Exam Number _____

FINAL EXAMINATION
in
EMPLOYMENT DISCRIMINATION LAW

May 10, 1983

Professor Shanor

This two and one-half hour exam contains four questions which will be weighted approximately in accordance with the time allocated to each.

The exam is closed book and may be taken only in this room (106) or the typing room (336).

Read, think, and organize before you write.

Write all your answers in bluebooks or type them on typing paper.

Write your exam number on each bluebook and on each page of the exam in the space provided. Return the exam questions with your bluebooks.

GOOD LUCK!

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I.
(30 minutes)

One theme of this course has been the similarities and differences between several federal employment discrimination laws. Listed below are five common employment discrimination terms which you should discuss concisely and precisely in connection with this theme. Compare the term's meaning in connection with any two employment discrimination laws. Cite leading authorities (when appropriate) and explain (where possible) the rationale for divergent interpretation. For example, a good two-sentence answer to the term "discrimination" would be:

> Discrimination: Under Title VII, discrimination includes disparate impact of facially neutral practices not justified by business necessity (Griggs v. Duke Power Co.), while under the Equal Protection Clause only intentional discrimination is prohibited (Washington v. Davis). The rationales for divergent interpretation are (1) the legislative history and language of Title VII, (Congress' desire to eliminate "badges of slavery" and tests "used to discriminate") and (2) the Supreme Court's desire to avoid inflexible interpretation of the Constitution.

The terms which you should analyze in this fashion are:

(1) Bona Fide Occupational Qualification (BFOQ)

(2) Reasonable Accommodation

(3) Alienage

(4) Liquidated Damages

(5) Affirmative Action

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II.
(30 Minutes)

Jelly Beans, Inc. is a candy manufacturer with a single plant in Louisiana. The plant was racially segregated until 1964, but since then has hired whites and blacks in numbers comparable to their availability in the local work force.

Unfortunately, some of the most senior employees at Jelly Beans have not adapted well to the employer's equal employment opportunity policies. Ralph Smith, a black man employed as a "sugar coater" at the plant, has come to you with the following story:

> Some of the older whites at the plant have been trying to drive me off the job. They use derogatory racial slurs in my presence, tell unflattering racist jokes when I am around, and move to other tables in the company cafeteria when I sit down for lunch. I have reported this to my supervisor, who has indicated sympathy but says there's nothing he can do. His attitude is that 'It's too late to teach old dogs new tricks,' and that so long as I am getting a good salary and scheduled promotions I have no complaint. While there is a grievance procedure, the union steward says my problem is not covered by the terms of the collective bargaining agreement and, therefore, the grievance mechanism is inappropriate. The vibes at the plant have been so bad I don't think I can take it much longer. I'm fed up with this trash.

Advise Mr. Smith of what causes of action he may have under any federal employment discrimination laws, and what relief he may expect if he wins.

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III.
(30 minutes)

The Fourth Circuit, in Newport News Shipbuilding and Dry Dock Company v. EEOC, held a medical insurance plan unlawful under Title VII. The plan reimbursed female employees' pregnancy-related disabilities through its insurance program on the same basis as other employee disabilities. However, the plan set a $500 reimbursement cap on pregnancy-related expenses incurred by spouses of male employees. Other spousal coverage, the same for spouses of both male and female employees, has no such cap.

The U.S. Supreme Court, having taken the case to resolve a split in the circuits, heard arguments on Newport News last week. From the bench, Justice Stevens termed the question of statutory interpretation a "very difficult, unusual problem."

As Justice Stevens' only law clerk with a strong background in Title VII law, you have been asked to write him a brief memo setting forth your analysis as to how the Court should resolve Newport News.

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IV.
(one hour)

International Schools Services, Inc. (ISS) is a private U.S. corporation which contracts with overseas governments and corporations to provide comprehensive educational services for the children of Americans employed abroad. Pursuant to a contract with Bell Helicopter International, ISS established the American School in Isfahan, Iran in 1973. This school was open not only to the children of overseas employees of Bell Helicopter but also to the children of overseas employees of other American companies in Iran.

