely for a signature is irrelevant. The policy bound Chavarria and all other potential employees upon submission of their applications.

These circumstances are similar to others where we have held agreements to be procedurally unconscionable. In [an earlier case], we held that an arbitration agreement was procedurally unconscionable under California law because it was imposed upon employees as a condition of their continued employment. We explained, "where . . . the employee is facing an employer with 'overwhelming bargaining power' who 'drafted the contract and presented it to [the employee] on a take-it-or-leave-it basis,' the clause is procedurally unconscionable." Likewise, in [another prior case], we held that "a contract is procedurally unconscionable under California law if it is 'a standardized contract, drafted by the party of superior bargaining strength, that relegates to the subscribing party only the opportunity to adhere to the contract or reject it.'" Chavarria could only agree to be bound by the policy or seek work elsewhere. Ralphs' policy meets the standard under which we have previously found arbitration provisions in employment contracts to be procedurally unconscionable. Further, we have held that the degree of procedural unconscionability is enhanced when a contract binds an individual to later-provided terms. Ralphs did not provide Chavarria the terms of the arbitration policy until her employment orientation, three weeks after the policy came into effect regarding any dispute related to her employment. The employment application merely contains a one-paragraph "notice" of the policy. The policy itself is a four-page, single-spaced document with several complex terms. . . . [T]he district court did not err when it held that the policy was procedurally unconscionable.

2. Substantive Unconscionability

Chavarria must also demonstrate that Ralphs' arbitration policy is substantively unconscionable under California law. A contract is substantively unconscionable when it is unjustifiably one-sided to such an extent that it "shocks the conscience."

The district court found that several terms rendered Ralphs' arbitration policy substantively unconscionable. First, the court noted that Ralphs' arbitrator selection provision would always produce an arbitrator proposed by Ralphs in employee-initiated arbitration proceedings. Second, the court cited the preclusion of institutional arbitration administrators, namely AAA or JAMS, which have established rules and procedures to select a neutral arbitrator. Third, the court was troubled by the policy's requirement that the arbitrator must, at the outset of the arbitration proceedings, apportion the arbitrator's fees between Ralphs and the employee regardless of the merits of the claim. The court identified this provision as "a model of how employers can draft fee provisions to price almost any employee out of the dispute resolution process." The combination of these terms created a policy, according to the court, that "lacks any semblance of fairness and eviscerates the right to seek civil redress. . . . To condone such a policy would be a disservice to the legitimate practice of arbitration and a stain on the credibility of our justice system."

* * * Regarding the arbitrator selection provision, Ralphs does not deny that its policy precludes the selection of an arbitrator proposed by the party demanding arbitration. Nor does it deny that the party selecting the arbitrator gains an advantage in subsequent proceedings. * * * Ralphs simply argues that it won't always be the party that is guaranteed an arbitrator of its choosing. In particular, Ralphs argues that the district court erred in assuming that an employee will always be the party that demands arbitration. Ralphs contends that the opposite is true. In Ralphs' view, Chavarria, the employee in this case, will wind up with an arbitrator of her choosing because it is Ralphs that demanded arbitration. Ralphs' logic is thus:

(1) Chavarria brought a claim in federal court;
(2) Ralphs filed a motion to compel arbitration;
(3) If the court grants the motion, then the case will go to arbitration; and
(4) Ralphs will have "demanded" arbitration and thereby relinquished the first strike to Chavarria. Chavarria will, under Ralphs' scenario, strike all three of the arbitrators on Ralphs' list, and the last remaining arbitrator will necessarily be from Chavarria's list.

It doesn't take a close examination of Ralphs' argument to reveal its flaws. To begin with, Ralphs' argument invites an employee to disregard the arbitration policy and to file a lawsuit in court, knowing that the claim is subject to arbitration. * * *

Perhaps more to the point, Ralphs' argument relies on a fanciful interpretation of its arbitration policy. Ralphs' motion to compel arbitration does not constitute a "demand for arbitration" as provided in the policy. Paragraph 9 of the arbitration policy provides that "[a] demand for arbitration . . . must be made in writing, comply with the requirements for pleadings under the [Federal Rules of Civil Procedure] and be served on the other party." Ralphs' motion to compel arbitration is not a demand for arbitration under the terms of Ralphs' policy because it does not comply with the Federal Rules of Civil Procedure requirements governing pleadings. A fair construction of the agreement suggests that an employee, even after filing a frivolous claim in federal court, nonetheless must serve on Ralphs a demand for arbitration that complies with the Federal Rules. Accordingly, as the district court found, Ralphs gets to pick the pool of potential arbitrators every time an employee brings a claim.

