

DISCRIMINATORY PRACTICES EXAMINATION
FALL 1992
Professor Charles A. Sullivan

INSTRUCTIONS

1. This take-home examination is being distributed on Thursday, December 17, 1992. Your answers are due back by the close of business (5:00 pm) on January 20, 1992. Answers will be turned in to Gary Bavero's office, at which point a receipt will be issued to you.

2. This examination consists of two questions of unequal weight. Question I is worth 75%; Question II only 25%.

3. Although there is more than a month between the distribution of the take-home and its due date, you should limit yourselves to a reasonable time in light of your preparation for other examinations.

4. The following rules will govern this examination:

a. Your answer must be typed, with a *maximum* length of 25 pages. This is truly a maximum: it is not necessary that your answer be this long

In measuring pages, the standard assumes typing on 8.5" by 11" paper, double-spaced, with margins 1" on left and right, and 1" on top and bottom. These are in fact the "default" settings on Wordperfect, the wordprocessing program on the computers in the computer lab. Fonts must be no smaller than Courier 10.

Any violation of the length requirement will result in the offending portion not being considered in grading.

b. Discussion of the examination with other students before preparing your answer is permitted, indeed encouraged.

c. While I encourage consultation in considering the issues and answers, the actual answers of each student

must be prepared solely by that student. **"Review" or "editing" of draft answers by others is expressly prohibited.** It follows, of course, that individuals should not share disks or hardcopy prior to the due date for answers. You are, however, invited to retain copies of your answers and may share and/or compare them after they are turned in.

d. In the course of preparing your answers, you should adhere to the general rules of attribution of printed or written sources which govern your legal writing papers. Bluebook form, however, is **not** required, and you may refer to cases or principles in shorthand, so long as I can understand it. E.g., "The McDonnell Douglas principle does not apply because. . . ."

e. This examination is **not** intended to be a research paper. While research is not prohibited, a model answer can be prepared with only the casebook and supplements together with class discussions and your own analysis.

5. In answering the following questions, you may assume that Title VII, which was amended by the Civil Rights Act of 1991, and the Americans with Disabilities Act are the only statutes that apply.

QUESTIONS

I.

(75 %)

Cleveland Maximal Light Works is a manufacturer of light bulbs located in a largely Hispanic and Asian neighborhood on the north side of Cleveland. The majority of ML's entry-level work force were Hispanics and Asians, and the vast majority were women (over 80%). Plaintiff Equal Employment Opportunity Commission investigated ML, found reasonable cause to believe that it had engaged in a pattern or practice of discrimination against blacks as a class, and filed suit against Maximal Light. After a bench trial, the district court found that ML had violated Title VII by engaging in a pattern or practice of discrimination against blacks as a class under both a disparate treatment and a disparate impact theory.

You are the law clerk to Judge Reginald ("Re") Vue of the Sixth Circuit. The Judge has asked you to draft a preliminary opinion deciding the appeal that Maximal Light has taken, and indicate whether you believe that the district court should be affirmed or reversed. The lower court's decision is summarized as follows:

Maximal Light manufactures incandescent and neon bulbs and related components at its plant located on Crowwood Avenue in Cleveland. The EEOC alleged that ML had discriminated against blacks in its hiring of entry-level workers. Although some evidence reaches back as far as 1970, the bulk of the evidence presented at trial concerned its hiring practices from 1988 to 1991.

The entry-level jobs at ML involved light manufacturing work and did not require any prior experience, particular educational background, or special skills. Basic manual dexterity and the ability to speak some English were the only qualifications required by ML. The beginning pay was low and did not rise substantially over time. Because the jobs did not require English language fluency, they had some special attraction to those who did not speak English as their first language.

Maximal Light's principal method of obtaining new entry-level workers was almost exclusive reliance on "word-of-mouth" in order to fill its entry-level job openings. Employees would simply tell

their relatives and friends about the job. If interested, these persons then would come to ML's office and complete an application form. ML did not tell or encourage its employees to recruit in this manner. The evidence indicates that the only time ML initiated this word-of-mouth process was during 1977 when it adopted an Affirmative Action plan. At that time, ML asked one or two black employees to recruit black applicants from among their relatives and friends.

