EMORY UNIVERSITY

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Employment Discrimination Law Exam
Professor Shanor

1. Cordelia Crenshaw I would bring a systemic disparate treatment claim against the Er - for disc. against "Black Females" combo. under Pattern Practice. T.7 (ala Teamsters) b/c no formal policy mentioned Manbart. Statistics are enough to support a Pat. & Prac. case (Teamsters) however we have no anecdotal evidence here which will make the case harder to win (Sears) - also not "inexorable" zero where anecdotal evid. would matter less b/c 10% of black females were hired. However, under the EEOC 80% rule all the figures for other combos of race and sex outnumber what would expect by at least 10%. The significance of these numbers may be weak b/c small groups but should @ least pass p/f case b/c low standard. Also, this is Applicant flow data rather than comp demographic data (Hazelwood) which is preferred (App. Flow I mean) so this will help. Plaintiff probably has enough to meet p/f case - although questionable w/ out Anecdotal Evid. Next Defendant has the burden to challenge the facts on which Πs claim based - or challenge the stats or inference from them. They might very well be able to show that some factors left in the statistical analysis can account for difference - ala education, experience, qualifications etc. (Smith). Should get an expert to counter. They might even be able to bring up general interest info. to show black females are less interested in this job ala (Sears). However, would need to examine the qualifications the er has set forth and in so doing may realize we could even bring a D.I claim also (although SDT may be better b/c punitives etc. The er. really has no other defenses b/c while BFOQ defense available for sex - it is not for race, and clearly this is not some kind of voluntary aff. action program (ala Weber, Police Officers Ass'n). Think could also contact other women and bring a class action if client wished - Title VII follow R.23 FRCP - so would have to figure out if met those requirements.

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2. Bevis Butthead In this case arguably no one has a claim against the Er, although women have the best shot. First, the group of males. T.7 allows two types of sex harassment - QPQ and hostile work environment this would have to be latter b/c affect "terms and conditions" of employment. To establish has to be "severe" or "pervasive" (Meritor) and look at "totality" (EEOC guidelines) The problem w/ men's case is that has to be "b/c of sex". Men can have claim if women harass (Dominos/Huebsker) or same sex is actionable (Oncale) but has to be "b/c of sex" (id.). Here not b/c of sex b/c he seems to harass everyone. Some cts. say same sex won't be b/c of sex unless both homosexual (McWilliams v. Ffx. County) and that isn't case here. I assume. The homosexual male probably also doesn't have a claim due to the same reasoning homosexuality is not "b/c of sex" and not protected by T.7 or ADA (see §508 ADA & DeSantis). May have a state law claim or Local Const. Issue (ie Ca. Gay Law Students Association) Other theories such as Associational (Ala. Loving to Fouraca) but w/ little success and Since not state actor 14th amendment won't help - even though wouldn't anyway. *Also, in Smith v. Liberty Mutual G said that "effiminancy" not protected - but this might be slightly in ? now due to Price Waterhouse (ie females "male" traits") Females, on other hand, received the only statement relating to sex "suck my cock" and may be able to claim that while others abused only they received that kind of treatment. However, again arguably not b/c of sex b/c all employees harassed. Also, while surely unwelcome (Meritor, Burns) mere offensive comments (Harris) may not be enough to rise to level of "severe or pervasive". Most of what he said could be said on Prime Time TV (Baskerville)... If could get ct to buy this, other problem is er liability. This is a supervisor which makes a little better (Meritor cf. Juarez (coworker)) but the ees never let the ee know. The Er. may need to have knowledge to be liable (ie Intlekofer) especially if have a policy and procedure and you don't use it (Gary v. Long) Not clear here. But also Er took an adequate response by firing when did find out (Kaufman). May be able to get the ee supervisor though personally on some state tort claim.

