

VANDERBILT UNIVERSITY SCHOOL OF LAW

Civil Procedure (Section B-1)
Prof. Lonny Hoffman
Spring Semester, 2008

Tuesday, April 22, 2008

Time: 1:00 p.m. - 5:00 p.m.

GENERAL INSTRUCTIONS

All checked (✓) items apply to this exam:

<input type="checkbox"/> Open Book <input type="checkbox"/> Closed Book <input checked="" type="checkbox"/> Partial Open Book <i>(see specific instructions)</i> <input checked="" type="checkbox"/> Scantron needed <input type="checkbox"/> Bluebooks needed <input type="checkbox"/> Supplemental Materials <i>(separate from exam)</i> <input type="checkbox"/> TURN INTO REGISTRAR when finished <input checked="" type="checkbox"/> Collected by Proctor	<p><u>DO NOT WRITE YOUR NAME ANYWHERE ON THE EXAM.</u></p>
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If you have any questions during the exam, see _____.

IT IS A VIOLATION OF THE HONOR CODE TO WRITE YOUR NAME OR ANY OTHER IDENTIFYING INFORMATION ON THIS EXAM

In the Space Below, by writing your exam number and placing the mark /s/ next to it you acknowledge that you attended at least 80% of the scheduled classes this semester for this course. DO NOT WRITE OR SIGN YOUR NAME IN THIS SPACE.

Civil Procedure**Professor Hoffman**

Tuesday, April 22, 2008

Time: 1:00 p.m. - 5:00 p.m. (4 hours.)

Instructions

This examination is open book, provided that the materials you bring into the exam with you are your own. You may not use anyone else's notes. You may not use any commercial outlines, hornbooks, treatises, articles, or anything else that you did not produce yourself. Of course, you are free to bring in your course materials, your federal rules book, and any other materials I handed out to you during the semester.

The examination is worth a total of one hundred points. The first section contains three essay questions. Each question is worth 23 1/3 points. Collectively, then, the essay portion of the test is worth 70% of the total written examination grade. You will not need any bluebooks for the examination as you will write (if you don't type) on—and only on—the exam pages that I give to you. You must only write on the lines that I have given. Write on every line (do not skip lines) but do not write on the back, between the lines, on the side or any place else. For students who type, you must limit your answer to no more than 1600 words for each question.

The second section contains 15 multiple choice questions. Each multiple choice question is worth 2 points, making the multiple choice section worth 30% of the total written examination grade. You should mark your answers on the scantron answer sheet provided.

A few last, important reminders. First, write as legibly as you can. Second, remember to write your examination number on the copy of your examination which you turn in. Third, the amount of time you spend on any question is entirely up to you, but I would strongly suggest that you allocate your time to correlate with the relative values of the questions.

I have handed out this instruction page to you before the date of the final examination and encourage you to read this page over carefully before the test. Make certain that when you finally sit down to take the examination, you have already familiarized yourself fully with all of these instructions so that you do not have to spend any time re-reading them on exam day. Good luck.

Part I
Essay Questions

Essay Question #1 (total – 23 1/3 points). Total points: 23 1/3. For students who type, you must limit your answer to no more than 1600 words.

1. Plaintiff, David Payne, at all relevant times, was an employee of Defendant New York State Department of Transportation (NYSDT) holding the position of Grade 10 Lead Worker. Defendant Wayne Dubois was one of plaintiff's supervisors at NYSDT's Martindale facility located in Craryville, New York. Defendant Myles Donald was plaintiff's other supervisor at the same facility.

Plaintiff contends that on two occasions one of his co-workers Don Coombs sexually harassed him by attempting to expose Plaintiff by tugging on the bottom of his shirt and trying to pull it over Plaintiff's head. Plaintiff further asserts that he believes that Defendant NYSDT had previously investigated Mr. Coombs for sexual harassment when he exposed his genitalia on a lunchroom table directed at a co-worker in the presence of others. Plaintiff complained to his supervisors about the harassment on several occasions, including June 18, 2003 and January 2004, but no corrective action was taken.

