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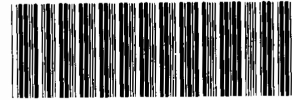
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Employment Discrimination Law
December 18, 1998

Exam Number
Professor Shanor

FINAL EXAMINATION
In
EMPLOYMENT DISCRIMINATION LAW

December 18, 1998

Professor Shanor

This 2½ hour exam contains seven short answer questions of approximately equal weight.

Please write all your answers in the space provided on the exam. I have been generous with writing space; you should attempt to be focused with your answers.

Write your exam number on each of the exam pages and in the space provided below for the Honor Code pledge.

The exam is open book; computers and assistance from other persons is prohibited; additionally, since the exam is being administered to different members of the class at different times, please be especially careful not to discuss anything about the exam in front of classmates who have not taken the exam.

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

Read, think, and organize before you write!

GOOD LUCK!

I acknowledge that in this, as in all other Law School activities, I am bound by the Honor Code.

Exam Number:________________

Employment Discrimination Law
December 18, 1998

Exam Number [redacted]
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Seven short-answer fact patterns follow. Please analyze the legal issues posed by each fact pattern under the employment discrimination statutes we have studied. You are provided with one page of lines on which to analyze each fact pattern (each page is labeled by the name of an employee).

1. Nora Perkins was hired in December 1997 as associate director of a health maintenance organization (HMO) trade association for a 90-day probationary period. During Perkins' job interview, Director Lea Bennett told her that the annual HMO Convention in September would be a large time commitment. At the time of her interview, Perkins was pregnant, but did not inform Bennett of her condition until two weeks after she started work. When told of Perkins' planned eight week maternity leave, Bennett expressed concern about such an absence during the months before the convention, its likely effect on the other employee working on the convention, and that another candidate did not have "this issue." In February 1998, Bennett fired Perkins, saying that Perkins' lack of health care background required the rewriting of letters drafted by Perkins and that Perkins was having trouble finding speakers for the convention. After filing a charge and receiving a right-to-sue letter from EEOC, Perkins filed suit.

2. Angelo Rodriguez, a Roman Catholic police officer in Chicago, sought an exemption through internal complaint procedures from his scheduled assignment to guard an abortion clinic during anti-abortion demonstrations. He cited his religious belief that individuals should avoid participating in or facilitating elective abortions. Following a subsequent assignment to guard the clinic that occurred in the normal course of police beat rotations under the seniority-based job bidding system, Rodriguez filed a charge with the EEOC. The EEOC investigation disclosed that, if Rodriguez had sought a transfer to another precinct, he could have avoided guarding any abortion clinic. He had not sought such a transfer, however, because such a reassignment might have placed him in the line of fire between rival street gangs in the other precinct.

3. Anna Richardson, Mayor of a major American city recently acknowledged that, of 100 positions she had filled in city government since her election in November, 1996, 25 went to black males, 25 to black females, 25 to white males, and 25 to white females. The Mayor has a long history of support for affirmative action, contract set-asides for minorities, and "race and gender fairness." In fact, the city over which she presides is comprised of almost equal numbers of residents in each of these demographic groups.

4. David Koresh, a 58-year-old California-based aeronautical engineer, was given two weeks notice of being laid off on New Year's Day, 1995. The company for which he worked told him this layoff was due to a decline in military business, but Koresh suspected that the real reason was that his pension was scheduled to vest in February, his tenth anniversary with the company, and he had heard that the pension plan was under-funded. When a former colleague told Koresh in August that his job had been taken over by a newly-hired but experienced 50-year-old engineer, Koresh filed a charge of age discrimination with the EEOC. When EEOC processed his charge at what Koresh thought to be a "glacial pace," Koresh obtained a right-to-sue letter in September 1998 and filed a private ADEA suit several weeks later.

5. Phil Quick, a white heterosexual male working as a heavy equipment operator in a plant whose managers and line employees alike were predominantly male, complains of sexual harassment by other employees. First, he complains that he has been "bagged" several times by coworkers. "Bagging" consists of "the intentional grabbing or squeezing of another employee's testicles." Second, he complains that several employees have suggested orally and in writing that he is homosexual (for example, tags were placed on his forklift by various employees calling him a "pocket lizard licker" and accusing him of deviant activities with a cucumber). Phil's employer has no policy against sexual harassment.

6. Geneen Greenfield, a black part-time employee of Help for the Homeless, a small nonprofit organization which dispensed clothing and food to the homeless, found that she couldn't perform her duties within the 20 hours per week of her employment. Greenfield's boss stated that the organization's primary source of funds, the United Way, would not provide enough funds to hire Greenfield full-time. Irritated, Greenfield said "You won't upgrade my job because I'm black. You'll change your tune after I complain of this racism to United Way." Greenfield's boss said "If call the United Way, I'll have to fire you." Greenfield called United Way and was fired.

