

**Joint Newsletter for AALS Sections on
Labor Relations and Employment and
Employment Discrimination**

2014

Contents

The AALS Section on Labor Relations and Employment and on Employment Discrimination have once again worked together to produce this year’s annual AALS Joint Newsletter.

Relevant AALS presentations.....page 2

Comings, Goings and Kudos – new hires, promotions, moves, administrative appointments, honors, etc. among our section members.....page 6

Publications by our section members.....page 8

Announcements of writing competitions, conferences, calls for papers, etc.....page 13

Blogs.....page 15

Selection of recent judicial opinions and other legal developments.....page 16

This newsletter has been compiled by the Secretaries of the Sections:

Monique C. Lillard (*University of Idaho, Labor Relations and Employment Section*) and
Natasha T. Martin (*Seattle University, Employment Discrimination Section*)

AALS Section Presentations

We begin with the offerings of our own sections (on Saturday and Monday of the conference) and a brief discussion of the Anita Hill presentation (Monday). We then chronologically list offerings that may be of interest to section members, some of which are in unfortunate conflict with each other.

We are often asked how professors can get involved with AALS sections. The answer is easy – show up to the sessions, and then stay to attend the “business meeting,” usually directly following the session. Do not be shy about volunteering to be an officer or a member of the section’s Executive Committee. The sections exist so that we can share information and get to know each other. You will be welcomed.

Times and programs are subject to change; double check the program schedule you are given at registration.

Section on Labor Relations and Employment Law, co-sponsored by the Sections on Socio-Economics and Women in Legal Education: Emotions at Work: The Employment Relationship During an Age of Anxiety, *Monday, January 5, 10:30am-12:15pm*

In uncertain economic times that translate into uncertain times in the workplace, many individuals are experiencing a greater range and intensity of emotions at work, both as employees and as employers. Employees may be anxious about job security even when they have an employment contract or other job protections, may feel more pressure with respect to their work responsibilities, and may be emotionally (and not just financially) unprepared for sudden changes to their employment relationships and changes in career plans. Employers also are experiencing heightened pressure as they try to steer their work organizations safely past the rough economic waves while needing to make some hard decisions along the way. Are these emotions in the workplace openly recognized and managed, and if so, how? This panel explores the emotional aspects of the employment relationship and how employment law or workplace policy should address these concerns.

Moderator: Rebecca K. Lee, Thomas Jefferson School of Law

Speakers: Marion G. Crain, Washington University in St. Louis School of Law; Laura A. Rosenbury, Washington University in St. Louis School of Law; Thomas Ulen, University of Illinois College of Law; David Yamada, Suffolk University Law School

Speaker from Call for Papers: Sachin S. Pandya, University of Connecticut School of Law

Papers to be published in the Employee Rights and Employment Policy Journal; business meeting at program conclusion.

Section on Labor Relations and Employment Law Luncheon,
Monday, January 5, 12:15-1:30pm

Sections on Disability Law and Employment Discrimination Law Joint Program:

Employment Discrimination and the Americans with Disabilities Act at 25 Years, *Saturday January 3, 10:30 am-12:15 pm*

This panel will reflect on the development and impact of the Americans with Disabilities Act (ADA) on its twenty-fifth anniversary. Senator Tom Harkin of Iowa, champion and sponsor of the statute, will offer introductory remarks. Panelists will pursue a range of timely issues including the ADA's effect on accommodations related to employees' commutes to work; new challenges in applying the ADA in an internet-based and computer-based society; recent developments in other countries, examining the ADA in relation to the Convention on the Rights of Persons with Disabilities; the past and future of the reasonable accommodation provision; the intersection of health and disability in the workplace; the significance of the ADA and the role that Congressional overrides play in employment discrimination. Notably, the panel will include the perspective of some of the architects of the ADA and the ADA Amendments Act (ADAAA), who will offer reflections and insights on future directions of this significant law.

Moderator: Timothy Gulbranson, Drake University Law School

Speakers: Stephen Befort, University of Minnesota Law School; Ruth Colker, The Ohio State University, Michael E. Moritz College of Law,; Chai Feldblum, U.S. Equal Employment Opportunity Commission; The Honorable Tom Harkin, U.S. Senate – Office of Senator Tom Harkin, (Iowa); Arlene Kanter, Syracuse University College of Law; Nicole Porter, University of Toledo College of Law; Jessica Roberts, University of Houston Law Center; Deborah Widiss, Indiana University, Maurer School of Law

(Papers to be published in *Drake Law Review*)

Section on Law and Sports, Co- Sponsored by Section on Labor Relations and

Employment Law: Locker Rooms and the Law of the Workplace: Bullying, Hazing and Harassment in Professional Sports, *Sunday, January 4, 4-5:45 pm.*

Section on Employment Discrimination Law, Works-in-Progress for New Law School Teachers, *Saturday, January 3, 5:15-6:30 pm.*

AALS Crosscutting Program - Anita F. Hill, Supreme Court Confirmation Hearings, and a Screening of the Film "Anita," *Monday, January 5, 2-5 pm.*

Moderator: Michael A. Olivas, University of Houston Law Center

Speakers: Taunya Lovell Banks, University of Maryland Francis King Carey School of Law, Anita Hill, Senior Advisor to the Provost and Professor of Social Policy, Law, and Women's Studies, Brandeis University Heller School for Social Policy and Management, Jessica Silbey, Suffolk University Law School.

