UNITED STATES DISTRICT COURT WESTERN DISTRICT OF NEW YORK

:

EQUAL EMPLOYMENT OPPORTUNITY:

COMMISSION,

Civil Action No.

1:06-cv-00345-RJA-HKS

Plaintiff,

:

v.

ALEX C. FERGUSSON, INC.,

Defendant.

CONSENT DECREE

I. Introduction

- 1. The parties to this Consent Decree are plaintiff Equal Employment Opportunity Commission (hereafter "EEOC"), and defendant Alex C. Fergusson, Inc.
- 2. The EEOC brought this action on May 25, 2006, pursuant to the Age Discrimination in Employment Act of 1967, as amended (hereafter "ADEA"), 29 U.S.C. §§ 621 et. seq. The EEOC alleged, inter alia, that Defendant discriminated against Raymond Allen because of his age by adopting and enforcing a mandatory retirement policy and requiring him either to retire or to go to part-time status.
- 3. The EEOC and Defendant (hereinafter "the parties") desire to conclude fully and finally all claims arising out of the above action. They enter into this Consent Decree to further the objectives of equal employment opportunity as set forth in the ADEA.
- 4. This Consent Decree is not an adjudication or finding on the merits of this case and shall not be construed as an admission of a violation by Defendant.

5. The Court has reviewed the terms of this Consent Decree in light of the pleadings, the record herein, and the applicable law, and now approves the Consent Decree in its entirety.

Therefore, IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

II. **General Provisions**

- 1. This Court has jurisdiction over the subject matter and the parties to this action.
- 2. This Consent Decree resolves all issues concerning alleged discrimination by Defendant through the date of this Consent Decree which were raised in the Complaint filed by the EEOC in this case. This Consent Decree also resolves all issues that were raised in the Charge of Discrimination filed by Raymond Allen with the EEOC against Defendant. This Decree in no way affects the EEOC's right to process any pending or future charges that may be filed against Defendant in accordance with standard EEOC procedures, and to commence civil actions on any such charges.
- 3. The parties have agreed that this Decree may be entered into without Findings of Fact and Conclusions of Law having been made and entered by the Court.
- 4. This Consent Decree shall become effective upon its entry by the Court (the "effective date").
 - 5. Each party shall bear its own costs and attorney fees, unless otherwise specified.
- 6. The EEOC and Defendant agree that this Consent Decree constitutes the complete agreement between them. No waiver, modification, or amendment of any provision of this Consent Decree shall be effective unless made in writing, approved by all parties to this Consent Decree, and approved or ordered by the Court.

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III. **Injunctive Relief**

Age Discrimination: Consistent with Section 4 of the ADEA, 29 U.S.C. §623, 1. Defendant, its officers, agents, managers (including supervisory employees), successors and assigns, and all those in active concert or participation with them, are enjoined from discharging or failing to hire any individual or otherwise discriminating against any individual with respect to his or her compensation, terms, conditions, or privileges of employment, because of such individual's age. In particular, Defendant is enjoined from maintaining a mandatory retirement policy, unless such policy is consistent with 29 U.S.C. Section 631(c).

2. Retaliation: Defendants, their officers, agents, managers (including supervisory employees), successors and assigns, and all those in active concert or participation with them, are enjoined from retaliating against any employee for exercising his or her rights under the ADEA.

IV. **Monetary Relief**

1. Defendant agrees to pay Fifty Thousand dollars (\$50,000) in consideration of the mutual promises herein. This sum, less lawful deductions, shall be paid to Raymond Allen within ten (10) days of the effective date, subject to paragraph four below.

2. Payment to Raymond Allen shall be made by delivering, by United States Postal Service, certified mail receipt, a check payable to Raymond Allen in the amount set forth above to an address to be supplied by the EEOC.

3. Defendant shall send copies of the check, tax forms, and return receipt to:

Equal Employment Opportunity Commission Boston Area Office Attn: Mark Penzel JFK Federal Building, Room 475 Boston, MA 02203-0506

4. The payment to Raymond Allen shall be contingent upon his execution of, and subject to, the terms and conditions of a separate agreement and release. Defendant shall pay counsel for Raymond Allen an additional Five Hundred Dollars (\$500.00) for attorney's fees in conjunction with Mr. Allen receiving legal advice regarding the signing of this separate agreement and release. The name and address of counsel retained by Mr. Allen shall be provided to counsel for the Defendant. Payment shall be made directly to said designated counsel. Defendant is not responsible for any legal fees incurred by Mr. Allen which exceed Five Hundred Dollars (\$500.00). This amount shall be paid simultaneously with the payment in paragraph one.

V. Non-Monetary Relief

A. Posting and notice

- 1. No later than seven (7) days after the effective date, Defendant shall post at all its facilities a copy of a remedial notice printed on its letterhead and signed by its Chief Executive Officer, attached hereto as Exhibit "A." Said notice shall remain posted for two (2) years from the date of this Decree.
- 2. In addition, Defendant shall, no later than seven (7) days after the effective date, mail a copy of the remedial notice described above to any of its employees who work offsite on a regular basis, including, but not limited to, sales staff.

