

THE LAW AT WORK

EMPLOYMENT LAW FOR MANAGERS

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

Location: 345 JMHH

Wednesday: 3:00 P.M. – 6:00 P.M.

<https://webcafe.wharton.upenn.edu/eRoom/lgst/208-sp12-1>

Professor: Deborah Weinstein, Esquire

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

Office hours: Wednesday, 2:00-3:00 P.M., after class or by appointment,

JMHH, 5th Floor, Room 652, or at

The Weinstein Firm, 1800 John F. Kennedy Boulevard, Suite 1720, Philadelphia

dweinstein@weinsteinfirm.com [students please use this email address]

Telephone: 215-636-0616 (office); 215-498-6338 (mobile)

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. Balancing employer legal compliance and equal employment opportunity imperatives with dynamics conducive to a successful enterprise is a significant theme throughout the course. 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 investigations, drug testing, violence, safety and electronic communications; employee misclassification; affirmative action; and the legal

and regulatory environment regarding immigration, wage and hour, leaves of absence, hiring, the non-employee workforce, whistle blower 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 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 SYLLABUS¹

Session #1 Jan. 11 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 - 2012.

READING²: *City of Ontario v. Quon*, 130 S.Ct. 2619 (2010)(U.S. Supreme Court rules against employee privacy of texting on employer issued devices); *Lyle v. Warner Brothers TV Prods.*, 38 Cal. 4th 264 (Cal. Sup. Ct. 2006)(“Friends” sitcom writers sue Warner Brothers for harassment); *Woodson v. AMF Leisureland Ctrs., Inc.*, 842 F.2d 699 (3d Cir. 1988) (bartender fired for refusing to serve visibly intoxicated patron); “Some Workers’ Facebook Beefs Are Protected by Federal Law, NLRB Concludes,” http://www.abajournal.com/news/article/some_workers_facebook_beefs_are_protected_by_federal_law_nlr_b_concludes (August 31, 2001); “Abercrombie & Fitch Sued Over Head Scarf Firing,” Silicon Valley Business Journal, June 30, 2011.

Session #2 Jan. 18 Who is Working Here?

Employee? Independent Contractor? Consultant? Intern? Volunteer? Why Does It Matter?

READING: “Independent Contractor or Employee?” (IRS Pub. 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; *Kirleis v. Dickie McComey, PC*, No. 09-4498 (3rd Cir. July 15, 2010); *Weir v. Holland & Knight*, N.Y. Sup. Ct., Dec. 9, 2011 (are partners or shareholders employers or employees under discrimination laws?); “Statement of Seth D. Harris before the Committee on Health, Education, Labor and Pensions, U.S. Senate,” June 17, 2010 (proposed Employee Misclassification Act and stepped up enforcement); *Fact Sheet #71: Internship Programs Under the Fair Labor Standards Act*, U.S. Wage and Hour Div., April 2010.

¹ Readings for each session will be selected from the materials listed herein.

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 opinion can be found at http://scholar.google.com/scholar_case?case=5345229437303352235&q=%22woodson+v.+amf+leisureland%22&hl=en&as_sdt=2003.

Session #3 Jan. 25

Part I. Help Wanted: Filling that Job

Job Applications, References, Background Checks, Investigation of Applicants, Discriminatory Hiring, Use of Internet/Social Networking Sites, Medical Exams 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 Dos and Don'ts; 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); ADA Section 102(d)(2) (post-offer medical exams); *EEOC v. Freeman Companies*, No. 09-02573 (Nov. 2009) (EEOC suit over using credit and criminal histories in hiring); "Scrub, Inc. To Pay 3 Million to Settle EEOC Racial Discrimination Suit," EEOC Press Release, Nov. 9, 2010 (alleging janitorial service failed to recruit/hire African Americans).

Part II. Immigration Laws and Employment

Stepped up enforcement, unauthorized workers, non-immigrant/temporary visas, green cards, citizenship, H-18 labor conditions, application and worksite compliance (I-9s, E-Verify and Social Security no match letters).

Guest Lecturer: Jen Hermansky, Esquire, Klasko, Rulon, Stock & Seltzer, LLP

Readings to be announced.

Session #4 Feb. 1 Civil Rights in Employment

Introduction to Equal Employment Opportunity Law: Protected Classes, What the Law Prohibits and Requires; Procedure/Jurisdiction, Proving Discrimination, Management's Defenses (Business Necessity, BFOQ, RFOA), Disparate Treatment and Impact, Retaliation, Civil Rights Act of 1964 as amended, 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 Poster³: *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. 8 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/weight standards); "Among Friends," Wall Street Journal,

³ http://www.eeoc.gov/employers/upload/eeoc_self_print_poster.pdf.