We wanted especially to draw your attention to this program. Anita Hill's testimony at Clarence Thomas's confirmation hearings brought the topic "sexual harassment" into America's consciousness and living rooms. This was before the Lewinsky-Clinton revelations that would emerge a few years later. The concept was so new that newscasters debated how to pronounce

“harassment.” Even for those who worked in the employment law field, it was astonishing to hear U.S. Senators reciting the allegations on primetime newscasts. Much testimony came out during the televised hearing, but people on all sides who addressed the Senate panel mentioned the seriousness of the problem of sexual harassment in the American workplace. We are lucky indeed, this January, to have a chance to hear from the people who helped to make this history.

Now here are other programs that our section members may find interesting, listed chronologically:

Saturday, January 3:

Section on Civil Procedure , The Rising Bar to Federal Courts: Beyond Pleading and Discovery (Papers to be published in *Journal of Civil Rights and Economic Development*) – 10:30 am-12:15 pm.

Remember the Employment Discrimination program this morning which unfortunately conflicts with the Civ Pro topic of interest to those who study the operations in federal courts.

Section on Women in Legal Education Luncheon, Special Guest: Ruth Bader Ginsburg, Associate Justice, Supreme Court of the United States, Washington, D.C. -- 12:15-1:30 pm

Sections on Legal History and Women in Legal Education Joint Program, Co-Sponsored by Section on Constitutional Law : Engendering Equality: A Conversation with Ruth Bader Ginsburg, Associate Justice, Supreme Court of the United States, and New Voices in Women’s Legal History -- 1:30-3:15 pm

Section on Litigation, Co-Sponsored by Section on Civil Procedure: The Future of Discovery, -- 1:30-3:15 pm

Section on Immigration Law and Minority Groups Joint Program: The 1965 Immigration Act: Fifty Years of Race- Neutral (?) Immigration? -- 3:30-5:15 pm

Section on Sexual Orientation and Gender Identity Issues: Transgender Equality: Prisons, Workplace, and Academic Institutions -- 3:30-5:15 pm

Section on Law and Mental Disability: Adding Cases and Hypos Regarding Individuals With Physical and Mental Disabilities to Your Doctrinal Class -- 5:15-6:30 pm

Sunday, January 4

Section on Poverty Law: Working But Poor: Understanding and Confronting the Working Poor Phenomenon -- 10:30 am-12:15 pm

AALS Crosscutting Program: The More Things Change...: Exploring Solutions to Persisting Discrimination in Legal Academia -- 2-3:45 pm

Section on Remedies: Structural Reform Litigation at 60 -- 2-3:45 pm

Monday, January 5

Section on Employee Benefits and Executive Compensation: Retirement Policy: Incremental v. Fundamental Reform -- 8:30-10:15 am

Section on Law and Religion: How (Not to) Provide Statutory Accommodations for Religion 8:30-10:15 am

Section on Minority Groups: Tenure, Austerity, and Academic Freedom 8:30-10:15 am

Remember the Labor Relations and Employment Law session, which unfortunately conflicts with these other fine programs, and the Labor Relations and Employment lunch. The Anita Hill program is this afternoon.

Comings, Goings and Kudos

Certainly there has been more movement than what was reported to us, but here is at least a sample of movement, promotion, and honoring of our members. Congratulations to all!

Mark L. Adams, formerly Vice Dean for Academic Affairs at Valparaiso, is now Dean of the University of Idaho College of Law. At Valparaiso he had taught Labor and Employment Law.

Jason R. Bent, Stetson, was promoted from Assistant to Associate Professor. And thank you Jason for your help with this newsletter.

Susan Bisom-Rapp, Thomas Jefferson, accepted an invitation to become a member of the Scientific Committee of the Marco Biagi Foundation, University of Modena and Reggio Emilia, Italy. The Foundation houses the University's Doctoral Research School in Labour, Development and Innovation. The Scientific Committee advises the Foundation on its scholarly activities.

Michael C. Duff, Wyoming, was named Centennial Distinguished Professor of Law at the University of Wyoming this past September. Prof. Duff focuses on labor law and workers' compensation. He writes, "Not sure how many former Teamster shop-stewards have been honored in such a way. That it has all transpired in Wyoming is in many ways the seasoning that makes the stew." [After years in Idaho, I (Monique) understand the comment, although the percentage of union workers in Idaho and Wyoming, both in the 7-8% range, are by no means the lowest in the USA. http://en.wikipedia.org/wiki/Union_affiliation_by_U.S._state]

Julius (Jack) Getman, retired from the University of Texas.

Doris "Wendy" Greene, Cumberland-Samford, served as the inaugural Scholar-in-Residence at the St. Thomas University School of Law in Miami, where she taught a course entitled "The Contemporary Workplace: Appearance Discrimination, Dress Codes, and the Law." For path-breaking teaching, scholarship, and service, Professor Greene was also honored by *Diverse: Issues in Higher Education Magazine* as one of 12 "Emerging Scholars" in January 2014. Her articles *Title VII: What's Hair Got to Do With It?* and *Black Women Can't Have Blonde Hair...in the Workplace*, have been cited by the EEOC.

