THE SUPREME COURT'S NEW WORKPLACE

The US Supreme Court has systematically eroded the rights of minority workers through subtle changes in procedural law. This accessible book identifies and describes how the Supreme Court's new procedural requirements create legal obstacles for civil-rights litigants, thereby undermining their substantive rights. Seiner takes the next step of providing a framework that practitioners can use to navigate these murky waters, allowing workers a better chance of prevailing with their claims. Seiner clearly illustrates how to effectively use his framework, applying the proposed model to one emerging sector – the on-demand industry. Many minority workers now face pervasive discrimination in an uncertain legal environment. This book will serve as a roadmap for successful workplace litigation and a valuable resource for civil-rights research. It will also spark a debate among scholars, lawyers, and others in the legal community over the use of procedure to alter substantive worker rights.

Joseph A. Seiner is Professor at the University of South Carolina School of Law. He was lead counsel in the US Courts of Appeals in employment-discrimination cases as an appellate attorney with the US Equal Employment Opportunity Commission in Washington, DC. Professor Seiner has been featured in a number of publications, including the *New York Times* and *Wall Street Journal*.

The Supreme Court's New Workplace

PROCEDURAL RULINGS AND SUBSTANTIVE WORKER RIGHTS IN THE UNITED STATES

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This book is dedicated to Alice Ann Seiner. Thanks for being such a loving, encouraging, and wonderful mother, and for always being there for me.

– J. A. S.

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Preface

I love workplace law.

Early in my legal career I was struck by the impact procedural issues could have on employment claims. I saw first hand how few, if any, cases actually make it to trial. As an appellate attorney at the US Equal Employment Opportunity Commission, I began to fully understand how many companies would attempt to use procedural tactics to prevail in their cases, regardless of how strong the evidence of discrimination was in the matter against them. Procedure has always been something that has greatly interested me. The intersection between procedure and workplace law is one of undeniable significance.

Much of the literature and scholarship after Title VII of the Civil Rights Act of 1964 was enacted focused primarily on theory. Over time, however, theory has given way to procedure and now success in an employment-discrimination matter often turns on how adept attorneys are at maneuvering procedurally within a particular case. This trend has been mirrored in the federal courts, culminating in the last decade with numerous Supreme Court decisions on procedural questions that directly impact employment issues.

The Supreme Court, under the direction of Chief Justice John Roberts, has begun to chip away at the substantive protections offered to civil-rights victims and workplace litigants under the auspices of procedural rulings. Often dry, these cases frequently fail to attract public attention. Indeed, as discussed in this text, perhaps the most significant ruling undermining the substantive rights of civil-rights plaintiffs in years came in the context of an antitrust case. It thus likely went unnoticed by many civil-rights practitioners.

This book combines my passions for employment law and civil procedure by explaining how these Supreme Court procedural decisions have impacted worker rights. It is not enough to simply identify the problem. Rather, I also offer here a framework that litigants can successfully use to navigate the procedural minefield created by this case law. To help the practitioners and the courts I have put

this framework in context rather than simply formulating an abstract theory that would be difficult to use in actual practice. Thus, I apply my proposed framework to one emerging area of the law – litigation by workers in the on-demand economy. Applying the theory to workers in the technology sector helps identify many of the advantages and shortcomings of the model offered here.

No approach is perfect. At the end of the day, only congressional intervention can completely remedy the existing problems facing the civil-rights community. In the meantime, however, this framework allows litigants to minimize the dangers of allowing many viable civil-rights claims to go unresolved.

It is impossible to write a comprehensive work on labor and employment law alone, and this text is no different in that regard, having benefited from the assistance of numerous individuals. I would like to thank a number of students at the University of South Carolina School of Law, including Megan Clemency, Elliot Condon, Chelsea Evans, Arden Lowndes, and Emily Rummel. The book also benefited from the helpful assistance of Inge Kutt Lewis. Finally, without the extraordinary efforts of Vanessa L. McQuinn, this book would not have been possible.

