

THE LAW AT WORK

EMPLOYMENT LAW FOR MANAGERS

**UNIVERSITY OF PENNSYLVANIA
THE WHARTON SCHOOL
LGST 208-401/MGT 247-401**

Location: JMHH 250

Wednesday: 3:00 P.M. – 6:00 P.M.

webCafé: <https://webcafe.wharton.upenn.edu/eRoom/lgst/208-sp10-1>¹

Professor: Deborah Weinstein

John M. Huntsman Hall, Legal Studies and Business Ethics Dept.

Office hours: Wednesday, 2:00-3:00 P.M., JMHH, 5th Floor, after class or by
appointment at THE WEINSTEIN FIRM

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Description

This course is based on the principle that knowledge and understanding of employment law facilitate (1) promotion of a workforce with a high degree of commitment to reaching business goals, (2) the development of practical business solutions to problems arising in the workplace, (3) effective human resources policy and procedures that comply with applicable laws. This course provides future business owners, entrepreneurs, executives, managers and students interested in going to law school or intending to enter the workforce with an introduction to the law of the workplace. The course examines the various employment laws with which businesses must comply and the legal rights and responsibilities of employees and employers. The emphasis is on laws concerning equal employment opportunity with respect to discrimination and harassment because of sex, race, national origin, religion, sexual orientation, age, disability and other characteristics protected by workforce laws; work-related security and privacy including workplace drug testing and electronic communications;

¹ Students who are from other schools at Penn [non-Wharton students] or who are new to the University may not initially have the Wharton computing account necessary to use webCafé. Students who are enrolled in the class but who do not yet have a Wharton computing account may create one using this site: <http://accounts.wharton.upenn.edu>.

affirmative action, the regulatory environment including wage and hour laws, leave of absence laws, recruiting and hiring regulations, the non-employee workforce, workers compensation, Sarbanes Oxley and whistleblower concerns, labor/management relations and collective bargaining.

Assigned Readings

Course materials will be posted on the webCafé throughout the semester. Readings are court opinions, laws and regulations, articles from the media and outlines of particular topics in employment law for managers. Many of the Readings listed on the Course Syllabus will not be assigned. There is no textbook for the course.

Exams and Grading

Class participation counts for 15% of your grade. There will be one midterm examination counting 30% and a final examination counting 30% of your grade. In addition, you will be responsible for a presentation to the class, either individually or as a group assignment, concerning a court opinion that addresses an employment law issue (counting 25% of your grade). A list of opinions from which you may choose will be distributed in class.

Class Preparation

The readings listed on the syllabus are subject to change. MANY of the readings listed will NOT be assigned. Final assignments will be announced prior to the class for which they are assigned. Final reading assignments for each class are mandatory. Any handout provided before class must be read before class because the discussion will focus on this material. Class preparation is crucial to meaningful class participation.

Topical Assignments

The assignments listed for each date are also subject to change as a result of course pacing, schedule changes or developments in the law. Some topics may not be covered.

COURSE SYLLABUS

Session #1 Jan. 13 Introduction: The New American Workplace

Course Introduction and Expectations, Employment at Will Rule, Sources of Employment Law, Employee/Employer Relationship, (Un)Employment & The Changing Legal Landscape - 2010.

READING²: *Quon v. Arch Wireless Operating Co.*, 529 F.3d 892 (9th Cir. 2008)(employer may not monitor employee's text messages without consent), *cert. granted*, *City of Ontario v. Quon*, 2009 WL 1146443 (Dec. 18, 2009); "Torture, Chrysler Cases Ended; 3 Grants,"³; *Lyle v. Warner Brothers TV Prods.*, 38 Cal. 4th 264 (Cal. Sup. Ct. 2006)("Friends" sitcom writers and Warner Brothers sued for sex harassment); *Woodson v. AMF Leisureland Ctrs., Inc.*, 842 F.2d 699 (3d Cir. 1988) (bartender fired for refusing to serve visibly intoxicated patron); "Cold Eagles Sure Are Thin-Skinned," Philadelphia Inquirer, March 9, 2009 (Eagles fire employee over Facebook vent about Brian Hawkins).