Maximal Light received applications whether or not it currently had an entry-level opening to fill. Whenever ML needed to fill an opening, it would go through its applications on file in order, phoning applicants until one was reached at home. ML would start with the applications that were four to five months old and process them forward in time. Evidence indicated that only one person was hired for every fifteen that applied. Because of the success of this process, ML never advertised for these jobs, and never used the State of Ohio unemployment referral service.

The district court found that Maximal Light's reliance on word-of-mouth for filling entry-level jobs "resulted in the exclusion of blacks from the network of information concerning jobs at Cleveland Maximal Light, and gross under-representation of blacks in, and their exclusion from, Cleveland Maximal Light's entry-level work force." In reaching this conclusion, the lower court relied on two kinds of evidence, statistical and other evidence.

1. Statistical Evidence

The only statistical evidence was presented by the EEOC's expert, Dr. Goodmath. Defendant put on no statistical expert.

In defining the relevant labor market -- that area from which ML would be expected to draw workers -- the district court looked to the location of the employer, commuting patterns, and applicant flow. It then found that Cleveland (the city only, not the metropolitan area) was the relevant labor market.

Although it concluded that Cleveland was the relevant labor market, the district court examined a number of different "relevant labor markets" and concluded that illegal discrimination occurred in each. Specifically, the district court examined: the City of Cleveland; a 12-zip code area from which ML drew more than 90% of its applicants; a 5-zip code area from which it drew more than 70% of its applicants, and ML's own zip code area, from which it drew nearly 30% of its applicants.

In 1970, the percentage of entry-level workers in Cleveland who were black was 35%. In 1990, this percentage had increased to 36.4%. The judge used these percentages as a basis for comparison

against ML's work force in two ways. First, he compared them with the percentage of blacks in Maximal Light's entry-level work force for the years 1970-1991. In addition, he compared them with the percentage of blacks hired by ML for entry-level positions for the years 1988-1991.

Between 1988 and 1991, Maximal Light hired 146 entry-level workers. Nine of these workers (6%) were black. The trial court concluded that "the statistical probability of Cleveland Maximal Light's hiring so few blacks in the 1988-81 period, in the absence of racial bias against blacks in recruitment and hiring, is virtually zero." The trial court also concluded that racial bias was the reason for the disparities between the percentage of blacks in ML's entry-level work force for the years 1970-1991 and the percentage of black entry-level workers in Cleveland. Although the differences between expected number of black hires and applicants and actual numbers were less when the judge restricted the relevant labor market to smaller geographical areas closer to ML's plant, he concluded that racial discrimination must have caused the disparities even in geographically smaller relevant labor markets. The judge also commented that a number of black applicants (the record reveals that there were 11) had the letter "B" hand-written on their applications.

The district court declined to attach significance to the fact that ML, on a percentage basis, hired more blacks than non-blacks who applied for the jobs in question. From 1988-1991, the percentage of black applicants who were hired was 16.4%; the overall percentage of applicants who were hired was 6.1%. The judge considered the higher percentage of black applicants hired an unreliable figure because of the small number of blacks involved (only 9 blacks were hired in the 1988-1991 period).

The data underlying the statistical findings is as follows:

1. Maximal Light's "static work force statistics" for the years 1970-1991. The static work force statistics are an employment "balance sheet" that provides a snapshot of the employer's work force for each year. For the 21 years reported, the percentage of blacks in entry-level jobs at ML was relatively constant, ranging from 4.5% to 6.5%. The total number of entry-level workers ranged from 202 to 396 over this period; the actual number of black entry-level workers ranged from 9 to 22. Unlike the percentage of black entry-level workers, the percentage of Asian and Hispanic entry-level workers during 1970-1991 was not static but rather increased. The representation of Hispanic workers ranged from 40.0% to 66.0%, while Asian workers ranged from 0.0% to 16.5% over the period.

