February 2014 Bar Examination

Question 1

Mary Murray's husband has died, leaving Mary his entire $4,000,000 estate. Mary, a Georgia resident like her husband, owns $1,000,000 of assets in her own name. She has no descendants, and both of her parents died several years ago. Her only siblings, two brothers, have likewise died. One of her deceased brothers is currently survived by two sons, Able and Bob; and the other brother has one surviving child, a son named Cain.

A cousin from Florida convinced Mary that she needed to set up a revocable trust to hold all of her assets, including those she inherited from her husband. A friend's son just passed the Georgia Bar exam a few months ago and drafted a revocable trust for Mary that is almost identical to the one used by her cousin in Florida. It was the first trust the new attorney had ever prepared. The trust document names Mary as trustee for her lifetime, with her nephew Able as the successor Trustee upon her death.

Mary inherited the following assets from her husband: a farm worth $2,000,000, a stock portfolio worth $1,000,000, some bank accounts worth $500,000, some Certificates of Deposit worth $400,000, a year-old Lexus worth $50,000, and tangible personal property worth $50,000. The assets that she owns, independent of the inheritance, include the family home, which is solely in her name and worth $500,000, a rental house worth $400,000, $60,000 in a bank account and some furniture, furnishings, jewelry and personal effects worth $40,000. Her husband and she owned nothing together as joint tenants with rights of survivorship.

At the time Mary executed the revocable trust, she signed and recorded a deed transferring the farm she inherited from her husband into the trust and also a deed transferring her interest in her home into the trust. She then wrote out a memo saying that it was her intention to transfer all of the rest of her assets into the trust. She attached this memo to the trust document. Upon the advice of her Florida cousin, she declined to execute a Will, noting to her attorney that she had never actually signed one and did not need one now since she had transferred everything to the trust. The attorney said nothing but simply nodded.

The revocable trust provides that, upon Mary's death, one-half of the trust assets are to be transferred to two charities and the remaining half is to be divided equally among such of her three nephews as survive her. The trust directs that distributions may be made in cash or in kind, or partially in cash and partially in kind, as the Trustee in the Trustee's sole discretion shall decide. The trust document is silent about what would happen if either charity was not in existence at Mary's death.

It is now a year later, and Mary has just died. Mary died owing no taxes, debts or expenses; and her three nephews survived her. Nothing has changed in the ownership or value of her assets since she executed her revocable trust.

One of the two charitable beneficiaries of her trust, the art museum, was owned by her city.

The city experienced economic reversals beginning in 2008 and has filed for bankruptcy. The art museum was dissolved six months prior to Mary's death. The other charitable trust beneficiary, Mary's church, argues that it should receive not only its own bequest but also the charitable bequest that would have gone to the museum. A local natural history museum, which is not owned by the city, is contending that, since it is the only other local museum, it should receive the trust's charitable bequest that had been destined for the art museum. The bankruptcy trustee for Mary's city argues it is the successor in interest to the art museum and the bequest should go to pay the city's creditors. The three nephews collectively argue that the bequest should lapse and that they should receive the portion of the trust that would have gone to the art museum.

1. (a) Please discuss which of Mary Murray's assets would be deemed property owned by her revocable trust at her death and why.

(b) If there are no taxes, commissions or other expenses to be paid by the trust, what would be the value of the trust's two charitable bequests and the value of the trust's bequests to each nephew?

(c) How might these bequests be funded, given the nature of the trust assets?

2. (a) Which of Mary's assets, if any, would be part of her probate estate and which part of her intestate estate?

(b) Please explain which individuals or entities would inherit any such non-trust assets and calculate the value of such inherited shares.

3. (a) Which Georgia Court would have jurisdiction to decide the claims over the bequest to the now defunct art museum, and what principles of law might that Court apply in deciding who would be the recipient of the bequest that had been destined for the art museum?

(b) As succinctly as you can, please describe the strengths and weaknesses of the claims of the four parties which seek to receive the trust bequest that would have gone to the art museum.

4. What ethical issues, if any, might be involved in the attorney's drafting of Mary's revocable trust and his related estate planning advice?

Question 2

On April 17, 2013, there was a flash flood on Charlie's Waterford Farm. All the private access bridges that crossed Waterford Creek and most of the roads accessing them, including Charlie's, were damaged or destroyed by the flood. Charlie's farm was effectively cut off from the outside world. Before Charlie could get his vehicles out of the farm or anyone could come on to the farm, he needed assistance from contractors with heavy equipment and engineering experience to replace or repair his bridge and access road.

