EMPLOYMENT DISCRIMINATION
University of Colorado Law School, Spring 2012
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I. COURSE DESCRIPTION & OVERVIEW OF “EMPLOYMENT DISCRIMINATION”

Until a few decades ago, employees could not sue employers except on very limited common law grounds: tort liability for only the most egregious misconduct; and contract liability only where employer and employee agreed on certain specified terms of employment. In recent years, however, employment litigation has become a substantial portion of court dockets, primarily under the anti-discrimination statutes that began with the Civil Rights Act of 1964 and became a major field of practice only upon enactment of further major statutes in the early/mid-1990s. Today, numerous statutes require nondiscriminatory treatment, and sometimes affirmative accommodation, of certain employees.

This course is called “employment discrimination,” but it covers three related topics:

(1) **The phenomenon of employment discrimination.** This topic is best explained as a series of questions. Why do people discriminate? How has our conception of “equal opportunity” broadened (e.g., to include accommodation of disabilities and family medical needs) over the years? Has it gone too far? Not far enough? Too far in some areas, not far enough in others? Some of these are not purely “legal” questions – but courts, attorneys, and employers have come to apply and interpret employment discrimination laws very differently based on their answers to these key questions.

(2) **The law of employment discrimination.** We will study the discrimination laws that have come to regulate employment relationships. How does an employee’s attorney bring and prove a charge, and how does an employer’s attorney defend against it? What is the line between “discrimination” or “harassment” and permissible, if rough, treatment? When if ever do discrimination principles force employers to accommodate certain employees (e.g., those with disabilities or family responsibilities), bear real costs (e.g., lose customers or alter equipment), or otherwise alter their workplace practices (e.g., anti-harassment measures)?

(3) **The legal practice area of employment discrimination.** This is a young field of law; only after the Civil Rights Act of 1991 did “employment discrimination” truly come into its own as a widespread practice area for large numbers of attorneys – which may not seem “recent” to many students, but compare tort law, which has enjoyed centuries of common-law development of its rules and doctrines. Because the field of law is relatively new, it features many unsettled (and ideologically charged) legal issues. This uncertainty can be frustrating but also exciting, and it certainly gives us a great deal to study and discuss.

II. APPOINTMENTS, EMAIL, & PHONE

Email is the best way to reach me. I have no pre-set office hours (when I did, they almost never were used); feel free to visit my office anytime (I am there most weekdays), but emailing in advance can assure I am there at a particular time.

III. TWEN – SIGN UP BY END OF FIRST WEEK

Sign up by noon Friday, January 20, 2012, for the course TWEN (Westlaw) page, which I will use to email reading assignments weekly, post reading handouts, etc. If you do not sign up, you will not receive the reading assignments.

IV. CLASS PARTICIPATION

Because doing the reading and participating in class matter, I like to mix cold-calling (especially if I haven’t heard from you in a while) with calling on volunteers. If you are unprepared when called on, (1) just say so, don’t make something up, and (2) expect to be called on in an upcoming class (which I do to give you a second chance). If you have a reasonable excuse for being unprepared or absent, it is in your interest to let me know before class so that I (1) will know a reason other than lack of interest and (2) won’t call on you while unprepared.

V. GRADING

A. **Final Exam, But No Midterm**

There will not be a midterm, just a final exam. Your final exam grade is your presumptive course grade, subject to the plus/minus factor detailed below. The final exam will occur at the scheduled time but most likely with the following two-part, extended-duration (roughly 3½ to 4 hours) format (though I reserve the right to change the format during the semester): (1) a multiple choice test of roughly 20-25 questions (open-book, scan-tron; probably about 1 hour); and, after a short break, (2) a traditional “issue-spotter” essay question (open-book, typing mandatory; probably about 2½ hours).

