Exam Number _____

FINAL EXAMINATION
in
EMPLOYMENT DISCRIMINATION LAW

December 13, 2002

Professor Shanor

This 2½ hour exam contains 6 short answer questions. Credit will be allocated approximately equally for each question.

Handwritten exams. Please write your **exam number** on each of the exam pages. Write all your **answers in the space provided on the answer sheets**. If you have especially large handwriting, you may write a bit in the space at the bottom of the answer pages for each question.

Typed exams. Please write your **exam number** on each of the exam pages and at the top of each page of your answers. You may use **25 typed lines to answer each question**. Type your answers in **12-point** or larger font using side margins of not less than **1 inch** and **normal spacing** between letters and words.

All exam questions must be returned at the end of the exam, whether you write or type your answers!

This exam is **open book**. Computer research, downloading, and electronic cutting and pasting are forbidden, as is assistance from any other person. Moreover, since the exam is being administered at different times, **do not discuss the exam** in front of classmates who may not have taken it. This exam is covered by the **honor code**.

If you think you need **additional information** to analyze any question, state what you believe is needed and why it makes a difference.

Read, think, and organize before you write!

GOOD LUCK AND HAVE A HAPPY HOLIDAY!

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Questions
(25 minutes and lines per answer)

1. Justin Travis had felt uncomfortable "inhabiting a male body" ever since attending high school. In 1997, Travis changed his name to Julienne Travis, began taking female hormones, and commenced to dress and groom as a female. In July of 2002, Travis began to work for West Publishing Company. When two female employees complained of Travis' use of the women's restroom and made derogatory comments to Travis about his use of the "wrong bathroom," the director of human resources issued a memorandum stating that it was the policy of the company that "all employees use the bathroom appropriate to their biological gender." Travis objected to the policy, refused to comply with it, and was threatened with disciplinary action. When he continued to use the women's restroom and cited the "undue stress, hostility, and degradation I suffered from the company's policy and employees' snide comments," Travis was terminated. Has West violated Travis' rights under any federal employment discrimination laws?

2. The University of Wisconsin at Whitewater has an affirmative action plan adopted in 1990 that provides, among other things, that the sexual composition of each department should mirror the percentage of males and females awarded doctorates nationally in that department's discipline. When a male faculty member, Perot Ross, came up for tenure in the psychology department last semester, the department's faculty voted to grant it. The Dean of the College of Arts and Sciences, however, blocked the appointment with tenure, noting that the psychology department needed three more female professors to reach parity with the 62% goal for the department based on doctorates awarded nationally in psychology to females. Advise Ross about his chances of overturning the Dean's decision.

3. Following the Al Qaeda attacks on the World Trade Center and the Pentagon, Iraqi-born Amar Amiroki's coworkers and his immediate supervisor began calling him "the local terrorist," a "camel jockey," and "sand nigger." Shortly after the United States began to discuss possible invasion of Iraq, co-workers said: "Do you have any weapons of mass destruction?" and "You should shave your Hussein look-alike moustache." Amiroki did not bring these comments to the attention of the human relations department, but resigned because "the abuse was giving me ulcers" (a serious condition verified by two physicians). Upon hearing the circumstances of Amiroki's departure, the human relations director sent a strongly-worded memo to all company employees reaffirming the company's commitment to maintaining a discrimination-free and harassment-free workplace. Evaluate Amiroki's likelihood of succeeding on a national origin harassment claim.

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4. The Uptown Marriott rejected Cool Hand Luke's application for employment as a massage therapist in the hotel's spa. Luke, a 45-year-old African-American who is certified as a massage therapist, has filed a charge with EEOC alleging sex, race, and age discrimination. It is the Marriott's published practice to fill massage therapist positions "with males or females, depending on customer demand and business needs." As the lawyer for Uptown Marriott, you have learned that 72% of the Marriott's massage clients request female massage therapists, that the company currently employs ten female and five male therapists, and that there are no African-American or over age 40 massage therapists at the Uptown Marriott. Massage therapists may touch and manipulate customers' abdominal areas and thighs, but clients can instruct therapists not to massage particular body parts and therapists do not touch or view the genitals of males or females. Advise Marriott concerning its exposure to liability based on Luke's charge.

5. Missiles Systems (MS) has an unwritten policy of not rehiring employees who were terminated or who resigned in lieu of termination because they ran afoul of personal conduct rules. Joel Hernandez, who worked for MS in 1998, tested positive for cocaine during a workplace drug test and was allowed to resign rather than face termination. Since successfully rehabilitated, Hernandez recently applied at MS for an opening in the same job he had previously held, but was rejected because of the company policy. The person who actually rejected Hernandez's application did not know about Hernandez' past drug problems, but only that he had resigned following a "personal conduct" violation. Hernandez asks your advice about his chances of prevailing against MS under the ADA. Advise him.

