FINAL EXAMINATION
in
EMPLOYMENT DISCRIMINATION LAW

December 6, 1984

Professor Shanor

This three 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, the typing room, or the smoking room.

Read, think, and organize before you write.

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

Write your exam on each bluebook and on each page of the exam in the space provided. Return the exam questions with your blue-books.

GOOD LUCK!

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I.
(1 hour)

Four short-answer questions follow. Please give your reasons for concluding that the following would be legal or illegal under federal employment discrimination laws, citing authority when appropriate:

1. A widget manufacturer has received three bids from prospective suppliers of component parts for widgets. The low bid is from a company whose president is a woman. A died-in-the-wool sexist, the widget manufacturer refuses to deal with her because, in his opinion, "a woman's place is in the home."

2. An insurance company desires to cope with the fact that its sales force is only 4% black in a geographic area that is 25% black. Its personnel director suggests an "affirmative action program" of filling alternating entry-level vacancies with blacks and whites; the best-qualified black would be given the first job opening, the best-qualified white would be given the second job opening, etc.

3. A university proposes to raise the salary of its female art history professor by 20% to match a competing offer of another university without simultaneously raising the salary of its male art history professor.

4. Connecticut law provides "no person who states that a particular day of the week is observed as his Sabbath may be required by his employer to work on such day" and "an employee's refusal to work on his Sabbath shall not constitute grounds for his dismissal."

5. American Cyanamid's "fetus protection" policy gives women of "childbearing capacity" the choice between sterilization and their jobs. The jobs at issue involve exposure to chemicals harmful to fetuses. Under the policy, women aged 16 to 50 are deemed to be of childbearing capacity unless they present proof of surgical sterilization.

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II.
(30 minutes)

Aldona Petrulis filed charges with EEOC alleging sexual harrassment and sex discrimination by her employer, International Harvester. Her charge specified that Thomas J. Thomas, for whom she had worked as a secretary, had harassed her in a number of unmentionable ways which eventually led her to resign her employment. The charge is still pending with the EEOC.

Thomas filed suit for libel in state court, alleging that the statements in the charge were false, that they were made with a malicious intent to injure him, and were libellous per se. He also alleged that he lost his job with International Harvester because of the allegations in Petrulis' charge.

As a law clerk for the state court judge scheduled to rule on Ms. Petrulis' motion to dismiss, you have been asked to write a brief memo advising the judge whether Title VII forecloses, preempts, or otherwise requires dismissal of this action.

III.
(30 minutes)

Dr. Bob Leftwich, a 47-year-old tenured white biology professor at Harris-Stowe State College in St. Louis, was rejected for rehire to the faculty in 1979, when the school passed from management by the St. Louis Board of Education to management by the Board of Regents of the Missouri State College System. The circumstances of this rejection follow.

Upon taking over Harris-Stowe, the Board of Regents decided to hire new faculty and staff. It invited incumbent faculty members to apply for positions, hired Dr. Warren Joseph of Educational Management Consultants to recommend appropriate personnel policy, and announced an intention to reduce the number of tenured positions on the faculty.

Dr. Joseph recommended, inter alia, that the biology department be reduced to one tenured position and one untenured position. After giving "competency tests" to all candidates, Dr. Joseph recommended for the tenured position Dr. Nathaniel Watlington, a 62-year old black man who had taught in the department for 20 years as an assistant professor. He recommended Dr. Sam Brown, a 30-year old white male, for the nontenured position. The Board of Regents accepted these recommendations without discussion after listening to Dr. Joseph's recommendations and reasons.

Dr. Leftwich, after complying with all procedural prerequisites, filed suit against the Board of Regents under Title VII and the ADEA in federal district court. At trial, the evidence showed that Leftwich scored higher than Watlington but lower than Brown on the competency tests. Dr. Joseph testified that he had recommended Watlington over Leftwich because Watlington "would make a better role model for the predominantly black student body because he is black." Statistical evidence was introduced showing that there were 21 black and 31 white teachers at Harris-Stowe State College before and 19 black and 16 white faculty members after the reorganization. A letter from the Board of Regents to Dr. Leftwich was introduced which said that "budgetary considerations resulting from tenure density led to your rejection." Uncontroverted evidence revealed that, nationally, older faculty members were more likely to have tenure than younger faculty members.

