

EMPLOYMENT LAW

FALL 2021

Professor Neal Mollen (nmollen@gmu.edu 202-236-2353)

Class schedule: We will meet every Thursday from 6:05 until 8:05, with a ten minute break roughly half way through. I have no set “office hours,” but I am available for (and encourage) your questions by email or, with a prior appointment, by phone. I will usually answer substantive questions received by email in class for the benefit of all.

Course content and learning outcomes: Our plan for the semester will be to examine the ways in which the employment relationship is regulated by federal and state law, as expressed in statutes, regulations, and case law. The course is designed to survey the breadth of the topic rather than to delve deeply into any one aspect of employment law. Among other subjects, we will cover the nature of the employment relationship and its formation; the concepts of “at-will” employment and “just cause” for discipline; wrongful discharge; unlawful discrimination against various protected categories of employees as defined by federal and state law, and, to a lesser degree, by local ordinances; unlawful retaliation and whistleblower claims; and workplace privacy issues. We will also cover some compensation and benefits law basics.

By the end of the course, students interested in employment law can expect to have a conceptual framework to inform further, more in-depth study. Students with no plans for further study will have an adequate basis to spot issues as they arise in their future practices.

Required reading: The assigned text for this class is Estreicher, Harper, and Tippet, *Cases and Materials on Employment Law: the Field as Practiced* (American Casebook Series) (referred to below as “Estreicher”). Note that we will not cover all of the material in the order it appears in the book. In addition to this text, I have identified a few additional cases and other materials you will need to read prior to designated classes. Any adjustments will be announced in class and by email. Also, in the field of employment law, one must anticipate “breaking news”; we will discuss these events as time allows.

With those caveats, the required reading for each class will be as follows:

Class 1, August 26: The Employment Relationship

Estreicher 1-41, *Coppage v. State of Kansas*, 236 U.S. 1 (1915)

Class 2, September 2: At-Will Employment and Contractual Exceptions

Estreicher 41-79; *Progress Printing Co. v. Nichols*, 244 Va. 337, 421 S.E.2d 428 (1992); *Strass v. Kaiser Found. Health Plan of Mid-Atl.*, 744 A.2d 1000, 1013 (D.C. 2000).

Class 3, September 9: “Just Cause” and the Public Policy Cause of Action

Estreicher 79-85, 227-247; *Lawrence Chrysler Plymouth Corp. v. Brooks*, 251 Va. 94, 465 S.E.2d 806 (1996); *Towson Univ. v. Conte*, 384 Md. 68, 86, 862 A.2d 941, 951 (2004).

Class 4, September 16: **Fundamentals of Discrimination (Disparate Treatment)**

Estreicher 97-135

Class 5, September 23: **Fundamentals of Discrimination (Disparate Treatment cont'd and Disparate Impact)**

Estreicher 136-159; *Watson v. Fort Worth Bank & Tr.*, 487 U.S. 977 (1988); *Smith v. City of Jackson, Miss.*, 544 U.S. 228 (2005); 42 U.S.C. § 2000e-2(k).

Class 6, September 30: **Fundamentals of Discrimination (Sex Discrimination and Harassment)**

Estreicher et al 161-192; *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731 (2020); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974).

Class 7, October 7: **Retaliation**

Estreicher 193-226; *Gogel v. Kia Motors Mfg of GA, Inc.*, No. 16-16850, 2020 WL 4342677 (11th Cir. July 29, 2020) (*en banc*).

Class 8, October 14: **Whistleblowers and Government Employee Protections**

Estreicher 247-296.

Class 9, October 21: **Employment Torts**

Estreicher 297-320, 377-411.