2. "Dynamic data" summarized ML's hiring rates for the years 1988-1991. These figures present an employment "profit and loss"

statement showing how many blacks applied and were hired over an entire year.

Year	Applicants (No.)			Hires (No.)		
	Total Blacks	Non-Blacks	Blacks	Total	Non-Blacks	
1988	401	396	5	66	65	1
1989	227	225	2	18	17	1
1990	879	863	16	38	34	4
1991	807	775	32	24	21	3

The trial judge rejected applicant flow because it "is not remotely representative of the racial and ethnic composition of the civilian work force in any area that might be deemed the relevant labor market," since the recruiting process itself was discriminatory.

The district court instead found that Cleveland was the relevant labor market for several reasons. First, the factory was conveniently located to both train and bus service, thereby connecting it to virtually every point in Cleveland because of Cleveland's extensive public transportation system. In addition, Maximal Light itself had identified Cleveland as its "basic recruiting area" in its Affirmative Action Plan in place from June 1977 to May 1988. Finally, specific testimony of applicants from the far South and West Sides of Cleveland was presented at trial as evidence that Cleveland was the proper relevant labor market.

After concluding that Cleveland was the relevant labor market, the trial judge compared both the static and dynamic figures with the expected figures based on the percentage of black entry-level workers in Cleveland. For example, in 1990 36.4% of the entry-level workers in Cleveland were black. However, only 6.0% of the factory workers (16 workers) at ML were black. Because the expected number of blacks would have been 98 (36.4% times the total number of factory workers -- 268), the court concluded that the actual number of black entry-level workers was 10.4 standard deviation units ("SDUs") below the expected number in 1990. Similar computations show that for all intervening years between 1970 and 1990, the actual number of ML's black entry-level workers was always at least 9 SDUs below the expected number.

The trial court used a similar analysis for evaluating the racial composition of Maximal Light's applicants, as summarized in

the table above. For these calculations, data was available only for the years 1988 to 1991. The court multiplied the number of applicants for a given year by 36.4%, the percentage of black entry-level workers in Cleveland in 1990. This number, according to the court, represented the "expected number" of black entry-level applicants. For example, in 1990 there were 879 applicants. Therefore, the court concluded that the expected number of blacks in this applicant pool was 320 (36.4% times 879).

In cross-examining Dr. Goodmath, Maximal Light's attorney established that Goodmath used a very simple demographic model. The applicant's race was the only variable considered in the model, and ML's racial composition was compared with the racial composition of Cleveland as a whole. The defense attorney challenged the statistical showing because it did not include either relative commuting distance and lack of an English fluency requirement.

Further, cross-examination established that the use of Cleveland as a relevant labor market, with no weighting of distance, meant that no consideration was given to the fact that blacks living on the South and West Sides might be less willing to apply at ML because of the commuting time involved. In addition, the model did not account for the fact that non-English speaking persons might be more willing to apply because of their inability to obtain jobs with English fluency requirements. Several ML employees testified at trial that ML's position was one of only a few jobs open to them because of their limited English fluency; indeed, these witnesses testified through an interpreter).

The court also conducted an "applicant flow analysis" for smaller geographic units -- a 12-zip code area, a 5-zip code area, and a "home" zip code area surrounding Maximal Light's plant. However, the court computed its statistics for these smaller areas somewhat differently than those it computed when it considered Cleveland the relevant labor market. When making its comparisons based on smaller areas, the court counted as the actual number of black applicants only that portion coming from the area being considered as the "relevant labor market." However, when considering Cleveland as the relevant labor market, the court did not restrict the number of black applicants to only those living in Cleveland. The effect of this restriction was to make these smaller areas more like "sub-markets" rather than a focal relevant labor market. ML received no credit in these "sub-analyses" for any applicants that came from outside the sub-markets, and was in effect penalized because a large percentage of its black applicants came from outside these closer areas.