* * * Ralphs also argues that there is nothing of concern in its cost allocation provision because it simply follows the "American Rule" that each party shall bear its own fees and costs. Ralphs misses the point. The troubling aspect of the cost allocation provision relates to the arbitrator fees, not attorney fees. The policy mandates that the arbitrator apportion those costs on the parties up front, before resolving the merits of the claims. Further, Ralphs has designed a system that requires the arbitrator to apportion the costs equally between Ralphs and the employee, disregarding any potential state law that contradicts Ralphs' cost allocation. * * * There is no justification to ignore a state cost-shifting provision, except to impose upon the employee a potentially prohibitive obstacle to having her claim heard. Ralphs' policy imposes great costs on the employee and precludes the employee from recovering those costs, making many claims impracticable.

The significance of this obstacle becomes more apparent through Ralphs' representation to the district court that the fees for a qualified arbitrator under its policy would range from $7,000 to $14,000 per day. Ralphs' policy requires that an employee pay half of that amount—$3,500 to $7,000—for each day of the arbitration just to pay for her share of the arbitrator's fee. This cost likely dwarfs the amount of Chavarria's claims.

* * * The district court focused its substantive unconscionability discussion on these terms, and it was correct in doing so because the terms lie far beyond the line required to render an agreement invalid. We therefore need not discuss at length the additional terms in Ralphs' arbitration policy, such as the unilateral modification provision, which we have previously held to support a finding of substantive unconscionability. * * *

III. Conclusion

The arbitration policy imposed by Ralphs on its employees is unconscionable under California law. That law is not preempted by the FAA. We affirm the decision of the district court denying Ralphs' motion to compel arbitration, and we remand for further proceedings. AFFIRMED and REMANDED.

CASE QUESTIONS

1. What was the legal issue in this case? What did the appeals court decide?
2. What does it mean for a contract to be "unconscionable"? To be "*procedurally* unconscionable"? To be "*substantively* unconscionable"?
3. What was the evidence that this agreement was procedurally unconscionable? That this agreement was substantively unconscionable?
4. Do you agree with this decision? Why or why not?
5. What would you advise this employer to do in light of this decision? Should it redraft the language of the arbitration agreement to deal with the court's objections (and, if so, how) or drop the whole thing?

case, courts have closely scrutinized arbitration agreements that require employees to bear a significant portion of the arbitration cost. Although some courts hold that any fee-splitting arrangement is objectionable, most courts look at the facts of the situation and the likelihood that the cost would deter employees from bringing claims.[35] Remedies that are markedly different from those available through litigation (e.g., reinstatement or punitive damages are not allowed) are also problematic.[36] Limitations periods for filing arbitration claims that are shorter than those that would apply to court proceedings have sometimes, but not always, been deemed unconscionable.[37] However, courts also recognize that the relative informality, rapid resolution, and lower cost of arbitration are precisely what make it attractive and therefore do not require that arbitration mirror the procedures and remedies of litigation. Thus, under the FAA, arbitration agreements are not invalid simply because they contain language disallowing "class-wide" (i.e., class-action) arbitration, even in cases where claims by individual plaintiffs would be prohibitively expensive relative to expected individual damages.[38] Nevertheless, it is currently an open question whether, despite being permissible under the FAA, prohibiting employees from banding together to bring arbitration cases violates the National Labor Relations Act (NLRA).[39] Without getting way ahead of ourselves, we can simply say here that the NLRA broadly protects collective action by employees. This includes the right to unionize, of course, but it might also include participating in class-wide arbitration. The Supreme Court is expected to decide this question soon.