Rule on Dr. Leftwich's claims, giving reasons for your rulings.

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IV.
(1 hour)

Based upon the following findings of fact, District Judge Tanner found unlawful sex discrimination under Title VII in AFSCME v. State of Washington. As a circuit court judge on the appellate panel hearing this case, draft a short opinion affirming or reversing the district court.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

All of the evidence and supporting documents have been meticulously examined. Many of the proposed Findings and Conclusions were modified, some not included, and others developed by the Court. All were systematically checked against the record. The Court has also read the cases cited by either party as possible authority concerning any issue in the case. Based upon a complete and exhaustive examination of the controlling law, briefs and arguments of counsel, and upon a preponderance of the evidence found credible and the reasonable inferences drawn therefrom, the Court now makes the following:

A. FINDINGS OF FACT

1. Plaintiff's include all male and female employees of all job classifications under the jurisdiction of DOP and HEPB which were 70% or more female as of November 20, 1980, or anytime thereafter.

2. Defendants include the State of Washington, its agencies and institutions, its legislature, and individuals in their official capacities for the State of Washington. (Defendant's PFF # 1).

3. The Plaintiff's filed timely charges with the EEOC on September 16, 1981. The EEOC took no action on Plaintiff's charges. On April 23, 1982, the United States Department of Justice issued Notices of Right to Sue to Plaintiffs. Plaintiffs filed their complaint herein on July 20, 1982.

4. The State of Washington operates two Civil Service systems. The Higher Education Personnel Board (HEPB) has jurisdiction over all classified employees at the institutions of higher education pursuant to Wash.Rev.Code § 28B.16. The State Personnel Board (SPB), and Department of Personnel (DOP) have jurisdiction over all classified employees at the State agencies pursuant to Wash.Rev.Code § 41.06.

5. There are approximately 45,000 classified personnel within these two systems. Plaintiff's Class is constituted entirely from these classified employees. (Defendant's PFF # II, p. 1).

6. In May 1971, then Governor Daniel J. Evans signed into law an amendment to the State Law against discrimination prohibiting employment discrimination based on sex. The amendment became law in July 1971. (Plaintiff's Exhibit 33 in Opposition to Defendant's Motion for Summary Judgment).

7. Prior to July 1971, discriminatory acts were prohibited only on the basis of age, race, creed, color, or National origin. Sex was not considered a factor for which discrimination could be charged.

8. In a memorandum of December 17, 1971, to Agency Representatives, Leonard Nord, Director of Department Personnel of the State said, "... This new amendment is broad in its impact and its passage by the legislature emphasizes not only a change in attitudes about the traditional roles of men and women but also recognizes the needs and realities of this age." (*Id.*)

9. The record is replete with contemporary letters, memorandums and reports, such as Leonard Nord's above noted memo of December 17, 1971. To this Court they indicate an administrative history that reflects knowledge by Defendant of sex discrimination in State employment since no later than March 24, 1972.

10. As early as the 1950's and as late as 1973, the Defendant deliberately ran help wanted ads in the "male" and "female" columns of newspapers throughout the State. (Plaintiff's Exhibit # 153). Plaintiffs offered no evidence that sex was a bona fide occupational qualification for the jobs advertised or that they were not responsible for the placement of these segregated classified ads.

11. Employer actions, such as use of segregated classified ads, have the expected effect of creating and perpetuating a segregated workforce. (Testimony of Eleanor Holmes Norton).

