



A Guide to

Diversity and Inclusion

in the 21st Century Workplace

Second Edition

Professor Michael L. Fox

New York State Bar Association publications are intended to provide current and accurate information to help attorneys maintain their professional competence. Publications are distributed with the understanding that NYSBA does not render any legal, accounting or other professional service. Attorneys using publications or orally conveyed information in dealing with a specific client's or their own legal matters should also research original sources of authority.

We consider the publication of any NYSBA practice book as the beginning of a dialogue with our readers. Periodic updates to this book will give us the opportunity to incorporate your suggestions regarding additions or corrections. Please send your comments to: Publications Director, New York State Bar Association, One Elk Street, Albany, NY 12207.

Copyright 2020, 2021
New York State Bar Association
All rights reserved
ISBN: 978-1-57969-027-4
Product Number: 415820

Dedication

*To my family, friends and colleagues—
particularly my parents, Hon. Mark D. and Jean Amatucci Fox—
for their never-ending support and encouragement in this ongoing
labor of love.*

*And to the New York State Bar Association:
the mission is vital, the calling unequalled, never tire.*

TABLE OF CONTENTS

Foreword	ix
Introduction	xiii
Chapter 1 The Landscape of Federal and New York State Anti-Discrimination Laws	
[1.0] I. Introduction to the Relevant Law	3
[1.1] II. Specific Provisions of New York Statutory Law	5
[1.2] III. Claims on the Fringe of the “Gender” Protected Class—Attractive Employees	17
[1.3] IV. Specific Provisions of Section 1981, Section 1983, Federal Title VI, and Federal Title VII	31
[1.4] V. Religious Accommodation	55
[1.5] VI. A Note on Age—ADEA	59
[1.6] VII. The <i>McDonnell Douglas</i> Burden Shifting Test	63
[1.7] VIII. Retaliation	69
[1.8] IX. Employer Defenses Based on Existing Policies	73
[1.9] X. Briefly on Damages and Fee Shifting	77
[1.10] XI. Conclusion	82
Chapter 2 Shifting Ground on Protection for Sexual Orientation, LGBT Status	
[2.0] I. Introduction	87
[2.1] II. Protections in New York	88
[2.2] III. The Status Under Federal Law	91
[2.3] IV. Marriage and Public Accommodations	102
[2.4] V. Conclusion	104
Chapter 3 Shifting Ground on Equal Pay	
[3.0] I. Statutory Provisions on Equal Pay	109
[3.1] II. Caselaw Speaking to Burdens of Proof	117
[3.2] III. Current Status of Equal Pay in the United States	121
[3.3] IV. Equal Pay on the International Stage	128
[3.4] V. Conclusion	130
Chapter 4 Current Status of Federal Equal Rights Amendment	
[4.0] I. A Brief History of Women’s Rights and the Right to Vote	135
[4.1] II. Where Does the Equal Rights Amendment Currently Stand?	137

[4.2]	III.	New York Has Held for Many Years That Women Are Entitled to Individual Rights Separate From Men.....	140
[4.3]	IV.	Conclusion.....	143
Chapter 5 Administrative Proceedings: The U.S. EEOC and N.Y.S. DHR, and the Importance of Policies and Paperwork			
[5.0]	I.	Overview of the U.S. EEOC and N.Y.S. DHR	147
[5.1]	II.	Procedures in the EEOC and DHR.....	149
[5.2]	A.	Federal EEOC Procedure.....	150
[5.3]	B.	New York DHR Procedure	159
[5.4]	III.	The Importance of Policies and Paperwork/Records ..	162
[5.5]	IV.	Conclusion.....	164
Chapter 6 Disabilities Law and Leave Issues			
[6.0]	I.	Introduction	167
[6.1]	II.	The Provisions of the American With Disabilities Act (ADA).....	168
[6.2]	III.	Family and Medical Leave Act (FMLA) and New York Paid Leave	188
[6.3]	A.	FMLA	188
[6.4]	B.	New York Paid Leave.....	196
[6.5]	IV.	Conclusion.....	199
Chapter 7 Websites and Requirements for Accessibility			
[7.0]	I.	Introduction	203
[7.1]	II.	The Relevant Guidance—A Divide in Need of a Bridge	206
[7.2]	III.	Conclusion: A “Compliant” Website?	213
Chapter 8 Scenarios and Hypotheticals for Analysis			
[8.0]	I.	Hypothetical #1 – Race Discrimination in the Workplace	221
[8.1]	II.	Hypothetical #2 – Sexual Orientation Discrimination in the Workplace	222
[8.2]	III.	Hypothetical #3 – Equal Pay When Employee Requests Less?	223
[8.3]	IV.	Hypothetical #4 – EEOC and/or Court Filing?	224
[8.4]	V.	Hypothetical #5 – Medical Marijuana Use.....	225
[8.5]	VI.	Hypothetical #6 – The Movie Theatre Patron With a Disability	228
[8.6]	VII.	Hypothetical #7 – Inaccessible Website.....	230

