

**DISCRIMINATORY PRACTICES EXAMINATION
FALL 1993
Professor Charles A. Sullivan**

INSTRUCTIONS

1. This take-home examination is being distributed on Tuesday, December 7, 1993. Your answers are due back by the close of business (5:00 pm) on Tuesday, January 18, 1992. Answers will be turned in to Gary Bavero's office, which will issue a receipt to you. Should you desire to do so, you may mail your answer to me at the law school. Mailed answers must be postmarked by Saturday, January 15, 1993 to be timely.

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.

QUESTIONS

I.

(75%)

The EEOC has sued defendant Basic Mining Company, alleging that it violated Title VII of the Civil Rights Act of 1964 by discriminating against women on the basis of their sex. The following is a summary of the proof at trial.

Basic mines and processes ore into pellets that are 66% iron. These pellets are then sold to be processed into pig iron and, ultimately, steel. Basic Mines' operations include two open pit mines covering thousands of acres, ore from which is loaded onto rail cars and shipped to the processing plant. The plant consists of a number of operations in several large buildings during which the ore is crushed into smaller and smaller pieces, finally being mixed with water and ground until it reaches the consistency of sand. The resulting mixture is then sent over magnetized drums which capture the iron-bearing grains of ore. From these grains, high-iron pellets are fashioned which are shipped to buyers.

Basic Mines's work force consists of both hourly and salaried employees. The hourly employees are all employed in production-related jobs at the open pits and the plant. The largest group of hourly workers are "operations workers", who are not required to have any special training or education. Operations workers begin as Laborers, the lowest job classification -- Job Class 1. Laborers perform physically-demanding tasks throughout the operations.

All job classifications are defined by the Basic's Collective Bargaining Agreement with the United Mine Workers. Base pay varies by job class; the higher the job class number, the greater the hourly wage paid to an employee. Advancement from Job Class 1 to higher classifications is dependent on seniority: interested persons bid for better positions with the person with the earliest job starting date receiving it.

Until 1975, Basic Mines' hourly work force was composed entirely of men. Thereafter, women began to be hired as hourly employees, beginning with those women who headed households. By 1978 women were hired without regard to their domestic status. By 1980, women comprised about 5% of Basic's hourly work force of about 1000 people.

During most of the 1980s, however, Basic engaged in no new hires. Indeed, the iron industry experienced a steep downturn,

leading Basic to lay off much of its hourly work force. Layoffs were according to seniority: those employees who were least senior were laid off first. From 1980 to 1988, the percentage of female hourly employees dropped to 3%. In 1988, Basic began to recall workers who had been laid off, and by 1989 it began new hiring. Some 46 individuals were hired into the Operations area as laborers, 44 men and two women. These hires improved the female percentage representation infinitesimally.

These 46 hires were made by Basic's Director of Human Resources, Jerry Rig, after reviewing 274 applications and resumes, 25 of which were submitted by women; 259 were submitted by men. Basic Mines made offers to three women, two of which were accepted.

At trial, Dr. Reba Integer presented statistical evidence of female availability or interest in laborer positions. First, Dr. Integer presented applicant-flow data, which was based upon her analysis of the 274 applications. Women represented 17.2% of the laborer applicants, as measured by the number of applicants who listed "laborer" or some similar name as their first choice of jobs. The 17.2% availability of women resulted in an expectancy that 7.9 of the 46 laborers hired would be women. The hiring of two women thus created a disparity of 5.9 female hires. Dr. Integer concluded that the standard deviation of the disparity of females hires was 2.5, which Dr. Integer testified was "statistically significant". Second, Integer also analyzed female availability based upon comparative work-force data. She used a relevant labor market for laborer jobs consisting of (1) individuals employed as laborers, excluding construction workers, plus (2) the unemployed. She calculated the availability of this population in five counties surrounding Basic Mines. In this area, the female availability rate was greater than the 17.2% figure resulting from the applicant-flow data. Accordingly, the expected number of female hires was higher than the applicant flow data, 23.3%, as was the standard deviation of disparity in hiring of females. The standard deviation was 3.26.

The EEOC also presented anecdotal evidence. Two women, Georgia Smith and Alice Alvins, testified that they had sought applications during the hiring period and were told that Basic Mines was not hiring and that applications were not being taken. Alvins did receive an application after stating that her father was a salaried employee. She was, however, not hired by Rig. The EEOC also put in testimony that (1) in years past, Jerry Rig's predecessor in charge of personnel had stated that women "did not belong in the mines", (2) that person and other personnel employees told sexist jokes and made other sexist statements.

In rebuttal, Basic Mines' expert, Dr. Denny Dutton presented

applicant-flow data based upon the 274 applications reviewed during the hiring process. He determined that 9.1% of the applicants were women, thereby making the expected number of female hires 4.19. The resulting disparity in hiring of women was 2.19 and the standard deviation of the disparity in hiring was 1.12 standard deviations.

Jerry Rig testified that he did not discriminate against anyone, and that, in reviewing the applications, he considered all individuals, regardless of whether they had listed laborer as their first choice. With respect to what criteria he did use, on direct examination Rig testified that he looked only to whether an applicant had a family member or friend who worked at Basic Mines.

