EMPLOYMENT LAW

I) Introduction

A) Sources of employment law (8-27-01)

1) Federal Statute (FLSA, Title VII, ERISA); State Statute (state anti-discrimination law, workers' comp, unemployment law); State Common Law (e.g. torts, contract); For gov. workers only apply fed. and State constitutional law (privacy, expression).

B) Themes of course

1) Traditional employment practices – even if efficient – may appear unfair or discriminatory.
2) Legal intervention and its costs may or may not be justified to address such practices.
3) Any given employment stage – hiring, promotion, discharge – may implicate a variety of legal theories.
4) Current work place laws or may not adequately reflect recent changes in employment patterns; e.g., the growth in contingency work force.

C) Employment characteristics: Work integral to humanity, Close to family relationships, Survival, Matters to employs.

D) History

1) Prior to the industrial revolution, the employment relationship was Master/Servant. This was a private relationship. Also a subservient status relationship.
2) Industrial revolution: the employment relationship is seen a contractual.
   a) But, not like other contracts because it deals with work and there is unequal bargaining power.
   b) Change from Master/servant: cannot have involuntary servitude because of the 13th amendment and a 1911 decision.

3) Employment-at-will: either the employer or the employee can terminate the employment at any time for any reason.
   a) Characteristics
      i) Intended to increase flexibility between the parties.
      ii) Can create problems when there is unequal bargaining power between the parties.
      iii) Only applies to employment situations that are for an indefinite period of time, not for fixed time or term employment.
      iv) Does not include unionized employment.
   b) Absent a state statute or some other legal doctrine, employment-at-will is presumed.
   c) The at-will doctrine does not apply to employment decisions that conflict with state law.
   d) State tort and contract doctrines also curtail at-will employment: In instances when the ordinary situation would lead to a harsh result.
   e) Depression: At this time, the courts began allowing statutes to curtail the employment relationship.
      i) Lockner struck down theses statutes as a const. violation of the due process clause by restricting bargaining.
      ii) Under the New Deal, Lockner has been reversed, Congress can now regulate the employment relationship, Opens the door to regulation, FLSA adopted.

E) Growth in the use of **contingent** workers (part time or other non-traditional)

1) Impetus is employers wanting to cut costs, workers want to have more flexibility.

2) This growth is important because of statutory definitions of "employee".
3) Characteristics of contingent workers: Part—time, Independent Contractor, Seasonal, this area is growing very rapidly, These workers get no benefits, Definition of employees varies from statute to statute.

FAIR LABOR STANDARDS ACT

I) **Fair Labor Standards Act** (Enacted in 1938: first major federal statute: covers 80-90% of workers)

A) FLSA's Big three

1) Minimum wage standard: Intended to spread the wealth and to jump-start the economy.
   a) Currently $5.15 per hour; Basic wage that allows survival.
   b) Allows a training wage; 90-120 days.
   c) States can set the wage higher if they want to.
   d) Can cover exempted employees.
2) Overtime pay requirement
   a) Must pay at least time and a half for time worked over 40 hours.
   b) Purposes: improve quality of life of workers; increase the number of people employed.
   c) Employers can still require workers to work overtime.
   d) No weekends or holidays.
3) Restricts/prohibitions on child labor
   a) Restricts the number of hours that they can work, applies to children under 12.

B) Employers covered under FLSA (This is the **first step of the analysis**)

1) $500,000 business per year; or
2) Engaged in interstate commerce.
3) Family businesses are excluded.
4) Interpreted broadly to include as many employers as possible.

C) **Employee versus Independent contractor**

1) **Economic realities test**: The P has the burden to prove that they are an employee (to get past summary judgment). No one factor of the test is dispositive:
   a) Degree of control: Employer's control over the worker.
   b) Workers' risk of profit/loss: Will the worker always get a wage or is there a risk of not getting paid.
   c) Workers' investment: own equipment, own workers.
   d) Workers' dependence: Is the worker dependant on the employer or are they dependant on themselves. Dependant on employer, likely an employee.
   e) Special skills required.
   f) Degree of permanence with single enterprise.
   g) Integral part of the employers business: does the employer really need the work done.

2) Donovan v. Dial America
   a) Facts: in this case there were two types of workers: at home researchers and distributors. Question was whether either one was an employee.
      i) Homework situation is distinct from telecommuting. Here there is more interaction between the employee and the employer.
   b) Home researchers
      i) These workers were considered employees. Factors:

- Workers dependence: workers were dependant on this single employer, the secondary income did not matter.
- Degree of control: rule that the researchers must abide by, control was large, ct said this is a trick question, not watching over the researchers. This type of relationship it is inherent that the constant control does not exist, however there is still significant control.
- Workers' risk of profit/loss: There was no chance to increase profit or to incur a loss. Nothing was invested (no equipment).
- No special skills required
- High degree of permanence: most of the workers only worked for one employer.
- The service that was provided was integral to the business: that what the business did.

c) Research distributors considered independent contractors: Factors:
i) Low dependence b/c other business involved. Tough call.
ii) More worker control: they were on their own.
iii) Risk did exist for a potential decrease in profits based on recruiting skills.
iv) No special skills required
v) There is some investment b/c provided own transportation
vi) Degree of permanence; some did move and could move to other companies.
vii) Not integral part of the business: there were other ways to get the cards to the researchers.

D) **Exempt employees**: **Professional**/Administrative/ Executive

1) FLSA exemptions
a) Outside sales people, sailors, cab drivers, lumber jacks, domestic employees living at employers home. (These do not fit the normal job type.)
b) Bona fide executive/administrative/professional employees
i) Over-time is the issue usually.

2) Exemption requires employer to show both
a) Paid on a salary basis: and
b) The worker's duties meet one of the **<u>three tests</u>**:
i) **Executive**: primary (more than 50% of time) duty is managing (means can hire or fire).
ii) **Administrative**: primary duty directly related to management operations (Not manual labor) – requires discretion/judgment: Must be important to the employer, Clerks, secretaries, bookkeepers are not exempt.
iii) **Professional**: 1) advanced knowledge in specialized field (more than an undergraduate degree), or (2) creative (must be original) or (3) teacher or (4) computer (certain situations: professionals like software engineer, systems analyst)

3) <u>Exemption test applied</u>
a) P has burden to prove they are an employee: Employer has duty to prove that the worker is exempt.
b) Employer must meet the two prong test
i) Paid on a salary basis (salary = can't be decreased, can't deduct for being late, can't deduct for 2 hour lunch break).
ii) Then go to the specific test prong of the duties test (either professional/exec/ or admin.)
c) <u>The exemptions are interpreted narrowly</u>.

4) Dalheim v. KDFW-TV (Illustrates exempt employees test)
   a) Reporters: employer says they are creative professionals; employees say they are not creative. Question is whether the employees are using some sort of discretion—autonomy = professional
      i) Everything had to go through the program director so not creative and not exempt.
   b) Producers: not creative professionals b/c they just follow what others have done. Not administrators because they have no control over the entire station. Not executives b/c they are not managing anyone.
   c) Directors and editors: there was no argument that they were creative. No evidence that they managed any thing so not executives. They had very limited authority and a narrow window of responsibility. No decisions about the direction of the operation of the station.

E) **Wages**
1) Fixed weekly or monthly salaries are permissible, as long as the average weekly salary equals or exceeds the minimum wage.
2) Employers may credit toward the minimum wage the reasonable cost to the employer of meals, lodging, and other facilities provided by the employer for the employees' benefit, not the employer's
   a) The facility must be of a kind typically provided by the employer, employees must be told that the value is being deducted from their wages, and acceptance by employees must be voluntary

F) **Determining compensable time**. Waiting to be engaged versus engaged to be waiting.
1) Hours worked (compensable time)(easier to do when employee on time clock)
   a) Includes when the employee is required to be at the workplace for all the time they are engaged in their "Principal" job activities as well as "incidental" activities which are an integral part of their work.
      i) Breaks of 20 minutes or less = time worked (compensable)
      ii) Meal breaks of 30 min. or more are not work time (not compensable).
      iii) Travel time to and from work is not compensable.
      iv) Traveling to job sites is compensable when it occurs within a 9-5 or regular work period.

2) IS ON-CALL/WAITING TIME "WORK TIME"? (On board); factors are:
   a) Degree to which
      i) Duties performed during idle time benefit employer
      ii) Employee free to pursue personal/private interests during idle time including: frequency of calls/demand, geographical/other restrictions
         - The more freedom = less likely to be compensable; less freedom = more likely to be compensable.

3) Halferty case: The at home dispatcher was fairly free to do what she wanted. She could use the idle time efficiently for her own purposes. There was very little time used for the employer's purposes. The time primarily benefited the employee.

G) **Determining Wages** (for overtime and minimum wage issues)
1) Divide the total hours of work determined earlier by the total compensation and see if it complies with the overtime and minimum wage requirements.
2) 50 hour work week at $10 per hour: there is no minimum wage issue.

a) There is overtime issue: due $50 in overtime pay per week
   i) Act only cares about how much over time you have been paid.
   ii) Does not allow the averaging of weeks (50 one week and 30 the next).

3) Tipped employees must get at least half of the minimum wage and the tips must equal out to the minimum wage.

H) **Enforcement actions available** under FLSA

1) Government brought suits
   a) Back wages (liquidated damages)
   b) Civil monetary penalties: govt. never usually pursues.
   c) Injunctive relief
   d) Criminal penalties (child labor)
2) Private employee suits
   a) Back wages (liquidated damages)
   b) N/A [Civil monetary penalties]
   c) Injunctive relief
   d) N/A [criminal penalties (child labor)]

I) **Employee actions for retaliation** (Statute of limitations).

1) Action for civil liability can be brought against any employer who discharges an employee in retaliation for instituting an FLSA suit. (Docking pay etc: doesn't matter if the employee wins or not).
   a) Do not want to chill employees from bringing claims.

2) Employees right to bring action **terminates** upon filing of
   a) Complaint by the secretary of labor in an action for an injunction in which either restraint is sought of any further delay in the payment of back wages or legal or equitable relief is sought as a result of an alleged attempt by an employer to discharge or in any other manner discriminate against any employee; or
   b) A complaint by the secretary in which recovery is sought of back wages or liquidated or other damages due such employees, unless such action is dismissed without prejudice on motion of the Secretary of Labor

3) **Willfulness**
   a) Statute of limitation is two years unless willful violation, then it's three years
   b) McLaughlin v. Richland Shoe (analysis of willfulness issue).
      i) Standard adopted for willfulness: that the employer **either knew or showed reckless disregard** for the matter of whether its conduct was prohibited by the statute. The court wanted to distinguish significantly between willful and ordinary violations.
      ii) REJECTED Jiffy June standard: Willful is when there is substantial evidence in the record to support a finding that the employer knew or suspected that his actions might violate the FLSA (Did employer know FLSA was in the picture?)
      iii) What is willful? Lots of acts outside FLSA uses willful in some determinations (like sol)
   c) Approaches for willfulness
      i) Whether employer knew or suspected his actions violated FLSA
      ii) Whether employer knew FLSA was in the picture
      iii) Whether employer knew his or her conduct violated the act or employer showed reckless disregard whether it violated act (COURT EMBRACED THIS STANDARD)
      iv) Whether employer knew it might be covered and failed to take reasonable steps to keep

from violating (sort of a negligence standard)

d) Generally its between knowing and reckless disregard and negligence; this court settles on knowing and reckless standard.
   i) Looks to precedent (not helpful in this case)
e) Plain language: Court looks at plain language and says in common usage it's more than negligence.
f) Legislative history
   i) Legislative history shows sol is to limit employers liability
   ii) Court says congress must have meant to distinguish between willful and ordinary violations; thus knowing and reckless distinguishes better than negligence standard.
g) Dissent wanted an intermediate standard
   i) Said plain language of willful doesn't apply b/c willful has different meanings
   ii) He thinks purpose should be to protect employees, not employers.

J) **Child labor Restrictions**

1) Purpose of the Act: not to threaten health or education b/c of work hours. Also protect competition and the market.
2) Mostly can't employ children under 14 years old.
3) Additional restrictions on hours 14 and 15 year olds can work (can't work hazardous jobs).
4) 16 and 17 year olds can be employed unlimited hours but no hazardous jobs
5) Reich v. Shiloh True light Church of Christ: The church was arguing that the kids were trainees. Govt. arguing that they were employees. Issue is whether the kids were employees under FLSA.
   a) Rule: **In order to satisfy the definition of "employee" under the FLSA, the court must determine whether the employer is the primary beneficiary of the person's work.**
   b) Kids working in construction for church enterprise. Kids under 16 weren't paid for their work to build houses (but were given gifts). Court said they are employees because the church got the primary benefit of work (employer in this case); not the children as trainees.

6) Children between 14 and 16 can work outside school hours, not more than 18 hours/week during school and no more than three hours a day; when school not in session, no more than 40 hours/wk or 8 per day. Employment must also be between 7am and 7pm (or 9 when school is not in session).

7) Exemptions
   a) Children who are employed by their parents in agriculture or in the family business (except hazardous conditions).
   b) Minors employed as actors or newspaper carriers.
   c) Employment of children under age 12 generally forbidden, but children age 10 and 11 can work as hand harvesters for not more than eight weeks in a calendar year

EQUAL PAY ACT

I) Equal pay act (supposed to increase pay, not reduce it)

A) Defined (Broadly): plaintiff must show male/female pay differential in job involving
1) Substantially equal skill
2) Substantially equal effort
3) Substantially equal responsibility, **and**
4) Similar working conditions

B) Plaintiff's burden
1) Must have **all of first four elements** from above
2) Job title doesn't matter; duties are what matters
3) Job duties, not the qualifications employee brings to the job

C) **Defenses**: If plaintiff established prima facia case above, violation is proven unless employer can prove any one of the following affirmative defenses; Employer must then show that differential due to:
1) Seniority system
2) Merit System
3) System measuring quantity or quality of production, or
4) Some other factor other than sex
5) FLSA do not apply to the equal pay Act.

*Defendant needs only to prove one of these four to not be subject to liability under the act

D) Two issues are primary to controversy
1) Whether work is equal
2) Or if employer has made out fourth affirmative defense; most circuits say there has to be some business related reason; some circuits say it has to be a factor that relates to their ability to perform the job
   a) Must be linked to a business reason
   b) Must be related to another factor other than sex that relates to the job

E) **Purpose** behind Act:
1) Remedy what was perceived to be a serious problem of employment discrimination in private industry—the fact that wage structure of many segments of American industry has been based on an ancient but outmoded belief that man, because of his role in society, should be paid more than a woman even though his duties are the same. Solution: equal work be rewarded with equal pay.

F) **Similar Working conditions**: Corning Glass works v. Brennan
1) Night inspectors where paid at a different level than day inspectors even after collective bargaining Employers are required to provide equal pay to both sexes for equal work on jobs the performance of which requires equal skill, effort, responsibility, and similar working conditions
2) Look at Corning's practice and legislative history, term of art; specialized vocabulary; working conditions means hazards and surroundings, not time of shift.
3) Analysis:
   a) In this context, court said **day v. night work is not working condition** (Legislative history: working conditions is a term of art under a specialized language). Work conditions means hazards not day or night, so burden shifts to employer to prove that differential is

for some reason other than sex, employer does not meet the burden.

b) Court says it could be factor other than sex that night workers get more than day workers.
c) Court said this was seen as women's work, men thought demeaning and should be better compensated; in no other jobs did Corning compensate night work other than day workers.
d) Court makes it clear that equal pay act **purpose** is to correct market distortions and raise underpaid women to men's level of pay.
e) Court said can't remedy the situation just by opening night inspection to women; also couldn't lower night wage.

G) **Title 7 compared to the Equal Pay Act**.

1) Title 7 applies to comparable work not similar work (equal pay act is for exactly the same work, title seven is for pay discrimination involving comparable work).
2) Comparable worth: refers to allegations of pay discrimination between workers with dissimilar duties but jobs that have relatively equal value to employers.
   a) Not uncommon for employers to do job evaluations to figure out how to set up pay scales.
   b) Pay discrimination with people with different jobs viewed as having equal worth.
   c) Level of the skill required is the key to comparable worth.