12. By letter of November 20, 1973, to then Governor Daniel J. Evans, of the State of Washington, Norm Schut, then Executive Director of the Washington Federation of State Employees, stated that "...the Boards have perpetuated the discrimination against women in salary setting that permeates through the private sector and other governmental units." (Plaintiff's Exhibit # 41C). Governor Evans responded by letter of November 28, 1973, directed to Douglas Sayan, Director of HEPB, and Leonard Nord, Director of DOP, stating in part that, "...If the State's salary schedules reflect a bias in wages paid to women compared to those of men, then we must move to reverse this inequity." (Plaintiff's Exhibit # 41D).

13. The two Boards conducted a joint study, and on January 8, 1974 the Directors of the Boards issued the results of their study. Their conclusions include: "There are clear indications of pay differences between classes predominately held by men and those predominately held by women within the State systems. Such differences are not due solely to job 'worth'. Further study is necessary to accurately determine the amount of salary differences and all classes to which a 'correction' would apply." (Plaintiff's Exhibit # 2).

14. Pursuant to the recommendations of both Boards, Governor Evans contracted for an outside, independent comprehensive study of State government salaries to look into reports of discriminatory pay scales. The consulting firm of Norman Willis & Associates was recommended by the Director of the Department of Personnel and retained to perform the study. The concern of the Evans administration throughout this period of time was the "elimination of all forms of discrimination." (Plaintiff's Exhibit # 41K & L).

15. The purpose of the 1974 Willis study was to "examine and identify salary differences that may pertain to job classes predominately filled by men compared to job classes predominately filled by women, based on job worth. Alternative suggestions to correct disparities were to be provided." (Joint Exhibit # 2, p. 1). The 1974 study examined 59 predominately male classifications and 62 predominately female classifications. The jobs to be examined were selected by representatives of the two personnel boards. "Predominately" was defined as 70% one sex or the other. The 70% cut-off was determined by the State's representatives. An evaluation committee was established, consisting primarily of representatives of State agencies and institutions. Evaluations of each classification were arrived at by consensus. (Joint Exhibit # 2, Testimony of Norman Willis).

16. The 1974 Willis report stated that:

> The conclusion can be drawn that, based on the measured job content of the 121 classifications evaluated as a part of this project, the tendency is for women's classes to be paid less than men's classes, for comparable job worth ... Overall, considering both systems together, the disparity is approximately 20 percent.

(Joint Exhibit # 2, p. 20).

17. The 1974 report also found that the degree of discrimination increased as the job value increased. For jobs evaluated at 100 points, men's pay was 125% of women's pay. For jobs evaluated at 450 points, men's pay was 135% of women's pay. (*Id.*, p. 13).

18. In December 1974, Governor Evans held a press conference, at which time he stated:

> We found that there is, indeed, a general relationship which results in an average of about twenty percent less for women than for males doing equivalent jobs ... I think that steps ought to be taken to rectify the imbalance which does exist ... There are two basic lines. One follows the practice for those positions filled primarily by males. The other by women. You can see the disparity which does exist...

(Plaintiff's Exhibit # 41–O)

19. By memorandum of April 9, 1975, Directors Nord and Sayan provided an update to the Willis comparable worth study.

The update computed the cost of eliminating discrimination by increasing the salary for all classifications with a given number of points to the average salary of the male classification with that number of job evaluation points. The update showed that the cost of equalizing salaries for jobs with the same number of points would be approximately 10 times as much for predominately female jobs as for predominately male jobs. (Plaintiff's Exhibit # 5, Testimony of Leonard Nord).

20. In 1976, Willis & Associates were retained by the Defendants to do an update of the 1974 wage discrimination study. The express purpose of the study, pursuant to a decision by Governor Evans, was to "establish a program leading to implementation of the comparable worth study completed in September 1974." (Plaintiff's Exhibit # 3, p. 1).

21. The update also evaluated 85 additional classifications and developed a formula for computing comparable worth rates of compensation based on a comparable worth salary line. The State continues to employ the methodology developed by Willis. (Joint Exhibit # 3, Testimony of Norman Willis).

22. This methodology purports to value each employment classification on the basis of four factors: knowledge and skills, mental demands, accountability and working conditions. The total of the value of these four components constituted the final point value for the Class. (Joint Exhibit = 4).

