

DISCRIMINATION IN EMPLOYMENT—210-002

SPRING 2022

Professor Neal Mollen (nmollen@gmu.edu)

Class schedule: We will meet every Thursday between 6:05 and 8:05 PM, beginning on Thursday, January 20. I have no set “office hours,” and no office, but within reason, I am available for, and encourage, your questions by email or, with a prior appointment, by phone.

Course content and learning outcomes: Our plan for the semester will be to examine federal (and to a more limited degree, state and local) statutory schemes that regulate or proscribe employment practices that treat adversely “prohibited characteristics” such as race, color, religion, sex, national origin, disability, and age.

Required reading: The assigned text for this class is Estreicher, Harper, and Tippet, *Cases and Materials on Employment Discrimination: the Field as Practiced* (American Casebook Series, 5th ed.) (referred to below as “Estreicher”). Unless I specifically indicate otherwise during class, all material in the assigned reading will be considered “fair game” for exam purposes. If you have questions about what you have read that are not otherwise answered by our class discussions, please ask about it during the relevant class, by email, or during our semester-ending review session.

In addition to this assigned text, I have identified a few additional cases and other materials you will need to read prior to designated classes. Any adjustments to this schedule will be announced in class and by email. Also, in the field of employment law, one must anticipate “breaking news” from the Courts, agencies, or (occasionally) Congress; we will discuss these events as time allows.

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

Class 1: Disparate Treatment

Estreicher 31-40, 45-64; *Troupe v. May Dep’t Stores Co.*, 20 F.3d 734 (7th Cir. 1994); *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993).

Class 2: Disparate Treatment *cont’d*; Systemic Disparate Treatment

Estreicher 70-108, *Hohider v. United Parcel Serv., Inc.*, 574 F.3d 169 (3d Cir. 2009).

Class 3: Disparate Impact

Estreicher 123-163; 42 U.S.C. § 2000e-2(k).

Class 4: Disparate Impact *cont’d*

Estreicher 163-191; *Mandala v. NTT Data, Inc.*, 975 F.3d 202 (2d Cir. 2020).

Class 5: Disparate Impact *cont'd* and Affirmative Action

Estreicher 191-243.

Class 6: Sex Discrimination

Estreicher 253-294.

Class 7: Harassment and Compensation

Estreicher 294-297, 301-325, 333-352.

Class 8: Sexual Orientation and Gender Identity

Estreicher 298-301, 357-366; *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731 (2020); *Marshall v. Indiana Dep't of Correction*, 973 F.3d 789, 792 (7th Cir. 2020).

Class 9: Age Discrimination

Estreicher 382-441.

Class 10: Discrimination and the Duty to Accommodate

Estreicher 443-449, 453-478, 505-511, 517-22; *Huber v. Wal-Mart Stores, Inc.*, 486 F.3d 480, 482 (8th Cir. 2007).

Class 11: Retaliation

Estreicher 539-560; *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997); *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170 (2011); *Gogel v. Kia Motors Mfg. of Georgia, Inc.*, 967 F.3d 1121 (11th Cir. 2020) (*en banc*).

Class 12: Role of the EEOC and Timeliness

Estreicher 563-586; *Fed. Exp. Corp. v. Holowecki*, 552 U.S. 389 (2008); *Pacheco v. Mineta*, 448 F.3d 783 (5th Cir. 2006) (scope of the charge); *Delaware State Coll. v. Ricks*, 449 U.S. 250 (1980).

Class 13: Class Actions and Arbitration; Review

Estreicher 588-621.

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, work that 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 unavoidable circumstances might prevent you from participating in our discussion on *rare* occasions. If circumstances prevent you from being prepared for a class, please tell me before we begin.

The Law School has strict and specific rules about attendance, which I have neither the authority nor the inclination to waive. I will take attendance before we begin 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 without prior approval of the Law School's administration.

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 also 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/>