B. Anti-discrimination Policy

1. Defendant shall distribute to all employees the EEO policy attached as Exhibit "B."

1. Defendant shall conduct an eight (8) hour training session for all management employees on the requirements of Title VII of the Civil Rights Act, the Equal Pay Act, the Americans with Disabilities Act, and the ADEA. Such training shall follow the outline attached as Exhibit C. The trainer shall be Kaufman Dolowich Schneider Bianco & Voluck, LLP. The training session will be completed within ninety (90) days of the Execution Date. A copy of the attendance sheet from the training session will be forwarded to the EEOC within ten (10) days after its completion. Such training shall also be provided within thirty (30) days to all employees hired or promoted into management positions within the term of the Consent Decree. Defendant shall submit to the EEOC at the end of each calendar year proof of such training.

VI. Additional Reporting and Monitoring

- 1. Six months after the effective date, Defendant shall submit a report to the EEOC detailing its compliance with this Decree.
- 2. Defendant shall also submit a final report to the EEOC thirty (30) days before the Consent Decree expires containing a statement verifying its compliance with the terms of the Consent Decree.
- 3. EEOC shall retain the right to monitor Defendant's compliance with the terms of this Consent Decree until its expiration through, <u>inter alia</u>, the inspection of records and the interviewing of witnesses.

VII. Expiration of Consent Decree and Miscellaneous Provisions

1. No party shall contest the jurisdiction of the federal court to enforce this Consent Decree and its terms or the right of any party to this Consent Decree to bring an enforcement suit upon breach of any of the terms of this Consent Decree by any party. Breach of any terms of this

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Consent Decree shall be deemed a substantive breach of this Consent Decree. Nothing in this Consent Decree shall be construed to preclude the EEOC from bringing proceedings to enforce this Consent Decree in the event that Defendant fails to perform the promises and representations contained herein.

- 2. This Consent Decree shall remain in effect for two (2) years from the date it is approved by the Court.
- This Consent Decree shall be binding upon Defendant's purchasers, successors, 3. and assigns.

SO ORDERED, ADJUDGED AND DECREED.

Signed this day of, 2007
United States District Judge
APPROVED IN FORM AND CONTENT:
By Plaintiff,
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
COMMISSION
By: <u>/s/ Elizabeth Grossman</u>
Elizabeth Grossman
Regional Attorney
EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
New York District Office
33 Whitehall Street, 5 th Floor
New York, NY 10004-2112
Elizabeth.grossman@eeoc.gov
/s/ Markus L Penzel
Markus L. Penzel
Senior Trial Attorney

EQUAL EMPLOYMENT OPPORTUNITY **COMMISSION**

Boston Area Office John F. Kennedy Federal Building, Room 475 Boston, MA 02203-0506 (617) 565-3193 markus.penzel@eeoc.gov

By Defendant, ALEX C. FERGUSSON, INC.

By: /s/ Michael Kaufman Michael Kaufman, Esq. Kaufman Dolowich Schneider Bianco & Voluck, LLP 135 Crossways Park, Suite 201 Woodbury, NY 11797 516-681-1100 mkaufman@kdsbvlaw.com

Exhibit A

NOTICE

- 1. This <u>NOTICE</u> to all employees of Alex C. Fergusson, Inc., is being posted and provided as part of a Consent Decree between Alex C. Fergusson, Inc., as Defendant and the U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ("EEOC"). Alex C. Fergusson, Inc., as part of the resolution of this matter, will not discriminate against any individual because of the individual's age, or engage in retaliation toward any employee because that employee has complained about age discrimination or assisted the EEOC.
- 2. In particular, Alex C. Fergusson, Inc., states that it does not have a mandatory retirement policy, and that no employees may be asked to work less hours because of their age.
- 3. Federal law requires that there be no discrimination against any employee or applicant for employment because of age, sex, race, national origin, color, disability, or religion with respect to hiring, compensation, promotion, discharge, or other terms, conditions, or privileges of employment. Federal law also prohibits retaliation against any person who opposes such discrimination or makes a charge, testifies, assists, or participates in any manner in any investigation, proceeding, or hearing relating to such discrimination.
- 4. Alex C. Fergusson, Inc. will comply with such Federal law in all aspects, and it will not take any action against employees because they have exercised their rights under the law by filing charges or cooperating with the EEOC or by otherwise opposing employment practices made unlawful under federal law.
- 5. The EEOC maintains offices throughout the United States. Its toll-free telephone number is 1-800-669-4000.

6. This <u>NOTI</u>	<u>CE</u> will remain pos	sted until $2(TWO)$ YEARS FROM DAT	E OF SIGNATURE.
SIGNED this	day of	, 2007.	
Owner and Preside	ent		

DO NOT REMOVE THIS NOTICE UNTIL 2 (TWO) <u>YEARS FROM DATE OF</u> <u>SIGNATURE</u>

The following represents the Equal Employment Opportunity policy of Alex C. Fergusson, Inc.

EQUAL EMPLOYMENT OPPORTUNITY

Our corporation is committed to equal employment opportunity. We will not discriminate against employees or applicants for employment on any legally-recognized basis including, but not limited to: veteran status, race, color, religion, sex, marital status, national origin, physical or mental disability and/or age.

In addition to the above, pregnancy, childbirth and related medical conditions, creed, familial status and ancestry are protected classes in Pennsylvania.

