

**EMPLOYMENT LAW SEMINAR—SPRING 2007**  
**PROF. MICHELLE TRAVIS**

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**Class Location:** Kendrick 301

**Class Schedule:** Th-3:00-5:50 p.m.  
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**INTRODUCTION**

The primary objective of this seminar is for you to produce a thesis-driven paper of publishable quality on an employment law topic of your choice. This course will give you the chance to explore an employment law issue in which you are particularly interested, as well as give you experience honing your analytic and persuasive writing skills. During the first two-thirds of the semester, we will use class time to build the skills necessary for you to produce your own law review style paper. During the final third of the semester, we will use class time for each of you to present your research, and for the rest of the class to ask questions and provide feedback.

During the first two-thirds of the semester, each class will be broken into two parts: (1) a substantive law discussion; and (2) a writing skills discussion. During the substantive law discussions, we will analyze and critique law review articles on a variety of employment law topics. While these discussions will expose you to new areas of employment law, or at least provide you with a more nuanced understanding of areas with which you already are familiar, the main purpose of our discussions will be to help you learn what makes a viable thesis, what makes effective arguments in support of a thesis, and how to organize and format a law review style paper. After our first class, I have selected law review articles for our substantive discussions that were all written by law students, so you will be reading work by authors who were your peers at the time of their authorship. This will give you numerous concrete examples of what your final work product for the semester should look like. We will spend the end of each class discussing a particular skill required in completing your writing project, including finding a topic, stating a thesis, conducting research, organizing your paper, writing effectively, and using footnotes and citations. Those class discussions will be taking place as you are working on those skills for your own paper outside of class.

While the syllabus below identifies the assigned reading for each class, please be aware that most of the reading you will do for this course will be as part of your own research for your paper. Writing a research paper in one semester is a very challenging endeavor that requires a significant commitment of out-of-class time. For those of you who decide to take on this challenge, you will complete the semester with an outstanding written product that may be useful as a writing sample for jobs, as a discussion topic for job interviews, and possibly to publish. Your writing project also will give you the opportunity to become a true expert on a particular employment law issue.

## COURSE MATERIALS

The attached tentative syllabus sets forth the assigned reading for the course. There is no assigned textbook. Any changes to this syllabus will be announced in class and/or via email. As you will see, the assignments include some handouts, but primarily they include published law review articles. You will need to obtain copies of the law review articles on your own by printing them from Westlaw, Lexis, or Hein Online, or by photocopying them from the journals in the law library. Because you are expected to produce your own law review style paper, including footnotes, you should skim the footnotes in the assigned articles to help you understand the role that footnotes play in legal scholarship.

## GRADING

- (1) A Paper that Meets the Upper Level Research and Writing Requirement Will Comprise 70% of Your Grade.

Please refer to the reading materials for Class 1 to see the specific criteria for the paper. That reading material explains the four steps that are required to complete this portion of the course: (i) a research proposal; (ii) a thesis statement and outline; (iii) a polished draft; and (iv) a revised final paper.

- (2) A Presentation of Your Own Research Paper Will Comprise 10% of Your Grade.

During the last third of the semester, each of you will have an opportunity to present your own research to the class. This will include a short, formal presentation in which you will describe your thesis and your major arguments in defense of your thesis. You will be providing a copy of your polished draft paper to all of the other students in the class prior to your presentation, and you will be expected to respond to questions and comments from the class.

- (3) “Expert” Participation Will Comprise 10% of Your Grade.

To facilitate class discussion, each of you will be designated as an “expert” for one class. I will turn to the experts to begin the class discussion (but of course, everyone is always welcome and encouraged to participate). In addition, each of you will be assigned to read the polished draft papers of two other students and provide feedback during those students’ in-class presentations.

- (4) “Non-Expert” Participation Will Comprise 10% of Your Grade.

While the experts will be playing the lead role each day, the rest of the class is still expected to come prepared to engage in our discussion. This portion of your grade will be based on your attendance and the quality of your class contributions when you are not assigned as an expert or as a paper-reader.

