**Employment Discrimination**

Law 284.1, Room 140

Spring 2018, MT 3:35-4:50

**Professor Catherine Albiston**

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**Course Description:**

This course examines the law regulating employment discrimination and equal employment opportunity, including Title VII of the Civil Rights Act of 1964, the Family and Medical Leave Act, and the Americans with Disabilities Act. It is an introductory, but comprehensive, course that emphasizes the major analytical frameworks for conceptualizing discrimination and equality in the workplace. The course will combine a pragmatic, litigation-oriented perspective with a theoretical, sociological one, as it investigates the assumptions underlying various legal approaches and situates legal trends within larger social and historical contexts. The primary focus will be federal law, as well as public policy concerns and the theoretical frameworks of equality doctrine.

**Course Materials:**

Zimmer, Sullivan & White, Cases and Materials on Employment Discrimination (9th Edition), Aspen (2017).

Reading posted on the course bCourses page.

**A Note about the Casebook:**

Our casebook is both useful and frustrating in the level of detail it provides and the many questions it raises. In general, you should read the cases carefully for detail and reasoning. With regard to the notes, read the material assigned but do not worry about working out the answers to all of the questions raised by the casebook prior to class. Some notes are not assigned to reduce the reading burden a bit; see the syllabus for details.

**Grading/Evaluation:**

The final exam at the end of the semester will be the primary basis for the course grade. Students also will be evaluated in part based on their participation in discussion. Participation will be evaluated by considering the following factors: attendance; evidence of comprehension and critical analysis of the material; quality of comments and questions in class discussion; and respectful engagement with ideas raised by other students.

**Learning Outcomes:**

Students in the course will be expected to achieve the following Berkeley Law and Course Specific Learning Outcomes:

* Develop a comprehensive understanding of substantive employment discrimination law under Title VII, the FMLA, and the ADA;
* Develop familiarity with social science research related to employment discrimination and bias, and understand how social science findings and theories differ from current employment discrimination doctrine;
* Identify and become familiar with the major sources of legal authority relevant to employment discrimination law, including statutes, administrative regulations, and interpretive guidance;
* Be able to:
	+ Identify relevant substantive law frameworks and apply them to factual situations, including identifying more than one legal framework that could apply to the same set of facts;
	+ Identify and explain the procedural challenges common to employment discrimination litigation, including pleading standards, standards of proof and inference, and discovery;
	+ Understand how to develop a litigation and discovery plan for fact-intensive employment discrimination claims;
* Learn how to use employment discrimination law to improve fair access to employment and to create a more just society.

**Assignments & Exercises:**

In addition to the final exam, during the semester we will complete several in-class exercises designed to test your ability to apply the material covered in class. **These exercises will not be graded.** They are intended to provide a collective opportunity to practice applying the analytical frameworks we learn in class to a question and set of facts similar to the exam. Exercises will be discussed in small groups then completed with the entire class participating.

In addition, students are expected to complete the reading assignments prior to class. A schedule of reading assignments appears below. I will use a modified on-call system, with a panel of students on call each week, so that all students have an opportunity to participate in class discussion. Other students are encouraged to participate in discussion when I seek volunteers even if they are not on call. If for some reason you cannot be on call on a particular day (e.g. jury duty), please let me know in advance. If you are on call and not prepared, please pass rather than waste the class’s time by trying to come up with something on the spot. I encourage you to ask questions, but I may have to postpone answering questions when necessary to keep the class on track; I will be happy to talk with you about those questions in office hours.

For those of you unable to buy the book at the start of the semester for financial or other reasons, the casebook pages for the first few days are posted on the bCourses page in the folder for the first week. I will also arrange for a copy of the casebook to be on reserve in the law library. Please bring your book (or equivalent) to class, you will need to refer to it.

**I. Introduction**

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| January 8* Introductory conversation.
* Legal theories v. social theories of discrimination.
* Krieger, The Content of Our Categories
* Sturm, Second Generation Employment Discrimination
 | **Krieger, read pp.1161-1217.****Sturm, read pp. 458-520.****Readings are posted on bCourses page.** |