Clippings

At best, there are pros and cons to the use of arbitration to resolve legal disputes between employers and employees. But when arbitrators are not impartial or the process is otherwise defective, serious miscarriages of justice can result—and these are not likely to be corrected. Emergency room physician Deborah Pierce filed a sex discrimination claim against the medical practice that terminated her. Under the arbitration agreement she had signed with the practice, her case was heard by Vasilios Kalogredis, a corporate attorney who also handles arbitrations. During the hearing, the practice withheld important evidence in the case and a female colleague reversed her previous testimony on behalf of Ms. Pierce after a conversation with male colleagues had "clarified" her recollection of events. Arbitrator Kalogredis ruled for the practice and his written decision contained large sections drawn verbatim from briefs filed by the medical practice's lawyers. Since arbitrators' decisions are final and rarely subject to judicial review, Ms. Pierce had no opportunity to challenge the proceeding. Instead, she was left with a $200,000 bill for legal costs. Law professor Myriam Gilles has opined that mandatory arbitration "amounts to the whole-scale privatization of the justice system. . . . Americans are actively being deprived of their rights."

SOURCE: Jessica Silver-Greenberg and Michael Corkery. "A 'Privatization' of the Justice System." *New York Times* (November 2, 2015), A1.

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[35] *Blair v. Scott Specialty Gases*, 283 F.3d 595, 609–10 (3d Cir. 2002).
[36] *Ingle v. Circuit City Stores*, 328 F.3d 1165, 1178–79 (9th Cir. 2003), *cert. denied*, 540 U.S. 1160 (2004).
[37] *Clark v. DaimlerChrysler Corp.*, 286 Mich. App. 138 (2005), *appeal denied*, 475 Mich. 875 (2006); *Ingle*, 1175.
[38] *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *American Express v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013).
[39] *D.R. Horton Inc.*, 357 N.L.R.B. No. 184 (2012); *Lewis v. Epic Systems Corp.*, 823 F. 3d 1147 (7th Cir. 2016), *cert. granted*, 2017 U.S. LEXIS 691; *Murphy Oil USA v. NLRB*, 808 F. 3d 1013 (5th Cir. 2015), *cert. granted*, 2017 U.S. LEXIS 680.

Besides delving into the contents of arbitration agreements, courts have considered what adequate notification entails and whether arbitration "agreements" actually existed. As with any valid contract, a clear offer must be made and accepted. An employee who was handed a booklet describing her employer's *Dispute Resolution Procedure* was not held to the arbitration provisions of that procedure because she never provided any written assent to the policy. "For an arbitration agreement to be binding, it must be an agreement, not merely a company policy. Moreover, pursuant to the FAA, the agreement must be in writing."[40] Likewise, an arbitration agreement that was communicated to employees via e-mail was not enforced when the e-mail message did not clearly alert employees to the legal significance of the new policy and the employer did not ascertain whether employees clicked on links that would have taken them to the details of the new policy.[41] Communication via e-mail satisfied the requirement that arbitration agreements be written, but the employer's failure to clearly notify employees regarding the policy's legal effect, to track whether employees accessed the linked details, and to obtain from employees acknowledgment that the materials had been read and understood, led the court to conclude that employees had received insufficient notice of the arbitration agreement to be bound by it.

Adequate notification is most clearly established when employers provide employees with the details of arbitration agreements and highlight their legal significance, as well as require employees to read and sign the agreements. Even so, courts have sometimes enforced agreements when these conditions were absent. In one such case, the court overlooked the absence of a signed agreement to arbitrate or even an explicit acknowledgment that information about the agreement had been read because there were numerous other indicators—mailings to the employee's home address, a brochure distributed at work, a video presentation viewed by the plaintiff at work, and multiple opportunities to opt out of the arbitration arrangement that were not acted upon—of sufficient notice to the employee.[42]

Practical Considerations
Would you advise an employer to use arbitration agreements? Why or why not?