7. Fred Rogers, after five years on the job, was fired in July by his division supervisor for "poor performance." After his discharge, Rogers told his division supervisor that he had been diagnosed in May with clinical depression, that he had just begun taking medication, that all he really needed to do his job properly was time off for an adjustment period, and that he wanted his job back. Prior to discharge, Rogers had mentioned to both a co-worker and his immediate supervisor that he was "feeling kinda down." He had also, in February, undergone counseling with an Employee Assistance Program (EAP) psychiatrist. No report of that conversation was made to management, however, because of requirements that all employee communications with the EAP remain confidential.

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1. Nora Perkins Taken into account the individual nature of this action, an individual disparate treatment case (IDT) will be instituted. Title 7 sec 703(a) prohibits discrimination against individuals because of sex and that also includes pregnancy, childbirth and related medical conditions. Nora must first make out a prima facie case of discrimination and she can do so either under McDonnell Douglas (indirect evidence) or Price Waterhouse (direct evidence of disc.) Intent to discriminate is required (Slack v Havens) and that can be inferred from Bennett's comments and reaction to Nora's pregnancy. Direct evidence could however also be found in these comments especially Bennett's referral to "this issue". The difference between the McD-D and PWH paradigms lie in the burden of proof required by the defendant: under McDD the defendant will only have to articulate a legitimate non-discriminatory reason which would be Nora's inability to write the letters + to organize the speakers for the convention. Bennett then only has the burden of production + not burden of proof + the ultimate burden of proof is on Nora to show pretext + discrimination based on pregnancy (Burdine). Under PW-House Bennett would have the burden of proof to show that even though pregnancy was not taken into account, the same employment decision would still have been taken (contra Wards Cove cited in terms of T7 CRA 1991). Direct evidence ∴ favours the plaintiff and if more direct evidence could be solicited Nora should pursue that route. The reasons articulated by Bennett that Nora cannot write the letters properly / organise the [illegible] conference appropriately could serve as legitimate non-disc. reasons taken the nature of the job into consideration. The question is just: shouldn't that have been sorted out at the interview? Another question: should Nora have told Bennett about her pregnancy during the interview? Her telling Bennett would have enabled to make accommodations in pacing the organization of the conference so as to ensure that everything would have been ok by the time Nora left on leave. If Nora was not appointed she would have had a clear pf-case of disc. based on pregnancy. Accommodation: pregnancy ≠ disability under the ADA but light duty demands can be made by pregnant women — not strictly spoken a right to accommodation but the PDA permits preferential treatment of pregnant women (Guerra). BFOQ: Bennett must show Nora = unable to do essentials of job because of pregnancy (Johnson Controls) — doubtful.

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good

∴ I will try to solicit more direct evidence in trying to put Bennett on the affirmative defence. Under Pw-House (as amended 1991 CRA) Nora will be able to recover attorney's fees and injunctive relief. It is not certain if she ... possible.

2. Angelo Rodriguez An individual disparate treatment case based on discrim. because of religion (T7 sec 703) should be instituted. Angelo's prima facie case should allege the following: a) that he was subjected to an adverse employment decision b) that he did his job satisfactorily and c) some evidence that the decision was based on religion (Prima ; Kamehameha) In casu Rodrigues sought exemption from guarding an abortion clinic during demonstrations because of his belief – he however didn't seek transfer to another precinct. The defendant in religion-cases has the duty to reasonably accommodate the religious beliefs/practices of the employee UNLESS such accommodation will cause undue hardship (Wilson ; 701(j) ; Ansonia ; Hardison)

There is ∴ not a duty to fully accommodate Angelo but only to reasonably accommodate him. The defendant can ∴ show that if Angelo was transferred to another precinct he would have been excluded from guarding abortion clinics at all → Angelo however didn't ask that – he just wanted not to guard the abortion clinics ∴ wanted lighter duties than his other mates & i.t.o. Hardison + Philbrook the defendant wouldn't make such an accommodation

Furthermore, being a policeman requires difficult and stressful work and if that is the price you will have to pay for honouring your religious beliefs so be it.

The defendant will ∴ succeed in showing a legitimate n-d reason in not fully accommodating Angelo and Angelo now has the burden to show pretext which will be very hard to make out especially in the light of his reluctance of asking for a transfer. The seniority system employed by the employer/defendant is also a legitimate one which will serve as sufficient rebuttal of the phase (Hardison)

To trigger accommodation, the employee should also inform the defendant of the conflict and show interference with his beliefs – which Angelo did – but defendant only needs to reasonably accommodate – & ∴ Angelo not succeed.