Rebecca K. Lee, Thomas Jefferson School of Law, the intrepid leader of the AALS Labor Relations and Employment Section, was awarded tenure in April 2014.

Nancy Leong, Denver, received tenure and was promoted to the rank of Associate Professor.

Orly Lobel, San Diego, has won the following prizes for her book *Talent Wants to be Free* (Yale University Press): 2014 Axiom Business Book Awards Gold Seal, 2014 Gold Medalist Independent Publisher Book Awards, Winner of the 2014 Thorsnes Prizes for Outstanding Legal Scholarship, Winner of the 2014 International Book Awards in the Law,

and Business/Careers categories. She now holds the Don Weckstein chair as Professor of Employment and Labor Law.

Angela Onwuachi-Willig, Iowa, visited at Yale Law School, Fall 2014. Her abstract, with Professors Marizen Ramirez and Corrine Peek-Asa and doctoral students, Laura Schwab-Reese and Erica Spies, entitled “Evaluation of the Implementation of Anti-bullying Legislation in Schools,” was recognized as the 2014 Abstract of the Year by American Public Health Association’s Law Section. Her past and upcoming lectures include: 2014 Sidney and Walter Siben Distinguished Professorship Lecture, Hofstra Law School, Hempstead, New York, March 24, 2015; Distinguished Public Lecture, Keynote Address for National African American History Month, Eastern Kentucky University, Richmond, Kentucky, February 26, 2015; *Brown v. Board of Education* at 60 Lecture Series, Indiana University-Bloomington Maurer School of Law, Bloomington, Indiana, November 13, 2014; Book Lecture: “*According to Our Hearts: Rhinelander v. Rhinelander and the Law of the Multiracial Family*,” University of Southern California Gould School of Law, October 2, 2014; Constitution Day Lecture, Drake University Law School, Des Moines, Iowa, September 15, 2014.

John Rumel, Idaho, has moved from the Moscow campus to the Boise campus. Workplace Law and Education Law will be part of his teaching package.

Craig R. Senn, Loyola University New Orleans, promoted to full professor and selected as the Janet Mary Riley Distinguished Professor of Law.

Jennifer Bennett Shinall was just hired as an assistant professor at Vanderbilt. She is researching and teaching employment discrimination.

Joseph Slater, Toledo, was recently inducted into the College of Labor and Employment Lawyers.

Lu-in Wang moved from the University of Pittsburgh School of Law to the University of New Mexico School of Law in Fall 2013.

Last but not least, here are the 2014 leaders of our AALS sections:

Labor and Employment Section: Chair: **Rebecca Lee** (Thomas Jefferson), Chair-Elect: **Jason Bent** (Stetson), Secretary/Treasurer: **Monique Lillard** (University of Idaho). Executive Committee: **Mike Green** (Texas A&M), **Brad Areheart** (University of Tennessee), **Danielle Weatherby** (University of Arkansas), **Peggie Smith** (our immediate past Chair whom we thank for her fantastic work in 2013)(Washington University - St. Louis).

Employment Discrimination Section: Chair: **Angela Onwuachi-Willig** (Iowa), Chair-Elect: **Brad Areheart** (Tennessee), Secretary: **Natasha Martin** (Seattle). Executive Committee: **Camille Gear Rich** (USC), **Wendy Greene** (Cumberland), **Joseph Fishkin** (Texas), **Leti Saucedo** (UC Davis)

Recent Publications

Here is a list of books and articles brought to our attention by our section members:

Bradley Areheart, Tennessee, *Accommodating Every Body*, 81 UNIVERSITY OF CHICAGO LAW REVIEW 689 (2014) (with Michael Stein, Anita Silvers, & Leslie Francis) (arguing for the extension of an ADA-type reasonable accommodation mandate to all members of the general population for whom accommodation is necessary to enable their ability to work).

Robert Belton, *The Crusade for Equality in the Workplace: The Griggs v. Duke Power Story*. Many of us remember Bob well. His book has been posthumously published by the University Press of Kansas, edited by Stephen L. Wasby. Hat tip to Brian K. Landsberg, University of the Pacific, McGeorge, for bringing this to our attention. Deborah Widiss's review is noted below.

Jason R. Bent, Stetson, *Hidden Priors: Toward a Unifying Theory of Systemic Disparate Treatment Law*, 91 Denver L. Rev. _ (forthcoming, symposium paper); *P-Values, Priors, and Procedure in Antidiscrimination Law*, 63 Buffalo L. Rev. _ (forthcoming); *Curtailing Voter Intimidation By Employers After Citizens United*, 43 Stetson L. Rev. 595 (Spring 2014, symposium paper).