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3. Mayda Martyr. May seek to bring a retaliation charge against the ER under T.7 (704(a)). Her first claim would be in re to her firing for "opposition" to the Er not hiring the black ee. Problem is that there is no evidence what the er did was illegal. Thus under her p/f case she can't show that she was engaged in "protective expression". Although can clearly show she suffered adverse employment decision and causally linked - b/c Er knew of conduct (Goldsmith) and proximity in time was close (O'Bryan). May be "protected expression" if she was "opposing unlawful practices" in a jurisdiction where say that "π's belief that unlawful has to be reasonable" (Sias / Trent) or in Good Faith (Monteiro). But there is no evid. that she even thought such. Defendant can then respond w/ Legitimate reason (b of prod.) in this case easy b/c of the egregiousness of her conduct in floating a falsified letter like in McDonnell Douglas and Disloyalty ideas of NLRA carried over from the (Fansteel) case. π could try to show pretext for the firing decision - if could show "other ees treated differently (Anderson)", past treatment of herself etc. But here Pretty clear cut - can fire b/c of letter. On the other hand, for the "Free Access" claims she will probably win b/c almost absolute protection for participating in ~~grievance~~ EEOC ~~EEO~~ claims etc. - even if you lie on the stand etc. Some Cts say per se protection. Moreover, this applies to things like giving bad references to Wolf Camera. if it were truly in "retaliation" - ~~back~~ but may not be because here they clearly have a good reason not to refer but "saying "not a team player" isn't really making clear what she has done etc. - May depend on whether a just (Sheridan) pretext or pretext plus (Hicks) - will be prot. even if not "real" reason b/c would have to be pretext for retaliation. Also this was disloyalty. Moreover, May inherently violate §704 here b/c grievance procedure may be available to all complaints except disc. when file w/ admin. But language seems broad enough to avoid.

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good

4. Tonia Jolley. Tonia clearly has a claim under the PDA provided that under PDA. 701(K) "on the basis of sex includes pregnancy..." means also perceived pregnancy. Will assume it does b/c boss clearly is firing on this basis etc. And have the direct evid (PW) of his comment concerning PG. The only defenses the Er might have to this claim is that a BFOQ or was fired for another reason other than pregnancy (Perhaps insubordination here) but doesn't seem likely). There is clearly no BFOQ for an admissions director to be not PG - ie not like a girls home (Chambers) etc. Moreover, this doesn't even really rise to the level of a light duty request where might be able to say we never did it before why should we now (White v. Frank). Moving desks was a onetime. Clearly nonessential fxn of the job. that was not "essence of the business (Diaz). Thus this defense will not work. And Er. May try to show not b/c pregnancy but ee can still show this Pretext especially if his non-dr are not believed (Hill, Tamimi)

Tonia might also try a sexual harassment claim under ~~"severe or perva~~ hostile work environment due to his comment about the pregnancy machine - but not a winner b/c not "severe or pervasive" (one time - he was new) (meritor)... and a single act is not usually enough unless Rape (Tomka).

Also pregnancy is exempted from ADA so that will not work as a claim - unless could use PG and claim by analogy that he let similarly disabled people not lift their desks - then might have a claim see Dodd, Elgin Teachers. or even a preferential T-ment argument under Guerra and Harty v. Harness Mt. (Kentucky case I think)

§102(a): if 15+ees, 20 wks per year.

5. Cortez Bridges He might have a claim under the ADA. First, would have decide if he is disabled. I don't think this would "substantially limit" in any major life activity §3(2) - especially since he has played contact sports & in Nat'l Guard. Nor does it seem to fit activities listed in Regs 1630.2. Might have a "record of impairment" if had this before (ala Woods) but doesn't seem as such. Best hope is that he can show that he was "regarded as having impairment (Reg. 1630.2(l)). §3(2)ADA. This tends to be a very narrowly read way of showing disabled (Forrisi v. Bowen, Stewart, Kutcha). However, assuming he can show this - I think his claim will fail anyway as to "Qualifications". Because, this is a job where the safety of the public at large is at issue Cts tend to give the ER more deference (Shadow Bd. case) (see Comm. Col. v. Davis). Being able to rescue people w/out bleeding to death internally if you get a bruise - is important to the job. Not to mention that he will be working around people who are injured w/ risk of communicable diseases to them and himself (Ex Bradley - surg. tech not qualified b/c AIDS). A qualified person is also measured by "w/ accommodation". Since I do not know of any cure or medication for hemophilia (this would be personal anyway and not Ers area to cover (ala Nelson: Seeing eye dog) - I am not sure of how they could accomodate, a firefighter has to go in buildings etc. It is by nature a rough job. They could have him be fully covered to avoid the comm. disease risk but doesn't change the fact that he could get internal injuries which would make him unable to save people. Also, could put him at desk job or ~~[illegible]~~ truck driving or hose holding duty. But under §101(8) for a firefighter - going in burning bldgs etc. is an essential fcn of the job "the position exists to perform the function" (ADA Regs, Kuntz). Even if ct. finds that π has shown one of these are reasonable accommodation - their failure should not violate §102(b)(5)(a) b/c. it would be an "undue hardship" on er. to have to hire and pay for someone who is danger to himself and public and may not be able to job. Might also be able to pt. to any federal law on the subject such as (shadow bd. case). Moreover, §101(3) "Direct Threat" provision (ala Arline) - when look at EEOC factors duration, severity, likelihood, imminence - not qualified. (argument against these two b/c sports/Nat'l)