3) AFSCME v. Washington
   a) Rule: A state's historical failure to pay workers in predominately female jobs their full evaluated worth demonstrates a pattern of sex discrimination in violation of Title VII of the Civil Rights Act of 1964.
   b) Analysis
      i) Facts of this case don't constitute title seven violation b/c Disparate impact didn't apply, but disparate treatment analysis did; but there was no intent driving pay differentials; court said market rates were driving differentials, and that is not intentional discrimination under title 7.
         - Where market rates causing wage inequalities were not responsibility of employer to fix (not discriminatory under Title VII).
         - Statistics should be used with caution; statistics alone should not be relied upon.
         - How is this consistent with Corning? Just b/c market discriminated against women is not a defense to equal pay act; in corning there's history of underpayment of women; here court says it's market forces.
         - Best explanation is that elements of equal pay act claim does not require intent; under this type of title seven claim (disparate treatment), intent is required (a title seven disparate impact wouldn't require intent).

FAMILY MEDICAL LEAVE ACT

I) Family medical leave act

A) General

1) Applies to employers w/ 50 or more employees.
2) Requires up to 12 weeks of job guaranteed leave.
3) Sets a floor that the employer can't go below.
4) Only applies to employees that have worked for the employer for 12 months and have at least 1,250 hours of service.

B) Triggered by one of four events

1) Having a new baby
2) Adopting a new child
3) You yourself have a serious medical condition
4) You need to care for an immediate family member w/ serious condition (child, spouse, parent).

C) Unpaid leave

1) To extent employer provides vacation or sick time, employee may choose or employer may require that employee uses that time instead.
2) There is a S. Ct case to decide if once she takes the employer's allotted leave under policy, whether she still have 12 weeks of family medical leave.
3) Other big issue is whether employee's condition is serious enough (measure is whether hospitalization or continuing medical treatment).
4) Only requirement is that whatever health insurance is going on must continue
5) Manual v. Westlake Polymers Corp.
    a) Issue is whether employee has to invoke the words of statute to say it's family medical leave when employer had no fault absenteeism policy; RULE: NO MAGIC WORDS HAVE TO BE USED
    b) Employer can't use family medical leave against her

D) **Purpose**: Enacted in order to entitle employees to take reasonable leave for medical purposes. It is bases on the same principals as the child labor laws, social security, minimum wage, and other labor laws that establish the minimum standards for employment.

TITLE VII

I) Title 7

A) Title 7: generally

1) Two types of Title 7 claims
   a) Disparate impact (no intent required)
   b) Disparate treatment (intent required)

2) Who it applies to
   a) Applies to race, sex, color, religion, national origin.
   b) Hiring, firing, promotion decisions, pay, benefits, other compensation, terms and conditions of job.
   c) 15 or more employees and all gov't employers.
   d) Exemptions for certain religious orgs and Indian tribes.

3) Remedies under Title 7
   a) Declaratory relief (like getting job and back pay)
      i) Injunctive
      ii) Equitable (reinstatement).
      iii) Back pay benefits
   b) Attorneys fees
   c) Compensation for punitive damages (capped based on size of the company; 50k to 300k)
      i) 1991 amendment
         - Expanded remedies to include damages, but there are limits to damages.
         - Lots of people attribute the growth of these claims to expansion of remedies.
         - If discriminated against but did not lose job, no remedy available before 1991 amendment.

4) Enforcement: Administrative exhaustion
   a) Must exhaust EEOC remedies first (file administrative charge)
   b) Short statute of limitations 180 to 300 days depending on state; if you don't file your charge w/in time, you're barred.
   c) EEOC determines if reasonable cause discrimination occurs, they conciliate (try to settle it)
   d) EEOC can litigate it or give a right to sue letter to the victim
   e) If EEOC finds no cause, it also issues right to sue letter
   f) Whether or not EEOC found cause is not terribly relevant once suit is filed b/c suit is viewed de novo.
   g) Advantages and disadvantages of having to go to EEOC first
      i) Disadvantage: could be waist of time.
      ii) Advantage: gives unrepresented parties ability to proceed.

5) **Purpose**: to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees.

B) Other anti-discrimination laws

1) State laws could provide additional protected classes.
2) Equal protection clause also prohibits discrimination (if government worker)
3) Section 1981 also covers employment issues: Reconstruction Era statute, which prohibits

discrimination in the formation of a contract based on race or national origin.

a) Plaintiffs sometimes allege both 1981 and title 7; 1981 doesn't require administrative exhaustion, no small employer limitation, no sliding cap, longer sol; 1981 only prohibits intentional discrimination where title 7 allows disparate impact theory.

TITLE VII THEORIES

4) Intentional Discrimination
   a) Disparate treatment
   b) Facially discriminatory hiring
   c) Failure to accommodate religious practices
   d) Harassment
5) Disparate impact: adverse impact of a particular employment practice.
   a) Example is height and weight requirements for policing; must show it is genuine job related issue, and height and weight don't relate.

C) **Disparate treatment**

1) McDonnell Douglas burden shifting
   a) Plaintiff's prima Facie Case
      i) Member of protected Class
      ii) Applies for and is qualified for the position.
      iii) P was Rejected and the position remains open.

   } This forces the P to screen out those without minimum qualifications and not having applied for he job).

   b) Defendant then has burden to <u>produce</u> nondiscriminatory reason for the rejection. (Doesn't have to be a good reason, just non-discriminatory).

   c) Plaintiff then has burden to <u>prove</u> (burden of persuasion) that the defendant's reason is a pretext for discrimination. (Evidence below helps fact finder find intent).
      i) Can use **direct** evidence (Example is that good evaluations go bad as soon as announce pregnant); (statement (1)<u>by the decision maker</u> (2)<u>about the decision</u>)
      ii) Can use **indirect** evidence (Inferential/circumstantial: Comparative—compare whites and blacks).
      iii) Can use **Statistical** evidence. Statistics alone are rarely enough unless very stark.

2) Price Waterhouse v. Hopkins (disparate treatment case, and application of M/D burden shifting)
   a) Rule: When an employee proves that her gender <u>played a motivating part</u> in an employment decision, her employer may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision had it not taken her gender into account.
   b) Analysis
      i) P makes out the prima facie case, D says that there was a nondiscriminatory purpose (bad interpersonal skills).
      ii) P then has to prove pretext
         - Direct evidence: selection committee decision makers made sex stereotypical remarks.
         - Indirect evidence: no male competitors did as well as she did but she was not promoted.
         - Statistical evidence: D had not promoted many females.
   c) Application of McDonnell Douglas burden shifting: prima facie case made; non-discriminatory reasons for dismissal
      i) The court found that the employment decision was based, in part, by sex discrimination

and that was enough.

3) Title VII focuses on individual: City of L.A. v. Manhart (applies a statistical analysis)
   a) Facts: Female employees made higher pension contributions than men because they lived longer. The D argued fairness because the men were subsidizing women and the reason for the difference was based on longevity tables, not sex.
   b) Longevity argument: The D did not consider other factors affecting longevity. The D needs to look to the individual rather than the group as a whole.
   c) Held: the purpose of Title 7 is to remove reliance on group bases stereotypes. Title 7 focuses on the individual and not the group as a whole. Not every woman will conform to the tables.

4) Disparate treatment based on **national origin**: the place of origin or based on ancestors.
   a) This class does not include discrimination based on citizenship (other statutes control this).
   b) Fragante v. City and county of Honolulu
      i) Rule: Employment decisions may be predicated on an individual's accent when it materially interferes with job performance.

      ii) Application of McDonnell Douglas factors:
         - Did Fragante make prima facia case
            1. Court assumed that he did: He was ranked number one among applicants.
         - What did employer identify as its non-discriminatory reason? City said there was communication problems b/c of accent, not b/c he's phillipino
         - Fragante said it was b/c of bias or prejudice of interviewers and said accent was pretext for national origin
            1. His basis for this was an expert that said his accent was not a problem
            2. Fragante points to subjective nature of the interviews; no training by interviewers in assessing verbal skills
            3. Comparative measures b/c he scored so high on the test
      iii) Fact finder said there was not a discriminatory reason; no evidence of discriminatory intent. Issue was whether he could be understood; fact finder never said he couldn't communicate or that he was understandable; court basically defers to employer.
      iv) Court says have to be careful not to use accent as pretext for national origin. Some courts have been less deferential to employers requiring an objective test for the communication skills.

5) BFOQ only comes into play when the employer says that there is only one type of person who will fit the position.

D) **Affirmative Action**
1) General rule: affirmative action program must have a remedial purpose in order to satisfy the requirements of Title VII.
   a) Employer's voluntary affirmative action plans permissible under title VII if:
      i) Plan is motivated by purposes that mirror those of title VII (e.g., addressing job segregation: remedy past discrimination), AND
      ii) Plan does not unnecessarily trammel rights of other employees (e.g., Flexible, time-limited).

2) Taxman v. Board of Education
   a) Issue: can affirmative action be used in layoff situations?
   b) Holding: violation of affirmative action because no remedial purpose (because the school was already integrated) and the plan trammeled rights of other employees (Court in taxman said this program failed both prongs of the rule above).
   c) **Purpose** of title seven was to create opportunities for minorities who had previously been denied them.
   d) Imposing layoffs on individuals achieves racial equality burdening only those individuals: that burden was too intrusive and therefore it trammels rights. Layoffs are different story than hiring and promotion; layoffs affect status quo.
   e) Change in practice can be evidence of discrimination

E) **BFOQ defense**.
1) General: Does not apply to race.
   a) Section 703(e): It is not unlawful for an employer to differentiate in hiring on the basis of religion, sex, or national origin "in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or operation."

2) **To establish a BFOQ defense**, an employer must show:
   a) Factual basis for concluding that sex so essential to job performance that member of opposite sex couldn't do the job,
   b) The qualification is essential to operations of business, **and**
   c) There's no way to evaluate the qualification on an individual rather than a group basis

3) BFOQ **Applies only to hiring decisions** (not other employment decisions)

4) Just because the customers prefer one sex over another is not enough for a BFOQ
   a) The plain language of the statute talks about qualifications: not customer preference.
   b) Dangerous policy implications: Employers could claim that custom requires certain attributes. This also applies to religion and other protected classes.

5) Only two supreme court decisions about this: Dothard v. Rawlinson: Alabama prison case where women couldn't work in parts of the prison where women would have to work amidst male prisoners:
   a) Majority said BFOQ supposed to be narrow, but in this case it fits; essence of job is to maintain prison security; regardless of any particular woman's strength, her womanhood limits her ability to be effective.
   b) All women present in this case undermine prison security.
   c) Scalia in descent said look at plain language of statute.

6) Wilson v. Southwest Airlines Co. (illustration of BFOQ defense)
   a) Issue was sex a BFOQ; airline trying to attract males, Sexy image for marketing. Is the relationship strong enough to withstand BFOQ.
   b) Court Rejected notion of customer preference
   c) Rule: Customer preference cannot make out a BFOQ (two reasons)
      i) Courts look at plain language of statute (centered on job performance, not preference)
      ii) Policy reasons: could justify discrimination if customer preference could dictate. Analogize to race.
   d) Court says no BFOQ, b/c it's not essence of job, essence of job is passenger safety, not

attracting men.

F) **BFOQ issues**

1) Privacy concerns:
   a) Strip searches in prisons: This is part of the job but not a large part. They can assign tasks w/in the job to only men (i.e., men strip search men, women strip search women)
   b) Gynecologists and proctologists: sex is not a BFOQ
   c) Rape counselor: still customer preference is controlling.

2) BFOQ is a very narrow defense

G) **Pregnancy discrimination** (pregnancy discrimination Act)

1) Just b/c an employer does not discriminate against each and every member of one sex does not mean they are not discriminating against some individuals based on that sex.

2) Pregnancy discrimination act did two things
   a) Clarified for purposes of title seven that sex discrimination includes discrimination based on pregnancy.
   b) Also requires that pregnancy be treated the same way as other temporary disabilities (e.g., if paid medical leave policy, it can't carve out pregnancy and exclude); even if treated equally badly.
   c) Before family medical leave act, employers didn't have to give leave for anything, but if they did they had to include pregnancy.

3) Lang v. Star Herald
   a) P claimed she was terminated because of her pregnancy. The employer must treat pregnancy the same way as it treated other temporary disabilities. Here, because others only took one day of leave, even though she wanted to take longer, she was not discriminated against because she was not treated differently.
   b) **Rule**: A prima facie case for employment discrimination requires a plaintiff to show that the employee was subjected to either disparate treatment or disparate impact (in this case plaintiff showed neither)

4) International Union, UAW v. Johnson Controls, Inc. (disparate treatment case)
   a) The employer excluded fertile female employees from jobs exposed to lead.
   b) Type of claim
      i) If the employer's policy is discriminatory on its face, then the employer must come up with a BFOQ.
      ii) If the employer has a facially neutral policy, it is a disparate impact claim, and then you use the business necessity.
      iii) Whether it is disparate impact or disparate treatment depends whether the policy on its face treats people differently because of sex. Intent of the employer does not matter.
   c) Here, the employer made out a BFOQ
      i) Court: safety itself does not ensure a BFOQ
      ii) Duty of the job is to make batteries, not safety
   d) **Have to treat people the same based on their ability to do the job, not their ability to become pregnant**.

e) Rule: Employers may not exclude fertile females from certain jobs merely because of concern for the health of the fetus the woman might conceive
f) Employer was worried about possible tort liability:
   i) Should warn the people about the lead. The employer should just make it as safe as possible and then let the employee decide.
   ii) Comply with OSHA
   iii) Concurrence feels that there still may be tort liability.

5) Trends

a) Much more disparate treatment than disparate impact.
b) Privacy issues
   i) The courts have not been convinced because of privacy concerns.
   ii) Limited exceptions: Professionals. This is a large job classification so they do not want to limit.
c) Lower courts show more deference to preference when it comes to clothes fitters: this could be resolved by assigning the same sex employee.
d) Law enforcement: Making of assignments is OK when it is necessary: prostitutes and gangs. These are assignment issues rather than hiring issues.
e) Split in courts over whether only women can be rape crisis counselors: close call.
f) Sex entertainment:
   i) The more sexualized the entertainment, the easier the court will find a BFOQ
   ii) Hooters is a closer call.

H) **<u>Disparate impact</u>**

1) **Elements** of disparate impact analysis

a) Plaintiff must show adverse impact of particular practice
   i) Statistical disparity must be significant: courts decide what is significant.
   ii) As a practical measure, courts use 80%; What percent of women are selected in comparison to what percent of men. (Divide % of men by % of women).
   iii) P has to point out the particular employment practice: doesn't have to be an objective practice.

b) Burden of persuasion then shifts to Defendant to show that practice is "job related and consistent with business necessity"
   i) Whatever is being measured must be necessary for the job.
   ii) Related to successful job performance.
   iii) If people on the job are not required to continually test, courts may find that it is not important to the job.

c) Plaintiff can still prevail if establishes less discriminatory alternative
   i) E.g., carry a fire hose instead of bench press.

2) Griggs v. Duke Power Co.

a) D required a high school diploma and general intelligence tests in order for workers to transfer. The jobs that the P's wanted were not high skilled jobs. A disproportionate number of blacks did not meet the transfer criteria. Also, the requirement was new, initiated when Title 7 came into effect.
b) Actions that are neutral on their face but discriminate anyway: Rule: Practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if

they operate to freeze the status quo of prior discriminatory employment practices.
i) Disparate treatment is often a term of art that goes beyond pure "disparate treatment analysis" under law and is misused to include all four things above (dis. Treatment, BFOQ, harassment, religious...)

c) Title seven doesn't require proof of intent; it's about discriminatory consequences. Practices can be fair in form but discriminatory in practice.
d) **The purpose of Title 7** is to achieve equality and to remove barriers, intent is not required. Court looks at purpose of title seven and found that intent wasn't the issue, it was to "achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."
e) Break from the typical analysis
i) In disparate treatment, employer just has to have a non-discriminatory reason, not even a good one. Here, the employer has to have a good reason for the employment practice.
f) In Griggs, the court may have been suspicious of past intentional discrimination.
g) Motivation: proving intent is hard so there needed to be another form of analysis.
h) The higher the skill of the job, the more deferential the courts will be to the employer's requirements. The lower the skill, the more the courts will look into the practices.
i) Even neutral in terms of intent, practices and procedures cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices
j) Employer has burden of showing that any given requirement must have a manifest relationship to the employment question.

