

Exam Number _____

FINAL EXAMINATION
in
EMPLOYMENT DISCRIMINATION LAW

December 13, 2006

Professor Shanor

This 3 hour exam contains 5 short answer questions. Credit will be allocated approximately equally 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 **30 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.

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 or on the backs of the answer pages for each question.

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!

Questions
(30 lines per answer)

1. Nasreen Masood, an immigrant with a history of depression who had worked for the City of Atlanta more than 30 years, was interviewed by the assistant director of human resources, Vicki Frazier. Frazier was investigating whether Masood's supervisor, Gene Hughes, had acted inappropriately with subordinate administrative personnel. Masood told the investigator that Hughes had sexually harassed her and other female employees, including making sexually suggestive comments and gestures to her on several occasions. Frazier's report found that Hughes had engaged in some inappropriate and unprofessional conduct, but not to the extent of Masood's allegations. It recommended training and education for staff members but no disciplinary action against Hughes. Ten months later, Masood was fired for reasons she believes were unfounded. Analyze Masood's claim that her discharge was retaliatory under Title VII.

2. In June 2004, EveryState Insurance Company terminated all 6500 of its salaried agents and gave these agents a choice of a severance package, a retirement package, or contracting with the company to sell EveryState Insurance as independent contractors. At the time of termination, 90% of the salaried agents were over age 40 while 50% of all company employees were over age 40. Soon thereafter, after EveryState began receiving applications from former salaried agents for non-sales jobs with EveryState, it announced a policy of not hiring former salaried agents into non-sales positions for a period of one year from the date of termination. Previously, the company had rehired former employees into any open positions available at the company, except individuals receiving retirement pay from it or individuals terminated by it for poor performance or misconduct. EveryState alleged in litigation that its rehire policy was adopted to avoid confusion for customers who would see former agents working in different jobs, to encourage former agents to participate in the independent contractor sales program, and to avoid having employees receiving severance benefits as well as paychecks. Discuss whether the EveryState rehire bar violates the ADEA.

3. Hamm Sausage Co. has a number of physically demanding jobs that require repetitive lifting of a 35-pound rod of sausages to a height approximately five and a half feet above floor level. Following a series of workplace injuries in the late 1990's, Hamm adopted several new safety standards and, in 2000, began evaluating new job applicants with a strength test. The company has had fewer workplace injuries after 2000. Before the test was adopted, 40% of the new hires in these jobs were women. Because 89% of the male applicants but only 50% of the female applicants passed the strength test, female hires dropped after 2000. Despite the changes in workforce composition, Hamm continued to give the test after being told by its consultant that the test replicated some job tasks. Paula Pork, after filing a timely charge, sued under Title VII on behalf of herself and other female applicants who failed the strength test, though Paula would not have been

hired because an undisclosed felony conviction would have barred her from employment. Discuss the strengths and weaknesses of both parties' positions in this suit.

4. Dar-Dar, an African American paramutual clerk with The Outdoor Club, Inc., filed a Title VII hostile work environment claim after receiving a right to sue letter from the EEOC. Her claims relate to ten incidents over a three year period. The final one, about six months before she filed her charge, involved a co-worker grabbing her buttocks several times one afternoon at an office party. Seven earlier incidents consisted of comments about how various clerks were "morons, idiots, and retards," were "old dogs" incapable of "new tricks," or were "mud brothers" who should be "pooper-scoopers" in the public parks. The other two incidents involved a question directed at Dar-Dar about whether she had ever seen a "built-out butt" and a male coworker's comment that he had just seen "a whale of a dick" in the men's room. The District Court ruled that the comments and final incident were isolated and dismissed Dar-Dar's claim. You are a law clerk for an appellate judge reviewing this decision. Explain whether the court below should be affirmed or reversed and why.

5. Cynthia Barnett has Downs syndrome, a mental disability. She applied for a position at Akin's Natural Food Markets as a grocery stocker accompanied by a "job coach." Tom Akin, the store owner and manager, spent approximately two minutes reviewing Barnett's application and asking her a few questions. He commented as Barnett left that he thought she would not fit in at the store, might be ridiculed, and would not flourish with Akin's. Later, after obtaining a stocker position with the Publix Grocery chain, Barnett filed a timely EEOC charge and later sued Akin for discrimination under the ADA. At trial, undisputed evidence was admitted that Akin's stockers arrange merchandise on shelves, sack and carry groceries, and assist customers. In stocking shelves, stockers read bar codes in order to stock merchandise and turn over older merchandise. Barnett had limited experience with using a scanner in a self-service checkout line, but had not used bar codes for the more complex purposes for which stockers used them. Her job coach testified that he could teach her to operate a product scanner and that he believed that, with experience, she would be able to perform that part of the job. Barnett was fully able to sack and bag groceries and was cheerful to all customers. Testimony showed that she would need to refer some customer inquiries to the manager, contrary to the store rule that employees should immediately stop to help any customer needing assistance. Discuss how the court, in the absence of a jury, should rule on Akin's motion to dismiss Ms. Barnett's case.

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Employment Discrimination Exam Answer Outline
Fall 2006

1. Masood/Atlanta/retaliatory discharge
 - participation clause
 - not “under this Title” because participation only in informal investigation or is that circumvented by Ellereth duties?
 - opposition clause
 - where was the opposition? Only in response to questions
 - does opposition need to be repeated, strong, public?
 - Was 10 months destructive of “because of” aspect of retaliation?
2. EveryState rehire bar/ADEA violation?
 - was there disparate impact?
 - 90% to 50% seems so, but that was for job elimination (not at issue here)
 - ER knew these demographics when it imposed the bar
 - Nonrehires over 40 not affected if applicant pool proper group
 - if DI, follow Smith v. City of Jackson
 - defense is “reason other than age”
 - ER gives 3, issue is whether pretextual; note BAR CAME LATER
 - “avoid confusion”; surely others change jobs
 - “encourage indep. Kor”; why give other options then?
 - “severance+paycheck”; comparable to retirement/pay otherwise?
 - What of DT? Argue at time instituted bar, KNEW demographics, acted because of rather than despite these. See pretext analysis above.
3. Hamm/strength test Title VII/Paula Pork
 - Test impact? High probability if any substantial # of applicants (4/5ths)
 - “job related and business necessity”?
 - “job related”
 - No info about how much strength relative to the 35 lbs. overhead
 - validate test? Not in advance but consultant (post-challenge?) says “test replicated some job tasks”
 - “business necessity”
 - ability to do the job requiring strength
 - avoiding accidents?
 - Is it the strength test or “new safety standards”?
 - Male/female accident info?
 - Hamm as plaintiff in class action (R 23)
 - no problem generally
 - “same decision” due to felony not relevant to class rep, if otherwise ok
 - stage II remedy may be affected (no backpay)
4. Dar-Dar/Outdoor Club/hostile work environment
 - Timely charge?
 - “about six months” needs more info if 180 days, not if 300

- “last act” allows reachback to other incidents (Amtrak v. Morgan)
- On merits, reject rationale of trial court?
 - point of hostile env. claim is cumulation, not isolation
 - but if incidents were stretched out enough, from different folks, etc....
 - What counts for “hostile environment”?
 - If sexual, last incident + the two incidents (butt Q and dick comment)
 - The seven others seem irrelevant
 - If “cumulative hostile environment,” add race, age, disability comments
 - Some under VII, others other statutes
 - Everyone abused (Lombardi defense)?
 - Or only minorities, women, older folks, disabled?
 - ER liability under Ellerth? Reported promptly? ER policies, reactions?

5.