

St. John's University School of Law

St. John's Law Scholarship Repository

Faculty Publications

2019

Finding Balance: Using Employment Law Problems to Achieve Multiple Learning Goals in Persuasive Legal Writing

Rosa Castello

Follow this and additional works at: https://scholarship.law.stjohns.edu/faculty_publications



Part of the [Labor and Employment Law Commons](#), and the [Legal Writing and Research Commons](#)

FINDING BALANCE: USING EMPLOYMENT LAW
PROBLEMS TO ACHIEVE MULTIPLE LEARNING GOALS IN
PERSUASIVE LEGAL WRITING

By: Rosa Castello*

INTRODUCTION

Legal Writing professors, like myself, face the same challenge each new semester: how can I effectively and efficiently help students learn one of the most important skills for a practicing lawyer? And one large hurdle in this quest to make our students good legal writers is creating a trial motion or appellate brief problem that helps them develop the particular skills required for persuasive legal writing.¹ The act of creating the problem is sometimes like tightrope walking—finding just the right balance of facts and law to challenge students and help develop and enhance vital research, analytical, organizational, writing, and citation skills,² but not overwhelm them so they topple over from the task. Often,

* Associate Professor of Legal Writing at St. John's Law School, and Assistant Faculty Director of The Ron Brown Center for Civil Rights. I would like to thank my Legal Writing colleagues at St. John's Law: Renee Allen, Robin Boyle Laisure, Patricia Montana, Rachel Smith, and Kayonia Whetstone, for their support and encouragement in matters large and small. And, particularly, thanks to Rachel and Patricia for their support as I took on this project and their helpful thoughts and feedback as I worked through it. Finally, I would be remiss if I did not thank my former colleague and dear friend, Jane Scott, for all her mentorship and support throughout my career, and especially with regard to this article.

1. See Jan M. Levine, *Designing Assignments for Teaching Legal Analysis, Research and Writing*, 3 *Persp: Teaching Legal Res. & Writing* 58 (1995) ("In a legal research and writing course, the assignments provide the heart and soul; nothing else is as important because the assignments set the context in which all of the teaching and learning takes place. . . . A well-developed assignment is the vehicle through which students are given the context that explains and justifies why they should learn research, composition and analysis.") (explaining that assignments should be easy enough for most, but challenging for the best students).

2. As Bannai et al. discuss in their article, an assignment should be a "secondary 'text' for a Legal Writing class" and should be designed to teach the goals and objectives of the course. See Lorraine Bannai, Anne Enquist, Judith Maier & Susan McClellan, *Sailing Through Designing Memo Assignments*, 5 *LEGAL WRITING: J. LEGAL WRITING INST.* 193, 200-01 (1999).

the first step in walking this tightrope is finding the right area of law to teach and develop these skills.

Federal employment discrimination law issues are uniquely well suited for teaching those skills. This Article describes the benefits of using employment discrimination claims as the basis for motion and brief assignments. It begins by identifying learning goals for the persuasive writing portion of the Legal Writing course. An overview of federal employment statutes follows, along with a description of the legal tests for discrimination, retaliation, and similar claims. With this background, the Article proceeds to a detailed discussion of specific learning goals and how employment discrimination problems help students achieve those goals.

LEARNING GOALS FOR PERSUASIVE LEGAL WRITING

The overarching goal in the second semester of the typical Legal Writing course is to teach students to write persuasively. But what does that mean beyond advocating for your client within the ethical and professional bounds of being a lawyer? Some years ago, my colleagues and I wanted to articulate and document the goals we had for our course.³ We compiled a set of specific goals consisting of a detailed list of skills each student should acquire by the end of the course, broken down into six main skill sets: research skills, analytical skills, organizational skills, writing skills, citation skills, and oral advocacy skills.⁴ Those skills are listed in the attached Figure 1.

Employment discrimination law issues, particularly discrimination, retaliation, and hostile work environment issues, help students develop all of these skills. These types of cases can be brought under a number of different federal statutes, including Title VII of the Civil Rights Act of 1964,⁵ the Family and Medical Leave Act (“FMLA”),⁶ the Age Discrimination in Employment Act (“ADEA”),⁷ and the Americans with Disabilities Act (“ADA”).⁸

3. My colleagues at the time were Larry Cunningham, Robin Boyle Laisure, Patricia Montana, and Jane Scott.

4. These are the goals of all Legal Writing courses, whether articulated and documented specifically in the course objectives or not.

5. 42 U.S.C. § 2000e-2 (2012).

6. 29 U.S.C. §§ 2601 *et seq.*

7. 29 U.S.C. § 623 (2012).

8. 42 U.S.C. § 12112 (2012).

Each statute has its own regulations and procedural requirements, but the overarching analysis for claims under each is very similar, and there is much overlap.

Using this rich area of law, we can situate students in complex statutory schemes that attempt to balance the competing policies of worker protection and employer freedom. We can show them the work of federal courts in shaping the law through the development of interpretative balancing tests, which impose a structure on what are often messy and difficult factual situations, implicate evolving social policy concerns, and vary drastically from circuit to circuit. We can also expose them to the crucial role of facts and narratives in determining legal outcomes. Thus, employment discrimination problems are the perfect laboratory for 1Ls to learn persuasive writing.

While employment law is complex and nuanced, it is also an area that is manageable and familiar.⁹ Most students are familiar with the area of employment either from jobs before law school or ones held by family and friends. Disputes between employers and employees are so often in the news that students can understand these issues even if they lack personal experience with them. Moreover, employment discrimination problems can easily be crafted to challenge students in different ways, resulting in assignments that are manageable for most if not all students but also engaging for those who have made the most progress; thus, the proper balance to walk the tightrope is achieved.

INS AND OUTS OF EMPLOYMENT LAW ISSUES

A number of statutes protect employees from discrimination in the United States,¹⁰ offering protection to different classes of employees for different reasons. However, whichever statute governs a particular employee's case, the claims that can be asserted under the statute are the same: discrimination and retaliation. And the test used to analyze the claims, the *McDonnell Douglas*

9. See Bannai et al., *supra* note 2, at 206 (noting that many students can readily understand employment issues).

10. This article focuses on federal statutory law; however, each state has its own employment discrimination laws, and these can be used to add another layer to the assignment. Additionally, this article focuses on intentional discrimination claims and not disparate impact claims.

burden-shifting test,¹¹ is the same. The particular elements and rules for a retaliation or discrimination claim vary based on the underlying statute and the legal theories asserted, but they are very similar.¹² Additionally, Title VII allows employees to assert a different type of discrimination claim not analyzed using the *McDonnell Douglas* test, a hostile work environment claim. This extensive law is beneficial for a Legal Writing professor precisely because of the similarity between the claims and the numerous theories that can be used to bring a claim.

