

**WORK, FAMILY, AND THE LAW**  
**Professor Laura T. Kessler**  
**Fall 2002**  
Library Moyle Conference Room

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**COURSE DESCRIPTION**

This course will explore those aspects of employment discrimination, family, and social welfare law that address the tensions between family and market work in America, as well as the theoretical frameworks that might inform a studied inquiry of this problem. Topics will include the role of Title VII, the Family and Medical Leave Act, and constitutional equal protection litigation in furthering women's opportunities to enter and advance in the workplace; the manner in which legislatures and courts have regarded working women and "stay at home" fathers in divorce and custody disputes; and the function of social welfare laws in reflecting and reinforcing changing family roles.

As the seminar covers several substantive areas of law, there will not be a single casebook. Instead, we will be using a course pack that I have prepared in conjunction with West Custom Publishing, and a series of law review articles which are accessible from a seminar web site that I have set up using Westlaw's TWEN service.

During the first four weeks of class, we will focus on gaining a basic understanding of the history of protective labor legislation in America, the predominant theories of employment discrimination under Title VII of the Civil Rights Act of 1964, and constitutional sex discrimination law. During the next six weeks, we will examine and critique the law as it applies to work/family conflicts within particular contexts. The remaining four weeks of the semester will be devoted to half-hour presentations of your papers.

The final product of the seminar will be an original research paper of twenty-five to thirty pages in length, exclusive of footnotes. The final paper must be a polished piece of independent scholarship with an introduction, body, and end; present a logical argument based upon original legal research; conform to THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION; and have been checked for grammatical and spelling errors before submission.

The research project will be conducted in six distinct stages: (1) choosing a paper topic; (2) preparing an outline and bibliography; (3) submitting a first draft; (4) preparing comments on a fellow classmate's paper (and receiving comments on yours); (5) presenting your research to the class; and (6) submitting your final paper. A detailed schedule outlining deadlines for each stage of the project follows below.

## POSSIBLE PAPER TOPICS

Possible topics for papers include:

Should -- and can -- the Family and Medical Leave Act be expanded? If so, how?

Are the recent Department of Labor regulations permitting states to offer unemployment insurance to those taking Family and Medical Leave within the scope of DOL's authority, or might they be subject to legal challenge? Will they be effective at resolving parents' work/family conflicts?

Is Title VII an effective tool for protecting women from sex discrimination in the workplace on the basis of their family caregiving responsibilities? Why or why not?

Given the Supreme Court's recent decisions holding certain provisions of the Age Discrimination in Employment Act, the Violence Against Women Act, and other federal congressional legislation unconstitutional under the fourteenth amendment and commerce clause, are Title VII's provisions prohibiting sex discrimination in employment, and the Pregnancy Discrimination Act in particular, constitutional?

What legal barriers continue to discourage men from taking more responsibility for their children? What legal reforms have helped in this area, if any?

Which families are at the center of our country's family leave laws and policies? Which families are left out? What reforms might provide for more inclusive work/family policies in America?

Whatever happened to the mandatory forty-hour work week? Should it be revisited?

Is the "mommy track" sound policy? Is it legal? What legal theories might be developed under Title VII to require employers to provide comparable benefits to part-time employees?

Should breast-feeding fall within the protections of the Pregnancy Discrimination Act, which currently prohibits employment discrimination on the basis of pregnancy or "related medical conditions?" Why or why not?

Should we reexamine state prohibitions on plural marriage? Could plural marriage, by expanding the number of adults in a family, resolve parents' work/family conflicts?

What labor regulations, if any, protect nannies from workplace abuses? How do work/family conflicts in America relate to immigration law and policy?

Under the Temporary Assistance to Needy Families program (TANF - formerly AFDC), states have great latitude to require mothers with small children to perform work as a condition of receipt of welfare benefits, and states are required to reduce or terminate assistance if work requirements are not met. Federal law does provide an exception,

however, for those who cannot obtain child care. To what extent and under what conditions is this exception being implemented in Utah? What should be done to ensure poor parents do not lose welfare benefits because of inadequate child care? Instead of making market work a condition of welfare receipt, should we extend some form of government subsidy to all who care for young children at home?