Two days after the flood, Charlie received a call from Brian offering to help repair his bridge. Brian and Charlie met at the property to discuss the damage and repairs.

That evening, Brian sent an email to Charlie stating, "Will repair your bridge for $20,000." Charlie responded, "$20,000 fee too high for my budget. I can offer you $10,000." Brian responded, "Because of the increased demand for my services due to the flood damages in the area, I'm sorry it is $20,000 or nothing. If you want me to fix your bridge, send me a contract for my approval." After thinking about his options, Charlie emailed Brian, "I accept your terms. A contract follows. Please sign it and send it back as soon as possible."

The next day before the contract from Charlie arrived, Brian accepted an offer from Charlie's neighbor to repair his bridge for $35,000. Brian immediately emailed Charlie, "I cannot sign your contract, I've been offered the job of repairing your neighbor's bridge and I have accepted that offer." Charlie responded, "You can't renege now. We've got a deal for $20,000, and I'm going to hold you to it."

Two days later Charlie contracted with Ronnie, another contractor, to repair the bridge damaged by the flood for a firm price of $30,000. Charlie agreed to pay $5,000 upon execution of the contract and the additional $25,000 upon the completion of the repairs.

The bridge repair contract with Ronnie contained the following provision:

> This contract is the parties' entire agreement. Nothing has been agreed to or is otherwise part of this contract that is not expressly included in it. This contract cannot be amended, varied, modified, or added to in any respect except by a writing signed by both parties.

Seven days after Charlie and Ronnie signed the contract and the work was begun on the repairs to the bridge, there was another flood that did more damage to the bridge and washed out many of Ronnie's repairs completed up to that point. Ronnie's engineer determined that the second flood resulted in $10,000 more in damage. Ronnie told Charlie that he would proceed with the repairs only if Charlie agreed to pay an additional $5,000, for a total of $35,000. Charlie said he would. When the construction was complete, Charlie refused to pay the $30,000 final payment and tendered only $25,000 explaining he would not honor the verbally-modified agreement.

Charlie contracted with Thurman for $3,000 to repair his access road. This repair included

re-contouring the road, cutting in a ditch, and installing a 25-foot galvanized pipe with a 20-inch diameter to carry runoff water under the road. The contract called for Charlie to pay Thurman $1,000 up front and $2,000 upon completion. Upon completion, Charlie discovered Thurman had installed a 20-foot galvanized pipe with a 15-inch diameter instead. The rest of Thurman's work was satisfactory. Charlie refused to pay Thurman the $2,000 final payment because Thurman installed the wrong size pipe.

After all the repairs were completed Charlie comes to your office and solicits your advice regarding the following questions.

1. (a) Did Charlie have an enforceable contract with Brian to repair the bridge?

(b) Should he proceed against Brian for the difference in the price with Brian and the contract with Ronnie?

Please explain your answers.

2. Is Charlie obligated to pay the additional $5,000 to Ronnie that was agreed upon after the second flood? Please explain your answer.

3. Is Charlie obligated to pay Thurman the final payment despite the fact that Thurman installed the wrong size pipe? Please explain your answer.

Question 3

Defendant's wife was killed sometime during the evening or early morning hours of January 6 – 7, 2013, by a single gunshot to the back of her head while she was asleep at home in her bed in Macon, Georgia. Defendant called 911 at approximately 1:30 a.m. to report the shooting but was not present when emergency responders arrived. At the scene, a 9 mm pistol was discovered under the pillow next to the victim, aimed towards the back of her head. The pillow on which the victim's head had been resting bore bullet entry and exit holes. A single shell casing was found on the floor near the bed, and the gun had a live round in its chamber.

During the trial testimony of the police investigator, the prosecution offered into evidence the bloody pillow on which the victim's head was resting when police arrived at the scene. A dowel rod was inserted through the pillow, as the police investigator explained, to demonstrate the trajectory of the bullet. Over a timely hearsay objection, the police investigator testified that the crime scene technician's written report stated that the entry and exit holes in the pillow, the straight path of the bullet, the gunpowder markings on the underside of the pillow, and the absence of any other gunshot residue all supported the theory that the shooter had folded a pillow around the back of the victim's head and shot her through the pillow.