II.
(1 hour)

Pete Wilson, a black male with a severe case of PFB (a condition which precludes him from shaving his beard) and an evangelical commitment to the Seventh-Day Adventist Church, worked for fifteen years as a mechanic for Eastern Airlines in its Atlanta, Georgia facility. When Eastern's employees went on strike in early 1989, Wilson, at age 47, was being paid $18/hour plus generous fringe benefits.

Wilson submitted employment applications to several other major airlines, including Patriot Air, at various times during 1989 and 1990. These applications were brief, asking questions primarily related to education, experience, and physical capabilities.

On one occasion, in November, 1990, Wilson showed up at a Patriot Air training center a couple of hours from his home on a morning that Patriot Air was beginning an airline mechanic's training class. The instructor commented that he was not sure Wilson matched Patriot's "vigorous, clean-cut" image and that the company "might be reluctant to hire a mechanic who couldn't work on Saturdays."

While unemployed, Wilson watched from the sidelines as his former employer did a terminal nosedive into bankruptcy liquidation. Moreover, as the months dragged by with no word from Patriot Air other than postcards acknowledging receipt of his applications, Wilson got more and more angry. As he told a friend at a baseball game in August, 1991: "Patriot is hiring green, inexperienced kids right out of college and they are ignoring me, despite my 15 years of experience and the fact that I know their main airplane, the Boeing 767, inside-out." His friend recommended that Wilson file a charge with the EEOC. The next day, Wilson proceeded to do this, writing on the EEOC form that "Patriot refused to hire me despite my excellent qualifications while hiring less qualified individuals for mechanic opening" and checking the race and age "basis for discrimination" boxes on the EEOC form.

The EEOC's investigation had barely commenced when Wilson obtained a lawyer who requested and received a right-to-sue letter and promptly filed suit against Patriot Air on Wilson's behalf. Discovery produced, inter alia, the following information: (1) nobody at headquarters, where applications were screened, even remembered Wilson's application from the thousands of applications the company had on file for mechanic positions; (2) various company officials gave differing reasons why Wilson was probably not even

invited for an interview; (3) some of the reasons given were clearly untrue, for people with various characteristics which company officials said were bars to employing Wilson had been hired; (4) Wilson had lied on all his applications in order to conceal past psychiatric treatment for severe depression; and (5) all the decision makers who passed over Wilson's application agreed that mechanics having "high seniority with another major carrier" were undesirable applicants due to "corporate culture differences and the shock of low pay, perks, and seniority" at Patriot compared to the other major carriers.

You are a law clerk for the district court judge who has received a comprehensive summary judgment motion from Patriot and an equally comprehensive opposition to that motion from Wilson. Because you told the judge that you had a first-rate employment discrimination course in law school, you have been asked to write a memo analyzing whether summary judgement should be granted or denied. Write that memo.

First as to Procedural Issues, ~~Statute of limitations problem~~ Wilson's Charge form is sufficient under §706(b) because "sufficiently precise to identify parties" and describe the general action or practice complained of" Waters. Very permissive std. - lack of oath not fatal can be remedied later. (Weeks) As for statute of limitations, b/c no state FEP agency in GA - 180 days from when alleged practice occurred (Ricks) - Began in 1989 filing applications - filed claim in Aug 1991. Need to look to when exact unlawful practice occurred (Chardon, Ricks). Here the problem is that even if disc. took place on first day he applied he did not necessarily know - see (Cada, Gates, Tucker)... some courts say when notice others say when had enough facts to know. Here though appears to be a cont'g violation if anything - implied in 706(g)? Sabree because of 2 yr. limit on backpay (which in remedial phase he would be subject to.). b/c he kept applying for the job and although 91 act changed somewhat cont'g violation law in response to Morrance ~~that it seems to~~ that only applied to seniority systems - and Bazemore suggests its still in effect. So, s.o.l. okay on filing. Also, requested right to sue (didn't know you could do before investigate etc. but will assume okay) and sued w/in 90 days after getting it. Moreover, these aren't all necessary jurisdictional requirements.

but rather subject to waiver, estoppel etc. - Zipes - which really doesn't arise here. Thus, can be no summary judgment on a procedural issue at least as I see it.