AMERICANS WITH DISABILITIES ACT

Our corporation is committed to providing equal employment opportunities to otherwise qualified individuals with disabilities, which may include providing reasonable accommodations where appropriate. In general, it is your responsibility to notify the Human Resources Coordinator of the need for an accommodation. Upon doing so, the Human Resources Coordinator may ask you for your input or the type of accommodation you believe is necessary, or the functional limitations caused by your disability. Also, when appropriate, we may need your permission to obtain additional information from your physician or other medical or rehabilitation professionals.

A WORD ABOUT OUR EMPLOYEE RELATIONS PHILOSOPHY

We are committed to providing the best possible climate for maximum development and goal achievement for all employees. Our practice is to treat each employee as an individual. We seek to develop a spirit of teamwork; individuals working together to attain a common goal. In

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order to maintain an atmosphere where these goals can be accomplished, we provide a comfortable and progressive workplace. Most importantly, we have a workplace where communication is open and problems can be discussed and resolved in a mutually respectful atmosphere. We take into account individual circumstances and the individual employee.

We firmly believe that with direct communication, we can continue to resolve any difficulties that may arise and develop a mutually beneficial relationship.

SEXUAL HARASSMENT

We firmly prohibit sexual harassment of any employee by another employee, supervisor or a third party. Harassment of third parties by our employees is also prohibited. The purpose of this policy is not to regulate the morality of employees. It is to assure that in the workplace, no employee is subject to sexual harassment. While it is not easy to define precisely what sexual harassment is, it includes: unwelcome sexual advances, requests for sexual favors and/or verbal or physical conduct of a sexual nature including, but not limited to, drawings, pictures, jokes, teasing, uninvited touching or other sexually related comments.

Sexual harassment of an employee will not be tolerated. Violations of this policy may result in disciplinary action, up to and including discharge. There will be no adverse action taken against employees who report violations of this policy or participate in the investigation of such violations.

Any employee who feels that (s) he is a victim of sexual harassment should immediately report such actions in accordance with the following procedure. All complaints will be promptly and thoroughly investigated.

1. Any employee who believes that (s) he is a victim of sexual harassment should report the act immediately to the Human Resources Coordinator. If you prefer not to discuss the

matter with the Human Resources Coordinator, you may contact any other member of management.

- 2. The corporation will investigate every reported incident immediately. employee, supervisor or agent of the corporation who has been found to have sexually harassed another employee may be subject to appropriate action, up to and including immediate discharge.
- 3. The corporation will conduct all investigations in a discreet manner. The corporation recognizes that every investigation requires a determination based on all the facts in the matter. We also recognize the serious impact a false accusation can have. We trust that all employees will continue to act responsibly.
- 4. The reporting employee and any employee participating in any investigation under this policy will have the corporation's assurance that no reprisals will be taken as a result of a sexual harassment complaint. It is our policy to encourage discussion of the matter and help protect others from being subjected to similar inappropriate behavior.

OTHER FORMS OF HARASSMENT

We also prohibit harassment of one employee by another employee, supervisor, or third party for any reason including, but not limited to: veteran status, race, color, religion, marital status, national origin, physical or mental disability and/or age.

In addition to the above, pregnancy, childbirth and related medical conditions, creed, familial status and ancestry are protected classes in Pennsylvania.

The purpose of this policy is not to regulate the personal morality of employees. It is to assure that in the workplace, no employee harasses another for any reason.

While it is not easy to define precisely what harassment is, it includes: slurs, epithets, threats, derogatory comments, unwelcome jokes and teasing.

Any employee who feels that (s) he is a victim of such harassment should immediately report the matter to the Human Resources Coordinator or any other member of management. Our corporation will investigate all such reports as confidentially as possible and in the same manner as described above regarding sexual harassment. Adverse action will not be taken against an employee who reports or participates in the investigation of a violation of this policy. Violations of this policy are not permitted and may result in disciplinary action, up to and including discharge.

TALK TO US

We encourage you to bring your questions, suggestions and complaints to our attention.

We will carefully consider each of these in our continuing effort to improve operations.

If you feel you have a problem, present the situation to your supervisor so the problem can be settled by examination and discussion of the facts. We hope your supervisor is able to satisfactorily resolve matters.

If you still have questions after meeting with your supervisor or if you would like further clarification on the matter, request a meeting with the Human Resources Coordinator.

Finally, if you still believe that your problem has not been fairly or fully addressed, request a meeting with the chief operating officer.

Your suggestions and comments on any subject are important and we encourage you to take every opportunity to discuss them with us. Your job will not be adversely affected in any way because you choose to use this procedure.

Exhibit C

The following represents an outline to be utilized by Alex C. Fergusson, Inc. for management training regarding discrimination and harassment.

