Employment Law Syllabus
Fall 2015

Professor Sandra Sperino
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Office: Room 412
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Class Meeting Time: Tuesdays and Thursdays, 10:40-12:05 (Room 302)

Office Hours: I enjoy speaking with students outside of class. I have an open door policy and students are invited to stop by my office any time my door is open. Students are encouraged to schedule individual appointments by email, and I will find a mutually agreeable time to meet. In addition, I am also available by telephone or email.

Course Goals: In class, we will be trying to reach three interrelated goals. First, by the end of the course, students will be expected to do the following: identify the legal issues that arise in employment law; know the doctrine and policy that would apply to those issues; apply the doctrine and policy to a particular problem; and predict the outcome. Second, students should understand the practical aspects of providing legal advice in the employment context. Finally, students will be expected to understand the theories that undergird employment law and know how to stretch the law by employing history, theory, policy, and legal argument.

Grading and Class Participation: Your grade will be based on a final, take home exam. In addition, I reserve the ability to raise a student’s grade for exceptional class participation. Likewise, I reserve the ability to lower a student’s grade for lackluster participation or numerous absences.

During the exam, students will be allowed to use any texts assigned for the course, class notes, and any notes or outlines in which they substantially participated in preparing. Commercial study aides and other materials may not be used during the final exam in any manner.

During the first week of classes all students will be considered on-call. After the first week of class, students will be divided into two groups. The first group will be on-call for the second week of class, and the second group will be on-call for the third week of class. The groups will then alternate responsibility for being on-call. Students who are on call during a particular week are expected to be prepared to discuss the reading assignment and topics addressed therein. I reserve the right to count a student as absent on a day where the student is on call and fails to adequately participate in or prepare for class.

Despite a common misperception, being on-call is not designed as a punishment or to embarrass students. As a lawyer, you will be required to demonstrate knowledge to your colleagues, your clients, and judges. The on-call system is designed to help practice and develop these skills.
Attendance: The reading assignments will serve as background information for class discussions, **which will incorporate information outside the required reading.** Therefore, students are highly encouraged to attend class.

Any student who misses more than four classes may be required to withdraw from the class or may not be allowed to take the final exam. Students who may miss more than four days of class for reasons such as illness or family emergencies are encouraged to talk to me (ideally prior to the absences).

**Disability Disclosure Statement:** The College of Law is committed to accommodating students who have disabilities. Students should contact Dean Nancy Oliver, who serves as a liaison between the College of Law and the Disability Services Office, regarding accommodations.

**Assignments:**

The primary text assigned for this class is Willborn, Schwab, Burton & Lester, *Employment Law: Cases and Materials* (5th ed.) (hereinafter “Willborn”).

Supplemental Materials are available on TWEN. In addition to Socratic method, this course uses problems to review substantive material and illustrate how legal issues will arise in a practical context. The Supplemental Materials often contain exercises. Students are expected to come to class fully prepared to discuss exercises.

The following reading schedule is the target for each day’s class discussion. At times, due to student questions or particular difficulty with a topic, we may not complete all of the anticipated material for a particular class. Unless otherwise directed, students will be expected to be prepared the following class day to discuss both the assigned reading for the particular day and the reading from the prior class that was not covered.

**Class 1 (August 25)**

**Unit:** The Employment Relationship

**Topic:** Defining the employment relationship

Read the syllabus; Willborn, pp. 3-11. Supplemental Materials, pp. 1-4; Willborn, pp. 47-58; Willborn, pp. 13-30 (We will study these cases in the order listed here.)

Study Questions: What is the default rule governing employment relationships in most states? Has this always been the default rule? Is at will employment a legal requirement or is it a policy choice?
Class 2 (August 27)
Unit: The Employment Relationship
Topic: Defining the employment relationship
Continue discussion from prior class; Willborn, pp. 35 (beginning with section C)-44 (do not read last two paragraphs on p. 44); Supplemental Materials, pp. 5-27.

Study Questions: What factors distinguish employment relationships from other relationships that relate to work? What are the various tests for determining whether someone is an employee? As we explore various tests, consider why the tests differ from one another. Some of the definitions of “employee” are rules and others are standards. Why do you think this is?

Class 3 (September 1)
Unit: The Employment Relationship
Topic: Defining the employment relationship

Study Questions: Are current definitions of employee sufficient to account for most individual’s work status? Who is in the best position to define employment relationships? The government? Employers? The market? Start making a list of the exceptions to at-will employment.

Class 4 (September 3)
Unit: The Employment Relationship
Topic: Erosion of at-will employment
Willborn, pp. 90-116; Supplemental Materials, p. 29.

Study Question: Continue your list of exceptions to at-will employment.

Class 5 (September 8)
Unit: The Employment Relationship
Topic: Erosion of at-will employment

Study Questions: What are the major tort exceptions to the at-will employment presumption? Should courts be declaring public policy? Are legislatures better able to declare public policy? What variations exist in state law?
Class 6 (September 10)
Unit: The Employment Relationship
Topic: Erosion of at-will employment

Study Questions: What are the elements of a retaliation claim under Title VII? What are the pros and cons of recognizing a claim for IIED based on workplace conduct? Should we retain the at-will presumption?

Class 7 (September 15)
Unit: The Employment Relationship
Topic: Continuing viability of at-will employment

Unit: Employee Duties, Promises and Rights to Intellectual Property
Topic: Duty of Loyalty and Trade Secrets
Willborn, pp. 333-352; Supplemental Materials, pp. 41-45.

Study Questions: What stage of the litigation process is especially important in trade secret cases? What strategies would you advise a client to take to protect confidential information?

