

UNIVERSITY OF MISSISSIPPI
SCHOOL OF LAW

EMPLOYMENT DISCRIMINATION LAW
Professor Secunda

FINAL EXAM

Date: December 10, 2002

Time Allowed: 3 Hours, 30 minutes

Instructions

1. You are allowed to refer to the statutes at the back of your text book, but no other materials may be consulted during this examination.
2. Please "sign" the following pledge by writing your examination number on the line after the pledge. DO NOT write your name on this examination or on any bluebook.

By the act of submitting my examination, I do pledge, on my honor, that I have neither given nor received any improper assistance and that I will report any improper assistance given or received by others of which I am aware.

Exam No. _____

3. No examinations may leave the examination room. Return your examination with your bluebooks.

GOOD LUCK AND HAVE A GREAT WINTER HOLIDAY!

DO NOT TURN TO THE NEXT PAGE UNTIL INSTRUCTED

THREE QUESTIONS

QUESTION ONE (One Hour; worth 1/3 of points)

Great ideas come along only so often. Developing a professional apology service was an idea whose time had come, as Sally Sorry soon discovered after opening All Apologies, Inc. ("AAI") in early 1995 in New Oxford, Oxonia. Oxonia is an EEOC work-sharing agreement state.

The demand for people wanting others to apologize for them was overwhelming and AAI quickly grew from a one-employee shop run out of an old Laundromat to a company boasting 21 individuals working in various capacities (10 full-time employees, 6 part-time employees, 5 independent contractors) in a sleek downtown office building by 2002.

Although AAI prided itself on providing solemn, gut-wrenching apologies on behalf of a self-righteous public (its motto was "We give voice to your regret"), AAI was not so good in resolving its own internal disputes. Case in point: one of AAI's first employees, Ron Remorseful, a 60-year old heterosexual, white male, was exceptional in the act of contrition and had risen to a Vice President position at AAI. He was also a notorious womanizer and commonly referred to as a "jerk." He was known around the office to tell numerous off-color jokes in front of both men and women and his comments, to both men and women, were always full of sexual innuendo.

Connie Contrite, a 46-year old lesbian, white female, was hired by Sally Sorry as a Junior Apologist for AAI in the fall of 2000 and immediately began admitting guilt on behalf of others at an amazing pace. By 2002, she was considered one of the top employees at AAI and was about to apply for a promotion to become a Senior Apologist.

In June 2002, however, Ron Remorseful became Connie's direct supervisor and began making numerous sexual remarks about Connie's appearance and also made numerous off color jokes in her presence. Connie asked Ron to stop making these jokes and comments in her presence, but Ron refused. At no time did Connie and Ron discuss Connie's sexual orientation.

AAI has an employee handbook which contains both an equal employment opportunity policy prohibiting all forms of illegal employment discrimination and a more specific sexual harassment policy. The sexual harassment policy establishes a zero-tolerance policy against sexual harassment in the workplace and sets up a complaint procedure under which an employee can complain to his or her supervisor about being the subject of sexual harassment. AAI distributes this handbook to all employees when they are hired and conducts sexual harassment training for all employees once every three years. Connie has not received this training, but Ron has.

On November 1, 2002, Ron made yet another inappropriate remark to Connie. Seeing Connie bending over to get a drink at the water cooler, and apparently referring to her back side, he remarked in a loud voice for everyone to hear, "Now, there is something that you never have to apologize for." About 5 fellow employees, male and female, standing in the general vicinity, laughed uproariously at Ron's comments. Connie left the office in tears and later that day left a voice mail for Sally Sorry stating, "I regret I can no longer work for AAI. Ron has made my working conditions intolerable." Connie never complained to Sally or anyone else in management (besides Ron) before this time. Although Sally is sorry to see a fine worker like Connie leave AAI, she shrugs her shoulders and a couple of months later hires a new employee, Rebecca Repentant, a 40 year-old, heterosexual white female. (As soon as Rebecca is hired, she is also subjected to Ron's unrelenting sexual banter).

A few days later, a very upset Connie Contrite comes to your law office to seek legal advice. She would like to sue AAI, Sally Sorry, and Ron Remorseful for employment discrimination and be reinstated to the Senior Apologist position, the position she believes she would have received absent Ron's conduct. She asks you to evaluate what claims she can assert against these parties. What are their chances of success? What additional information (if any) do you need to know? Write a memo evaluating Connie's case. Along with a discussion of potential claims, be sure to include a discussion of both the administrative process Sally must follow before proceeding in court (including a discussion about her obligations before the Oxonia Human Relations Commission, the parallel state administrative agency that deals with these types of cases in Oxonia, and which administers the parallel state antidiscrimination law, the Oxonia Human Relations Act) and the potential remedies, if any, Connie may recover under these circumstances.