Susan Bisom-Rapp, Thomas Jefferson, *Cause, Effect, and Solution?: The Uneasy Relationship Between Older Age Bias and Age Discrimination Law*, in THE MULTI-GENERATIONAL WORKFORCE: CHALLENGES AND OPPORTUNITIES (with Malcolm Sargeant) (Ronald Burke, Cary Cooper, and Alexander Antoniou eds., Edward Elgar, forthcoming 2015), providing a psychologically- based rationale for the legal prohibition of age discrimination is ubiquitous in jurisprudence, academic writing, and business literature. This chapter challenges the way doctrinal law attempts to ameliorate ageism, age-based implicit bias, and age stereotyping by arguing that bias against older workers is a complex phenomenon that may play out in a manner difficult to discern for the purpose of legal claiming; *It's Complicated: Age, Gender, and Lifetime Discrimination Against Working Women – The United States and the U.K. as Examples*, 22 ELDER L.J. 1 (with Malcolm Sargeant) (2014), considering the effect on women of a lifetime of discrimination using material from both the United States and the United Kingdom. To capture the phenomenon, the article develops a model of Lifetime Disadvantage, which considers the major factors that on average produce unequal outcomes for working women at the end of their careers, and argues that an effective, comprehensive regulatory framework could help compensate for these disadvantages, which accumulate over a lifetime; *Context Matters: A Reply to Professor Eisenberg*, 65 FLA. L. REV. FORUM 13 (2014) (invited response), responding, by invitation, to Professor Deborah Eisenberg's article "Regulation by Amicus," which assesses U.S. Department of Labor efforts to influence statutory interpretation through the use of amicus briefs. The essay contextualizes Eisenberg's significant contribution to the literature by placing the practice she describes in a historical and political context, and positions her observations in light of the changing nature of work in the 21st century.

Doris “Wendy” Greene, Cumberland-Samford, *Categorically Black, White, or Wrong: “Misperception Discrimination” and the State of Title VII Protection*, 47 MICH. J. L. REF. 101 (2013) and *A Multidimensional Analysis of What Not to Wear in the Workplace: Hijabs and Natural Hair*, 8 FIU L. Rev. 333 (2013).

Tristin K. Green, University of San Francisco: *Racial Emotion in the Workplace*, 86 S. Cal. L. Rev. 959 (2013) and *Civil Rights Lemonade: Title VII, Gender, and Working Options for Working Families*, 10 Stan. J. C.R.-C.L. (2014) (Invited as part of the Stanford Symposium on the Civil Rights Act at 50).

Zachary A Kramer, Arizona State, *The New Sex Discrimination*, 63 Duke Law Journal 891 (2014).

Rebecca K. Lee, Thomas Jefferson, *The Implications of Fisher v. University of Texas on Workplace Affirmative Action*, 89 St. John’s L. Rev. __ (forthcoming 2015) (selected paper for symposium issue on Title VII at 50), examining how the Court's analysis in *Fisher* would apply to race-conscious affirmative action efforts in the public sector workplace, and also offering considerations for private sector employers who engage in such efforts. And *Judging Judges: Empathy as the Litmus Test for Impartiality*, 82 U. Cin. L. Rev. 145 (2013) (actually published in 2014). This article makes an affirmative case for the use of empathy in judging and argues that empathetic decision making is necessary for objective adjudication.

Rosalie Levinson, Valparaiso, *Gender Equality vs. Religious Autonomy: Suing Religious Employers for Sexual Harassment after Hosanna-Tabor* will be published in January in the Stanford Journal of Civil Rights and Civil Liberties, examining the ministerial exception and the broader ecclesiastical abstention doctrine in the context of sexual harassment claims brought against religious employers.

Nancy Leong, Denver, *Negative Identity*, 88 Southern California Law Review (forthcoming 2015), examining identity marked by indifference or antipathy to something a majority of society considers importance -- for example, atheism, asexuality, singleness, or childlessness. It argues that such identities tend to be underprotected by antidiscrimination law in a variety of domains, including employment law. *Improving Rights*, 100 Virginia Law Review 377 (2014), examining the cognitive obstacles that lead judges to define rights in a way that does not adequately take account of all the situations in which the right applies, then proposes some ways to improve the rights-defining process. Both constitutional and statutory rights relating to employment law are examined.

Orly Lobel, San Diego: *The New Cognitive Property: Human Capital Law and the Reach of Intellectual Property*, forthcoming Texas Law Review 2015; *Behavioral Tradeoffs*, forthcoming in NUDGING IN EUROPE: WHAT CAN EU LAW LEARN FROM BEHAVIOURAL SCIENCES? 2015 (with Yuval Feldman); *How Noncompetes Stifle Innovation*, Harvard Business Review (2014); and

Driving Performance: A Growth Theory of Non-Compete Law, 16 *Stanford Technology Review* (2013).

Alex Long, Tennessee, *Reasonable Accommodation as Professional Responsibility*, *Reasonable Accommodation as Professionalism*, 47 *UC DAVIS LAW REVIEW* (2014) and *The Forgotten Role of Consent in Defamation and Employment Reference Cases*, 65 *FLORIDA LAW REVIEW* (2014).