Session #2 Jan. 20 Who is Working Here?

Employee? Independent Contractor? Consultant? Temp? Joint Employer? Does It Matter?

READING: "Independent Contractor or Employee?" (IRS Publication 1779, IRS Rev. 1-2005); "Determination of Worker Status for Purpose of Federal Employment Taxes," Form SS-8;" *Universal Am-Can Ltd. v. WCAB*, 563 Pa. 480 (2000)(Are truckers employees or contractors?); "Strippers Sue to Be Classified as Employees, Not Independent Contractors," NLJ, June 9, 2009; "IRS Orders FedEx to Pay 319 Million," Dec. 23, 2007; "Will They Still Need Me, Will They Still Feed Me, Will I Still Be a Law Firm Partner. . . After I'm 64," Deborah Weinstein, Philadelphia Lawyer Magazine, Spring 2006 (EEOC action against Sidley Austin law firm over mandatory retirement).

Session #3 Jan. 27 Help Wanted: Filling that Job

Recruiting, Interviews, Job Applications, Job References, Background Checks, Investigation of Applicants Using Internet/Social Networking Sites, Medical Exams, I-9s and Drug Testing.

READING: *EEOC v. Consolidated Service Systems*, 989 F.2d 233 (7th Cir. 1993) (recruiting by word-of-mouth); Section 704(b) of Title VII (nondiscrimination protections for applicants); EEOC hiring regulations; OFCCP Internet Applicant Rule; Interviewing

² For Session #1, the **only reading assignment** is the court opinion in *Woodson v. AMF Leisureland Ctrs., Inc.*, 842 F.2d 699 (3d Cir. 1988). This court opinion for this case can be found at http://scholar.google.com/scholar_case?case=5345229437303352235&q=%22woodson+v.+amf+leisureland%22&hl=en&as_sdt=2003. All other Session #1 "Reading" is listed here merely because the lecture and discussion during the first class may include these topics. These readings will be assigned later in the semester.

³ <http://www.scotusblog.com/wp/torture-chrysler-cases-ended-3-grants/>

Dos and Don'ts; I-9 Employment Eligibility Verification Form; PA Statute - Employer Immunity from Liability for Disclosure of Employee Information (job references), 42 Pa.C.S. § 8340.1 (2006); NY Law "Unfair Discrimination Against Persons Previously Convicted," N.Y. CLS Correc § 752 (2006); Section 102(d)(2) of ADA (post-offer medical exams); "Employment Tests and Selection Procedures," EEOC Fact Sheet, Dec. 3, 2007; *EEOC v. Freeman Companies*, Civil Action No. 8:09-cv-02573 (Nov. 2009) (EEOC files suit over use of credit and criminal histories in hiring).

Session #4 Feb. 3 *Civil Rights in Employment*

Introduction to Equal Employment Opportunity Law: Protected Classes, What the Law Prohibits and Requires; Procedural/Jurisdictional Issues, Proving a Discrimination Claim, Management's Defenses (Business Necessity, BFOQ, RFOA), Disparate Treatment, Disparate Impact, Retaliation, Civil Rights Act of 1964, Civil Rights Act of 1991, Section 1981, Age Discrimination in Employment Act

READING: Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. §§2000e *et seq.*; EEOC Poster⁴: *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1972)(burden-shifting method of proof for disparate treatment case based on circumstantial evidence); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (claimant must show discrimination was "a motivating factor," not sole reason, for adverse employment action); 42 U. S. C. §§2000e-2(m) & 5(g)(2)(B); *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642 (1989)(overruled by the Civil Rights Act of 1991).