Instead, Plaintiff alleges that, on January 22, 2004, Dubois escorted him to the shop floor and publicly advised him that he was demoted from his position of Lead Worker and that his duties were reassigned to an individual two grades his junior. On January 26, 2004, Defendant Dubois also criticized Plaintiff for making his complaints.

In addition, on December 22, 2004, Defendant Dubois stated to Plaintiff, "Don't worry, you (Plaintiff) won't be continuing with the State," while insulting and physically shoving Plaintiff. Defendant Dubois also made several public statements in 2004 and 2005 to Plaintiff's co-workers to be careful because Plaintiff could sue them for sexual harassment.

Plaintiff asserts that as a result of Defendants' conduct he has suffered and continues to suffer emotional distress, including physical manifestations, anxiety, loss of sleep, and effects upon his professional and personal relationships.

Based upon these factual allegations, Plaintiff asserts a cause of action for sexual harassment against Defendants NYSDT, Wayne Dubois, and Myles Donald in violation of a federal statute, 42 U.S.C. § 2000-e *et seq.* ("Title VII"). He specifically seeks relief for "reckless, wrongful, willful and malicious sexual harassment of the Plaintiff by managers, agents, servants and/or employees of the Defendant NYSDOT [which] were discriminatory." Assume that Plaintiff asserts no other causes of action in this case.

You should also assume that the relevant law is as follows: Title VII of the Civil Rights Act of 1964 provides, in relevant part, that "it shall be an unlawful employment practice for an employer ... to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such

individual's race, color, religion, sex, or national origin.” 42 U.C.C. 2000e-2(a)(1). “When the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment, Title VII is violated.” *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993).

“To prevail on a Title VII same-sex harassment claim, a plaintiff must prove that (1) ‘the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted discrimination . . . because of sex,’ and (2) the conduct was severe or pervasive enough to create an objectively hostile or abusive work environment [emphasis added].”

The first prong of a Title VII same-sex claim—that the conduct actually constituted discrimination because of sex—may be established by one of the following: (1) evidence that the harasser is homosexual and that the harassment is motivated by sexual desire; (2) evidence that the harasser was motivated by general hostility to employees of the victim's sex; or (3) comparative evidence that the harasser treated employees of both sexes differently.

As to the second prong, a plaintiff's allegations “should be judged from the perspective of a reasonable person in plaintiff's position, considering all the circumstances.”

Plaintiff brings suit in federal court. If the defendants move to dismiss the sexual harassment claim under Rule 12(b)(6), how should the court rule? Explain your answer fully.

Exam Number _____

Exam Number _____

Exam Number _____

Essay # 2. [Note: if this question seems familiar, it is. It is basically the same question that is the sample problem in your course materials at page 126:]. Total points: 23 1/3. For students who type, you must limit your answer to no more than 1600 words.

M e m o r a n d u m

To: Associate
From: Partner
Re: *Abel, et al. v. Tex-a-Pharm*; in the United States District Court for the Southern District of Texas

Our client, Tex-a-Pharm, has been sued by several Nigerian citizens in the United States District Court for the Southern District of Texas, for matters related to its work on an antibiotic, as described below.

Tex-a-Pharm is a Texas company with its principal place of business in Dallas. The company developed and used a new antibiotic to fight an epidemic of bacterial meningitis in Kano, Nigeria. In February 1996, the media reported an outbreak of bacterial meningitis in Kano, Nigeria. Tex-a-Pharm had been working on a new antibiotic which could be used to treat meningitis, but it had not received FDA approval by February 1996. In April 1996, Tex-a-Pharm sought and received FDA authorization to export Trovan to Nigeria. In that same month, Tex-a-Pharm researchers departed from the U.S. in a chartered a DC-9 bound for Kano, Nigeria. Tex-a-Pharm's research team spent approximately a month in Nigeria; no follow up care to the children who received the drug. By the end of May, all Tex-a-Pharm employees had returned home.