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3. Anna Richardson Race and gender fairness is an important imperative derived from basic principles of equity as embodied in the constitution and anti-discrimination statutes. In order to validate these figures one should distinguish between jobs requiring qualifications + certain skills and janitorial jobs (Wards Cove - these 2 cannot be compared!) In order to determine if discrimination took place one should, for the skilled jobs, look at the numbers in the different races + genders that are qualified and how that is reflected in the number of people employed. In this case we don't know which positions were actually filled by whom: were they all janitorial positions or were they positions that required skill - mere racial balance is not a sufficient defence to a discrimination claim (Connecticut v Teal): it may very well be that the bottom line outcome is racial balance but that unlawful discrimination took place earlier in the selection process. The purpose of T7 is not racial balance but the assurance of equal employment opportunities to all people - racial balance can very well have a severe disparate impact on a certain group - so also gender balance. Regarding janitorial positions, one should look at the population numbers - one needn't look at the national demographic data (Hazelwood v [illegible]) and it is ∴ correct also to look at the demographics of the specific city and surroundings. Statistics can be used both to make out a prima facie case and to rebut the pf case by defendant (Teamsters + Griggs) Subjective and objective practices can be subject to DI-analysis (Watson). Regarding affirmative action the courts have laid down certain touchstones to test its validity: an a-a-plan should be a) flexible; b) should not trammel unnecessarily with the rights of the non-protected group; c) should not place an absolute bar on the advancement of the non-protected group; d) should make room for the brilliant + ~~extra~~ extraordinary individual in the non-protected group and e) must be temporary (Weber; Johnson) It should also be a plan ∴ "designed" and not a arbitrary measure. Anna employed this system of hers from 1996 and it pretty much look like a quota (although the court in Johnson didn't think that aa-plan constituted a quota although it made provision for a one-one employment) in any we have too little detail to know if this employment-practice can survive the scrutiny of T7.

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Substantive issue

4. David Koresh The ADEA (sec 4(f)(3)) prohibits discrimination based on age but offers legitimate defenses in "good cause" and "legitimate / reasonable factors other than age". Here we have a clear case of discrimination: the fact that a younger (but also in protected group) person was appointed in David's place is evidence of that: as in Biggins the question is however if the discrimination was "because of age" or "because his pension was about to vest". In terms of Biggins the latter is not actionable under the ADEA although it is a violation of ERISA: it will ∴ only be actionable under ERISA → pension funds to vest is ∴ a legitimate nondiscr. reason for the defendant being sued under the ADEA. The question in this case however, is a procedural one: even if a case of age discr. could be made out because the younger person was employed, is David in time with his action? The ADEA follows Title 7 with regard to the procedures for instituting claims: A charge should be filed 180 days (or 300 days if state agency exists) after the occurrence of a violation. In terms of Ricks (although severely criticised) the time of occurrence is the date of the notice of the decision (which in casu will be 2 weeks before the end of Dec 1994). This case cannot be regarded as an ongoing violation (as in Bazemore v Friday; Evans) and the charge will ∴ not always be timely. From 2 weeks before the end of Dec 1994 to August 1995 is > 180 days - presumably where no state agency exists - and David's charge will ∴ not be timely. In the case where the state agency exists, the time period is 300 days and the charge will in that case be timely. There is not a specific time limit in which the EEOC should make a determination - David would however, have been entitled to obtain a right to sue letter any time from filing a charge with the EEOC. David must institute the action on the right to sue letter within 90 days of obtaining the letter + will have free discovery of EEOC files excluding any settlement negotiations. Tolling: According to Zipes v TWA the case will not toll during pendency of grievance procedures (Ricks) but it will toll when the EEOC files suit or a class action is filed. In terms of substantive and procedural grounds (if no state agency exists) David does not have a strong case on the ADEA.