The prosecution's firearms expert testified that had the gun discharged from underneath Defendant's pillow, it was unlikely the shell casing would have ejected and a second round cycled into the gun's chamber; rather, the casing would have stuck in the chamber. The prosecution's firearms expert also testified that the gun was in good operating condition and required several pounds of applied force to be fired. Citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the Defense sought to establish on cross-examination that the testimony of the firearms expert was not based upon reliable principles and methods. The trial judge sustained the prosecution's objection to this line of cross-examination, ruling that *Daubert* does not apply in criminal cases.

At trial, the Defendant testified that he was awakened that night by a noise and jumped out of bed, grabbing his gun, which went off as his hands were underneath his pillow. He further testified that he then proceeded to check the rest of the house and came back to discover that the victim had been shot. In rebuttal testimony for the prosecution, the police investigator testified from his incident report that in a statement a few hours after the shooting but before any arrest, the Defendant said that he kept the gun under his pillow for safety and that he was awakened that night by what he thought was a gunshot, jumped out of bed and checked the house but found nothing, and returned to the bedroom where he turned on the light to find his wife shot dead and his gun under the pillow next to her. The trial judge overruled the Defendant's objection that the incident report is inadmissible hearsay. The Defendant made no further objection to the incident report.

Over the objection of defense counsel, the pillow with the dowel rod was sent out with the tangible evidence for the jury's deliberations.

The Defendant was found guilty of murder and sentenced accordingly. Less than 30 days have passed since the sentence was entered by the trial judge.

Your senior partner has been contacted by the Defendant's family to undertake the Defendant's representation. He has directed you to prepare a memorandum of law addressing the following:

1. Should the prosecution's rebuttal evidence of the Defendant's pre-custodial statement have been excluded as hearsay? Please explain your answer.

2. Did the trial court err in restricting the Defendant's cross-examination of the prosecution's firearms expert? Please explain your answer.

3. Was the police investigator's testimony regarding his written report hearsay, and should it have been excluded? Please explain your answer.

4. Could trial counsel have objected on any other basis to the police investigator's testimony regarding the contents of his written report? Please explain your answer.

5. Should the Defendant's objection to sending the dowel rod out with the jury have been sustained? Please explain your answer.

Question 4

On October 2, 2010, Arthur was driving southbound in the outside, right-hand lane of I-75 when he was struck suddenly and without warning in the rear by a tractor-trailer rig driven by Bernard. At the time of the collision, Clarence was riding as a passenger in the tractor-trailer rig and was a co-employee of Bernard, both working for Hauling Freight, Inc. As a result of the collision, Arthur's vehicle was knocked across the southbound lanes of I-75 and into a concrete bridge abutment, resulting in a significant brain injury which permanently disabled Arthur.

Many months later, Arthur's son was appointed as his guardian. Due to the extensive nature of Arthur's injuries and the proceedings to have a guardian appointed, Arthur's son did not engage the services of an attorney until two days before the statute of limitations was to expire. Consequently, Arthur's counsel was able to review only the Georgia Motor Vehicle Accident Report before he drafted, signed, and filed a Complaint for Damages against Hauling Freight, Inc. and Bernard. All investigation was done after the filing.

During the course of discovery, the plaintiff's counsel learned that Clarence was terminated by Hauling Freight, Inc. for reasons unrelated to the collision; and Hauling Freight, Inc. did not know where he resided or how he could be located. Plaintiff's counsel hired an investigator who was able to locate Clarence, then residing in Texas. Clarence was willing to return to Georgia to assist plaintiff's counsel with his investigation. Plaintiff's counsel paid to have Clarence flown to Atlanta, at which time Clarence was taken to the accident site and interviewed by plaintiff's counsel. Thereafter, Clarence gave a recorded statement to plaintiff's counsel. Plaintiff's counsel then notified counsel for Bernard and Hauling Freight, Inc. of Clarence's location, and noticed the deposition of Clarence for a specific date and time. Defendants' counsel filed a Motion for Protective Order to prohibit the use of any prior statements given by Clarence as a result of the *ex parte* contact by plaintiff's counsel. A hearing on this motion was scheduled by the Court for 11:00 o'clock a.m. on the day preceding the noticed deposition of Clarence.]

