

EMPLOYMENT DISCRIMINATION

PROFESSORS COOPER AND GOCHANOUR

FIRST READING ASSIGNMENTS

1. **REGISTER FOR TWEN AND FOR CALI.** The syllabus and course materials are on TWEN.
2. **READ THE SYLLABUS,** page 1 through the first assignment.
3. **I have copied the portions of the syllabus below for part of your first assignment (I've omitted most of the first page of the syllabus—but please read it before class).**
4. **The assignment for class #2 is huge, and I know it. But it will be worth it! And for those of you who like to see how law is practiced, this is it.**
5. **I suggest you download the syllabus, then print it and keep a hard copy.**
6. **WELCOME!**

TEXT: Zimmer, Sullivan & White, *Cases and Materials on Employment Discrimination* (7th ed., Aspen, 2008) and its latest supplement, *Employment Discrimination: Selected Cases & Statutes 2011*.

Assigned readings with a simple number refer to pages in the case book; an “S” refers to pages in the supplement.

OVERVIEW: This class examines the major federal employment discrimination statutes. You will read statutes, cases, and textual material; you will write a short paper based on your experience at an EEOC intake interview; you will contribute in an informed way to class discussions; and you will do a class presentation by PowerPoint on an aspect of discrimination on the basis of either (1) religion or (2) disabilities. Each of these aspects will be graded, and grading is not anonymous. There is no final exam. Grading details can be found at the end of [the] syllabus under the heading “Grading.” Attendance is required. You must register for TWEN and for CALI. Presentation details are also near the end of this syllabus and will be discussed the first two weeks of class.

CLASS # 1: Why do we have these laws anyway? And what are they about? Be prepared to discuss!

Take one of the Implicit Association Tests at implicit.harvard.edu/implicit. Are you surprised? Do you think the test makes sense? Does it tell you anything about discrimination?

History, Context, and Policy, **761-787**

Note to Students, **xxvii-xxx** (purpose of casebook and back-story of employment-at-will).

Are discrimination laws necessary? Efficient? Useful?

In a prior edition of this case book, an excerpt from a Professor Epstein article explained the anti-anti-discrimination viewpoint. To oversimplify, it goes like this: in a world of properly limited government (the libertarian vision), irrational discrimination will be driven out by the free market, and the discrimination that remains will be rational (it is sometimes rational to discriminate due to the high search and governance costs entailed by a diverse workforce). Since irrational discrimination will largely

disappear and rational discrimination is efficient, discrimination laws are an abomination, an intrusion on liberty (particularly the right to freely associate and contract). Rational discrimination is not that harmful anyway. Victims of discrimination have powerful strategies for self-protection in a free market. What do you make of Epstein's arguments? (Note the back story of employment at will).

What do you make of Williams "buzzer" experience? Could Condoleezza Rice (or Michelle Obama) have given Williams a lesson?

Is discrimination in employment still a problem in American society? How do you know? Anecdote or statistics (employment, earnings, high-status jobs)? Barack Hussein Obama, our president, is the most powerful person in the world, Hillary Clinton is Secretary of State, and Oprah Winfrey is one of the most successful business people on the planet. Will that matter for discrimination?

Review Cooper's Introduction to Employment Discrimination, on TWEN. You will wish to refer to this from time to time. *During the first few classes*, we will lecture on statutory coverage and on the two major theories of discrimination: disparate treatment (both individual and systemic) and disparate impact.

I will also introduce information regarding the state and local anti-discrimination agencies that enforce state and local anti-discrimination statutes: the Illinois Department of Human Rights, the Illinois Human Rights Commission, the Cook County Commission on Human Rights, and the Chicago Commission on Human Relations. Materials on these agencies are near the end of the TWEN course materials. You need not read these materials in advance. I will go over them in class.

Class #2: And now, for a whole lot of knowledge. An introduction to the field: (1) pleadings in an age discrimination case, (2) the records in a sex harassment, retaliation, and fee dispute case, and (3) statutory materials on purposes, protection, and coverage of four of the most important federal anti-discrimination statutes—Title VII, the ADA, ADEA, and §1981.

TWEN: *Martina pleadings*--cocktail waitress complaint of age and sex discrimination, and answer

Very important note about the cocktail waitress case: this case is brought under NJ state law, *not* under the federal laws that consume our attention. And for good reason—compared to federal law, some states provide more plaintiff-friendly coverage, procedures and remedies. Too, substance may vary. Even though NJ law will apply in the *Martina* case, the complaint takes you through the theories of discrimination that also apply in federal claims of discrimination.

TWEN: *Pickett v. Sheridan Health Care Center*. This is a voluminous file, and I don't expect you to read the whole thing now. But I do want you to read the Danielle Pickett overview narrative—be sure to read this 2-page summary first; then Pickett 1 (the very short complaint), Pickett 6 (the jury instructions), Pickett 11 (affirming the jury's damage award), and Pickett 13 (7th Cir. remand of attorney's fee determination). These items are near the end of the "Course Materials." This file is rich and long, and I hope you will be inspired by what it says about how you evaluate the monetary worth of a case. You'll also see how ubiquitous Supreme Court decisions are, especially the ones you will read later in this course. We will return to this file from time to time.

Who's protected from discrimination, and what's prohibited by whom? The cocktail waitresses could have brought federal claims under Title VII of the 1964 Civil Rights Act and the Age Discrimination in Employment Act. What groups are protected by these two federal statutes? (Hints: Title VII—race, color, sex, religion, and national origin; ADEA—persons 40 and over). Whose employment discrimination is prohibited by these statutes? (Hint: depends on how many “employees” an employer has over a specific time period.) Similar questions could be asked about any statute. In this class, we focus on Title VII, the ADEA, the somewhat recently amended Americans with Disabilities Act, and Section 1981 of the nineteenth century civil rights acts. The cocktail waitresses are not claiming violations of the ADA (they aren't “qualified individuals with a disability”) and they aren't claiming violations of §1981 (it doesn't cover sex discrimination or age discrimination).

Don't forget: if an entity is not “covered,” it is free to discriminate! If the discrimination is not on a “prohibited basis,” it's ok. If an employee is not “protected,” she is simply not protected.

Read the statutory provisions on what's prohibited, why (“findings and purposes”), coverage, and some exceptions:

- **Title VII: §§701-703 (S437-445), §2, 3 of the 1991 CRA (S320-21)**
- **ADA: §§2, 3,4, 11, 102, 103 (S294-302)**
- **ADEA: §§2, 4 (S275-278—you can stop there), 101-03 (S297-302)**
- **§1981: S366, 68-77**

Who's protected by §1981? *McDonald v. Santa Fe* (US 1976) (all races covered by §1981). (BTW, in contrast to the other statutes we study, §1981 has no employee minimum, no administrative prerequisites, and a longer statute of limitations).

Have you noticed the exceptions for religious institutions?