

SETON HALL UNIVERSITY SCHOOL OF LAW

Employment Discrimination
Final Examination

Prof. Tristin Green
Fall 2000

INSTRUCTIONS:

1. This examination contains **5 pages** (including this one) and **3 essay questions**. The times suggested for each question 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.

ESSAY # 1: (suggested time: 1 hour and 15 minutes)

Paula Phillips has worked for Fly-By Airlines, a Newark, N.J. airline, as a ground school academic instructor since 1996. Phillips sought and was denied a position as pilot on three occasions over a two-year period.

Fly-By's application and selection process for pilots involves two phases. In the initial phase, Fly-By accepts applications from individuals meeting certain minimum qualifications including 350 hours of flight experience, commercial pilot certification, and a high school diploma. At the second phase, applicants must complete a simulator flight and a formal interview. Based on the applicant's performance on the flight test and interview, the VP of Flight Officers then decides whether to reject the applicant or to extend an offer.

Two Fly-By employees, an employment representative and a flight operations representative conduct the formal interview. These individuals assess the applicant in four broad categories or "dimensions" including: motivation, leadership, interpersonal skills, and decision making. Interviewers ask an applicant a series of questions and assign a number to the applicant's responses with a number "1" reflecting a poor level of the dimension characteristic and a number "5" reflecting a high level of the dimension characteristic.

Phillips has 360 hours of flight experience, a commercial pilot certification, and a high school diploma. She went through the pilot application and selection process for the first time in December 1998. After she was notified in January 1999 that she had not attained a pilot position, Phillips complained to Fly-By's Manager of Flight Officer Employment, Mara Miller, and expressed her concern that the VP of Flight Officers was biased against her. She told Miller that she had seen the VP of Flight Officers on the day that she was denied the position and he had told her that she should not be upset about not getting a pilot position because "[w]omen aren't cut out for flying, and, anyway, they should think about their children before considering a dangerous flight position." Miller responded by informing her that she had been denied the position because she had failed the formal interview, receiving an average score of "2" rather than a passing score of "3." According to Miller, the Fly-By "dimensions" are important because they target applicants with certain personalities who are more likely to get along with other pilots in the air, avoiding crossed communication signals and, ultimately, crashes. Miller also pointed out to Phillips that even though women have an interview pass rate of 20% to the men's 50%, much of that disparity is probably due to the fact that men typically take an interest in flying at an earlier age and log more flight hours, making them more in-tune with pilot style and more responsive to the interviewers' questions.

Fly-By has a total of 40 pilots on its flight officer staff; 6 of those pilots are female. Typically, only one or two women, and sometimes no women, apply for open Fly-By pilot positions. Women make up 30 percent of all individuals who meet Fly-By's minimum requirements in the nation but only 20 percent of individuals who meet Fly-By's minimum requirements in the Newark area. Using the 30 percent figure as the basis for calculating the expected value in a binomial distribution analysis results in a difference in observed and expected values of

approximately 4 standard deviations. Using the 20 percent figure results in a difference of approximately 1 standard deviation.

Phillips applied for and was denied the position of pilot two more times, once in May 2000 and again in August 2000, and received a score of “2” on both occasions. Phillips filed her charge with the EEOC in November 2000 and received a right-to-sue letter from the EEOC last week.

Write a pre-litigation memo in which you evaluate Phillips’ possible claims under the federal anti-discrimination statutes. Be sure to consider Phillips’ arguments in support of her claims as well as Fly-By’s possible defenses and/or arguments in response to her claims and to discuss the likely result. 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 #2: (suggested time: 1 hour)

Betty Balk was hired as a product support manager in 1992 by Meat Packer Co., a manufacturer of meat packing equipment. The Meat Packer meat packing machine, Meat Packer’s most popular piece of equipment, slices beef and packages it into plastic wrap for resale. As a product support manager, Balk spent approximately 80% of her time in the field and the remainder in the office. In the field, she inspected and provided demonstrations of Meat Packer machines in various meat packing plants. In the office, she maintained an email discussion group for meat packing plant operators and helped out the administrative staff with various paperwork.