**II. Individual Disparate Treatment Theory**

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| January 9* Intent to discriminate.
* Employment relation.
* Terms, conditions, or privileges of employment – adverse employment action.
 | **CB 1-14, 56-60**.* Skip note 3, p.5.
* Skip note 6, p.60.
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| January 16th, 22rd & 23rd **NOTE: NO CLASS JANUARY 15TH*** Proving discrimination.
* Burden shifting framework.
	+ Plaintiff’s prima facie case
	+ Defendant’s rebuttal
	+ Pretext
* Nuances of proving disparate treatment
 | **CB 14-56.****Skip the following:*** Note on Preferences for Older Workers, p.44.
* Note 6, p.50.
* Notes 4-5, p.55-56.
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| January 29th & 30st* Causation: Linking Bias to Adverse Employment Action
* Pulling individual disparate treatment standards together
 | **CB 61-91.****Skip the following:*** Note 11, p.78.
* Note 13, p.78.
* Note 17, p.80.
* Note on Evidentiary Issues about Admissions Testimony, p.80-82.
* Notes 3-4, p.87.
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| February 2th **FRIDAY*** Practice problem for IDT.
* **Make up class for February 20th (no class)**
 | We will go over a practice problem for applying IDT. |

 **III. Systemic Disparate Treatment**

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| February 5th & 6th * Formal policies of discrimination
* Pattern and Practice Discrimination Theories
 | **CB 93-113; 141-151 through note 1.****Skip the following:**Note 8 p.113. |
| February 12th & 13th * WalMart and the future of systemic theories
* Defenses to systemic theories
* **Possible Guest Speaker: Jocelyn Larkin of the Impact Fund, represented plaintiffs in the Walmart case.**
* **NO CLASS February 19th (holiday) or February 20th.**
 | **Skim Expert Report of William Bielby in WalMart (posted on bCourses page).****CB 113-118.****CB 131-140; 151-165.** |

**IV. Disparate Impact Theory**

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| February 26th * Intro to Disparate Impact Theories
* Note: as you read *Wards Cove*, be aware that the Civil Rights Act of 1991 legislatively overruled much of this decision as it applies to Title VII actions.
 | **CB 167-180; 182-183 (stop at “Plaintiffs’ Proof of a Prima Facie Case”).** |
| February 27th* Disparate Impact after the Civil Rights Act of 1991
 | **CB 183-202.*****McReynolds* [bCourses]** |
| March 5th* Defenses to Disparate Impact Theories
 | **CB 202-219.** |
| March 6th * Combining systemic theories.
* *Ricci*: the rock and the hard place.
 | **CB 219-224; 230-262.** |

**VI. Sexual and Other Harassment**

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| March 12th* Defining Sexual and Other Harassment
* **Recommended reading**: Laura Beth Nielsen, Situating Legal Consciousness: Experiences and Attitudes of Ordinary Citizens about Law and Street Harassment (2000).
 | **CB 326-337.****Nielsen article on bCourses page.** |
| March 13th * Sex, Sexual Orientation, and Gender Identity
* David Schwartz, When is Sex Because of Sex? The Causation Problem in Sexual Harassment Law [excerpt].
* **Possible guest Speaker Elizabeth Kristen, Legal Aid at Work**
 | **CB 275-306.****Schwartz article excerpt posted on bCourses page.** |
| March 19th & March 20th * Employer Liability for Sexual Harassment
* *Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004) [excerpt]
* **Recommended reading:** Beth A. Quinn, The Paradox of Complaining: Law, Humor, and Harassment in the Everyday Work World (2000).
 | **CB 337-368.****Penn. State Police v. Suders excerpt posted on bCourses page.****Quinn article on bCourses page.** |

**SPRING BREAK**

**VII. Pregnancy & Care Giving Under Title VII and the FMLA**

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| April 2nd and 3rd* Pregnancy and care giving under Title VII
* Stereotype theory revisited
 | **CB 306-325.****The following case excerpts posted on bCourses:*** ***Armstrong***
* ***Back***
* ***Chadwick***
* ***Garcia***

**Also read the EEOC Caregiving Guidance, posted on bCourses.** |

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| April 9th* Pregnancy and care giving under the FMLA
 | **Read for today and tomorrow the following cases posted on bCourses**:* ***Coleman***
* ***Hibbs***
* ***Pereda***
* ***Sanders***
* ***Amway.***

**Also read the FMLA selected provisions posted on bCourses.** |
| April 10th* Bringing gender theories together
 | **See above** |

**VIII. The Americans with Disabilities Act**

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| April 16th* Americans with Disabilities Act
* Individual with a disability
 | **CB 444-462.** |
| April 17th* Qualified individual with a disability
 | **CB 462-474.** |
| April 23th* Reasonable accommodation
 | **CB 474-495.** |
| April 24th* Undue hardship, special problems.
 | **CB 495-514.** |