Employment Discrimination Law  
Fall 2016  
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Koppelman Hall, Room 202  
Mondays and Wednesdays, 8:10 – 9:30 am  


Summary: In this class, we will study U.S. laws banning discrimination in employment, including Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and others. We will examine the law’s development over time, the role of the courts in interpreting the applicable statutes, the policy choices implicit in the law, and how these choices affect day-to-day practice by lawyers.  

Learning Outcomes: By the end of this class, you should be conversant in the basic substantive and procedural provisions of the federal anti-discrimination laws referenced above. You will know how the interpretation of these statutes has developed over time, as societal attitudes toward discrimination have changed. You will gain facility in analyzing real-life fact patterns to determine how these statutes may apply, so that you will be able to give useful and practical counsel to clients who are facing workplace discrimination or are defending against (or seeking to prevent) discrimination claims.  

Expectations: Please come to class prepared to discuss the assigned readings. In order to foster an atmosphere conducive to discussion, the use of cell phones, laptops, i-pads, and similar devices will not be allowed in class. Please print out copies of all supplementary readings and bring them to class, together with the textbook. Work outside class is expected to average at least six hours per week, which is the ABA minimum for a 3-credit course such as this.  

Grading: Grading will be based 90% on a final examination, and 10% on class preparation and participation. The final examination will consist of essays and short answers, and will test both substantive and analytical skills.  

In class participation, what matters is how thoughtfully you respond to the material and to your classmates. All points of view are welcome, and should be respected by everyone. No member of the class should be thought of as necessarily representing his or her race, sex, or group. All political views should be considered valid. To foster open discussions, classes may not be recorded.  

Attendance: The rules of the New York Court of Appeals, the American Bar Association, and the Law School all require that you must attend at least 85% of regularly scheduled classes. There will be a sign-in sheet at each class to document
attendance. The Law School will consider you to have withdrawn from the class if you miss more than 15% of classes—i.e., more than four classes. If you must be absent for more than four classes, you should contact the Office of Student Affairs. Accommodations will be made for students who must be absent for religious reasons or for compelling hardship. (See Classes 13 and 14!) Of course, if you want to learn about employment discrimination law and do well in this class, you should try your best not to miss any classes at all.

Please do not arrive late. If you must arrive late, then please do so in a nondisruptive way.

**Communications:** A course page will be set up on TWEN (The West Education Network). Supplemental readings will be posted there, and out-of-class communications will take place there. You must register on TWEN by August 21.

The best way to communicate with me is by email, at the address above. I will almost always get back to you within 24 hours. If you want to speak with me in person, we can set up an appointment before or after class.

**Class 1** Monday, August 22

Introduction—Overview of discrimination law
The background of discrimination law: Employment at will

*Readings:*

LED 1-2
Restatement of Employment Law §2.01

Questions to consider:
What are the rationales for the employment-at-will doctrine?
Are those rationales convincing?
What types of employment discrimination should be unlawful?

**Class 2** Wednesday, August 24

The post-Civil War civil rights laws

Introduction to Title VII of the Civil Rights Act of 1964
Historical context
Substantive provisions
Procedural provisions
LED p. 1137 (§703(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a))

Questions to consider:
Who had the stronger argument in Jones—the majority or the dissent? Why?

How is the wording of Title VII different from that of the post-Civil War civil rights laws?

If you were a senator in 1964, how would you have expected the courts to have interpreted the law?

Class 3 Monday, August 29

Early interpretations of Title VII
Race discrimination
McDonnell Douglas v. Green
Disparate treatment

Readings:  McDonnell Douglas Corp. v. Green, 411 U.S. 792
LED pp. 62-80 (Texas Dept. of Community Affairs v. Burdine)

Questions to consider:
How did the Supreme Court derive the McDonnell Douglas process from the statute?

Why did the Supreme Court reach the result that it did?

Is McDonnell Douglas fair to plaintiffs? Is it fair to defendants?

How does McDonnell Douglas affect the employment-at-will doctrine?
Class 4  Wednesday, August 31

The evolution of McDonnell Douglas

Readings:
LED 80-110  (St. Mary’s Honor Center v. Hicks; Reeves v. Sanderson Plumbing Products)

Questions to consider:
Who was right in Hicks—the majority or the dissent? Why?
Would the McDonnell Douglas court have agreed with Hicks? Why or why not?
What is the “pretext-plus” doctrine? Does it make sense?
Is Bennett fair to employers? To employees?
Why is it so important whether a party gets summary judgment?

Class 5  Wednesday, September 7

Disparate impact

Readings:  LED 267-72 (Griggs v. Duke Power Co.)
LED 275-86 (Connecticut v. Teal)

Questions to consider:
How did the Supreme Court derive Griggs from the statute?
Could Griggs have been decided based on McDonnell Douglas?
How would you define “business necessity”? 
Does the result in Teal make sense?

