

SETON HALL UNIVERSITY SCHOOL OF LAW

Employment Discrimination
Prof. Tristin Green
Final Examination — Spring 2001

INSTRUCTIONS:

1. This examination contains **5 pages** (including this one) and **4 essay questions**. The times suggested for each question roughly reflect the weight that each question will be given in grading.
2. Total time allowed: **3 and ½ hours**. The examination is designed to be written in 3 hours, with a ½-hour reading period.
3. This examination is entirely open book.
4. Do not tear pages out of the bluebooks.
5. Write as legibly as possible.
6. Clarity and organization are important. I strongly suggest that you outline your answers before you begin to write. If you find that it would be useful to have additional information, explain what information you would like to know and how it would be useful to your analysis.

ESSAY # 1: (suggested time: 40 minutes)

You are a law clerk for federal District Court Judge Deborah Deliberate in the Thirteenth Circuit. She has recently turned her attention to a motion for summary judgment filed by the defendant in an employment discrimination case, EEOC v. Shop-Town, Inc., and she seeks your input. She gives you the following briefing on the facts and evidence presented by the parties in the case:

The EEOC filed the action on behalf of Joe Santana, alleging that Shop-Town, a national department store chain, discriminated against Santana on the basis of national origin in violation of Title VII of the Civil Rights Act when it refused to hire him as an inventory control agent at Shop-Town's New Jersey store. Santana, born in Mexico, moved to this country in 1971 and became a naturalized citizen of the United States in 1988. He speaks English with a Hispanic accent. He worked for a number of years as an inventory control agent at a department store in Arizona, but moved to New Jersey in 1999 to be closer to his wife's family. When he arrived in New Jersey, he applied for an open inventory control agent position at Shop-Town in New Jersey. An inventory control agent typically keeps detailed records of merchandise stock in the store and places discretionary reorders with product vendors.

Santana was called in for an interview with Martin Wallis, the interviewing agent for Shop-Town in New Jersey. At the interview, Wallis commented on Santana's accent and asked where he was "originally from." Wallis's interview notes state that Santana was "likeable," but "not too sharp."

Shop-Town asserts that Nick Brown, who is white, was chosen for the position because he was better qualified than Santana. Shop-Town points to Wallis's interview notes for Brown, which state that Brown "respond[ed] well to questioning." The candidates' job applications reveal that Santana has more relevant job experience, including favorable reviews of his work in Arizona, and a higher degree of education than does Brown. Shop-Town has also submitted evidence that it employs several Hispanic employees in the inventory control department at the New Jersey store.

Judge Deliberate has asked you to prepare a memo in which you provide an analysis of the defendant's motion as it is likely to be decided under current individual disparate treatment doctrine. She requests that in analyzing the motion you be sure to consider all possible arguments for plaintiff as well as for defendant based on the evidence presented. In addition, recognizing that she sits in the Thirteenth Circuit, bound only by the Supreme Court and Congress, Judge Deliberate asks that you provide her with your recommendation as to how she should rule in this case in light of the goals of Title VII. She thanks you in advance for your well-reasoned and thoughtful response.

ESSAY # 2: (suggested time: 1 hour)

Your firm represents the Dulton County Sheriff's Office ("DCS") in employment matters. Recently, you have been notified of an employment discrimination suit filed by Sylvia Nelson against DCS. Nelson worked as a patrol officer at DCS for ten years. In her history at DCS, she never had a negative employment evaluation and was honored on several occasions for her outstanding service to the community. Beginning in early 1998, she suffered from a variety of psychological afflictions, including post-traumatic stress disorder related to childhood abuse by her father. As her condition worsened, she began to miss work frequently and had difficulty staying focused to perform manual tasks. Then, in August of 1999, she fired six rounds from her revolver into the ground at her father's grave. The next

day, Sheriff Dick Donovan placed her on administrative leave. In the weeks that followed, Nelson entered a psychiatric hospital for treatment. In October, Nelson was released for work by her supervising physician on the condition that she continue therapy and prescribed medication.¹

In late October, Nelson met with Donovan and sought reassignment to her former position as patrol officer at DCS. Although Nelson insisted that she was fully capable of returning to her former patrol officer position, she indicated that in the alternative she would be willing to take the position of unit coordinator, which had just opened up at DCS. That position involved leadership, administrative, and organizational duties rather than patrol or use of force.

Donovan told Nelson that, despite her years of valued service, he was unwilling to consider her for assignment. He said that “[b]ased on what we know about what happened this past year, [Nelson] would be better off in some other field.” Donovan did not request that Nelson undergo the standard psychological evaluation required for patrol officer positions because “she did not make it to that step.”