EQUAL EMPLOYMENT OPPORTUNITY MANAGEMENT AND SUPERVISORY TRAINING

I. <u>INTRODUCTION</u>

A. Goals of Training

- 1. To educate and create an understanding of the sensitive issues that shape our workforce; primarily that the Employer is an Equal Opportunity Employer and will not discriminate on the basis of race, creed, color, religion, national origin, ancestry, gender, age, marital status, handicap, veteran status, pregnancy, childbirth and related medical conditions, creed, familial status, ancestry and/or other protected status. Specifically, Alex C. Fergusson, Inc. does not tolerate discrimination of any kind. Throughout the program it will be emphasized through real life and hypothetical examples that discrimination or harassment of any kind will not be A kindly, sympathetic and understanding attitude is essential. tolerated. In accepting employment with the Alex C. Fergusson, Inc. you have made the commitment to become part of a group that is trusted and held in esteem by the public. By employing you we indicate our faith in your ability to live up to this trust. We expect from you: cooperation, loyalty, integrity and diligence in the performance of your duties. These objectives, especially that of a discrimination-free workplace, can only be accomplished through the maximum utilization of the skills and abilities of all employees in all departments working together as a team in a cooperative and friendly atmosphere.
 - 2. To familiarize the employees with the Alex C. Fergusson, Inc.'s:
 - a. Equal Employment Opportunity Policy
 - i. <u>Purpose</u>: (a) to state the Alex C. Fergusson, Inc.'s policy with respect to equal employment opportunity; (b) to ensure that all persons are treated equitably with respect to employment opportunities throughout the Alex C. Fergusson, Inc.; (c) to demonstrate commitment to comply with applicable federal, state and local laws and regulations relating to non-discrimination in employment.
 - b. Sexual Harassment Policy (to be discussed in greater detail later).
 - 3. To encourage employees to feel more comfortable with system.

B. Five Major Concepts Of Equal Employment Opportunity

1. Applicants And Employees With Equal Qualifications, Abilities And Performance Must Be Treated Equally.

- 2. An Employer Must Be Able To Provide Legitimate Job-Related Reasons For Adverse Actions Against Protected Groups, Such As Minorities, Women, Older Workers, Disabled, etc.
- Show that rules and policies are enforced uniformly regardless of race, sex, etc., resulting a. in equal treatment for all; and (b) show by documentation that you followed Company and Department policy on warnings and/or counseling prior to final action.
- 3. Hiring And Promotion Standards That Appear To Be Neutral And Apply Across-the-Board May Still Be Discriminatory If They Impact More Heavily On Minorities, Women Or Other Protected Groups. (Disparate Impact)
- 4. Employment Decisions Based On Stereotypes Lead To Unlawful Results.
 - (a) Applicants and employees must be evaluated on their individual abilities and performance, not on unjustified assumptions about them as members of a group; (b) Common stereotypes to avoid: i. women cannot do strenuous work; ii. men cannot do work requiring great dexterity; iii. Hispanics and Asians cannot communicate clearly in English; iv. Blacks lack sufficient education to master highly technical jobs; v. handicapped workers have high absenteeism rates; vi. older workers are less productive than younger workers; vii. young women are not interested in job upgrading because they plan to quit when they get married.
- 5. Usually Equality and Uniformity Result In Full Compliance with EEO Laws, But, In Limited Situations, Reasonable Accommodation Is Necessary.
 - a. Reasonable Accommodation is required to assist employees whose religious beliefs or ethnic practices may conflict with work.
 - b. Under the Americans with Disabilities Act, reasonable accommodation is required in order to enable disabled individuals to perform the essential functions of their positions (unless providing an accommodation would cause an undue hardship).

What constitutes "reasonable accommodation" and "undue hardship" is largely determined on a case-by-case basis.

II. **DISCRIMINATION LAWS**: What Every Individual Should Know:

Α. **Federal Statute**

- Title VII of the Civil Rights Act of 1964 1.
 - Purpose: protects employees from discrimination based upon: i. Religion; ii. gender and sexual harassment (includes pregnancy); iii. Race; iv. color; v. national origin

- b. In addition to the above, Pennsylvania also considers the following to be protected classes: pregnancy, childbirth and related medical conditions, creed, familial status and ancestry.
- c. <u>Scope of Coverage</u>: applies to employers with 15 or more employees for each working day in 20 or more calendar weeks in preceding or current year.
- d. Title VII specifically prohibits an employer from taking any adverse employment action against an employee or applicant because of their membership in a protected class. Adverse employment action includes: i. refusal to hire; ii. Termination; iii. discipline; iv. limiting or restricting an employee's compensation or other terms and conditions of employment; v. refusing to grant a reasonable accommodation; vi. failure to promote.
- e. An employee seeking relief under Title VII must be able to establish the following general elements (*prima facie*) in order to prove a Title VII violation: i. membership in a protected class; ii. adverse employment action; iii. employee was qualified for position or was performing in satisfactory manner; and iv. adverse employment action was motivated by membership in protected class.
- "Terms and conditions of employment" includes any form of harassment related to an employee's race, color, sex, religion and national origin. Alex C. Fergusson, Inc. has a zero tolerance policy regarding discrimination. Be aware that discrimination and harassment can occur among members of the same race, religion, sex, color and National Origin. (i.e. racial slurs between members of the same race, religious epithets exchanged between members of the same religion); i. in a United States Court of Appeals case the court found that an African American supervisor referring to another African American employee as a "black boy" was discrimination "because of such individual's race." Ross v. Douglas County, Nebraska, 234 F.3d 391 (8th Cir. 2000). The court stated "we have no doubt that, as a matter of law, a black male could discriminate against another black male 'because of such individuals race.' Such comments were demeaning to Ross. They could have been made to please [a] white superior or they may have been intended to create a negative and distressing environment for Ross. However, whatever the motive, we deem such conduct discriminatory . . . We are well aware that Title VII should not turn into a general civility code, but Johnson's epithets go beyond mere incivility: that Johnson was also black does not alter this;" ii. the court found that these incidents constituted harassment because these statements severely affected the terms and conditions of Ross' employment. The court stated that severity is determined when viewed objectively by a reasonable person. The court found that when viewed by a reasonable person, the harassment here was severe.
- g. To rebut an employee's claim of discrimination, employer must be able to offer a legitimate business reason for taking such employment action.
- h. If employer is able to offer a legitimate business reason for its action, employee may still prevail if he or she can demonstrate that the reason offered was pretextual or that the proffered reason is false.
- i. <u>Retaliation</u>: an employer cannot discriminate against an employee because he or she opposed, testified or complained about an employer's unlawful practice under Title VII. For example, if an employee files a complaint of discrimination with the employer or government agency, and the employer disciplines the employee as a result, the employer will be found to have violated Title VII even if the underlying complaint by the employee is dismissed.
- j. Supervisor Tips to Prevent Harassment