A. *Statutory Law*

Title VII prohibits employment discrimination and retaliation based on race, color, religion, sex, and national origin.¹³ The ADA prohibits discrimination and retaliation based on disability,¹⁴ and the ADEA prohibits the same based on age.¹⁵ The FMLA prohibits discrimination or retaliation against an employee for exercising rights under the act to take family and medical leave.¹⁶ Each of these acts protects vulnerable populations, and enforces social justice initiatives.

B. *Employment Discrimination Claims*

1. *The burden-shifting test for discrimination and retaliation claims*

Historically, courts struggled to apply Title VII in summary judgment motions where the plaintiff lacked direct evidence of discrimination or retaliation, and then the landmark decision in *McDonnell Douglas* provided a framework that has since been used for Title VII claims and other claims.¹⁷ A summary judgment

-
11. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).
 12. See discussion *supra* Section II.B.
 13. 42 U.S.C. § 2000e-2 (2012).
 14. 42 U.S.C. § 12112 (2012).
 15. 29 U.S.C. § 623 (2012).
 16. 29 U.S.C. §§ 2601 et seq.
 17. *McDonnell*, 411 U.S. 792 (1973).

motion on a Title VII claim is analyzed using the *McDonnell Douglas* burden-shifting test.¹⁸ The plaintiff must first establish a prima facie case.¹⁹ The burden then shifts to the employer to offer a legitimate, nondiscriminatory reason for the adverse action. If the employer meets this burden, the presumption of discrimination drops out of the picture, and the burden shifts back to the plaintiff to demonstrate that the reason proffered by the employer was merely a pretext for discrimination.²⁰

Each step in the burden-shifting analysis has its own legal rules, and some steps have multiple elements with their own rules. In the first step of the *McDonnell Douglas* burden shifting test, the plaintiff must establish a prima facie case of discrimination.²¹ The plaintiff's burden here is to "show[] actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were based on a discriminatory criterion illegal under" the statute.²² A plaintiff bringing a discrimination claim must establish four elements.²³ Those elements vary somewhat depending on the type of claim, but they overlap considerably. For example, in a failure to hire case, those elements focus on some proof to support a theory that the plaintiff was not hired because of her protected status: (1) she belongs to a protected class; (2) she applied and was qualified for a job for which the employer was seeking applicants; (3) despite these qualifications, she was rejected; and (4) after this rejection, the position remained open and the employer continued to seek applicants from persons of plaintiff's qualifications.²⁴

In a discriminatory discharge case, the first and third elements are the same, but the other two elements focus on proof that the employee would not have been fired absent discrimination. Thus, in a discriminatory discharge case, the second element is established with a showing that the plaintiff was performing his duties satisfactorily, and the fourth element is satisfied with a showing that his discharge occurred in circumstances giving rise

18. *Id.*, See *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252 (1981).

19. *Burdine*, 450 U.S. at 252-53 (1981).

20. *Id.* at 804.

21. *Id.* at 802.

22. *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1354 (2015).

23. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993).

24. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

to an inference of discrimination based on his membership in the protected class.²⁵ Discharge claims can be brought under two theories: direct discharge or constructive discharge, and each has its own requirements.²⁶

In a retaliation case, the elements focus on proof that the employer's action was retaliatory. There, the prima facie stage requires a showing that (1) plaintiff was engaged in an activity protected under the statute; (2) her employer was aware of her participation in the protected activity; (3) the employer took adverse action against her; and (4) a causal connection existed between the protected activity and the adverse action.²⁷

For the prima facie stage in a discrimination or retaliation claim, each element has its own rules and some have multiple rules and theories available to a plaintiff to satisfy her burden at this stage.²⁸ Regardless of the exact elements required to establish a prima facie case, the courts have developed rules governing the nature and degree of proof required to establish each element,

25. *Chambers v. TRM Copy Centers Corp.*, 43 F.3d 29, 37 (2d Cir. 1994).

26. An actual discharge occurs when the employer uses language or engages in conduct that "would logically lead a prudent person to believe his tenure has been terminated." *Chertkova v. Connecticut Gen. Life Ins. Co.*, 92 F.3d 81, 88 (2d Cir. 1996) (citations omitted). In contrast, constructive discharge occurs when an employer intentionally creates an intolerable work atmosphere that forces an employee to quit involuntarily. *Id.* at 89.

27. *Zann Kwan v. Andalex Grp. LLC*, 737 F.3d 834, 844 (2d Cir. 2013).

28. For example, to establish that she experienced an adverse action, the plaintiff must show that she experienced "a materially adverse change in the terms and conditions of employment." *Joseph v. Leavitt*, 465 F.3d 87, 90 (2d Cir. 2006) (internal quotation marks and citation omitted). Courts further explain that an adverse action is "more disruptive than a mere inconvenience or an alteration of job responsibilities." *Id.* A non-exhaustive list of examples of adverse actions is often cited to demonstrate actions that are more than a mere inconvenience. *Id.* ("termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices unique to a particular situation").

lending complexity to the analysis.²⁹ However, courts have cautioned that the plaintiff's burden at this stage is not high.³⁰

In the second step of the *McDonnell Douglas* burden shifting test, the employer now has the burden to offer a legitimate, non-discriminatory or non-retaliatory reason for the action.³¹ As a plaintiff had in the first step, a defendant also has many theories to consider to establish a defense, and courts have shown deference to an employer when it offers a business justification.³² The employer could offer evidence of the employee's misconduct or failure to perform,³³ the elimination of the employee's position,³⁴ or a corporate downsizing or mass lay-off.³⁵ Each theory has its own rules and evidentiary burdens.

Finally, the burden shifts back to the plaintiff to demonstrate that the reason the employer proffered was a pretext for discrimination or retaliation.³⁶ The plaintiff can establish that the defendant's asserted reason is pretext under a number of theories,

29. For example, to establish an adverse action, a plaintiff alleging discrimination has to show conduct that "affect[s] the terms and conditions of employment." But a plaintiff seeking Title VII's protection against retaliation need show only "that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Hubbell v. FedEx SmartPost, Inc.*, 933 F.3d 558, 569–70 (6th Cir. 2019). To show a causal connection between the protected act and adverse action, a plaintiff may demonstrate the adverse action followed closely in time or may provide other evidence that supports an inference of a link between the two. *Daza v. Indiana*, 941 F.3d 303, 309 (7th Cir. 2019).

30. *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981) ("The burden of establishing a prima facie case of disparate treatment is not onerous.").

31. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

32. This burden is one of production, not persuasion; it "can involve no credibility assessment." *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 142 (2000). A "court should be loath to interfere" with a management decision. *Kelly v. Drexel Univ.*, 94 F.3d 102, 109 (3d Cir. 1996).

33. See *Reeves*, 530 U.S. at 144 (finding unsatisfactory employee performance proffered by employer was legitimate reason).

34. See *Smith v. Naples Cmty. Hosp., Inc.*, 433 F. App'x 797, 800 (11th Cir. 2011) (finding elimination of position was legitimate reason).

35. See *Jaiyeola v. Carrier Corp.*, 350 F. App'x 583, 585 (2d Cir. 2009) (downsizing of department was legitimate reason).

36. *McDonnell Douglas*, 411 U.S. at 804.

including more favorable treatment of similarly situated employees not in the protected class.³⁷

2. *The test for hostile work environment claims*

Hostile work environment claims are not analyzed under the burden-shifting framework; however, courts analyzing these claims also apply a multi-layered set of rules. To prevail on a hostile work environment claim under Title VII, a plaintiff must show that the harassment was sufficiently severe or pervasive to alter the conditions of the plaintiff's employment and create an abusive working environment.³⁸ The test has objective and subjective elements: (1) the misconduct must be severe or pervasive enough to create an objectively hostile or abusive work environment; and (2) the plaintiff must also subjectively perceive that environment to be abusive.³⁹ Courts look at the totality of the circumstances and consider a number of factors to determine whether an environment is sufficiently hostile: (1) the frequency of the discriminatory conduct; (2) its severity; (3) whether it is physically threatening or humiliating, or a mere offensive utterance; and (4) whether it unreasonably interferes with an employee's work performance.⁴⁰

In a hostile work environment case, the employer can be vicariously liable for an actionable hostile environment created by a supervisor.⁴¹ The employer may raise an affirmative defense if it can show that it exercised reasonable care to prevent and promptly correct any sexually harassing behavior, and that the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided or to avoid harm otherwise.⁴²

To analyze these claims and apply this complex web of rules and burden shifting, courts focus on the facts of the case, and employment discrimination cases often have many facts and multiple

37. See *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1354 (2015).

38. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986); see also *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993) (“[W]hether an environment is ‘hostile’ or ‘abusive’ can be determined only by looking at all the circumstances.”).

39. *Faragher v. City of Boca Raton*, 524 U.S. 775, 786-87 (1998).

40. *Faragher*, 524 U.S. at 787-88.

41. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764-65 (1998).

42. *Id.* at 765.

witnesses. Thus, employment law issues offer multiple ways to advance the teaching objectives of persuasive writing.

ACHIEVING LEARNING GOALS

As described above, the learning goals for the persuasive writing semester of Legal Writing can be grouped into six broad categories of skills: (1) Research; (2) Analysis; (3) Organization; (4) Writing; (5) Citation; and (6) Oral Advocacy. Each category consists of specific skills that students should master by the end of the semester. In this section, certain skills in each category are addressed in detail to show the distinct advantages of employment discrimination problems as a means of teaching and learning.⁴³

A. Research Skills

Employment discrimination problems offer many opportunities for students to practice their research skills. Employment discrimination claims are common, and decisions on summary judgment motions abound.⁴⁴ There is so much law for students to wade through, and it can be challenging for those who have no experience with this area of law. Therefore, students must use secondary authorities to perform initial background research, and to find relevant primary law on the issue. The use of secondary sources as an entry point to an unfamiliar area of law is a valuable lesson.

And the secondary sources for these problems are not just limited to treatises, legal compilations, and journals. Students also learn to use reputable online sources, like the Department of Labor (“DOL”) or the Equal Employment Opportunity Commission (“EEOC”) websites. These websites are also good initial places for

43. While the goal is to have students learn all of the skills identified in the learning objectives, the following section discusses just a few significant skills that can be taught using employment law issues. Certainly, other skills are learned using these issues and with other problems assigned during the semester.

44. See Vivian Berger et al., *Summary Judgment Benchmarks for Settling Employment Discrimination Lawsuits*, 23 HOFSTRA LAB. & EMP. L.J. 45, 49 (2005) (discussing the precipitous rise in employment discrimination lawsuits and the increase in summary judgment and decrease in jury trials).

students to begin when they are unfamiliar with the law. Using government websites is an important skill for all lawyers.⁴⁵

Additionally, because employment law issues are abundant and decisions are issued constantly, students must be vigilant to use citators to determine whether a primary authority remains good law, in addition to using it to find new primary and secondary authorities.

Because the case law on top of the statutes and regulations is tremendous, even within a single jurisdiction,⁴⁶ students learn to plan and organize their research. Students need to develop a research plan to strategize how they will research each issue and what sources they will consult. Learning to plan and strategize is important for future litigators who will handle complex matters and large case-loads. They must perform different types of searches, including searches using statutes, regulations, citators, and reputable online sources. And each step in the analysis requires its own research because different rules and tests apply at each stage. Students are forced to keep careful track of their searches and results, or they will have to redo the work and lose valuable time.

B. Analytical Skills

In addition to the opportunities to practice research skills, employment discrimination problems offer many opportunities for students to make important decisions about content and enhance their analytical skills.

First, building on skills developed during predictive writing,⁴⁷ students have an opportunity to work with statutes, regulations, and policy. Title VII, the FMLA, the ADA, and the ADEA have multiple provisions, and students must learn to navigate

45. As many of us do, students will begin researching an unfamiliar topic using Google. Legal Writing professors can use this as an opportunity to teach the value of websites but also the importance of using reliable, accurate internet sources.

46. For example, at the time this article was written, a case law search on Westlaw limited to the Second Circuit to determine whether a mass layoff or downsizing was a legitimate reason for an employer's action resulted in over 75 cases. And that is only one part of the multiple steps in the argument.

47. See Bannai et al., *supra* note 2, at 193-94 (explaining that designing assignments to reinforce old skills and develop new ones results in a spiral curriculum).

these complex statutes and understand how case law works in conjunction with them. Additionally, the EEOC is responsible for enforcing federal employment discrimination laws.⁴⁸ The EEOC, in addition to other responsibilities, passes regulations implementing these laws.⁴⁹ The DOL does the same for the FMLA.⁵⁰ These regulations often add layers to the law in the statutes and the cases applying these statutes. Students have an opportunity to expand their skills and understanding of authorities and how they work together and relate to each other.⁵¹

For example, several years ago, my colleague and I created an FMLA problem. One of the issues in the problem was whether the employee waived her rights to bring an FMLA claim when she signed a severance agreement. The DOL regulations address waiver of FMLA claims,⁵² and students were tasked to research and understand these regulations and how they worked and use them in analyzing and arguing the issue.