Good

5. Phil Quick Sexual harassment is actionable under T7 as discrimination on the basis of sex and two types are distinguished i.e. quid pro quo and hostile environment - in casu: hostile work environment Sexual harassment must be sufficiently severe and pervasive to be actionable and it should :. alter the working conditions of the victim and create a hostile work environment (Meritor) In determining whether or not the working environment is affected as such, both an objective and subjective test is to be employed :. focus is placed on the unwelcomeness of the action (Harris) and not voluntariness (Meritor.) Mere offensive remarks will not be enough (Harris; Fair v (ordinary types for me bold)) and it is submitted that in this case we are not dealing with mere offensive remarks: these remarks are continuously and severely influencing Phil's environment and the innuendos and suggestions would be regarded as severe + pervasive: however, the circumstances must be considered in their totality (EEOC Guidelines) (The fact that the harassment takes place in a plant where only / mostly males are working is one of the factors to be taken into account - but the mere fact of the plant doesn't give a person a green card to harass another) Discrimination must also be because of sex: if discriminatory harassment is directed at both males and females the court will have difficulty in finding that the harassment was because of sex - then rather personal animosity. The court in Oncale was also evident that the harassing conduct need not be motivated by sexual desire to support an inference of discr. on the basis of sex: the trier of fact need only reasonably find that general hostility existed :. Same-sex harassment is actionable under Title 7 and Phil will have an action - fact that is same-sex will not bar him from having an action. Who will be liable? Under T7 the employer or his agent is liable and provision is not made for individual liability of the harasser. If Phil wishes to hold them (harassers) personally liable he should institute tort actions against them. The fact that the employer didn't have a policy could lead to a finding of increased liability. What can Phil claim: compensatory + punitive damages (CRA 1991) equitable relief + interest: There is no evidence of he resigned: if yes, he could claim back + front pay (706(g)(1))

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6. Greenfield Geena having tried would like to institute a discrimination action against the employer for discrimination based on race and retaliation. Regarding the discrimination claim under Sec 703 her weak pf-case will easily be rebutted by the employer claiming no money to upgrade her job and that there is really no pretext in that reason. Regarding the retaliation claim, Geena will have to show under 704(a) that she opposed made illegal under the act or made a charge, testified, assisted or participated in an investigation, proceeding or hearing and was adversely affected because of that. The act complained of is her being discharged because she called UW claiming racial discrimination in the NOO. Drawing analogy from the pregnancy case where the threat to discharge had to be carried out in order to ensure that the employer does not make hollow threats, the same could be argued by the defendant here: she asked her during her irritated stage of Lucy not to call UW and still she did so in face of the threat to be discharged because of that. Also the employer could then easily argue that Geena acted disloyally ~~or~~ (Jennings) and disruptively (McDonnell Douglas v Green) and that such action should not be protected under sec 704(a). Thus: instituting a 107-claim, Geena will have to make out a prima facie case claiming: that she was engaged in protected expression against the employer (which is doubtful in case), that she suffered an adverse employment decision (discharged) and that there was a causal connection between the 2. The employer can now prove a legitimate nondiscriminatory reason — : Geena was disloyal + disruptive and she was asked not to call UW which she did; ~~although~~ and Geena can then prove pretext which could exist in claiming that if she didn't call, racial discr. that is going on (which is doubtful in case) would never have been exposed. (Jennings + McD for structure) In case Geena's Lucy didn't bring her the wanted outcome and she will not be able to recover (It bds for me as if people are often worse off pursuing retaliation-cases ?!)

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7. Fred Rogers In terms of sec 102(a) ADA it is unlawful to discriminate against a qualified individual with a disability because of that disability. Discrimination is however allowed if the qualified individual cannot be reasonably accommodated without undue hardship or (direct threat) to the employer. Is Fred disabled? A qualified individual with a disability is someone who with or without reasonable accommodation can perform the essential functions of the job (in casu we are not sure precisely what kinda job Fred does — The Court will have to take all these factors into consideration.) Determining whether or not Fred's depression is a disability one should look at sec 102C: a) physical or mental impairment that substantially limits one or more of the major life activities of an individual or b) a record of such disability or c) being regarded as having such an impairment. In casu Fred has undergone therapy and has been diagnosed with clinical depression and he [illegible] fits under both a + b. Regarding the limitation of the major life activities being impaired, the ADA cites the following as major life activities: caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning + working, and in so far as depression limits one's ability to work + concentrate for long periods of time, depression can be regarded as limiting a major life activity. ∴ Fred is a qualified person with disability: qualified - because he performed his job satisfactorily for ~~a~~ ~~[illegible]~~ 5 years and with reasonable accommodation he will be able to do again. Accommodation The duty to accommodate is more substantial in the case of the ADA than regarding religion. It should however, still be clear that Fred will be able to perform the essentials of his job - if not he's not qualified (Davis) and accommodation is not needed. In order not to accommodate the employer should prove undue hardship (Vande Zande) and if reasonable accommodation IS in fact possible, failure to do so will constitute unlawful discrimination. Included in the accommodation is altering work schedules, changes in work rules etc. It is submitted that Fred could be reasonably accommodated. Should employer have known? In order to trigger duty of accommodation, employer should know about disability + reasonable + available accommodation - fact that he only informed them after discharge should not be bar to relief - confidentiality of counselling protects employees; fact that he told co-worker [illegible] feel kinda down is not enough to waive this confidentiality BUT accommodation could have been made earlier without this drastic measure if employer knew beforehand.

10(1)(8) ADA
Arline-case

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Good