B. **Participation Plus/Minus Factor**

I run a discussion-based class, because I see that as the best way to learn this material. Discussions only work if people discuss, so I consider class participation in grading. Specifically, your grade may rise or fall one-half notch or one
full notch based on your class participation: if your final exam grade is B, your course grade probably will be B, but (1) you might drop as low as B- for weakness in your participation (which includes attendance, because you cannot participate if you are not there), and (2) you might rise as high as B+ if your participation is especially strong. Application of the plus/minus factor is the exception, not the rule. Frequent participation does not guarantee a grade boost, so the vast majority of you who receive no boost should not think I had some problem with your participation.

C. Serious Attendance Problems

While attendance ordinarily affects only your plus/minus factor, classroom learning and discussion are critical to learning this subject, so a serious, ongoing lack of attendance may have more significant consequences, like a further grade decrease (i.e., beyond the one-notch plus/minus factor) or, in extreme cases, a failing grade for the course. Absent special circumstances, you will receive notice and an opportunity to remedy the situation (e.g., an email about the grade decrease) before any consequences beyond the one-notch plus/minus factor.

VI. COURSE MATERIALS & READING ASSIGNMENTS

- The casebook is Employment Discrimination Law (Avery, Ontiveros, Corrada, Selmi, and Hart; 8th ed. 2010), abbreviated “CB” below. I also will distribute various handouts, many listed below, throughout the semester.

- Following are the assignments for the first two classes; assignments for all other classes will be posted via TWEN.

  Class #1: CB 10-20 (through n.3); 92-98 (through end of Furnco), 118-123 (just majority op).
  Class #2: CB 124-130 (n.1-4 & 7-8); 134-142 (just the case); 145 n.5; 151 n.1; 154-155 (n.4-6).

A. INTRODUCTION & FEDERAL LAW OVERVIEW (11p)

  CB 10-20 (through n.3)

B. THEORIES OF DISCRIMINATION (276p)

  1. INTENTIONAL DISCRIMINATION (184p)

     a. INDIVIDUAL DISPARATE TREATMENT (38p)

        i. BASIC BURDENS OF PROOF & “PRETEXT” ANALYSIS (16p)

            CB 92-98 (through end of Furnco), 118-123 (just majority op), 124-130 (n.1-4 & 7-8)

        ii. “MIXED-MOTIVE” CLAIMS (10p)

            CB 134-142 (just the case), 145 n.5, 151 n.1, 154-155 (n.4-6)

        iii. SELECTED PRESUMPTIONS & ISSUES OF PROOF (12p)


     b. RETALIATION (28.5p)

        i. BASIC BURDENS OF PROOF (5p)

            CB 159-164

        ii. “PROTECTED ACTIVITY” (8p)

            CB 164-167 (through n.2), 168-174 (case through block quote on 174), 176-177 (case & n.1)

        iii. CAUSATION (3.5p)

            CB 191-195

        iv. ADVERSE ACTION (12p)

            CB 178-189

     c. SYSTEMIC (PATTERN-OR-PRACTICE) DISPARATE TREATMENT (34p)

            CB 195-213 (through n.8), 336-340 (just the case); Handout, Wal-Mart Stores v. Dukes (2011)

     d. HOSTILE WORK ENVIRONMENTS & HARASSMENT (83.5p)

        i. BASIC BURDENS OF PROOF, & SEX HARASSMENT (24p)

            CB 500-526 (though n.12, but skip: Ginsburg op on 512; n.9 on 521; part (c) of n.11 on 524-25)

        ii. RACE HARASSMENT (7p)

            CB 591-597 (through end of 597)

        iii. SEX STEREOTYPING, SEX TARGETING, & SAME-SEX HARASSMENT (12.5p)

            CB 348-351 (just the case), 531-534 (n.2-7), 477-84

        iv. VICARIOUS LIABILITY & EMPLOYER DEFENSES (25p)

