

**UNIVERSITY OF PENNSYLVANIA  
THE WHARTON SCHOOL  
LEGAL STUDIES 208/808**

**LAW AT WORK: EMPLOYMENT LAW AND MANAGEMENT**

SPRING 2020 – PROFESSOR AMY SEPINWALL, J.D., Ph.D.

**OVERVIEW:** This course aims to introduce the student to the central laws, rule, and regulations governing employment and labor organization. Students will come away with a working knowledge of the employment and labor laws with which managers need to comply. But much more than that, this course is an exploration of the workplace issues that arise because of the hierarchical nature of organizations and the diversity (along lines of race, sex, religion, sexual orientation, etc.) of those within them and those who seek employment. The course will address questions, such as:

- What is work? How do we value it? What is the relationship between volunteer “work” and paid employment?
- Who is an employee? Are Uber drivers employees or independent contractors? Why does this matter?
- What are the rights of individuals at work?
  - Can employers mandate drug tests for their employees? Surveil their employees during their employees’ off hours?
  - Can employers require their employees to support particular political candidates, or can they prohibit certain kinds of speech at work?
  - Why should employees with kids get time off work (e.g., after giving birth) and other accommodations (e.g., more time to reach certain benchmarks) when others with meaningful, time-consuming projects receive no such accommodations?
  - To what extent must employers accommodate employees’ religious commitments? Must a clothing store that markets itself as all-American allow a Muslim woman to wear a hijab at work, when it deems that the hijab doesn’t fit its “brand”?
- What are the rights of individuals to employment? Beyond the traditional protected classes (race, sex, etc.), may an employer decline to hire someone because of their sexual orientation? Non-conforming sexual identity? Appearance? Why can’t men and overweight women get jobs at Hooters?
- When, if ever, may an employer undertake affirmative action?
- What are unions? who must join? is compelled membership unconstitutional?

At times the course will be heady, engaging with legal scholarship on, say, notions of equality. At other times the course will be raw and experiential. You will be tasked with challenging yourself in multiple ways, including ways that might (should!) take you beyond your comfort zone.

**CLASS MEETS:** MONDAYS, 6:00-9:00 PM

**CONTACT INFO:** 642 Jon M. Huntsman Hall  
E-mail: *sepin@upenn.edu*

**OFFICE HOURS:** By appointment

**MATERIALS:** Course materials will be **posted on Canvas** throughout the semester. Readings are court opinions, laws and regulations, scholarly articles and articles from various media and outlines of particular topics in employment law for managers. *Many of the readings listed on the Syllabus will not be assigned.* There is no textbook for the course.

**GRADING:**

1. Participation and reading responses/news reports = 20%
2. Questions for our field trip = 5%
3. Book report = 10%
4. Individual field trip and report = 10%
5. Judicial opinion = 25%
6. In-class oral argument = 15%
7. Serving as a Justice at oral argument = 5%

1. ***Participation, reading responses, and news prep:*** There are no tests in this class. It is nonetheless imperative that you complete the reading assignments carefully, and come to class prepared to discuss them. To provide additional incentives for you to do so, I will be cold-calling during the course of the semester. Your participation grade will be based on evidence of your preparation for class; the quality of the insights you bring to bear; and your ability to listen to and respond to the comments of your classmates.

For **seven** class sessions, you will submit three questions that the readings prompt. You may provide no more than one question per reading; at least one question must address a case and at least one question must address a scholarly article (i.e., not a news article).

Scholarly articles are under the “Commentary” section in the calendar of readings.). You should submit no more than three questions total. You should not answer these questions. Instead, the questions should raise issues that you think would make for good fodder for class discussion. You must submit your questions **by 8 PM on the Sunday night before our class session. *Late assignments will receive a 0.*** Please email your questions directly to me – [sepin@upenn.edu](mailto:sepin@upenn.edu) – AND upload them through our Canvas portal.

For some class sessions, you will also be asked to ***find a news item*** related to the topic for that day. You should come to class prepared to describe the news item and the questions it raises. Each of you will do this twice over the course of the semester, on dates I will assign. Please send me a copy of the news article **by 8 PM on the Sunday night before class session. *Late assignments will receive a 0.*** Please email the news article directly to me – [sepin@upenn.edu](mailto:sepin@upenn.edu). You are excused from submitting reading responses for dates on which you are assigned to prepare a news item for discussion.