3) Height and weight requirements
a) Courts want employees to actively measure strength if that is what is needed, not just height and weight.

4) **Qualified applicants**: Ward's cove v. Antonio
a) The only part of this case that is still good law is the holding where the court requires the use of statistics to only consider those applicants who are qualified.
i) Do not look at the minority population as a whole, just those that are qualified.

b) Rule: Statistical evidence comparing an employer's practice of hiring nonwhite workers in one position to low percentage of such workers in other positions does not establish a prima facie case of disparate impact of employer's policies in violation of title VII. Statistical evidence is not enough. What is statistically significant is up to court
c) Can't just look at general distribution of group, must look at distribution for that type of job (i.e., accountants)
d) Courts often use 80% rule; that means that you look at whether selection rate for disadvantaged group falls below 80% for the non-disadvantaged group; e.g., 88% of men pass test only 32% of women pass; they fall well below the 80% (32/88 = 36% [which is much less than 80% threshold])
e) Plaintiff has to show that adverse impact is due to impact of a **particular practice**
f) Once plaintiff has made the showing, burden of persuasion shifts to employer to explain why it is a business necessity; courts say business necessity means
i) What its trying to measure something necessary to job performance
ii) That test measures it accurately
g) Then P must show a less discriminatory alternative

I) **Sample exam** question **#1**
1) Intro: test taking

a) Understand subject matter
b) Address both sides of an issue fairly; P side, D side, or sitting on the supreme court where you can change the law: assess the strengths and weaknesses.
c) Anticipate possible legal claims

2) This question is as plaintiff's counsel
3) Part a
   a) Question of assignment
   b) Why shouldn't you use a BFOQ analysis? B/c BFOQ only applies to hiring, not existing employment
   c) Disparate treatment analysis it appropriate (walk through steps)
      i) In this case key is whether decision to assign by sex is legitimate non discriminatory alternative
      ii) One explanation is females are better at getting complete info in these circumstances
      iii) Tell plaintiff what they'd need as evidence of pretext
4) Part b
   a) Involves scaling a wall
   b) Analysis would be disparate impact analysis (not an intentional claim)
   c) First show disparate impact (use 80% rule from above); P can make out initial case
   d) Employer would have to show how frequently foot chases occur, i.e., present evidence why it's related to a business necessity
   e) Then third prong, as plaintiff must show a less discriminatory alternative could be established; burden on plaintiff to show less discriminatory alternative
5) Summary
6) Don't have to discuss things not raised in class
   a) But if equal protection, what level of review would you apply to A? Intermediate scrutiny (gender based claims); important government interest (not compelling as with strict); is this activity substantially related to the objective of the government
   b) What level of review would you apply for "b"? rational basis b/c it's not based on gender (facially neutral practice with discriminatory basis (Washington case); Rational basis is defined as government has to have a rational basis, deferential; 1 does government have a legitimate interest; 2 look to whether requirement is rationally related to the objective; she says no successful equal protection claim could be made.
   c) If have a burley guy standard, it is a BFOQ defense (hiring issues), switched to a test;
      i) Once test demonstrated to be adverse to women,
      ii) Then must show now least discriminatory alternative available; has to be a less discriminatory way to select people for the job, not a less discriminatory way of doing the job
      iii) Reference to second question (jumping over obstacles); burden to show disparate impact by plaintiff, then burden shift to defendant to show it is necessary and (2) that police

J) **Sexual harassment**

1) Types of sexual harassment
   a) Tangible employment action: (quid pro quo; if/then) (when supervisor makes tangible employment benefits contingent on subordinates response)
   b) Hostile work environment: P must show that conduct (by supervisor or co-worker) was:
      i) Unwelcome
      ii) Sexual or sex-based, and
      iii) Sufficiently severe or pervasive

2) Application of types of sexual harassment
   a) If plaintiff establishes tangible employment action, then defendant automatically liable.
   b) If hostile work environment, by **supervisor**, then defendant liable unless it can show
      i) It took reasonable care to prevent and correct and
      ii) Plaintiff unreasonably failed to take advantage of preventative/corrective opportunities
   c) If hostile work environment by **co worker**, to establish employer liability, plaintiff must show that employer was negligent (knew or should have known of harassment and failed to take prompt corrective action)

3) **Hostile work environment**: Harris v. Forklift Systems
   a) Issue: Was the work environment sufficiently hostile: must the P suffer pschycological injury.
   b) Rule: Sexual harassment is not required to be psychologically injurious in order to constitute an abusive work environment (under title VII)
      i) But, if attorney brings a tort claim for intentional infliction of emotional distress, attorney will have to prove psychological injury
   c) Must show more than offensive epitaphs, and must be severe and pervasive (both subjective and objective) but not an emotional breakdown
   d) **Test**:
      i) Objective; reasonable person would find it sufficiently severe or pervasive
      ii) Subjective: That actual P must have found it pervasive.
   e) **Factors** for objective component (not all inclusive):
      i) Frequency of conduct
      ii) Severity of conduct
      iii) If unreasonably interferes with work performance
      iv) Psychological injury, but not required
      v) Physically threatening or humiliating or merely an offensive utterance
   f) Scalia concurrence: The statute does not say anything about work performance: just work environment.
   g) Ginsberg tries to get some real world guidance to what the standard actually is. "it suffices to prove that a reasonable person subjected to the discriminatory conduct would find that the harassment so altered working conditions as to make it more difficult to do the job." Do not have to actually prove decline in productivity.

4) **Same sex harassment**: Oncale v. Sundowner Offshore Services, Inc.
   a) Rule: A plaintiff may maintain an action under Title VII for gender discrimination based on sexual harassment when the harasser and the plaintiff are of the same sex.
   b) Critical issue in title VII's text is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed

c) The court had three options to choose from
   i) Never, only when motivated by sexual desire, or if the elements can be made.
d) Court held that it is actionable: why
   i) Textual: Looked at the language of title 7 and there is nothing about the same sex limitation.
   ii) Read Title 7 very broadly because remedial
   iii) Analogizes to race: the same race can discriminate against each other.
e) D's practical concerns: sexual harassment will spin out of control.
   i) But, Still have to prove the harassment and it is not easy.
   ii) Have to apply the standards.
f) It is what the legislature has written down which controls, not what they had in their minds.
g) How to prove harassment when it is the same sex
   i) Evidence of hostility towards the same sex.
   ii) Comparative evidence: Treats members of one sex badly as compared to another sex.
   iii) Harassment when the harasser is motivated by sexual desire.

5) **Employer liability for employee conduct**: Faragher v. City of Boca Raton
a) Issue: when do employers have to pay for the harassment when an employee is the harasser? Holding: the employer is liable for the discrimination caused by the supervisors of the city.
b) Employers position on liability
   i) The employees conduct is outside the scope of employment; employer did not know that the employees were doing it.
c) Employees position
   i) Whenever a supervisor engages in harassment the employer should have to pay like in other areas of Title 7.
d) Test
   i) If tangible employment action (quid pro quo) then the Defendant is automatically liable.
   ii) If the Plaintiff can show the second hostile work environment test and that it was by supervisor then defendant liable unless
      - It took reasonable care to prevent and correct the action: and
      - The P unreasonably failed to take advantage of the preventative or corrective opportunities.
   iii) If the harassment is by a co-worker, to establish the employer liability, P must show that the employer was negligent (Knew or should have known about the harassment and failed to take prompt corrective action).

e) Dissent: would have taken the employers position. Would hold liable only if the employer was negligent (knew but didn't do anything).
f) This test is basically a balance; tries to prevent harassment in the workplace but will only hold business liable under certain circumstances.

6) Harassment base on race, religion, national origin
a) Content may or may not include references to race, natural origin, or religion, doesn't matter as long as decision to target that worker was based on one of those reasons.
b) Apply same elements of the claim as in sexual harassment with couple of exceptions:
   i) Tangible employment action doesn't really apply: just the hostile work environment.
   ii) The unwillingness prong is less relevant because sometime sexual behavior is welcome: If the person joined in with the racial joking; must later say stop.

iii) In these other contexts it's based only on hostile work environment
- Standard is whether its severe and pervasive

iv) The same defenses apply as in sexual harassment.

K) **Religion and reasonable accmodation**

1) Title 7 contains the standard ban on discrimination in employment decisions based on relegion.
2) Additionally, Title seven is unique w/ respect to religion; coverage includes an affirmative duty for employers to reasonably accommodate the employees ability to exercise their religion unless undue burden on employer (**duty of reasonable accommodation**)
3) The reasonable accommodation standard only kicks in if the employer can make an accommodation with only de minimums cost.
   a) This will depend on the facts of the case and the hardship of the specific employer.
   b) Some employers may have to give the Sabbath off while others will not.
   c) Worker's who's religious beliefs require them to dress a certain way; court will be less likely to allow this if the job requires a uniform (like police); in other contexts, employees can dress the way they want.
4) Courts have interpreted title 7 narrowly when ever possible to avoid constitutional questions
5) Title seven exempts certain places, like religious organization or religious schools regarding religious discrimination (still have to abide by rest of title 7). Anyone in ministerial capacity, church can hire whoever they want; won't enforce any of title 7
6) The question of religious discrimination and accommodation bring up first amendment issues. The government as employer or enforcer.
7) The courts try to construe the protection narrowly like using the exception to religious discrimination
   a) Religious schools and churches
   b) Can discriminate on any grounds for ministerial employees.
8) Reasonable accommodation under the ADA is broader because there are no constitutional issues.

L) **First Amendment**: Tucker v. Cal. Dept. of education

1) Government employer prohibited religious advocacy on the part of employees and prohibited displaying artifacts.
2) Rule: When the state seeks to effect a broad ban on the speech of its employees, it must demonstrate that the employees' interest in freedom of expression is outweighed by the impact of that expression on the operation of the government (balancing test)
   a) Pickering: the government can regulate its employees speech more than general citizen's speech
   b) Test: whether employer's interest in restricting speech outweigh employees free speech right
      i) Policy prohibiting religious materials in the workplace; court said overinclusive and underinclusive
      ii) RE: religious advocacy; court said w/in self contained office, discussion of religious matters, or display of religious info should not be confusing where people would think it was a government endorsement of religion

3) What if this was a purely private employer (Title 7 analysis)
   a) Letterhead = company speech
   b) Analysis
      i) Identify the religious practice at issue
      ii) Proposed reasonable accommodation
      iii) Does this impose an undue hard ship on the employer
         - Is it costly
         - Burdensome
         - Evidence that other employees are offended would help the employers reaction: harder to prove an undue hardship when the other employees have not complained.
      iv) Look at if the conduct is severe and pervasive
      v) Some times look to see if the church does expound this belief-But could be a one man religion.

ADEA

I) Age discrimination in employment act (ADEA)
- A) Prohibits job discrimination against workers 40 years old or older.
- B) Applies to Employers of 20 or more (title seven applies to 15 or more)
- C) Sometimes require first step of filing with EEOC; remedies come from fair labor standards act
- D) Enforcement and remedies are the same as for the FLSA: but just have to go through the EEOC.

E) **Purpose:** Congress sought to prohibit the inaccurate stereotyping of the elderly. Requires the employer to ignore the employees age, employer must base employment decisions on factors other than age.

F) Types of claims under ADEA
1) Disparate treatment (apply mcdonnel Douglas burden shifting)
   a) Hazen paper; fired just before pension rights vested; he claimed under ADEA and ERISA
   b) Court concluded that a finding of age discrimination under ADEA was not compelled just b/c employer based decision on something that correlated w/ age (i.e., length of service).
   c) Have to show **age motivated decision**, not just something that correlated w/age.

2) **BFOQ defense**; applies to any age based decision, not just hiring decisions under ADEA
   a) Employer must prove either: (Mandatory retirement for flight engineers (western airlines case)
      i) Factual basis for believing that all or almost all older people cannot perform the job satisfactorily, or
      ii) Must show it is impossible to measure the characteristic (like through a physical exam)
   b) Western Airlines case: Plaintiffs showed aging has variety of effects; court said no reason why based on medical exams decisions can't be made about retirement for employees that can't cut it.

   c) ADEA prohibits mandatory retirement ages unless employer can make out BFOQ
      i) But there are a few jobs were permissible: public safety officer, some high level management officers, judges.

3) **Disparate impact claims** (Split in circuits whether allowed under ADEA)
   a) One position (Majority): The statutory language of the ADEA is not the same as Title 7: does not include "applicants for employment." Because congress did not include this language, disparate impact does not apply.
   b) Other position: The purpose of the ADEA is to uncover unconscious age discrimination and disparate impact does that. Refusing older employees and making them work for less should be addressed.
   c) EEOC v. Francis W. Parker School (disparate impact claim): An older teacher was not hired because they would have had to pay him more under the salary guidelines. Disparate treatment did not work because it was based on pay rather than age.
      i) Court said disparate impact claim is not available; court says this is not a mirror w/ title 7. ADEA draws heavily from title 7, the mirror provision in the ADEA omits from its coverage "applicants for employment." Although disparate impact theory was available under title seven by supreme court, it was later codified in title 7 but legislature did not amend ADEA at that time
      ii) Purpose of ADEA, one purpose is to uncover unconscious discrimination. Dissent argues purposes of ADEA suggest that disparate impact is important; dissent also frames issue is fact that older person was willing to work for that lower salary, the employer refused to let him; that creates disparate impact against older workers
   d) ADEA has prohibition on mandatory retirement except a few exceptions (e.g., public safety)
      i) But ADEA allows employers to engage in **voluntary** age based retirement plans (by providing financial incentives) (gov't distinguishes b/w "carrots" and "sticks"). The employer cannot force retirement.

4) Older worker benefit protection act
   a) ADEA claims cannot be waived by the employee unless certain conditions are met. (Conditions are on p. 1160: mainly is knowing and voluntary).
      i) Older workers were being terminated and told to sign a waiver; this act prevented such waivers without some conditions (like ability to consult counsel); point was that waivers had to be executed voluntarily. Prohibits discrimination against older workers with retirement benefits unless there are cost justifications.
   b) Employer can reduce benefit if it's too expensive; have to spend same on older as younger workers. Don't have to pay more for the older workers, just the same.

ADA

I) Americans with disabilities act (ADA)

A) General

1) Draws from rehabilitation act of 1973 and title 7.
2) Covers all employers with 15 or more employees.
3) Have to start with filing a government claim; like title 7
4) Congress intended broad application of accommodation (more than in religious context in title 7: e.g., public places)
5) Expressly provides for disparate impact claims
6) **Purpose:** to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.

B) **ADA Rule**

1) Covers qualified workers with disabilities
2) Qualified individual with a disability is one who can perform essential functions of a job with or without a reasonable accommodation (affirmative duty).

C) **ADA definitions**

1) Qualified individual with a disability

a) One who can perform the essential functions of a job with or without reasonable accommodation.

2) **Essential functions of a job**: duties performed by someone in a job

a) Look to job description (is it listed in writing?)
b) The time spent doing the task
c) What happens if the duty is not performed

3) **"Disability**" means:

a) Having a physical or mental impairment that substantially limits one or more of the major life activities of an individual.
b) Having a record of such an impairment, **or**
c) Being regarded as having such an impairment (when the employer thinks that the person is disabled).

4) **Substantially limits** means: impairment inhibits or restricts major life activity; look at severity, duration impact, comparison to society (broken bones, pregnancy, acute heart attack w/o accompanying disease) (substantial impairment not met by temporary short term disability).

a) Degree of impairment compared to the average person.