Unknown to plaintiff's counsel, defense counsel caused a subpoena to be issued and served on the registrar of the local college that Arthur attended, requiring the registrar to appear at a hearing at 10:00 o'clock a.m. on the same day that the defendants' Motion for Protective Order was to be heard. The subpoena required the registrar to bring a complete copy of Arthur's college transcript to the hearing, or in lieu of his appearance, the registrar was directed to simply forward a copy of that transcript to defense counsel. No hearing was actually scheduled for 10:00 a.m., nor was any notice of the hearing given to counsel for plaintiff.

1. Discuss the ethical propriety of plaintiff's counsel filing this Complaint for Damages without having conducted any investigation of the facts. After filing this Complaint for Damages, what are his ethical responsibilities as to an investigation and continued litigation?

2. Please discuss the ethical propriety of plaintiff's counsel in contacting Clarence, flying him to Georgia, taking him to the accident scene, interviewing him, and taking a recorded statement from him, prior to notifying defense counsel. How should the judge rule on the Motion for Protective Order?

3. Discuss the ethical propriety of defense counsel's subpoena to the college registrar requiring his attendance and the production of Arthur's transcript at or before a non-existent hearing and without notice to plaintiff's counsel. Further, if the registrar produces the transcript to defense counsel under these circumstances and plaintiff's counsel learns about it after the fact, what is plaintiff's counsel's recourse?

Applicant Number

[redacted]

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214

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In re Rowan

Read the directions on the back cover.
Do not break the seal until you are told to do so.

NATIONAL CONFERENCE OF BAR EXAMINERS
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608-280-8550
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In re Rowan

FILE

LIBRARY

FILE

Law Offices of Jamie Quarles
112 Charles St.
Franklin City, Franklin 33797

TO: Examinee
FROM: Jamie Quarles
DATE: February 25, 2014
RE: *Matter of William Rowan*

We represent William Rowan, a British citizen, who has lived in this country as a conditional permanent resident because of his marriage to Sarah Cole, a U.S. citizen. Mr. Rowan now seeks to remove the condition on his lawful permanent residency.

Normally, a married couple would apply together to remove the conditional status, before the end of the two years of the noncitizen's conditional residency. However, ten months ago, in April 2013, Ms. Cole and Mr. Rowan separated, and they eventually divorced. Ms. Cole actively opposes Mr. Rowan's continued residency in this country.

However, Ms. Cole's opposition does not end Mr. Rowan's chances. As the attached legal sources indicate, he can still file Form I-751 Petition to Remove Conditions on Residence, but in the petition he must ask for a waiver of the requirement that he file the petition jointly with his wife.

Acting pro se, Rowan timely filed such a Form I-751 petition. The immigration officer conducted an interview with him. Ms. Cole provided the officer with a sworn affidavit stating her belief that Rowan married her solely to obtain residency. The officer denied Rowan's petition.

Rowan then sought our representation to appeal the denial of his petition. We now have a hearing scheduled in Immigration Court to review the validity of that denial. Before the hearing, we will submit to the court the information described in the attached investigator's memo, which was not presented to the immigration officer. We do not expect Cole to testify, because she has moved out of state.

Please draft our brief to the Immigration Judge. The brief will need to argue that Mr. Rowan married Ms. Cole in good faith. Specifically, it should argue that the immigration officer's decision was not supported by substantial evidence in the record before him and that the totality of the evidence supports granting Rowan's petition.

I have attached our guidelines for drafting briefs. Draft only the legal argument portion of the brief; I will draft the caption and statement of facts.

Law Offices of Jamie Quarles
112 Charles St.
Franklin City, Franklin 33797

TO: Attorneys
FROM: Jamie Quarles
DATE: March 29, 2011
RE: Format for Persuasive Briefs

These guidelines apply to persuasive briefs filed in trial courts and administrative proceedings.

I. Caption
[omitted]

II. Statement of Facts (if applicable)
[omitted]

III. Legal Argument

Your legal argument should be brief and to the point. Assume that the judge will have little time to read and absorb your argument. Make your points clearly and succinctly, citing relevant authority for each legal proposition. Keep in mind that courts are not persuaded by exaggerated, unsupported arguments.

Use headings to separate the sections of your argument. In your headings, do not state abstract conclusions, but integrate factual detail into legal propositions to make them more persuasive. An ineffective heading states only: "The petitioner's request for asylum should be granted." An effective heading states: "The petitioner has shown a well-founded fear of persecution by reason of gender if removed to her home country."