What theoretical justifications exist for providing legal recognition of family caregiving work, whether in the form of employment nondiscrimination provisions, social welfare programs, subsidies for child care, or post-divorce support payments? Are children a public good? Is the family, and the caregiving performed there, necessary for the maintenance of a civil society? Is engaging in caregiving a fundamental constitutional right of the individual? Is caregiving a cultural practice? Is it a form of political expression? Is it an oppressive responsibility imposed on women? Is the value of childcare and housework property that should be accounted for upon marital dissolution? What legal regimes flow from these different conceptions of caregiving?

Should a law modeled on the Americans with Disabilities Act be adopted to require employers to reasonably accommodate working parents? What are the arguments for and against an accommodation model? What lessons from the last decade since the ADA was passed can inform this question?

## **SCHEDULE FOR RESEARCH PROJECTS**

**September 18, 2002:** Deadline for choosing topics. You must submit a short statement of your paper topic at the beginning of class.

**October 9, 2002:** Deadline to submit tentative outline and bibliography, due at the beginning of class. This should be a clear statement (two-three paragraphs) of your thesis or project, an outline of the basic sections of your paper, and a bibliography of at least ten proposed sources that you have read. For each of the sources in your bibliography, you should provide a three to four sentence summary of the source and how it fits into your paper. Failure without previous excuse to miss this deadline will result in mandatory withdrawal from the seminar.

**October 30, 2002:** First draft of paper due. Please bring two copies to class, one for me, and a second to be distributed to a fellow classmate for comment. Failure without previous excuse to miss this deadline will result in mandatory withdrawal from the seminar.

I will not be grading this draft but rather reading it as your coach, in ways that I think can help the coherence of your argument, organization, and your thinking about the complexities and contradictions of your topic.

- November 6, 2002:** Deadline for submitting written comments on your fellow classmate's draft research paper. You should write comments directly on the paper, and type a one- to two-page summary of your impressions. Please bring to class the marked up original paper and your typewritten comments, as well as a copy of each for me.
- Nov. 13-Dec. 3:** Oral presentations of seminar papers, approximately three students per week. There may be a make-up class scheduled in November. *See* Notable Schedule Changes, *infra*.
- Dec. 20, 2002:** Final drafts of papers must be emailed to me by 4:30 p.m. Failure without previous excuse to miss this deadline will result in automatic reduction of one full grade in the overall seminar grade for each day late.

## **COURSE MATERIALS**

Laura T. Kessler, *CASES AND MATERIALS ON WORK, FAMILY AND THE LAW* (West Custom Publishing, 2001)

Selected law review articles available on the Work, Family, and the Law web site I have set up using Westlaw's TWEN service ([www.lawschool.westlaw.com](http://www.lawschool.westlaw.com)). You will need a Westlaw password to access this site. If you do not presently have one, please contact the law school research librarian immediately to get an account established. For instructions on accessing TWEN, see the instructions below.

## **INSTRUCTIONS FOR ACCESSING THE WORK, FAMILY AND THE LAW WEB PAGE ON TWEN:**

In order to access the TWEN web page, you will need to register as a seminar participant over Westlaw. To do so, go to [www.lawschool.westlaw.com](http://www.lawschool.westlaw.com) over the Internet, click the TWEN link, fill in the requested information for first-time TWEN users, sign onto Westlaw using your password, choose Utah Law School from the pull-down list of law schools, and choose Work, Family, and the Law. Upon entering the web site for our course, you will see a list of options on the left side, among them, "Supplementary Course Materials." Click that option. You should then see a list of links to law review articles. By clicking on the cite of an article, you will be taken directly to the article on Westlaw. If you have any technical difficulties accessing the TWEN course page, you can receive technical assistance by calling 1-800-Westlaw.

## **NOTABLE SCHEDULE CHANGES:**

(1) Class will not meet Wednesday, September 25.

A make-up class may be scheduled in November in light of this cancellation to accommodate student presentations, depending on enrollment. Please stay posted.

(2) The last week of the semester, we will meet on Tuesday.

## **SUMMARY: COURSE REQUIREMENTS**

(1) Class Attendance.

(2) Preparation for and participation in classroom discussion. Each week, two or three course participants will be responsible for leading class discussion.

(3) Completion of an original research paper of 25-30 pages in length, exclusive of footnotes.

(4) Compliance with all of the deadlines set out in the schedule for research projects, above.

(5) Preparation of written comments (1-2 typewritten pages) on a fellow classmate's draft research paper.

(6) Oral presentation of your paper to all seminar participants.

**Note:** In accordance with law school policy, a student may be denied credit for a course on the basis of excessive unexcused absences from class or unexcused failure to complete any stage of the research project.

