

**Professor McGinley**  
**Employment Discrimination**  
**Problem on McDonnell Douglas and Price Waterhouse**  
**Spring 09 – PROBLEM 1**  
**Written memos due 2/10/09**

**READ THE FOLLOWING FACT PATTERN AND ANSWER THE QUESTION. ANALYZE THE ISSUES USING THE CASES WE HAVE READ IN CLASS. DO NOT MERELY RESTATE THE RULES OR GIVE THE ISSUE AND A CONCLUSION. USE THE FACTS IN YOUR ANALYSIS. YOUR MEMOS ARE DUE ON 2/10/09 BEFORE CLASS. (WORTH 15% OF FINAL GRADE)**

Jeffrey Meyers is a 30 year old black man who worked from late 1999 until last month for Rivers and Associates as a Consulting Tech Associate. Rivers is a consulting firm in Birmingham, Alabama, that consults with large corporate clients on their technology needs. Rivers is a growing company, with 25 employees. Meyers, who grew up in Boston, is a whiz with computers; he has a Masters degree in computer technology from MIT. When Meyers was hired, Rick Jansen, the owner of the company and his supervisor, told him that he would be considered in 2005 or 2006 for partnership in the firm. At his one year review in late 2000, Jansen, a white male, told Jeff Meyers that his work was "above average, but you need to improve your relationships with our clients." Jansen stated, "some of the clients, you know, they are so old-fashioned, and they don't really like your formality. They think you are sullen and unfriendly. They also wonder whether you are up to the task."

Meyers was insulted but he said nothing. In late 2001, Rick Jansen hired a 21 year old white male to work as Meyers' assistant. Ed Spence, the new assistant, was a personable young man who often joked with customers. He did not know too much about computers and Jeff Meyers trained him. By the end of the year, Ed had his own clients, some of whom were Meyers' old clients. Ed confided in Jeff Meyers that two of the clients told Ed that they were glad that they had Ed instead of Jeff as their representative because Jeff was, "a bit too full of himself. We don't know why Rick insists on hiring those uppity northerners. Doesn't he understand this is the South?"

From 2001-2004, Jansen told Meyers twice that his work would be better if he "loosened up." Besides this advice, however, Jansen wrote on his yearly evaluations, "Does excellent technical work. Couldn't be better." Another co-worker, Sally Hesse, a white woman, told Meyers, "you need to watch out for your a--, they are watching every move you make. This is a relatively new company serving some stuffy old clients and we have to dot our i's and cross our t's. You have to be particularly careful." Meyers asked her what she meant, but she refused to explain further. He believed that she was referring to his race. Although there were three black female secretaries, he was the only black in a consultant position at the firm.

In late 2006, Meyers asked Rick Jansen about Meyers' application for partnership. Rick was a bit evasive. "It is still a bit early. This company may not be ready yet." Much

to Jeff's surprise, Ed was made a partner soon after that. Jeff Meyers angrily told Rick Jansen, "Ed knows half as much as I do about computers and he came in here as my assistant. Now you promote him to partnership. When am I going to be a partner?" Rick Jansen, said he was sorry, but, "Ed just fits in. The clients like him. I hope to make you a partner very soon. I don't think the clients are quite ready for you yet."

Meyers decided to hold his tongue and wait to become a partner. In Winter 2007, the company hired two more Consulting Tech Associates. They were white males. Jeff heard them talking about partnership. They said that Rick had promised them that they would be considered for partnership in Summer 2011. In Spring 2008, a new Consulting Tech Associate was hired: Jennifer Stanley, a white women who was also an MIT graduate. Jennifer and Jeff hit it off and soon began to date outside of the office. Rick Jansen came storming into Meyers' office. "What the he-- are you doing? Don't you know it is against company policy to date a co-worker? Haven't you ever heard of sexual harassment? What happens if our clients find out? You are fired!" There was nothing in the company handbook forbidding dating coworkers. The next day after hearing about what happened to Jeff, Jennifer quit her job.