2. ***Court Field Trip:*** I am hoping that we can attend oral argument at a local court, to hear an employment law case being argued. More information about the trip itself to follow. Each of you (whether you can attend or not), will be charged with submitting three questions based on the Petitioners’ and Respondents’ briefs for one of the cases we will be hearing. Your questions should be ones you would ask if you were one of the Judges hearing the case. Again, you should not answer these questions. (If the field trip does not work out, I will nonetheless identify an important employment law case being heard this term for which you will read the briefs and articulate questions for the parties.) You must submit your questions **via email by 8 PM on the night before the case will be heard. *Late assignments will receive a 0.***
  
3. ***Book report:*** We will be discussing Ann-Marie Slaughter’s *Unfinished Business* on **Feb. 10, 2020. By 8 AM the day before**, you must submit a “book report.” The book report should identify a key issue described in the book, summarize one research article and two popular press articles related to that issue, and then articulate and defend a policy recommendation for addressing that claim. The *articles* should support Slaughter’s claim that the issue she identifies is real and they should add further detail – by revealing that the issue is keenly felt by real people, or it is more widespread, or more pronounced, or more profound than even the book reveals. The *policy recommendation* should be something that can be codified in a law or legal regulation OR in a workplace rule. You should describe how the recommendation would work, identifying in particular how it would address the problem. The report should be no longer than three double-spaced pages using 12-point Times New Roman Font and 1-inch margins all around. You should come to class prepared to discuss the issue you chose and your recommendation. (You don’t need to develop a presentation; just expect that I will call on you.)

4. **Individual Field Trip:** A good part of this course will deal with disparities in success along lines of established protected characteristics (gender, race, sexual orientation, etc.) and less well-recognized characteristics (appearance, weight, etc.). Many of us belong to groups that have shielded us from the experience of being “other” – an experience that those who are socially or economically disfavored may be made to live every day. To give you a sense of “otherness,” I am going to have you immerse yourself in an experience in which you are an “outsider.” Examples include: a white student going to a Black church; a woman dressing as a man for a day; etc. You must have your experience pre-approved by me. Please send me an email by **March 5, 2020**, with a description of your proposed field trip. Once you’ve completed the experience, you will submit a two-page single-spaced write-up describing the experience and the reactions it conjured in you and others: What did you do? Why was this an experience in otherness? How did others react to you? How did this make you feel? Did you do anything – change your behavior, say something – in light of others’ reactions? What did you learn from your experience? Your write-up can address each of these questions individually but you might find it more freeing just to write something up in a narrative (or journal entry) style and that would be fine too. If you choose something more free-flowing, please do nonetheless try to touch on each of the questions above. Write-ups are due by **April 5 at 11:59 pm**. Please email them to me at [sepin@upenn.edu](mailto:sepin@upenn.edu).
5. **Judicial opinion** – you will write a judicial opinion for *Bostock v. Georgia*, a case involving a gay man who claims that he was fired because of his sexual orientation. The legal question in the case is whether Title VII of the Civil Rights Act, which prohibits employment discrimination “on the basis of sex” extends to employment discrimination on the basis of sexual orientation. You may choose to decide the case for either side. Your opinion should rely on the Court of Appeals opinion below, the Petitioner’s main brief and reply brief and the Respondent’s brief, as well as the briefs of at least two amici – one supporting your side and the other supporting the opposing side. (Obviously, your job is to defeat the arguments that the other side and its amici advance.) You are responsible for reading whatever caselaw you cite (a diligent judge would never rely on the parties’ presentation of a case) and you are free\* to consult other literature – law review scholarship, blog posts, etc. (\*Those of you taking the course as 808 are required to consult and cite law review scholarship supporting your side.) Your opinion should be in the range of 5 single-spaced pages. You can find the briefs [here](#). (The Petitioner’s merits brief is the one filed on June 26; the Respondent’s brief is the one filed on Aug. 16; and the Reply brief is the one filed on Sept. 10.) Your opinion **must be submitted via email to me by 11:59 PM on March 26. Late assignments will receive a 0.**
6. **In-class oral arguments:** We will hold oral arguments on *Bostock v. Georgia* during our last two class sessions and, if necessary, during the final exam period. You will be

assigned to a side, and must come prepared to defend that side. Details about the format of the oral arguments to follow.