## **EVALUATION**

Your semester grade will be determined, as follows:

15 percent - Written comments on a colleague's draft paper.

15 percent - Oral presentation of your research.

70 percent - Final paper.

**COURSE SUPPLEMENT:** We will cover approximately 30-40 pages per class hour. At the end of each week, I will announce and post on the course web page an assignment for the following week. Selection and presentation of the material will be paced to accommodate class discussion and interest, therefore, don't read too far ahead! Note: The following materials will be supplemented with law review articles on TWEN.

## **I. Introduction/History of Protective Labor Legislation**

Nancy E. Dowd, *Work and Family: Restructuring the Workplace*, 32 ARIZ. L. REV. 431 (1990). This article can be accessed from the TWEN Work, Family, and the Law web site.

Barbara Allen Babcock et al., *Sex Discrimination and the Law: History, Practice, and Theory* (2d ed., 1996) (Little Brown), pages 80-130.

## **II. Introduction to Constitutional Sex Discrimination (Supp. 3-67)**

### **A. Introduction**

### **B. Modern Cases**

*Reed v. Reed* (Kay)

*Frontiero v. Richardson* (Kay)

*Craig v. Boren* (Kay)

*United States v. Virginia* (Gunther)

## **III. Introduction to Title VII Employment Discrimination**

### **A. Note on Women and Employment (71-73)**

### **B. Disparate Treatment (Supp. 74-112)**

*McDonnell Douglas Corp. v. Green*

*Texas Department of Community Affairs v. Burdine*

*St. Mary's Honor Center v. Hicks* (Kay)

*Reeves v. Sanderson Plumbing Products, Inc.* (Estreicher)

### **C. Disparate Impact (Supp. 113-44)**

*Griggs v. Duke Power Co.*

*Wards Cove Packing Co. v. Atonio* (Kay)

*Washington v. Forth Worth Bank & Trust*

## **IV. Applying Sex Discrimination Law to Work / Family Conflicts**

### **A. Introduction (Supp. 147-54)**

### **B. Pregnancy (Supp. 155-220)**

*Geduldig v Aiello* (Greenberg)

*General Electric Co. v Gilbert* (MacKinnon)

The Pregnancy Discrimination Act (Greenberg)

*Troupe v. May Stores*

*Sheehan v. Donlen*

*McNill v. NYC DOC*

*Fejes v. Gilpin*

*Pearlstein v. Staten Island*

### **C. Caregiving Discrimination**

#### **1. Disparate Treatment (Supp. 221-65)**

##### **a. Title VII's Sex Plus Theory**

*Phillips v Martin Marietta Corporation* (Kay)

##### **b. Promotion Cases**

*Trezza v. The Hartford, Inc*

*Coble v. Hot Springs School District No. 6*

##### **c. Demotion / Termination Cases**

*Chi v. Age Group*

*Martinez v. NBC*

*Fuller v. GTE*

*Bass v. Chemical Banking Corp*

#### **2. Disparate Impact (Supp. 267-87)**

##### **a. Leave Policies**

*Payseur v. Grainger*

*Roberts v. U.S. Postmaster*

##### **b. RIF Policies**

*Ilhardt v. Sara Lee Corp*

##### **c. Travel Requirements**

*Goicoechia v. Mtn. States Te. & Telegraph*

##### **d. Attendance Policies**

*Ahmad v. Loyal*

### **3. The Family and Medical Leave Act (Supp. 289-344)**

#### **a. Overview / Introduction** (Greenberg)

#### **b. Limits of "Serious Health Condition"**

*Reich v. Midwest Plastic*

#### **c. Applications to Extended Families**

*Krohn v. Forsting*

#### **d. Caregiving Men**

*Knussman v. State of Maryland*

News Article: Laws that Will Make Men Do the Chores,  
Daily Mail, May 20, 1999

### **V. Work and Family Law Disputes**

#### **A. Divorce (Supp. 347-352)**

*Reid v. Reid*

#### **B. Child Custody (Supp. 353-410)**

*Lewis v. Lewis*

*Andrews v. Andrews*

*Fitzsimmons v. Fitzsimmons*

*Burchard v. Garay*

*Kerkhoff v. Kerkhoff*

*In re Marriage of Tresnak*

*Ireland v. Smith* (1995)

*Prost v. Greene*

*Ireland v. Smith* (1996)

### **VI. Work/Family Conflicts and Welfare Reform**

In class materials - TBA

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