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Off Hrs: M 12:00-1pm; 3-5pm
& appt.

Employment Discrimination Syllabus
Room 703 Lewis
Fall 2008

I. COURSE DESCRIPTION: This course will examine the major federal statutes prohibiting employment discrimination based upon race, color, sex, religion, disability, citizenship status, national origin, and age. In addition to covering the substantive law, the course will critically examine its assumptions about the nature of the employment relationship, the definition of discrimination, and the role of the government in regulating employment.

II. REQUIREMENTS:

A. *Attendance and Participation.* As a class that meets only once a week, the quality of each discussion is critical to the educational process. Accordingly, you will be evaluated on your contributions to the joint learning venture. You are expected to be a prepared, active, and thoughtful participant in shaping the class discussion and will be graded accordingly. Your grade will be based on both your quantitative attendance and your qualitative participation. (15 pts.)

B. *Case Brief Coop.* Each student will select two cases prior to the midterm from the sign-up sheet. One case will be briefed from an Employer's perspective, the other from the Employee's. The brief should succinctly convey the Facts, Issue, Holding, and Analysis in one page ideally. Be sure the Issue is framed in the form of a question that can be answered by the "Holding" by a "Yes" or "No" and one sentence. The Analysis should contain the *court's* reasoning for its decision (majority opinion and any significant concurrence/dissent), not your own. The remaining Critique paragraph should be written from *your* assigned perspective (Employer or Employee, not necessarily your personal opinion or analysis). Be sure to post your brief *at least 24 hours prior to the start of class* so that your classmates and I will have time to print out and review all briefs. **All briefs and documents posted onto Blackboard should be in MS Word, not WordPerfect.** Late posting of your scheduled brief as well as underprepared or missed in-class brief presentations, will result in significant point deductions for this assignment. Please note the schedule below is tentative only, and we may not get to your case on the

scheduled day. You are responsible for your case even if it does not fall on the tentatively scheduled date below. (5 pts. each brief, 10 pts. total).

C. *Midterm.* There will be take-home midterm distributed at the end of class on November 3rd, and due one week later November 10th. Should you be absent for the distribution of the midterm, it is up to you to get a copy from my faculty clerk, Lawrence Arendt (larendt@depaul.edu or 2-8450). All midterms regardless of whether you receive it in class will be due at the same time. The midterm is designed to test your knowledge of basics in employment discrimination, emphasizing your grasp of theories of liability and proof structures, particularly under Title VII. While you may consult any materials, your cited works are limited to your textbook and materials distributed in the course. To preserve anonymity, be sure to use your 4-digit midterm exam number you select for the midterm namesheet. No midterms may be submitted to me in person or to my e-mail. You may submit your exam in one of two ways: 1) In person: If you elect this route, you must have your midterm time-stamped and submitted to the 9th floor receptionist (who leaves at 6pm) no later than 5:50pm on November 10th. 2) Electronically: You may e-mail your exam to larendt@depaul.edu no later than 5:50pm on November 10th. Be sure to check your sent mail to ensure it transmitted properly in case you need verification. Be forewarned that you bear the risk of, and burden of proof for, any transmission problems if you elect the convenience of electronic submission. There will be no class on the day the midterm is due, but you may want to use that time to coordinate with your fellow expert panelists for your next assignment (40 pts.)

D. *Expert Paper:* You will sign up in small groups to serve as a “panel of experts” following the midterm. Each panelist will prepare a 3-5 page paper (750-1250 words) for which the central question is how your particular special topic in employment discrimination (sexual orientation, religion, national origin, age or disability) and assigned reading material compare and contrast with the cases, theories and/or structures of Title VII liability that we’ve studied thus far. The question is decidedly broad and open-ended to allow you space to engage your topic in the way that you believe to be most useful to the class. You should be ready to discuss your papers and consider your fellow panelists’ responses during your scheduled session.

You should do outside reading for this assignment. A good place to start is with the notes following the assigned materials identifying pertinent research and scholarship. It may be helpful to read the entire source cited on particular items of interest to you. You may find that you disagree with a given author, and may use that disagreement to inform your argument. Or you may agree, but seek to “tweak” the author’s proposal or analysis. Or you may find that a reform you seek has not been mentioned at all in the notes. The purpose of the assignment is to engage a more theoretical or conceptual and applied understanding of the material and to prepare you for

the essay-oriented final exam. Papers that merely describe or reiterate the state of the law will be considered mediocre. Bluebook citation form with footnotes (not endnotes) is strongly urged.

A hard copy of your typed final paper must be submitted at the conclusion of your expert panel session, with the final word count appearing next to your name. You will also post the paper to Blackboard under the appropriate designated folder under the Discussion Section within 48 hours AFTER your session for your classmates. Late submissions (in class or to Blackboard) will have a significant point deduction. (15 pts.)