Second, given all of this law, students must make strategic decisions about what cases to use and how many. Students must think about which cases are favorable for their client and which unfavorable cases should be included. This requires consideration of not only the persuasive value of each case and the persuasive value of addressing unfavorable law,⁵³ but also the lawyer's ethical

48. 42 U.S.C. § 2000e-5; See <https://www.eeoc.gov/laws/statutes/>.

49. See EEOC Regulations for a list of current regulations at <https://www.eeoc.gov/laws/regulations/index.cfm>.

50. See DOL Rules & Regulations for a current list at <https://www.dol.gov/agencies/ebsa/laws-and-regulations/rules-and-regulations>.

51. See Levine, *supra* note 1, at 59 (“A truly integrated course will treat research in a manner that simulates real-world practice and demonstrates how multiple sources and techniques must be brought to bear on a research problem.”).

52. “Employees cannot waive, nor may employers induce employees to waive, their prospective rights under FMLA.” 29 C.F.R. § 825.220.

53. In offering advice on how to persuade, Judge Lebovits wrote that “[f]ailing to address unfavorable arguments in advance is strategically wrong and sometimes unethical.” Gerald Lebovits, *Persuasive Writing for Lawyers - Part I*, 82 N.Y. St. B.J. 64, 59 (2010).

obligations to include a particular case (even if unfavorable⁵⁴).⁵⁵ This also requires students to think about how much law they need to support a particular rule or argument. It is challenging for them to navigate when and where they should include multiple sources of support or just one.

Third, this vast amount of case law also offers more opportunities to remind students about hierarchy of authority, hammering home some basics already covered and exploring new areas. In my experience, many students need to be reminded to use cases from the highest court when they find many cases stating the same principle. A new struggle for students comes when they do not find binding authority and must decide which cases are the most persuasive for them to use. This new challenge offers opportunities to go beyond just structural hierarchy. The students should consider the content of an opinion, the writing, the authoring judge, and the reputation of the court. Even if students are initially overwhelmed by these considerations, they become aware of their importance in a litigator's practice.

Fourth, students must also make difficult decisions when they find conflicting cases. This is a particular challenge for 1L students, who want to know what the "right" law is for their respective issue. For example, one of the elements to establish a prima facie case of retaliation is a causal connection between the protected activity and the adverse employment action.⁵⁶ This causal connection can sometimes be satisfied by the mere tem-

54. MODEL RULES OF PROF'L CONDUCT r. 3.3 cmt. 4 (Am. Bar Ass'n 2018) ("A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party.").

55. See Frances C. DeLaurentis, *When Ethical Worlds Collide: Teaching Novice Legal Writers to Balance the Duties of Zealous Advocacy and Candor to the Tribunal*, 7 DREXEL L. REV. 1, 7-8 (2014) (discussing the tension between zealous advocacy and candor to the courts and noting the need to teach and incorporate this into the Legal Writing classroom). Employment law problems present an opportunity to allow students to explore these ethical issues and develop another skill for the maturing law student and legal writer. "The goal of every legal research and writing course should be to have a classroom of 'struggling' students who recognize the challenges inherent in effective advocacy, and to provide them with the tools to navigate such a struggle as they transition to practice." *Id.* at 33-34.

56. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

poral proximity between an employer's knowledge of the protected activity and the adverse employment action.⁵⁷ Although courts have uniformly cautioned that the temporal proximity must be "very close,"⁵⁸ what constitutes "very close" varies. Some courts have held that over a year can establish temporal proximity, while other courts in the same jurisdiction have held that three months does not establish temporal proximity.⁵⁹ Students face a challenge here in considering what law to use to argue their position and how to address the conflict. Students with more advanced skills recognize that courts may be influenced by other facts outside of temporal proximity and may find temporal proximity where other facts support a finding of discrimination overall.

This consideration of the facts as a whole is another area where there is inconsistency.⁶⁰ For example, the Seventh Circuit has recently held that courts should consider the evidence as a whole to determine if it allows a plaintiff to make her case and survive summary judgment.⁶¹ Some courts have understood this to be a separate test than the *McDonnell Douglas* test, and if a plaintiff could not survive summary judgment under *McDonnell Douglas*, the court should then consider the evidence as a whole to determine whether a reasonable factfinder could conclude that the plaintiff was discriminated against.⁶² Other circuits have not yet considered this issue.⁶³

57. Clark Cty. Sch. Dist. v. Breeden, 532 U.S. 268, 273 (2001).

58. *Id.* (citing cases).

59. In some cases, time periods ranging from twelve days to eight months have been found to show the necessary temporal proximity. *See Deravin v. Kerik*, No. 00CV7487(KMW)(KNF), 2007 WL 1029895, at *11 n.21 (S.D.N.Y. Apr. 2, 2007) (collecting cases). In other cases, time periods ranging from two-and-a-half months to eight months have been deemed insufficient to show the necessary temporal proximity. *See id.* at *11 n.22 (collecting cases).

60. This issue might be a good one for an appellate brief assignment – should other Circuits adopt the plaintiff-friendly standard of the Seventh Circuit Court of Appeals and consider whether the evidence as a whole allows the plaintiff to survive summary judgment?

61. *Ortiz v. Werner Enterprises, Inc.*, 834 F.3d 760, 765 (7th Cir. 2016).

62. *Davis v. Brennan*, No. 14C753, 2016 WL 5476251, at *2-3 (N.D. Ill. Sept. 29, 2016).

63. However, there is a circuit split on another issue. In *University of Texas Southwestern Med. Ctr v. Nassar*, the Supreme Court held that a retaliation claim under Title VII must be established in accordance with the traditional "but-for" causation standard. 570 U.S. 338, 362 (2013). However, the Court did

In addition to the skill of determining what authority to use and why, discrimination claims offer opportunities to enhance other analytical skills. First, employment discrimination issues often involve policy considerations, and sharp students recognize the opportunity to enhance an argument with the addition of policy. While reading decisions that span a decade or more, students learn to appreciate the development of law over time and how that law is influenced by societal standards and concerns.⁶⁴ What was acceptable in the workplace ten or twenty years ago, may no longer be acceptable today. Decisions reflect these evolving standards, and there is a place for argument informed by policy.⁶⁵

For example, last year, my colleague and I created a hostile work environment problem where a law partner was harsh, unfair, and demeaning to a new female associate.⁶⁶ Some of his behavior and comments may have been “acceptable” or not actionable when he began practice 30 years ago, but they certainly raised issues in 2018. And more than just grappling with policy, students must figure out how to deal with cases that are still “good law” but feel quite outdated in terms of social mores. Students representing the employer must critically examine whether an older favorable case with similar facts would persuade a judge considering the issue in this day-and-age. Students representing the employee must determine whether to address older unfavorable law and how to do so persuasively.

not specify whether this standard applies to establish causation in the prima facie step of the analysis or the pretext step or both. The Tenth Circuit applies the “but-for” requirement at the prima facie step. *Foster v. Mountain Coal Co.*, 830 F.3d 1178, 1191 (10th Cir. 2016). However, the Third and Fifth Circuits apply it at the pretext step. *Young v. City of Phila. Police Dep’t*, 651 F. App’x 90, 96-97 (3d Cir. 2016); *Nicholson v. Securitas Sec. Servs. USA*, 830 F.3d 186, 189 (5th Cir. 2016).