7. ***Serving as a Justice for an Oral Argument:*** You will be assigned to serve as a Supreme Court Justice for one set of our oral arguments in *Bostock v. Georgia*. You will be given class-generated material to prepare you for the case. In your role as a Justice, you will ask questions of the parties. At the end of oral argument, you will cast a vote in favor of the petitioner or respondent.

## COURSE POLICIES:

1. **Canvas:** There will be a course website on Canvas. The website will contain your assigned readings, or links thereto, plus supplemental materials.
2. **Readings for the course:** These are listed on the calendar of readings (below, and on Canvas). Almost all of the readings are accessible through Canvas. The one exception is Anne-Marie Slaughter's book, *Unfinished Business*, which is available through Amazon for under \$15. If you have any difficulty accessing the book, please let me know.
3. **Email:** Students should check email at least daily in the event that I send a message to the class.
4. **Absences:** Please notify me in advance if you expect to miss a class. Properly justified absences will be excused but, depending on the circumstance, a short writing assignment may be required.
5. **Late assignments:** All assignments must be submitted by the deadlines stipulated above. Late assignments will receive a 0. I will make exceptions only for extraordinary circumstances. You should not request lenience unless you feel reasonably certain that your circumstances are in fact extraordinary.
6. **In-class conduct:** In order to ensure your full engagement, you may not use any electronic device during class (no laptops, no tablets, no cell phones). I welcome disagreement in our class discussions but I nonetheless expect that these will proceed with a tone of civility and respect for one another.
7. **Non-Wharton Students:** A Wharton account is required for this course. To obtain a Wharton account, please visit <http://accounts.wharton.upenn.edu>.

## LGST 208/808 – Calendar of Readings and Assignments

Legend:

- TB/Upload: you can find these in a Canvas folder for that week’s class (under the “Files” tab)
- Articles with hyperlinks: you are responsible for following the hyperlinks through to their associated web content.

<b>Week 1 – Jan. 15</b>	<p><i>Intro</i></p> <ul style="list-style-type: none"> <li>• <i>Basic tools and concepts, including how to read a case</i></li> <li>• <i>Who is an employee?</i> <ul style="list-style-type: none"> <li>• Reading: Secretary of Labor v. Lauritzen (upload)</li> <li>• In-class film: The Hand That Feeds</li> </ul> </li> </ul>
<b>Week 2 – Jan. 27</b>	<p><i>Who is an employee (cont’d)?</i></p>
Cases:	<ul style="list-style-type: none"> <li>• Berger v. NCAA (upload);</li> <li>• Overview of NCAA disputes – (<a href="#">news article</a>)</li> <li>• Hearst corporation and interns (<a href="#">news article</a>)</li> <li>• Berwick v. Uber (<a href="#">news article</a>)</li> <li>• Razak v. Uber (UberBlack case) (upload)</li> </ul>
Commentary:	<ul style="list-style-type: none"> <li>• Susan Marquis on <a href="#">migrant workers</a></li> <li>• Sabine Tsuruda, “Volunteer Work, Inclusivity, and Social Equality” (upload)</li> </ul>
<b>Week 3 – Feb. 3</b>	<p><i>Hiring and Racial Discrimination</i></p>
Cases:	<ul style="list-style-type: none"> <li>• Hiring <ul style="list-style-type: none"> <li>○ Griggs (TB)</li> <li>○ Washington v. Davis (TB)</li> <li>○ McDonnell-Douglas v. Green (TB)</li> <li>○ Southwest Airlines (TB)</li> </ul> </li> </ul>