5) **Impairment** means mental or physical disorder (addiction is an impairment, but excludes the current illegal use of drugs); if in treatment you're covered; if your still acting on addiction, not covered. HIV included.

a) Hiv without symptoms is still a disorder, court said HIV positive status is impairment
   i) Major life activity was affected (no symptoms), but argued she couldn't reproduce and that was a major life activity (court agreed)

6) **Major Life Activities**:
   a) Walking, seeing, hearing, sleeping, breathing, speaking (If it's just one task you can't do it's not enough to qualify)
   b) Working: Substantially limited from doing a broad range of jobs

7) **<u>Corrective measures</u>**: Sutton v. UAL
   a) The issue revolved around the definition of a disability and whether people who used corrective measures on their impairment are considered disabled under the Act.
   b) Facts: Sisters near sighted (myopic), wanted to work as pilots, UAL has 20/100 uncorrected vision minimum requirement. P argued shouldn't consider corrective measures, so did EEOC. D said look at the present tense and see if they are disabled now.
   c) Court: **Look at your impairment after the corrective measures are taken** (must look at mitigating measures taken). Do not consider whether they could be disabled.
      i) Court says it's all about individuals, how they are today; they use mitigating measures
      ii) Plain reading of the statute says if plaintiff is using mitigating measures, you must look at the mitigating measures
      iii) Considering people with corrective measures as disabled would include many people
      iv) Court talked about third prong (being regarded as disabled); have to show employer precluded them from a whole range of jobs, not just as a pilot. Working is a major life activity but not being able to work only one job is not.
   d) Dissent says remedial statute, construe broadly not narrowly and majority takes to narrow an interpretation. Dissent says under majority view your covered if you have record of impairment, but your not covered if you're regarded as impaired now.
      i) What is dissent's response to majority's practical concerns of majority wanting a limiting principle
      ii) Dissent says everyone covered under title 7; he thinks they may lose in this case even if you find their covered b/c there might be some business necessity or other reason why they might not win

D) **<u>Reasonable Accommodation</u>**
1) Employers need to look at status quo and see if what they are doing creates barriers.
2) Reasonable accommodation means an alternative that works: is it effective in reducing the barriers (Not cost or burden; cost or burden means undue hardship)
3) Process
   a) Employee has duty to let employer know they need reasonable accommodation.
   b) Ideally, the employer and the employee will work together.
   c) Employers who engage in this process in good faith, even if not reasonable accommodation, will protect them from damages for not having reasonable accommodation (may still have to make changes though through injunctive relief)
4) Reasonable accommodation could mean changes to rules, procedures, physical changes to business, providing changes in application process, leave for medical treatment, restructuring the job.
5) <u>Not reasonable</u>
   a) Eliminating the primary job: Eliminating some responsibilities may be required, but not the

essential essence of the job.
b) Do not have to lower production.
c) Don't have to provide wheel chairs or hearing aids
d) Not reasonable accommodation to have to tolerate violation of a rule consistent with business necessity (like insubordination or violence in the workplace)

6) Undue hardship
a) This is not a de minimus standard
b) Considerations are cost, employer size, ability to alter program.
c) Employer is required to show it would be undue hardship

7) Employers may adopt measures that prevent a direct threat to the employee's self and others. The employer must have evidence to support these conclusions.

8) Van Zande
a) Facts: Paraplegic wanted to work at home with a computer from the employer. The paraplegic's ulcers were considered as part of the disability.
b) Rule: an employee making a claim under the ADA must make a prima facie showing that the requested accommodation is both efficacious and proportional to costs.
i) What is reasonable: effective plus cost benefit analysis
- This is the minority view
- Majority view is: effective equals reasonable

ii) Working at home is unreasonable because working at home is not effective: cannot do the job there. The sink and the computer were undue hardships.
c) Distinguish between the two prongs
i) Reasonable = effective
ii) Undue hardship = cost, alternatives

E) **Hiring, medical questionnaires**

1) Cannot ask potential employees if they are disabled. Can ask "can you perform the job with or without a reasonable accommodation."

2) Griffin v. Steeltek
a) Rule: (Minority view): The provisions of the ADA, prohibiting non-business related medical inquiries prior to granting employment, do not provide a cause of action for a person who does not meet the definition of "disabled" under the act. Or, in order for a person to have a cause of action under the Act, they must be disabled.
i) Majority says Disability status requirement is only for claims related to reasonable accommodation or discrimination, not in a situation like griffin
b) The P in this case was not disabled, but was asked the medical questions under the Act.
i) Court rules he doesn't have a cause of action whether or not questions were improper; this is not necessarily the majority view

F) **Summary of ADA**

1) P MUST SHOW THAT HE/SHE IS A QUALIFIED INDIVIDUAL WITH A DISABILITY
a) Discrimination claim
i) Disparate treatment
ii) Harassment
iii) Disparate impact
b) Reasonable accommodation claim

i) Plaintiff shows failure to engage in reasonable accommodation Defendant must then sow undue hardship (as affirmative defense)

2) PROHIBITIONS ON DISABILITY RELATED INQUIRIES

a) Pre-offer: not allowed
b) Post-offer but pre-employment allowed if made of all employees in that job category
   i) Can ask whatever they want as long as done to everyone in that job category
c) During employment allowed only if job related and consistent with business necessity plus prohibition on disclosing medical information
   i) Example: worker suddenly develops absenteeism problems (work is suffering), can inquire; or a forklift operator that becomes suddenly light headed.
   ii) If not threat to safety and/or no loss of performance, you can't ask
   iii) Any info they do get, employers can't disclose it.

OSHA

I) Occupational Safety and Health Act

A) General

1) Attributes of OSHA

a) OSHA: to ensure every person has safe working conditions.

b) Before OSHA, employers raced to lax states (re worker safety). Concerns about conscientious employers being undercut (price wise) by competitors that didn't worry about safety

c) Workplace injuries for farms, fed and state gov't employees, airlines, truckers, mines, governed by different agencies.

d) Covers 5-6 million workplaces: does not cover some workplaces governed by other statutes.

e) Pre-empts state law unless the state plan is approved by the fed.

2) Two major OSHA requirements

a) General duty clause: Employers must keep workplaces kept free of recognized hazards.

b) Specific duty clause: Covered employers must comply with OSHA standards regarding specific toxic substances or conditions.

3) Inspections

a) OSHA can inspect any covered workplace: Could be triggered by employee report, accident reports, media reports, or just spot check.

b) Can lead to civil penalties, and criminal penalties

c) Employers can petition for administrative review with an ALJ, then to OSHRC (Occ. Safety and health review commission); then can appeal to relevant federal circuit court of appeals

4) **Purpose**: To assure so far as possible every working man and woman in the nation safe and healthful working conditions and to preserve our human resources. Central concern was avoidance of safety and health hazards at the place where the work is performed.

B) **Definition of Workplace**: Frank Diehl Farms v. Secretary of Labor

1) Issue: does OSHA cover the housing of seasonal employees? OSHA may regulate employer-provided housing if employees are required to live in such housing as a condition of their employment.

2) Possible tests

a) Employer says the test should be **"condition of employment test"**: either that employer required them to live there or as practical necessity they had to live there.

i) Determine if housing is provided as a condition of employment. Living employer-provided housing is construes a condition of employment if a) employers require employees to do so; or b) geographical circumstances require employees to do so.

b) Other test is **"directly related to employment"** standard: Was it directly related to employment: does the employer benefit from the housing.

3) Courts reasoning for selecting condition of employment test:

a) Court looks to plain language (workplace is not defined), so common meaning
b) Dept of labor's stand is not a legal argument, but a policy argument, doesn't mean it violates OSHA.

4) Dissent follows the directly related to employment test
a) Should interpret remedial statutes broadly.
b) The housing of seasonal employees is directly related: the employer was benefiting.

C) **Pre-emption of state law**

1) There are two types of preemption
a) Express: names the state law preempted.
b) Implied: two ways:
i) Field preemption: such a comprehensive federal regulatory scheme that congress sough to occupy the field.
ii) Conflict preemption: compliance with both is impossible or state law would undermine federal purposes.

2) **Preemption of state criminal law**: Illinois v. Chicago Magnet Wire Corp.: Employer was charged criminally for injuries suffered by employee. Question is whether OSHA preempts state criminal prosecutions that do not involve new or different workplace safety standards.

a) Rule: OSHA does not preempt state criminal prosecutions that do not involve new or different workplace safety standards.
   i) Employers argued OSHA and states had same purpose to promote worker safety.
b) Holding: OSHA did not preempt state from going after the employers criminally.
   i) Both have deterrence aspect, but **criminal goes to punish and to seek retributive justice**.
   ii) Court said it supplements OSHA, not undermines OSHA; OSHA is a floor of protection, states can't go below, not a ceiling
   iii) Court said criminal law is historically a state matter (court said they will require express preemption).
   iv) Legislative history and department of labor memo: no preemption of state criminal law.
c) Employer argues why preemption is a good idea: Employer is concerned about mixed signals from feds and states: want clear direction.
d) OSHA does not preempt tort claims or workers comp claims.

3) **State regulations**: Gade v. National Solid Wastes Management Association
   a) Rule: OSHA preempts duplicative state occupational safety regulations.
   b) G/R State laws of general application will probably not be preempted, but specific laws that are within same arena as OSHA will be preempted.
      i) Laws here preempted because of conflict preemption
      ii) Would undermine the purposes of OSHA: OSHA requires that state plans be approved and to set clear and consistent guidelines for employers.
      iii) OSHA prevents duplicative legislation: requirement of the statute that state plans be approved.
      iv) State plans must not burden interstate commerce.
   c) Trial court's argument that the state law had a broader public safety purpose.
      i) Have to look at the effect of the law. Here, the law sets worker safety standards. Cannot avoid preemption simply because there is another purpose as well.
      ii) Court distinguishes between general purposes and worker safety.
   d) Concurrence: Preempted because OSHA also designed to prevent duplicative state law.
   e) Dissent: Traditionally the state has had the police power within state borders: federalism argument.

D) **<u>Standards</u>**
1) Employers must comply with specific standards that have been developed by OSHA.
2) 3 Ways OSHA can promulgate standards
   a) Adopt national standards without rule making, adopt existing standards of other fed laws or privately developed standards. (2 years).
   b) Promulgate, modify, revoke Standards
      i) Must go through rule making process
   c) Emergency temporary standards: effective for 6 months: reasons must be severe.

3) Employers can challenge the standards or raise as a defense in enforcement.
4) Employers can petition for a variance: either temporary or permanent
   a) Permanent: doing something else that is just as safe.
5) Enforcement: response to complaints or audits.

6) **Standards without rulemaking** (like national consensus standards)
   a) Could adopt national consensus standards within two years after adoption of OSHA. If

adopting national standards, **they must be adopted as-is**: if the agency wanted to modify the standard then it would have to go through regular rulemaking.

i) Usery v. Kennecott: Employer cited when an employee did not use ladder. Commission said that the employer did not violate the guardrail standard because the rule was no promulgated properly. Did not violate the ladder standard because the ladder was available.

ii) The standard adopted by OSHA originally had "should" and when OSHA adopted it changed it to "shall."

iii) Rule: To be enforceable, interim regulations promulgated under the Occupational Safety and Health Act must be adopted verbatim from existing industry standards or else by following the appropriate due process procedure

iv) Ladder issue: the rule said that the ladder must be provided: the court says that means the ladder must be available for use.

- The statute purpose was to make a safe work environment but the employees must take some responsibility.
- The plain language did not require the employee to use the ladder.

7) **Promulgating new initial standards**: Statutory language

a) As a general matter standards must be "**reasonably necessary or appropriate**" to safe; healthy employment § 3(8)

i) S. Ct. interpretation: DOL must show – based on substantial (tough) evidence – that current levels pose significant risk of material health impairment: must decide this before setting the standard.

b) Standards for toxic substances must " most adequately assure that no employee will suffer material impairment" – " to the extent feasible" § 6(b)(5)

i) S. Ct. interpretation DOL must show that standard is feasible – i.e., capable of being achieved without undermining industry viability (the cotton dust case); not so tough for DOL: use this to see if the right standard is set.

c) Benzene case

i) Court likes 6b5 standard: Court said it never got that far though b/c first Gov't must get to § 3(8) to set the standard; then 6b5 asks if they set the right standard. Burden is on the agency there is substantial evidence to show current levels pose a significant risk of material health impairment.

ii) OSHA not about risk free work place, but a safe work place; unsafe means significant risk of harm.

iii) Because the agency did not show that there was presently a significant risk, the threshold was not met: the agency did not say how dangerous it was at the current standards. The evidence does not have to be certain, just be the best available evidence. Court said OSHA could continue to monitor and test employees.

iv) Dissent: Should defer to the expertise of the agency.

- Disagrees with the statutory interpretation of the plurality: all of the other statutes with the first phrase haven't given as high of standard as "significant risk."
- The scientific evidence was conclusive so must defer (the evidence available was enough in this case).

8) **Feasibility standard** (Cotton dust case (p. 725, not assigned)

a) Industry says cost benefit analysis, benefits exceed cost of compliance

b) Court: DOL must show that the standard is feasible: capable of being done without

undermining the industry's viability. This is not a very tough standard for the agency to meet.

c) How to analyze costs of standards
   i) Cost-oblivious
   ii) Cost effective (consider cost in determining <u>which</u> standard to impose)
   iii) Cost sensitive (consider cost in determining <u>whether</u> to impose any standard at all)
   iv) Strict cost-benefit (benefits must outweigh costs of compliance)

d) As a matter of law we are probably between cost-effective or cost-sensitive
   i) Agency has to show risk, then use a cost effective analysis in picking among standards

9) AFL-CIO v. OSHA

a) Rule: OSHA safety standards for each air contaminant must be supported by substantial evidence. All contaminates should not have been clumped together.
   i) Must make a threshold showing that each substance shows a significant risk: not a general conclusion about the contaminants all together.

10) Temporary emergency standards

a) The DOL has to identify a grave danger, 6 months Only, don't need rule making.
   i) 5th circuit struck down the asbestos standard because the science was not good enough.
   ii) This case seems to require that rulemaking is needed: purpose for emergency standard would be thwarted.

E) **<u>Specific duty claims</u>**

1) ELEMENTS OF SPECIFIC DUTY CLAIM

a) Government must show
   i) Applicable standard exists,
   ii) Employer failed to comply with standard
   iii) Employee(s) had access to violative conditions, **<u>and</u>**
   iv) Employer knew or should have known of violative condition

b) Where there are specific duty standards, the general duty does not apply.
   i) But if a duty is shown for what employer is supposed to do, then employer comes into compliance but it doesn't make the workplace safe (doesn't rectify the problem, and there were repeated complaints, then OSHA could bring a general duty claim)

c) No need to show feasibility, this was done when the standard was passed.

2) Specific duty applied (Brock v. City Oil Well Service Co.)

a) Employee's dies because of hydrogen sulfide gas. Federal law requires an employer to provide either effective engineering controls or respirators to its employees. ALJ said the fed govt did not show that the employer did not comply with the gas.
   i) Employer argued that the standard said to first provide engineering controls and if that was not feasible then to provide respirators. Employer said that there were feasible controls (even though it didn't use them) so the respirator standard should not apply. The employer tried to shift the blame to the well owner but the specific standard applied to the employer.

b) Court engaged in a purpose-based analysis look to purpose of the reg. The purpose of OSHA is to provide employee safety; the employer approach wouldn't have protected the employees at all (pragmatic: employers interpretation absurd).

c) **Statutory/regulatory interpretation:**
   i) Text: the plain language and the structure.

ii) If the text is ambiguous or otherwise unclear then:
- Other indicators of the legislative/regulatory intent: leg. History and purpose based analysis.
- Precedent.
- Pragmatic consequences.
- Deference to the reasonable agency interpretation.

3) Durez Division ... v. OSHA (specific duty claim)
   a) The DOL said that the employer failed to notify buyers of product about the potential dangers of exposure to the product. The D said that there was not a significant enough risk to include warnings.
   b) Court: Manufacturer should disclose all potential risks b/c mftr. Doesn't know how it will be used downstream; err on the side of caution: list all of the risks.
      i) The court used precedent and deferred to the agency action.
   c) Employer expressed concern that it would undermine warning of real risks. That could lead to tort liability.
      i) Why did mftr fight this? IF OSHA violation it hurts the manufacturer in tort cases against it. Also cost of fixing the problem.