April 22, 2006; *Ash v. Tyson Foods*, 546 U.S. 454 (2006) (“boy” as evidence of discrimination); *Brian Reid v. Google, Inc.*, 235 P.3d 988, 50 Cal.4th 512 (Cal. 2010) (“stray remarks, alleged discriminatory comments made by non-decisionmakers and coworkers, as admissible evidence); *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 “but for” causation); Proposed H.R. 3721, Protecting Older Workers Against Discrimination Act (to amend ADEA to clarify standards of proof); *Hodczak v. Latrobe Specialty Steel Company*, No. 11-1085 (Nov. 17, 2011)(workers’ explicit emails, not age, led to discharge).

Session #6 Feb. 15 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 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*); Proposed Employment Non-Discrimination Act (ENDA);⁴ “GAP Unlawfully Fired Employee With Disability, EEOC Charges,” EEOC Press Release, Nov. 19, 2010 (alleging manager with kidney disease terminated despite excellent performance).

Session #7 Feb. 22 Being a Jerk is Not Unlawful Harassment: What Is?

READING: *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. (1986) (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). EEOC Guidance “Vicarious Employer Liability For Unlawful Harassment By Supervisors,”⁵ “It’s Complicated: Mixing Romance and Work,” Deborah Weinstein, Philadelphia Lawyer Magazine, Winter 2011.

Midterm Examination Handed Out in Class.

⁴ <http://www.hrc.org/12973.htm>

⁵ <http://www.eeoc.gov/policy/docs/harassment.html>

Session #8 Feb. 29

Part I: Beyond Equality: Affirmative Action and Reverse Discrimination

READING: *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) (prohibiting New Haven from setting aside firefighters’ test results where all earning promotions were Caucasian); *OFCCP v. O’Melveny & Myers LLP*, DOL AOLJ, No. 2011-OF-00007 (October 31, 2011)(DOL administrative law judge concludes law firm is federal contractor judge to OFCCP jurisdiction).

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?); *Jespersion v. Harrah’s Operating Co.*, 444 F.3d 1104 (9th Cir. 2006)(requiring female employees to wear makeup).

Midterm Examination Due in Class.

March 7 No Class [vacation]

Session #9 March 14 **When the Employment Relationship Ends**
To be announced.

Session #10 March 21 **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, 2008; *Wilson v. Southwest Airlines*, 517 F. Supp. 292 (N.D. Tex. 1981) (Love Airlines); “Casting Calls May Violate Federal Law,” L.A. Times, Nov. 30, 2006; *Diaz v. Pan Am World Airways, Inc.*, 442 F.2d 385 (5th), cert. denied, 404 S.Ct. 275 (1971)(customer preference only where it affects company’s ability to perform primary necessary function or service, not tangential aspects); *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); *Chaney v. Plainfield Healthcare Center*, No. 09-3661 (July 20 7th Cir. 2010)(racial preferences may not determine work assignments).

*Session #11 March 28 **The Wired World at Work***

Employee Privacy, Employer Security, Surveillance and Monitoring (phone, email, Facebook, blogging, Utube, videos, photos, etc.); Employer's social media policies

READING: *Smyth v. The Pillsbury Co.*, 914 F. Supp.3d 97 (E.D. Pa. 1996) (no expectation of privacy in contents of employee's email sent over company email system); *City of Ontario v. Quon*, 130 S.Ct. 2619 (2010) (U.S. Supreme Court rules against employee privacy of texting on employer issued devices); "Acquisitive Craigslist Post Reddens Faces All Around," New York Times, Oct. 8, 2007; "Google Admits It 'Mistakenly' Captured E-Mails, E-Mail Addresses, Passwords," Corporate Counsel, October 25, 2010
Guest Speaker: Margaret DiBianca, Esquire, Young, Conway, Stargatt & Taylor LLP

*Session #12 April 4 **The Organized Workforce: Unions in America***

Overview of Collective Bargaining and Unionized Employees

Guest Lecturer: Robert J. Haurin, Esquire, The Weinstein Firm

READING: "How the National Labor Relations Act Affects Non-union Employees," Deborah Weinstein and Robert J. Haurin, *The Legal Intelligencer*, July 17, 2009; "An Employer's Guide to Real Political Activity at Work," Deborah Weinstein and Robert J. Haurin, *Phil. Business Journal*, October 24, 2008. Other reading to be announced.

*Session #13 April 11 **Laws Protecting Workers***

Part I: Fair Labor Standards Act and Pay Issues

READING: Department of Labor (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); "Remarks for the Honorable Hilda L. Solis, Secretary of Labor, "Treating In-Home Caregivers as Professionals," Dec. 15, 2011.

Guest Lecturer: Pete Winebrake, Esquire, The Winebrake Law Firm, LLC

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

READING: DOL Fact Sheet #28: The Family and Medical Leave Act; *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 20 **Whistle Blower Laws.** **READING:** To be announced.*