QUESTION TWO (One Hour; worth 1/3 of points)

Anachronistic Alloys Corporation ("AAC") is in the business of producing materials that few companies use anymore -- copper, tin and lead-based alloys. Because of the peculiar properties associated with these older materials, AAC still has to rely on old machinery from the industrial revolution to produce these materials. For instance, AAC has a 100-ton tin smelter which helps shape the various tin-alloy products AAC produces.

It takes five employees to work the tin smelter. Each employee is jointly responsible for various parts of the process. According to the tin smelter job description promulgated by AAC, the process requires employees to lift approximately 50 pounds, to operate hard-to-turn gear shifts, to stand for extended periods of time, and to perform a multitude of manual tasks with great concentration, to name but a few of the more strenuous aspects of the job. Because of the highly integrated nature of the operation, tin smelters work closely together and depend on one another to avoid injury to themselves or others.

Gary Grumble, a 35-year old, Hispanic male, was hired for an entry level position at AAC in 1990. After 10 years with AAC, Gary has established himself as a dedicated, excellent worker who has received top notch performance reviews from all for whom he has worked. In 2000, Gary had enough seniority to bid for a coveted tin smelter job and receives it. Although the work is hard, Gary loves his job.

Unfortunately, starting in the spring of 2002, Gary experiences a mysterious ailment which causes him to suffer intense joint pain, excessive fatigue, and major depressive episodes, during which he is unable to perform his tin smelter position. Because of operation of the tin smelter requires all five employees to be present at all times, Gary's frequent absences, and the need to replace him, cause much production delay (although in no way threatens AAC's overall financial health). Gary is also unable to do daily chores at home such as laundry, washing dishes, and shopping for groceries during these periods. Nevertheless, he can still drive his car and vacuum the rug during these same periods of illness.

Concerned, Gary goes to his doctor and is told that his symptoms are a result of fibromyalgia, a disease of unknown derivation and unknown duration. The doctor is neither able to predict with certainty when, if ever, Gary's physical and emotional pain will subside nor whether his condition is aggravated by his job as a tin smelter. Although the doctor can prescribe antidepressant medications to alleviate the depressive episodes, there is little he can do for the other symptoms.

Initially, Gary continues to work at the tin smelter position when he is able, but he continues to miss an exceedingly large amount of time from work due to his illness. In order to lessen the chances of these debilitating episodes, Gary asks his employer to accommodate his fibromyalgia condition by transferring him to a less strenuous position, tin-alloy quality control inspector. Hearing that Gary will no longer work be able to work at the tin smelter position, his supervisor, Igor Igorovich, a 42-year old, white male, comments to his co-workers (which Gary overhears as he is leaving the work area), "I'm sure glad that Mexican fool is leaving. They don't have the proper work ethic."

There are two problems with accommodating Gary with the quality control inspector job, as the company sees it. First, because of his major depressive episodes, the company is concerned that Gary will not be able to properly concentrate on the quality inspection causing danger to clients who buy AAC's products. Second, under the existing internal bidding procedures, the job in question is awarded based on a combination of seniority and merit. Although there is currently an inspector job which is open, AAC does not believe that Gary has the same level of merit for the job that Tommy Tireless, a 34 year-old white male, has. Since Tommy and Gary were hired on the same day and have the same seniority, AAC awards Tommy the inspector position.

After giving the inspector job to Tommy, AAC offers Gary an alternative job, a mailroom clerk position, to accommodate his illness. Although AAC agrees to pay Gary the same amount of money and benefits in this position as he made in the tin smelter position, Gary refuses the mailroom clerk job because he believes the mailroom clerk job is beneath him. Gary demands that his illness be accommodated by assigning him to the quality inspector job, that he be able to continue in the tin smelter job, or nothing. The company refuses to allow Gary to continue in the tin smelter job, to award him the quality inspector job, or to offer him another job besides the mail room clerk job. Consequently, Gary is terminated from his employment at AAC.

Although a year goes by without hearing anything from Gary, AAC upper management learns that Gary filed an EEOC charge (your state has no parallel state antidiscrimination administrative agency) 280 days after his termination. You are in-house counsel for AAC. Upper management has asked you what claims Gary may have against the company and what their chances are of success. What additional information (if any) do you need to know? Write a memo evaluating the likely success of a case brought against AAC by Gary Grumble, including a detailed analysis of possible claims, defenses, and remedies. AAC also wants to know from you whether it would make sense to make an offer of judgment to Gary in this case for strategic reasons.

Question Three (One Hour; worth 1/3 of points)

Comment critically on the following statement. Advocate a position with respect to the statement. Integrate cases, statutes, and arguments discussed in class to support your view.

"The duty to accommodate employees or applicants in religion and disability employment discrimination cases is properly given divergent interpretations based on the nature of the interest sought to be accommodated. Therefore, both the religious accommodation standard as set out in the Hardison case and the disability accommodation standard as set out in the Barnett case are appropriate."