## DEADLINES

As a practicing attorney, deadlines are enormously important. So I take deadlines very seriously. Turning in assignments late will impact your final grade. Please make a note of these deadlines in your calendar:

<u>Thurs., Jan. 25, at 3:00 p.m.</u>	Research Proposal is Due at the Beginning of Class (use the form in the handout assigned for Class 1) (a hard copy is required).
<u>Thurs., Feb. 15, at 3:00 p.m.</u>	Thesis Statement and Outline are Due at the Beginning of Class (a hard copy is required).
<u>Tues., Mar. 20, at 12:00 p.m.</u>	Polished Draft is Due for Students Presenting on Mar. 22nd (an electronic copy emailed as an attached Word document is required).
<u>Tues., Mar. 27, at 12:00 p.m.</u>	Polished Draft is Due for Students Presenting on Mar. 29th (an electronic copy emailed as an attached Word document is required).
<u>Tues., Apr. 3, at 12:00 p.m.</u>	Polished Draft is Due for Students Presenting on Apr. 5th, 12th, & 19th (an electronic copy emailed as an attached Word document is required).
<u>Sat., May 12, at 12:00 p.m.</u>	Final Paper is Due for All Students (a hard copy is required).

## SYLLABUS

Below is a tentative syllabus for the semester. Any changes will be announced in class and/or via email.

### Class 1—Thursday, January 11

#### SUBSTANTIVE LAW DISCUSSION

**Topic:** The Changing Workplace

Identify the differences between the “old psychological contract” and the “new psychological contract” in the work relationship. Consider what implications the new psychological contract might have for existing employment laws. Are there any existing employment laws that seem ill-suited to address the problems in the new workplace?

**Reading:** Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. REV. 519 (2001) (read only Parts I.C, II, III.A.1, III.A.2, III.A.3, and III.B.3., which are found on pages 535-560 and 568-572).

#### WRITING SKILLS DISCUSSION

**Topic:** Overview of the Paper Writing Process & Selecting a Paper Topic

**Reading:** Suggestions and Criteria for Papers (handout).

Paper Requirements (handout).

Research Proposal (handout).

Heather Meeker, *Stalking the Golden Topic: A Guide to Locating and Selecting Topics for Legal Research Papers*, 1996 UTAH L. REV. 917 (1996).

## Class 2—Thursday, January 18

### SUBSTANTIVE LAW DISCUSSION

**Topic:** Applying Existing Employment Laws to New Workplace Phenomena

One category of legal scholarship consists of articles that analyze how existing laws might or should apply to new phenomena. In the employment context, these articles identify significant changes in the employment relationship or the work environment and analyze whether current employment laws remain an appropriate fit. For this class session, we will use the growth of telecommuting employment relationships as an example of this type of legal scholarship. In each of the assigned articles, the student authors identify a particular legal problem that arises when existing employment law is applied to telecommuting relationships, and they propose a solution to the problem.

As you read these articles, consider what other existing employment laws might require re-thinking when applied to telecommuting employment relationships. In addition, try to identify other new workplace phenomena (besides telecommuting) that might create problems when applying traditional employment laws. This brainstorming exercise is one way to identify a potential topic for your own paper.

**Reading:** Emily J. Kuo, *Comment, The Enforceability Gap of Covenants Not to Compete in Telecommuting Employment Relationships*, 1996 U. CHI. LEGAL F. 565 (1996).

Matthew B. Duckworth, *Comment, The Need for Workers' Compensation in the Age of Telecommuters*, 5 J. SMALL & EMERGING BUS. L. 403 (2001).

Kristen M. Ludgate, *Comment & Note, Telecommuting and the Americans with Disabilities Act: Is Working at Home a Reasonable Accommodation?*, 81 MINN. L. REV. 1309 (1997).