Do not restate the facts as a whole at the beginning of your legal argument. Instead, integrate the facts into your legal argument in a way that makes the strongest case for our client. The body of your argument should analyze applicable legal authority and persuasively argue how both the facts and the law support our client's position. Supporting authority should be emphasized, but contrary authority should also be cited, addressed in the argument, and explained or distinguished.

Finally, anticipate and accommodate any weaknesses in your case in the body of your argument. If possible, structure your argument in such a way as to highlight your argument's strengths and minimize its weaknesses. If necessary, make concessions, but only on points that do not concede essential elements of your claim or defense.

Law Offices of Jamie Quarles
112 Charles St.
Franklin City, Franklin 33797

TO: File
FROM: Jamie Quarles
DATE: November 25, 2013
RE: Interview with William Rowan

I met with William Rowan today. Rowan is a British citizen and moved to the United States and to Franklin about two and a half years ago, having just married Sarah Cole. They separated in April 2013; their divorce became final about 10 days ago. In late April, after the separation, Rowan, acting pro se, petitioned to retain his permanent residency status. After that petition was denied by the immigration officer, Rowan called our office.

Rowan met Cole in Britain a little over three years ago. He had been working toward a graduate degree in library science for several years. He had begun looking for professional positions and had come to the realization that he would have better job opportunities in the United States. He had two siblings already living in the United States.

He met Cole when she was doing graduate work in cultural anthropology at the university where he was finishing his own academic training as a librarian. He says that it was love at first sight for him. He asked her out, but she refused several times before she agreed. After several weeks of courtship, he said that he felt that she shared his feelings. They moved in together about four weeks after their first meeting and lived together for the balance of her time in Britain.

Soon after they moved in together, Rowan proposed marriage to Cole. She agreed, and they married on December 27, 2010, in London, England. Cole subsequently suggested that they move to the United States together, to which he readily agreed. In fact, without telling Cole, Rowan had contacted the university library in Franklin City, just to see if there were job opportunities. That contact produced a promising lead, but no offer. He and Cole moved to Franklin City at the end of her fellowship in May of 2011.

Rowan soon obtained a job with the Franklin State University library. He and Cole jointly leased an apartment and shared living expenses. At one point, they moved into a larger space, signing a two-year lease. When Cole needed to purchase a new car, Rowan (who at that point had the more stable salary) co-signed the loan documents. Both had health insurance

through the university, and each had the other named as the next of kin. They filed two joint tax returns (for 2011 and 2012), but they divorced before they could file another.

Their social life was limited; if they socialized at all, it was with his friends. Rowan consistently introduced Cole as his wife to his friends, and he was referred to by them as "that old married man." As far as Rowan could tell, Cole's colleagues at work did not appear to know that Cole was even married.

Cole's academic discipline required routine absences for field work, conferences, and colloquia. Rowan resented these absences and rarely contacted Cole when she was gone. He estimates that, out of the approximately two and a half years of cohabitation during the marriage, they lived apart for an aggregate total of seven months.

In March of 2013, Cole announced that she had received an offer for a prestigious assistant professorship at Olympia State University. She told Rowan that she intended to take the job and wanted him to move with her, unless he could give her a good reason to stay. She also had an offer from Franklin State University, but she told him that the department was not as prestigious as the Olympia department. He made as strong a case as he could that she should stay, arguing that he could not find another job in Olympia comparable to the one that he had in Franklin.

Cole chose to take the job in Olympia, and she moved there less than a month later. Rowan realized that he would always be following her, and that she would not listen to his concerns or needs. He told her that he would not move. She was furious. She told him that in that case, she would file for a divorce. She also told him that she would fight his effort to stay in the United States. Their divorce was finalized on November 15, 2013, in Franklin.

Rowan worries that without Cole's support, he will not be able to keep his job in Franklin or stay in the United States. He does not want to return to the United Kingdom and wants to maintain permanent residency here.

In re Form I-751, Petition of William Rowan to Remove Conditions on Residence

Affidavit of Sarah Cole

Upon first being duly sworn, I, Sarah Cole, residing in the County of Titan, Olympia, do say:

1. I am submitting this affidavit in opposition to William Rowan's Form I-751 Petition to Remove Conditions on Residence.

