PartI allestion #1 Memo to Mr. Jackson To: Mr. Jackson From: Elnhonse Courses (Dete") Re: Harassmert & Disparate trament Clams E Natt. 0713. discommention This memo will address whether Time Traveles, as the employer, is liable bor dispar D.T., Natt Onigin or harassment claims brought by little Home, Douglas or Formest. Firstly, Time Traveless will most clikely hostile environment suffer cliability for the sexual rarassment ("HESt") to and disparate treatment

(A) against an employee b/c of his or her prosected Status. This means that the noticted trast played a note in the degrin & had a determinative influence, that the decision was motivated by the protected trait, that the decision was met for basing the division on a protected trait; or that He protected trait & the neason/factors which on analytically disturctures mot considered separately



claims brought by Howe. The D.T. Claim will be discussed pirst, bottowed by the HESH claim. Disporare treatment & a control constitues umployer discrimates against un complènce because of a prosected trait, mor week in the basis of wace, veligion, sex, naxl. origin, or ulgion. Such "perfected classes" are professed under the Title 7 ("T7") of the Civil Rts see Left Pagen act of 1964. an Empire may not discinisate Under the McDinnell Douglas Gramework Gor a menitorions claim, the TI, in this case Hope, must prove that: 1. the is a menter of a protected class; I thus she was

qualified & lor appoined but a yob; 3. that the adverse employment decision was made against It despite the qualifications, 4 4. that the position remared open. after to present the PFC# under McDonnell Pouglas. to the bears the builder of proving a cligitmate non-discremmetory reason bor she employment action. If the exployer Austains thes builder, the # then must snow / persuade the court that the employers mosqued reason is merely a metext for discrimation (#) (see & page) Un our case, formest with most likely

"prefert," ar 71, must 31000 Hat the that can be drawn burn the le N'A Ptc, the westons for the ER's mobation rallie of the T's proof to show the ER's waren was false & my other evidence the employee may have, the H may have to persuade the court that the implemen was to truly motivated by dischienters i, that the proppered was on now galoc ("Pretex+ Plus"), wy the TI'S # PEC & aishelief of the employer's new or draw a strong-interesce then pre-disbelief will be enough. However, it mere is sufficient imantimented evidence in the cucord or the employer's digitionate mondiscum. nearon & It's fuch are weak, then Pretext Phs will be required.

argue that he would have dismoted House who adverse formed have a sometiment have a firstly, the me to make out a Pfc. House is a member or and easily arome that a or and and the some of a duaker wellight

may easily argue that or Quaker

played a note & had a detaminative

influence on the Forrest's diesion to demote

he. Un addition, It = a protected mentoerdue to

her religion and sex, the was goods rously

qualities for the yob, the was demoted, &

the necord backs to vereal that the position

has such been billed.

Because formest will most clikely argue that he would have made the decision to



demote Howe onyway, the lase will be argued as office a mixed mother case, sin a mixed mother office lase, the Employer has an affirmative defense, coditived in the CRA of 1991, that the would have a made the accision anyway. The CRA of 1991 incorporated the language of Pricehaterhouse. The Er Urdh Breaman's analysis, the often the employer arquer that he would have mude the decision anyway, the suppopee thous that the onthat the protected trait was a motivaling bactor. The employer than has the burden of persuasion to prove that the adverse



employment decision still would have been the language from made. The CRA of 1991 aid not in corporate J. O'Conmor 's concurrence which coquired an employee to prove, by the introductive of direct evidence (ie: "8moking Sun"), that the protected trait was a substantial factor in the employment deciston. O'common would not switch the burden to the s wiles there was direct evidence, its addition the CRAOBAGI Simits employer cliability. ter a mixed motive case, the duploya will only be liouse/facen injunction, court cot & attorney's cost.

apper the CRA of 1991, Costa interpreted the out to as: Whether a reasonable guy could brua by the preponderance of the evidence that the motieted that was a motivating factor. Here, His Wilkely that Time Traveler's motion for sum nay your gener would surve. # as dis aused before, # 15 a

musion but surk many you great worker

survive. ## as dis dused before, ## a

much the 4 negurements of nonmell

Donglow. In addition, it is unlikely that

the employer Time Travelers Could

sustain its burden by susuasion in its

employment, unoddition, she It must snow that the employer acted b/c of" 113 Aux. Meaning, that other mentions of the opposite sermen not subject to the termo & conditions It was, it need not be motivated by Adual and lesse,

+ that he conduct)

Enmust madeler the terms & conditions of the work centivon ment. the addition, when defermining a harasoment case, the will 1st determine whether the a tausible or intansible action was taken against He employer. If an intransible

artin was taken, then the complimen must show taket they took mercatative ; corrective measures to correct the harassment & that the Employee bailed to take advantage to this of the avoid hown otherwist. Uf theus and ment devision, such as a demotion or giring, the summatic vicanous liability is suposed as the employer Here, agray law dictates that the actions taker has a managertype of employee Constitute the act of an agent on behalf of the grineipal unployer.