Over 1,000 children died from the epidemic in total. The survival rate for the children who received Trovan was higher than it was than for those who did not receive it, but the fatality rate was still extraordinarily high. Moreover, a high percentage of those who survived have sustained permanent physical and mental disabilities which plaintiffs allege is the result not of the epidemic but of having taken Trovan. The strongest evidence plaintiffs can cite in support of this allegation is that of all of the surviving children, only those treated with Trovan seem to have these disabilities.

The Nigerian government provided Tex-a-Pharm with a letter of request necessary to secure the FDA's approval for the export of Trovan. Further, the Nigerian government facilitated Tex-a-Pharm's efforts to conduct the Kano Trovan Test, by among other things arranging for Tex-a-Pharm's accommodations in Kano, and providing access to two of the hospital's wards to conduct the Kano Trovan Test, as well the services of hospital's nurses and physicians.

All research on the drug was performed in Dallas and in various places throughout the United States the company gathered data from clinical trials used to further research and development efforts of the drug. Plaintiffs have alleged that Tex-a-Pharm intended to use the experiments in Nigeria to aid its efforts to obtain FDA regulatory approval of the drug in the United States. Such FDA approval of the new antibiotic would, in turn, then pave the way for sale of Trovan in the United States, according to plaintiff's allegations. To date, however, no Trovan has been sold in this country.

I want you to consider whether we should file a forum non conveniens motion. As always, I want you to consider not only the strength of the arguments for dismissal but also the force of the argument that plaintiffs will make against dismissal.

Exam Number _____

Exam Number _____

Essay Question No 3. Total points: 23 1/3. For students who type, you must limit your answer to no more than 1600 words.

Paula, from Ohio, holds a federal patent for the Paula Penlight, a product designed for bedtime reading. She enters into a contract with Danielle, also from Ohio, pursuant to which Danielle is permitted to manufacture and sell the Paula Penlight and is to pay Paula a royalty of \$1.00 per product sold. After a year, Paula discovers that Danielle has sold 100,000 penlights on which she has paid no royalty. When confronted, Paula says that she has not paid the royalty because Paula's patent is invalid. Paula brings suit in federal court against Danielle to recover damages of \$100,000 under the contract, maintaining that her patent is valid.

If Danielle moves to dismiss for lack of subject matter jurisdiction, what result?

Part II
Multiple Choice Questions

(This Part is worth, in total, 30 points. There are 15 questions, so each question is worth 2 points)

Blacken the circle on the scantron sheet that corresponds to the correct answer.

1. State X's long arm statute allows the state to exercise personal jurisdiction over nonresidents who "derive substantial revenue" from goods that are "used or consumed in the state," only if the cause of action arises from the use or consumption of those goods. Can a court exercise jurisdiction over a nonresident defendant who has derived substantial revenue from goods used in the state if the cause of action against her is not related to the plaintiff's claim?

- A. Yes, always. It is not constitutionally improper for states to exercise jurisdiction over nonresident defendants on general jurisdiction grounds.
- B. Yes, assuming that the facts demonstrate the defendant had such continuous corporate operations within the state that were so substantial and of such a nature as to justify suit against it even on causes of action arising from dealings entirely distinct from those activities.
- C. Never, because the defendant isn't statutorily amenable to suit.
- D. It depends on how the court would weigh the reasonableness factors from the second step of the *International Shoe* test.

2. D1 (Mississippi) is sued in the United States District Court for Central District of California by P (California). D believes P's complaint fails to state a claim for which relief can be granted and moves under Rule 12(b)(6) for a dismissal. Ten days later, before P has filed a response to the motion to dismiss, and before the case has been placed on the trial calendar, D decides that it is best to challenge the exercise of personal jurisdiction over him by the court and moves to amend his pre-answer motion to include a Rule 12(b)(2) motion to dismiss for lack of jurisdiction. Can he do so?

- A. Yes

- B. Yes, assuming he can obtain leave of court to do so.
- C. No
- D. Yes, unless it is shown that P will be prejudiced by the amendment.