2. I am a United States citizen. I married William Rowan in London, England, on December 27, 2010. This was the first marriage for each of us. We met while I was on a fellowship in that city. He was finishing up his own graduate studies. He told me that he had been actively looking for a position in the United States for several years. He pursued me and after about four weeks convinced me to move in with him. Shortly after this, William proposed marriage and I accepted.

3. We decided that we would move to the United States. I now believe that he never seriously considered the option of remaining in Britain. I later learned that William had made contacts with the university library in Franklin City, Franklin, long before he proposed.

4. Before entering the United States in May 2011, we obtained the necessary approvals for William to enter the country as a conditional resident. We moved to Franklin City so that I could resume my studies.

5. During our marriage, William expressed little interest in my work but expressed great dissatisfaction with the hours that I was working and the time that I spent traveling. My graduate work had brought me great success, including the chance at an assistant professorship at Olympia State University, whose cultural anthropology department is nationally ranked. But William resisted any idea of moving and complained about the effect a move would have on our marriage and his career.

6. Eventually, I took the job in Olympia and moved in April 2013. While I knew that William did not like the move, I had asked him to look into library positions in Olympia, and he had done so. I fully expected him to follow me within a few months. I was shocked and angered when, instead, he called me on April 23, 2013, and informed me that he would stay in Franklin.

7. I filed for divorce, which is uncontested. It is my belief that William does not really care about the divorce. I believe now that he saw our marriage primarily as a means to get U.S. residency. I do think that his affection for me was real. But his job planning, his choice of

friends, and his resistance to my career goals indicate a lack of commitment to our relationship. In addition, he has carefully evaded any long-term commitments, including children, property ownership, and similar obligations.

Signed and sworn this 2nd day of July, 2013.

Sarah Cole

Sarah Cole

Signed before me this 2nd day of July, 2013.

Jane Mirren

Jane Mirren
Notary Public, State of Olympia

Law Offices of Jamie Quarles
112 Charles St.
Franklin City, Franklin 33797

TO: File
FROM: Victor Lamm, investigator
DATE: February 20, 2014
RE: Preparation for Rowan Form I-751 Petition

This memorandum summarizes the results of my investigation, witness preparation, and document acquisition in advance of the immigration hearing for William Rowan.

Witnesses:

— George Miller: friend and coworker of William Rowan. Has spent time with Rowan and Cole as a couple (over 20 social occasions) and has visited their two primary residences and has observed them together. Will testify that they self-identified as husband and wife and that he has heard them discussing leasing of residential property, purchasing cars, borrowing money for car purchase, and buying real estate, all together and as part of the marriage.

— Anna Sperling: friend and coworker of William Rowan. Has spent time with both Rowan and Cole, both together and separately. Will testify to statements by Cole that she (Cole) felt gratitude toward Rowan for moving to the United States without a job, and that Cole was convinced that Rowan "did it for love."

Documents (Rowan to authenticate):

— Lease on house at 11245 Old Sachem Road, Franklin City, Franklin, with a two-year term running until January 31, 2014. Signed by both Cole and Rowan.

— Promissory note for $20,000 initially, designating Cole as debtor and Rowan as co-signer, in connection with a new car purchase.

— Printouts of joint bank account in name of Rowan and Cole, February 1, 2012, through May 31, 2013.

— Joint income tax returns for 2011 and 2012.

— Certified copy of the judgment of divorce.

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EXCERPT FROM IMMIGRATION AND NATIONALITY ACT OF 1952

TITLE 8 U.S.C., Aliens and Nationality

8 U.S.C. § 1186a. Conditional permanent resident status for certain alien spouses and sons and daughters

(a) In general

(1) Conditional basis for status: Notwithstanding any other provision of this chapter, an alien spouse . . . shall be considered, at the time of obtaining the status of an alien lawfully admitted for permanent residence, to have obtained such status on a conditional basis subject to the provisions of this section.

. . .

(c) Requirements of timely petition and interview for removal of condition

(1) In general: In order for the conditional basis established under subsection (a) of this section for an alien spouse or an alien son or daughter to be removed—

(A) the alien spouse and the petitioning spouse (if not deceased) jointly must submit to the Secretary of Homeland Security a petition which requests the removal of such conditional basis . . . .

. . .

(4) Hardship waiver: The Secretary . . . may remove the conditional basis of the permanent resident status for an alien who fails to meet the requirements of paragraph (1) if the alien demonstrates that—

. . .