- (i) avoid "questionable" questions during hiring process (eg: have you ever been arrested? Where was your birthplace? Membership in certain organizations, etc...). Certain questions demonstrate animus towards protected classes.
- (ii) adhere to company discipline policy and apply it consistently and equally for all employees
 - 1. recordkeeping maintain documents such as performance reviews, progressive discipline memos, and investigation notes.

В. **Other Federal and State Antidiscrimination Statutes**

1. **Race Discrimination**

A. Discrimination Based On Race Is Prohibited By Federal, State and Local Law

B. Fact Pattern Exercise

1. Facts

Joan has worked in law enforcement all of her working life – 20 years. She is a patrol She has taken all the tests for Sergeant and passed all but one. Each year, for the past three years, white females with less experience have been promoted. Until yesterday, Joan had no problem, believing as she did, that those who got the positions had passed all tests. That is not true -2 of the 3 only passed the tests Joan passed.

Joan is African American. She has never heard racial remarks made by her supervisors or coworkers, but has heard occasional comments about religion or national origin.

Over the years, her shift and work assignments have not been good – she seems to get more night assignments in lousy neighborhoods than others. She has been told she does a good job, understands those folks and can talk to them better than most.

2. Questions

- Has Joan been discriminated against, and if so how? a.
- Are there any additional facts needed to determine whether Joan has been b. discriminated against?
- If Joan never complained or grieved about her treatment, would her case be c. thrown out?

C. Forms of Racial Discrimination Other Than Blatant Acts

1. Actionable discrimination does not require actual blatant discriminatory statements. In EEOC v. St. Michael Hospital, 77 FEP 86-96 (USDC E.Mich., 1998), the Court held that the employee was entitled to trial on claims of racial harassment despite the fact that no slurs or other racial comments were directed at the employee. Other comments and conduct directed at others may be construed as racial an inference of discrimination may exist.

> "An act of harassment need not be facially and specifically racial in nature when examined in isolation in order to support a claim of

a racially hostile environment. . . . The nature of a hostile environment claim is unusually context dependent."

2. Totality of circumstances

Words or conduct which may appear neutral on their face will be viewed in their full context. EEOC vs. St. Michael Hospital. References to "they" or "them" do not facially reflect any racial bias. However, where the conduct attributed to "they" or "them" has an arguably racial inference, the conduct will be viewed as discriminatory.

3. Pretext

An employer's assertion of a legitimate business reason for taking action does not preclude a finding of discrimination if it can be shown that the reason was a pretext for discrimination. For example, a failure to promote on the basis that an equally qualified candidate was given the position did not preclude trial where plaintiff claimed she was not given adequate notice that a position was available. Blow v. City of San Antonio, 84 FEP 1268 (5th Cir. 2001).

- 4. Subtle forms of adverse employment action An individual may be deemed terminated even though they quit. This is the notion of constructive discharge. An employee who was increasingly isolated, and not spoken to by his supervisors after filing a discrimination charge was found to have been constructively discharged and entitled to an award of \$70,000. Moore v. Kulka Welding Systems, 79 FEP 795 (6th Cir. 1999). Unfair allocation of days off, unfair assignments, and refusals to train constituted racial discrimination in Hanley v. Sports Authority, 78 FEP 1149 (USDC Fla, 1998).
- 5. Disparate impact requirements not needed for a position are unlawful if they adversely impact a protected group. Educational requirements have long been the subject of EEOC inquiry as African Americans statistically do not attain as high levels of education as their white counterparts.
- 6. Stereotyping Hiring decisions based on stereotype may constitute racial discrimination. Certainly there have been a host of cases making reference to comments about a group's laziness and lateness issues or propensity not to pay bills on time as evidence of racial stereotype and discrimination. Hightower v. Roman, Inc., 88 FEP 1804 (USDC N.J., 2002), EEOC v. St. Michael Hospital.