2. Other Evidence

In his findings of fact, the trial judge referred to several

non-statistical evidence. This evidence was of two kinds. First, the trial court stated that "numerous entry level job applications have the letter "B" written by hand on them," 11 applications of blacks out of 55 applications between 1988 and 1991.

Second, the trial court referred to the case of James Clark, a black who applied for employment at ML but was not hired. The court found both that Clark was "an individual victim of discrimination," and that "the defendant's treatment of Clark casts revealing light on the statistical case." According to the evidence, Clark, who had filed an application several months before at the urging of one of his friends (one of ML's few black employees) had been called about a position. At his interview, Clark had indicated continuing interest in a job, had passed a simple manual dexterity test, and been taken on a brief facility tour. Although the Maximal Light Personnel Director had promised to "get back to him real soon," Clark was never called again. ML continued to hire others during this period. Maximal Light's Personnel Director testified that he couldn't really remember why Clark hadn't been hired, but he recalled one black applicant who had raised questions about the number of Asian and Hispanic faces during the normal facilities tour, and he didn't hire that person because he was afraid of "interpersonal problems."

II.

(25%)

You are General Counsel for Enlightened Industries, and have been consulted by the Director of Human Resources about the appropriate response to the following situation. Advise him what action the corporation should take.

Enlightened Industries, Inc. adopted an extensive leave policy in 1979. It specifies three kinds of leave available as a matter of right to employees. First, there is "maternity leave"; this is paid leave (at the employee's normal salary), but is limited to one month for each pregnancy and described by EI as intended to "enable our female employees to bear children without incurring financial penalties." The second kind of leave is "family leave"; this is unpaid, is limited to three months in any five year period, and includes such purposes as child care and care of spouses or parents. Finally, there is disability leave, which is also unpaid, and extends to any physical or mental condition which prevents the employee from working at his or her normal job. Disability leave is limited to "one month after the expiration of the employee's accumulated sick pay."

EI's leave policy explicitly provides that no leave other

than those specified above will be provided. Further, employees may not "aggregate leaves to extend absences, except for adding family leave for care of newborn infants at the end of a maternity leave." Finally, employees who must be absent for more extended periods than provided by the leave policy must be terminated, although they remain eligible for reemployment.

EI supplements its leave policy with insurance benefits, all paid for by the company. For example, the medical and hospital costs of pregnancy are fully covered. Further, any employee disabled by illness or injury will have his or her medical and hospital costs for a period of one year from the onset of the condition.

Donna Moody has been an employee of EI for about five years. She is married to Sam Moody, another employee of EI (whom she met on the job). Donna became pregnant in the Spring of 1992, and delivered her baby on November 10th. She worked up until the delivery, since her job as Manager of EI's advertising department did not require strenuous physical exertion and her health appeared excellent.

To this point, the Director of Human Resources is confident of his facts. Yesterday, however, he was visited by Sam Moody who claimed that, while his wife's delivery had no complications, and Donna physically recovered quickly, she has experienced severe post-partum depression. Sam gave the Director a letter from Dr. Shrink, a psychiatrist, whose letter stated that, in his medical opinion, Donna suffered from that condition. Although the letter did not say so, Sam stated that Shrink believed that Donna will be unable to care for her child in the near term. Sam therefore applied for 3 months' unpaid family leave for himself. He also informed the Director, "on behalf of Donna," that she would be using all her remaining accumulated sick days (some 10 days' worth) at the end of her maternity leave.

Although Sam told the Director that Shrink believed that Donna would have difficulty returning to work because of her condition, the Moody family could not afford for both breadwinners to be on unpaid leave simultaneously. Accordingly, he informed the Director that Donna would be returning to work on December 18th (the end of her maternity leave and sick days). He told the Director that Shrink had said that Donna's recovery depended on maintaining a low-stress environment in her workplace, and that Donna's workers would have to be "nurturing" toward her and that EI should be ready to "pick up the slack" if Donna were unable to perform her supervisory and decision-making duties at various times.