23. In December 1976, just prior to completing his third term, Governor Evans included a $7 million budget appropriation to begin implementation of comparable worth. (Plaintiff's Exhibit = 41 BB). The same month, the State Personnel Board adopted a resolution stating that:

> ...the Board supports the correction of disparities identified by the study and that salaries will be based on prevailing rates except where such criteria do not adequately compensate the employee based on the concept of comparable worth.

(Plaintiff's Exhibit = 41 AA).

24. Governor Dixy Lee Ray became the successor to Governor Evans in 1977. She took the appropriation out of the budget even though there was a surplus in the 1976–77 State budget that could have been used to pay Plaintiff's their evaluated worth. (Testimony of Joseph Taller).

25. In her Message to the Legislature of January 15, 1980, Governor Dixy Lee Ray said, "...That survey revealed an average salary difference of 20 percent, favoring men over women for work of similar complexity and value. Because of the cost of bringing women's salaries up to men's, the only thing that we ... and I include the Governor with the Legislature in this ...have done about that 1974 study, was to have it up-dated [sic]. The update revealed that since salary increases have been established on a percentage basis, the inequality gap between men's and women's salaries for similar work has now increased. The dollar cost of solution will be high; it probably cannot be achieved in one action. But, the cost of perpetuating unfairness, within State government itself, is too great to put off any longer...." (Plaintiff's Exhibit = 186, p. 7).

26. In 1977, the State legislature amended the State compensation statutes to provide that, in conjunction with the salary survey findings, HEPB and DOP should furnish the Governor and the Director of Financial Management with supplementary data indicating differentiation in compensation for jobs of comparable worth. The amendment provided that "[a]dditional compensation needed to eliminate such salary dissimilarities shall not be included in the basic salary schedule but shall be maintained as a separate salary schedule for the purposes of full disclosure and visibility." Wash.Rev.Code §§ 41.06.160(5) and 28B.16.110. (Joint Exhibit 6A).

27. HEPB and DOP have each submitted supplemental salary schedules since 1977.

28. Plaintiff's case does not require this Court to make its own subjective assessment as to "comparable worth" as to the jobs at issue in this case.

29. "Comparable Worth", as defined by the Defendant, means the provision of similar salaries for positions that require or impose similar responsibilities, judgments, knowledge, skills, and working conditions. (SSB 3248, Defendant's Exhibit AAAA).

30. In 1983, subsequent to filing of the instant suit, the State legislature passed two comparable worth implementation bills: Substitute Senate Bill 3248 (SSB 3248) and Engrossed House Bill 1079 (EHB 1079). EHB 1079 appropriated $1.5 million to increase the salaries by $100.00 a year of occupants of job classifications for which the current salary range is more than 8

ranges (20%) below the comparable worth range, as shown by the 1982 supplementary salary schedule. The salary increase is not payable until July 1984. (Defendant's PTO ≠ 2; 1983 Wash.Laws, 1st Ex.Sess., Ch. 75 and Ch. 76 § 135).

31. SSB 3248 calls for implementation of salary changes necessary to achieve comparable worth in compliance with the findings of the DOP and HEPB supplemental surveys, and provides that such implementation "shall be fully achieved not later than June 30, 1993."

32. The total number of job classifications that have been evaluated as of 1982 is 284. There are other classifications that are included in Plaintiff's Class Action which have not been evaluated at this time.

33. There are approximately 15,500 employees who are included within the Plaintiff's Class Action. All of the individual Plaintiffs within the Class have not been identified at this time.

34. In addition to testimony and documentary evidence Plaintiffs submitted general statistical data, prepared over a period of years by Defendant, tending to show a general pattern of discrimination by the Defendant against women. This data, when considered together with substantial other non-statistical evidence, provides evidence of a pattern of sex discrimination in employment by the Defendant.

35. The State did not pay, and has not paid, predominately female jobs the full evaluated worth of their jobs as established by the State's own job evaluation studies.