Class 10, October 28: **Discrimination Law and the Duty to Accommodate**

- *Rohr v. Salt River Project Agric. Imp. & Power Dist.*, 555 F.3d 850, 853 (9th Cir. 2009) (what is a “disability” within the meaning of the ADA)
- *Bragdon v. Abbott*, 524 U.S. 624 (1998) (whether HIV infection is a disability within the meaning of ADA)
- *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002) (what is a reasonable accommodation – seniority)
- *Huber v. Wal-Mart Stores, Inc.*, 486 F.3d 480, 482 (8th Cir. 2007) (what is a reasonable accommodation – transfer to a vacant position)
- *Davis v. Fort Bend Cty.*, 765 F.3d 480, 485 (5th Cir. 2014) (what “religious beliefs” require accommodation)

- *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977) (what is the duty to accommodate).

Class 11, November 4: **Compensation**

Estreicher 413-456.

Class 12, November 11: **Benefits**

Estreicher 457-490.

Class 13, November 18: **Remedies and Review**

Estreicher 491-523.

Grades and expectations: Student grades will be based on a final exam. Note, however, that this grade will be *subject to a discretionary class participation adjustment in either direction*, typically by a single increment. That is, what would otherwise earn a B can be raised to a B+ or lowered to a B- depending on the level and quality of class contributions. Truly exemplary in-class performance, or persistent dereliction in class preparedness and participation might warrant an even larger adjustment.

I cannot overemphasize the importance of, and my expectation for, active, thoughtful participation by members of the class in our discussions. In order for the class to be a success, it is essential that *every* student arrive at *every* class having read and carefully considered the assigned material. Although members of the class are always encouraged to participate in the discussion voluntarily – and I will ask for volunteers – *you should expect to be called on without prior warning*. In order to get out of the class all that it can offer (and in order to get a top grade), meaningful participation in the discussion will be essential.

Nonetheless, I understand that, especially in our current remote learning environment, unavoidable circumstances might prevent you from participating in our discussion on *rare* occasions. If you are not prepared when called on, please say so rather than waste everyone's time by trying to wing it.

The Law School has strict and specific rules about attendance, which I do not have the authority (or the inclination) to waive. Attendance will be taken before we begin each class. If you have questions or concerns about these rules, please contact the director of student academic affairs.

Exam conflicts: In accordance with Academic Regulation 4-4.1, if, for some reason you cannot sit for the exam on the date and time for which it is scheduled, you must present your request for alternate arrangements, with appropriate documentation, to the Assistant Dean, Student Academic Affairs. Except in emergencies, such requests should be presented no later than two weeks before the date of the examination. I am powerless to address these issues.

Additional rules and regulations: Students are prohibited by Academic Regulation 4-2.2 from recording any of our classes. I expect students to comply with this regulation. If extraordinary circumstances arise suggesting an exception to this rule might be appropriate, please let me know and we will discuss the subject.

It is expected that students will adhere to the Antonin Scalia Law School Honor Code. The Honor Code prohibits lying, cheating, or stealing. For example, a student obligation may never represent the work of another as his or her own, nor provide or accept unauthorized assistance on any school-related assignment. The Honor Code is available here: <https://sls.gmu.edu/honor/>.

Learning accommodations: Disability Services at George Mason University is committed to providing equitable access to learning opportunities for all students by upholding laws that ensure equal treatment of people with disabilities. If you are seeking accommodations for this class, please visit <https://ds.gmu.edu/> for detailed information about the Disabilities Registration Process. Faculty may not receive or respond to requests for an accommodation. All requests must be handled by the office of Disability Services. You may contact Disability Services directly via email at ods@gmu.edu, or phone at (703) 993-2474. If you have any questions about how in-class or testing accommodations are implemented at the law school, please contact the Assistant Dean, Student Academic Affairs for more information.

University Life: University Life provides student support resources such as Counseling and Psychological Services (<https://caps.gmu.edu/>), Student Health Services (<https://shs.gmu.edu/>), and the Student Support and Advocacy Center (<https://ssac.gmu.edu/>). For more information about University Life on the Arlington Campus, please visit: <https://ularlington.gmu.edu/>