64. See Michael Selmi, *The Evolution of Employment Discrimination Law: Changed Doctrine for Changed Social Conditions*, 2014 WIS. L. REV. 937, 942-53 (2014) (describing the progression of discrimination law cases and noting that many core discrimination cases arose in the 1970s during a very different era, but over the last few years the Supreme Court has taken notice of the way social conditions have changed and has revamped existing case law).

65. Creative students and those willing to experiment with persuasion are also influenced by social movements, like the Me Too and Black Lives Matter movements.

66. On file with author.

Second, because of the structure of the *McDonnell Douglas* analysis and the layered rules that govern employment discrimination issues, professors can design a problem so that the depth and degree of dispute for each stage varies. For example, a problem can be designed so that in the prima facie step, issues like whether the plaintiff was engaged in a protected act and whether the defendant knew about that act are undisputed. But the issue of whether the employer took an adverse action could involve a number of facts about employment actions that occurred after the protected act that might be “adverse.” Students representing the employer need not address the first two elements, but students representing the plaintiff would need to address them to establish the prima facie case, but could do so briefly. The problem could also be designed so that the plaintiff would not address the defendant’s burden to articulate a legitimate reason,⁶⁷ but would focus on arguing why that reason is pretext. Because the defendant has the burden to establish a legitimate reason, students representing the defendant would have to address the issue, but could do so briefly. This offers students an opportunity to experiment with varying the CREAC structure depending on the issue and the corresponding argument.⁶⁸ This variation is often seen in practice, and it is a critical skill for legal writers to develop.⁶⁹

Third, summary judgment itself is challenging for students. Students must understand what a material fact is and what creates a genuine issue for trial.⁷⁰ Employment discrimination cases are well-suited for a summary judgment motion because they often

67. For example, the defendant company might have engaged in a “reduction in force,” which is a legitimate reason. *See Kelly v. Drexel Univ.*, 94 F.3d 102, 109 (3d Cir. 1996) (noting that the court would not second guess a business decision to reduce the employee force).

68. *See* CHRISTINE COUGHLIN, JOAN MALMUD ROCKLIN & SANDY PATRICK, *A LAWYER WRITES* 94-95 (Carolina Academic Press 3d ed. 2018).

69. In Joi Montiel’s article discussing formative assessment that requires students to self-regulate their learning, she discusses specific requirements for a “good memo,” noting that showing students that “CREACs vary in degrees of depth . . . is beneficial. Whereas using the CREAC structure is a cognitive skill, determining when to modify the structure is a metacognitive skill, which requires a more complex thought process.” *See* Joi Montiel, *Empower the Student, Liberate the Professor: Self-Assessment by Comparative Analysis*, 39 S. ILL. U. L.J. 249, 267 (2015).

70. FED. R. CIV. P. 56(a).

involve many facts.⁷¹ Professors can craft the facts to create genuine issues, or challenge students by providing conflicting accounts regarding facts that are not material to the legal issues.

For example, in the previous hostile work environment problem I mentioned, one of the issues was whether the plaintiff took advantage of the defendant's corrective measures.⁷² For this problem, the defendant's policy required that the plaintiff report the problem to a supervisor. We created a discrepancy in the facts that was potentially material to this issue, and some students picked up on it and made creative arguments.⁷³

When my colleagues and I create these problems, we write multiple depositions. Students are exposed to the types of questions asked, objections made, and the difficulty lawyers might have in getting the facts they want from a particular party or witness. Students then face the challenge of going through all the facts and deciding what is material, what must be included, and what should be included. So many decisions come down to the facts, and a good persuasive argument does not overlook the value in presenting and arguing those facts.

71. See, e.g. Paul D. Seyferth, *A Roadmap of the Law of Summary Judgment in Disparate Treatment Cases*, 15 LAB. LAW. 251, 260–61 (1999) (“In employment discrimination cases, courts have taken pains to ensure that only genuine facts are relied upon by plaintiffs to oppose summary judgment or to prove pretext. Counsel must therefore diligently examine the wide array of instances to determine whether there is truly no genuine issue of fact.”).

72. On file with author.

73. In this problem, the plaintiff reported the problem to her mentor, whom she believed was a junior partner at the time. However, the mentor was not named junior partner until after the plaintiff reported the problem, as demonstrated by the mentor's deposition and her work file. Some students relied on only one source of evidence and did not realize the discrepancy. The defendant's policy never defined or explained what or who was a “supervisor.” Some students representing the plaintiff focused on arguing that a junior partner is a supervisor, not recognizing that there was evidence that the mentor was not a junior partner at the time. Others argued that a mentor is a supervisor, even if the mentor was not a junior partner at the time. Others used the law and facts creatively to argue that the plaintiff believed the mentor was a junior partner, and her belief was reasonable and therefore she was reasonable to report the incidents to her. They also argued that, at the very least, it raises an issue of fact. Some students representing the defendant recognized this potential problem and, in addition to an argument that a mentor is not a supervisor, they also argued that a junior partner is not a supervisor (even if the plaintiff believed she was a junior partner), using some of the explanation about what a junior partner is/does from the facts.

Here, students grapple with ethical issues and the art of persuasion. They must decide what facts should be included and addressed, even if unfavorable, and how best to do that. They must step back from the specifics of their legal arguments and think about their case and their strategy as a whole to best frame the case to make an impact.

For example, this past year my colleague and I did a retaliation issue.⁷⁴ The plaintiff was a transgender woman who had her transition surgery while employed with the defendant. After the plaintiff told her supervisor about her surgery, his comments and actions suggested that he discriminated against the plaintiff because she was a transgender woman.⁷⁵ The plaintiff complained to human resources, and after that complaint, privileges attendant to her position were revoked. My colleague and I asked students to argue the retaliation issue, not the discrimination issue.⁷⁶ Students representing the defendant employer struggled with how much of the supervisor's pre-retaliation actions and words to include. Students representing the plaintiff struggled with staying focused on the facts relevant to the retaliation issue and avoiding the temptation to over-rely on and over-include pre-retaliation facts.