### WRITING SKILLS DISCUSSION

**Topic:** Coming Up With a Thesis

**Reading:** Suggestions and Criteria for Papers (handout) (review the section on Choosing a Thesis).

Eugene Volokh, *Writing a Student Article*, 48 J. LEGAL EDUC. 247 (1998) (read only Part I).

## Class 3—Thursday, January 25

### DEADLINE

The Research Proposal is due at the beginning of class for all students.  
Use the form attached to the handout assigned for Class 1.

### SUBSTANTIVE LAW DISCUSSION

**Topic:** Statutory Interpretation

Another category of legal scholarship consists of articles that engage in statutory interpretation by explaining an ambiguous statutory provision, resolving conflicting judicial interpretations of a statutory provision, or arguing how a statutory provision should apply to a particular situation. Many federal and state statutes govern the employment relationship, so statutory analysis often makes a good focus for a paper.

For this class session, we will use Title I of the Americans with Disabilities Act of 1990 (the “ADA”) as an example of this type of legal scholarship. Title I of the ADA is the federal statute prohibiting disability-based employment discrimination. In the two assigned articles, the student authors analyze whether or not smokers who are addicted to nicotine meet the ADA’s statutory definition of a disabled individual and thereby obtain legal protection from employment discrimination. The authors arrive at different conclusions. As you read the articles, assess which position you find most persuasive and why. In addition, consider whether there are other federal or state employment statutes that interest you. If so, research likely will lead you to an unresolved statutory interpretation issue that could become the basis for your own paper.

This pair of articles also should help debunk the common misperception that you may not write an article on a topic on which someone else already has written (which some refer to as “topic preemption”). As long as you have a unique thesis, your paper will contribute to the academic discussion on a legal issue.

**Reading:** Jimmy Goh, *Comment, “Smokers Need Not Apply”: Challenging Employment Discrimination Against Smokers Under the Americans with Disabilities Act*, 39 U. KAN. L. REV. 817 (1991).

Mark W. Pugsley, *Note, Nonsmoking Hiring Policies: Examining the Status of Smokers Under Title I of the Americans with Disabilities Act of 1990*, 43 DUKE L.J. 1089 (1994).

### WRITING SKILLS DISCUSSION

**Topic:** Conducting Research

**Reading:** TBA

## Class 4—Thursday, February 1

### SUBSTANTIVE LAW DISCUSSION

**Topic:** Analyzing the Need for Legal Protection of a Particular Type of Employee

Another category of legal scholarship consists of articles that identify a particular category of employees who face unique issues or workplace challenges, and that analyze whether those employees have adequate legal protection. For this class session, we will use three types of workers as an example of this type of legal scholarship: unattractive and/or overweight workers, working mothers who are breastfeeding, and transgender workers. In each of the three assigned articles, the student authors describe the unique problems that each of these groups of workers face in the workplace, and they analyze whether new laws are required to protect their interests.

Consider whether there are other groups of employees whose unique workplace issues interest you. Consider whether existing law is well-suited to address their needs. If not, analyzing the need for more targeted legal regulation might be a useful way to frame a thesis for your own paper.

**Reading:** Elizabeth M. Adamitis, *Note & Comments, Appearance Matters: A Proposal To Prohibit Appearance Discrimination in Employment*, 75 WASH. L. REV. 195 (2000).

Lara M. Gardner, *A Step Toward True Equality in the Workplace: Requiring Employer Accommodation for Breastfeeding Women*, 17 WIS. WOMEN'S L.J. 259 (2002).

Marvin Dunson III, *Comment, Sex, Gender, and Transgender: The Present and Future of Employment Discrimination Law*, 22 BERKELEY J. EMP. & LAB. L. 465 (2001).

### WRITING SKILLS DISCUSSION

**Topic:** Building Arguments and Addressing Counter-Arguments

**Reading:** Suggestions and Criteria for Papers (handout) (review the section on Content).

Eugene Volokh, *Writing a Student Article*, 48 J. LEGAL EDUC. 247 (1998) (read only Part II.C).