(B) the qualifying marriage was entered into in good faith by the alien spouse, but the qualifying marriage has been terminated (other than through the death of the spouse) and the alien was not at fault in failing to meet the requirements of paragraph (1).

EXCERPT FROM CODE OF FEDERAL REGULATIONS

TITLE 8. Aliens and Nationality

8 C.F.R. § 216.5 Waiver of requirement to file joint petition to remove conditions by alien spouse

(a) General.

(1) A conditional resident alien who is unable to meet the requirements . . . for a joint petition for removal of the conditional basis of his or her permanent resident status may file a Petition to Remove the Conditions on Residence, if the alien requests a waiver, was not at fault in failing to meet the filing requirement, and the conditional resident alien is able to establish that:

. . .

(ii) The marriage upon which his or her status was based was entered into in good faith by the conditional resident alien, but the marriage was terminated other than by death . . .

. . .

(e) Adjudication of waiver application—

. . .

(2) Application for waiver based upon the alien's claim that the marriage was entered into in good faith. In considering whether an alien entered into a qualifying marriage in good faith, the director shall consider evidence relating to the amount of commitment by both parties to the marital relationship. Such evidence may include—

(i) Documentation relating to the degree to which the financial assets and liabilities of the parties were combined;

(ii) Documentation concerning the length of time during which the parties cohabited after the marriage and after the alien obtained permanent residence;

(iii) Birth certificates of children born to the marriage; and

(iv) Other evidence deemed pertinent by the director.

. . .

Hua v. Napolitano

United States Court of Appeals (15th Cir. 2011)

Under the Immigration and Nationality Act, an alien who marries a United States citizen is entitled to petition for permanent residency on a conditional basis. *See* 8 U.S.C. § 1186a(a)(1). Ordinarily, within the time limits provided by statute, the couple jointly petitions for removal of the condition, stating that the marriage has not ended and was not entered into for the purpose of procuring the alien spouse's admission as an immigrant. 8 U.S.C. § 1186a(c)(1)(A).

If the couple has divorced within two years of the conditional admission, however, the alien spouse may still apply to the Secretary of Homeland Security to remove the conditional nature of her admission by granting a "hardship waiver." 8 U.S.C. § 1186a(c)(4). The Secretary may remove the conditional status upon a finding, *inter alia*, that the marriage was entered into in good faith by the alien spouse. 8 U.S.C. § 1186a(c)(4)(B).

On September 15, 2003, petitioner Agnes Hua, a Chinese citizen, married a United States citizen of Chinese descent and secured conditional admission as a permanent United States resident. The couple later divorced, and Hua applied for a hardship waiver. But the Secretary, acting through a U.S. Citizenship and Immigration Services (USCIS) immigration officer, then an immigration judge, and the Board of Immigration Appeals (BIA), denied Hua's petition. Hua appeals the denial of the petition.

Hua has the burden of proving that she intended to establish a life with her spouse at the time she married him. If she meets this burden, her marriage is legitimate, even if securing an immigration benefit was one of the factors that led her to marry. Hua made a very strong showing that she married with the requisite intent to establish a life with her husband. Hua's evidence, expressly credited by the immigration judge and never questioned by the BIA, established the following:

(1) She and her future husband engaged in a nearly two-year courtship prior to marrying.

(2) She and her future husband were in frequent telephone contact whenever they lived apart, as proven by telephone records.

(3) Her future husband traveled to China in December 2002 for three weeks to meet her family, and she paid a 10-day visit to him in the United States in March 2003 to meet his family.

(4) She returned to the United States in June 2003 (on a visitor's visa which permitted her to remain in the country through late September 2003) to decide whether she would remain in the United States or whether her future husband would move with her to China.

(5) The two married in a civil ceremony on September 15, 2003, and returned to China for two weeks to hold a more formal reception (a reception that was never held).

(6) The two lived together at his parents' house from the time of her arrival in the United States in June 2003 until he asked her to move out on April 22, 2004.

Hua also proved that, during the marriage, she and her husband jointly enrolled in a health insurance policy, filed tax returns, opened bank accounts, entered into automobile financing agreements, and secured a credit card. *See* 8 C.F.R. § 216.5(e)(2)(i).