Angela Onwuachi-Willig, Iowa, with Dean Erwin Chemerinsky and Associate Dean Mario Barnes of the University of California, Irvine School of Law, *Judging Opportunity Lost: Race-Based Affirmative Action and Equality Jurisprudence After Fisher v. University of Texas, Austin*, 62 *UCLA L. REV.* (forthcoming February 2015), examining the recent, affirmative action case, *Fisher v. University of Texas, Austin*, as a means for highlighting why the “equal opportunity” or “anti-subordination” approach is the correct approach to equal protection, and suggesting that, with regard to race-conscious affirmative action, courts should guide their consideration by what role law must play in mitigating long-term, structural disadvantages maintained through race, which now functions as caste within the United States. Angela Onwuachi-Willig also wrote a book review with William Kidder, Assistant Executive Vice Chancellor of the University of California, Riverside, *Still Hazy After All These Years: The Lack of Empirical Evidence and Logic Supporting Mismatch*, 92 *TEXAS L. REV.* 895 (2014), reviewing RICHARD H. SANDER & STUART TAYLOR, JR., *MISMATCH: HOW AFFIRMATIVE ACTION HURTS STUDENTS IT’S INTENDED TO HELP, AND WHY UNIVERSITIES WON’T ADMIT IT* (2013), focusing on Sander and Taylor’s claims that purported mismatches between students and institutions give rise to lower graduation rates and wages, that Proposition 209 has resulted in “warming effects” that have increased the attractiveness of the University of California system to underrepresented minorities, and that affirmative action causes its beneficiaries to feel stigmatized. The review ends by highlighting what Sander and Taylor’s silence about mismatch effects for white students reveals about what truly motivates their, and others’, anti-affirmative action arguments. *An Educator Who Gives Prisoners a Chance*, *N.Y. TIMES, ROOM FOR DEBATE*, Jan. 26, 2014, arguing that the President should invite the founder of the Bard College Prison Initiative to the State of the Union.

Nicole B. Porter, Toledo, *The New ADA Backlash*, 82 *TENNESSEE LAW REVIEW* 1 (forthcoming 2014), exploring case law after the ADA Amendments and potential backlashes. *A Defining Moment: Book Review of DISABILITY & EQUITY AT WORK*, -- *EMP. RIGHTS & EMP. POL’Y J.* -- (forthcoming 2014). *Caregiver Conundrum Redux: The Entrenchment of Structural Norms*, 91 *DENV. L. REV.* -- (forthcoming 2014, symposium paper), arguing that the entrenchment of structural norms in the workplace (the rules and policies regarding when and where work is performed) make it difficult to remedy the “caregiver conundrum” experienced by workers with caregiving responsibilities. *Mutual Marginalization: Individuals with Disabilities and Workers with Caregiving Responsibilities*, 66 *FLORIDA L. REV.* 1099 (2014, arguing that individuals with disabilities and workers with caregiving responsibilities share common experience and stigma in the workplace, and proposing a shared solution. *Finding a Fix for the FMLA: A New*

Perspective, A New Solution, 31 HOFSTRA LABOR AND EMPLOYMENT LAW JOURNAL 327 (2014,, symposium paper), exploring the FMLA from the perspective of employers. *Choices, Bias, and the Value of the Paycheck Fairness Act: A Response Essay*, 29 ABA J. LAB. & EMP. L. 429 (2014), responding to (and disagreeing with) the idea that the gender pay gap is caused not by employer discrimination, but instead by women's choices. *Women, Unions, and Negotiation*, 14 NEVADA L. J. 465 (2014), highlighting the benefits of unionization to women. Symposium: Teaching Labor and Employment Law, *A Proposal to Improve the Workplace Law Curriculum from a Corporate Compliance Perspective*, 58 SAINT LOUIS UNIVERSITY LAW JOURNAL 155 (2014), an experiential course that focuses on the practice of employment and labor law from the perspective of counsel for employers. Of special interest to us AALS section members, this article provides a survey of labor and employment law courses taught in all law schools in the country. Please contact Nicole if you want a reprint, as the tables do not show up on Westlaw.

John Rumel, Idaho, *Toward an 'Unqualified' Otherwise Qualified Standard: Job Prerequisites and Reasonable Accommodation under the Americans with Disabilities Act*, 18 Employee Rights & Emp. Pol'y J. 35 (2014), discussing whether a disabled individual is a qualified individual with a disability under the ADA when he or she is able to perform the essential function of his or her job and can satisfy all job prerequisites with a reasonable accommodation from the employer. The article concludes that the ADA, including its statutory text, legislative history and the EEOC regulations interpreting it, is ambiguous on this point, but that the EEOC should issue further regulations and guidance making clear that individuals should be entitled to ADA protection under these circumstances.

Michael Selmi, George Washington, *The Evolution of Employment Discrimination Law: Changed Doctrine for Changed Social Conditions*, 2014 Wisconsin L. Rev. 937. And the Third Edition of the casebook *Work Law*, co-authored with Marion Crain and Pauline Kim and published by Lexis, will be out this Spring in time for Fall 2015 adoptions.

Joseph Slater, Toledo, 2014 Update to MODERN LABOR LAW IN THE PRIVATE AND PUBLIC SECTORS: CASES AND MATERIALS (with Seth Harris, David Gregory, and Anne Lofaso) and also MASTERING LABOR LAW (with Paul Secunda, Jeffrey Hirsch, and Anne Lofaso) (Carolina Academic Press, 2014).

Sandra Sperino, Cincinnati, *The Tort Label*, 66 FLA. L. REV. 1051 (2014). This article discusses how the Supreme Court's use of tort law to interpret federal discrimination law has become more robust and automatic over time. It questions whether Title VII is and should be characterized as a tort.

Sandra F. Sperino, Cincinnati, & Suja A. Thomas, Illinois, *Fakers and Floodgates*, 10 Stan. J. Civ. Rts. & Civ. Libs. 223 (2014).

Lu-in Wang, New Mexico, *At the Tipping Point: Race and Gender Discrimination in a Common Economic Transaction*, 21 VIRGINIA JOURNAL OF SOCIAL POLICY & THE LAW 101 (2014).