On cross-examination, when confronted with the files of some males he had hired without such connections, Rig first testified that he looked only for technical training or skills and/or previous mine experience, and then changed his position, saying he looked for skills and experience for some of the 46 positions, but that for the majority of positions he considered whether an applicant was a relative or friend of Basic Mines employees. When asked why he favored persons connected to present employees of Basic Mine, he explained that "workers worked better if they thought that poor performance would embarrass a relative or friend." He went on, "That's just plain old horse sense."

Until 1987, Basic had no written policy on sexual harassment. In that year, Basic Mines and the Union negotiated a collective bargaining agreement with a statement on sexual harassment:

It is the continuing policy of the Company and the Union that all Employees shall be provided with a work place free of sexual harassment. Such harassment shall be considered discrimination under this agreement. In the event any such discrimination should occur, and the Company is made aware of same, the Company shall take corrective action as appropriate. Neither the Company nor the Union shall retaliate against an Employee who complains of such discrimination, or who is a witness to such discrimination.

No woman ever filed a harassment grievance. Under the existing grievance process, were a female employee to bring a charge against a fellow bargaining unit employee, the Union would be required to simultaneously press the woman's claim and seek to avoid punishment for the alleged male perpetrator.

Several witnesses testified that Basic Mines is male dominated. Men only were employed as hourly employees for the first ten years of Basic's existence; women began to work there in 1975. Men occupy every supervisory and managerial position, whereas women occupy mostly lower level job classifications. Five

female employees also testified that Basic is also male-dominated in terms of the sexualized nature of the work place. Men initiate and promulgate frequent references to sex and to women as sexual objects. Visual references to sex and to women as sexual objects were found throughout Basic Mines, including areas where women worked and ate. These took the primary forms of graffiti, photos, and cartoons. Some of the visual materials remained on walls for long periods. All relevant testimony indicated that male employees felt free to exhibit sexually-focused materials anywhere they chose. A few women also exhibited similar materials, almost always in their own personal areas, e.g., lockers.

Language at Basic was generally coarse; both men and women cursed and used words with a sexual referent. Strikingly, however, only men went further and used language either (1) referring to women generally in terms of their body parts, and/or (2) directing comments to or about specific women and their sex lives, including proposing sexual relationships and discussing sexual exploits. "Pet names" and terms that persons in romantic relationships might use, were common, e.g, "honey" or "baby." Much, of this language was not directed at any specific woman, but some references to individuals were made and the language used by men referred to women at Basic Mines or women in general.

few women at Basic were subjected to physical acts that reflected a sexual motive. These incidents ranged from a male pretending to perform oral sex on a sleeping woman co-worker, to a man touching a woman in an objectionable manner, to women being presented with various dildos, one of which was named "Big Red." These incidents were few in number.

Many of Basic Mines' first-line supervisors had actual knowledge of these behaviors: some foremen participated in them and others worked closely with those who did. Further, management personnel testified that they saw photos and graffiti of a sexual nature. The defendant's response, however, was at most situation-specific: Basic Mines responded only to complaints about specific incidents of sexual harassment. At no time did it take steps to determine whether the incidents were indicative of a problem requiring a company-wide response. In addition, Basic never established a system for processing records of complaints.

While most of the visual materials which came to the knowledge of management did not have an identifiable origin, certain materials appeared in offices shared by identifiable foremen, or on or in specific foremen's desks. Basic did not generally attempt to prevent such materials from remaining.

How should this case be decided? In answering this question, please discuss all applicable theories of liability, but you need not go into detail about remedies.

II.

(25%)

You are General Counsel of General Hospital. The Chief Administrator has come to you for advice. She reminds you that, for years, General Hospital has tried to provide a rubella-free environment. Rubella, also called "German Measles", is a highly contagious disease that can cause serious birth defects when contracted by pregnant women. As part of its efforts, General Hospital has had a strictly enforced policy that provides: as follows:

All new employees of the hospital will be given a rubella titer test as precondition for employment. This test will be given in Employee Health at the time of the pre-employment physical examination. If the test results from the titer are less than one to ten, it will be mandatory for that employee to receive the rubella vaccine.

Until recently, no objections have been raised to the policy, and no employee has ever refused to be inoculated.

Recently, however, a problem arose. A month ago the Hospital, after an extensive interview process, wrote to Sara Spann, who had applied for employment as Hospital Decorator, offering her the position. The letter stated Spann's starting date, and that "This position is a temporary position which is projected to end on or before July 1994." The letter went on to state that, "as with all new employees, the above position is conditional upon your passing the preplacement physical examination to be scheduled in our Employee Health Department."

When Spann was given her preplacement physical examination, she was informed that her rubella titer was low. The Hospital offered Spann immunization, but she refused it because she thought she might be pregnant and was worried about the potential danger to her fetus from the immunization. Further testing revealed that she was indeed pregnant, and Spann has persisted in refusing to be immunized.

Spann's scheduled starting date is tomorrow. The Chief Administrator has prepared a draft letter which he wishes to send

to Spann. It provides:

As you are aware, the rubella vaccine that you are not able to receive right now due to your pregnancy is required of all employees who show a negative titer in the physical process. Because of this policy regarding the vaccine, General Hospital has to discontinue your employment. We understand your decision not to take the vaccine and we do feel that this was sound judgment on your part.

You would have been an asset to the Hospital and we have appreciate your interest in us. We highly encourage your reapplying to General Hospital upon your being able to receive the vaccine.

Advise the General Counsel as to the legality of this proposed action, including, if appropriate, alternative courses of conduct.