Session #5 Feb. 10 *Civil Rights in Employment (Continued)*

READING; *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971)(testing's disparate impact discrimination on Black employees); *Dothard v. Rawlinson*, 433 U.S. 321 (1977) (business necessity defense for height and weight standards); "Among Friends," Wall Street Journal, April 22, 2006; *Ash v. Tyson Foods*, 546 U.S. 454 (2006) (using "boy" as evidence of Section 1981 discrimination); *Brian Reid v. Google, Inc.*, Cal 6th Dist. Ct. of Appeals (Oct. 15, 2007)(summary judgment in age disparate treatment case); *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581 (2004)(ADEA favors older workers; no reverse age discrimination); *Gross v. FBL Financial Services Inc.*, 129 S. Ct. 2343 (2009) (ADEA plaintiff must prove that "but for" causation); Proposed H.R. 3721, Protecting Older Workers Against Discrimination Act (amending ADEA to clarify standards of proof).

Session #6 Feb. 17 *Other Discrimination and Duty to Accommodate*

READING: *Bergen Commercial Bank v. Sisler*, 723 A.2d 944 (N.J. 1999)(discrimination because of young age); "Got Religion? Accommodating Religion in the Workplace," Deborah Weinstein, Philadelphia Lawyer Magazine, Fall 2003; *TWA v. Hardison*, 432

⁴ http://www.eeoc.gov/employers/upload/eeoc_self_print_poster.pdf.

U.S. 63 (1977)(religion); *Burlington Northern & Santa Fe Railway Co. v. White*, 126 S. Ct. 2405 (2006)(retaliation); Section 2000e-3 of Title VII, Retaliation, Participation and Opposition Clause; *Sutton v. United Air Lines*, 527 U.S. 471 (1999)(ADA disability determination made *with regard to* mitigating measures); 2008 Amendments to the Americans With Disabilities Act (overruling *Sutton* holding disability determination made *without regard to* mitigating measures); Proposed Employment Non-Discrimination Act (ENDA)⁵.

*Session #7 Feb. 24 **Being a Jerk is Not Unlawful Harassment: What Is?***

READING: *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. (1986) (a hostile work environment is a form of sex discrimination); *Farragher v. City of Boca Raton*, 524 U.S. 775 (1998) (employer defenses to harassment claims); “Communication is Critical to Avoiding Sexual Harassment,” Deborah Weinstein, Philadelphia Business Journal, April 22, 2005; Sample sexual harassment policy; Investigation into harassment complaints; *Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004)(constructive discharge). “Vicarious Employer Liability For Unlawful Harassment By Supervisors,”⁶

Midterm Examination Handed Out in Class.

Session #8 March 3

Part I: Beyond Equality: Affirmative Action and Reverse Discrimination

READING: *Kohlbeck, City of Omaha, Nebraska*, 447 F.3d 552 (8th Cir. 2006); *Taxman v. Board of Ed. of Tnshp of Piscataway*, 91 F.3d 1547 (3d Cir. 1996); “Desperately Seeking Diversity,” Deborah Weinstein, Philadelphia Lawyer Magazine, Summer 2003; Executive Order 11246; *Ricci v. DeStefano*, 120 S. Ct. 2658 (2009)(New Haven could not set aside firefighters’ test results because those who earned promotion were all white).

Part II: Equal Pay for Equal Work and other Gender-Related Issues

READING: *Lilly Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162 (2007); Lilly Ledbetter Fair Pay Restoration Act of 2009; *EEOC v. Joe’s Stone Crab, Inc.*, 220 F.3d 1263 & 296 F.3d 1265 (11th Cir. 2002) (Should boys be pirates and girls be wenches?)

Midterm Examination Due in Class.

March 10 No Class [vacation]

⁵ <http://www.hrc.org/12973.htm>

⁶ <http://www.eeoc.gov/policy/docs/harassment.html>

Session #9 March 17

To be announced.