Those in the academic community were extraordinarily helpful in providing suggestions and insight into this topic. Earlier versions of this book were presented at the Duke University School of Law and the University of Indiana School of Law as part of symposia held at those schools. As this book is the culmination of research conducted throughout my career, I am indebted to all of those in the academic community who helped me to formulate my thoughts in this area. I offer special thanks to Suja Thomas, who has helped pave the way on scholarship related to the intersection of procedure and employment law. I would also like to acknowledge the superb co-authors of two of my works relied upon in this text, Benjamin Gutman and Benjamin Means. Finally, I would like to thank Dean Robert Wilcox at the University of South Carolina School of Law for his support in the development of this work and for all of the research assistance provided by the law school.

As an early note to this text, I would like to disclose that I directly worked as an attorney on a number of the cases discussed in this book while at the US Equal Employment Opportunity Commission (EEOC). The opinions expressed in this book in no way reflect the views of the EEOC or the US government. I would like to acknowledge the superb efforts of those at the EEOC who work so diligently to eradicate discrimination in the workplace.

This text naturally flows out of my previous research and scholarship, which examines the intersection of employment law and civil procedure. For certain topics and discussions, I refer the readers to a number of articles set forth here, on which this book relies:

Chapter 2, "Access to the Courts," draws heavily from the following articles: Joseph A. Seiner & Benjamin N. Gutman, "Does *Ricci* Herald a New

Disparate Impact?," *Boston University Law Review* 90 (2010): 2181; Joseph A. Seiner, "Plausibility Beyond the Complaint," *William & Mary Law Review* 53 (2012):987; Joseph A. Seiner, "After *Iqbal*," *Wake Forest Law Review* 45 (2010): 179; Joseph A. Seiner, "The Trouble with *Twombly*: A Proposed Pleading Standard for Employment Discrimination Cases," *University of Illinois Law Review* (2009): 1011; Joseph A. Seiner, "Pleading Disability," *Boston College Law Review* 51 (2010): 95; Joseph A. Seiner, "Plausibility & Disparate Impact," *Hastings Law Journal* 64 (2013): 287; Joseph A. Seiner, "Understanding the Unrest of France's Younger Workers: The Price of American Ambivalence," *Arizona State Law Journal* 38, no. 4 (2006): 1053.

Chapter 3, "Class Actions, Systemic Claims, and Arbitration," draws heavily from the following articles: Joseph A. Seiner, "Commonality and the Constitution: Applying *Wal-Mart* to State Court Cases," *Indiana Law Journal* 91 (2016): 455; Joseph A. Seiner, "The Issue Class," *Boston College Law Review* 56 (2015): 121; and Joseph A. Seiner, "Weathering *Wal-Mart*," *Notre Dame Law Review* 89 (2014): 1343.

Chapter 5, "Striking at Relief," draws heavily from the following articles: Joseph A. Seiner, "The Failure of Punitive Damages in Employment Discrimination Cases: A Call for Change," *William & Mary Law Review* 50 (2008): 735 and Joseph A. Seiner, "Punitive Damages, Due Process, and Employment Discrimination," *Iowa Law Review* 97 (2012): 473.

Chapter 6, "The On-Demand Economy Example," draws heavily from the following articles: Benjamin Means & Joseph A. Seiner, "Navigating the Uber Economy," 49 *University of California Davis Law Review* 49 (2016): 1511; Joseph A. Seiner, "Tailoring Class Actions to the On-Demand Economy," *Ohio State Law Journal* 78 (2017): 21.

I hope that the readers of this work enjoy contemplating and debating these issues as much as I have enjoyed putting this text together. Civil rights and civil procedure interact in a way that combines the technical precision of the law with the human element of workplace conflict. This intellectually stimulating topic will be one explored by the courts and academics for decades to come. My goal here is to further that important discussion.

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Acknowledgments

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