	<ul style="list-style-type: none"> <li>• Racial Discrimination <ul style="list-style-type: none"> <li>○ Ricci v. DeStefano (TB)</li> </ul> </li> </ul>
Commentary:	<ul style="list-style-type: none"> <li>• Bertrand and Mullinaithan (upload)</li> <li>• Anita Alessandra, When Doctrines Collide (upload)</li> </ul>
<b>Feb. 9 at 8 am</b>	<i>You must submit your book report to me – <a href="mailto:sepin@upenn.edu">sepin@upenn.edu</a></i>
<b>Week 4 – Feb. 10</b>	<b><i>Promotion and Sex Discrimination</i></b>
Cases:	<ul style="list-style-type: none"> <li>• Dothard v. Rawlinson (TB)</li> <li>• Phillips v. Martin-Marietta (<a href="#">news summary</a>)</li> <li>• Price-Waterhouse v. Hopkins (TB)</li> <li>• Walmart v. Dukes (upload) <ul style="list-style-type: none"> <li>○ Optional: Betty Dukes’s <a href="#">obituary</a></li> <li>○ Optional: Chavie Lieber, <a href="#">Walmart women sue again</a> (2019)</li> </ul> </li> </ul>
Commentary:	<ul style="list-style-type: none"> <li>• Anne-Marie Slaughter, <i>Unfinished Business</i></li> </ul>
<b>Week 5 – Feb. 17</b>	<b><i>Sexual Harassment</i></b>
Cases:	<ul style="list-style-type: none"> <li>• Meritor Savings Bank v. Vinson (TB)</li> <li>• Ellison v. Brady (TB)</li> <li>• Faragher v. City of Boca Raton (TB)</li> </ul>
Commentary:	<ul style="list-style-type: none"> <li>• Catharine MacKinnon, excerpts from <i>Butterfly Politics</i> (upload)</li> <li>• Vicki Schultz, <a href="#">The Sanitized Workplace</a> (this is long; you may skim it...judiciously!)</li> <li>• Tristen Green, <a href="#">Was Sexual Harassment Law a Mistake?</a></li> <li>• Rachel Arnow-Richman, <a href="#">Of Power and Process</a></li> <li>• Angela Onjuachi-Willig, <a href="#">What about #UsToo?</a></li> <li>• Crain and Matheny, article on sexual harassment and unions (upload)</li> </ul>
<b>Week 6 – Feb. 24</b>	<b>Unprotected classes; Labor Law</b>

	<i>For this class, at least one of your three questions must address the “Labor law” content</i>
Cases:	<ul style="list-style-type: none"> <li>• Unprotected classes: <ul style="list-style-type: none"> <li>○ Farfan, Workplace Obesity (upload)</li> <li>○ Tove Danovich, <a href="#">How Workplaces Get Away with Look-Based Discrimination</a></li> <li>○ Eric Meyer, <a href="#">Hooters 2.0</a></li> </ul> </li> <li>• Labor Law <ul style="list-style-type: none"> <li>○ <a href="#">employee rights to form a union</a></li> <li>○ <a href="#">employer and union rights and obligations</a></li> <li>○ <a href="#">rights to strike</a></li> <li>○ Janus v. AFSCME (upload)</li> </ul> </li> </ul>
Commentary:	<ul style="list-style-type: none"> <li>• Unprotected classes: <ul style="list-style-type: none"> <li>○ Lucy Wang, <a href="#">Weight Discrimination</a></li> <li>○ Kenji Yoshino, <a href="#">The Pressure to Cover</a> (highly recommend this!)</li> </ul> </li> <li>• Labor law: <ul style="list-style-type: none"> <li>○ Kate Andrias, The New Labor Law (upload)</li> </ul> </li> </ul>
<b>Week 7 – March 2</b>	<b>Speech and Privacy at Work</b>

Cases:	<p>[I know there’s a lot here but each of these readings is short]</p> <ul style="list-style-type: none"> <li>• Pickering v. Bd. Of Education (upload)</li> <li>• Tom Spiggle, <a href="#">Free speech rights at work</a></li> <li>• O’Connor v. Ortega (TB, 781)</li> <li>• Shoun v. Best Formed Plastics, Inc. (TB, 784)</li> <li>• City of San Diego v. Roe (TB, 786)</li> <li>• City of Ontario v. Quon (TB, 788)</li> <li>• Peterson v. Wilmur Communications, Inc. (TB, 562)</li> <li>• Peterson v. Hewlett-Packard Co. (TB, 570)</li> </ul>
Commentary:	<ul style="list-style-type: none"> <li>• Elizabeth Anderson, Private Government (upload)</li> <li>• Areheart and Roberts, <a href="#">GINA, Big Data, and the Future of Employee Privacy</a></li> </ul>