6. A recent EEOC policy document states, in part: "Dress codes must not treat some employees less favorably because of national origin. For example, prohibiting traditional African or Indian attire but otherwise permitting casual dress could violate Title VII. When a dress code conflicts with religious practices, the employer must modify the dress code unless doing so would result in undue hardship." Your client, a fast-food chain, requires its employees to wear khaki pants and short-sleeve polo-style navy blue shirts. The company president says the employee dress code is an important component of its neat, hygienic presentation to the public and a key aspect of its brand recognition by customers. Advise the company as to whether it should change its dress code and, if so, how.

[redacted]

Class Name: employment discrimination
Professor Name: Shanor
Exam Date: Friday, December 13, 2002

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Quesion 1

First, Travis could argue under a sexual harassment claim that he was discriminated against due to a hostile work environment. Travis could argue that sex-plus another characteristic, such as his effeminate transgender identity has caused him to be harassed at work. Travis could argue, as in Oncale, that while the harassment was not motivated by sexual desire, it was motivated because of his feminine look, dress, and identity. Travis would need to show that the env/treatment received was due to his sex (or sex-plus another characteristic – see above). Second, Travis would need to show intimidation or a hostile environment through the comments and policy. Third, Travis may have difficulty showing the hostile environment was severe and pervasive. It is difficult to determine if there have been numerous comments and if the comments were offensive enough that a reasonable person would find this to be severe. While Travis may have actually found the env hostile, a reasonable person would also have to find it severe. This is not likely to occur. Forth, Travis should be able to show the comments were unwelcome. In sum, this claim would fail as the environment would not likely be found severe and pervasive. There is no evidence of any disparate impact from this facially neutral policy. Furthermore, West is treating all males and all females the same so this claim would fail. In addition, Travis would not have a disability claim. ADA section 101-102 specifically excludes various sex related conditions. Travis would not qualify as an IWD as he does not have a physical or mental impairment that substantially limits a major life activity. In addition, he does not have a record of and is not regarded as having an impairment. Thus ADA would not apply and Travis is not entitled to any reasonable accommodation for his trans-gender persona to use the women's bathroom.

Could also argue Individual DT under McDonnell Douglas by using the sex-plus protected characteristic and was constructively discharged (Jurgens). But D would have legit non-discrim reason as it disrupts the workplace. Travis could then argue pretext. Thus, there would be no claim under any federal employment discrimination law.

good 14

Question 2

While Title 7 (T7) does not prohibit AA (affirmative action), because the intent of the statute and AA is to break patterns of segregation and discrimination, Ross would have a good chance of overturning the Dean's decision. Ross would meet his prima facia case by showing that sex was taken into account. The burden then will shift to the University to show an AA reason. In order to have a legitimate voluntary affirmative action plan, the University must show there is a manifest imbalance in a traditionally segregated job. Tenured professorship positions have likely been primarily held by males, however, there is no evidence that there is a current imbalance when comparing the women with tenure to the general population with the requisite of having a doctorate. Ross could find statistics for the local area to determine if there is a manifest imbalance in this area. However, the university may show that women with doctorates may be willing to transfer to a new area for a tenured position. If the University was able to meet their burden, Ross would then need to show the AA plan is invalid. Ross could argue there was no plan. The university appears to be using more of a quota system and not more flexible goals. Ross could argue no manifest imbalance (see above). Ross could argue that the university unnecessarily trammeled interests of males because did not appear to take a variety of factors into account when it bared Ross solely because he was

then try to argue a **defense**. First the employer would argue that they should not be vicariously liable for the supervisor and co-worker's comments. The employer would argue they did not intend the comments of the supervisor and co-workers which were not within the scope of employment. They could also argue the direct supervisor was not high enough in rank to be considered the employer's alter-ego. However, Amiroki could argue that the employer was negligent if it knew or should have known about the conduct and failed to stop it. As the employer found out not too long after, Amiroki would have a good claim the employer should have known. The employer would then argue the Ellerth defense that it exercised reasonable care to prevent and correct promptly by sending the letter as soon as it found out AND Amiroki unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer to avoid harm. If the employer had sufficient practices in place following strong anti-harassment standard, then the employer would likely prevail as Amiroki did not seek assistance. There could be factual issues if the employer did not make known any procedures to get assistance if discrimination. Could also argue constructive eviction for damages.