Summary judgment in employment cases in particular offers a useful teaching opportunity to go beyond the mechanics of brief writing and discuss the logistics of practice and litigation. Students often identify the tension between letting the plaintiff have her day in court and needing to limit the resources that would be spent on unnecessary trials, particularly when there is a sense

74. On record with author.

75. For example, the supervisor asked the plaintiff how customers would react to her after the surgery and how they would know what to call her. When she returned from surgery, he put her behind a desk in another department where there was no personal contact with customers. When she confronted him about this, he lied and said there was no work available in his department.

76. The discrimination issue would have been its own challenge and could potentially be a good assignment for a summary judgment motion or an appellate brief. Circuits are split about whether plaintiffs can assert a claim under Title VII under a theory that they were discriminated against because they are transgender individuals. The Second Circuit, where our problem was set, had yet to decide the issue. However, the Supreme Court is set to hear the issue this October. *See* R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, No. 18-107 (Sup. Ct. 2019) (decision pending).

that many employment law claims are not meritorious.⁷⁷ Students may also understand that some employers will settle claims rather than spend money on litigation, face negative publicity, or lose a valuable employee because of a contested litigation.⁷⁸

Finally, employment discrimination issues also offer good opportunities for students to experiment with storytelling and persuasion. The plaintiff's case can be compelling, and students can develop skills using narrative and practice incorporating the right degree of emotion into an argument. Students who represent the defendant have different challenges. Telling a story from the defendant's perspective may involve thoughtful consideration of how to organize the facts, because telling the plaintiff's story will not be compelling. The students representing the defendant must also think about emotional appeal and how to use it when representing a corporate entity. Students may be surprised to realize that the employer is not always "the bad guy," and many employers earnestly attempt to have an inclusive and non-discriminatory work environment. Additionally, students may also be surprised to realize that not all plaintiffs are always sympathetic or truthful.

77. See, e.g. *More and More Workplace Discrimination Cases are Closed Before They're Even Investigated*, CTR. FOR PUB. INTEGRITY (June 14, 2019), <https://publicintegrity.org/business/workers-rights/workplace-inequities/injustice-at-work/more-and-more-workplace-discrimination-cases-being-closed-before-theyre-even-investigated/> (discussing the increasing rise in the percentage of cases that the EEOC closes without even investigating them); Sean Captain, *Workers Win Only 1% of Federal Civil Rights Lawsuits at Trial*, FAST COMPANY (July 31, 2017), <https://www.fastcompany.com/40440310/employees-win-very-few-civil-rights-lawsuits> ("[A]ccording to a new analysis of employment cases by legal research service Lex Machina, very few employees who file federal job discrimination, harassment, and retaliation claims even make it to court, and only 1% of those claims eventually succeed in court.").

78. See *Settling an Employment Discrimination Case: The Agreement*, POSPIS LAW (December 16, 2018), <https://pospislaw.com/blog/2018/12/16/settling-an-employment-discrimination-case-the-agreement/> ("Employment discrimination cases are often resolved by settlement – i.e., a negotiated agreement for the parties to discontinue a case on agreed-upon terms.").

C. Organizational Skills

One of the greatest benefits of employment discrimination assignments is the opportunity they provide to practice and enhance organizational skills. As discussed, the law that has developed to analyze employment discrimination issues is layered and involves nesting rules and burden switching. When working with these issues, I often work with the class as a whole to develop an outline for the argument. In one of my first years teaching, when I did an issue requiring application of the *McDonnell Douglas* burden-shifting test, I regretfully did not implement this exercise, and the students were frustrated by the struggle to figure out the organization, and the papers were ultimately less effective overall.

The *McDonnell Douglas* burden shifting test is especially challenging to organize clearly and persuasively, particularly because some of the cases applying this test are difficult and lengthy. Using this test, however, offered the opportunity to discuss whether students should vary the organization and why. All courts follow these steps in order to analyze similar claims, and students must use the same structure for clarity. But within each step of the analysis, because there are multiple arguments that can be made, students struggle with which arguments to make first and why. This exercise not only emphasizes the importance of organization, but also allows students to see how organization is more than just clarity; it is argument and persuasion itself.⁷⁹

79. While many of us use one of the traditional organizational paradigms to teach our students legal writing in the first year, these paradigms can sometimes have limitations in brief-writing because they emphasize deductive reasoning over storytelling. In a study of organizational paradigms used in appellate briefs, Diane Kraft found that “while practicing attorneys certainly include the parts of CREAC when crafting their arguments . . . they do so in a much more flexible way than most first-year legal writing textbooks teach.” Diane Kraft, *CREAC in the Real World*, 63 CLEV. ST. L. REV. 567, 592 (2015).

Kraft posited a number of reasons why attorneys may have deviated from a pure paradigm, such as varying from the traditional explanation than application paradigm to alternate between explanation and application repeatedly to discuss the facts sooner or emphasize them more, or including cases in the application that were not in the explanation to emphasize the number of cases that supported an argument. *Id.*

Employment discrimination issues offer students the opportunity to experiment with when to deviate and why. The clear structure of the *McDonnell Douglas* analysis lends itself to the traditional CREAC paradigm, but it is flexible enough to allow students at different stages in their development as a legal writer to

For example, in the prima facie step of a retaliation claim, the plaintiff must establish that her protected act was the cause of the defendant's adverse action.⁸⁰ This can be established using a number of theories.⁸¹ One consideration is what theory to use first. This forces students to consider the strength of each argument and the logical order of them. However, another consideration is whether to include all of these arguments in the prima facie step or move some to the third step, where the plaintiff must establish that the defendant's proffered reason is actually a pretext for retaliation. Many of the arguments to establish causation also work to establish pretext, and students must now consider the different burdens of each step in the analysis in addition to the strength of the different arguments. Likewise, sharp students representing the defendant employer realize that putting all the causation arguments in the prima facie step of the analysis, where the plaintiff's burden is lower, is more persuasive for the employer.

