

Memorandum

To: Employment Law Students
From: Professor Daniel
Date: August 12, 2013
Re: Final Examination – Three Hours

Your final exam consists of two essay questions and one multiple short-answer question totaling 90 points. The other 10 points of your grade is based on class participation. Part I is worth **35** points; Part II is worth **30** points; and Part III is worth **25** points. I recommend that you divide your time accordingly.

You should carefully read each question and outline each answer before you begin. An answer that consists of conclusions with no reasoning will receive little credit. Support all of your conclusions with a full discussion of the issues and the facts; and how the facts apply to the rule(s) of law. If you assume facts that are not given, explain why you need to assume these facts and how they effect your conclusion. References to key cases is desirable.

If you are handwriting this exam, please write on every other line in your bluebook and write only on one side of each page. Please skip a page between questions and **write legibly**.

If you are using a computer, please double space and begin a new page for each question.

Good luck and have fun!

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FINAL EXAMINATION – 3 HOURS

PART I (35 Points)

Having just passed the California Bar Examination, you have begun working for the Gottcha Law Firm, a small firm with 3 partners and 4 associates. Part of your assignment is to interview potential clients and advise the partners concerning the strengths and weaknesses of their claims.

On Monday, August 12, 2013 you are asked to interview Sam Silva, a potential client. Silva, who is Hispanic, tells you that he worked for Sonoma Light & Power Company ("SLAP") since 1990 as a bookkeeper. His duties included maintaining, verifying and balancing accounts as well as inputting daily time sheets into the computer system. SLAP has about 150 employees. Until about 2 years ago he states she consistently received positive performance appraisals. In January 2012, Harry Hurtfish became his supervisor and began making numerous condescending remarks to him. He told Silva and other employees they could no longer speak Spanish on the job. He also began to criticize Silva's work without justification.

In April 2012, Silva's repetitive data entry work resulted in carpal tunnel to his right wrist. He was out of work for one month, received treatment and SLAP made ergonomic modifications to his work station. When he returned to work, Hurtfish continued to accuse him of data entry errors (which he says were false) and required him to bring his lunch so he could eat and work at his desk. He refused to allow him to go to training classes. Silva stated that Hurtfish made comments to him, in front of other employees, that he was a "beaner" and asked him if he liked tacos. He also asked if he spoke Spanglish.

In August 2012, Silva suffered an emotional breakdown caused by Hurtfish's conduct toward him. He was placed on disability for an industrial stress claim and filed a Workers' Compensation claim. Silva also immediately made an internal complaint with SLAP's human resource department complaining about Hurtfish's treatment. SLAP told him an investigation would be started and would take about 3 weeks.

Two months later, in October 2012, Silva returned to work with a doctor's note advising that he should no longer work for Hurtfish. He was told by HR that he had to meet with Hurtfish and another supervisor. At that meeting he says he was falsely accused of "errors and overtime issues concerning his personal timekeeping records." Silva was told by HR that they had not completed the investigation of his charge and could not move him. During the next week he was placed under constant scrutiny and his job duties were

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changed. After one week, his treating doctor placed him on disability again stating that his stress issues were being exacerbated.

While on leave Silva sent an email to HR asking about the status of the internal investigation of his complaints against Hurtfish. He received a response the next day stating that there were two investigations going on, one involving his complaints and the other concerning Hurtfish's allegations against Silva for timekeeping irregularities. Silva was told that his required contact in HR was Helen Hurtfish, Harry's wife. At this point Silva filed a charge with the Department of Fair Employment and Housing alleging disability and national origin discrimination.

SLAP challenged Silva's Workers' Compensation Claim, and he was evaluated by a Qualified Medical Evaluator who wrote a December 5, 2012 report concluding that Silva "has suffered a temporary and total industrial psychological disability as a result of an injury (stress) related to harassment and disparagement by his immediate supervisor, Mr. Hurtfish." The evaluator stated that the only necessary work restriction was to place Silva in a different department under a different manager. After SLAP requested a supplemental report, the evaluator concluded in a January 2013 report that Silva's "major source of psychological stress and distress (more than 75%) arises from negative treatment, amounting to harassment by his current supervisor, Harry Hurtfish." Silva applied for other jobs with SLAP while out on leave but was not interviewed for them.

In April 2013 while still on leave, Silva learned that Hurtfish had been transferred to a different location and department and he requested to return to work at his former position. SLAP brought him back to work in May 2013 but also notified him that it was resuming the investigation into the timekeeping allegations made against him by Hurtfish in December 2012. When he met with his new supervisor and a senior HR manager, he states he was threatened with termination based on the 2012 allegations. Silva was told he would be fired unless he signed a release of all claims against SLAP including a requirement that he withdraw his charge with the DFEH. After thinking about it, he decided he would not sign the release. His employment with SLAP was terminated on June 14, 2013.

Silva tells you that as of today, August 12, 2013, he has not heard anything about the complaints he made to HR in September 2012.