In April of this year, a supervisor at Meat Packer noticed that Balk seemed tired and irritable and was developing a strange blue stripe across her forehead. He requested that Balk submit to a psychological and medical examination. Balk was hesitant to do so, but out of fear of losing her job, she agreed. Later that month, Balk informed Meat Packer that she had been diagnosed with Alterior-Micondosis (A-M), a rare genetic disorder that, in its most developed stages, can produce severe problems with gait, balance, coordination, hearing, and vision. Balk’s A-M is in its early stages and currently manifests itself in the form of periodic fatigue triggered by reading and a striking blue stripe across her forehead. Medical experts project that it should take at least ten years before Balk develops any additional symptoms. Medication is known to alleviate the symptoms associated with early-stage A-M, but Balk is wary of taking medication and has declined to do so.

By May, Balk was having great difficulty staying awake in the office. She requested that she be permitted to do paperwork and maintain her email discussion group at home, where she could lie down for periodic naps. In addition, she requested that she be provided an assistant to read emails to her and to type in her responses. Meat Packer denied both requests. However, it did supply Balk with a voice-recognition adaptor that permits a user to speak rather than type instructions into a computer.

In October 2000, Balk requested a transfer to a field sales position, in which she would travel to plants to sell Meat Packer machines but would do no office work. Meat Packer denied the request, stating that a candidate with a “more appropriate sales appearance” had applied for the position. Not long after Balk was denied the transfer, the News Ledger, a local newspaper, ran a story about a man who purportedly had A-M in its early stages and who, in addition to having an “unbelievable blue stripe across his head,” would, without notice, lose all coordination. Just last month, Meat Packer discharged Balk on the ground that her in-office work productivity had fallen below an acceptable level and that she was a danger in the field because if she lost her coordination during a demonstration of the Meat Packer machine, she would harm herself and/or potential clients.

Write a pre-litigation memo in which you evaluate Balk’s possible claims under the ADA. Again, be sure to consider Balk’s possible arguments in support of her claims as well as Meat Packer’s possible defenses and/or arguments in response to her claims and to discuss the likely result. 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 # 3: (suggested time: 45 minutes)

Jack Jennings worked for one year at Local Construction before he quit on September 1, 2000. Local Construction is a construction company with 20 employees that sends crews of 5-7 construction workers and one on-site manager to various construction sites for several months at a time.

While Jennings was employed by Local Construction he claims that he was subjected to taunting and name-calling on a daily basis both from his co-workers and from his on-site manager, Ed Engle. Several times each week he would find sexually explicit cartoons in his tool box and would find tools missing, although the tools would usually turn up somewhere on the job site grounds. Jennings says that the trouble began after he had been working for Local Construction about three months and Engle’s wife started coming by the job site. Engle thought that his wife was interested in a sexual relationship with Jennings, and Engle became jealous of and verbally abusive toward Jennings from that day forward. The co-worker behavior seemed to spiral outward from Engle’s verbal abuse. Jennings says that although some name-calling and telling of sexual jokes is part of the culture of any construction crew, he felt singled out for particularly abusive name-calling and pranks. Jennings says that he was deeply troubled by his co-workers’ and Engle’s behavior, but that he could never bring himself to complain or to stand up to them and tell them to stop. Finally, when he could take it no longer, he quit.

Local Construction’s anti-discrimination policies are outlined in its employee handbook, and include a procedure for reporting any harassing behavior to one’s on-site crew manager or to the roaming site manager. The roaming site manager makes monthly visits to each site and lunches

with the on-site crew manager.

Jenning is now considering bringing suit against Local Construction. He says that he likes working construction but that he has not yet sought another construction job. In fact, he thinks that with the help of the psychological counseling that he is now undergoing, he will be capable of returning to Local Construction, and he says that he would prefer to be reinstated to his position at Local Construction rather than have to search for another job. He would also like any monetary relief that might be available to him.

Write a pre-litigation memo in which you evaluate Jennings's possible claims under the federal anti-discrimination statutes. Also, presuming that Jennings does succeed in establishing Local Construction's liability on any of his claims, discuss the types of relief that might be available to him and assess his likelihood of attaining those types of relief. 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.

END OF EXAMINATION

PLEASE RETURN YOUR EXAMINATIONS WITH YOUR BLUEBOOKS.

Have a Happy and Restful Holiday.