# EMPLOYMENT DISCRIMINATION FINAL EXAM

December 16, 2005 9:30 a.m. – 12:30 p.m.

Please read and follow these instructions carefully.

- 1. This exam consists of **THREE** (3) questions.
- 2. Each question begins on a separate page. This exam has **EIGHT** (8) pages. Check that your copy has all of the pages in the proper order.
- 3. Be sure that you have received a copy of excerpts of the applicable statutes. You may refer to **NO OTHER MATERIALS** during the exam.
- 4. Skim over the entire exam before you begin. Note that each question is worth a specified percentage of the total exam. Use these percentages to help you budget your time during the exam.
- 5. Note also that each question has specific instructions at the end of its fact pattern. Read and follow these instructions carefully.
- 6. Outline and plan your answers on scrap paper before writing in your exam book. Expect to spend  $\frac{1}{4}$  -1/2 of your time for each question reading, thinking, and outlining your response.
- 7. You do not have to answer the questions in order, but PLEASE CLEARLY INDICATE which question you are answering.
- 8. You may answer more than one question in a single exam book.
- 9. When writing in the exam book, please **SKIP LINES**. You may write on both sides of the page.
- 10. If you use more than one exam book, be sure to place your anonymous number on each book and label the books "1 of 2," "2 of 2," etc.

### **GOOD LUCK!**

## **QUESTION 1**

### 30% of Total Score

During the summer of 2004, Judy Jones, then a 30-year-old ticket agent at USAir's Pittsburgh hub, began to experience extreme fatigue and sporadic weakness in her right leg. She was examined by her doctor, but the results were inconclusive. The doctor said, "Your symptoms are consistent with multiple sclerosis, but at this point I can't be certain. I advise you to watch and wait. Keep track of your symptoms and see me again in six months, or earlier if your condition worsens." Rather than worsening, Judy's symptoms improved. She began to feel better and continued working as usual, until she was laid off when USAir reduced its Pittsburgh workforce in October 2004. She did not return to her doctor. After the layoff, she moved from Pittsburgh to the Jersey Shore area.

On March 1, 2005, Judy applied for a job with UpStart Airlines, a new low-cost carrier that was establishing flight service at the airport in Atlantic City, NJ. Judy applied for the position of "station agent." According to the posting on the employment opportunities page of UpStart's website, the station agent position "will encompass involvement in our ENTIRE flight operation." The posting described station agent duties as including three areas of service: (1) **ticket counter work**, consisting of checking in passengers, loading their bags onto a conveyor belt behind the counter, completing paperwork and, if necessary, running a late-arriving passenger's bag to the airplane; (2) **gate work**, consisting of collecting passengers' boarding passes as they boarded their flights, assisting passengers with carry-on luggage, and assisting handicapped passengers during boarding and deplaning; and (3) **ramp work**, involving loading and unloading baggage and freight from the aircraft. Station agents were expected to perform all three types of work, depending on their shift.

UpStart contacted Judy shortly after she submitted her application on line. Judy was invited to an interview with Joe Wing, the manager of UpStart's Atlantic City operation. Wing noticed a slight limp when Judy entered the room for the interview. He did not ask her specifically about the limp, but he did ask, "Are you physically capable of performing ramp work, including the loading and unloading of baggage from aircraft?" Judy responded affirmatively. Wing told her that she would be hired provided she passed a physical exam. Judy agreed.

Her physical was conducted one week after the interview. During the physical exam she was asked to complete a standardized medical history form that asked, *inter alia*, "Have you ever been diagnosed with a nervous system disorder?" Judy checked the "NO" box. In addition to a medical history, this physical exam included a test of reflexes, balance, vision, and lifting. The doctor who examined Judy did not notice a limp or any other symptoms. On March 15, 2005 Judy was notified that she had been hired as a station agent with UpStart Airlines.