Session #10 March 24 ***What If Following Management and Customer Preferences Would Cause a Disparate Impact on a Protected Class?***

READING: *Playboy Bunny & Hooters*; “Man sues ‘The Apprentice’ and Trump over alleged age discrimination,” UPI, Jan. 1, 2007; “The Look of Abercrombie & Fitch,” cbsnews.com; “Abercrombie & Fitch Employees Allege Promotions Based on Looks,” Dallas Morning News, Aug. 27, 1008; *Wilson v. Southwest Airlines*, 517 F. Supp. 292 (N.D. Tex. 1981) (Love Airlines); “Youth, good looks a gold mine on LV Strip,” Las Vegas Sun, May 19, 2006; “Casting Calls May Violate Federal Law,” Los Angeles Times, Nov. 30, 2006. *Jespersion v. Harrah’s Operating Co.*, 444 F.3d 1104 (9th Cir. 2006)(requiring female employees to wear makeup); “White Men Can’t Help It,” Business Week, May 15, 2006; *Diaz v. Pan Am World Airways, Inc.*, 442 F.2d 385 (5th), *cert. denied*, 404 S.Ct. 275 (1971)(customer preference may only be taken into account where it affects company’s ability to perform primary necessary function or service, not tangential aspect); *Bradley v. Pizzaco of Nebraska, Inc. d/b/a/ Domino’s Pizza*, 7 F3d 795 (8th Cir. 1993), *cert. denied*, 502 U.S. 1057 (8th Cir. 1993)(requiring male employees to be clean shaven may be discriminatory).

Session #11 March 31 ***The Wired World at Work***

Employee Privacy, Employer Security, Surveillance and Monitoring (phone, email, blogging, texting, IMing, videos, photos and other electronic communications)

READING: *Smyth v. The Pillsbury Company*, 914 F. Supp.3d 97 (E.D. Pa. 1996) (no expectation of privacy in contents of employee’s email sent over company email system); *Quon v. Arch Wireless Operating Co.*, 529 F.3d 892 (9th Cir. 2008)(employer may not monitor employee’s text messages without consent), *cert. granted*, *City of Ontario v. Quon*, 2009 WL 1146443 (Dec. 18, 2009); *Doe v. Cahill*, 884 A.2d 451 (Del. 2005) (discoverability from ISP of identify of allegedly defamatory post of anonymous blogger); “Acquisitive Craigslist Post Reddens Faces All Around,” New York Times, Oct. 8, 2007.

Session #12 April 7 ***The Organized Workforce: Unions in America***

Overview of Collective Bargaining and Unionized Employees.

Guest Lecturer: Robert J. Haurin, Esquire

READING: To be announced.

*Session #13 April 14 **Laws Protecting Workers***

Part I: Fair Labor Standards Act and Pay Issues

Guest Lecturer: Randall C. Schauer, Esquire

READING: Department (DOL) FLSA Summary; DOL Fair Pay Fact Sheet #17A: Exemption for Executive, Administrative, Professional, Computer and Outside Sales Employees; DOL Fair Pay Fact Sheet #17M: Financial Services Industry Employees and Part 541 Exemptions; *IBP, Inc. v. Alvarez*, 126 S. Ct. 514 (2005); "Wage Wars," Business Week, Oct. 1, 2007, pp. 50-58.

Part II: Leaves of Absence, Pregnancy Discrimination and Employees with Caregiving Responsibilities

READING: DOL Fact Sheet #28: The Family and Medical Leave Act of 1993; *Ragsdale v. Wolverine World Wide*, 543 U.S. 1053 (2001); *Sarnowski v. Air Brooke Limousine, Inc.*, No.06-2144 (Dec. 12, 2007, 3d Cir.)(interference with FMLA rights); "Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities," EEOC Notice No. 915.002, May 23, 2007; *UAW v. Johnson Controls*, 499 U.S. 187 (1991)(Pregnancy Discrimination Act).

*Session #14 April 21 **What Sarbanes-Oxley Means to the Worker***

READING: To be announced.

Final Exam