2. Equal Pay Act (EPA)

- a. Purpose: Protects employees from discrimination in wages based upon their gender.
- b. Prohibits employers from paying male and female employees different wages for work performed under similar working conditions that require equal skill, effort and responsibility. Includes providing employees with equal benefits, even if the benefits cost more with respect to one sex than the other.
- c. Terms to Know: i. Equal Skill includes relevant experience, education, training, and ability determined by the performance of the job. The skill must be related to the performance requirements of the job; ii. Equal Effort – the measurement of the physical or mental exertion required for the performance of the job. iii. Equal Responsibility - the degree of accountability required in the performance of the job; iv. Similar Working conditions – the "surroundings" and "hazards" where a job is performed. Includes elements that an employee regularly encounters, the frequency, and intensity.

d. Exceptions: Paying male and female employees differently for equal work can be legal if compensation is based on: i. a seniority system; ii. a merit system; iii. a system that measures earnings by quantity and quality of production, or iv. a differential based on any factor other than sex.

3. Pregnancy Discrimination Act (PDA)

- Protects employees by prohibiting employers from treating pregnancy, childbirth, or related medical conditions different from other temporary disabilities regarding terms and conditions of employment.
- b. The PDA does not require employers to treat pregnant employees differently or in any special manner.
- c. An employer may not pre-establish: A mandatory date for an employee to begin pregnancy leave or take time off for pregnancy.

4. Age Discrimination in Employment Act (ADEA)

- a. Purpose: Protects employees 40 years old or older from discrimination based upon their age.
- b. Covers employers with 20 or more employees for each working day in each of 20 or more calendar weeks in preceding or current calendar year; employment agencies; labor organizations and most employees of federal, state and local governments.
- c. Exceptions: i. states are immune from lawsuits by public worker's who claim age discrimination under the ADEA; ii. if an employee is age 65 or over, the employer may require an employee to retire if the employee has been serving as a bona fide executive or in a high policy making position for two (2) years immediately prior to the mandatory retirement date proving: (a) the employee earns an annual retirement income of at least \$44,000.00; (b) the employee heads local or regional operations of a corporation or major departments or divisions of a corporation; iii. Indian tribes are immune; iv. The Bona Fide Occupational Qualification ("BFOQ"). Where age is bona fide occupational qualification the ADEA does not prohibit employers from discriminating on the basis of age.
- d. Recordkeeping ADEA requires that employers retain the following documents: i. employee application and resumes; ii. job advertisements; iii. records of promotions or discharges; iv. results of physical examinations considered in connection with personnel actions; v. test results in connection with aptitude or employment tests administered by employer.
- e. An employee seeking relief under ADEA must show the following: i. employee is 40 years old or older; ii. employee suffered adverse employment action; iii. employee was qualified for position or was performing job satisfactorily; iv. adverse employment action was motivated by age.
- f. As in Title VII actions, the employer can offer a legitimate business reason to counter any claim of discrimination.
- g. Other employer defenses to a claim of discrimination under the ADEA include: observance of a bona fide employee benefit plan and/or bona fide seniority system.

- h. Employee has ultimate burden to prove that legitimate business reason offered by employee is pretextual.
- i. Supervisor tips to prevent ADEA violations
 - i. avoid help wanted ads which imply age bias (e.g. "recent college grad wanted")
 - ii. prohibit hiring personnel from suggesting that potential employees are "overqualified" or that they are looking for "young blood."
 - iii. maintain performance evaluations
 - iv. maintain consistent policy of discipline
 - v. do not refuse to invest in training in individuals because of age
 - vi. do not imply to older workers that it is time to retire.

5. Americans with Disabilities Act (ADA)

- a. <u>Purpose</u>: protects qualified employees with disabilities from discrimination.
- b. <u>Employers Covered</u>: ADA applies to employers with 15 or more employees, including part-time employees, working for 20 or more calendar weeks in preceding or current year.
- c. <u>Employees Covered</u>: an individual is disabled under the ADA if the individual has a physical or mental impairment that substantially limits one or more major life activities, has a record of such impairment, or is regarded as having such impairment.
- d. <u>Terms to Know</u>: i. <u>qualified employee</u>—a qualified employee can perform the essential functions of the job with or without a reasonable accommodation; ii. <u>major life</u> activity—activities such as walking, breathing, hearing, seeing, speaking and working; (Temporary conditions such as broken limbs, sprains, infection, etc. are <u>not</u> considered disabilities that limit major life activities); iii. <u>reasonable accommodation</u> a modification to a job or work environment that enables a disabled employee to perform the essential job duties. (These can include: (a) modifying work schedules; (b) modifying equipment; (c) reassigning employee to new position if one is vacant.)
- e. An employer is liable for a violation under the ADA when there is adverse employment action taken against an employee because of the disability, perceived disability or record of disability. Liability can also exist if an employer unreasonably denies a reasonable accommodation.
- f. Employers are not required to employ unreasonable options that could impose an undue hardship on the employer's business.

g. Preventing Discrimination

- i. Build flexibility into description by saying list of essential functions is not exhaustive. In addition, list the types of tools used in performing functions.
- ii. Do not ask questions during interview about a specific disability. Employers can ask if employee can perform essential functions of job, with or without a reasonable accommodation.
- iii. Do not take adverse action solely because an applicant or employee has a communicable disease. Four factors must first be considered:
 - Nature of risk to others (how is it transmitted)
 - Duration of risk
 - Severity of risk
 - Probability disease will be transmitted

- iv. Before deciding upon a reasonable accommodation, consult with the employee to determine his or her limitation(s). If the requested accommodation presents undue burden, retain any documents supporting undue burden.
- v. Do not ask questions regarding a potential employee's Worker's Compensation history.
- vi. Do not require a potential employee with a disability to take a doctor's examination before a job offer is made. If an offer of employment is made the offer can be conditioned on the satisfactory result of a medical examination, provided all prospective employees, not just those thought to be disabled, are put through the same examination. If the medical examination shows that the employee poses a "direct threat" to other employees in the workplace the individual can be disqualified.
- h. Retaliation: an employer cannot discriminate against an employee because he or she opposed, testified or complained about an employer's unlawful practice under the ADA. For example, if an employee files a complaint of discrimination with the employer or government agency, and the employer disciplines the employee as a result, the employer will be found to have violated the ADA even if the underlying complaint by the employee is dismissed.