UpStart's Atlantic City service opened on April 1. UpStart established a seniority system for its Atlantic City employees based on date of hire. All station agents were permitted to

bid on job shifts under this seniority system. Judy bid a shift that included ticket counter, gate and ramp duties. She began working this shift on April 1. On May 1 Judy began to experience weakness in her right leg. This made it increasingly difficult for her to perform ramp duties.

On May 7 Judy underwent additional medical testing. As a result, she was diagnosed with Multiple Sclerosis (MS). For purposes of this exam, refer to the following information about MS (adapted from the National Multiple Sclerosis Society website, www.nmss.org):

MS is thought to be an autoimmune disease that affects the central nervous system (CNS). The CNS consists of the brain, spinal cord, and the optic nerves.

At this time, no single test is available to identify or rule out MS. Several tests and procedures are needed. These are likely to include:

#### **Complete Medical History**

Healthcare providers need an overall view of the individual's health picture, including symptoms and when they began.

#### **Nervous System Functioning**

Testing of reflexes, balance, coordination, and vision— as well as checking for areas of numbness

Symptoms of MS are unpredictable and vary from person to person and from time to time in the same person. For example, one person may experience abnormal fatigue, while another might have severe vision problems. A person with MS could have loss of balance and muscle coordination making walking difficult; another person with MS could have slurred speech, tremors, stiffness, and bladder problems. While some symptoms will come and go over the course of the disease, others may be more lasting. Most people with MS experience clearly defined flare-ups (also called relapses, attacks, or exacerbations). These are episodes of acute worsening of neurologic function. They are followed by partial or complete recovery periods (remissions) free of disease progression.

Upon receiving her diagnosis of MS, Judy met with Wing. She informed him of her diagnosis, presented a letter from her doctor, and requested that she be relieved from ramp duties. Wing replied that he could not guarantee her "a long-term slot in an inside shift," but assured her that he would make an effort to do so. Wing then reassigned Judy to a shift consisting of ticket counter and gate work only. In making this reassignment, Wing transferred an employee with less seniority than Judy into Judy's original shift, which included ramp work. In her new shift, Judy performed ticket counter duties without any accommodation. When working at the gate, she was unable to assist disabled passengers or to assist passengers with their carry-on baggage. Her co-worker, Sarah Samaritan, who worked the same shift as Judy, volunteered to perform these duties for Judy when the need arose.

This situation continued until June 15 when a change in flight schedule required the UpStart employees to rebid their shifts. While Judy was able to retain her shift, which included only ticket and gate work, Sarah was reassigned such that she and Judy were no

longer working at the same time. Consequently, Sarah was not available to assist Judy with her gate duties.

Judy met with Wing and told him that she could not assist passengers or handle baggage and that she required an assistant when working the gate. Specifically, she requested (1) that she be permanently excused from ramp work; **and** (2) that she be provided with an assistant when assigned to gate work **OR** (3) that she be assigned ticket counter work only. Wing said, "I'm sorry, Judy, there's no way I can help you with this. I can't afford to pay someone else to work alongside you, and I can't keep you at the ticket counter. Other people have the right to work the ticket counter, too. I can't help you out without causing problems with other employees, especially under the seniority system."

Judy quit her job after this conversation.

### QUESTION 1

Assess Judy's potential ADA **failure to accommodate** claim against UpStart. Consider the elements of Judy's claim and any defenses available to UpStart. Be sure to discuss the impact, if any, of UpStart's medical inquiry/examination of Judy.

DO NOT discuss whether MS is a disability under the ADA; presume that it is.

DO NOT address any procedural issues, such as EEOC filing, statute of limitations, etc.

DO NOT address any remedies that might be available to Judy should she prevail.