E. *Final*. The SOFTEST final exam on Monday evening, December 8th, will be comprehensive, but weighted toward the post-midterm material. You may bring in your textbook, coop casebriefs, any handouts distributed in or through class, and any outlines for which you are the primary author. Its format will be essay (vs. issue-spotting or hypos) and test your analytical or theoretical understanding of course materials. The final exam is designed to test your creative and conceptual understanding of employment discrimination law, most of which is statutory. As such, this area of law derives not solely from the common law, but rather from the synergy between law, politics, and policy. Like the expert panel assignment, you will be expected to answer an essay question or questions asking you to assess the coherence of federal employment discrimination laws across the multiple theories of liability, proof structures, and special topics that we've studied. The grading standard for the final exam will be based on your ability to respond comprehensively to the question or "prompt," state a strong argument in response, and support that argument using as many of the on point course materials as evidence. (20 pts.)

III. MATERIALS/TEXTS:

A. REQUIRED (available in DePaul bookstore): Belton, Avery, Ontiveros & Corrada, *Employment Discrimination Law: Cases and Materials on Equality in the Workplace* (Thomson-West, 7th Ed. 2004). *Please note that this is a **new edition** this fall and a completely different casebook from what I've used in the past.*

B. There will be supplementary materials that will usually be distributed online or in class.

IV. TENTATIVE WEEKLY SCHEDULE:

Week 1

(8/25): Introduction to the Course

Richard Epstein, *Forbidden Grounds* excerpt (read online)

Alan Freeman, Legitimizing Anti-Discrimination Law excerpt (read online)

Ch 1. The Problem of Discrimination in Employment: A Brief Overview

Ch. 2. Laws Prohibiting Discrimination in Employment: An Overview

A. Introduction

B. Survey of Major Federal Laws

C. Enforcement Schemes

1. Administrative Exhaustion

National Railroad Passenger Corp. v. Morgan

2. Judicial Enforcement

D. Coverage (Recommended)

1. The Meaning of “Race” and “Color” (skip Al-Khazraji)

2. Who Is An “Employee”(skip Clackamas)

3. The Meaning of “Employer”

4. Individual Liability of Agents of Employers

5. The Meaning of an “Employment Practice”

Video excerpt: in class

TEXT: pp. 2-41; Recommended: 42, 45-64
Epstein & Freeman excerpts online

Week 2

(9/1): No Class (Labor Day: University Closed)

Week 3

(9/8): Ch. 3. Disparate Treatment

A. Introduction

B. Disparate Treatment Claims

1. Pretext or Single-Motive Claims

McDonnell Douglas Corp. v. Green

Furnco Construction Corp. v. Waters

TX Dept. of Comm'ty Affairs v. Burdine

St. Mary's Honor Center v. Hicks

TEXT: 65-115

Week 4

(9/15): *Reeves v. Sanderson Plumbing*

Note: The Same Actor Defense

2. Proving Discriminatory Intent by Circumstantial or Direct Evidence
3. Mixed-Motive Cases
Price Waterhouse (read online)
Desert Palace, Inc. v. Costa

TEXT: 115-26; 136-63

Week 5

(9/22):

5. Systemic Disparate Treatment: Pattern & Practice
King v. General Electric Company
Teamsters v. United States
Hazelwood School District v. United States
DeGraffenreid v. Ford Motor Co. (read online)
Notes on Intersectionality

- Systemic Disparate Treatment: Formal Policy
E. Bona Fide Occupational Qualification Defense
International Union, UAW v. Johnson Controls

TEXT: 170-78; 211-21; 225-232; 47-50;
354-80

Week 6

(9/29):

- Ch. 4. Disparate Impact
 - A. Introduction
 - B. The Theory of Disparate Impact
 1. Objective Criteria
Griggs v. Duke Power Co.
 2. Subjective Criteria
Watson v. Fort Worth Bank & Trust
 - C. Statistical Evidence
Dothard v. Rawlinson
 - D. The Business Necessity Defense
Contreras v. City of Los Angeles

TEXT: 188-211; 221-25; 233-42

Week 7

(10/6):

- E. The Bottom-Line Defense
Connecticut v. Teal
- F. Griggs Revisited

Watson v. Fort Worth Bank & Trust
Wards Cove Packing Co. v. Atonio
Lanning v. Southeastern PA Transportation Authority

- Ch. 5: Equal Protection & Sec. 1981
- A. The Legacy of Reconstruction-Era Reforms
 - B. Equal Protection: The Fifth and Fourteenth Amendments
Washington v. Davis
 - D. The Civil Rights Act of 1866: 42 U.S.C. Sec. 1981
 - 1. Theory of Liability
- Derrick Bell, *And We Are Not Saved* excerpt (read online)

TEXT: 242-91

Week 8

(10/13): Pt. III: Specific Categories of Discrimination

Ch. 6. Discrimination Because of Sex

Introduction

- A. Theoretical and Analytical Approaches to Sex Discrimination
- B. Discrimination on the Basis of Pregnancy
 - 1. The Pregnancy Discrimination Act of 1978
Newport News Shipbuilding & Dry Dock Co. v. EEOC
 - 2. Fringe Benefits & the PDA
Erickson v. Bartell Drug Co.