6. Pennsylvania State Law

- Pennsylvania Human Relations Act: prohibits discrimination in employment on the basis of race, color, religious creed, ancestry, handicap or disability, use of guide dogs, age, gender or national origin. Under the Pennsylvania Human Relations Act, there are no "caps" on any damage categories and punitive damages are not allowed. Jury trials are not permitted under the Act.
- The Pennsylvania Human Relations Act applies to employers with 4 or more b. employees.
- The Pennsylvania Human Relations Commission handles discrimination and harassment complaints. The Commission has broad discretion to award or deny reinstatement, back pay and injunctive relief. Discrimination and harassment claims can also be filed in Court.

III. EQUAL EMPLOYMENT OPPORTUNITY TEST

1. Supervisor Tribiano is di	scussing	candidates	for promo	otion. Wh	en Monio	ca is sugge	ested
Tribiano rejects the idea.	"Monica	is a good	worker,	but she's	recently	engaged.	My
experience has proven time	and time	again that	newly-w	ed womer	leave th	eir jobs v	vithir
one year." Is this discrimina	tion?						
	Yes		No				

2. When Meadow Soprano answered an ad for a laborer's position, she was laughed out of the office. The supervisor, Cousin Christopher, says that laborers have to lift heavy objects

and "she is not built to do that," and "Tony would kill me." Is this discrimination? Is it
discrimination if it was known that she was unable to pick up a 20 pound object?
Yes No 3. Rachel and Joey are hired for the same clerical positions. Although their backgrounds are identical Joey has additional experience as an architect. Can Joey be paid more money? Yes No
4. Serena Williams applied for work at the Dix Hills Park that is located about ten miles from the nearest public transportation. The Town turns her down because she doesn't own a car, and would probably have trouble getting to work regularly. The Town is trying to avoid a potential absenteeism problem. Is this unlawful discrimination against Serena? Yes No No No No She is refused employment because her application states she has been convicted of shoplifting. Is this decision a violation of the law?
6. Jeffrey, in the Parks Department, asks Michael to borrow \$5. Michael says, kidding around, "only if you pay me \$6 tomorrow." Jeffrey takes the \$5, laughs and jokingly says "Just like a Jew." Is this unlawful discrimination? Would your answer be different if both were Jewish?
YesNo 7. Brittney Spears applies for an accounting position. During the interview, she tells you that she is epileptic. Is it discrimination if she is denied employment because of her condition?
Yes No
8. Vinny Testeverde applies for a porter position. After a very good interview Vinny gets out of his chair and states "up until 6 months ago my leg was so bad I had trouble standing up." Can Vinny be denied employment on the basis that the porter position requires strenuous activity including regular lifting? Yes No
9. Fraser, 45, is transferred from his coordinator job due to job elimination. Four months later, Fraser sees a posting for the coordinator job. When he applies for the position, he is told the position has been given to a 27 year old employee who Fraser trained. Is this age discrimination?
Yes No
10. The New York Jets are looking for some new front office clerical employees. They post an advertisement which says "Applicants need a graduate degree." to apply. Additional criteria noted are "collegiate sports, preferably football." Is this discrimination; if so, what kind?
Yes No

IV. OTHER TYPES OF DISCRIMINATION

- A. Alex C. Fergusson, Inc.'s Procedure regarding Sexual Harassment:
 - 1. Under the Alex C. Fergusson, Inc.'s policy regarding the reporting of Sexual Harassment, the employee must report the harassment to their Supervisor or the Human Resources

Coordinator. Should the alleged harasser be the employee's Supervisor, the report shall be made to the next level of management.

- 2. Incidents of sexual harassment may be reported informally or through the filing of a formal complaint.
- 3. Upon receipt of a formal or informal complaint an investigation takes place. Complainants are then notified of the outcome of the investigation.
- 4. If the investigation reveals that sexual harassment did occur, appropriate action will be taken.
- 5. Following a finding of sexual harassment, complainant will be periodically interviewed by their Supervisor to ensure that no retaliatory action has occurred and the harassment has ceased.
 - a. In conveying your concerns to the assigned individual, be specific so as to allow the person investigating the complaint to conduct a thorough investigation and speak to all potential witnesses. Remember, the investigation is confidential.
 - b. Allow investigation to take place. Although you will likely not be advised of the specific discipline taken against the harasser, the employer should advise you that the investigation is completed and that discrimination will not continue.
 - c. Promptly advise the employer of any retaliation taken against you after setting forth your complaint.
- B. Sexual Harassment Under both Federal (Title VII) and State Law a claim for sexual harassment must proceed under one of two theories: Quid Pro Quo Harassment or Hostile Work Environment.

