1)

======== Start of Answer #1 (2020 words) ========

35 points
Excellent

TO WHOM IT MAY CONCERN

Prerequisites to Filing Suit:

All employment contracts in the US are presumed to be at will. However, congress enacted certain statutes that do not allow certain employment decisions based upon certain protected classifications. The first is Title VII of the 1964 Civil Rights Act (T VII), which protects against discrimination regarding religion, national origin, sex, color, or race. The second is 42 USC 1981 (1981), which forces anyone contracting to be placed on equal footing with white males. The third is the Americans with Disability Act (ADA) whith does not allow employers to discriminate based upon a qualified disability. California has also passed a measure to protect its citizens, which is under the Fair House and Employment Act that protects a vast array of classifications, including disability, race, and national origin.

In order to file a lawsuit regarding employment discrimination, you must exhaust your administrative remedies. To be discussed next.

Where you would file suit and Why:

The first place we need to file with is the EEOC regarding the T VII claim of retaliation for the firing on 6.14.2013. We have 180 days from 6.14.2013 to file. We will also want to include in that filing our harrassment claims under ADA and T VII. I suggest we attempt to get a right to sue letter from the EEOC in order to conciliate all these actions and get straight to court. The fresher the memories on our witnesses the better.

Since we have already filed suit with the Department of Fair Employment and Housing around 10.2012, we should check with them how that investigation is going, and if it is completed or not request a right to sue letter from them as well in order to proceed to court.

Potential Causes of Action, and Prima Facie Cases:

We likely have causes of action for 1.) Retaliation against a protected class under FEHA, T VII, and ADA 2.) Discrimination against a disabled employee under ADA and FEHA, , 3) Harrassment (hostile work enviroment) under T VII and FEHA.

Retaliation under all FEHA, T VII and the ADA follows the same prima facie case: 1.) plaintiff was engaged in protected behavior, 2) was the victim of an adverse employement action, 3.) the protected behavior and the adverse employement action are casually connected. In this case, we have Sam (S), who is a disabled, hispanic male, who took two actions that are protected behavior. The first is on 8.2012 when he filed an internal complaint against his supervisor Hurtfish (H), the second is when he filed on 10.2012 with the Department of Fair Employment and Housing. He was harrassed before and after these two behaviors about an unsatisfactory work product that he contends was untrue. After his initial complaint, upon hearing of his former supervisors transfer, S returned to work, only to be bullied by the trail that his previous sadistic boss had left for him. H had filed his own compliant against S internally. S was forced to deal with H's wife in order to sort all this out, essentially forcing him to be victimized again, which he chose not to do, since he was already in the midst of a nervous breakdown.S was told he needed to sign a release that stated that SLAP would not be liable for any claims, and to drop his claim with DFEH otherwise he would be fired. He refused, and he was fired anyways. This is direct and explicit testimony that one of the reasons he was fired was his DFEH claim, which he was legally entitled to bring, and was protected behavior. Also, the timing of the whole narrative can be taken into account when considering casual correlation, and to put it plainly, this case stinks

of retaliation.

T VII and FEHA have provisions that protect individuals against harrassment in the workplace. The situation here is a hostile work enviroment with S's previous supervisor S. The statute of limitations under T VII is to be filed within 300 days of the harrassment, or within 1 year under FEHA. S last worked and was subjected to H's behavior on 10.2012 when he returned to work after his emotional breakdown. If we file quickly, we will be able to bring claims under both of these statutes.

The prima facie case for hostile work enviroment is: 1.) the comments were based upon race (a protected class) , and the comments were severe or pervasive. In the situation we have here, the comments that the supervisor H was making were things like: "beaner", "do you like tacos" and "do you speak spanglish". The comments were all related somehow to S's national origin, which is hispanic. H also made many comments telling employees they were no longer allowed to speak spanish. H's pattern of behavior suggests that he singled out S in order to harrass him about his national origin, his race, and potentially his color. S endured between 1.2012 and 8.2012, and was given two seperate evaulations from medical personal that stated that the majority of his diability and his stress was a result of the supervisors actions.

ADA prohibits discrimination against disabled individuals.

The first step in proving a claim under the Americans with Disabilities Act is determining if the individual is a qualified disabled individual. In order to qualify, it must be proven that you have a history of the condition, and you were known to have the condition. It also must be shown that it substatially impairs a major life function. Major life function under the ADA is broadly defined as anything you daily, that is being impaired by the condition. This is more restrictive that FEHA's definition. FEHA defines it as an impairment to you're ability to work.

Here, S was injured on the job physically in 4.2012, and was out of work for 1 month. The company accomodated his injury with a better keyboard. The company contends however, that his job performance after this time was sub par. S disagrees with that. In support of this position, the disagreement with the supervisor about work

product could be a reflection of the supervisor H not liking S.