D. Writing Skills

Employment discrimination issues also offer good opportunities for students to expand on and practice rewriting and refining writing skills. Some students have difficulty transitioning from predictive writing and need to learn to write more forcefully as an advocate in persuasive writing. Many students now realize they can experiment with the passive voice, particularly those students representing defendants who want to de-emphasize the employer's actions. Others still struggle with lessons learned in predictive writing. For example, a common recurring problem is using parallelism, particularly using parallelism now as a tool for persuasion when describing multiple favorable cases. I still find myself reminding students to use transitions to connect sentences and arguments, and parts of their analysis. This is particularly

experiment in the ways Kraft identified. See Linda L. Morkan, *The Gestalt of Brief Writing*, 49 No. 7 DRI FOR DEF. 27 (2007) (discussing how organization can contribute to the overall persuasiveness of a brief); Stephanie A. Vaughan, *Persuasion Is an Art . . . but It Is Also an Invaluable Tool in Advocacy*, 61 BAYLOR L. REV. 635, 660 (2009) (discussing different ways to organize arguments persuasively).

80. See *supra* note 23.

81. See *Foster v. Univ. of Maryland-Eastern Shore*, 787 F.3d 243, 253 (4th Cir. 2015) (addressing whether plaintiff established causation at the prima facie stage and considering three different theories advanced).

important for clarity and persuasion in an analysis that involves multiple steps and arguments, like employment discrimination issues. This serves as a reminder to be concise, particularly because more words do not necessarily add persuasive value, but may in fact decrease it.

After a first draft, students meet with me and, in addition to discussing the “writing,” we talk about their arguments and their strategy, and think through better ways to persuade and address issues. We also do this as a class before and after the first draft is submitted. These strategy discussions also offer students some insight into legal practice and how a team of lawyers manage and handle a case.

Students also work on “re-researching.” As part of our strategy talks, we discuss what other authorities and support they may need and better authorities that could be used. They learn and practice targeted research for particular and specific points they want to make in their briefs, and often learn the hard lesson that there is no “perfect” case.

E. Citation Skills

While many legal issues allow students to learn citation skills, working with employment law issues is a good way to help students practice the advanced citation skill of using signals and parentheticals effectively. Students learn to make use of the full range of signals, including the signal *c.f.*⁸² to cite authority that is good for their side but not directly on point. They also learn to use parentheticals to convey multiple authorities concisely and increase the persuasive value of the argument. They grapple with issues about parenthetical content and placement. And because there are always unfavorable decisions for each side, students learn to use signals and parentheticals as a way of acknowledging adverse authority without unduly emphasizing it.

For example, a student representing the plaintiff addressing the temporal proximity element of the prima facie case in a retaliation claim may state a rule that there is no bright line rule establishing how close in time the protected act and adverse action

82. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 2.1(a) (stating *c.f.* is used when citing authority that supports a proposition different from the main proposition but sufficiently analogous to lend support).

must be.⁸³ This could be followed by a string cite to cases with parentheticals indicating specific time frames.⁸⁴ Students could alternatively include such a string cite in the argument rather than the rule, supporting their position that the time between the plaintiff's protected act and the alleged adverse action was close enough to establish proximity.⁸⁵

F. Oral Advocacy Skills

As in most Legal Writing courses, our students present formal oral arguments after they complete their briefs. To enhance their oral advocacy skills, students negotiate with one another in an attempt to settle the case. After they have turned in the first draft of their briefs, students pair off with other students representing the opposing side and engage in settlement discussions. These discussions help students see the other side and broaden their frame of mind.

While learning persuasive writing, students can often get tunnel-vision and focus heavily on their client's perspective. Students representing the plaintiff sometimes focus single-mindedly on the plaintiff's perceptions to the detriment of a consideration of the facts as a whole. And students representing the defendant may villainize the plaintiff at first and get frustrated that their client has to defend this suit. Both may miss opportunities to make better and more nuanced arguments. They may fail to appreciate that advocacy and persuasion is not blind, and a single-minded focus on their client's version of the story will not help them present the case. Students have conveyed that these settlement discussions have helped them make their own arguments more persuasive and

83. See *Gorman-Bakos v. Cornell Co-op Extension of Schenectady Cty*, 252 F.3d 545, 554 (2d Cir. 2001) (stating rule and string cite of cases with parentheticals indicating time frames).

84. *Id.*

85. For example, an argument that the time between the protected act and the adverse action establishes causation could be supported in the following way:

The time between Plaintiff's complaint on May 8 and her demotion on August 29, less than 4 months, falls well below what this Circuit considers close enough to establish a causal connection. See *Grant v. Bethlehem Steel Corp.*, 622 F.2d 43, 45-46 (2d Cir. 1980) (finding that a period of eight months indicated a causal connection); see also *Espinal v. Goord*, 558 F.3d 119, 129 (2d Cir. 2009) (finding that a period of six months was sufficient to support an inference of causation).

have helped them think about the facts more broadly and in different ways.

By helping students refine their arguments, the settlement discussions give more meaning to the rewrite phase of the brief assignment. It can be challenging for students to make the rewrite impactful and valuable, and go beyond making just the changes noted in my feedback on their first draft. The settlement discussion exercise is also a good opportunity to remind students about reputation and respect. I use it as an opportunity to remind students that opposing counsel is not “the enemy,” and advocacy can be effective (and more so even) without aggression and antagonism.

ADDITIONAL BENEFITS

Employment discrimination problems offer additional opportunities that do not fit squarely within the learning objectives listed above, but are valuable to students’ development as young attorneys. First, employment discrimination law offers the opportunity to discuss social justice issues and practice cultural competency.⁸⁶ Problems can focus on any number of issues involving race, gender, sexual orientation, and nationality. Depending on how much or how little you want students to address these issues, you can adapt the problem to suit your goals and your comfort with them.

For example, this past year was the first time I had done a problem where the plaintiff was a transgender individual.⁸⁷ Before creating the problem, I did my own research on the issues transgender individuals may face, the terminology that may be preferred, and the varied experiences they have. This was enlightening and informative for me, but it also helped me raise these

86. See Pamela Edwards & Sheilah Vance, *Teaching Social Justice Through Legal Writing*, 7 *LEGAL WRITING: J. LEGAL WRITING INST.* 63, 65-68, 81-83 (2001) (discussing the value for professors and students in incorporating social justice issues into the Legal Writing classroom as background or substantive law).