[20] 36. The wage system in the State of Washington has a disparate impact on predominately female job classifications. Several comparable worth studies, since 1974, found a 20% disparity in salary between predominately male and predominately female jobs which require an equivalent or lesser composite of skill, effort, responsibility and working conditions as reflected by an equal number of job evaluation points. (Joint Exhibit ≠ 4). There is a significant inverse correlation between the percentage of women in a classification and the salary for that position. (Testimony of Dr. Stephen Michelson).

37. Defendant failed to produce credible, admissible evidence demonstrating a legitimate and overriding business justification. What evidence Defendant did introduce did not rebut the Plaintiff's prima facie showing of disparate impact nor did Defendant's evidence outweigh the countervailing national interest in eliminating employment discrimination.

38. Implementation and perpetuation of the present wage system in the State of Washington results in intentional, unfavorable treatment of employees in predominately female job classifications. Credible, admissible, statistical evidence, bolstered by relevant circumstantial evidence, supports this finding of disparate treatment.

39. Evidence which, when considered as whole shows discriminatory intent, includes the historical context out of which the challenged failure-to-pay arose (FF ≠ 10, *supra*, fn. 11, *infra*); obstacles that confronted employees in the predominately female job classifications and subjective employment practices utilized by the Defendant resulting in a pattern disfavoring those employees (FF ≠ 11, *supra*); the foreseeable adverse impact of those practices (FF's ≠ 12, 16, 18, 25, *supra*); the proposed increase in pay to the Plaintiff's since filing of the instant suit (FF ≠ 30, *supra*); and recognition of disparate treatment by responsible State officials (FF's ≠ 12, 16, 18, 25, *supra*).

40. Defendant failed to produce credible, admissible evidence raising a genuine issue of fact as to whether it discriminated against the Plaintiffs herein. What evidence Defendant did introduce did not rebut the Plaintiff's prima facie showing of disparate treatment, nor did Defendant's evidence frame the factual issue with sufficient clarity so that the Plaintiff would have a full and fair opportunity to demonstrate pretext.

41. All job classifications which were 70% or more female as of November 20, 1980, or anytime thereafter, are within the Class definition and all employees currently in those classifications are entitled to a remedy.

42. Defendant presented evidence in support of its opposition to remedy. Specifically, that evidence was as follows:

a. that there is unemployment and a recession in the State of Washington. (Defendant's PFF Nos. 20–24).

b. that because of the depressed economy State revenues are diminished. (Testimony of Mr. Joseph Taller; Exhibits JJ, KK, LL).

c. that other demands on the State treasury prevent full and complete implementation of comparable worth. (Defendant PFF Nos. 16–19).

d. that Art. 8, § 4 of the Washington State Constitution prohibits deficit spending. (Defendant PFF ≠ 12).

e. that the cost of full and complete implementation of comparable worth salary increases would be prohibitive. (Testimony of Joseph Taller).

f. that full and complete implementation of comparable worth would be disruptive of State government. (Testimony of Joseph Taller).

43. Defendants have failed to present evidence that would tend to show good faith, in failing to pay Plaintiffs their evaluated worth. (Plaintiff's Exhibit Nos. 2, 110, 186).

Insofar as any of the preceding Findings of Fact constitute Conclusions of Law, they are hereby adopted as such.

Answers Outline to Employment Discrimination Exam
December 6, 1984

I. 1. Title VII and other fed. e.d. laws don't govern independent contractor or purchase-supplier relationships e.g. Section 703. Possibly a violation of EO 11246 if widgets are being supplied to the USA. Possibly local or state law protections, 1981 not applicable to discrimination sex.