42 USC 1981 prohibits discrimination based upon race. This was originally made to protect blacks but the wording places everyone on equal footing with black individuals. 1981 claims have a 4 year statute of limitations, so we are well within our rights to make this claim. 1981 standing is given to any one in a contract relationship. This claim is most likely a back up plan, and a good one at that since we are allowed every damage available including attorney's fees.

Potential Defendents

The company in this case will be held liable for all the discrimination against S as a disabled individual, the harrassment and the retaliation. The company will attempt to say that they did not discriminate against S due to his disability. They accomodated him with a keyboard, with time off, with medical check ups, and were very patient. They ultimately had to let him go though because his work product suffered so greatly. S, if we choose to take the case, will counter stating that yes, they accomodated him with the keyboard, his original injury, but they should be held liable for his emotional breakdown as well. H was the cause of the emotional breakdown, and although the company may be able to escape liability for his actions under T VII harrassment criteria (it must be shown that H's behavior was known to the company and they failed to correct it) it should be noted that FEHA has a strict liability approach so both the company and H will be responsible for all the damages caused by H's actions.

It will be hard for the company and H to defend themselves, for S took at the steps necessary of him. He started an internal complaint, which he was assured would be finished in 3 weeks. 2 months later, when he called to check up on it, he was told he would have to talk to the wife of the very man that harrassed him for months, and so he chose to file with DFEH. He should have waited for that report from HR, but given the bad faith and the harrassment by the company, I think that the courts will look favorably

upon S's plight. Given that almost a year later there has been no word on that internal report, I would suspect that it did not go very far. And if it did, and the company never told S, it only adds to the story that they were harrassing and hiding things from him.

Potential Defenses:

Under the ADA and FEHA, employers are to accomodate disabled individuals who qualify. If it is shown in this case that our client qualifies, as a purely psychological disability has been allowed to (post wrist injury), there is two standards to be applied. Under the ADA, we would be required to show that he is still disabled with accomodations and that the employer attempted to provide that. FEHA determines this question without the accomodations. Here, the employer was told in the supplemental evaluation and the original one that he would need to work for a new supervisor as an accomodation. The employer may be able to argue that they had a new supervisor in charge of S, however, S was attempting to look for other departments and attempted to stay away from H, but the damage was already done, and the employer did not allow a transfer. We should attempt to argue that the employer might be reasonable under the ADA standard, but didnt even try under the FEHA standard.

The best defense from the company would likely be that S's work product was deteriorating before he was under H's harrassment. That would provide them with a non discriminatory reason for firing him. However, it is difficult to say if his work product before H's supervision would have inspired the company to fire him. Either way it would be a mixed motive analysis under *Price-Waterhouse*, or congress's later codification of O'Connor's concurrence there in that the discriminatinatory reason need be a substantial factor in the decision for adverse employment action. I believe here, we could prove, given the medical report that stated the supervisor was 75% at fault, along with the evidence of harrassment, retaliation, threats of firing unless dropping suit, etc, that the substantial factor for his termination was discriminatory. As a result, we would be entitled to a good deal of damages, even if they were able to slightly mitigate the situation with a mixed motive argument.

We should take this case.

Actions brought under T VII, regarding companies of 150 employees are capped at $100,000. However, under the FEHA, the ADA, and 1981, there are no caps. Also under all of these statutes, we would be entitled to attorneys fees if we prevail. We will be able to prevail in at least one of them, if not more.

We may also be able to get punitive damages. If we can show under T VII that we have a disparate treatment case (that our client was discriminated against because he was hispanic, or that there was a hostile work enviroment because he was hispanic, that the employer knew about) we might get punitive damages if we can show that the company knew what H was doing, and failed to act. If they buried that internal complaint, or the wife did. We could also get compensatory damages from the company on a pain and suffering argument since the goal of damages under most of these statutes is an attempt to make the plaintiff whole. Regarding the ADA, we could get double damages if we were to show malicious behavior on the part of the company. FEHA and 1981 also would potentially allow us to collect potentially lucrative amounts of fees while doing an extremely good deed for a hurt member of our society that should be compensated, as well as against a company that should be punished for his misdeeds.

======== End of Answer #1 ========

2)

28 points excellent

======== Start of Answer #2 (905 words) ========

The Department of Fair Employment and Housing is governed by the Fair Housing and Employment Act (FEHA). FEHA applies to any employer with more than 5 employees, here the company has 55.

FEHA incorporates many of the requirements of Title VII in its analysis of Sex

Discrimination, Sexual Harrassment and Hostile Work Enviroment Claims. FEHA has a protected status list that is quite long and inclusive and one of the major protections is : sex. Sex has always applied to gender based classifications.