Hell, 91 Aufocreatly makes out a PLE 652 AHESH. FIRSTLY, Hone was dimoted in Heregou suplomment decision, & Meregore automatic vicacions diousility is ruposed on Time Travelus. This demotion, Herrica angue, was reposed the of her Sex & failure to me abide by the criteria "touthern belle" suggested to her too her employer. eln addition, Howe could also argue wieler asuid pro guobekause Formest would not went state Home until the read the

The Hady ment argument could also ugually apply b/c of there's religious belieb as a Quake. Clearly, Hone's Villes constitute à moral, ethical belles that assure the fruction of religion. the addition, He hur or meet of two weeks of pressure to partipate w re- enactments (which would be Contrary to her beliefs) constitute seven E, rollesive heran mont that charge altered. He termo & conditions of suployment. Her my boss not only demoted her bour also paraded around

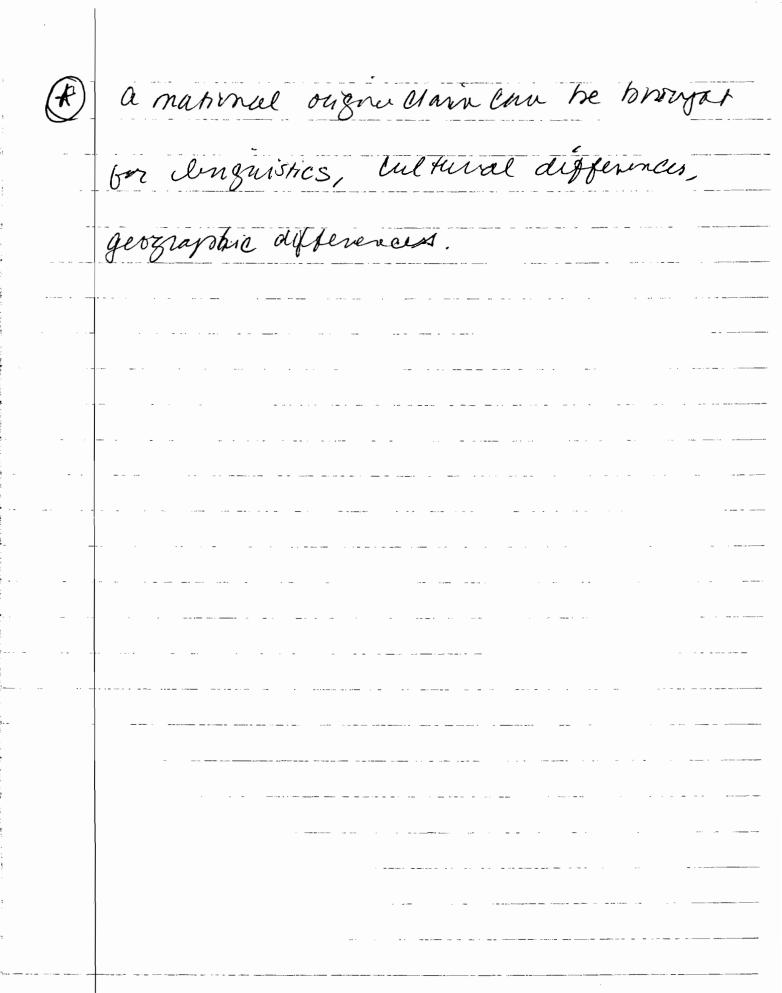
the office unterfederate uniterm they Thirdly, Douglas would not be able to make out a ATC for vacial discurration under mcDennell Dongler because he faited to suffer an adulise imploy ment action. Therefore, his Douglay claves 602 D. T. faits inder mcDonnell Douglas for Sailure to meet the 3rd pross. Douglas, honever, may have a better opportunity to prevail windles à harassment claure. as dis curted Marilier, one must distruscrisa 1st Schweren

turgible & mirrorsible imployment decisions. In addition, Tr (Dongley)

must prome that the herard ment wers so perasive & severe so as to alter the terms & conditions from a work of motory ment.