Class 8 (September 17)
Unit: Employee Duties, Promises and Rights to Intellectual Property
Topic: Covenants Not to Compete
Supplemental Materials, p. 46; Willborn, pp. 355-365; 371 (starting with n.1)-375.

Study Questions: What interests do non-competition agreements protect? Why do courts usually refuse to enforce all non-competes? What kinds of problems will lead to a non-competition agreement being declared unenforceable?

Class 9 (September 22)
Supplemental Materials, p. 47.

Unit: Statutory Protections
Topic: Discrimination Statutes
Willborn, pp. 395-400; Supplemental Materials, pp. 48-52.

Study Questions: What analytical framework does the Court create and how does it work? What is the first step of the analytical framework supposed to accomplish? In thinking about this case, consider what the difference is between a burden of production and a burden of persuasion. Does the Court hold that subjective employment criteria are inherently suspect? Should subjective criteria be viewed skeptically by a court? Is the
analytical framework provided in this case going to have the same components in every case?

Class 10 (September 24)
Unit: Statutory Protections
Topic: Discrimination Statutes
Willborn, pp. 400-416; Supplemental Materials, p. 53.

Study Questions: What framework does the Supreme Court establish for evaluating mixed-motive claims under Title VII? Does this test favor plaintiffs or defendants? Why? Does the test require a plaintiff to have direct evidence of discrimination? Count the votes in Price Waterhouse. Is there a majority opinion in this case? If not, what kind of opinion is this and what kind of precedential value does it have? What is the holding of the Court? Why was it necessary for the Court to decide Desert Palace?

Class 11 (September 29)
Unit: Statutory Protections
Topic: Discrimination Statutes

Study Questions: After Gross, can a plaintiff prevail on a mixed-motive claim under the ADEA? Does traditional discrimination analysis break down with regards to grooming codes? Why?

Class 12 (October 1)
Unit: Statutory Protections
Topic: Discrimination Statutes
Willborn, pp. 454-456; Supplemental Materials, pp. 67-68; Willborn, pp. 488-498 (SKIM Oncale).

Study Questions? What is the underlying rationale for disparate impact claims? How do they differ from disparate treatment claims? Does a high school diploma or an intelligence test accurately determine a person’s ability to do a job? If not, what is a better alternative? What is harassment?

Class 13 (October 6)
Guest Speaker: Scott Carroll (Jackson Lewis)
Class 14 (October 8)
Unit: Statutory Protections
Topic: Discrimination Statutes
Willborn, pp. 508-520; Supplemental Materials, pp. 69-86.

How does the affirmative defense set out in *Faragher* work? Are there areas that employment discrimination law does not cover but should? What are the hallmarks of good corporate policies to prohibit and remedy discrimination? Are these policies necessarily focused on discrimination?

OCTOBER 12-16 FALL BREAK – NO CLASSES

Class 15 (October 20)
Mid-term Review.

Class 16 (October 22)
Unit: Statutory Protections
Topic: Leave

Study Questions: What administrative agency is responsible for administering the FMLA? What materials are available on that agency’s web page? What is the legal effect that is to be given to the materials available on the web page?

Class 17 (October 27)
Unit: Statutory Protections
Topic: Leave
Willborn, pp. 697-719; *skim Rogers v. City of San Antonio* to get a general idea of what USERRA does.

Study Questions: What are the various federal statutes that might entitle a person to leave benefits? What are the differences between the eligibility requirements for these various statutes? As a matter of policy, are leave provisions in the United States adequate?

Class 18 (October 29)
Unit: Statutory Protections
Topic: Wage and Hour Legislation

Study Questions: Why should we have a minimum wage? What is the goal(s) of the minimum wage and does the FLSA accomplish this goal? What are some of the common problems that arise under the FLSA?
Class 19 (November 3)
Unit: Statutory Protections
Topic: Worker’s Compensation
Willborn, pp. 865-867; 872 (beginning with n.2)-907.

Study questions: What does a worker’s compensation regime try to accomplish? Does the employer gain a benefit for its participation in such a system?

Class 20 (November 5)
Unit: Statutory Protections
Topic: Worker’s Compensation
Willborn, pp. 908-928.

Study questions: Make a list of the limitations that might apply to a worker’s claim for compensation. In Prows, the court adopts a standard for considering when horseplay is covered by worker’s compensation. Would a rule have been better? Why or why not?

Class 21 (November 10)
Unit: Common Enforcement Problems
Supplemental Materials, pp. 110-130.

Class 22 (November 12)
Unit: Employee Privacy, Speech Rights & Defamation
Willborn, pp. 213-238 (SKIM Garcetti); pp. 239-253.

Study Questions: Do employers have legitimate interests in restricting the speech of employees?

Class 23 (November 17)
Unit: Employee Privacy, Speech Rights & Defamation
Willborn, pp. 263-274; Supplemental Materials, pp. 131-145.

Study questions: What interests does an employer legitimately have in monitoring employees? Should employees enjoy a right of privacy in the workplace?

Class 24 (November 19)
Unit: Employee Privacy, Speech Rights & Defamation
Willborn, pp. 274-302 (do not read note 9).

Study Questions: How do the state constitutional protections offered in Soroka compare to federal protections?
NOVEMBER 24. NO CLASS. CLASS WILL BE MADE UP THROUGH A FINAL EXAM REVIEW TO BE SCHEDULED.

NOVEMBER 26. NO CLASS. THANKSGIVING BREAK.

Class 25 (December 1)
Unit: Employee Privacy, Speech Rights & Defamation

Class 26 (December 3)
Final Discussion. Additional reading, if any, will be posted on TWEN. Come to class prepared to discuss the following. Does American employment law work? What aspects of the law are good? Where could we improve?

FINAL EXAM REVIEW TO BE SCHEDULED.