### **QUESTION 2**

### 30% of Total Score

Beth Burke was a junior architect with Dorrance & Associates, a large and prestigious architecture firm in Philadelphia. Beth was assigned to a team that would design a new commercial shipping terminal on the waterfront in Elizabeth, New Jersey, just across the Hudson River from New York City. Franklin Dorrance, the head of the firm, handpicked the team. Beth was assigned to work directly for project manager Thomas Dorrance, Franklin's son. The team consisted of seven architects; Beth was the only woman. The firm employs 60 architects, of whom 12 are women (including Beth).

When he found out that Beth would be on his team, Thomas said, "I wish I could get a man to do your job. Women have no place in architecture." When Beth asked a work-related question, Thomas replied, "If you were a man, you'd already know the answer." He also repeatedly asked Beth to bring him coffee – a request he never made of male architects. When the design team convened for group meetings, Thomas frequently told sexually explicit jokes, despite the protests of architect Carl Hansen. When Hansen complained about the persistent dirty jokes, Thomas said, "You need to loosen up, Carl. You need to get laid. Why don't you and Beth get together?"

Beth became increasingly unhappy at work. She experienced symptoms of stress and anxiety, such as insomnia and panic attacks. She discussed Thomas's comments and dirty jokes with some of her co-workers, but did not complain directly to Thomas because she was afraid that he would have her fired. She said, "If I complained, that would be just the excuse he'd need to get rid of me." She also felt that she couldn't complain to Franklin Dorrance because he was Thomas's father. Rather, Beth resolved to try to avoid Thomas by switching from the design to the construction aspect of the terminal project.

To avoid Thomas, Beth applied for the position of Construction Liaison on the terminal project. The Construction Liaison would be responsible for personally overseeing all aspects of construction, which would require frequent visits to the construction site and nearly daily contact with construction contractors and the client, the Port of Elizabeth Corporation. The position of Construction Liaison would constitute a promotion, in terms of increased pay and responsibility, from Beth's current position of junior architect. Beth approached Ernie Rodriguez, the head of the firm's construction division, and expressed her interest in the position.

Rodriguez met with Thomas and Franklin Dorrance to select the Construction Liaison. The three discussed several candidates but quickly narrowed their choice to Beth or Harry Chin. The following transpired at their meeting:

Rodriguez was impressed with Beth's credentials and her enthusiasm for the construction side of the business. He was similarly impressed with Harry. Beth and Harry both graduated from top architecture schools and had comparable educational credentials and experience. Beth had worked at Dorrance for 5 years, since graduating from architecture school; Harry worked for Dorrance for 3 years but had previously worked for another firm for 3 years. Both of them had excellent performance evaluations and were regarded as hard-working and ambitious.

Thomas Dorrance admitted that Beth worked hard and competently, but he expressed reservations about putting her in a position that would require frequent visits to the construction site of the terminal. "She'll be eaten alive," he said. "I just can't picture her in a hardhat at a construction site. If she can't handle my joking, how's she going to handle those construction workers? Not to mention the longshoremen! She'll be in tears every day. Furthermore, I don't think it's safe. She's so . . . so cute and tiny. What if something happens to her? No, I don't trust those guys on the waterfront. I think this is a man's job. I'd go with Harry."

Franklin said, "I agree with Thomas on this one. Let's keep Beth in mind for a smaller project in a better environment, like that new dorm we're building at Blossom Academy [a local girls' prep school]."

Rodriguez acquiesced. He said, "You know Beth better than I do. If you think she can't handle it, I'll defer to you. Let's go with Harry."

Harry was selected as the Construction Liaison on the terminal project. Beth continued to work on the terminal design team. Beth was not told why Harry was selected over her.

Beth admits that Harry is qualified for the position, but, she says, "There's more to it than that. I think Thomas made up his mind from the start that he wanted a man in that position. I didn't even have a chance."

#### **QUESTION 2**

Beth is considering suing Dorrance & Associates for (a) sexual harassment and (b) sex discrimination based on failure to promote. Analyze the strengths and weaknesses of her Title VII claims, being sure to discuss her prima facie case and any defenses available to Dorrance.