            CB 539-548, 557-570 (through n.9), 550-552 (n.3)
v. CONSTRUCTIVE DISCHARGE (8.5p)
   CB 574-583 (just the case & n.1-8 thereafter)

vi. COWORKERS, SUBORDINATES, CUSTOMERS, & CONSENSUAL RELATIONSHIPS (6.5p)
   CB 553-557 (note, claims from consensual relationships), 585-588 (n.1-4)

2. DISPARATE IMPACT (44.5p)
   i. THE FORMATIVE EARLY CASES (15p)
      CB 218-223 (just the case), 228 n.9, 231-235 (just the case), 239-244 (just the case)
   ii. LEADING RECENT EXAMPLES (29.5p)
      CB 254-264 (just the cases), 267-287 (just the case)

3. BONA FIDE OCCUPATIONAL QUALIFICATION (“BFOQ”) DEFENSES (24p)
   CB 358-75 (through n.2), 376-379 (n.7-9), 381-385 (note, privacy-based BFOQ)

4. AFFIRMATIVE ACTION (23.5p)
   CB 880-91; 893-895 (n.3-4), 908-919 (just the case)

C. SELECTED GENDER/SEX-RELATED ISSUES (69.5p)

1. FAMILY RESPONSIBILITIES, PREGANANCY, & PARENTHOOD (24p)
   CB 407-419 (top of 407 to n.8 on 419, but skip n.1 on 415), 421 n.12, 433-442 (through n.3), 443-444; Handout – “Demand Letter” in Cesto v. Flox News Network, Inc.

2. SEXUAL ORIENTATION & GENDER IDENTITY (23p)
   CB 457-460 (through first paragraph on 460), 465-466 (n.3-6), 468-476 (through n.3), 478-487 (through n.6, but skip n.1 on 484-485), 489-490 n.1

3. THE EQUAL PAY ACT (22.5p)
   CB 600-622 (through n.3 on 622, but skip n.5 on 614)

D. NATIONAL ORIGIN & IDENTITY (14.5p)
   CB 42-44 (paragraph before case through end of case), 47-49 (n.1-3), 684-88 (through end of case), 694 (note, national origin & BFOQ), 696-700 (through end of majority op), 706 (just the paragraph under header “D”), 724 (just the paragraph under header “3”), 729-730 (n.1-2)

E. RELIGION (24.5p)
   CB 634-659 (from 634 n.2 to end of case on 659; skip n.5-6 on 646, & skip dissents on 655 & 659)

F. AGE (40p)
   CB 733-750 (through n.4), 756-760 (just majority op), CB 764-775, 785-787 (just majority op), 793 n.13, 794-799 (through 1st paragraph on 799)

G. DISABILITY (54.5p)
   1. OVERVIEW & THE MEANING OF DISABILITY “DISCRIMINATION” (19.5p)
      CB 801-819 (through end of majority op), 826 n.4
   2. DEFINING “DISABILITIES” (16.5p)
      CB 834-851
   3. QUALIFICATIONS, DIRECT THREATS, & UNDUE HARDSHIPS (18.5p)
      CB 851-855, 856-857 n.4, 857-859 (note, threat to worker’s own health), 859-860 n.4, 860-866 (through n.2), 867 n.4, 868-873

H. LITIGATION PRACTICE & PROCEDURE (31p)
   1. STATUTES OF LIMITATIONS & EXHAUSTION OF ADMINISTRATIVE REMEDIES AT THE EEOC (7.5p)
      CB 20-25 (starting with header “C” and ending before “b”), 36-37 n.4-8, 38 (just the first paragraph after header “2”), 40 (just the last paragraph on the page)
   2. REMEDIES: DAMAGES; INJUNCTIVE & DECLARATORY RELIEF; & ATTORNEYS’ FEES (20p)
      CB 65-84
   3. PREDISPUTE MANDATORY ARBITRATION (3.5p)
      CB 927 (just the first paragraph following header “1”), 939-940 n.3, 942 n.8, 942-944