**1. Assume that all the procedural prerequisites have been met and Meyers files a suit under Title VII of the Civil Rights Act in federal court. After engaging in discovery, Rivers and Associates files a motion for summary judgment. Assume that the above facts came out in discovery. You are the law clerk to the judge deciding the motion. Write a memorandum to the judge advising whether she should grant the motion. Discuss the evidence using both the McDonnell Douglas/St. Mary's Honor Center/Reeves v. Sanderson Plumbing construct and the Price Waterhouse/Costa/1991 Act mixed motives construct.**

Professor McGinley  
Employment Discrimination  
Spring 2009  
Problem 2  
Due 2/24/09

**You may discuss this with others, but you must write and edit it on your own.**

**Problem: Voluntary Affirmative Action Plans**

You are in-house counsel for Amorcord Scientific Equipment, located in Las Vegas. The CEO of the company, Sandra Spader, recently came to you to discuss the possibility of enacting a voluntary affirmative action plan. She fears that the company may be subject to a discrimination lawsuit in the future brought by women. As you are aware, Amorcord is the designer, manufacturer and supplier of high tech scientific equipment to laboratories across the country. Amorcord holds a number of the most important patents

in the area of high tech equipment. Amorcord has encouraged its in-house design technicians (“Design Techs”) by paying them well and by giving them bonuses for designing new equipment which is eventually sold to Amorcord’s laboratory customers.

Ms. Spader explains that there are 78 positions for Design Techs in the company. Of those 78 positions, only two are held by women. She explains that in the past, in order to qualify for a Design Tech positions, an applicant must have had an advanced degree in mathematics, preferably a PhD. Currently, 70 of the 78 Design Techs have PhDs. The other 8 have completed their course work toward a PhD, but have not completed their dissertations.

Amorcord hired its Design Techs from a national pool of scientists and mathematicians. Generally, Design Techs enter the institutions as Designers and are promoted within the ranks as Design Tech II, Design Tech III, etc.

Spader explains that the problem is that there are few women with PhDs in mathematics. Amorcord is beginning to get applications from women who have PhDs in math, but the company receives applications for the positions from 25 men to every qualified woman. Amorcord, although it has a national reputation and draws Design Techs from across the country for its much coveted positions, has done very little, if any, recruiting. Occasionally, the company has sent a representative to M.I.T. to meet with its PhD candidates, but the company’s reputation is so strong that it really has done little to solicit applications. Students in the PhD programs evidently are encouraged by their advisors to apply to Amorcord for positions.

Below the position of Design Tech is another position at Amorcord., entitled Design Assistant. The Design Assistant works closely with the Design Tech to conduct experiments in the laboratory, testing potential new equipment. The Design Assistant position is filled mostly by women (63 of 95). The persons in these jobs generally lack the PhD which is required for the Design Tech position, but they are intelligent persons, most of whom have B.S. degrees or M.S. degrees in Math or Science from the local state university whose math and science departments are good, but not nationally renowned. The Design Assistants make approximately two-thirds as much as the Design Techs, not including bonuses earned by the Design Techs. Design Assistants are not eligible for bonuses. There is no current rule preventing the Design Assistants from applying for or receiving a job as a Design Tech and one very extraordinary male Design Assistant was promoted to the position of Design Tech 7 or 8 years ago.

Spader also theorizes that because Amorcord is located in Las Vegas many women who have PhDs are not available for the positions because they are members of two-career couples and the women are not able to move. She would like to institute, along with the Mathematics Department of a local private college, a training program for women who have not taken the proper math courses. The training program would be open to Design Assistants and would take place partially during the day and partially at night to prepare those who take it to become Design Techs. Those who take the training program would study a number of sophisticated mathematics courses. Because the training program

would be a great deal of work for those enrolled, Spader wants to be able to guarantee those who do well in the training program an opportunity to become Design Techs.

**To Do:**

- 1. Think about whether these facts would subject the company to a potential systemic disparate treatment lawsuit under Title VII by women. Consider *Teamsters*, *Hazelwood*, *EEOC v. Sears*. Write a memo advising Spader as to whether the company could possibly be subject to a winning systemic disparate treatment lawsuit. Be sure to use the cases we have read and to account for all of the facts in this problem. (12 font; 500 word limit).**
- 2. You know Spader well enough that even if you advise her that the company is not subject to a lawsuit, she will still be interested in opening up opportunities for women. Write an outline of an affirmative action plan that will be upheld under Title VII. Consider *Weber* and *Johnson v. Transportation Agency of Santa Clara County* when designing your plan. Remember, Amorcord is not a government employer; the Equal Protection Clause will not apply. (maximum length of outline = 2 pages).**
- 3. Write a memo to the file explaining your thought process in outlining the affirmative action plan. In the memo, explain the problems you faced and why you made the choices you made, justifying your explanation with a discussion of the case law. (12 font; 500 word limit).**