4) **Informing employees of danger**: Superior Custom Cabinet Co. (specific duty claim)
   a) Full commission review after worker died in a fall. Employer violated safety training requirement to inform employees of specific dangers. Did employer fail to comply with that specific standard (specific duty claim)
   b) Commission: specific instructions were not given about unsafe conditions; should not be left to the employee about what is unsafe; instructions that were given (general) were not based on the applicable regulations.
   c) Rule: An employer's instructions are sufficient if they are adequately specific to advise its employees of the potential dangers inherent in their work, of ways to avoid those dangers, and if they are based on the applicable standards.

5) Syntron Inc. (specific duty case)
   a) Employer didn't put guard on a saw blade. ALJ and commission said that failure to put guard on the blade did not produce the hazard because hands never got close enough to the blade: the standard was not designed to prevent the mere possibility of injury.
   b) Rule: The issue of whether a machine poses a hazard to an employee is determined by how the machine functions and how it is operated by the employees.
      i) Held dept of labor fail to show that employer failed to comply w/ standard
      ii) Majority says no consideration of inadvertence was considered
   c) Dissent: Purpose based analysis, and pragmatic concerns: cheap to supply the guard.
   d) Hazards are different than accidents: when accidents happen, it may trigger OSHA investigation, but doesn't necessarily mean a violation occurred, and vice versa
   e) Standard to that hazard is to be minimal, not that hazard has to be eliminated

F) **<u>General duty clause</u>**

1) ELEMENTS OF GENERAL DUTY CLAIM
   a) Government must show:
      i) Workplace condition presents a hazard to employees,
      ii) Employer or industry recognizes hazard,
      iii) Hazard is causing or likely to cause death or serious physical harm, and
      iv) Feasible means exist to eliminate or markedly reduce the hazard.

2) Pepperidge Farm, Inc. (general duty clause)
   a) Repetitive motions at factory were causing injury. Was it a breach of the general duty clause?
   b) Elements
      i) Workplace condition presented a hazard to employees
         - There is evidence of injury to humans; when allegation of human injury, not going to require a specific threshold; more deferential toward finding a hazard; There is medical testimony that there is a way to determine carpal tunnel
      ii) Did employer recognize the hazard
         - Commission said there was recognition; med records, workers comp, hired ergonomics expert; they knew there was a hazard
         - Some indication, Pepperidge hired ergonomics expert to try to solve problem, then that evidence got used against Pepperidge farm in employees claim
         - Courts are split; some courts won't allow efforts of employer to be used against them, others say it's all discoverable
      iii) Is this death or serious physical injury
         - Court says b/c there is temporary or permanent loss of work time, it's serious
      iv) Whether feasible means exist to eliminate the hazard
         - IN this case they could change posture, rotate duties, work breaks
         - Dept of labor didn't show that their proposals would do more than Pepperidge farm had already done; action dismissed.

3) Defense to OSHA general duty claim (Brennan v. ASHRC (general duty clause))
   a) Employee was killed when he tried to unload ties. The employer puts forward the defense of unpreventable employee misconduct. The employer told the employee not to unload the truck, but the employee did anyway.

   b) **Unpreventable employee misconduct defense**:
      i) The employer has established work rules designed to prevent violation
      ii) It has adequately communicated these rules to its employees
      iii) It has taken steps to discover violations; and
      iv) It has effectively enforced the rules when violations have been discovered.

   c) Case stands for proposition that employer has defense in unpreventable employee action that results in injury (natural selection defense; the dumb ass that cut the strap to the r.r. ties).

4) Not general duty claim: (Westlaw) Oil Chem. & Atom. Workers Int'l Union v. Amer. Cyanamid Co.
   a) Employer gave fertile women choice to get sterilized or quit. This was not a general duty claim because a policy requiring sterilization is not a workplace condition that presents a hazard. Leg. History never said the policy was a hazard.
   b) Employer now has to reduce lead levels as low as possible; but not feasible to get them low enough to keep from posing reproductive risk to people; not OSHA violation b/c not feasible; then notify employees and let the employees choose.

G) **<u>Employee rights under OSHA</u>**:
   1) Two major rights
      a) Right of access to medical, exposure records

b) Right to be free from employer retaliation

2) Employees have a duty to comply with OSHA, but there is not penalty for the employee for not complying

3) **Right of access to medical records** (right to know regulations)
   a) Rights to exposure records (means employer's environmental monitoring records, safety data sheets)
   b) Purpose: designed to inform employees of risks of certain jobs, and enabling employees to inform doctors of what they've been exposed to; also for sunshine law: the more people talk about risks, the more employers will try to control the risks.

   c) General Motors Corp.
      i) Rule: Section 4(b)(4) of the OSH Act requires that the OSH Act and OSHA regulations are not to be construed as altering the terms of any other worker's compensation law
      ii) Employees want access; employer wouldn't give them; employer said it conflicted with worker's comp laws b/c there were claims pending
      iii) Court said GM had to provide the records: nothing in the state WC law prevented the employer from turning over the records. Medical records were available under the state WC law.
      iv) Other issue was whether violation was deminimus; Policy implications: if found deminimus then no penalties for violation so no incentive to provide records. Here, was not a de minimus violation because it may not always be non-harmful plus other records not related to the WC claim were withheld.

4) Whirlpool Corp. v. Marshall (**right to not perform work**)
   a) Rule: employees have the right to choose, without being subject to discharge or discrimination, not to perform his assigned task b/c of a reasonable apprehension of death or serious injury coupled with a reasonable belief that no less drastic alternative is available.
   b) TC said that regulation where employee had a right to refuse work was not consistent with OSHA.
   c) The SC looked at the purpose of the Act: prevent occupational deaths and serious injury:
      i) Deferred to the secretary
      ii) The Act did not forbid the regulation and the regulation was in furtherance of the Act.

5) <u>Retaliation claims</u>

a) Elements
   i) Plaintiff must show
      - Participation in protected activity,
      - Suffered subsequent adverse employment action
      - Causal Connection between the first two above
   ii) Burden of production then shifts to Defendant to articulate legitimate, non retaliatory reason for adverse action
   iii) Burden of persuasion remaining with plaintiff to show that retaliation was real motivation

b) Right to be free from retaliation claims: Reich v. Hoy Shoe Co., Inc. (retaliation claim case)
   i) The employee claims she was fired for filing a claim.
   ii) Rule: In a case alleging retaliatory discharge, the plaintiff is not required to prove that the employer had actual knowledge of the identity of the particular employee engaged in a protected activity.
   iii) In this case the employer argued that there was no causal connection b/c employer wasn't sure who filed the complaint (no causal connection)
   iv) Dept of labor pointed to subjective enforcement of tardiness policy and policy was implemented after the complaint, also statement by president that he know what was going on.
   v) Practical effect is if they identify themselves they are legally free from retaliation; if they remain anonymous it will be harder to show retaliation
   vi) The only recovery under OSHA is re-instatement.

H) **<u>Enforcement and adjudication</u>**

1) Warrant requirements
   a) Warrant requirement somewhat relaxed in administrative context: Bottom line: OSHA needs warrant;
   b) Must show reason to believe violation occurred or
   c) Show a particular employer is selected in conformity with a specific enforcement plan (neutral criteria); significant deviation from criminal law
   d) No warrants needed in 3 situations (WARRANT EXCEPTIONS)
      i) Employer consent
      ii) Emergency (e.g., accident or fire that requires immediate intervention)
      iii) Violation is in open view (observable by public)

2) OSHA doesn't initially seek a warrant: only if access is denied.

3) **On-site inspections**: Marshall v. Barlow's Inc.
   a) OSHA allowed on-site inspections and did not require the use of a warrant. DOL says that the warrantless inspections were best because they would be with surprise (the employer couldn't clean up) and that there were warrant exceptions for highly regulated businesses.
   b) Rule: Except in certain carefully defined classes of cases, a search of property, private or business, without proper consent is unreasonable unless it has been authorized by a valid search warrant. Violation of the 4th amendment.

i) Court said there is exception for closely regulated businesses (where license is required to operate)

ii) Standard for probable cause is more relaxed than in criminal context, but in this context probably cause may be based on specific evidence of an existing violation but also on a showing that "reasonable legislative or administrative standards for conducting an inspection are satisfied with respect to a particular establishment; if inspection is part of a neutral regulatory scheme, then they can get a warrant

- Two reasons for other standard of pc; compromise or b/c lower expectation of privacy than in a home.

4) **Enforcement of OSHA regulations** (contempt case): Reich v. Sea Sprite Boat Co.

a) Employer was issued several citations but never fixed the problem. The court using the contempt power fined the employer. May be an effective way to enforce:

b) Enforcement of OSHA is only through the agency, there is no private right of action
i) Penalties go to the govt, not the employees.
ii) Penalties may be small and it may be cheaper not to fix the problem.

c) Rule: Parties who continue to violate OSHA standards may be held in contempt and levied the daily fines used in administrative proceedings

d) OSHA primary focus is construction and manufacturing; OSHA inspections are rare

I) Second sample exam question

1) This question could be expanded. This is an OSHA question.

2) Answer: look at the general duty clause, make sure the employees are covered,must meet the 4 requirements for the general duty clause
a) Whether or not this workplace presents a hazard
b) Must be potential for physical harm
c) Potential for violence is a hazard

3) This is a statutory interpretation question
a) Purpose of the statute: Protect the employees
b) Pragmatic approach → costs and benefits

4) Employer is going to say that this is not a hazard this is life or the employee should not have been there

5) This is an unusual problem and is ∴ not covered by OSHA. This is 3rd party violence outside the employer's control. Not what OSHA was designed to address. Congress was looking at chemicals, conditions, atmosphere etc. 3rd parties outside the control of the employer is not under OSHA.

6) The employer or industry recognizes the hazard, employees brought the issue to the attention of the employer, Hazard is causing or likely to cause death or serious harm. Very likely in this case

7) Feasible means exist to the potential for the hazard. This does not limit you to what the employees have suggested any means can be used

Erisa

I) ERISA

A) Introduction

1) Regulates Welfare plans and benefit plans
2) Originally for pension plans: this is ERISA's primary purpose.
3) Doesn't require employers to provide benefits, but for those that do, there are minimum standards
8) ERISA doesn't tell employers what they have to cover within the plans except
   a) COBRA
      i) Continued coverage after employment ends (insurance must be allowed to be maintained for 18 months after a triggering event)
      ii) Burden on plan administrator to prove that the notice was given
   b) HIPA (health insurance portability act)
      i) Hipa make insurance portable and solves pre-existing condition problem)

9) Consequence of ERISA
   a) B/c of broad exemption provisions, employers are exempt from complying with state requirements
   b) Covers all employers who choose to provide covered welfare and pension plans (except gov't employers and religious employers)
      i) Question is whether employer is providing employee benefit plan: Example: one time payment of severance benefits is not covered by ERISA

10) Employer who have benefit plans have a duty to disclose to employees the policy provisions
   a) Remedies are exclusive under ERISA
   b) These remedies are easier to defend that state tort or contract claims and liability is significantly less

11) **Purpose**: designed to promote the interests of employees and their beneficiaries by regulating the creation and administration or employee benefit plans.

B) **Major ERISA Rights**

1) Information about plans to employees
2) Fiduciary responsibility
3) Grievance/appeal process
4) Section 503: right to challenge benefits denial
5) Section 510: no discrimination/ retaliation for exercising ERISA rights
   a) "It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan . . . ."

C) **Law before ERISA**: Dawes Mining Co. v. Callahan (insurance policy issue for employees)

1) Employer switched insurance companies where the new plan did not cover pre-existing conditions. The employee sued the employer for not conveying that information.
2) Rule: Employers act as the agent for employees when they change group insurance plans and have a duty to notify employees of the differences in the policies
   a) Agency law:
      i) The employer is the agent of the emplyeee when getting a policy or plan so that a

fiduciary duty exists where the employer must act on behalf of the employee and fully disclose.

ii) The employer is an agent of the insurance company after the policy is given.

1) Under ERISA, employer also has duty
   a) ERISA only gives equitable relief (e.g., court could order company to provide coverage)

D) **ERISA preemption**

1) Metropolitan Life Insurance Co. v. Massachusetts
   a) Massachusetts had a statute, which required a minimum coverage for health insurance. The court held that this statute is related to benefit plans covered by ERISA.
   b) Rule: A state's mandated-benefit law is a law which regulates insurance and thus is not preempted by ERISA (ERISA preempts state regulation of pension plans, not insurance plans).
      i) **Savings clause**: Clause in ERISA that saves certain things for regulation by the states
      ii) Mass state law applies to employee benefit plans so ERISA should apply (argument)
   c) Court says statute does relate to employee benefits plan, so it would be preempted by ERISA, except that because saving clause applies (insurance, doesn't apply to ERISA), there really is no pre-emption of state law
   d) Tools of statutory interpretation
      i) Plain language
      ii) Legislative intent
      iii) Precedent
   e) **Deemer Clause**: This is the exception of the savings clause. State laws that regulate ins co's are not preempted, except for employers who are self insured, aren't considered insurance companies for these purposes; Employers who self ensure don't have to comply with ERISA standards, but they do have to comply with state law;
      i) Congress created this distinction probably because states regulate insurance companies and not self insurers.

2) Scope of the savings clause

   a) ERISA distinguishes between laws of general application (Tort or contract claims) and laws that are specifically targeted toward the insurance companies.
   b) **Saving clause** (exception to preemption) (saves state law regulating insurance)
      i) Common law claims are preempted
      ii) State laws of general applicability (tort, contract laws, broad statutes that cover all benefit, welfare plans, etc.) are preempted because they apply to more that insurance.
      iii) State laws that are specifically targeted at the insurance industry are not preempted by ERISA.
   c) **Deemer clause** (exception to the savings clause) (state insurance laws)
      i) Self insured companies don't escape ERISA: Deemer clause says self insurers are not to be deemed insurance companies
   d) ERISA will preempt state contract and tort claims

3) **Preemption of state tort claims**: Kuhl v.Lincoln Nat'l Health Plan of Kansa City, Inc.
   a) Rule: ERISA preempts state laws that apply to employee benefit plans.
   b) Employee died from a heart attack. The ins. Company did not authorize the surgery to fix his problem. The P brought a tort claim against the ins. Co. Big issue is whether state

claims were preempted by ERISA (and therefore no damages available).
i) The employer argues that state law is preempted by ERISA.

c) Remedies under ERISA are limited: only equitable relief is available: pay for the procedure if it happened. If Kuhl would have proceeded even though surgery was denied, he would have received compensation for the surgery
i) B/c he didn't have the surgery and he died, under equitable relief, he gets nothing

d) Issue of preemption: Claims were found to be related to ERISA so no tort action. The state law claims related to an employee benefit plan so they fall under the broad preemption clause.
i) Plain language was tool used to interpret: " Congress preempted "all State laws insofar as they may now or hereafter relate to any employee benefit plan"

e) Now patient's bill of rights might create a situation where plaintiff's might be able to get damages if it were to pass.