2. A. A. programs receive limited shelter under Weber (construing Section 703(j) as permitting vol. A.A.), but must be designed to overcome "old patterns" of segregation, not "unnec. trammel" whites, not be an obsolute bar, and be a "temporary measure." Arguably, this isn't a plan at all, but only ad. hoc.; may not be rooted in seg. patterns, may go too far. No BFOQ defense for race and "bus.nec" inapplicable to intentional discrimination (but see Miller; however, Miller-type authenticity concerns not present here). Compare Santa Fe

3. Do the two art history teachers do "equal work" within EPA? If not, no violation. If so, issue is whether economic forces are affirmative defense ("factor other than sex")? Corning says no where "women willing to work for less" but some recent case law (compare Robert Hall Clothes) says you can meet the competition. Under VII, jobs don't have to be equal (Gunther; Section 703(h) Defenses of EPA incorporated, but perhaps business necessity also a defense. Lack of case law with male plaintiffs under EPA.

4. Title VII permits state law supplementation but not state laws requiring or permitting "unlawful employee practices." (Section 708) Only de minimus accommodation of religion required by VII (TWA v. Hardison) because of fear of establisment of religion contra to 1st Amendment Title VII could not go further; likewise, this state law may unlawfully establish religion (Sabbatarianism).

5. Theoretical framework choices: disp. impact, disp. treatment, BFOQ, Bus. necessity (Wright v. Olin Corp.). May be treatment since focuses on women only (see Manhart), at least under Section 701 (k) definition (pregnancy, childbirth, or related medical conditions"). BFOQ defense very narrow (Weeks-Diaz, Rosenfeld, Dothard), requiring ER to show (1) only women's reproduction affected, (2) all women affected (perhaps loosened a bit if no testing alternatives possible), (3) no less obvious alternatives available. Bus. necessity defense may be easier if safety wrt fetuses "reasonably requires" this program.

II. 1. Is content of charge privileged?

a. Quasi-judicial functions of EEOC
b. Anti-retaliation analogy with more absolute protection for charges than other activities (Section 704)
c. Confidentiality provision (Section 706 (b))

2. Preemption of State action?

a. Section 708 doesn't relieve people from "liability duty, penalty or punishment" under state law
b. Is libel suit "an act which would be an unlawful employment practice" under Section 704 (retaliation)
c. Isn't proper forum for libel as
(1) defense to Title VII charges?
(2) counterclaim in fed. ct. action?
d. Frivolous P suits= atty fees (Christensburg)

III. A. Race claim (Leftwich vs. Watlington)

1. Whites Protected (McDonald v. Santa Fe)
2. Disparate Treatment
a. P.F. Case
1. Smoking gun: blacks teach blacks better
2. Mc-D: memos, qualified, denied, filled
3. Statistical support 21B/31W 19B/16W
but sample small, whole univ. context
b. Legit, nondisc. reasons
1. Not "tests" (L beat W!)
2. "Role model"? Hazelwood pupil race irrel. No race BFOQ (nor even not non-disdiscrim. "authenticity")
c. Pretext: not really relevant here

B. Age claim (Leftvich v. Brown)

1. Within 40-70 vs. 30 yr. old
2. Disp. impact
a. P.F. case
1. National figures
2. Tenure/older correlation (Gellar v. Markham)
(Rehnquist dissent)
b. Rebuttal/defense
1. "factor other than age"?
2. "legit, nondisc. reason"?

IV. A. Standard of Review - Pullman Standard v. Swint
1. Facts

2. Law

B. Holding Possibilities
   1. Int. Disc. (VII, not EPA)-Gunther OK-Evidence of intent to discrim. vs. Evid. of intent not to pay "comp. worth."

   2. Impact Disc. (VII)
      -Does Gunther permit?
      -Post-Gunther caselaw - this is C/A
      -What is the impacting policy or practice?
         -Griggs to Pouncy case analysis
         -"Refusal to implement" comp. worth?

   3. Comp. Worth
      -Actionable? (Gunther & followups indicate No)
      -Role of market?
      -Not addressed by judge
      -Addressed by defendants? Only opposition to remedy?
      -Refusal to pay evaluated worth in context of own studies (Gunther)

C. Miscellaneous
   1. Historical Bkg. vs. 1981 charge
   2. Remedial "Armageddon" and Manhart?