Bleaute Douglas dis not see an out ways log ment decision, Tomo Traveleis will not suffer automatic reacions elability. Unaddition, as istated laiter, The Travelers, ni arguing against an retaugble decision can point out that 71 6ailed to utilizé any corrective moredural

mechanisms troppo objected by the Company. althoriza the necord does not revolat a formalized propess, the news does ytast that everyees can complain to upper monagement, or mo. Home has done. Just Dongler tailed to do So. un addition, posses alshough one instance may be supplicient to more harassment (here, the ldog), it is walitely as purasive ; newere enough.) Lastley, is it is writely that Time Traveleus will face a matt.ougut



Claim by formest if it disciplines Formest bor the his behavior. To prove a Natel. origin claim, a Ti must establish the PFC under the Mc Dormell Douglas

prove de beief

francer & falepend of the empirer's legitimete nondisemmating reason Depending upon the strength of TT's PFC, the # probable value of the IT's most the the employer's reason is balse & any other revidence that supporty Ties case, PFC + dustreliset refficient. Homene, & there is sufficient uncontrated liderale

that the newad of the employer's legit. mondiservo. vason, or if the It's cevidence 13 weak mile & there is supporter desce in the necord to support a finding of mon discomme notion, then "Present Plus "may be me me on prefexo plus the employee must per suche the court war the emploners at stated reason is false, & that the imployer was outing bloop unternitional discrimination Here, so there it is likely that forrest's stand he and deed as worn his Confederate Roots. Although It should be

noted that many, initially, some cours may be well chant to find that he Confederacy = a Natl. origin. although nung argue it is a bulture some court may find mas recognitions tais "culture" werns counter to the policy E, purpose behind T7. unaddition, the bush (if the cour news mires must the Confeditacy = a Nate. orig. & therefore placing Fornest una protected status) formest may establish a PFC blc he's of protected status, he was graffled, he was disciplind (the adverse imployment

decision), & the position remarked open (which usette in this case, the this case), the back buder will most likely believe Fine Travelers ligit, mut nondiscrumatory reason. Therefore, Ferres world. There will be little or mo influences of discouration to be drawn from the PFC + dishelief & therefore I will have to prove pretax plus", which is a bunden he will be weakle to meet.

Part I Essay QHZ

that The issue here is whether Time travallers brought by formest wil wisk nath. ougra or warial discruman charies brought boy extress Pouglas or formest. if it bans both the enjustrate blag button ; the agrican kente cloth tie. the time rone a charm of nocial dis-Comination, the it must prove : a PFC under meDownell Donglas (1.00 profected Class, a. qualter, 3. unspend adverse suplonment clecisia despite qualifications & 4. Position unawed open). The secution Hus, it is unlike for Douglas to prevail because no adverse employment antion

has been taken against him. although Douglas, es un african american, is a menber of a protected class, he was not denuted or fired. Douglas may, noverer, merail undar the theory of accommodation. although this theory is usually used in well gious discrimination casos, it may be applicable here. In accompation cased, the employer baskel to measonable accommodate the To depite the availability. to wear the Obucan Kerte Work. Honova, Hanny will be writely to prevail,

Un terus of Formest's mate, organ disemunation clain, of discussed earlier, he will most likely be wrable to merry. As wer timed earlier, it is ouchear whether his Confederate quality as a material origin the Confederates Classify a broad group of people & could arguably wefer more to a stage of mind. Suaddition, Time Traveler beas a valid lawful reison for mot allowing fact Forrest or Douglas to wear their With or show the Hag. The imploye could argue that it is imposing a type of dress code upon all employees

to avoid vacally mutivated altercations and to prompte respect throughtout the workplace. The employees at Inno Travelers appear vary involved in the vacial 15 sues & this could arguably detract from their productivity. thenfore, The Travelers will not cikely be so not fuce liability bos these claims.

Question 1, part 2

Brook's defense in response to African American Clairn of Disparate impact:

A disparate impact claim requires that P offer that they met the 4/5 rule and linked the cause of the disparity to the ERs facially neutral practice. P's claim will nt be discussed here as it was not called for. This quesiton will address Brook's defense of business necessity in response to this dispartae impact claim. COurts have stated that the business necessity defense is to be modeled after Griggs and its progeny. To this end, ER must prove that there is a demonstrable relationship between the ability to do the work and the skills required. ER has the burden of persuasion. Wards Cove was rejected as requiring a less stricter requirement of business necessity. Because this is not an ADEA claim, Wards Cove does not apply. One of Brooks requirements is that the wait staff have an appealing presence. As the show is going to be on television, and the success of the show depends on viewer ratings and perception of the staff as appealing, it is possible that this would be a legitimate business necessity. Brooks relies on the pleasing look of the staff as part of the success of the show and restaurant. While it is possible that this claim is put forth, it is not decided how the court will look upon this defense. The plaintiffs could rebut this defense with the lesser discriminatory alternative of permitting

business.

them to carry their inhalers and use them when needed. It is foreseen that they would argue that the inhalers are small enough to fit in their pocket and would not distract the viewer, and that if they needed to use them, they could go off camera and use it. Brooks could then argue, based on her unreasonable accommodation answer, that a worker experiencing an asthma attach in television is distracting to the viewer. It is known that the inhaler is given not as

preventative measure, but as a restorative measure, to be given during an attack. Brooks could

argue that the condition would not really be controlled or prevented, but merely treated when it happens, which can be at any time depending on the triggers of stress, noxious fumes caused by the smoke, scents, etc. Because having these smells in the restaurant is essential to the busines, to have to stifle that to accommodate the asthmatic would put a burden on her