JUST THE FACTS

An employee believed that he had been discriminated against by his employer. He filed a lawsuit in federal court, but the employer argued that the court should require him to arbitrate the dispute instead. When the employee was hired, he had signed an arbitration agreement. During his first week of employment, he had been instructed by the human resources manager to "read it and sign it." The document was the standard agreement that the company required all of its employees to sign, and there was no opportunity to negotiate over the terms. Under the agreement, employees were required to file grievances within five days of the actions being challenged. This limitations period did not apply to any claims that the company might have against employees. The agreement also provided that each party would bear its own attorney's fees and expenses. Arbitrators were to be selected from a list of four names provided by the American Arbitration Association. In the absence of mutual agreement on who would arbitrate the case, names would be struck from the list until a single name remained. The company would get the first strike and then the parties would take turns. Should the court compel arbitration of this dispute? Why or why not?

[40] *Lee v. Red Lobster Inns of America*, 92 Fed. Appx. 158, 161 (6th Cir. 2004).
[41] *Campbell v. General Dynamics*, 407 F.3d 546 (1st Cir. 2005).
[42] *Tillman v. Macy's*, 735 F.3d 453 (6th Cir. 2013).

Employers that opt to use arbitration agreements should clearly communicate those agreements to employees in written form and obtain written statements of assent. Employers should provide for a fair arbitration process and avoid the temptation to draft one-sided agreements that place burdens on employees without imposing corresponding limitations on themselves. The agreements should provide employees with a genuine opportunity to vindicate their legal rights and not leave them much worse off than if their day in court had been available to them.

Remedies for Violations of Employment Laws

If an employee takes legal action against his employer and is successful, what does he get for the trouble? **Remedies** available in employment cases include attorneys' fees, court orders, back pay, front pay, reinstatement, hiring, liquidated damages (awarded for serious, intentional violations in amounts up to twice the actual damages incurred), compensatory damages (a wide range of damages beyond loss of wages, including pain and suffering), and **punitive damages** (intended to punish the employer in cases of serious, intentional violations and to create an example to affect the behavior of others). Not all remedies are available for every type of legal claim, nor are all the remedies for which a successful plaintiff is eligible necessarily awarded by the courts. Under the National Labor Relations Act, for example, employees are eligible for "make-whole" remedies, including reinstatement and back pay, but not compensatory and punitive damages. In contrast, common law tort claims can yield monetary damages, but not reinstatement.

In *EEOC v. AutoZone*, an appeals court reviews the remedies awarded to a successful plaintiff in a disability discrimination case.

EEOC v. AutoZone
707 F. 3d 824 (6th Cir. 2012)

OPINION BY CIRCUIT JUDGE MANION:

The Equal Employment Opportunity Commission filed this employment discrimination case on behalf of John Shepherd, a former employee of AutoZone, and alleged that AutoZone had violated the Americans with Disabilities Act. * * * [A] jury returned a verdict in Shepherd's favor. The magistrate judge then approved $100,000 in compensatory damages, $200,000 in punitive damages, $115,000 in back pay, [and] an injunction on AutoZone's antidiscrimination practices. . . . AutoZone appeals the . . . remedies. We affirm . . . except for a provision in the injunction, which we remand for further proceedings.

Shepherd started working for AutoZone in 1998. He initially worked as a sales clerk—a nonsupervisory position—but was promoted to parts sales manager a year later. * * * Shepherd averaged the highest sales per customer among the employees at his store in 2003. Although Shepherd received several reprimands at work, he won the AutoZone Extra Miler award, which AutoZone characterized as a "prestigious honor," and AutoZone even asked Shepherd to train new employees.

But Shepherd suffered from a chronic back injury. In 1996, Shepherd had been permanently injured while working for a different employer, and he sought help from his neurologist, Dr. Marc Katchen. Dr. Katchen determined that Shepherd had impairments to his trapezius and rhomboid muscles of the upper-left side of his back, a degenerative-disc disease of the cervical vertebrae, and a herniated disc of the cervical vertebrae. As a result, Shepherd could rotate his torso, but repetitive twisting aggravated his condition and caused "flare-ups," which brought on severe pain in his neck and back.

About 80% of Shepherd's work at AutoZone was devoted to sales and customer service, and these activities did not affect his health. However, soon after starting work at AutoZone, Shepherd began to experience severe flare-ups that caused his back and neck to swell, and would cause pain with the slightest of movements. * * * Dr. Katchen determined that these flare-ups were

caused by the repetitive motions involved in mopping AutoZone's floors, which was one of Shepherd's job requirements. Shepherd asked his store manager, Larry Gray, if he could be released from mopping, and Gray informally allowed Shepherd to perform other tasks instead. But when the district manager, Steven Smith, found out that Shepherd was no longer mopping the floors, he directed Gray to have Shepherd resume mopping. Gray complied.