DO NOT address any procedural issues, such as EEOC filing, statute of limitations, etc.

DO NOT address any remedies that might be available to Beth should she prevail.

# **QUESTION 3**

### 40% of Total Score

CheapLube is a chain of auto repair facilities, specializing in quick lube/oil/filter changes and other minor auto servicing. CheapLube also sells auto supplies and accessories. Each of its locations is comprised of a garage for performing repairs and an attached retail store for the sale of items such as windshield wiper blades, seat covers, antifreeze, etc. CheapLube opened a location in Milltown on March 1, 2005. Milltown is an urban community. Its population is 70% African-American, 15% Hispanic, 5% Asian, and 10% white. The Milltown CheapLube is easily accessible by foot or by public transportation, including train and bus service, although some employees and nearly all the customers arrive by car.

Beginning on January 1, 2005, CheapLube began to recruit employees for all of the positions at the Milltown location, except for manager. Phil Morris, an experienced manager, was transferred to Milltown from another location. Morris is a white male. The positions to be filled were: auto mechanic, auto mechanic assistant, and retail sales associate. The auto mechanic positions, the most highly paid at CheapLube other than manager, were skilled positions requiring appropriate state licensing and experience. The mechanic assistant jobs were unskilled with no experience required. The sales associate jobs were unskilled, although CheapLube expressed a preference for hiring individuals with prior retail experience and knowledge of automotive supplies.

The initial workforce of the Milltown CheapLube was 44% African American, 20% Hispanic, 6% Asian, and 30% white. African Americans were heavily concentrated in the jobs with the lowest skill level and the lowest pay, representing 75% of the mechanic assistants (30 of 40 assistants were African American), 20% of the sales associates (4 of 20 sales associates were African American), and 5% of the auto mechanics (1 of 20 mechanics was African American). All of the other mechanics (19, or 95%) are white.

Clifford Jones is a licensed auto mechanic who lives in Milltown. He has come to your office to seek your advice on suing CheapLube for employment discrimination. He tells you the following:

"I am a licensed mechanic. I graduated from Milltown Vocational High School and got a job at Henry's Superior Auto Service. I began as a mechanic's assistant and completed all required training and experience to earn my mechanic's license in 1991. I continued to work at Henry's until 2004 when Joe Henry retired and sold the business to a developer who tore it down. I had worked at Henry's for 15 years. I was excited when CheapLube opened up in Milltown. I thought I was a shoo-in for a mechanic's position. Even though my pay would be lower than at Henry's, it seemed like an opportunity to move into management or maybe to transfer to a different CheapLube location in the future.

"I applied in person on January 3, 2005 and I was interviewed by the manager, Mr. Morris. I brought with me a copy of my mechanic's license and a letter of reference from Mr. Henry. I didn't hear from CheapLube for a week, so I called. Mr. Morris said they hadn't made a decision yet and I should call back in a week. When I did, I was told that I had not been hired as a mechanic, but I wasn't told why not. About a week later CheapLube called and Mr. Morris offered me a job as a mechanic's assistant. I was really insulted. I was an assistant 15 years ago! I want to go forward, not backward, with my career. I turned down the assistant position and am still looking for work as a mechanic."

### **QUESTION 3**

(a) Can a properly certified plaintiff class of African American auto mechanics who applied but were not hired by the Milltown CheapLube prove a Title VII case of racial discrimination based on **systemic disparate treatment**? Discuss the plaintiffs' prima facie case and any defenses available to CheapLube. Identify any additional information you would like to have or any presumptions you have made in reaching your answer.

DO NOT discuss procedural issues, such as the requirements for certifying a "class," EEOC filing, statute of limitations, etc.

(b) If CheapLube is found to be liable for systemic disparate treatment in this case, what remedies may be available to Clifford Jones? Identify any additional information you would require to assess the availability of remedies. (For purposes of this question, presume that this claim would not be cognizable under § 1981.)

### **END OF EXAM**