The subjective test used by the producers would be the same as that as in Joe's Stone Crab. Although in that case the maitre'd interviewed the applicants, his subjective analysis of the prospective employees was part of the selection process. In that case, the court found that, although a disparate impact claim, there was no facially neutral practice to justify and remanded for review under disparate treatment theory. The same can be said for this case. Brook is relying on the reputation of her business and while we're not under a BFOQ claim, the court would see this the same way. Although Title VII states that if behaviors cannot be separated out, they can be analyzed as one, the subjective judgment and breathing test are easily disentangled and therefore it would appear that the subjective judgment would tossed.

Addressing the ADA claim, Brook could argue that the asthmatics do not meet the minimum qualification standards. The minimum qualification standards allows an employer to employ a practice that has a disparate impact on the disabled when it is ascertained that the disability

prohibits them from having the needed job related skills and consistent with business necessity. MQS requires the ER to look at the EE with the disability and ask whether, with theAlthough the asthmatic employees would not be a direct threat to others (ADA) the EEOC regs expanded that to allow the employer to not offer employment to an employee who, working for the ER, would pose a significant risk to himself. THe Echazabal court allowed an employer to refuse to hire an EE based on his liver disease, fearing that allowing him to work amidst the noxious chemicals would damage his liver. THe court required an individlualized assessment of the employee and medical judgment based on known or recent understanding of the disease. All six employees lost their jobs because of their inability to pass the breathing test. In order to argue business necessity, which is part of the minimum qualifications standard, Brook would have to show that this test is validated, because one cannot argue business necessity with an unvalidated test. If Brook can show that the test is content based (tests specific skills required of the job and shows that the test significantly correlates to the fundamental elements of the job required) then this defense should be allowed. This test would serve as individualized analysis of the 6 african americans who were not offered a job. based on data from the American Lung Association, inner-city living (where there is the increased presence of smog and other noxious fumes caused by subways, traffic fumes, manufacturer fumes, etc) Brook can analogize those fumes to that of her restaurant. Both pose a health risk to the asthmatic and can trigger an asthma attack.

Question 2, part 2

The most likely argument that Brook will put forth regarding the statistical disparities is the

ID: 403253

interest factor. As in Sears, Asians and Hispanics did not show any interest for the job as evidenced by their not applying. IN looking at the applicant flow data, even though there may be Hispanics and Asians in the community and in the hiring pool, there is no evidence to show that anyone in those classes applied for the position and were rejected. It is more probative to assess the applicant flow data as opposed to the general population in the area. Although the Asians and Hispanics may claim futility, that they self-selected out, there is nothing in the facts to indicate that anything that Brooks did to influence their decision. The ad was placed in the city's mainstream newspaper, which was presumably printed in English. Although the two minority groups can argue that they were disadvantaged because they did not know of the ad, Brook can argue that the people who speak and can read english are the ones who were privy to the ad. Brook can argue that if someone cannot read or speak english, how are they supposed to be able to work at her establishment where it would be supposed that english is the spoken and written language. It could therefore be argued that english speaking is a BFOQ or related to the job. Using multiple regression analysis, Brook could factor those who speak english into the equation and hopefully show that the minorities that are filing suit but did not apply were not english speaking. Assuming that it is a mainstream newspaper, it would have stories of all cultural interests, but that is not known by the fact pattern. Furthermore, statistical proof alone is not enough to establish disparate treatment. There

Furthermore, statistical proof alone is not enough to establish disparate treatment. There appears to be no anecdotal evidence to suggest that the minorities were denied employment. Additionally, it would have to be ascertained what the Caucasion population is. If the applicant flow data of 70 Caucasians is about equal to the general population, then Brook can argue that statistically the numbers are consistant with what is to be expected and that therefore no discrimination can be inferred.

(Question i continued)

ID: 403253 Employment Discrimination

Maatman

The evidence of systemic disparate treatment and disparate impact are essentially the same. Systemic disparate treatment focuses on the effect that the pattern or practice creates, while the effect of the same evidence in a disparate impact claim is proof of violation. In a SDT claim, P can introduce evidence of DI. At this point, ER can rebut with a claim that it was not intentional, but that a policy is in place that creates a disparate impact. ALthough this seems contrary to 703(k) "a complaining party demonstrates DI" courts have come to understand the relationship between SDT and DI. By claiming a facially neutral practice as the BFOQ, that opens up ER to DI liability, which would seem easier to rebut with business necessity, much lower standard.

By arguing the BFOQ of clientelle preference (which is questionable in the courts as evidenced by Hooters) Brooks may then be able to respond with business necessity that english speaking or non-asthmatics is required for the job.