Class 6  Monday, September 12

National origin discrimination
Bona Fide Occupational Qualifications

Readings:  LED 386-91 (Espinoza v. Farah Mfg. Co.)  
Fragrante v. Honolulu, 888 F.2d 591 (9th Cir. 1989)  
LED 1138 (Section 703(e) of the Civil Rights Act of 1964)

Questions to consider:

When can it be a bona fide occupational qualification to speak without an accent?

For what kinds of jobs is it a BFOQ to be female? To be black?

For what kinds of jobs is it a BFOQ to be physically attractive?

Is it a BFOQ to be Chinese, if you’re hiring waiters for a Chinese restaurant?

Restaurant sign: “Se necesitan lavaplatos.” Ok?

Class 7  Wednesday, September 14

Sex discrimination  
Equal Pay Act  
Failure to conform with stereotypes  
Pregnancy discrimination  
Comparable worth

Readings:  LED 110-123 (Price Waterhouse v. Hopkins)  
LED 156-69 (UAW v. Johnson Controls)  
LED 399-404 (Willingham v. Macon Telegraph Publshg. Co.)  
AFSCME v. Washington, 770 F.2d 1401 (9th Cir. 1985)  
Chapter 177, Mass. Acts of 2016 (Act to Establish Pay Equity)

Questions to consider:

Can these cases be decided on the basis of Congress’s intent in 1964?

Can dress codes that differ by sex be defended?

Should “comparable worth” be a recognized legal doctrine?
Class 8  Monday, September 19

Sexual harassment—what is it?
Quid pro quo harassment
Hostile environment harassment

LED 182-99 (Meritor Savings Bank v. Vinson; Harris v. Forklift Systems)
LED 430-39 (Oncale v. Sundowner Offshore Services, Inc.)

Questions to consider:
Why didn’t Olga Monge claim sexual harassment under Title VII?

Does Title VII prohibit a bisexual employer from harassing both men and women in the same way?

To what extent is sexual harassment analogous to racial or religious harassment? To what extent is it different?

Class 9  Wednesday, September 21

Sexual harassment—the Faragher-Ellerth defense
Harassment on the basis of other protected categories
Training employees

Readings: LED 199-212 (Burlington Industries v. Ellerth)
Corporate policy on harassment

Questions to consider:

How did the Supreme Court arrive at the Faragher-Ellerth affirmative defense?

What policy purposes are served by the defense?

September 26—No class—Presidential debate
To be made up on a date to be arranged, with a visit by a plaintiff-side discrimination lawyer
Class 10 Wednesday, September 28

Workplace investigations
Simulation exercise

Readings:
EEOC Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors

Questions to consider:

How would you advise a corporate employer to investigate a complaint of sexual harassment?

How would you advise a sexually harassed employee to deal with an investigation by her company?

Class 11 Wednesday, October 5

The Age Discrimination in Employment Act
Mandatory retirement
Exceptions to the law
Early retirement incentives

Readings: LED 850-862 (General Dynamics Land Systems, Inc. v. Cline)
Auerbach v. Bd. of Educ., 136 F.3d 104 (2d Cir. 1998)
LED 1165 (ADEA §2)

Questions to Consider:

To what extent is age analogous to race? To sex?

Are early retirement incentives consistent with the stated purposes of the ADEA?

Class 12 Monday, October 10

Combining protected classes—e.g., “sex plus”

Readings: Gorzynski v. Jet Blue, 596 F.3d 93 (2d Cir. 2010)
Fisher v. Vassar College, 114 F.3d 1332 (2d Cir. 1997)
Questions to consider:
Does it make a difference if the “plus” category is not in itself protected by law?

If someone sues under multiple categories (e.g., an elderly Norwegian Presbyterian woman), how will that affect the chances of the employer obtaining summary judgment and avoiding a jury trial?

Class 13  Monday, October 17
Discrimination on the basis of religion
Accommodations to religion

Readings:  
LED 1136 (CRA of 1964, § 701(j), 42 U.S.C. § 2000e(j))  
LED 364-80 (TWA v. Hardison)  

Questions to consider:  
What is the relationship between accommodation and disparate treatment?  

Is the requirement to accommodate religion constitutional?

Class 14  Wednesday, October 19

The Americans with Disabilities Act
Accommodations to disability

Readings:  
LED 919-28 (Bragdon v. Abbott)  
LED 936-45 (Toyota Mfg., Kentucky v. Williams)  
LED 968-81 (U.S. Airways v. Barnett)  
N.Y. Exec. Law § 292(21) (Definition of “disability”)  

Questions to consider:  
What does “undue hardship” mean?  

If the definition of “undue hardship” is uncertain, how does that affect the conduct of employers and employees?
Class 15 Monday, October 24

Retaliation

Readings:  LED 229-37 (Payne v. McLemore’s)
          LED 245-56 (Burlington Northern & Santa Fe Railway v. White)
          LED 262-67 (Thompson v. North American Stainless, LP)

Questions to consider:

Should an employer be permitted to take action against an employee who invents a false claim of discrimination?

Should an employer be able to fire a Director of Human Resources who wants to strengthen the wording of the employer’s anti-harassment policy?