Prima Facie Case for Sexual Discrimination follows a *McDonnell-Douglas* analysis which is , 1.Was plaintiff a member of a protected class? , 2. did not get the position, 3.) was qualified for the position, and the 4.) the position remained unfilled. This analysis does not fit because she was not applying for a position and was denied, she was not passed over for a promotion, and was not fired. She quit her job. There may be an argument that she was constructively discharged, but the stronger part of this case obviously relates to the harrassment below.

Sexual Harrassment Prima Facie cases are governed by a Quid Pro Quo analysis. Quid Pro Quo is where a supervisor offers employment related incintive for sexual services, or implies such. The plaintiff alleges that the President of the Company, her supervior, made comments such as "the two of us should go to the Holiday inn to negotiate your raise". This comment This comment in itself, the implication that if she gave him what he wants, she will give him a raise, qualifies as Sexual Harrassment under Quid Pro Quo if she can prove it happened. This can be done by direct or circumstancial evidence. The other employees that her boss made the comments in front of could testify as to what he said. This would also bolster FF"s credibility regarding other comments that her boss made while no one else was around. There may be other complaints with the human resources of HEC that could be brought in as well. If that evidence is brought in, FF will have a strong case against both the company, and its president, Warren Wolf.

Hostile Work Enviroment Claims have a Prima Facie Case of 1.) comments dirrected at the plaintiff and unwanted, 2.) sex based, and 3.) severe or pervasive. Here, FF alleges that she was often insulted because of her gender, was the target of sexual innuendos, and comments regarding being a woman were made in a less than positive light of the course of two years. The comments in themselves might not be individually "severe",

and would seriously disrupt a reasonable employee's work. (i.e. final comment in sex & customer)

however, 9th Circuit decisions in *Harris* states that this is based upon the reasonable woman standard, so they may be considered as such in that light. The continual barrage of such idiocity as : "we need a man as rental manager" and "you're a woman, what do you know" will grind upon the individuals conscious and be severe over time of any reasonable woman.

Two years would also qualify as "pervasive", so I believe that the prima facie case would be met. The defendant may attempt to show that it was not severe or pervasive, most likely in a summary judgement, but I would not grant that motion, as their appears to be enough evidence for the plaintiff's case to go to the jury.

The best defense for the Defendant would be procedural. In a Sexual Harrassment cases under FEHA the plaintiff has 1 year to file its charge, which she abided by, and 1 year after getting her right to sue notice to bring a lawsuit in a courtroom. She complied with both of those requirements. She had one day to spare on the filing of the lawsuit issue.

The Defendant could also deny that the comments were unwanted. The facts as shown are merely the plaintiffs story. If the Defendant can show a prior history, or that the plaintiff was involved in instigating the comments or behavior he may be able to mitigate some of the damages. It is presumptively improper for such sexual comments and innuendo to be made from the President of the company to the manager, however, it may damage her credibility on other issues if hes has damning evidence that she was not merely an idle observer.

If FF did not go through internally set up procedures involving reporting and fixing the issue, she may not have exhausted her remedies before filing suit. She put Wolf on notice that she was not happy with his behavior, and as a result he told her that he would stop. She would have quit her job otherwise. However, he did not curb his behavior, and only after FF attempted to work through the issue, did she quit. She attempted to mitigate the damage, and attempted to correct the problem, both went un

noticed.

"Avoidable Consequences

There may be liability issues here against both the company and against the president personally. The company is on the hook for any quid pro quo discrimination. They are also on the hook strictly for the actions of her supervior under a sexual harrassment claim under FEHA. If she brings a Title VII claim however, she would need to prove that the company knew of the presidents behavior and did not stop it. Since he is the president, this would likely occur under either statute.

There is no business necessity defense, or BFOQ for such actions.

======== End of Answer #2 ========

3)

#3 Total 23 points

======== Start of Answer #3 (1368 words) ========

3 points

Inquiry 1: In California, both under FEHA and Title VII, there is a positive and negative duty to accommodate religion. Under FEHA it is more protected than T VII. However, both force us to accommodate such behavior if it does not require us to do anything more than de minimus. Since our business is buying and selling books, the fact that we do not allow headgear is not a business necessity, ie it is not strictly related to the job that individuals do not cover their head. As such, I would allow him to wear the turban, as it is a bona fide expression of his religion and I do not believe it is within our powers to not allow it.

Not true anymore in CA.

I would suggest not transfering the individual to a non-contact position. This may be seen as discriminatory conduct, however if you choose to take such action, perhaps suggest a promotion to a desk position if we have one in another department. Make sure not to impact any innocent third party however in doing so, or anyone that is unionized or within a bona fide seniority system. Those individuals will trump our attempts to accomodate like this.

Under new law, it is illegal in CA.