very good 15

Question 4

Luke would have a good claim under systemic disparate treatment under a general pattern or practice as there is no formal policy (Manhart). Statistics alone are enough to support a prima facia case for pattern & practice (Hazelwood, Teamsters). However, anecdotal evidence is always important to bring if available (Sears). Luke's claim for both race and age discrimination is clear as there is overwhelming statistical evidence (inexorable zero) greater than the 4/5 rule and the 1.96 SD to show that the patterns are

not random. Luke could show that this was the regular rather than the unusual practice by a preponderance of the evidence (Teamsters). Marriott could try to defend by showing a legitimate non-discrim reason, rebutting the statistics and that there were no blacks or applicants over 40 who applied. Also could use demographic statistics to show the qualified population in the relevant labor market did not have many blacks or over 40's. In addition, Marriott may be able to limit their liability if they are able to show that those who were actually hired instead of any blacks or over 40 were better qualified. Marriott would have a better claim under the sex discrimination charge. Luke could show statistical evidence of a gross disparity b/t males and females which is the regular practice. However, Marriott could rebut to show a legit non-discrim reason. 33.3% of employees are males and the request for females is 73%. Thus, Marriott is hiring more males than requested since by need, they would only hire 27% males. Marriott could arso argue a BFOQ that it was reasonably necessary to normal operations to hire more women (this would not be a defense under a race claim). Marriott could show it was more than just a convenience issue. Due to the systemic claim, there would be a presumption that Luke was individually discriminated against. Even if the SDT failed, Luke could argue individual DT. Under McDonnel Douglas, would make PFC by showing minority, qualified, rejected, and position remained open. Marriott would then try to argue a legit non-discrim reason which Luke could rebut as a pretext that the trait had a determinative influence on the outcome.

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Question 5

Hernandez would not likely prevail against MS under the ADA. Section 104a states that IWD does not include any employee or applicant who is **currently** engaging in the illegal use of drugs, however an IWD can include those who have successfully completed a supervised drug and rehab program and is no longer engaged in the illegal use of drugs (ADA 104b). Thus, it is possible (but not likely) Hernandez could meet the requirements of a disability. While he does not have a physical or mental impairment that substantially limits a **major life activity** (does not affect his ability to care for self, manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working - Toyota), Hernandez may have a **record** of impairment or could be regarded as having an impairment. There is no evidence that the employer had knowledge that Hernandez went into treatment. The person rejecting Hernandez only knew that he resigned following a "personal conduct" violation. It is not likely that the employer **regarded** Hernandez as having a disability since the decision-maker did not even know of the drug problem or any other disability. As Hernandez does not meet the definition of an IWD, he would not be entitled to any protection under the statute. Even if he were regarded as disabled or if the employer could have found out he had a record of being disabled, he would not be entitled to any accommodation since this is only allowed if he were an actual IWD. If disabled, he would be qualified as there is no evidence that he would be unable to perform the essential functions of the position. In addition, if for some reason Hernandez was found to be an IWD, MS could argue that their unwritten policy is job related and a business necessity as it is too burdensome to take all employees back that are forced to resign or terminated d/t improper personal conduct which would not be a protected characteristic. This accommodation would be too costly or difficult that could constitute

an undue hardship (true defense, Dexler) on the employer if forced to take back and give all employees a second chance who used illegal drugs and may relapse in the future. 13

Question 6

Dress codes are generally upheld under the theory that people can conform (Willingham – long hair). But, the company may need to change its dress code as sometimes mutuable characteristics can still be found discriminatory (eg. Price Waterhouse – could wear makeup). **Religion discrim** - Even if an employee has a bona fide religious beleif that required certain dress, the employee informed the employer of the need to wear a certain dress, and the employee was discrplied for failing to comply with the dress code, the company could argue **undue hardship**. The employer could argue that any accommodation to allow someone not to conform could cause hardship. The employer uses the dress code as an important component of its presentation to the public and is a key aspect of its brand recognition by customers. Allowing employees to change the basic requirements of the dress could impact business if customers did not know who the employees were. There is likely at least a de minimis cost to the employer by creating this inconvenience to customers (TWA). The employer, however, may need to allow those with religious practices to wear a yamake or headdress along with the basic uniform. The employer may, however, want to modify the dress code to include a statement that case-by-case determination will be made for exceptions to the dress code where it would not cause UH (possible that it could be found that allowing someone to wear traditional religious clothes along with something like a recognized vest may not be UH). Nonetheless, the employer could probably meet the low hurdle for an undue

hardship. Also the employer could argue a **bfoq** that it is reasonably necessary to normal business operations to require the dress code. It would be 'highly impractical' for the employer (if it had many employees) to determine individually if an accommodation could be made. The employee could also argue the dress code had a **disparate impact** on certain religions. If there were statistics to back up this claim that the particular employment practice causes an impact d/t religion, the employer would have the heavier burden of showing business necessity and job relatedness. The employer would still have a good argument, but this is a gray issue so may want to allow for some flexibility.

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NOTE – a couple of answers went over by 1 or 2 lines. I ran out of time to cut. I also couldn't widen margens to 1 inch and hope this won't be a problem. Sorry.