When questioned about his reasons for refusing Nelson’s reassignment, Donovan explained:

I had concerns for her as a patrol officer because we have to testify in court. And what generally happens, or happens frequently, is the officer is attacked. And I thought that if she were to testify, it might be brought up in court about what had happened to her in the past. And I was quite concerned that if she had to use force on duty, for sure, that would be brought up in court by the opposing side in any investigation. And I thought she would suffer and so would the whole county.

In addition, he said that he was concerned that fellow officers would not “trust” her, which might affect officer and/or public safety. Finally, he said, even if he had wanted to give Nelson the unit coordinator position, he couldn’t have done so because a patrol officer with several months seniority over Nelson had also applied for the position.

When Nelson’s administrative leave expired, she was terminated. She filed a timely charge with the EEOC alleging discrimination in violation of the ADA, received her right to sue letter, and timely filed suit against DCS in federal court.

Write a pre-litigation memo in which you evaluate Nelson’s possible claims under the ADA. Be sure to consider Nelson’s possible arguments in support of her claims as well as DCS’s possible defenses and/or arguments in response to her claims and to discuss the likely result.

Exam continued on next page . . .

ESSAY # 3 (suggested time: 1 hour)

¹ Her physician prescribed an anti-depressant that must be taken at regular 4-hour intervals during the day and night; its only known side effect is a physical inability to conceive a child while on the medication.

Tom Danwell has come to you for legal advice. Danwell has been a successful account executive at Roll Out, a high-end advertising firm in New York City, for the past two years. His job requires that, in addition to in-house design work, he visit clients in the New York City area, including several well-established banks and numerous high-tech start-up firms. This February, Danwell started wearing skirts to work. He says that this has caused several problems for him. First, Roll Out denied Danwell a promotion that he was expecting to receive on March 15. Roll Out notified him that he would not receive the promotion until he complied with company policy stating that men must wear pants to work (but providing that women may wear pants or skirts to work). Second, he says he feels harassed by several of his co-workers, male and female, who have been calling him names, leaving piles of fashion magazines on his desk and chair, and defacing his account folders with sexually explicit cartoons of men in dresses.

Danwell has filed internal complaints about the promotion denial and the incidents of harassment. He has also explained to the management at Roll Out that wearing skirts is integral to his sincerely held belief that men and women were created equal and must be treated with equal dignity and respect. Donovan's complaints are still being processed, but Donovan says that nothing has been done to stop the harassment.

You make a few preliminary calls on Danwell's behalf. Sally Munson, VP of Human Affairs at Roll Out, tells you that the firm's partners are concerned about maintaining the firm's image as a "powerful and aggressive" advertising agency. She explains that image is a big part of what advertising agencies sell and that there is a fear among the partners that the big banks, Roll Out's more mainstream and best paying clients, may drop Roll Out if it continues to permit Danwell to wear skirts. In addition, she says that the partners are concerned about the disruption that Danwell's attire is causing his co-workers in the office.

Danwell tells you that he would prefer to settle this issue through the internal grievance procedure but asks that you provide him with a memo advising him of his possible legal claims against Roll Out under the anti-discrimination statutes. Be sure to consider Danwell's possible arguments in support of his claims as well as Roll Out's possible defenses and/or arguments in response to the claims and to discuss the likely result. Also be sure to advise Danwell whether he is at risk of losing his legal rights by completing the internal grievance procedure before filing a charge of discrimination with the EEOC.

ESSAY # 4: (suggested time: 20 minutes)

The EEOC is considering bringing a claim of discrimination in hiring on the basis of sex against Programit Inc. Programit is a computer programming company based in Cupertino, California, the heart of the high-tech industry. Programit has 260 computer programmers, 35 of whom are women. Programit says that although it has a high turnover, it has little trouble filling its positions and does not actively recruit programmers. Typically, job announcements are simply posted on the company's web site, which is accessible around the world. Programit requires that its programmers have a college degree, but has no other formal requirements, relying primarily on applicant interest and experience in programming as evaluation criteria. Women make up 42% of the college graduates within a 50-mile radius of Programit. Nationwide, 35% of college graduates are female, and 18% of college graduates with degrees in computer science or computer programming are female. In a recent survey of girls aged 15 to 18, girls ranked computer programming last out of 11 choices of careers, ranking health care, art, and music at the top.

Running some quick math, you conclude that using the 42% figure in calculating a binomial distribution

analysis results in a Z score of approximately -9.32; using the 35% figure results in a Z score of approximately -7.28; and using the 18% figure results in a Z score of approximately -1.91.

Prepare a memo evaluating the likelihood of success in a systemic disparate treatment claim brought by the EEOC against Programit based on these statistics. Please be sure to explain the rationale behind the use of statistics in proving a pattern or practice of intentional discrimination and to discuss possible arguments by the EEOC and Programit on the statistics available in this case.

END OF EXAM