From 1973 through 1979 (when the Ayotollah Khomeini and his followers intervened), this school was staffed primarily by teachers hired through the ISS referral service in Princeton, N.J. Additional teachers, if needed, were recruited from among Americans already living in Iran. ISS had a two-tiered contract system; first-tier or ISS-sponsored contracts were offered to all teachers hired through the ISS referral service in Princeton, N.J. and to heads of household whose primary purpose for being in Iran was to teach for ISS; second-tier or local-hire contracts were offered to Americans in Iran. Since the wives of Bell Helicopter employees constituted the largest pool of unemployed Americans, locally-hired teachers were usually women.

The first-tier or ISS contracts contained eleven benefits not given in local-hire contracts, including a monthly overseas allowance equal to 25% of base salary, a monthly transportation allowance of $150, a housing allowance, moving expenses and relocation bonus for initial travel to Iran, and various annual round-trip air fares to the United States. ISS deemed these extra benefits necessary to recruit and reward people for going to Iran and remaining there to teach.

In October, 1975, Theresa O. Lallibridge, who had accompanied her husband to Iran where he was to work for Bell Helicopter, was hired under a local-hire contract. When she later became aware of and inquired about the additional benefits of the ISS-sponsored contracts, she was informed by the school that she was ineligible for them. She renewed her local contract in October 1976

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IV. (continued)

and October 1977, divorced her husband in January 1978, and returned to the United States at the end of the 1977-78 school term in May 1978.

Immediately upon her return to the United States, Ms. Lollibridge filed charges with the EEOC alleging sex discrimination. In January 1982, upon receipt of a right-to-sue letter, she filed suit in the D.C. District Court under Title VII and the Equal Pay Act, basing her claims on the information above and the facts contained in the following tables:

Table I
Distribution of Local-Hire Contracts by Sex and Marital Status, 1975-79

	Married Females	Single Females	Married Males	Single Males
1975-76	15	0	0	0
1976-77	24	0	1	0
1977-78	28	0	0	0
1978-79	30	0	0	0
	97	0	1	0

Table II
Distribution of ISS-Sponsored Contracts by Sex and Marital Status, 1975-79

	Married Females	Single Females	Married Males	Single Males
1975-76	13	20	25	7
1976-77	19	35	36	17
1977-78	24	47	44	27
1978-79	36	46	51	29
	92	148	156	80

How should Ms. Lollibridge's suit be resolved both procedurally and on the merits?

Answers Outline to Employment Discrimination Exam
May 10, 1983

I. (1) BFOQ: Under Title VII, the courts have narrowly construed this exception to the prohibition against intentional discrimination (Dothard, Diaz), while under the ADEA, the courts have given more leeway to employer evaluations of age-related factors (Tamiami). This difference may be premised on the concern that female employment opportunities have often been barred by sexual stereotypes, and that the aging process - for virtually everyone - involves physical changes (e.g. slower reactions, which may affect the health and safety of others).

(2) Reasonable Accommodation: Under Title VII, religion is defined in § 701(j) to include a duty to accommodate, but the courts have interpreted this as a de minimus obligation (Hardison); under the Rehabilitation Act, the § 505 accommodation duty is more than de minimus, though cost may properly be considered. The difference is the fear that the Establishment Clause bars any more extensive accommodation of religious practices.

(3) Alienage: Title VII's prohibition of national origin discrimination does not prohibit alienage discrimination (Espinoza), while § 1981's prohibition of less favorable treatment than that given "white citizens" has sometimes been found to bar discrimination against aliens (Guerra). The language of the two statutes and Title VII's legislative history afford some explanation of this divergence.

(4) Liquidated Damages: Title VII contains no liquidated damages provision and has been construed to be limited to a "make whole" theory of equitable relief (Franks, Albemarle). Under the EPA, liquidated damages are in the court's equitable discretion, while under the ADEA "wilful" violations may be remedied by awards of liquidated damages. Liquidated damages are needed in wage discrimination cases (race, sex, etc.) to deter violations. There is little evidence that age cases were seen as more important than race cases (and hence more worthy of doubling damages for violations); rather, the ADEA's partial origins in the FLSA may explain double damages for "wilful" violations.