Deborah A. Widiss, Indiana, *Griggs at Midlife*, ____ Mich. L. Rev. ____ (forthcoming 2015) (book review of Robert Belton, *The Crusade for Equality in the Workplace: The Griggs v. Duke Power Story*).

Announcements

Thomas Jefferson School of Law has launched the **inaugural Jameson Crane III Disability and the Law Writing Competition**, which seeks to encourage excellent student writing at the intersection of law and medicine, or law and the social sciences. **Submissions are due by January 15, 2015** and must be submitted electronically to: cranewritingcompetition@tjssl.edu . Information about the competition is available at: <http://www.tjssl.edu/cranewritingcompetition> Susan Bisom-Rapp is coordinating the competition and may be contacted with questions at: susanb@tjssl.edu .

Louis Jackson Memorial National **Law Student Writing Competition** in Employment and Labor Law. The competition is sponsored by Jackson Lewis in memory of one of its founding partners and is administered by Chicago-Kent's Institute for Law and the Workplace. Papers addressing any topic in labor and employment law (broadly defined) from students at accredited law schools in the U.S. are eligible. All papers are blind judged by a panel of law professors and their decisions are final. There is a first place award of \$3,000 and two second place awards of \$1,000 each. Papers must be accompanied by indicating the law student author's name, address, telephone number, email address, law school, paper title, labor and employment law course work history, and a brief paragraph describing the genesis of your interest in the field. Judging will be blind, so the only identification that may appear on the first or subsequent pages of the paper is the paper title. **Entries must be received by Tuesday, January 20, 2015** and should be sent to Louis Jackson Memorial Student Writing Competition, Institute for Law and the Workplace, IIT Chicago-Kent College of Law, 565 W. Adams St., Chicago, IL 60661. More information is available at <http://kentlaw.iit.edu/institutes-centers/institute-for-law-and-the-workplace/louis-jackson-writing-competition>.

The University of Baltimore School of Law's Center on Applied Feminism seeks submissions for its Eighth Annual Feminist Legal Theory Conference. This year's theme is "**Applied Feminism and Work.**" The conference will be held on March 5 and 6, 2015. For more information about the conference, please visit law.ubalt.edu/caf.

The Stetson Law Review is hosting a symposium titled: **Inequality, Opportunity, and the Law of the Workplace** on March 6, 2015. The symposium will focus on the role of labor and employment laws in ensuring adequate opportunities for social mobility. Participants include former NLRB Chair Wilma Liebman, Politico's Timothy Noah, and moderator David Cay Johnston, as well as many of our wonderful section members. For more information visit: <http://www.stetson.edu/law/conferences/homepages/law-review-symposium.php>

The Workplace Justice Project in cooperation with the Gillis Long Poverty Law Center at the Loyola College of Law, New Orleans, will be presenting a conference titled: **Work in the South: Dixie Cotton, American Steel and a Hurricane Named Katrina – A Reinvention of Bondage** on **March 6-7, 2015** in New Orleans, Louisiana at the Loyola College of Law. They are currently accepting proposals for the conference; accepted applicants will have their

proposals published in the Loyola Journal of Public Interest Law and may be offered the opportunity to present their work in a conference panel. More information about the RFP, the conference and official registration can be found on our website at www.wjpnola.org.

[Marco Biagi Foundation](#) conference will be March 19-20, 2015, in Modena, Italy. The topic is **Employment Relations and Transformation of the Enterprise in the Global Economy**.

The 42nd annual national conference of National Center for the Study of Collective Bargaining in Higher Education at Hunter College is entitled **Thinking About Tomorrow: Collective Bargaining and Labor Relations in Higher Education**. It will take place April 19-21, 2015.

The 10th annual **Colloquium on Scholarship in Employment & Labor Law** will be held at Indiana University Maurer School of Law, **Sept. 11-12, 2015**, in Bloomington. This conference offers participants the opportunity to present works-in-progress to a friendly and knowledgeable audience. Details and registration will be forthcoming in the spring, but please mark your calendars now! Contact Deborah Widiss (dwidiss@indiana.edu) if you have any questions.

Rachel Arnow-Richman seeks intrepid plaintiffs' attorneys: My recent article *Mainstreaming Employment Contract Law: The Common Law Case for Reasonable Notice of Termination*, 66 Fla. L. Rev. 1513 (2014), aims to debunk the dominant assumption that at-will employees may be terminated without notice. Written in part for practitioners, the piece lays out three common law contract theories supporting the conclusion that employers must provide reasonable notice to workers prior to termination. She is seeking to connect with **adventuresome plaintiffs' attorneys** who might be interested in bringing test cases using these theories. Lawyers in the following states are of particular interest: CA, LA, MA, MD, MO, NY PA, TN, and VA, but others are welcome. If anyone has a relationship with someone who fits this description, she would be grateful for an introduction. rarnow@law.du.edu.

In honor of the centennial of the Department of Labor, the DOL has asked **what books have shaped work in America**. You can weigh in or simply browse at <http://www.dol.gov/100/books-shaped-work/>

Blogs

Are you confused about how to reach out to all of us across the nation? Thanks to Marcia McCormick, here is some posting info:

To post on Workplace Prof Blog, http://lawprofessors.typepad.com/laborprof_blog/, contact one or more of the blog editors. You can always find them by clicking on the “About” tab at the top of the page. Currently, the editors are Jeff Hirsch (jmhirsch@email.unc.edu), Rick Bales (r-bales@onu.edu), Marcia McCormick (mmccor20@slu.edu), Charlie Sullivan (charles.sullivan@shu.edu), Sachin Pandya (sachin.pandya@uconn.edu), and Joe Seiner (seiner@law.sc.edu). There are guest bloggers, too, fairly frequently who can post. Check the blog for more details.