3. D1, a Mississippi resident, is sued in the United States District Court for Central District of California by P, a California resident. When D files his answer he includes in it a motion to dismiss for failure to state a claim on which relief can be granted. Ten days later, before P has filed a response to the motion to dismiss, and before the case has been placed on the trial calendar, D decides that it is best to challenge the exercise of personal jurisdiction over him by the court and moves to amend his answer to include this additional motion to dismiss for lack of personal jurisdiction. Can he do so?

- A. Yes
- B. Yes, assuming he can obtain leave of court to do so.
- C. No
- D. Yes, unless it is shown that P will be prejudiced by the amendment.

4. P (Maine) sues D (Idaho) in federal district court, in the District of Maine for breach of contract. P alleges the amount in controversy is in excess of \$75,000. D believes that the P has failed to state a cognizable claim for relief under the state substantive law. Look at the list below and then circle the answer that identifies the acceptable procedures by which D may challenge P's allegations.

- 1. File a motion to dismiss for failure to state a claim under 12(b)(6)
- 2. File a motion for summary judgment under Rule 56
- 3. File a motion to strike under Rule 12(f)
- 4. File a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) for failure to assert a cause of action arising under federal law and for failing to demonstrate a basis for supplemental jurisdiction over the state law breach of contract claim
- 5. File a motion for judgment on the pleadings

- A. 1, 3 and 4
- B. 2, 4 and 5
- C. 3, 4 and 5
- D. 1, 2 and 5
- E. 1, 2 and 3

5. On February 1, 2007 P, a Texas citizen, filed an action for breach of contract against two defendants, in Texas state court. P claims damages in excess of \$200,000. D1 is incorporated in, and has its principal place of business in, Texas. D2 is incorporated and has its principal place of business in Louisiana. On February 15, 2007, both defendants answered the state court lawsuit and neither attempted to remove the lawsuit to federal court at that time. On March 1, 2008, P settled his case against D1 and dismissed it from the lawsuit. On March 2, D2 removed the case to federal district court under 28 U.S.C. §1441, citing §1332 as the sole basis for jurisdiction. How should the court rule on P's subsequent motion to remand?

- A. The court should grant the motion to remand.
- B. The court should deny the motion to remand.
- C. Whether the court should grant the motion to remand depends on if the monetary claim against D2, standing alone, is for more than \$75,000.
- D. Whether the court should grant the motion to remand depends on if (i) the monetary claim against D1 was for more than \$75,000; and (ii) the claim against D2 is "so related" to the claim against D1, within the meaning of 28 U.S.C. §1367.

6. P files his suit in Harris County (Houston) district court. The United States District Court for the Southern District of Texas is the district court to which suits filed in Harris County state district courts are removed under 28 U.S.C. §1441. Thereafter, D removes the case on federal question grounds to the United States District Court for the Eastern District of Texas. If P moves to remand or in the alternative to transfer venue to the Southern District, how should the court rule?

- A. Because this case arises under 28 U.S.C. §1331, the court should deny remand, and retain the case in the Eastern District of Texas, provided that D can show it is for the convenience of parties and witnesses and in the interest of justice to adjudicate it in the Eastern District.
- B. Because this case arises under 28 U.S.C. §1331, the court should deny remand but can exercise its residual power under the All Writs Act, 28 U.S.C. §1651(a) and retain the case in the Eastern District of Texas without regard to whether the D can show it is for the convenience of parties and witnesses and in the interest of justice to adjudicate it in the Eastern District.
- C. It makes no difference that the case is based on federal question jurisdiction: the court should deny remand and has full discretion to retain the case in the Eastern District of Texas.
- D. It makes no difference that the case is based on federal question jurisdiction: the court should deny remand and should transfer it to the Southern District of Texas

7. Plaintiffs are residents of New Jersey. They buy a car from an automobile dealership in New York, where the dealership is incorporated. The car is manufactured in Detroit, Michigan, by Ford Motor Company, which is incorporated and has its principal place of business in Michigan and which engages in heavy sales and marketing throughout the United States. While driving through Oklahoma, the car explodes, severely injuring plaintiffs. Plaintiffs would like to sue the automobile manufacturer and the dealership in federal district court. Would *venue* for this action be proper in the district of Oklahoma?