Eugene Volokh, *Test Suites: A Tool for Improving Student Articles*, 52 J. LEGAL EDUC. 440 (2002).

## Class 5—Thursday, February 8

### SUBSTANTIVE LAW DISCUSSION

**Topic:** Analyzing the Need for Legal Regulation of an Existing Employment Practice

Another category of legal scholarship consists of articles that analyze the legal implications and/or the potential need for additional regulation of an existing practice that employers use in making hiring, firing, promotion, compensation, or other employment decisions. For this class session, we will use three hiring practices as an example of this type of legal scholarship: personality/honesty testing, handwriting analysis, and genetic testing. In each of the three assigned articles, the student authors describe one of these types of hiring practices, they identify the pros and cons of the practice, they analyze the legal implications of the practice, and they make a proposal for legal change.

Consider whether there are other existing employment practices that you find particularly interesting and perhaps troublesome. Consider whether the law is well-settled regarding that particular practice, and if not, an analysis of that practice might become the focus of your own paper.

**Reading:** Katrin U. Byford, *Comment, The Quest for the Honest Worker: A Proposal for Regulation of Integrity Testing*, 49 SMU L. REV. 329 (1996).

Julie A. Spoh, *Note, The Legal Implications of Graphology*, 75 WASH. U. L.Q. 1307 (1997).

Jared A. Feldman & Richard J. Katz, *Note, Genetic Testing and Discrimination in Employment: Recommending a Uniform Statutory Approach*, 19 HOFSTRA LAB. & EMP. L.J. 389 (2002).

### WRITING SKILLS DISCUSSION

**Topic:** Organizing Your Paper

**Reading:** Eugene Volokh, *Writing a Student Article*, 48 J. LEGAL EDUC. 247 (1998) (read only Part II, including a review of Part II.C).

Suggestions and Criteria for Papers (handout) (review the sections on The Structure of the Paper and Organization).

## Class 6—Thursday, February 15

### DEADLINE

Thesis Statement and Outline are due at the beginning of class for all students.  
A hard copy is required.

### SUBSTANTIVE LAW DISCUSSION

**Reading:** Because of your deadline today, there are no new articles assigned.

### WRITING SKILLS DISCUSSION

**Topic 1:** Effective Writing Style

**Reading:** Suggestions and Criteria for Papers (handout) (review the section on Writing Craft).

Eugene Volokh, *Writing a Student Article*, 48 J. LEGAL EDUC. 247 (1998)  
(read only Part III and the Appendix on Clumsy Words and Phrases).

**Topic 2:** Getting Your Paper Published

**Reading:** If you are interested in learning more about publishing an article with a law review, you may find the following, **optional** reading useful: David B. McGinty, *Writing for a Student-Edited U.S. Law Review: A Guide for Non-U.S. and ESL Legal Scholars*, 7 N.Y. CITY L. REV. 39 (2004). Although this article was written particularly for authors outside of the United States, it should be helpful to anyone who is unfamiliar with the law review publication process.

## Class 7—Thursday, February 22

### SUBSTANTIVE LAW DISCUSSION

**Topic:** Resolving a Circuit Court Split

Another category of legal scholarship consists of articles that analyze how the United States Supreme Court should resolve an existing circuit court split on a particular legal issue. In the employment context, such splits often involve conflicting applications of a federal employment statute. Each of today's articles addresses a different unresolved issue raised by Title VII retaliation claims. Title VII of the Civil Rights Act of 1964 is the federal statute that prohibits employment discrimination against members of certain protected categories. Title VII's anti-retaliation provision prohibits covered employers from taking adverse employment actions against workers because they have opposed a discriminatory practice or participated in a Title VII charge, investigation, or proceeding.