To join the various listservs, contact their administrators:

Employment Discrimination Law, empdiscr, empdiscr@lists.marquettelaw.org, Paul Secunda, (paul.secunda@mu.edu);

Work Law, worklaw, worklaw@chicagokent.kentlaw.edu, Marty Malin, (mmalin@kentlaw.edu);

Employee Benefits; benefitsprof-1; benefitsprof-1@jmls.edu, Barry Kozak, (6kozak@jmls.edu);

Disability Law, aalsdisabilitylaw, aalsdisabilitylaw@law.emory.edu, Ani Satz, (asatz@emory.edu);

ADR/Arbitration, aals-adr-1, aals-adr-1@po.missouri.edu, John Lande, (landej@missouri.edu).

Recent legal developments and opinions

Voters in Nebraska, Arkansas, Alaska, Illinois, and South Dakota, as well as in San Francisco, Oakland, and SeaTac (Washington state) voted to raise the minimum wage. Pursuant to Executive Order 13658 the minimum wage for federal contractors will be \$10.10 an hour, effective January 1, 2015.

Handy.com (housecleaners) and Uber Technologies are disputing that certain workers are employees, as opposed to independent contractors. See also *Alexander et al v. Fed Ex*, 9th Circuit, 08/27/14.

Huge *Hat Tip* to Jennifer Jill Esmay, of LawMemo, for doing the lion's share of the work compiling this list of recent cases:

Arbitration:

-- *Iskanian v. CLS Transportation LA (California 06/23/2014)*

<http://case.lawmemo.com/ca/iskanian1.pdf> *Gentry v. Superior Court* was overruled; and Employees cannot waive PAGA actions in any forum. Why important? This is an anti wage & hour class action decision that may discourage individuals from pursuing claims against employers; however the court found that an employee could not waive PAGA actions.

Discrimination:

-- *Green v. American Federation of Teachers (7th Cir 01/23/2014)*

<http://case.lawmemo.com/7/green1.pdf> Union that refused to represent African-American teacher, who later won his case on his own and was reinstated, is being sued for violating Title VII. Why important? Interesting discrimination claim against a union.

-- *Burwell et. al v. Hobby Lobby Stores et al. (US Supreme 06/30/2014)*

<http://case.lawmemo.com/us/burwell.pdf> As applied to closely held corporations, Health and Human Services regulations imposing the contraceptive mandate violate the RFRA (5-4). Why important? How far can closely held corporations go in claiming that the federal government violate the RFRA?

-- *Schuette v. BAMN (US Supreme 04/22/2014)* <http://case.lawmemo.com/us/schuette.pdf> Voters

may determine whether a State policy of race-based preferences should be continued. Why important? Affirmative action decisions arising in the education context may be relevant to employment discrimination cases. See, e.g. Rebecca K. Lee, *The Implications of Fisher v. University of Texas on Workplace Affirmative Action*, 89 St. John's L. Rev. ___ (forthcoming 2015) and Monique C. Lillard, Deborah C. Malamud, Miranda Oshige McGowan, Charles A. Shanor and Robert Belton, *The Effect of the University of Michigan Cases on Affirmative Action in Employment*: Proceedings of the 2004 Annual Meeting, Association of American Law

Schools, Sections on Employment Discrimination Law, Labor Relations and Employment Law, and Minority Groups, 8 Employee Rights and Employment Policy Journal 127 (2004).

Labor Management:

-- *NLRB v. Noel Canning* (US Supreme 6/26/14). <http://case.lawmemo.com/us/nlrb.pdf> Finding that President Obama had lacked authority to make recess appointments to the NLRB on January 4, 2012 in the midst of a three-day Senate recess. Why important? Relevant to federal power struggles among the branches of government.

-- *Brown v. Denton* (Florida Ct App 10/21/2014)

<http://case.lawmemo.com/fl/brown1.pdf> Private mediation sessions, which resulted in a MSA that changed defined pension benefits of city employees in unions, in federal court violated the Sunshine Law. Why important? Parties to a collective bargaining agreement can't circumvent the bargaining process; and this case provided that by holding closed-door negotiations that resulted in changes to public employee's pension benefits, the defendants ignored an important party who also had the right to be in the room—the public.

Wage & Hour & Labor Management:

-- *Sandifer v. United States Steel Corp* (US Supreme 01/27/2014)

<http://case.lawmemo.com/us/sandifer.pdf> Time workers spend donning and doffing protective gear is not compensable when the parties' CBA provides that changing clothing is not compensable under the Fair Labor Standards Act, Section 203(o). Why important? Decision that had a tremendous effect on blue collar workers in unions who spend a lot of time donning and doffing.

Retaliation/Speech/Unions:

-- *Lane v. Franks* (US Supreme 06/19/2014)

<http://case.lawmemo.com/us/lane.pdf> Public employee's sworn testimony at former city employee's criminal trials is speech as a citizen on a matter of public concern. Why important? A public employee should not be fired for providing sworn testimony.