Class 16 Wednesday, October 26

Remedies

Readings:  LED 607-36 (Albemarle Paper Co. v. Moody; Ford Motor Co. v. EEOC)
          LED 642-43 (Front pay)
          LED 645-48 (Compensatory damages)
          LED 649-55 (Kolstad v. American Dental Association)

Questions to consider:

How does the availability of compensatory and punitive damages affect settlements?

Are discrimination cases easier to settle when they are new or when they are old? Why?

Class 17 Monday, October 31

Awards of attorneys’ fees

Readings:  LED 705-25  (Hensley v. Eckerhart; Christianberg Garment Co. v. EEOC)
          Townsend v. Benjamin Enterprises, 679 F.3d 41 (2d Cir. 2012)
Questions to consider:
  How does the prospect of attorneys’ fee awards affect the relationship between a plaintiff and her lawyer?

  If a plaintiff’s attorney agreed to accept a contingent fee, should the court award her an hourly fee?

Class 18  Wednesday, November 2

Litigation of discrimination cases I
EEOC investigations
Timeliness

Readings: Mach Mining LLC v. EEOC, 135 S.Ct. 1645 (2015)
LED 479-86 (Delaware State College v. Ricks)
LED 495-506 (Nat'l RR Passenger Corp. v. Morgan)

Questions to consider:
  Why did Congress create the EEOC?
  What is the purpose of a statute of limitations?

Class 19  Monday, November 7

Litigation of discrimination cases II
Court actions: discovery
Summary judgment
Settlement
Trial

Readings:
  FRCP Rule 68 (Offer of Judgment)
  Townsend v. Benjamin Enterprises, 679 F.3d 41 (2d Cir. 2012)

Questions to consider:
  Why don’t more discrimination cases get tried?

  As a plaintiff, who do you want on your jury?

  As a defendant, who do you want on your jury?
Class 20  Wednesday, November 9

Arbitration of discrimination claims
Issue preclusion effect of arbitration decisions

            Collins v. NYC Transit Authority, 305 F.3d 113 (2d Cir. 2002)

Questions to consider:
   Why do plaintiffs resist arbitration?
   Is arbitration less fair than a jury trial?

Class 21  Monday, November 14

Other civil rights laws
42 U.S.C. § 1983
New York State Human Rights Law

            Melzer v. NYC Bd. of Educ., 336 F.3d 185 (2d Cir. 2003)
            Jefferies v. Harleston, 52 F.3d 9 (2d Cir. 1995)

Questions to consider:
   Is Watts consistent with Melzer and Jefferies?
   Do Melzer and Jefferies mean that public employees have more limited First Amendment rights than other citizens?

Class 22  Wednesday, November 16

Sexual orientation discrimination
Gender expression and gender identity discrimination

Readings:
   Hively v. Ivy Tech Community College (7th Cir. 2016)
   NYC Commission on Human Rights: Legal Enforcement Guidance on Discrimination on the Basis of Gender Identity or Expression (2016)
Questions to consider:

How logical is the distinction between sex discrimination and sexual orientation discrimination?

Could protection of transgender people be derived from the Civil Rights Act of 1964?

Class 23  Monday, November 21

Political discrimination
Outside activities discrimination

New York Labor Law §201-d

Questions to consider:
Where does the distinction between policymakers and non-policymakers come from?

Is it Constitutional to protect religious beliefs but not political beliefs?

Class 24  Wednesday, November 23

“Reverse” discrimination
Affirmative action

Readings: LED 394-96 (McDonald v. Santa Fe Trail Transportation Co.)
LED 1139 (CRA § 703(j), 42 U.S.C. § 2000e-2(j))
LED 1054-94 (City of Richmond v. J.A. Croson Co.)
LED 1111-24 (United Steelworkers v. Weber)

Questions to consider:
What is the distinction between reverse discrimination and affirmative action?

How would you advise a client on the basis of Weber?
**Class 25** Monday, November 28

Discrimination on the basis of criminal convictions
"Ban-the-Box" laws

*Readings:* New York Corrections Law, §§ 750-755
NYC Commission on Human Rights: Enforcement Guidance on Fair Chance Act

Questions to consider:
Should an elementary school be permitted to discriminate against convicted murderers?

What is the connection between “ban-the-box” laws and race discrimination?

**Class 26** Monday, November 28

Discrimination under the National Labor Relations Act

Wright Line, 251 NLRB 1083 (1980)
NLRB v. Transportation Mgt., 462 U.S. 393 (1983)

Questions to consider:
Is there any practical difference between *Wright Line* and *McDonnell Douglas*?

How do the remedies under the National Labor Relations Act compare with the remedies under Title VII?

**Class 27** Wednesday, November 30

Backlash against discrimination laws

*Readings:* Fisher v. Vassar College, 114 F.3d 1332 (2d Cir. 1995)
Questions to consider:

What do you make of the Fisher court’s reference to “hatred for 42 year-olds, or animus against Romanians”?

Who is more convincing about “the way to stop discrimination”—Justice Roberts or Justice Sotomayor?

Class 28 Monday, December 5

Catch-up and review