#### Intersession: Employment Discrimination: Dress and Appearance Regulation in the Casino Industry

This course uses the lens of the casino industry to examine federal employment discrimination law and policy regarding employer regulation of employee dress and appearance. Because the appearance requirements in the casino industry tend to be at the extremes in terms of what employers require of employees, the study of this industry allows us to gain a unique perspective on not only the current state of the law, but also on where it is likely to go in the near future. The foundation blocks for the course are readings on dress and appearance based discrimination that draw from classic work in law, sociology, psychology and economics. This theoretical material will be supplemented with “on the ground” examinations of how the theories and formal legal structures play out in practice. To implement this latter element of the course, we will invite local guest speakers including human resources executives, employment lawyers and, of course, employees. The centerpiece of the course will be an “on the ground” examination of the impact of the decision in *Jespersen v. Harrah’s Operating Co.*, 444 F.3d 1104 (9<sup>th</sup> Cir. 2002) (en banc). Through this examination, students should consider whether case law translated to behavior “on the ground.”

The course will also examine the theme of gender and racial identity and expression, and the performance of identity in the workplace, and the implications for Title VII law.

All are required to write a **well-written** paper which is due on the last day of the class. Your project/paper assignment in this class is to explore the “on the ground” realities of the impact of the Ninth Circuit’s recent *en banc* decision in the case *Jespersen v. Harrah’s Operating Co.* that we will be discussing extensively in class.

Specifically, we want your project to address two questions. First, what does the Ninth Circuit’s decision tell employers with regards to what they can or cannot do with respect to specific dress and appearance requirements in the casino and entertainment industry in Las Vegas? To address this question, you will not only have to read the Ninth Circuit’s opinion carefully, but also think about various jobs in the casino/entertainment industry in Las Vegas where the opinion could have an impact. In other words, your report could work through hypothetical examples of typical jobs in the industry.

The second question then is to ask whether the realities of the day-to-day operations of these businesses reflect your predictions about changes the industry should have made in response to the *Jespersen* case. You can report on these day-to-day operations using a variety of sources including publicly available reports on how the operations of the casinos might have changed (or not) in response to the case; observations you make yourself; discussions with industry lawyers and human resources who we bring to class. Should you have conversations with people outside the context of the class, please be careful to assure them that these are informal conversations for informational purposes alone that will not be attributed to them in any way. Realistically, we assume that much of the information you will report will be based on conversations with people you know in the industry. Given that, it is very important that you report to us what information you obtained from talking to others – such as your friends or acquaintances who work in the industry – and what information you obtained from observation or public sources. For you to do more formal interviews that you use in your report, you would likely have to obtain approval from the University Internal Review Board that oversees the use of human subjects. It is unlikely that you would have time to get such approval in such a short class. We will let you know about this the first day of class.

In class, starting on the second day, we will discuss your observations and progress on your reports. Your final reports should be no longer than ten pages in length (1.5 in line spacing – we leave the matter of margins, etc., to your discretion). They papers are to be handed in on **Saturday, January 10 before the AM class to Professor McGinley.**

In your report, we expect that you will incorporate insights from the articles that we discuss in class. The amount of energy and space you devote to each of the two questions that we have set forth above should be about the same.

Please give us the paper in final draft form. This means no spelling, grammatical or bluebooking errors. This also means good organization, topic sentences and transitions, etc. You must edit, and re-edit this piece. Your paper/project will be worth **20%** of your final grade.

Intersession Project/Grading Sheet

Gulati & McGinley

Employment Discrimination: Dress and Appearance Regulation in the Casino Industry

To: Students – This briefly mentions our expectations. We also comment on your particular paper. All comments on how you met expectations are in **bold.**

Student \_\_\_\_\_

Project Expectations/Comments

Part A

Expectations – Description of the Law

1. Describe Jespersen well.
2. Use caselaw to place Jespersen in context.

3. Use law review articles to place Jespersen in context

### **Comments on your paper**

Part B. – Selection of two environments and predictions of how Jespersen should affect them.