After Shepherd transferred to another AutoZone store in Smith's district, he again sought to avoid mopping the floors. The store manager, Terry Wilmot, was willing to accommodate Shepherd's back injury, but when one of Shepherd's coworkers complained about Shepherd's special treatment, Smith again insisted that Shepherd should mop the floors. Although Wilmot allowed Shepherd to avoid mopping duties when Smith was not around, Smith demoted Wilmot in July 2002, and replaced him with a new store manager, Steven Thompson. * * * Shepherd testified that Thompson and Smith still required him to mop the floors. He stated that he had sent a myriad of health and medical forms—some produced in conjunction with Dr. Katchen—to AutoZone officials, but he never received an accommodation.

In March 2003, Shepherd took a medical leave of absence because his mopping duties had caused his condition to worsen. He returned to work in April, and . . . was still compelled to mop the floors. As a result, he suffered from flare-ups four or five times a week and was unable to perform basic tasks of his daily routine. Shepherd's wife, Susan, had to help Shepherd get dressed, wash his body, and engage in other activities around the house. Shepherd began to suffer from depression and Dr. Katchen prescribed an antidepressant.

Shepherd continued to seek an accommodation that would allow him to stop mopping the floors. Shepherd contacted a number of corporate officials at AutoZone and was quite insistent that he needed an accommodation. Among other corporate officials, Shepherd frequently contacted Jackie Moore, the lead disability coordinator who worked at AutoZone's corporate benefits department in Memphis, Tennessee.

On September 12, 2003, Shepherd was wringing out a mop when he felt a sharp pain. He tried to continue his work, but the pain persisted, and he suffered a disabling flare-up that left him unable to return to work for the rest of the year. Three days after this flare-up, Smith sent Shepherd a written letter that relieved Shepherd of his mopping duties because of his back condition. Over the next few months, Shepherd received extensive treatments from Dr. Katchen, including heat treatment, physical therapy, medications, deep tissue massage, ultrasound, antidepressants, and sleep inducers. When Shepherd tried to return to work in January 2004, he learned that AutoZone would not allow him to return. Instead, AutoZone kept Shepherd on involuntary medical leave until February 2005, when it terminated his employment with AutoZone. * * *

[W]e must now address AutoZone's arguments about the remedies that resulted from that trial. AutoZone raises issues relating to (1) the compensatory damages; (2) the punitive damages; [and] (3) the injunction.

1. Compensatory Damages

AutoZone first argues that the compensatory damages are excessive and should be remitted from $100,000 to $10,000. The jury awarded compensatory damages of $100,000 for the "physical, emotional and/or mental pain [Shepherd] experienced . . . as a result of AutoZone's failure to provide him with reasonable accommodation."

* * * To determine whether an award of compensatory damages is excessive, we consider whether the damages awarded (1) were monstrously excessive; (2) had no rational connection between the award and the evidence; and (3) were roughly comparable to awards made in similar cases. We agree with the magistrate judge that the EEOC provided sufficient evidence to support the award of compensatory damages. First, Shepherd testified about the symptoms of his back condition and the details of his disabling September 12, 2003, back injury. Additionally, evidence from Shepherd's wife provided a detailed account of the effect that Shepherd's injuries had on his daily life while working at AutoZone. Finally, Dr. Katchen testified in great detail about his diagnosis and treatment of Shepherd's myofascial pain. This evidence provides a basis for concluding that the compensatory damages were not monstrously excessive, but were instead rationally connected to Shepherd's pain.

Additionally, the magistrate judge accurately observed that the compensatory damages in this case are approximately the same value as the compensatory damages awarded in comparable cases. In fact, Shepherd's case is more extreme than some of these cases because Shepherd experienced near-daily pain that left him incapable of performing common activities, such as putting on his clothes and taking a shower. We have recognized that cases that include even the slightest "physical element" are often associated with more substantial compensatory-damages awards.