It is likely that the student authors of these articles began with a general interest in retaliation claims, which have been increasing in number and gaining more prominence in the media. Their general research on retaliation claims likely led them to the three different disputed issues that they address in their papers. Consider whether there are other "hot topics" in employment law that interest you. If you spend time reading everything you can find on that topic, you likely will end up identifying an unresolved issue that is worthy of legal analysis. In addition, please take note of the "size" of the legal issues that the students analyze in these articles. One of the common challenges in writing a paper is to identify a narrow enough topic to be able to cover it in appropriate depth. Note how the general topic of retaliation claims was broken down into three very distinct, manageable issues that appropriately provided the basis for three separate articles, rather than a single author trying to address all of the open issues raised by Title VII retaliation claims in one article.

**Reading:** Carrie B. Temm, *Comment, Third-Party Retaliation Claims: Where To Draw the Line*, 54 U. KAN. L. REV. 865 (2006).

Sandra Tafuri, *Note, Title VII's Antiretaliation Provision: Are Employees Protected after the Employment Relationship Has Ended?*, 71 N.Y.U. L. REV. 797 (1996).

Kari Jahnke, *Retaliatory Harassment Against Employees by Employees: Should the Employer Be Liable?*, 16 LAB. LAW. 465 (2001).

### WRITING SKILLS DISCUSSION

**Topic:** Footnotes and Citations

**Reading:** William B.T. Mock, *When a Rose Isn't "Arose" Isn't Arroz: A Guide to Footnoting for Informational Clarity and Scholarly Discourse*, 34 INT'L J. LEGAL INFO. 87 (2006).

## **Class 8—Thursday, March 1**

### **INDIVIDUAL CONFERENCES**

In lieu of class this week, I will be scheduling individual conferences with each student throughout the week. We will discuss your thesis statement, outline, and writing progress prior to you completing your polished draft paper.

## **Thursday, March 8: No Class—Spring Break**

## **Class 9—Thursday, March 15**

### **JACK PEMBERTON LECTURE ON WORKPLACE JUSTICE**

We will not be having class at our regular time today. In lieu of class, I would like each of you to attend the annual Jack Pemberton Lecture on Workplace Justice, which is a highlight of USF's Labor and Employment Law Program (co-sponsored by LELSA). The lecture takes place from 6:30-8:30pm at the Ninth Circuit Court of Appeals, located at 95 Seventh Street, San Francisco, CA 94103. The title of the lecture this year is: "The Great American Makeover: The Sexing Up and Dumbing Down of Female Workers after *Jespersen*." The title is referring to *Jespersen v. Harrah's Operating Co., Inc.*, 444 F.3d 1104 (9th Cir. 2006). In *Jespersen*, a female bartender at a casino was fired because she refused to wear make-up to work. The Court held that the casino's policy requiring all women bartenders to wear make-up did not constitute sex discrimination in violation of Title VII of the Civil Rights Act of 1964. The keynote speaker will be Professor Dianne Avery from SUNY Buffalo Law School. There will be a networking reception with employment law practitioners following the lecture.

(Please note: If you have another regularly-scheduled class on this evening, or if attendance at the Pemberton Lecture would otherwise constitute a hardship, please let me know and I will excuse you from the event. I encourage all of you to carpool to the event, if possible.)

**Tuesday, March 20**

**DEADLINE:** Polished Draft is due at 12:00 noon for students presenting on March 22nd. An electronic copy emailed as an attached Word document is required.

**Class 10—Thursday, March 22**

Student Presentations

**Tuesday, March 27**

**DEADLINE:** Polished Draft is due at 12:00 noon for students presenting on March 29th. An electronic copy emailed as an attached Word document is required.

**Class 11—Thursday, March 29**

Student Presentations

**Tuesday, April 3**

**DEADLINE:** Polished Draft is due at 12:00 noon for students presenting on April 5th, 12th & 19th. An electronic copy emailed as an attached Word document is required.

**Class 12—Thursday, April 5**

Student Presentations

**Class 13—Thursday, April 12**

Student Presentations

**Class 14—Thursday, April 19**

Student Presentations

**Saturday, May 12**

**DEADLINE:** Final Paper is due at 12:00 noon for all students. A hard copy is required.