1. Quid Pro Quo Harassment

- a. Making an individual's employment or opportunity for advancement contingent upon submission to or participation in sexual conduct, i.e. hiring, promoting, granting favorable assignments, etc. in return for sexual favors.
 - i. voluntary" granting of sexual favors by subordinate does not rule out a finding of harassment.
 - ii. test of whether conduct constitutes harassment is whether it was "unwelcome" as determined by such factors as:
 - was the conduct invited or solicited by the subordinate.
 - did the subordinate regard the conduct as undesirable or offensive.
 - iii. not limited to conduct occurring on work time or in work place.

2. <u>Hostile Environment</u>

- a. Subjecting individuals to unwelcome conduct of a sexual nature that alters the conditions of an employee's work environment.
 - i. physical contact
 - (a) assault
 - (b) touching
 - (c) rubbing up against
 - ii. non-physical conduct
 - (a) abusive language
 - (b) off-color jokes

- (c) comments about anatomy
 - "dirty" pictures
 - invitations to date
- (d) propositioning or solicitation
- iii. isolated instances ordinarily do not rise to the level necessary to support a claim of hostile work environment.

3. Liability For Conduct

- a. Quid Pro Quo Harassment; i. Potential individual liability on part of supervisor; ii. Alex C. Fergusson, Inc. liability under agency principles: (a) Determine whether employee suffered "tangible employment action" or consequence as a result of supervisor's conduct. If yes, Alex C. Fergusson, Inc. is liable for supervisor's conduct; (b)Where employee has suffered no "tangible employment action" or consequence, then Alex C. Fergusson, Inc. is vicariously liable for supervisor's conduct <u>unless</u> it can establish the affirmative defense (*see below*); (c) Affirmative Defense:
- that Alex C. Fergusson, Inc. exercised reasonable care to prevent and correct promptly any sexually harassing behavior, AND
- that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities pro-vided by Alex C. Fergusson, Inc. or to avoid harm otherwise.
- b. Hostile Environment
- i. Co-worker conduct
 - (a) Individual liability
 - criminal violations
 - civil liability
 - (b) Company liability
- ii. Supervisor conduct
 - (a) Individual liability
 - (b) Company liability
- iii. An employer is not liable for the conduct of it's employee's and/or supervisors if it can establish the affirmative defense (*see above*).

C. Other Types of Harassment

- 1. Any form of harassment related to a person's age, race, creed, color, national origin, gender, disability, marital status or other protected status in the workplace is in violation of Federal and/or State laws.
- 2. Harassment between two individuals in the same protected class is harassment in violation of Federal and/or State laws.

D. Dealing With Harassment In The Workplace

- 1. Policy: (a) Define prohibited conduct and (b) Provide method for handling complaints.
- 2. Communications: (a) Publication of policy and (b) Supervisory Training
- 3. Implementation of Policy: (a) Complaint mechanism; (b) Investigation and (c) response.

V. HARASSMENT QUIZ

Read carefully the statements listed below. If you feel that the statement involves harassment, mark "yes". If you feel the statement is definitely not sexual, or any other form of harassment, mark "no."

1. A male supervisor tells a subordinate that unless she has sex with him, she won't get a
raise.
Yes No
2. A male supervisor tells a subordinate that unless he has sex with him, he won't get a raise.
Yes No
3. A maintenance employee asks her male supervisor out on a date, thinking that this will
change the supervisor's evaluation of her work.
Yes No
4. A male supervisor tells explicit sexual jokes in front of his co-workers.
Yes No
5. A female employee tells racial jokes to a group of employees.
Yes No
6. The bottled water delivery person likes to make off-color remarks to the receptionists and
asks them jokingly to spend weekends with him.
Yes No
7. A non-supervisory employee has a sexually explicit cartoon taped to the wall of his work
area.
Yes No
8. A maintenance worker listens to the Howard Stern show in the maintenance department
only during his break time.
YesNo
9. A supervisor encourages a discussion by his employees about their experiences in the
armed services. Many stories are about the abusive language and conduct of their sergeants.
Yes No
10. A female supervisor yells at everybody in her department.
Yes No
11. A male supervisor puts his arm on the shoulder of a female subordinate when discussing a
problem with her.
Yes No
12. A male employee repeatedly leaves love notes and little gifts on the desk of a female co-
worker. She never responds.
Yes No
13. Employees open e-mails and find "KKK" and swastikas. Believing there is no way to
identify the sender, the supervisor does nothing.
Yes No
14. A pregnant person is disciplined and then fired because she has to leave early for doctor's
appointments.
Yes No

15. A yard worker and his supervisor have had a consensual relationship for a number of
years. He now wants to break it off. She says that he will not get the promotion he has been
expecting.
Yes No
16. A male supervisor tells a female subordinate that she looks "attractive".
Yes No
17. A male employee leers and gawks at his female co-workers but does not touch them and
does not say anything offensive.
Yes No
18. A female supervisor sees her male subordinate at a local dance club and asks him out on a
date.
Yes No
19. Ever since he reported harassment, Mike's co-workers do not speak to him as much and
his supervisor only sends him written messages.
Yes No
20. A handicapped worker has been given permission to start work 15 minutes late and leave
15 minutes late. A Purple employee is denied the same request.
Yes No