We conclude that all three factors used to determine whether compensatory damages are excessive weigh in

favor of the EEOC. The magistrate judge therefore did not abuse his discretion when he upheld the award of $100,000 in compensatory damages for Shepherd's pain and suffering.

2. Punitive Damages

The jury awarded $500,000 in punitive damages against AutoZone, but the magistrate judge reduced the punitive damages to $200,000 to comply with a statutory cap. AutoZone first asks us to vacate the punitive damages for insufficient evidence. If we decline to do so, AutoZone alternatively asks us to remit punitive damages under the Due Process Clause to no more than $10,000. * * *

Punitive damages are available to the EEOC if it can demonstrate that AutoZone engaged in intentional discrimination "with malice or with reckless indifference to the federally protected rights of an aggrieved individual." [T]he Supreme Court [has] established a three-part framework to determine whether punitive damages are proper. . . . First, the plaintiff must show that the employer acted with "malice" or "reckless indifference" toward the employee's rights under federal law. A plaintiff "may satisfy this element by demonstrating that the relevant individuals knew of or were familiar with the anti-discrimination laws" but nonetheless ignored them or lied about their discriminatory activities. The plaintiff has the burden of proving "malice" or "reckless indifference" by a preponderance of the evidence. Second, the plaintiff must establish a basis for imputing liability to the employer based on agency principles. Employers can be liable for the acts of their agents when the employer authorizes or ratifies a discriminatory act, the employer recklessly employs an unfit agent, or the agent commits a discriminatory act while "employed in a managerial capacity and . . . acting in the scope of employment." Third, when a plaintiff imputes liability to the employer through an agent working in a "managerial capacity . . . in the scope of employment," the employer has the opportunity to avoid liability for punitive damages by showing that it engaged in good-faith efforts to implement an anti-discrimination policy. This is a fact-intensive analysis, and "although the implementation of a written or formal anti-discrimination policy is relevant to evaluating an employer's good faith efforts . . ., it is not sufficient in and of itself to insulate an employer from a punitive damages award."

* * * First, a rational jury could have found that AutoZone acted with "reckless indifference" to Shepherd's federal employment rights. AutoZone stipulated that Thompson, Smith, and Moore had all received ADA training. Furthermore, Teresa James, the benefits manager for AutoZone and Moore's supervisor, testified about AutoZone's established procedure for handling employees' accommodation requests. If an AutoZone employee made an accommodation request, the benefits department would obtain the employee's medical documentation, such as a physician's report, then coordinate with AutoZone's legal department to "ensure that there is a consensus on what the request is." The benefits department would then review the physical demands of the employee's position and coordinate with a human resources manager in the field to determine whether AutoZone could accommodate the employee's disability.

* * * Although Moore was aware of Shepherd's situation, her testimony revealed that she did not address Shepherd's disability through AutoZone's typical procedures. Instead, when asked whether she could "recall having considered any potential accommodations that would address [Shepherd's] limitation," . . . Moore testified about what she hypothetically "would" do in Shepherd's case—not what she actually did. * * * Moore eventually did take concrete action to address Shepherd's situation. She coordinated with Smith and instructed him to type up a letter for Shepherd. This letter informed Shepherd that he should not engage in any activities that affected his medical condition. But this letter was dated September 15, 2003—three days after Shepherd suffered his disabling back injury, and the day that Dr. Katchen placed Shepherd on medical leave. A jury could easily conclude that this letter was delivered too late to affect Shepherd's work requirements. A jury might even conclude that this letter was nothing more than AutoZone's attempt to cover up its prior failure to accommodate Shepherd's disability.

AutoZone argues that its mistakes—if any—were not the result of reckless disregard for Shepherd's rights, but were caused by mere negligence, which is not sufficient to support punitive damages. . . . * * * AutoZone, however, understood that Shepherd had a back injury and regarded it as a disability. Thompson, Smith, and Moore did not deny Shepherd an accommodation because they doubted the veracity of Dr. Katchen's medical reports or because they were relying on another doctor's analysis. . . . Instead, a rational jury could have concluded that they failed to accommodate Shepherd's disability because they ignored AutoZone's established procedures for handling accommodation requests. Failing to follow up on an accommodation request might only be negligence if it occurs infrequently, but an employer's response sinks from negligence to reckless indifference when it repeatedly fails to accommodate an employee's disability. Because Shepherd repeatedly asked Moore

for an accommodation, and asked for an accommodation so often that Moore became frustrated by his persistence, a rational jury could have decided that AutoZone's response was not mere negligence, but reckless indifference.