Inquiry 2: Federally, the Pregnancy Discrimination Act (PDA) applies to this situation (Congress disagreed heavily with the *Gilbert* decision). The PDA operates on a disability model, only allowing the same accomodation that a disabled person would get in this situation. Since she needs time off, we could give here only the time off we would give another disabled similarly situated person. The PDA is about giving pregnant women the same protections as everyone else, nothing more. Congress in passing the PDA said that this was the minimum standard however, and allows the states to grant more protections. Here in California, under FEHA, we have extended this protection greatly. You will need to give her a maximum of 4 months off, and you need to have her job waiting for her when she returns. I would advise you to attempt to get her to come back to work sooner, but she is allowed the four months and if she elects to take that time, do not take any actions against her, or we will be facing more issues. Hire a temp to help out in the mean time and pray she comes back quickly to help out.

5 points

if she is disabled due to pregnancy.

Inquiry 3: The ADEA covers employment situations involving individuals over 40, in companies with more than 20 individuals. First of all, I would advise you to not make any more comments about his age, or work product involving his age. All of that will be used against you should you take any employment action. The more you do it, the more likely he will have a cause of action for harrassment. Just keep it less than "severe" and "pervasive". We need to not encourage him to hate us if we are going to attempt to let him go.

also under FEHA

5 points

Reid case "stray remarks"

Questions to Ask: Who would you replace Tim with? If there is someone closer to his age that we could hire instead, we could fire him quicker since it would seem to the courts to be less discriminatory. How much does Tim get paid? There is a provision within the ADEA that high level executives could be let go due to age. On second thought since he is 54, not 65, this wouldnt apply.

The Company will be able to raise a defense of business necessity. It is related heavily to the IT department and the company that the site be up and running so that we can continue to make money. We should be able to show that there are reasonable factors

other than age that required us to let him go. In showing this, I suggest that we focus highly on his work product being insufficient, and that we would fire him for that issue regardless. Even if that argument does not win us the case, it would mitigate our damages, since our legitamite reason for firing him comes into play with how much we would have to pay him. The more likely and better our reason is, the less it hurts our bottom line. ADEA actions are not able to get punitive and compensatory damages, so worst case scenario here would be that we pay him backpay, possibly front pay for our actions. You should think about what damage his 15 minutes of downtime every now and then is doing versus him suing us and us paying him for doing noting. what about giving him a written warning?

Inquiry 4: The black applicant could raise either a Disparate Treatment or a Disparate Impact claim under T VII. The inquirly merely states that it appears to be based upon the requirement that applicants have a college degree. If the Black individual has a college degree and was rejected, it would fall under a disparate treatment claim. If he does not have a degree, and is challenging that requirement, it would be a disparate impact claim. Title VII would apply here, since our company has more than 15 employees and we are engaged in something that effects interstate commerce (the selling of books across state lines). +7 points excellent

Disparate Treatment has a prima facie case that follows the *McDonnell-Douglas* Analysis. First, the individual must show he falls within a protected class as to title Vii, in this case race. Next, he must show he was qualified for the position, had a college degree, that we still rejected him, and the position was not filled. We can rebut this with a legitamite non discriminatory reason. It doesnt even truly have to be a good one, so long as it is not discriminatory. If we have one, the plaintiff will then have to show that our reason is merely pretextual. If he can show that, then we would lose and would be forced to give him the job, backpay, and attorney fees.

Disparate Impact is the more likely scenario given your inquiry. Here, the implication is that the black individual was not given the job because he lacked a college degree. The controlling case in this area is *Griggs*. In a *Griggs* analysis, the court will look for a

facially neutral policy that affects a member of a protected class unfairly. In our case, we are just trying to protect and get our company the best employees we can, but by forcing them to have a college degree for a sales position, we may be unfairly limited certain classes of individuals ability to get the job. We can rebut this however, if we can show that having a degree in sales in a requirement for the position, or at least it is a business necessity. If it is a entry level sales job, I fear we will not succeed in proving this. We could also attempt to counter it that the test itself does not impact minorities as much as the plaintiff alleges. Have you had other black applicants apply in the past? In that area do many minorities have college degrees? Do the minorities in the past have college degrees and have not been hired for other reasons? The more information we have on seemingly minor points the more we may be able to fight this in the end.

The above two theories would also apply to a 42 USC 1981 claim that we discriminated against the applicant based upon his race. Since we are based in California, and this office is in Nevada, this statute would apply. 1981 is designed to equal playing field, and it appears that our rejection of this applicant is illegally discriminatory. 1981 claims open us up to more damages potentially then the disparative impact analysis that is most likely the plaintiffs strongest point. Here he could get compensatory and punitive damages, although I doubt we maliciously did not hire him.

My suggestion would be that we quickly settle with the EEOC, or we make the man an offer for a position regardless of cost. It will be cheaper for us in the long run than fighting what appears to be a losing battle in courts and dragging our name through the mud as racists, even if we truly are not.

======== End of Answer #3 ========

END OF EXAM