“Performative Identity” vs. “Sex-Plus”

- F. Dress, Grooming, and Appearance Requirements
 - 1. *Rogers v. American Airlines*, Caldwell excerpt (read online)
 - 2. *Jespersen v. Harrah’s Operating Co.* (read online)

Ch. 7: Sex-Based Compensation Schemes

C. Fringe Benefits

- 1. *City of Los Angeles v. Manhart*

TEXT: 308-39; 380-94; 433-39

Week 9

(10/20): Ch. 8. Harassment

- A. Introduction
- B. Sexual Harassment
 - 1. Quid Pro Quo
 - 2. Hostile Work Environment
Meritor Savings Bank v. Vinson

Harris v. Forklift Systems

1. Same-Sex SH: The Meaning of “Because of Sex”

Oncala v. Sundowner Offshore Svcs.

TEXT: 440-487

Week 10

(10/27):

C. Employer Liability for Discriminatory Harassment

1. Vicarious Liability

Burlington Industries v. Ellerth

Faragher v. City of Boca Raton

2. Liability for Negligence: Harassment by Co-Workers

Ch. 15. Retaliation as Discrimination

A. Introduction

1. Statutory Provisions

B. Scope of Protected Activity

1. The Participation Clause

2. The Opposition Clause

Payne v. McLemore’s Wholesale & Retail Stores

3. Individuals Protected from Retaliation

TEXT: 487-528; 81-14; 821-41

Week 11

(11/3):

Ch. 7. Sex-Based Compensation Schemes

A. Introduction

B. The Equal Pay Act of 1963

Ledbetter (read online)

D. The Bennett Amendment to Title VII

Review of Major Theories of E.D., Q & A, Applications

Take-Home Midterm Distributed at the End of Class

TEXT: 395-99; 413-20

Week 12

(11/10):

Take-Home Midterm Time-stamped and submitted to 9th Fl. receptionist NLT 5:50pm. Receptionist leaves at 6pm. No late papers accepted. If you opt to submit electronically to larendt@depaul.edu, be forewarned that you bear the risk (and burden of proof) for any technical problems in transmission. To preserve anonymity, you must use the 4-digit number you select on the midterm namesheet, and you MAY NOT submit your

exam to me personally or to my e-mail. No Class, but you are encouraged to use class time to prepare for your expert paper (with fellow panelists).

Week 13:

- (11/17): Ch. 9. Discrimination Because of Sexual Orientation
- A. Introduction
 - B. Sexual Orientation Claims Under Title VII
 - 1. Sexual Orientation Discrimination as “Sex” Discrimination
DeSantis v. Pacific Telephone & Telegraph
 - 2. Sexual Harassment Because of Sexual Orientation
 - C. Protection of Conduct and Status Under the Constitution
- Ch. 10. Discrimination Because of Religion
- A. Introduction
 - B. The Meaning of “Religion”
 - D. Establishing a Prima Facie Case
Heller v. Ebb Auto Co.
 - E. Reasonable Accommodation and Undue Hardship
TWA v. Hardison
Ansonia Board of Education v. Philbrook

TEXT: 541-71; 578-84; 590-617

Week 14

- (11/24): Ch. 11. Discrimination Because of National Origin
- A. Introduction
 - C. National Origin and Citizenship
Anderson v. Zubieta
 - D. National Origin Discrimination Based on Language and Accent
 - 1. English Proficiency as a Job Requirement
 - 2. English-Only Requirement for Bilingual Employees
Garcia v. Spun Steak Co.
 - 3. Accent Discrimination as National Origin Discrimination
Hasham v. California State Board of Equalization
- Ch. 12. Discrimination Because of Age
- A. Introduction
 - B. Disparate Treatment
Hazen Paper Co. v. Biggins
Sperling v. Hoffmann-LaRouche
 - C. Disparate Impact
Ellis v. United Airlines

TEXT: 628-32, 642-67, 668-705

Week 15 (Labor Day Make-up Class)

- (12/1): Ch. 13. Discrimination Because of Disability
Part. I: Definition
A. Introduction
B. The Meaning of “Discrimination” Under the ADA
Raytheon v. Hernandez
US Airways v. Barnett
C. The Meaning of “Disability”
Sutton v. United Airlines
Part II. Application
D. Qualifications and Undue Hardship
1. Qualification Standards
3. Reasonable Accommodation and Undue Hardship
VandeZande v. Wisconsin Department of Administration
Closing Comments

TEXT: 717-56; 767-70; 780-87

- (12/8): **SOFTEST Final Exam**