Also, due to the structure of burden of shifting set up in Burdine and Price Waterhouse I do not think that summary judgment is appropriate on most of the other issues in this case. I will approach each issue separately for your ease of reading. ① Religious claims: under 701(j) defn of not discriminating based on religion includes "observance and practice" of religion - which would include not going to work on Saturday if a Sabbitarian. Thus, Wilson has to show his p/f case in order to not be dismissed - a permissive requirement. ① Adverse Employment Action - here clearly he was not hired by patriot airlines ② Satisfactory Job Perf. or Qualifications - Clearly w/ his years of experience at other airline ③ Other Evid - the employer made the comment at the Saturday training session about working Saturdays so this would be enough. Problem is his attorney arguably committed malpractice by not filing for this - so I really shouldn't talk about it. I guess he could amend his claim to include this should he choose. But not a winner in light of TWA v. Hardison; Ansonia

② Age. Under the ADEA people who are over 40 years old are protected thus Wilson is clearly covered by the act. Because we have no statistics (Teamster) presented nor a formal policy (Manhart) will assume that this must be an IDT case that he attempts to bring for Age (ala Biggins) Thus, plaintiff has burden

of persuasion throughout. 1st clearly, π has established a π/f case under the McDonnell Douglas - because age - over 47, qualified and applied, rejected, and job stayed open. Patterson. says only have to be minimally qualified but not the case he has years of experience. Since, π met under Burdine Δ just has a Burden of prod. to show that had LNDR. Here there are clearly some factors - first, Wilson lied on application (although most likely we will consider this w/ remedy (ie summary) not here), but they also cite the fact that "high seniority" at other companies is a problem b/c culture shock. Because ADEA says "factors other than age" - high seniority may be an okay tool unless using as a proxy to disc. based on age - ~~like~~ (see for example Biggins). ~~[illegible]~~ Also, can say so many applicants that didn't even really get a chance to look at his. Thus a legitimate non-disc. reason is a low burden (Burdine) - employer has met it. Can now go on to Pretext - where employee again has arguments available to keep this out of summary judgment. First, they lied about some other reasons - b/c clearly other people w/ those same characteristics are working there. But if this is a pretext-plus jurisdiction like Hicks - has to show pretext for disc - not just any pretext. (ex. Woods) Either way, the trier of fact - Judg. unless liq. damages. - is entitled to decide b/c might not believe. Er. etc. and Wilson has presented enough evidence where could reasonably conclude. (3) The lawyer for π may also end up amending to include ADA claim b/c of sever depression found in investigation - but I won't address since he hasn't done.

so are they hiring a lot of kids right out of college.

yet. (4) Race: The last claim will be a race claim. Arguably, can't really bring a disp. systemic t-ment case against stats. Also there is very little evidence to suggest and individual disp. t-ment-case b/c no real reason to think wasn't hired b/c of race - doesn't seem like application mentioned, nor was he called for interview - the only argument would be they saw him that day he went to training. Either way, π can easily make p/f case - but Endr if can show didn't even know - and makes since b/c no one remembered application - can dismiss this on summary judgment. As for disparate impact - have a case similar to shadow bd. firefighter case because PFB disproportionately effects blacks. Also can have subjective disparate impact (Watson) - here would have to be the subjective policy of "clean cut" people working there. Defendant's only way to counter is really business necessity and job related §703(K)(1)(A) which in the context of safety and firefighters may hold but clearly not here where a mechanic. Maybe under a Wards Cove - lose bus. necessity requirement but CRA '91 has moved back to original. Thus, er would easily lose this. Here also Er may attack what the man said that day and say "we have no such policy" he doesn't know what he's talking about... But if they do even if in terms of grooming-dress code - Running out of Time - which is usually quite permissive (Craft; Willingham?) not going to be able to win. Ee may show pretext then in any event that another means could keep up same "clean cut image" (Albemarle) - for example that could just keep really short and neatly trimmed. In any event, summary judgment in favor of Defendant is not appropriate on this claim.

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Very good