Second, a rational jury could have imputed liability to AutoZone through a manager acting in the scope of employment at AutoZone. * * * Moore was the lead disability coordinator in AutoZone's benefits department and was responsible for coordinating employees' accommodations. * * * Because Moore had the authority and discretion to make decisions about employees' accommodations, a rational jury could have concluded that Moore was acting in a managerial capacity in the scope of her employment when she authorized accommodations for AutoZone employees. Therefore, a rational jury could have imputed liability to AutoZone based on the evidence presented at trial.

Third, a rational jury could have concluded that AutoZone did not engage in good-faith efforts to enforce an anti-discrimination policy. AutoZone did not introduce a written anti-discrimination policy into evidence, but instead relied on James, AutoZone's benefits manager, to explain AutoZone's procedures for handling disability accommodations in her testimony. Although the employer is not required to present a written or formal anti-discrimination policy, "it is difficult to ascertain the contours of this policy without physical evidence of its existence."

Nor did AutoZone present evidence that an anti-discrimination policy was properly enforced in Shepherd's case. We have held that an employer is unable to establish good-faith efforts when "top management officials" disregard the company's anti-discrimination policy. * * * [A] rational jury could have concluded that Moore exhibited reckless indifference to Shepherd's federal employment rights, and a rational jury could also have concluded that she disregarded AutoZone's antidiscrimination procedures.

. . . [W]e conclude that the magistrate judge correctly ruled that a rational jury had sufficient evidence to impose punitive damages. We therefore decline to vacate the punitive damages.

Because we find sufficient evidence for a rational jury to impose punitive damages, we must next consider whether the punitive damages in this case are so grossly excessive that they offend the Due Process Clause of the Fourteenth Amendment. We analyze the punitive-damages award of $200,000 under the framework the Supreme Court established in *BMW of North America, Inc. v. Gore*. In Gore, the Supreme Court observed that punitive damages "may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition," but punitive damages violate the Due Process Clause "[o]nly when an award can fairly be categorized as 'grossly excessive' in relation to these interests." The Supreme Court then instructed courts to consider three guideposts: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases."

The first guidepost requires us to consider the reprehensibility of the defendant's conduct and is "[p]erhaps the most important indicium of the reasonableness of a punitive damages award." * * * These five factors weigh against AutoZone. First, Shepherd suffered physical—not just economic—harm. Mopping the floors aggravated Shepherd's back condition, and Shepherd suffered severe, and ultimately disabling, pain as a result. Second, AutoZone's conduct demonstrated a reckless disregard for Shepherd's health. AutoZone was aware that Shepherd suffered from a back injury but did not adequately accommodate his disability and required him to mop the floors anyway. Third, Shepherd was financially vulnerable. When Shepherd was asked at trial why he continued to mop the floors even though it caused him pain, he stated he could not afford to lose his job because he had a wife and children. Fourth, AutoZone's dismissiveness of Shepherd's health concerns occurred on multiple occasions and was not an isolated incident. Indeed, Shepherd had contacted Moore so often that she expressed frustration with Shepherd's persistence. The fifth factor considers whether the harm was caused intentionally or accidentally. Shepherd's flare-ups were not the result of a mere accident, but were instead the result of AutoZone's reckless indifference. Therefore, when we consider these factors as a whole, we conclude that AutoZone's conduct was sufficiently reprehensible to justify imposing punitive damages.

The second guidepost requires us to examine the ratio between punitive damages and "the actual harm inflicted on the plaintiff." The Supreme Court has repeatedly declined to set a fixed ratio to limit punitive damages based on constitutional grounds, but it has recognized that in practice, "few awards exceeding a single-digit ratio between punitive and compensatory damages . . . will satisfy due process." * * * The jury awarded the EEOC $100,000 in compensatory damages, $500,000