After the interview with Mr. Silva, you are asked to write a memo which evaluates Silva's claims and recommends whether the firm should take the case. Since cases such as these are taken on contingency, it is extremely important that you analyze all possible causes of action which the firm could bring on the client's behalf and all possible

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defenses that would be asserted by SLAP. You also need to discuss what steps need to be taken to preserve Mr. Silva's claims.

At a minimum you are expected to discuss the following:

- Prerequisites to filing suit and preserving his claims; (3 points)
- Where you would file suit and why; (2 points)
- Who are potential defendants and why; (3 points)
- Possible causes of action; what must you show to present a prima facie case; (15 points)
- Potential defenses; (5 points)
- Potential damages ; (5 points)
- Would you take the case and why. (2 points)

PART II (30 Points)

You have just graduated from law school and received a judicial internship with a new state court judge. While in practice your judge's main area of expertise was tax law. She will be trying a newly filed employment discrimination case in several months and knows you completed a course in Employment Discrimination Law. She asks you to write a memo that will educate her about this area of the law and make specific recommendations about issues which may arise in this case. She asks you to be specific about the requirements to state a *prima facie* case for all causes of action including sex discrimination, sexual harassment and hostile work environment; what defenses may be asserted and how plaintiffs may counter these defenses. She also asks you to describe any competing legal considerations.

The case is entitled Fedup v. Haphazard Equipment Company ("HEC"). The plaintiff, Frieda Fedup, alleges the following:

- She worked as a manager at HEC from April 2010 until she quit in October 2012.
- She filed a charge alleging sexual harassment and hostile work environment with the Department of Fair Employment and Housing ("DFEH") in October 2012 and received a right to sue notice on October 30, 2012. She filed this lawsuit on October 29, 2013.
- The president of HEC is Warren Wolf. HEC has 55 employees.
- She alleges that during her over two years at HEC, Wolf often insulted her because of her gender, made her the target of unwanted sexual innuendos and in the presence of other employees, made statements such as, "You're a woman,

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what do you know" and "We need a man as the rental manager"; at least once, he told her she was a "dumb ass woman."

- Again in front of others, Wolf suggested that the two of them "go to the Holiday Inn to negotiate [Fedup's] raise." Occasionally, Wolf asked Fedup and other female employees to get coins from his front pants pockets and threw objects on the ground in front of her and other women and asked them to pick them up. He frequently commented, using sexual innuendo, about Fedup's and other female employees' attire.
- In August 2012, Fedup complained to Wolf about his conduct and he claimed he was only joking and apologized. Based on his assurance he would stop, she agreed to stay on the job. However, in September 2012 while she was arranging a deal with one of HEC's customers, Wolf asked her, in front of other employees and her customer, "What did you do, promise the guy some [sex] Saturday night?"
- She collected her paycheck and quit October 1, 2012.

PART III (25 Points)

You have joined the General Counsel's office of Whodunit, the largest on-line retailer of mystery books, magazines, games and stories. Whodunit provides both digital and hard copy content to its customers. Its main office is in Sebastopol, California and it employs 100 full-time employees. Whodunit has two retail outlets in San Jose and Los Angeles, California. Part of your job duties is to answer legal questions from managers. On a typical day, you get 4-5 calls. Today you received the following inquiries:

1. The manager of the San Jose store called and told you that one of his sales employees is insisting on wearing a turban to work as part of his religious observance. Whodunit has a dress code for employees in their retail stores that requires employees to wear dark pants or skirts and a company logoed shirt. They are specifically told they cannot wear anything on their head. The manager wants to transfer the employee to a non-customer contact position. What do you tell him and why? **(5 Points)**
2. The manager of the Finance department called. He has a key employee who has just told him she is pregnant with triplets and may have to take time off during her pregnancy as well as maternity leave. He has several important audits which will occur in the next several months and into next year and needs her to be at work. He wants to know what to tell her. What laws apply and what do you advise him to say? **(5 Points)**

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3. Creative Engineering is the department responsible for keeping Whodunit's website and supporting order technology up and running. The head engineer calls you and tells you that Tim Turtle, an engineer who has been with the company for 5 years and is 54 years old, appears to be getting absent minded and slowing down. In fact, the head engineer says that he has been telling Turtle that he is working too slowly and is "an absent-minded professor." Today, Turtle forgot to enter several key lines of code and caused the website to crash for 15 minutes. The head engineer wants to fire him now! What questions do you need to ask? What legal issues might the company face? What defenses might the company have? **(8 Points)**
4. Your sales manager in Reno, Nevada calls to tell you that a black applicant for a sales position, who was not hired, has just filed a charge with the EEOC in Reno alleging racial discrimination. The charge appears to be based on Whodunit's requirement that sales professionals have a college degree. What theories of recovery might the applicant (or the EEOC) argue? What defenses might Whodunit raise? What would you advise the General Counsel? **(7 Points)**