Expectations

1. Select two environments to study. Make predictions about how the casinos will react based on Jespersen language and other caselaw.

### **Comments on your paper**

Part C. -- Observations

Expectations

1. Describe your observations in detail.
2. Consider your observations in light of the speakers' comments.

### **Comments on your paper**

Part D

Expectations -- Critique

1. Critique what you have seen.
2. Consider in light of speakers' comments.
3. Consider in light of law review articles we have read.
4. Consider in light of other information you learned from comments in class, other students, etc.

### **Comments on your paper**

## **Employers' Anti-Harassment Policies and Procedures**

1. Create a set of anti-sexual harassment policies and investigation procedures for a casino on the Strip that is concerned about sexual harassment by supervisors, co-workers and customers; (max 5 pages)
2. Create 2 Power Point Training presentations – one for managers and the other for casino workers to explain the policy and how they are to react to any sexual harassment; (max 15 slides each)

3. Write a memo explaining the choices you made in creating your policies and procedures. It will include an explanation of the law and theory of sexual harassment law, the problem of the possibility of liability of the casino because of sexual harassment of its employees, and an explanation of how you solved those problems. (max 3,000 words).

### **Policies and Procedures and PowerPoints**

In preparation for writing the policies and investigation procedures, read Linda M. Edwards and Cheryl L. Kopitzke, *Ensuring a Fair and Proper Sexual Harassment Investigation*, 20 LOS ANGELES LAWYER 24 (1997).

Also, read at least three law review articles (not all from the same author) on the topic in preparation for writing the policies and the memo. Suggested readings:

Ann C. McGinley,

*Harassing "Girls" at the Hard Rock; Masculinities in Sexualized Environments*, 2007 U. ILL L. REV. 1229 (2007).

*Babes and Beefcake: Exclusive Hiring Arrangements and Sexy Dress Codes*, 14 DUKE J. GENDER, L. & POL'Y 257 (2007) (symposium).

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Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001).

Tristin Green, *Work Culture and Discrimination*, 93 CAL. L. REV. 623 (2005).

Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L. J. 1683 (1998).

Also, visit at least two casinos on the Strip and do 1) observations; and 2) interviews with at least 5 casino workers. Look at the casinos, the costumes worn by the workers with a view toward the question of how to anticipate and prevent sexual harassment. Discuss with casino workers whether they have witnessed sexual harassment or have been subject to sexual harassment. I would also ask them about what they believe sexual harassment is, and whether they believe that they are protected against supervisor, co-worker and customer sexual harassment. You might want to consider how security plays into the issue, whether the casino can be liable if there are security tapes revealing sexual harassment.

**CONFIDENTIALITY** -- When you do your interviews, it is VERY IMPORTANT that you promise confidentiality to the persons you interview. Do not mention the persons' names to anyone other than your professor (in your paper), who is under a duty of

confidentiality as well. This information that you glean will make your paper more responsive to the real problems on the ground.

## **Memo**

Your memo should be a maximum of 3,000 words long. It should have four sections.

Part 1 will review sexual harassment law you have studied, along with the law of dress and appearance code regulation and the relationship between them. Look at the *Jespersen* case in its entirety for this discussion and any cases it cites to concerning this issue.

Part 2 will explain the particular problems of the casinos in preventing and correcting sexual harassment. This part should include a discussion of your observations, and your interviews, and should evaluate this information in light of the legal doctrine.

Part 3 should explain how you attempted to solve the problems presented by the law and the particular atmosphere of the casinos in your policies and procedures. In this section, you need to consider carefully ways to eliminate sexual harassment and employer liability for sexual harassment. A quick conclusion of “assumption of the risk” is inadequate.

Part 4 is the theory part of your paper. Here you place your critique of the law and your efforts in preventing and correcting sexual harassment. Consider whether there are other more effective ways of protecting workers and clients and discuss this. This section will demonstrate your ability to be creative. This section should discuss law review articles that you have read that may have been helpful in thinking about this issue.

## **Employers’ Anti-Harassment Policies and Procedures**

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Intersession