- A. No.
- B. Yes.
- C. It depends on whether the defendants can show that the case could have been brought in the United States District Court for the Eastern District of Michigan.

- D. It depends on whether the defendants can show that (i) the case could have been brought in the United States District Court for the Eastern District of Michigan and (ii) that it is in the interest of justice and for the convenience of parties and witnesses for the case to be heard in the United States District Court for the Eastern District of Michigan.
8. Which of the following statements is least accurate about federal civil practice?
- A. If a defendant believes she needs a more definite statement of a claim before being able to respond, she should serve a motion for more definite statement before serving an answer.
- B. Because a plaintiff has discretion to join claims under Fed. R. Civ. P. 18, there is little risk if he asserts some but not all claims arising out of a single occurrence.
- C. A complaint may but need not narrow the factual issues in dispute.
- D. A defendant's pleading can include a motion to dismiss for failure to state a claim on which relief may be granted.
9. Which of the following statements is most accurate?
- A. To satisfy Rule 8 a plaintiff must only provide fair notice to give the defendant fair notice of the claim and the grounds upon which it rests.
- B. To satisfy Rule 8 a plaintiff must only state enough facts to state a claim for relief that is plausible on its face.
- C. To satisfy Rule 8 a plaintiff must only provide enough facts to create a suspicion of a legally cognizable claim for relief.
- D. To satisfy Rule 8 a plaintiff must provide fair notice to give the defendant fair notice of the claim and the grounds upon which it rests and provide enough facts to state a claim for relief that is plausible on its face.

- E. To satisfy Rule 8 a plaintiff must provide fair notice to give the defendant fair notice of the claim and provide enough facts to create a suspicion of a legally cognizable claim for relief.
10. Ted is a lawyer representing the defendant in a breach of contract suit brought by Paul. While reviewing the files, he discovers a memorandum to the file written by one of his client's employees in which the employee concedes there may have been false assertions made by the client in connection with the contract.
- A. If Paul had previously sent a request for production under Rule 34 asking the defendant to produce "any documents, memoranda, electronic files, etc. in defendant's possession discussing or related to any subject that concerns this pending action," then Ted may have to produce the memorandum.
- B. Even if no such request for production had previously been sent, Ted must produce the memorandum because it is required under the mandatory disclosure rule of Rule 26(a).
- C. The memorandum is work product not subject to discovery
- D. Even if the memorandum was not work product when it was written, now that it has been reviewed by Ted in the course and scope of his work as a lawyer for defendant, it is exempt from production on work product grounds.
11. Paula (Texas citizen) brings suit in Texas state court against her employer (Texas citizen) for age and national origin discrimination. She claims she lost her job in July 2007 because she is 55 and Hungarian. She intends to assert federal claims under Title VII of the Civil rights Act of 1964 and under the Age Discrimination in Employment Act of 1967, both federal statutes. She also asserts claims under Texas civil rights law. A former employee, Joan (also a Texas citizen), would like to join as a co-plaintiff in Paula's case. She claims, too, that she was the subject of discrimination—she alleges gender discrimination—when she was fired in September 2007. The same supervisor made the decision to fire both women. In addition to asserting federal and state claims for gender discrimination, Joan would also like to sue the company for negligence (under state law). She claims that several months before she was fired her car was damaged while in the company parking lot.

Which of the following statements is correct concerning Paula and Joan joining together in the same suit?