-- *Harris et al. v. Quinn et al.* (US Supreme 06/30/2014) <http://case.lawmemo.com/us/harris.pdf>

A State cannot compel personal assistant providers to subsidize speech on matters of public concern by a union they do not wish to join or support under the First Amendment (5-4). Why important? Discussion of Abood and union speech.

SOX:

-- *Lawson v. FMR LLC* (US Supreme 03/04/2014)

<http://case.lawmemo.com/us/lawson.pdf> Section 1514A of the Sarbanes-Oxley Act protects whistleblowers who are employees of private contractors and subcontractors (6-3). Why

important? The Court held that based on the text of Section 1514A and legislative history, Congress intended the law to protect whistleblowers who are employees of private contractors and subcontractors. American corporations, the economy required this decision.

-- *Halliburton v. ARB* (5th Cir 11/12/2014)

<http://case.lawmemo.com/5/halliburton.pdf> Employer informing employee's colleagues that he blew the whistle to the SEC constituted illegal retaliation under SOX. Why important? The court found that the employee suffered an adverse action because in his workplace environment, collaboration is an important part of the job and that the employer's disclosure was a contributing factor in the employee being ostracized. The court further found that the employer's targeted disclosure created an environment of ostracism that might dissuade a reasonable employee from whistleblowing.

A Few Important Cases to Watch:

-- *Equal Employment Opportunity Commission v. Abercrombie & Fitch Stores, Inc.* (U.S. Supreme Court)- Whether an employer can be liable under Title VII of the Civil Rights Act of 1964 for refusing to hire an applicant or discharging an employee based on a "religious observance and practice" only if the employer has actual knowledge that a religious accommodation was required and the employer's actual knowledge resulted from direct, explicit notice from the applicant or employee. Why important? This decision will specify what constitutes employer "knowledge" of a conflict between a workplace requirement and an individual's bona fide religious belief, practice, or observance, triggering the employer's affirmative obligation under Title VII to make a reasonable accommodation. This decision may have far reaching implications on discrimination claims.

-- *M&G Polymers USA, LLC v. Tackett* (U.S. Supreme Court)- Whether, when construing collective bargaining agreements in Labor Management Relations Act (LMRA) cases, courts should presume that silence concerning the duration of retiree health-care benefits means the parties intended those benefits to vest (and therefore continue indefinitely), as the Sixth Circuit holds; or should require a clear statement that health-care benefits are intended to survive the termination of the collective bargaining agreement, as the Third Circuit holds; or should require at least some language in the agreement that can reasonably support an interpretation that health-care benefits should continue indefinitely, as the Second and Seventh Circuits hold. Why important? This decision will have an affect a number of former union retirees in this country and how much governments will need to contribute to their care oppose to private insurance companies.

-- *Integrity Staffing Solutions v. Busk* (U.S. Supreme Court)- Whether time spent in security screenings is compensable under the Fair Labor Standards Act, as amended by the Portal-to-Portal Act. Distribution center workers who process orders for employers like Amazon are required to go through "airport-style" security check points -- a process of screening for stolen

goods that includes long lines and metal detectors. Workers are required to clear the security checkpoints before exiting the building and leaving the premises. Because many workers are completing their shifts around the same time, employees may wait in the lines for nearly 30 minutes before they are able to leave the worksite. The workers are not compensated for the time spent negotiating the lines as this screening process occurs after the workers clock out, but before they actually exit the job site. The case below involves two former employees of Integrity Staff Solutions (a temp agency that supplies workers to many Amazon warehouses around the country) who sued seeking back pay for the time spent in these security lines after clocking out at Amazon warehouses in Nevada. Why important? The decision will direct on the scope of the Fair Labor Standards Act (FSLA) (amended in 1947) as the Court determines whether the security screens are “integral and indispensable” to the principle job activities for which the workers are paid. Several business groups filed amicus curia briefs, which is not surprising given the business interests at stake. Additionally, with the ever growing numbers of contingent workers, this decision will impact the experience of many low-wage earners nationwide. In fact, an interesting side note is that Integrity has partnered with other large companies to supply workers in this form including Wal-Mart.

-- *Young v. United Parcel Service (U.S. Supreme Court)* - Whether and in what circumstances an employer that provides work accommodations to non-pregnant employees with work limitations must provide work accommodations to pregnant women who are similarly situated in inability to work. The case involves a female who was a driver for UPS and sought a light-duty assignment during the latter part of her pregnancy, a request that was denied. Why important? The case address the intersection of the Pregnancy Discrimination Act and the Americans with Disabilities Act, a tension that the EEOC planned to issue guidelines around before the case was before the Supreme Court. The case also raises interesting policy considerations regarding reproductive rights of women and ability to balance work and family, including the negative impact on families and communities when employers fail to accommodate pregnancy and related conditions.

-- *Mach Mining v. Equal Employment Opportunity Commission (U.S. Supreme Court)* - Whether and to what extent a court may enforce the Equal Employment Opportunity Commission's mandatory duty to conciliate discrimination claims before filing suit. Why important? The case considers whether the adequacy of the EEOC's pre-litigation conciliation efforts is subject to judicial review and whether defendants may raise the failure to conciliate as a defense to a discrimination action brought by the EEOC.

END