E) **ERISA substantive provisions**

1) § 503 Claims

a) Generally: § 503 wrongful denial of benefits; must have appeals process, writing as to why denied, plaintiffs can then go to court; there is an administrative exhaustion requirement under 503.
i) Exceptions: (1) extreme emergency, (2) lack of procedure
ii) If plan entrusts decisions about denial to fiduciary then review is under arbitrary and capricious standard
iii) Courts generally defer to the administrative decision
iv) But if conflict of interest, then less deference
v) IF plan is silent about entrusting decisions to fiduciary; then court will review de novo

b) **Denial of benefits**: Salley v.E.I.Dupont . . .
i) The ins. Co. denied continuing coverage for employee's daughter who was receiving mental treatment. P claims that coverage was wrongfully discontinued.
ii) Rule: ERISA administrators can abuse their discretion by failing to obtain the necessary information on which to base a payment decision.
iii) Cased turned on the interpretation of "medically necessary" clause: was the treatment medically necessary. § 503 claim.
iv) **Standard of review**: Look to whether the plan itself gives the fiduciary discretion. If it does, then it is an abuse of discretion standard. If not, then review is de novo. The plan here reserved discretion.
v) Here, the administrator abused discretion because he failed to obtain the necessary information. He followed some of the treating physician's advice but not all of it.
- Denial was arbitrary because they did not have enough information to deem the treatment not medically necessary.

vi) ERISA preempts state law claims against plan administrator; ERISA doesn't have anything to do with malpractice claims against the doctor

2) §510 claims

a) Generally
i) Keeps employers from interfering w/ attainment of ERISA right and for retaliation for exercising an ERISA right
ii) Can't fire employee b/c of fear that employees benefits will burden ERISA health care

plan.

iii) No administrative exhaustion requirement (split in authority).

b) Phelps v. Field Real Estate Co. (§510 claim)

i) Employee was fired. The Issue was whether the employee was fired as a desire to prevent his AIDS condition from burdening the plan.

ii) Rule: ERISA prohibits the termination of employees in order to interfere with their benefits under an employee benefit plan

iii) Same type of analysis as for disparate treatment claim

- P is required to prove by a preponderance that the discharge was motivated by an intent to withhold employee benefits protected by ERISA. (Fired after medical problem; good evals)
- D says that dismissal was due to poor performance and restructuring.
- P then has burden to show that D's reason is a pretext.

iv) The court was persuaded that this was a performance based firing.

c) McGann v. H and H Music Co.

i) Employee had AIDS and the company reduced the payout from plan for that type of condition. P claims that the reduction was a retaliation for exercising his rights under ERISA. D claims that it was trying to protect the entire plan from the expensive disease.

ii) Rule: Unless an employer's intent is to discriminate against one employee in particular, an employer has an absolute right to alter the terms of medical coverage for employees. ERISA doesn't require employers to provide welfare plans so if they do, then flexibility is required.

- The employee must have been promised the rights
- The court wants to make the plans feasible.

iii) ERISA doesn't apply to local or state governments so state law claims could apply in those situations

iv) EEOC could have created a claim but this case was before EEOC; EEOC says to single out types of claims is discriminatory under ADA; but courts have all said that's still no violation of ADA

F) **COBRA**: McDowell v. Krawchison

1) Employee and wife were covered under the employees plan. The employee leaves thinking that he and the wife are covered still, one year later he finds out no. COBRA requires notice to beneficiaries of his or her right to insurance coverage for up to 18 months after a "qualifying event". Termination is a qualifying event.

2) Issue here: Is notice given to the employee enough when notice is not also given to the wife.

3) Rule: A covered spouse is a qualified beneficiary under COBRA, thereby requiring entitlement to notice of his or her rights

a) Notice to beneficiary's spouse wasn't sufficient: spouses may make separate decisions so need separate notice

b) Divorce is also a qualifying event: spouse needs separate notice.

c) Notice to the spouse of the employee is enough to give notice to the dependant children.

4) The employer will have to pay any expenses including premiums under the other policy but the beneficiary must pay past premiums.

G) **Retiree health benefits**

1) Curtiss-Wright Corp. v. Schoone-Jongen
   a) The employer modified the retiree welfare plan to say that if the plant closed where the retirees once worked then the health benefits ceased.
   b) ERISA does not require the employer to provide benfits. Only requires the employer to follow the procedure set out.
      i) 1102(b)(3): requires the every employee benefit plan provide "a procedure for amending such plan, and for identifying the persons who have the authority to amend the plan."

   c) Rule: The standard provision in an employee benefit plan that the company reserves the right at any time to amend the plan constitutes an amendment procedure as required by ERISA
      i) Holding: As long as amendment of the plan is foreseeable in writings to the employee, there is no problem
      ii) Plain language argument; court said the broad reservation to amend was enough to comply with the requirement
      iii) No guarantee that employer will continue to provide benefits to employees or retirees

ERISA and Pension Plans

A) Introduction
   2) ERISA addresses pension problems by requiring that ERISA plans have
      a) Vesting
      b) Funding at adequate level
      c) Imposing Fiduciary duties on administrators
      d) Gov't insurance for the plan

   3) History/Background
      a) Aging American population
      b) ERISA does not require employers to provide pensions plans but does allow tax incentives.
      c) Before ERISA, employees would retire and the pension plan would not be there
         i) This is what the Act was designed to address
         ii) Provides protection for pensions more that welfare plans.

   4) Defined contribution plans: once you start to participate, employer will put in x % of salary (like 401k)
   5) Defined benefit plans are falling out of favor; employer tells you what you'll get when you retire (employer bear the risk). Employee starts earning credits after first year toward retirement

   6) ERISA's substantive protections re: pension plans include
      a) Information: same as the welfare plans
      b) All workers 21 and older and with 1000 hours of service over one year must be allowed to participate (earn/make contributions),
         i) Two types of plans: defined benefit plans and defined contribution plans (p. 1196).

      c) Pension rights must vest after minimum period of service (100% after 5 years, or gradual over seven years, multi-employer after 10) ("vest" = entitlement to funds invested/credited at that point)
         i) 7 year vesting: 20% after 3 years, and 20% in years 4,5,6, and 7.
         ii) Vesting means employee has an entitlement to funds

B) **Fiduciary duty** under ERISA:

1) Donovan v. Bierwirth

a) Case deals with plan trustees and their fiduciary duty to the plan beneficiaries.

b) To help thwart a takeover attempt, the plan trustees refused to sell the company stock and also bought more. The trustees were also directors of the company.

c) Fiduciary duties under ERISA

i) Must discharge duties solely in the interests of the participants and beneficiaries

ii) Must do this for the exclusive purpose of providing benefits to them

iii) And must comply "with the care, skill, prudence, and diligence under the circumstances then prevailing" of the traditional "prudent man."

d) There was evidence that allowing the takeover would not be in the best interests of the beneficiaries: the financial status of LTD, condition of LTD's pension plan, and the pending litigation against LTD.

e) There was evidence that there were other purposes other than to benefit the beneficiaries: Did not sell when the price was high and bought more stock when the price was higher, took longer for the directors to see what the plan's role would be. Lost several million dollars in the deal b/c bought overvalued stock and b/c they wouldn't sell at $45 per share (the amount offered from LTV).

f) Held: Breach of fiduciary duty

i) The trustees should have waited to see is buying stock was necessary and get independent advice about the plan's assets.

ii) Focused on the directors inability to distinguish between job as director and as trustee.

2) Plan fiduciaries: exercise discretionary control or authority over plan management, assets, or investment advice (on board). For example, fiduciaries include

a) Plan administrators (manage plan day to day)

b) Plan trustees (manage plan assets)

c) Investment committee (provides investment advice)

3) **Remedies** (on board)

a) If fiduciaries breach fiduciary duty, personally liable to

i) Restore plan losses

ii) Restore improper profits

iii) Other equitable relief in court's discretion

C) **Employee v. Independent contractor**: waiver of pension rights.

4) Vizcaino v. Microsoft Corp.

a) Question about whether workers were employees or independent contractors and what was the effect of labeling them independent contractors.

b) Hold: Employees could not waive their rights to benefits because both sides were mistaken about the workers classification so the waiver was not valid.

c) Dissent: The employees struck a bargain: they were getting higher pay so they contracted not to get the benefits. They bargained for this compensation because they thought they were independent contractors.

d) Rule: A company may not properly exclude common law employees from the receipt of welfare and pension benefits provided to its other employees

D) **Denial of benefits/ plan participants**: Firestone Tire and Rubber Co. v. Bruch

1) 2 issues: what is the standard of review when employees challenge the denial of benefits and what is the definition of a participant to obtain information about the plan.
2) Standard of review: A denial of benefits is to be reviewed under a de novo standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan.
    a) If discretion granted by plan: this is an arbitrary and capricious standard: any conflicts on the part of the fiduciary is considered when determining if arbitrary.
3) Participants: Employees, or reasonably expected to be in, currently covered employment or former employees who have a reasonable expectation of returning to covered employment or who have a colorable claim to vested benefits.
    a) To establish eligibility for benefits, a claimant must have a colorable claim that
        i) He will prevail in a suit for benefits, or
        ii) That eligibility requirements will be fulfilled in the future.

4) ERISA requires that participants get certain information; Court said it includes former employees that have a colorable claim, or if they have no reasonable expectation to return to firestone.

E) **ERISA: connection with WC**: Alessi v. Raybestos
1) The pension plan in question off-set pension benefits by the amount of worker's comp. Benefits that an employee might receive.
2) Court held that the pension could be offset by WC funds because congress contemplated integration: which is money coming from different sources like social security benefits (even though this was a hard analogy to make).
    a) The purposes of WC and SS are similar but why didn't congress put in WC.
3) The court looked at the purpose, analogy to social security, and cited the fact that the IRS came to the same conclusion.
4) Second issue: Whether NJ state law was preempted.
    a) Yes it was preempted because the state law dealt with benefits being paid.
5) Offset provisions in an employee retirement plan which reduce a retiree's pension benefits by the amount of workers' compensation awards received subsequent to retirement are lawful under ERISA and may not be prohibited by state law.

F) **Benefit alienation**: Englehoff (not in reading)
1) Facts: beneficiary was divorced and killed shortly after. X-wife was the beneficiary of his pension. Under state law the benefits would be severed.
2) Supreme court says that the benefits are not severed: ERISA preempts state intestacy statutes that didn't allow the money to go to the divorced spouse.
    a) This is a plain language analysis
    b) The court sassy that the x-wife should get the money
3) Dissent
    a) Purpose based analysis: nothing in the state law that burdens anyone, the state law should stand.
    b) X-wife already got benefit in the divorce, this is a windfall for her
    c) The children should get the money

G) **Pension plan termination** (Pension benefit Guaranty Corp. v. LTV Corp.)
1) An employer can terminate the plan when the plan cannot meet its obligations (under funded): can be terminated voluntarily by the employer if it can show financial distress.

a) Can't be voluntarily terminated if arrived at by collective bargaining unless PBGC agreed to terminate.
b) There is fed insurance to cover some of the plan. LTV agreed with the employees to do a follow up plan (pay the difference between the original plan and the Govt. insurance)
c) Now the govt insurance co. PBCG wants to restore the plan, they don't want to pay.

2) The court held that the Govt Ins. Co. could restore the plan
a) A turnaround in the steel business is persuasive that LTV can now pay.
b) Follow-on plan: The plan may have not been in much distress and allowing this option would encourage employers to terminate. Employees would not be upset because they are getting all of their money.

3) Dissent thinks that the follow-on plan is a good idea because the employees are getting all of their $.
a) Wanted to see more evidence of the steel industry turn around.

4) Plans can also be terminated if they are over funded
a) Terminate the over funded plan and re-instate an adequately funded plan
b) The surplus is then distributed to the shareholders
c) This termination must still meet certain requirements

5) Under funded or over funded plans can only be terminated in context of defined benefit plans (not a defined contribution plan, where employee bears the risk of underfunding).

WORKER'S COMPENSATION

I) Worker's Compensation

A) Introduction

1) No fault
2) Policy: Substituting less generous but more certain measure of expense
3) Some exceptions to worker's comp in some states: farm workers, casual labor, household worker's (but 90% of employees covered)

4) Purposes

a) Easy recovery for workers: gives employee fast access to compensation for work related injuries.
b) Substitutes a fixed and inexpensive system, for tort scheme: Gives certain damages quickly (lower) instead of possible higher damages slowly under tort.
c) Single remedy
d) Decreases costs and delays of recovery
e) Spread loss over a broader portion of society
f) This is a no fault scheme: Encourages closer examination of problems in the work place, employer has no reason to argue.

B) Types of Compensation and benefits

1) Medical benefits independent of wage replacement (100%)
2) Certain rehab services
3) Partial wage replacement for lost income and earning capacity (usually 2/3).
4) Regardless of fault as long as arose in course of employment
5) No pain and suffering damages

C) **Types of wage replacement** (def. of disability varies from state to state (this def. is diff. than under the ADA)

1) Temporary total: worker unable to work pending recovery
   a) MOST COMMON TYPE OF CLAIM
   b) Benefit levels are either 2/3 of wage or state average wage what ever is lower
   c) Does not give full wage replacement
2) Temporary Partial: earnings reduced, but not eliminated during recovery
   a) Can work but not like before
   b) Look at the difference between what you did make and what you are getting now and you get 2/3 of that (2/3 of lost wage).
3) Permanent Partial: permanent but partial impairment
   a) Scheduled; unscheduled
   b) Can still work in some way
   c) Schedule of benefits identifies impairments and determines how much they are worth
   d) E.g. p. 860.
4) Permanent total: inability to engage in any occupation for which worker is fitted by age, education, experience or regional economy/labor market
   a) Unable to work on a regular basis, any occupation for which you are fit.
   b) Limit on the amount of time
   c) Some states can only collect for 2 years
5) Death

D) Employer defenses

1) Not a compensable injury: Did the injury or illness arise out of and in the course of employment. If so, WC is the exclusive remedy.
2) If the injury is work related can challenge the Extent of illness/injury. What level of benefits should be paid.

E) The bargain

1) Workers gave up right to bring tort claims in the interest of have a prompt and certain system
2) Employers gave up tort defenses in exchange for immunity (contrib. Neg. assumption of risk)
3) The worker will want to fall under the WC scheme when a common law tort defense would have precluded recovery.

F) Compensable injury

1) One that arises out of and in the course of employment
   a) What is meant by arising out of and in the course of employment (what's a compensable injury); see cases below

2) **Course of employment**: Eckis v. Sea World Corp.
   a) Secretary brought a tort claim for being attacked by shamu when modeling. Issue was whether the modeling was within the course of her employment.
   b) Rule: When an employee's injuries are compensable under the Workers' Compensation Act, the right of the employee to recover the benefits provided by the Act is his exclusive remedy against the employer
      i) D employer argued it was on the employers premises, regular work hours, employer requested activity, employer benefited.
      ii) Employee argued that it was not a part of her secretary duties.
   c) Court found that riding a whale was in course of employment b/c she agreed to do this and was trained for it.
      i) WC exclusive remedy: medical bills and probably temporary total disability or possibly permanent partial.

3) Weiss v. City of Milwaukee (intentional infliction of emotional distress case)
   a) Employee received threatening phone call from her husband at work after the city gave him her home phone # and address. P claimed emotional distress and that when she was injured she was not performing service in the course of her employment.
   b) Rule: When an employee suffers an attack, occurring during the course of his or her employment and arising from personal animosity imputed from a private relationship, the incident is deemed to arise out of the claimant's employment if the conditions of that employment contributed to or facilitated the attack.
      i) When the employee performs personal acts of comfort (talking on the phone) while otherwise engaged in employment, it is covered under WC
   c) She claims not compensable
      i) Injury is receiving abusive calls from ex-husband, not arising out of or in course of employment
      ii) She says no causal connection b/w her employment and injury
   d) Court invokes personal comfort doctrine; those aren't sufficient to severe from work related
      i) **Personal comfort doctrine**: employee acts within the course of employment when he or

she is otherwise within the time and space limits of employment, and briefly turns away from his or her work to tend to matters "necessary or convenient to his [or her] own personal health or comfort.

4) Recreational company activities: Whether this is in the course of employment may depend on whether the employee's participation benefited the employer (publicity, moral) and whether the employees were reasonably expected to participate in the recreational activity.

5) **Causation issues**: Mulcahey v. New England Newspapers (aggravating an existing condition, sportswriter)
   a) An employee had a cerebral hemorrhage; the issue was whether the injury arose out of the employment.
   b) P has to show that the injury arose out of employment
      i) Conditions and the nature of the employment contributed to the injury.
      ii) The employer takes the employee as he finds him: id the job aggravate the injury.

   c) Rule: When an employee aggravates an existing condition which results either in incapacity for work or in death, the employee or his survivors are entitled to workers' compensation.
      i) The court said that there was evidence that job stress contributed to the injury so it falls under WC.
   d) The causation issue in illness cases is very tough, hard to make, and fact specific. May also depend on the language of the statute.