Appendix A: Sexual Harassment Policy for All Employers in New York State	233
Appendix B: Minimum Standards for Sexual Harassment Prevention Policies	241
Appendix C: Complaint Form Requirements for Reporting Sexual Harassment	243
Appendix D: Executive Order Declaring Juneteenth a Holiday for New York State Employees.....	249
Appendix E: Revised Guidelines Aim to Facilitate Swifter Provision of Appropriate Accommodations for Court Users with Special Needs, June 29, 2020	251
Table of Authorities	253
About the Author	269

ABOUT THE AUTHOR

Michael L. Fox is Assistant Professor of Business Law in the School of Business at Mount Saint Mary College, in Orange County, New York. He teaches in the undergraduate business program and Masters of Business Administration program. He also serves as the Coordinator of the Business Graduate (MBA) Program, and as the College's Pre-Law Advisor. In addition, he is Assistant Adjunct Professor of Law in Professional Responsibility at Columbia University School of Law in New York City. Before this book, he authored the book *Primer for an Evolving eWorld* (Kendall Hunt Publ. Co. 2019, 2d Ed. 2020).

Professor Fox received his Bachelor of Arts degree, Phi Beta Kappa and *summa cum laude*, from Bucknell University, with a major in Economics and minor in Biology. He was elected to Phi Beta Kappa in his junior year. At graduation, he received the award for highest standing among those in the major field of Economics. Professor Fox received his Doctor of Law degree from Columbia University School of Law, where he was a Harlan Fiske Stone Scholar and an Articles Editor on the *Columbia Business Law Review*.

Professor Fox is a former law clerk to Hon. Lawrence E. Kahn, U.S. District Judge, Northern District of New York, in Albany. He has been rated AV-Preeminent by Martindale-Hubbell since 2015, and was selected to the Upstate New York Super Lawyers list from 2013 through 2016, when he was engaged in the active practice of law. He is admitted to practice in New York State, as well as the U.S. District Courts for the Southern, Eastern and Northern Districts of New York (*N.D.N.Y. is currently inactive*), the Second Circuit U.S. Court of Appeals, and the Supreme Court of the United States. He has been a litigation associate with Stroock & Stroock & Lavan LLP, in Manhattan; and, sequentially, an associate, senior counsel, and partner and litigation managing attorney at Jacobowitz & Gubits, LLP, in New York's Hudson Valley. At Jacobowitz & Gubits his primary practice areas included Federal Practice, Electronic Discovery, Estates Litigation, Employment and Discrimination Law, and Business Entity Disputes. From February 2014 to November 2016, he served as Deputy Corporation Counsel and special labor counsel for the City of Port Jervis. Just prior to entering full-time academia, he was special counsel with the Hudson Valley law firm Catania, Mahon, Milligram & Rider, PLLC.

Professor Fox is a former Vice President for the Ninth Judicial District of the New York State Bar Association, and former member of the NYSBA Executive Committee. He previously served as a Delegate in the American Bar Association House of Delegates from 2008 through 2014,

A GUIDE TO DIVERSITY & INCLUSION IN THE WORKPLACE

and as a Delegate in the NYSBA House of Delegates from 2008 to 2014. He is currently again serving in the NYSBA House of Delegates, 2015 to present. He is a member of the Commercial and Federal Litigation Section, and a past Chairperson of the Young Lawyers Section (one of NYSBA's largest Sections). He also serves on the NYSBA Committee on Professional Discipline and Committee on Legal Education and Admission to the Bar, among others; and Chairs NYSBA's Standing Committee on Communications and Publications. Involved with the NYSBA YLS Trial Academy program, held at Cornell Law School, since its inception in 2010, Professor Fox served as a member of critique faculty and co-chair of the Committee on the NYSBA YLS Trial Academy from 2013 through 2019. In 2017 and 2018 he served as a team leader and lecturer at Trial Academy; and in 2019, he served as a lecturer and critique faculty at the 10th Anniversary Trial Academy. Professor Fox serves on the Board of Directors of the Orange County Bar Association and the Advisory Board of the Food Bank of the Hudson Valley.

Professor Fox is co-host of *Gold/Fox: Non-Billable*, a podcast of the New York State Bar Association, available on Spotify, Google Play, Apple iTunes/Podcast App, iHeart Radio App, or wherever podcasts are available. He has authored or co-authored numerous articles and CLE materials, and has spoken at more than 100 conferences, programs and symposia, concerning federal civil procedure, attorney-client privilege and work product, electronic discovery and social media, evidence, professional ethics, employment/anti-discrimination law, and pre-law advice.