87. On file with author.

issues with my class. One particular issue we discussed was pronoun use,⁸⁸ which allowed me to address a recurring grammar issue and a cultural sensitivity issue.⁸⁹ It also opened up conversations about how to properly and adequately represent a client.⁹⁰

While there are many benefits to using employment discrimination law issues for an appellate or trial brief assignment, there are also potential drawbacks to be aware of, particularly with regards to social justice issues. Employment discrimination cases can be difficult for students to read and tricky to discuss in class. The issues are sensitive, and there is often upsetting language and sexual conduct. As a professor, you do not want to offend or upset students in the process of helping them develop legal writing and persuasive advocacy skills. For this reason, one should carefully consider the issues and facts of the assignment and the cases students will find researching those issues. Doing your own research on how to address these issues with the class and making sure you are comfortable doing so is a crucial part of preparing an employment discrimination assignment for your class.⁹¹

Using these issues as the basis of a problem has also allowed me to bring employment law practitioners to class and talk about the realities of the practice.⁹² Students enjoy hearing from attorneys about the practice of law, and they may make connections with practitioners that are valuable to their professional advancement. Many students end up doing this kind of work, so they get

88. Here, the plaintiff preferred the pronouns she, her, and hers.

89. Additionally, we discussed related things like how to describe transition and use of preferred terms (i.e., transgendered is not appropriate). I was able to not only provide the students with resources to help them write the brief, but also expand their awareness of cultural competency and sensitivity, particularly for transgender clients.

90. The June 2019 New York State Bar Association Journal was dedicated entirely to diversity issues. Several articles focused on serving transgender clients. See Sally Fisher Curran & Adam Martin, *Serving Transgender Veterans*, 91 N.Y. ST. B.J. 37 (2019); Milo Primeaux, *What's in a Name? For Transgender People, Everything*, 91 N.Y. ST. B.J. 40 (2019).

91. See Edwards & Vance, *supra* note 67 (addressing ways to deal with potential issues when incorporating social justice issues into the Legal Writing classroom).

92. See Susan E. Thrower, *Teaching Legal Writing Through Subject-Matter Specialties: A Reconciliation of Writing Across the Curriculum*, 13 LEGAL WRITING: J. LEGAL WRITING INST. 3, 28 (2007) (explaining that using “real-world” legal problems better prepares students to work as lawyers).

experience and writing samples in something that is very practical, which helps with job applications and interviews. I have had so many students say they discussed the specifics of the case during interviews when they had used their briefs as a writing sample.

Finally, there are additional benefits for the Legal Writing professor who uses an employment law problem to teach persuasive writing.⁹³ As discussed in Sections I and II, employment law lends itself to variations in the brief problem from year to year because of the wealth of statutes, causes of action, and procedural requirements. This helps Legal Writing professors manage their heavy workload, because once you master the basic recipe, you can just vary the ingredients from year to year. This deep and evolving area of law also fosters learning throughout the career of the Legal Writing professor.⁹⁴ And because it has such immediacy and interest for law students, it has given me a deeper understanding of younger generations and their views on social justice, legal practice, and society.

CONCLUSION

Crafting Legal Writing problems to help students learn and improve research, analytical, organizational, writing, citation, and oral advocacy skills is challenging and can be frustrating. Like an experienced tightrope walker, the Legal Writing professor must juggle complex challenges and maintain the perfect balance. Having a go-to area of law that one knows will help accomplish these goals can be a relief in that short interval between predictive and persuasive writing classes. One must develop these problems and find the right balance of issues so students can practice familiar skills and learn and develop new ones. Employment discrimination is that area of law.

93. I myself did not practice employment discrimination law, but as a law clerk in the trial and appellate courts, I worked on a lot of employment discrimination cases. They were some of my favorite cases to work on because of the complexity of the facts and law and the human dimension.

94. See Susan P. Liemer, *Many Birds, One Stone: Teaching the Law You Love, in Legal Writing Class*, 53 J. LEGAL EDUC. 284, 289 (2013) (encouraging Legal Writing professors to use the law they “love” as the subject matter for assignments and noting that one of the “best benefits” of being a Legal Writing professor is the “stimulation of learning about new areas of law throughout your career”).

Figure 1

Learning Goals for Legal Writing II

Goals: After completing Legal Writing II, students will be able to perform legal research in state and federal sources, formulate persuasive legal arguments, and communicate persuasive arguments to a court in a formal written and oral presentation. The new skills necessary to achieve these goals are listed below. Students will continue to practice and hone the skills learned in Legal Writing I.

RESEARCH SKILLS

1. Understanding the research process
2. Finding state and federal case law relevant to a legal issue
3. Finding state and federal statutory law relevant to a legal issue
4. Using secondary authorities to perform background research and find relevant primary law on the issue
5. Using a citator to determine whether a primary authority remains good law and find new primary and secondary authorities
6. Using the LexisNexis and Westlaw research systems proficiently
7. Understanding the availability of other online research systems and sources in common use, such as Bloomberg, government websites, etc.

ANALYTICAL SKILLS

1. Identifying issues and developing arguments
2. Determining whether an authority is relevant to the analysis
3. Determining whether an authority is necessary to the analysis
4. Determining whether an authority is favorable or unfavorable
5. Determining the weight of an authority

6. Using the burden of proof and standard of proof in an analysis
7. Framing legal rules favorably
8. Dealing with negative authority
9. Addressing counterarguments/developing a rebuttal

ORGANIZATIONAL SKILLS

1. Organizing the overall presentation of a brief in the conventional order: Question Presented/Introduction; Statement of Facts; Argument; Conclusion
2. Organizing the Argument section:
 - a. Beginning with a thesis or umbrella section that roadmaps the Argument
 - b. Dividing the Argument into sections to address, as appropriate, the following: separate dispositive issues raised on the motion or appeal; alternative arguments as to a single dispositive issue; topics and subtopics within a single issue or alternative argument
 - c. Organizing each section according to the paradigm for legal argument: issue; law; application of law to facts; conclusion
 - d. Within each section, structuring the legal authorities that support the argument (includes identifying the cases or other authorities to use, determining the order of the authorities used, and determining the specific use of each authority, etc.)

WRITING SKILLS

1. Writing for a particular audience (a court) and purpose (to persuade the court to decide in the client's favor):
 - a. Using the appropriate degree of formality
 - b. Omitting material that would be obvious to a judge
 - c. Stating the issue persuasively
 - d. Stating assertions as conclusions

- e. Writing persuasive headings
 - f. Stating the law favorably
 - g. Arguing the application of the law to the facts
 - h. Deflating adverse arguments
 - i. Writing a persuasive conclusion
2. Identifying a persuasive theme and using it throughout the brief
 3. Writing persuasively, using emphasis, placement, word choice, and other persuasive techniques

CITATION SKILLS

1. Composing full and short form citations to constitutions and rules according to Bluebook rules
2. Using signals
3. Writing parenthetical explanations
4. Including prior and subsequent history in a citation
5. Using multiple authorities in a single citation

ORAL ADVOCACY

1. Understanding the purpose, structure, and formalities of oral argument
2. Preparing and outlining an oral argument on a brief point
3. Presenting an oral argument on a brief point