6) Review
   a) Eckis and Weiss; both cases court held they were compensable under WC
   b) Majority of cases lean toward finding them compensable injuries
   c) Wyoming is minority: no presumption regarding whether to find compensable or not

7) Wyoming coverage provisions
   a) Some employers are required to participate, others have the option
   b) Some industries are extra-hazardous (they have to participate)
   c) Some are not extra-hazardous, then it's up to employer to decide whether to participate in WC
   d) In Wyoming most of the optional employers still subscribe to workers comp: maybe to avoid the higher claims in a tort action.

G) <u>Exceptions to the exclusive remedy rule</u>

1) **2** exceptions for suits against employer
   a) When employer acting in dual capacity
   b) When employer is alleged to have committed an intentional tort

2) **Dual capacity** exception: Weinstein v. St. Mary's Medical Center
   a) Employee of hospital was hurt while in the course. Later, while be treated at the same hospital, she slipped and aggravated her injury. P brings a claim for the aggravation because she was not working.
   b) Rule: In order to overcome the "dual capacity" exception to the exclusive remedy of worker's compensation, the employer must demonstrate that the employee at the time of injury was performing services arising from, and incidental to, her employment and was

acting within the scope of that employment.

i) Dual Capacity: The employer possess a second persona so completely independent from and unrelated to his status as an employer that by established standards the law recognizes it as a separate legal person.

c) Court said the P was not acting within the course of employment when the aggravation happened so employee could file claim b/c she was there as a patient.

d) Dual Capacity is the minority rule; Doesn't work very often

3) **Intentional tort exception**: Mandolidis v. Elkins Industries (Recklessness)

a) The issue in this case is what is intentional: Reckless and willful but not intentional

b) In W. Virginia,: willful, wanton, or reckless conduct involves some appreciation of the risks involved. Workers comp won't apply with willful, wanton or reckless conduct.

i) Negligent conduct on the part of the employer will fall under WC but reckless will not.

ii) In this case there was strong evidence that the harm would likely result from not using the guard.

iii) Easier to argue employer was reckless as opposed to intent

c) Rule: An employer loses immunity from common law actions where its conduct constitutes an intentional tort or willful, wanton, and reckless misconduct (this is minority rule; majority requires intent but anything less won't work)

d) Majority rule requires intent not just recklessness (unlike West Virginia). Majority wants to get as much conduct under the WC statutes as possible.

H) **<u>Employee actions against third parties</u>**:

1) York v. Union Carbide Corp.

a) OSHA doesn't preempt any worker's comp or tort claims against third parties.

b) Issue: Was manufacturer liable in tort for the accident for failure to warn about hazards of gas.

c) Rule: The savings clause of 29 U.S.C.A. § 653 operates to exempt from preemption tort law claims brought pursuant to state law. 2) The duty to warn an employee of the hazards associated with the use of a product is satisfied by informing the employee responsible for the receipt and constructing of the product of the hazards associated with the use of that product.

i) Manufacturer does not have a duty to warn every employee. The employer is at fault, not the third party.

2) Teil v. E.I. DuPont de Nemours & Co. (third party claim)

a) Independent contractor was hurt while working at the D's site because of an unsafe ladder. Guy fell off ladder; ladder didn't meet OSHA standard; Ladder was owned by third party (DuPont).

b) D violated the OSHA regulation with the ladder and the P wanted an instruction that the D was negligent per se for failure to comply with the OSHA standard.

c) The specific duty clause protects all employees (not just the employers employees) so the violation is negligence per se.

d) Most jurisdictions say that the violation would be evidence of negligence.

I) **Exceptions to exclusive remedy rule summary**;

1) Suits against injured worker's employer
   a) When employer is acting in a dual capacity (in jurisdictions that recognizes dual capacity doctrine)(this is the minority rule). Usually narrowly construed.
   b) When the injury is the result of an intentional tort.

2) Suits against third parties; e.g., (traditional tort claims). . .
   a) Products liability
   b) Premises liability
   c) (Suits against other employees)

3) Suits against other employees
   a) Normally co-employees are immune from actions in tort.
   b) May come down to a question of whose employee it is.

Common Law Employment Claims

I) Employment At will
- A) This is the status of the common law, subject to statutes that modify it; also other common law doctrines that modify it.
- B) Common law exception to the at-will doctrine
  - 1) Wrongful discharge: discharge against some public policy; tort action
  - 2) Breach of contract

II) **Wrongful Discharge**: Issue: what is public policy
- A) Common law causes of action
  - 1) Wyo. Law re: wrongful Discharge
    - a) Plaintiff must show
      - i) Discharge violates some "well-established" (not clear whether this includes items other than statutes) public policy; and
      - ii) No other remedy available to protect interest of the aggrieved employee or society.
        - Prevents double recovery under some other cause of action.
    - b) Includes constructive discharge under the majority rule.

  - 2) Breach of contract
    - a) To overcome presumption of at-will employment, employee must show enforceable promise of employment for a particular time period or terminate only for certain reasons or through certain procedures look to
      - i) Express agreements
      - ii) Implied agreements
      - iii) Employee hand book manual

- B) **Against public policy:**
  - 1) The vast majority of states have recognized that an at will employee possess a tort action when he is discharged fro performing an act that public policy would encourage or for refusing to do something that public policy would condemn.
  - 2) Gantt v. Sentry Insurance: Issue in this case is where does public policy come from.
    - a) P Constructively discharged for supporting a sexual harassment claim of fellow employee. (Worker's comp didn't apply violation of public policy is an intentional tort).
    - b) When public policy was offended
      - i) Public policy must be fundamental, substantial and well established
      - ii) Things in this case that led to conclusion: this court requires that the policy be expressed by statute or constitution.
        - State constitution and state statute violation were clear expression of public policy
        - Most jurisdiction will look only to statutes and constitutions, but Colorado looks to non-legislative sources of information
    - c) What minority of courts use to establish public policy violation:
      - i) Constitution and statutes exclusively let people know what the policy is. Only using this This disallows judicial policy making.

ii) Only looking to those above may be too confining and public policy could come from other sources.
iii) Statutes
iv) Admin regulations
v) Cases
vi) Constitutional provisions
vii) Most jurisdictions don't recognize non legislative policy consideration
viii) Colorado says that other policies exist: helps thwart robbery for example

3) Murphy v. American Home Products
   a) This case represents the minority view that some courts do not recognize any exceptions (public policy) to the at-will doctrine. The court reasoned in this case that such an exception should be left to the legislature.
   b) Rule: The recognition of tort liability for what has become known as abusive or wrongful discharge should await legislative action (this rule applies in N.Y., minority rule)

4) Three models
   a) NY model: wont' recognize tort claim unless legislature has codified it
   b) Common law creates this claim
   c) Montana is the only state to have a just cause statute (eliminates at will, can only be discharged for good cause; but employers got a limit on liability of 4 years wages, punitive only if malice shown, no pain and suffering
   d) These models only apply to wrongful discharge, not wrongful demotion (small minority recognizes wrongful demotion).

C) **Breach of contract**
1) To overcome presumption of at-will employment, employee must show **enforceable promise** of employment for a particular time period or to terminate only for certain reasons or through certain procedures look to
   a) Express agreements
   b) Implied agreements
   c) Employee handbook/manual

2) Gordon v. Matthew Bender
   a) Rule: Satisfactory or acceptable performance language does not transform an at-will contract into a contract which cannot be terminated by either party at any time for any reason
   b) Claim was that employment manual said only discharged if not acceptable performance
   c) Court said this was still at will employment
      i) If words "just cause" are used then that means something; "Acceptable sales performance" is not sufficient to override employment at will
      ii) Acceptable performance is implicit in every employment relationship anyway

3) Review
   a) Tort of wrongful discharge: exceptions to employment at will when violates public policy
   b) Majority carves out narrow exception: public policy is defined as statutory or constitutional provisions
   c) Unwritten policies won't arise to ground for wrongful discharge
   d) Minority would go to other sources;
   e) Difference is b/w courts that want bright line rules as opposed to acceptable standards (predictability v flexibility)
   f) Then breach of contract claims: i.e., breach of promise; in express or implied agreements

4) **Implied contract**: Pugh v. See's Candies
   a) P worked his way up the corporate ladder and was a vice president. He was fired one day after vacationing with the president. The P argued that he had an implied contract based on the longevity of the employment, the presidents past statements, and his duties on the job.
   b) Issue: whether the employee had an implied contract with the employer based on the factors that P presented indicating there was a promise by the employer not to terminate the employee, unless it was for cause.
   c) **Rule for implied in fact contract**: whether there exists an implied in fact promise for some form of continued employment courts have considered a variety of factors in addition to the existence of independent consideration, which include:
      i) The personnel policies and practices of the employer,
      ii) The employee's longevity of service,
      iii) Actions or communications by the employer reflecting assurances of continued employment, and
      iv) The practices of the industry in which the employee is engaged.

5) Employee handbooks
   a) Courts are split whether statements made in handbooks can modify employee at will. The majority trend is to let the jury decide.
   b) Woolley v. Hoffmann-LaRoche
      i) The parties agreed the contract of employment was for an indefinite duration, However, the P argued that the employment handbook created a "just cause standard for dismissal.
      ii) Rule: Absent a clear and prominent disclaimer, an implied promise in an employment manual that an employee will be fired only for cause may be enforceable against an employer even when the employment is for an indefinite term and would otherwise be terminable at will
      iii) Holding was implied contract; company should be held to their own policy
      iv) Handbook laid out reasons why a person would be discharged
      v) Also talks about procedures to be followed before firing
      vi) Both parties agree there is a contract of indefinite duration (employer says that's at will, employee says manual creates contract)
      vii) Court says reason employer puts the things in the handbook is to create a happy, loyal, cooperative work environment
      viii) Court said a disclaimer could have kept it from being a contract, but there

was no disclaimer

c) Wyoming law Re employee Handbooks (on board)
i) Question of fact for jury to determine whether language in employee handbook creates implied contract
ii) Employer cannot unilaterally modify implied contractual promise of job security absent consideration; employees continued work is not consideration for modification
- This is the minority view;
- The majority rule is that a employer can unilaterally modify a handbook, if notice is given to the employee, then, the employee's continued work is for consideration of the changes.

iii) Language disclaiming enforceability of handbook provisions valid if sufficiently conspicuous and unambiguous

D) **Breach of covenant of good faith and fair dealing** (Wyoming recognizes this action)
1) Some argue that it does not apply to employment K's
2) This can be a contract or tort claim (tort is minority rule); but tort requires showing of special relationship
3) Fortune v. National Cash Register Co.
a) The employer fired the P after he had made a big cash register sale, and it looked like they fired him to avoid paying him his commission.
b) Rule: When an employer's termination of an at-will contract of employment is motivated by bad faith or malice, such termination constitutes a breach of the employment contract.
c) Duty of good faith: parties to contract and commercial transactions must ct in good faith towards one another. Good faith and fair dealing between parties are pervasive requirements in the law and parties are bound by this standard.
i) Covenant above was implied in this case; this case is probably a **minority view**
ii) Wyoming does recognize this claim
iii) The majority of courts have held that this rule is not consistent with the at-will doctrine and have therefore refused to recognize it.

4) **Remedies for breach**: Foley v. Interactive Data Corp.
a) This case deals with damages in cases that have recognized the duty of good faith and fair dealing. P was fired for telling the employer that his new supervisor was under investigation by the FBI for embezzlement. The P was fired for being a snoop and reporting this to the employer.
b) Holding: the court first held that there was no violation of public policy because the public already knew that this person was under investigation. Second, what remedies (contractual, which are designed to make the P whole, or tort, which are designed to make the P whole and to give damages to deter future conduct) are available when there is a breach of duty of good faith and fair dealing. Held that contract damages only are available. (Contract damages are only available because there was not any special relationship between the employer and the employee).
c) Rule: The covenant of good faith and fair dealing applies to employment contracts and breach of the covenant may give rise to contract damages but not to tort damage.

d) **Wyoming does recognize breach of covenant of good faith and fair dealing (contract claim)**; then say limited to contract remedies unless there's a special relationship of trust and reliance b/w employer and employee (that is question of fact for the jury)

E) **Intentional infliction of emotional distress**:

1) Intentional infliction of emotional distress: Wilson v. Monarch Paper Co.
   a) Rule: An employee may sue an employer for intentional infliction of emotional distress if the employer's actions are so outrageous that they are utterly intolerable in a civilized society
   b) **Outrageous conduct**: was it beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community
   c) Wyoming recognizes this tort like Texas
   d) Key issue: whether or not element of extreme and outrageous was met
   e) Causation, defendant's conduct, requirement that emotional distress be severe
   f) It's the way they did it, not the dismissal itself

2) **Elements: Intentional infliction of emotional distress** (also adopted by Wyoming)
   a) Plaintiff must show
      i) Defendant acted intentionally or recklessly,
      ii) Defendant's conduct was extreme and outrageous, p.968
      iii) Defendant's actions caused plaintiff's emotional distress, AND
      iv) Plaintiff's emotional distress was severe

F) Frequent common law claims (on board)
1) Wrongful discharge in violation of public policy (tort)
2) Breach of (implied or express) contract (contract remedies)
3) Breach of covenant of good faith and fair dealing (contract or tort remedies-depending on jurisdiction
4) Intentional infliction of emotional distress (tort)
5) Defamation (tort)
6) Negligent Hiring/Retention (tort)

G) **Qualified privilege** protects (employer) communications made for legitimate business purposes – e.g., job references (on board)
1) Privilege can be lost if:
   a) Communication is made with knowledge of falsity or reckless disregard of falsity or
   b) Communication made for malicious purposes – e.g.,
      i) Adverse info disclosed more broadly than necessary
      ii) More adverse info than necessary is communicated

H) **Privacy**: Bodewig v. K-Mart, Inc. (reckless and intentional infliction of emotion distress claims)
1) Employee strip searched; sues customer and K-mart. There was no intent to cause the distress, but the conduct was reckless so that was enough (In Oregon, reckless must be accompanied by a special relationship).
2) Elements

a) The Defendant's conduct intentionally or negligently inflicted the emotional distress
   i) reckless Is ok in most jurisdictions: If reckless must have a special relationship (in some jurisdictions) employee/employer relationship was enough here.
   ii) Or intent
b) Conduct must be extreme and outrageous: Intolerable in civilized society, beyond the bounds of decency.
c) Defendant caused the distress
d) The distress must be severe (this is a subjective examination)

3) Holding: Both claims were sent to the jury for a factual determination

I) **Employee reference** cases: Chambers v. American Trans Air, Inc. (defamation)

1) Employee found out that she was given bad references from her ex-employer. The truth is an absolute defense but it is hard to prove.
2) Rule: Former employers have a qualified privilege when giving employee references to prospective employers
   a) Privilege for communications made for a legitimate business purpose, like job references.
   b) Concerned about poor job evaluations
   c) Rule designed to protect certain communications from tort actions: a qualified privilege exists regarding a former employer's statements given to a prospective employer concerning a former employee.
3) Privilege can be lost if:
   a) Employer lies (the statement is made with knowledge of falsity or in reckless disregard for falsity); or
   b) If communication can be made for malicious purposes (the communicator was primarily motivated by ill will in making the statement)
      i) Communication made to a broader audience than necessary
      ii) Communicating more adverse information than necessary (more than to provide a reference).
4) In this case, the P alleged ill will or malice
   a) The employer usually sent reference requests to the HR department
   b) Showing of animosity with supervisor
5) In this case there was not enough showing of malice so there was a qualified privilege.

J) **Negligent hiring**: Malorney v. B & L Motor Freight (negligent entrustment)

1) Employer trucking company hired a driver without checking his criminal background. The employee raped a hitchhiker when he had a history of such conduct. Issue: did the employer have a duty to check the employees background. The employer said the harm was not foreseeable and it was too burdensome to do the checks.
2) Rule: A vehicle owner has a duty to deny the entrustment of a vehicle to a driver it knows, or by the exercise of reasonable diligence could have known, is unfit for the job.
   a) Third party (rape victim) brought suit; usually third party can only go after assailant b/c third party can't bring an action for employees action outside the scope of employment
   b) Exception to this is a negligent hiring claim
   c) Whether there is a duty is a question of fact; court said there was a duty to entrust its truck to a competent employee fit to drive an over-the-road truck equipped

with a sleeping compartment.

i) It was foreseeable that the driver would pick up the hitchhiker. The burden of checking outweighed by the utility of finding out the criminal record.