- A. Federal rules governing joinder of parties and claims permit Paula and Joan to join as plaintiffs but do not permit Joan to assert her factually-unrelated claim of negligence.
 - B. Under federal rules governing joinder of parties and claims, Paula and Joan may proper join as plaintiffs and assert all their claims, but there may not be federal subject matter jurisdiction over Joan's negligence claim.
 - C. Under federal rules governing joinder of parties and claims, Paula and Joan may proper join as plaintiffs and assert all their claims, and there is subject matter jurisdiction over all claims.
 - D. The joint suit by Paula and Joan is neither authorized by federal rules governing joinder of parties and claims nor is there subject matter jurisdiction over all claims.
12. Plaintiff sues Defendant for damages she suffered in an auto accident. Defendant alleges in its answer that Plaintiff previously signed a release waiving all claims she might have against Defendant. If Plaintiff believes the release is unenforceable because it was obtained by fraud, which of the following has any chance of success?
- A. Serve on Defendant and file with the court a motion under Rule 12(b)(6) that Defendant's defense of waiver fails to state a claim on which relief may be granted.
 - B. Serve on Defendant and file with the court a motion under Rule 12(c) seeking to have the release defense dismissed on the ground that Defendant itself waived the right to assert this defense by not bringing it as a preanswer motion under Rule 12(b)(6).
 - C. Serve on the Defendant a motion for sanctions against Defendant for filing a frivolous defense on the ground that Defendant knew the release was procured by fraud and then seek sanctions from the court if, within 21 days, Defendant does not withdraw its answer regarding the release.
 - D. Serve on Defendant and file with the court a motion for sanctions against Defendant for filing a frivolous defense on the ground that Defendant knew the release was procured by fraud. Even if Defendant withdraws its answer, continue to press for sanctions on the ground that Defendant knew the defense was frivolous when it filed it with its answer.

13. All the following statements concerning summary judgment are true except:
- A. Allegations contained in the pleadings are generally not considered to be evidence on which a party can rely.
 - B. A party arguing against summary judgment may rely on his own affidavit even though testimony given in the affidavit has not been subject to cross examination
 - C. At the summary judgment stage a party who has the burden of proof for a claim at trial must normally present some admissible evidence supporting each element of the claim to withstand summary judgment.
 - D. Because discovery responses are automatically filed with the court when produced, a party seeking summary judgment can rely on the filed discovery to support its summary judgment motion.
14. Peter, a citizen of Texas who lives in Houston, was involved in an auto accident while visiting El Paso, Texas. The driver of the other auto was David, a citizen of Mexico living in El Paso. The owner of the auto David was driving, Victor, is also a citizen of Mexico living in El Paso. Peter sues both David and Victor for negligence and seeks damages from them in excess of \$75,000 each. He files suit in Harris County (Houston) state district court. Which of the following statements is correct?
- A. If David and Victor both have been admitted to the United States for permanent residence, they may remove the suit to the United States District Court for the Southern District of Texas.
 - B. If neither David nor Victor has been admitted to the United States for permanent residence, they may remove the suit to the United States District Court for the Southern District of Texas.
 - C. If either David or Victor has not been admitted to the United States for permanent residence, they may remove the suit to the United States District Court for the Southern District of Texas.
 - D. If either David or Victor has not been admitted to the United States for permanent residence, they may remove the suit to any federal district court in the United States under 28 U.S.C. §1391(d).

15. Plaintiff (citizen of CA) filed a suit based on state law against David in a federal district court in California alleging breach of contract based on a contract negotiated in Nevada and to be performed by the parties in Nevada. David is a citizen of Texas. All witnesses in the case, except for Plaintiff and Defendant, live in Nevada. Defendant moves to change the venue to Texas, or alternatively, to Nevada. Which of the following is most accurate?

- A. Assuming there is personal jurisdiction over David in California, the action must be transferred to Texas or Nevada pursuant to 28 U.S.C. §1404.
- B. Assuming there is personal jurisdiction over David in California, the action may be transferred to Texas or Nevada pursuant to 28 U.S.C. §1404.
- C. Assuming there is personal jurisdiction over David in California, the action must be dismissed pursuant to 28 U.S.C. §1406.
- D. Without regard to whether there is personal jurisdiction over David in California, the court has discretion under 28 U.S.C. §1406 to retain the action or transfer it to Texas or Nevada.
- E. Without regard to whether there is personal jurisdiction over David in California, the court has discretion under 28 U.S.C. §1406 to dismiss the case or transfer it to a federal district court in Texas or Nevada.