

EMPLOYMENT DISCRIMINATION EXAM December 14, 1993

TWO HOURS *Lewis*

This test is open materials.

I. One and Three-Quarter (1-3/4) Hours

After timely satisfying all prerequisites to suit, Susan Strident, a forewoman in a 200-employee textile pattern assembly plant, brought an action under Title VII of the 1964 Civil Rights Act and 42 U.S.C. §1981 against her employer, Indifferent Enterprises, in a state court of general jurisdiction. Strident, a citizen of Italy, speaks English as a second language and has a pronounced Austro-Italian accent.

At trial she testified that her manager, Gordon Liddy, denied her promotion to the job of sewing production supervisor after Susan rejected his thrice-repeated invitation to have dinner with him. She further testified that she was qualified for the supervisor's job by reason of 6 years' experience in Indifferent's textile operations and that the company had denied her promotion application because of her gender, her accent, her alien status, and her national origin. She said Liddy's personal advances were offensive to her and impaired her work performance but that she had never used Indifferent's Sexual Harassment Complaints Procedure because she had not lost time from work or incurred any medical expenses as a result of those advances. Last, Strident testified that during the litigation Indifferent had terminated her employment in retaliation for her EEOC and court complaints of discrimination. At that point she said she suffered great emotional distress and incurred psychiatric expenses totalling \$12,000 to date.

Liddy testified that he asked Susan out because she had dated other employees, both co-workers and superiors, and so he assumed she would not be offended. He testified that he personally found Strident's accent charming. He said that he selected Buster Brawn instead of Strident for the supervisory position because Brawn was a better trouble-shooter on the machinery in the sewing department. On cross-examination, however, Liddy admitted that the company's maintenance department, not the sewing production supervisor, was primarily responsible for fixing mechanical breakdowns.

Indifferent's Director of Personnel, Carol Carnegie, testified that a key factor in Brawn's promotion was that Brawn but not Strident had passed a standard "Supervisory Human Resources Readiness" test. Carnegie acknowledged that nationwide only 45% of

testtakers whose principal language is not English achieved the minimum cutoff score, compared to 70% of speakers whose principal language is English. But she said that Indifferent thought the test would be "helpful" to assess a candidate's capacity for the personnel aspects of the job. Carnegie testified that another factor in selecting Brawn was an Indifferent affirmative action plan that gave a modest preference to male candidates for positions like sewing production supervisor, from which the industry had long excluded men. Carnegie denied, however, without contradiction, that Indifferent itself had ever discriminated against men for those positions.

Finally, Carnegie testified that during the discovery process in this action the company learned that Strident had falsely asserted on her resume six years ago that she was an honors graduate of Fashion Institute of Technology; according to Carnegie, the company terminated Strident because of this falsehood, not in retaliation for Strident's initiating anti-discrimination proceedings.

Strident seeks reinstatement, promotion to the position of sewing production supervisor, back pay resulting from both the nonpromotion and termination, \$12,000 for the accrued psychiatric expenses, \$60,000 for emotional distress and future psychiatric expenses, \$150,000 in punitive damages, and, to the extent she is not reinstated or promoted, front pay.

A. With respect to each of the alleged violations of federal law, please predict whether Indifferent will be found liable. In order to answer these questions you will need to state your assumptions about some of the employment practices at issue, the evidence produced at trial, and how a fact-finder would resolve contested facts and issues. Please give reasons for each answer.

B. Please state, with reasons, to what extent, if any, you believe Strident will recover on each of the claimed items of relief.

II. One-Quarter (1/4) Hour

When is the cost of an employment decision or practice likely to be a defense to a claim of discrimination under Title VII? When is it not?

Best wishes for a relaxing break.