3) The problem may become that felons will not be able to get jobs or that employers will be open to wide liability.

K) **Personal associations:** Rulon-Miller v. International Business Machines Corp. (breach of covenant of good faith)

1) P brought intentional infliction and wrongful discharge claims. Court basically treated as a breach of good faith.

2) An employee was fired because she was dating a competitor. The court was persuaded that the company knew of the relationship before she was promoted.

3) There was evidence that the employer had a policy concerning employee privacy. There was no real proof of an actual conflict because of the relationship and she really did not have access to secret company documents.

4) Rule: Company policy insures to the employee both the right of privacy and the right to hold a job so long as off-the-job activities do not present a conflict of interest or interfere with the employee's work.

L) Common law claims application:

1) What common law claims: scenario about guy who asks about job security then buys big ticket stuff, then gets demoted; promissory estoppel and breach of contract; maybe breach of covenant of good faith and fair dealing?; intentional infliction of emotional distress (is it outrageous) Worley v. Wyoming bottling co.

2) Lingle v. Norge Division of Magic Chef

a) P may plead as many claims as possible but certain claims may be preempted by the LMRA § 301: dealing with the interpretation of a collective bargaining agreement.

i) Held: There was no **preemption** here because the just cause provision did not require the court to interpret the collective bargaining agreement: rather, it only required that the court figure out why the P was fired.

b) Rule: A state-law claim for retaliatory discharge is preempted by applicable federal law only if such a claim requires the interpretation of a collective-bargaining agreement

c) Not uncommon to make several claims on one set of facts; any claim that requires interpretation of the collective bargaining agreement are barred; but claims that don't require interpretation of the collective bargaining agreement are not barred

d) Just because something violates terms of a collective bargaining agreement doesn't mean a title seven claim is precluded (like a discrimination claim)

UNEMPLOYMENT COMPENSATION

I) Introduction
- A) System is a state by state program but there is federal involvement in oversight.
- B) Primary goal is to create safety net for temp relief to workers who become unemployed by no fault of their own.
- C) Workers are discouraged from leaving jobs w/o good reason.
- D) Employers are discouraged from layoffs b/c tax rating goes up.
- E) Federal payroll tax on all employers, states also get federal funding for administration of program.
- F) States are free to determine conditions of eligibility, duration of benefits, amount of benefits.
- G) Unemployment compensation system covers most people except some farm workers, domestic workers.
- H) Even covered people aren't necessarily eligible; they have to meet conditions below
- I) Benefits aren't much; $283 per week cap in Wyo.
- J) State maintains separate accounts against each employer
- K) Amount of tax employer pays in depends on separation rates (meaning those that file claims for benefits, separations without benefit claims aren't assessed in the computation)
- L) Employers therefore have incentives to fight benefit claims

II) **Conditions of UC eligibility**
- A) Sufficient recent prior workforce attachment (based on last 4 of 5 calendar quarters)
- B) No-fault separation (no fault of employees own)
  - 1) No voluntary quit w/o good cause. Wyoming – re: voluntary quits disqualified from UC eligibility if left most recent work w/o good cause "directly attributable to employment" except for
    - a) Bona fide medical reasons
    - b) Returning to approved training
    - c) Forced to leave work as a result of documented domestic violence
    - d) Not fired for misconduct
- C) Continued search/availability for work

III) Sufficient recent prior workforce attachment
- A) Base period: the "recent prior" workforce is determined generally a base period: the first four of the last five calendar quarters, and if they had enough hours, then they are eligible for employment (this means you have to be in the workforce for a certain amount of time before you can become eligible for benefits).

IV) **What is Good Cause**:
- A) Raytheon Co. v. Director of Division of Employment Security
  - 1) The employee worked the night shift, got rides with co-employee, co-employee quit, and the employee had no way to get to work. Was this reason for quitting for quitting good cause. Should she get compensation when no one was at fault
  - 2) Policy: Paying benefits in this instance may best further the purposes of worker's compensation, hence, it may be safer to err on the side of the employee, and support persons who are in bad positions.
  - 3) Employer said not good cause; Court held for employee.

B) Norman v. Unemployment Insurance Appeals Board
1) Rule: The voluntary termination of one's employment in order to follow a non-marital loved one to another location does not constitute good cause for purposes of determining eligibility to receive unemployment compensation benefits.
2) Court said leaving to follow a non-marital "loved one" to another location is not "good cause" for purpose of determining eligibility to received unemployment compensation benefits.
3) Would've been different if married in that jurisdiction (but not all jurisdictions).
a) Difficult and unmanageable to determine which non-marital relations would be covered

C) Garner v. Horkley Oil
1) Rule: To be eligible for benefits, a claimant must show that his unemployment is not due to the fact that he voluntarily left his employment without good cause connected with that employment.
2) If person takes a job just for betterment and it doesn't work out, that's not good cause (Larry's tough titty rule).

D) **Seasonal**: Toledo Area Private Industry Council v. Steinbacher
1) A number od states exclude from coverage seasonal workers and the employer does not have to pay unemployment benefits hen the employees quit at the end of the season. The issue becomes the definition of season.
2) Rule: Employment qualifies as seasonal employment if it is limited by its seasonal nature, by climatic conditions, or by a contractual obligation.
3) Absent evidence regarding the climatic or seasonal nature of the industry, the controlling factors are:
a) Is whether the industry operates in regularly recurring periods of less than forty weeks.
b) The second, and overriding, factor to be considered is whether, due to the nature of the industry or the climate, it is customary to operate on a seasonal basis.
4) Holding: because an SYEP is contractually limited in its operation to less than forty weeks is an insufficient basis for the review board to find that employment under the program is non seasonal

V) INITIAL ELIGIBILITY – SEPARATIONS (on board)
A) Worker must not:
1) Have voluntarily quit without good cause
2) Have been discharged for misconduct
B) Continued eligibility – worker must:
1) Be available for work
2) Not refuse offer of "suitable" work
C) Wyoming – in determining whether work is "suitable," consider:
1) Risk to health, safety, and morals
2) "Physical fitness
3) Length of unemployment
4) Prospects for local employment in customary occupation
5) Commuting distance
D) After 4 weeks, offer of 50% of former pay is "suitable" (Wyoming)

VI) What is misconduct

A) Pesce v. Board of Review

1) Driver had four accidents in 4 months and was discharged. P files for UI. Employer says he was discharged for misconduct.
2) Rule: a justifiable discharge does not necessarily disqualify the discharged employee from receiving unemployment benefits.
3) Court looks at the definition of misconduct for the purposes of UI. Definition basically requires intent or reckless willful disregard for the employers interest. Does not include negligent acts or good faith bad judgment. Requires deliberate or its equivalent.
4) Here, there was no evidence of deliberate conduct: just a bad driver. The reason was good enough for firing but did not disqualify him from unemployment cmpensation.
5) Difficult for the employer to prove intent:
    a) Drinking on the job and stealing easy.
    b) G/R is that misconduct must take place on the job: if the misconduct takes place off the job then the courts are split.

B) Amador v. Unemployment Insurance Appeals Board

1) Medical technician would not perform a certain procedure because she thought it would hurt people.
2) Majority said that the conduct must evidence culpability or bad faith, here, P had a good faith reason for refusing to do the procedure.
3) Dissent: Employees should not be allowed to dictate employment conditions in conflict with the job description.
4) Rule: A worker who has been discharged for willfully refusing to perform work which she reasonably and in good faith believed would jeopardize the health of others has not committed misconduct disqualifying her from collecting unemployment insurance benefits.

VII) What is Availability:

A) State agency is only agency that tracks whether claimant maintains eligibility (availability), the employer is out of the picture.

B) Glick v. Unemployment insurance Appeals board

1) P had three kids and was going to law school. Issue: given her scheduling limitations, was she available for work.
2) Rule: An unemployed individual is eligible to receive unemployment compensation benefits with respect to any week only if he is able to work and available for work for that week.
3) Majority: Giving this person UI benefits furthers the purposes of UI: education makes her more employable
    a) Court said education furthers aims of the program, and it wasn't her fault she lost her job
    b) Court talks about two part test (1) that individual claimant be willing to accept suitable work which he has no good cause for refusing and (2) that the claimant thereby make himself available to a substantial field of employment.

C) Wyoming – in determining whether work is "suitable," consider:

1) Risk to health, safety, and morals

2) "Physical fitness
3) Length of unemployment
4) Prospects for local employment in customary occupation
5) Commuting distance

After 4 weeks, offer of 50% of former pay is "suitable" (Wyoming)

D) **Suitable work**:

1) Frazee v. Illinois Department of Employment Security
   a) P would not work on Sunday. State said that because the P did not belong to a religious sect or church that did not prohibit working on the Sabbath, didn't get UI.

   b) Rule: The forfeiture of unemployment benefits for choosing fidelity to religious belief over employment brings unlawful coercion to bear on an employee's choice in violation of the Free Exercise Clause of the First Amendment. It does not matter if P belongs to a church or not, as long as it is a sincerely held religious belief.
      i) You can be a religion of one; as long as it's a **sincerely held religious belief**
      ii) Majority said key is whether you have a sincere belief and so in this case there was a first amendment violation.
      iii) Does plaintiff have a sincere religious belief, it doesn't have to be an organized belief as part of a particular sect;
      iv) Even if Plaintiff has that belief it just means first amendment applies, you still have to apply strict scrutiny to see if plaintiff would win; in this case the situation did not pass strict scrutiny. (Compelling govt. interest)
         - Tension b/w free exercise and establishment clause

2) Wyoming law says when benefits recipient fails to apply for or accept suitable work;
   a) Wyoming statute says suitable should consider risk to health safety and morals; physical fitness; length of unemployment; prospects for local employment in your field, commuting distance;
   b) Wy Statute also says certain work is not suitable (i.e. if job came about b/c of strike (wanting them to cross a picket line); job offer at wages or under conditions less favorable than the standard for that field are not suitable;
   c) Wyoming, after four weeks of unemployment you may have to expand b/c any offer that is at least 50% of previous salary, you must accept or lose benefits

3) General trend to determine eligibility; employees have more latitude in whether or not to accept new work as suitable or not, than when they are leaving existing employment.
   a) Jurisdictions are more flexible to say that some element is not suitable: either way it maintains the status quo.

CONSTITUTIONAL CLAIMS ARISING IN EMPLOYMENT CONTEXT

I) Introduction

A) Government may act as employer, educator, property owner, operator of correctional facilities, in addition to acting as sovereign. The constitution only figures in when it is government action so it only deals with government employees.

B) To what extent does the constitution constrain government when it is acting as employer instead of sovereign:

1) Three views

a) Applies the same as it would normally: Constitution restraining gov't as sovereign also apply to gov't acts in these other special capacities.

b) Another view is that constitution shouldn't apply in these special situations because the const. only applies when acting as sovereign

c) The hybrid view (in force); When government is employer and is subject to some constitutional claims but not all.

i) As employer can punish for speech they can't punish for as sovereign; to punish it must be related to job performance

C) **Possible constitutional claims** in context of government employment

1) First Amendment: is employee speech on matter of public concern

a) If yes, apply balancing test

b) If no, apply rational basis

2) Fourth Amendment: is government action a "search?" (i.e., does it infringe upon legitimate employee expectations of privacy?)

a) If yes, apply balancing test

b) If no Rational basis

D) Employment decisions based on **political affiliation**: Rutan v. Republican Party

1) Issue: Whether the constitution allows the government to make employment decisions based on political affiliation.

a) The court had previously held that the govt. could not fire an employee because of political affiliation.

b) This case, the state govt. would only hire or promote republicans.

2) Rule: The First Amendment forbids government officials from promoting transferring, recalling, or hiring public employees solely on the basis of their support of the political party in power, unless party affiliation is an appropriate requirement for the position involved .

3) Test: if gov't action significantly burdens freedom of association, then apply strict scrutiny

a) First prong of strict scrutiny: Compelling government interest

i) Asserted government interest here is insuring effective and loyal employees

b) Second prong: is it necessary to promote the government's interests: Whether this government action is necessary to accomplish the asserted government interest

i) Here, it is not narrowly tailored enough, hire and fire based on performance, not politics.

ii) Court says this is not permissible b/c you're paying party loyalists with

government jobs.

4) Scalia dissent: Allow consideration in judicial appointments, so why not here.
   a) This is the way it has always been done and there are a lot of good reasons for it.
   b) Question should be left to the legislature to decide.

5) Can a private employer hire and fire based on political affiliation: There is no cause of action unless there is a specific anti-discrimination law.

E) **Searches**: Nat'l Treasury Employees union v. Von Raab

1) Customs service instituted a drug test program (urine) for employees who wanted to fill certain positions (directly related to drug enforcement, and those who carried firearms.
2) 4th Amendment: government searches: the court says that this qualifies as a search under the fourth amend.
   a) Next question: would the search serve some special government needs.
      i) Balancing test between the govt. interest and the right to personal privacy.
   b) Traditional warrant and probable cause do not apply because this is the government as employer: not law enforcement. So use the balancing test instead.
3) Rule: Employee drug testing does not violate the Fourth Amendment proscription against unreasonable searches where the government demonstrates a compelling interest in maintaining a drug-free workforce for certain sensitive positions.
4) Court says the search is less intrusive because people who want the jobs know the search is going to happen, there is less expectation of privacy. Does not matter that there was no evidence of drug use because the program was preventative.
5) Dissent: says that there is no evidence of good cause: no proof that people were using drugs (The train regulation had good cause).
   a) Argues that after the court's holding, any government job with a safety component would qualify for a drug test. This was a mere pretext for the war on drugs.

6) Private employers ability to do drug tests
   a) No cause against the private employer unless there is a specific state statute.

F) **Defining search**: Vega-Rodriguez v. Puerto Rico Telephone Co.

1) Public employer installed video cameras to surveil the employee work area.
2) First need to determine if the surveillance is a search: is there an expectation of privacy:
   a) Subjectively (did that person believe they had an expectation of privacy) and
      i) Is the area understood to be an area for private things (deck, office).
      ii) In this case, employer told them up front about the video surveillance; court thought this notice meant there was less expectation of privacy
   b) Objective expectation of privacy: would a reasonable employee expect privacy.
      i) This was not a private space that was being monitored.
      ii) Employees argued that this is unrelenting, unblinking camera, never a reprieve from observation
3) Rule: in order for an intrusion to constitute a violation of a plaintiff's constitutional rights of privacy, the plaintiff must have an actual and reasonable expectation of

privacy

4) Court: Because this was an open workspace, and the supervisor couls always watch anyways, and the employees were notified of the cameras, there was no expectation of privacy
   a) Do not even get to the balancing test: apply the rational basis test.
   b) Is there a rational basis for the government wanting the cameras: worker productivity probably enough.

G) **Grooming and dress**: Kelly v. Johnson

1) Police officers brought a claim against the city because of grooming standards.
   a) The government has a greater interest in regulating the speech of its employees than it does regular citizens.
2) Rule: Law enforcement organizations may regulate the personal appearance of its officers.
   a) The government has a legitimate interest in regulating appearance (public confidence, uniformity) and there is a rational basis between the interest and the regulation.
3) Dissent says rational basis does not even work. Regulating hair length and facial hair has no rational basis to advance the government's interests.

4) Private employers: No cause of action and grooming standards and these claims do not usually work under title 7.

H) **Free speech**: Rankin v. McPherson

1) P brought a freedom of speech claim against her employer, county sheriff.
2) Threshold question: Is the employees speech about a matter of public concern (consider the content, form, and context of the speech)
   a) If it is public concern: do the balancing test
   b) Not a public concern: there is no first amendment violation.

3) Balancing test: Weight the government's interests in efficiency as an employer against the employees interest in free speech
4) Majority: this is speech on a matter of public concern but there is no evidence that the remark lowered workplace morale so the employee wins the balance
5) Dissent: Employer (sheriff) should not have to employee those that root for the bad guys. Also, there should be a narrower definition of a public concern.