(5) Affirmative Action: In Title VII, this term appears as a remedial concept only (§ 706(g)), and even here § 703(j) does not require "preferential treatment." (though an employer may, under limited circumstances give such treatment -- Weber). Under EO 11246 and § 503 of the Rehab. Act of 1973, it is the stated

goal (albeit undefined) of the government's relationship to government contractors. There is less difference between "nondiscrimination" and "affirmative action" than meets the eye because employers seeking to avoid Title VII liability will often do what "affirmative action" would require (compare Timken with Hazelwood).

II.

Title VII

Racial Harassment or Disc. Work Envir.
(compare Bundy & Henson)
Is ER liable?
Co-workers - "knew or should have" std.
Supervisor - stricter liability? (Bundy vs. Henson)

Is U liable?
"failure to process" tenuous absent evidence of intent to discrim.

Are Ees liable?
Not under VII - "ER" 703(a) - 701

Remedies -- Injunction only (no $, no punitives), atty fees
N.B. - "bottomline" of ER no defense Teal

§ 1981

Denial of "same rt. to contract"?
Intent Disc. only (Assoc. Gen. Kors)
Reaches discriminators individually
Punitive Damages? Johnson v. REA - yes

Tort

Pendent State CA? yes § 708

Advice: don't quit bec. "const. discharge" dicey
(unless getting too heavy to endure)

III.

In Gilbert, S. Ct. said "preg. disc" ≠ "sex disc." for VII purposes
Congress enacted 701(k), overruling Gilbert, thereby at least mandating that female workers get preg. coverage in disability plans equivalent to rest of plan coverage.
Whether 701(k) also mandates spousal pregnancy coverage for male workers' wives is question

Language of 701(k) is inartful:
First clause -- "pregnancy" differentials not premissible for § 703(a)(1) purposes, so male ee's "compensation, terms, or privileges" of employment may not be so limited.
Second clause -- "women . . . shall be treated the same for all employment-related purposes"
appears to be a one-way street
limited to female (not male) employees
Which governs?
If the latter, Gilbert analysis still remains wrt male ee spouse benefits and this ≠ "sex" disc.
If the former, dissent in Gilbert wins the day (this seems more in keeping w/ Congress' intent)
What of disp. impact on female ees, if male ee package of benefits worth less? Manhart may imply no problem if alternative is disp. treatment vs. male ees.

IV.

1. Procedural Qs:

(a) VII

(1) Does VII cover overseas employment?
701(i) = yes "between a State and any place outside"
All parties are U.S. citizens & corps.

(2) Timeliness
180 days filing restriction after "the alleged unlawful emp. prac. occurred"
All contracts outside 180 day period but "change of status" for P (perhaps triggering 1st tier) is w/in 180; compensation factors (paychecks, trips, etc.) are w/in 180 and may trigger "contin. disc." (Evans; Ricks)
Tolling of S/L due to overseas service?

(3) Laches
Leaving charge for 3½ years w/EEOC probably no bar

(b) EPA

(1) No stat. bkg. on extra territoriality

(2) Even for "wilful" violations, 3 yrs. is limit; taking last possible date (May 1978) for unequal comp.,
Jan. 1982 is too late

2. Substantive Qs:

(a) EPA

(1) Does she do equal work? (clearly "paid" less)
yes, "skill, effort, responsib, work cond." formula met; no facts indicate differentiation in job duties

(2) Is less pay "bacause of sex"?
disp. treatment theory = no
disp. impact theory = compar. of 1st tier (50% male female) vs 2nd tier (99% female) = perhaps

(3) ER Aff. defense
(any other factor other than sex"
doesn't include market to extent women will work for less (Corning)
may include market in recruiting for jobs sense

(4) Is this "pay"? Some yes, some no.

(b) VII

(1) "discrim . . . compensation" covered in 703(a)

(2) Rennett Amendment no bar, (Gunther), but complicates theory

(3) How does VII apply?
(a) P.f. case:
1. No indiv. disp. treatment unless other divorcees (male) not upgraded upon divorce, 1° purpose "direct evid. of intent disc."

2. Systematic disp. treatment not applic. (published rule)

3. Disp. Impact -- #s look strong but must compare w/ "qualified applic. pool" wh/ may be at least as fully female

(b) Defense - "bus. nec." for recruiting fairly wide
"other factor" - see above