<b>March 5, 2020</b>	<i>Send your proposal for your individual field trip to me at <a href="mailto:sepin@upenn.edu">sepin@upenn.edu</a></i>
<b>Week 8 – Mar. 16</b>	NO CLASS (Our court field trip, date TBD, will count as a “make-up” class for this meeting.)
<b>Week 9 – Mar. 23</b>	<b>Accommodations at Work</b>
<b>Cases:</b>	<ul style="list-style-type: none"> <li>• TWA v. Hardison (TB)</li> <li>• EEOC v. Abercrombie &amp; Fitch (TB)</li> <li>• Johnson Controls (upload)</li> <li>• Young v. UPS (<a href="#">Harvard Business Review article</a>)</li> <li>• Gilbert (upload)</li> <li>• <a href="#">Family Medical Leave Act (FMLA)</a></li> </ul>
Commentary:	<ul style="list-style-type: none"> <li>• Claire Michelle Simonich, <a href="#">On the relationship between pregnancy and disability</a></li> <li>• Blanc and Meijers, <a href="#">Firms and Parental Justice</a></li> <li>• Gedicks and van Tassell on religious accommodations and third-party costs (upload)</li> </ul>
<b>March 26 at 11:59 pm</b>	<i>You must submit your judicial opinion to me – <a href="mailto:sepin@upenn.edu">sepin@upenn.edu</a></i>
<b>Week 10 – Mar. 30</b>	<b>Employment At-Will; non-compete; secrecy; and non-disclosure agreements</b>
Case:	<ul style="list-style-type: none"> <li>• Employment at-will: <ul style="list-style-type: none"> <li>○ Wagenseller v. Scottsdale Memorial Hospital (upload)</li> </ul> </li> </ul>
Commentary:	<ul style="list-style-type: none"> <li>• Employment at-will: <ul style="list-style-type: none"> <li>○ Richard Epstein, <a href="#">In Defense of the Contract At-Will</a></li> <li>○ Clyde Summers, <a href="#">The Divine Right of Employers</a></li> </ul> </li> <li>• Non-compete: <ul style="list-style-type: none"> <li>○ Wiessner, <a href="#">Jimmy Johns and non-compete clauses</a></li> </ul> </li> <li>• Secrecy <ul style="list-style-type: none"> <li>○ Wong, <a href="#">pay gaps and pay transparency</a></li> </ul> </li> </ul>

	<ul style="list-style-type: none"> <li>• Non-disclosure: <ul style="list-style-type: none"> <li>○ Elizabeth Tippet, ABA on <a href="#">#MeToo</a></li> <li>○ Harvard Law School Forum on <a href="#">NDAs and Sexual Harassment</a></li> <li>○ LA Times article, <a href="#">#MeToo law restricts use of nondisclosure agreements in sexual misconduct cases</a></li> <li>○ Gretchen Carlson, <a href="#">New York Times Op-Ed</a></li> </ul> </li> </ul>
<b>April 5 by 11:59 PM</b>	Send your write-up of your individual field trip to me at <a href="mailto:sepin@upenn.edu">sepin@upenn.edu</a>
<b>Week 11 – Apr. 6</b>	<p><b>Non-Disclosure Agreements</b> (if required);  <b>Course wrap-up</b> (including optional discussion of individual field trips)  <b>Bombshell!</b> (movie, watch in class)</p> <ul style="list-style-type: none"> <li>• No readings</li> </ul>
<b>Week 12 – Apr. 13</b>	<b>Oral argument</b>
<b>Week 13 – Apr. 20</b>	<b>NO CLASS</b>
<b>Week 14 – April 27</b>	<b>Oral argument</b>
<b>Week 15 – May 4</b>	<p><b>Oral argument</b> – if necessary</p> <p>(This is during the final exam period but it will count as a “make-up” class for one of our missed classes. Please let me know of a conflict as soon as you know it.)</p>