Nevertheless, the BIA cited four facts in support of its conclusion that Hua had failed to carry her burden: (1) her application to secure conditional permanent residency was submitted within two weeks of the marriage; (2) Hua and her husband married one week prior to the expiration of the visitor's visa by which she came to the United States in June 2003; (3) Hua's husband maintained an intimate relationship with another woman during the marriage; and (4) Hua moved out of the marital residence shortly after obtaining conditional residency. Hua's husband's extramarital affair led to cancellation of the reception in China and to her departure from the marital home.

We do not see how Hua's prompt submission of a conditional residency application after her marriage tends to show that Hua did not marry in good faith. As we already have stated, the visitor's visa by which Hua entered the country expired just after the marriage, so Hua had to do something to remain here lawfully.

As to the affair maintained by Hua's husband, that might offer an indication of Hua's marital intentions if Hua knew of the relationship at the time she married. However, the uncontradicted evidence establishes that Hua learned of the affair only after the marriage.

The timing of the marriage and separation appear at first glance more problematic. Ordinarily, one who marries one week prior to the expiration of her visitor's visa and then moves out of the marital home shortly after the conditional residency interview might reasonably be thought to have married solely for an immigration benefit.

But well-settled law requires us to assess the entirety of the record. A long courtship preceded this marriage. Moreover, Hua's husband, and not Hua, initiated the separation after Hua publicly shamed him by retaining counsel and detailing his affair at her conditional residency interview.

We conclude that the Secretary's decision lacks substantial evidence on the record as a whole, and thus that petitioner Hua has satisfied the "good faith" marriage requirement for eligibility under 8 U.S.C. § 1186a(c)(4)(B). Remanded for proceedings consistent with this opinion.

Connor v. Chertoff

United States Court of Appeals (15th Cir. 2007)

Ian Connor, an Irish national, petitions for review of a decision of the Board of Immigration Appeals (BIA), which denied him a statutory waiver of the joint filing requirement for removal of the conditional basis of his permanent resident status on the ground that he entered into his marriage to U.S. citizen Anne Moore in bad faith. 8 U.S.C. § 1186a(c)(4)(B).

Connor met Moore in January 2002 when they worked at the same company in Forest Hills, Olympia. After dating for about one year, they married in a civil ceremony on April 14, 2003. According to Connor, he and Moore then lived with her family until November 2003, when they moved into an apartment of their own. In January 2004, Connor left Olympia to take a temporary job in Alaska, where he spent five weeks. Connor stated that in May 2004, he confronted Moore with his suspicion that she was being unfaithful to him. After Moore suggested they divorce, the two separated in June 2004 and divorced on November 27, 2004, 19 months after their wedding.

U.S. Citizenship and Immigration Services (USCIS) had granted Connor conditional permanent resident status on September 15, 2004. On August 16, 2005, Connor filed a Petition to Remove Conditions on Residence with a request for waiver. *See* § 1186a(c)(4)(B).

Moore voluntarily submitted an affidavit concerning Connor's request for waiver. In that affidavit, Moore stated that "Connor never spent any time with [her] during the marriage, except when he needed money." They never socialized together during the marriage, and even when they resided together, Connor spent most of his time away from the residence. Moore expressed the opinion that Connor "never took the marriage seriously" and that "he only married [her] to become a citizen." Connor's petition was denied.

At Connor's hearing, the government presented no witnesses. Connor testified to the foregoing facts and provided documentary evidence, including a jointly filed tax return, an unsigned lease for an

apartment dated November 2003, eight canceled checks from a joint account, telephone bills listing Connor and Moore as residing at the same address, an application for life insurance, and an application for vehicle title. There was no evidence that certain documents, such as the applications for life insurance and automobile title, had been filed. Connor also provided a letter from a nurse who had treated him over an extended period of time stating that his wife had accompanied him on most office visits, and letters that Moore had written to him during periods of separation.

Other evidence about Connor's life before and after his marriage to Moore raised questions as to his credibility, including evidence of his children by another woman prior to his marriage to Moore. Connor stated that Moore knew about his children but that he chose not to list them on the Petition for Conditional Status and also that the attorneys who filled out his I-751 petition omitted the children due to an error. Connor testified that he did not mention his children during his interview with the USCIS officer because he thought that they were not relevant to the immigration decision as they were not U.S. citizens.

In a written opinion, the immigration judge found that Connor was not a credible witness because of his failure to list his children on the USCIS forms or mention them during his interview and because of his demeanor during cross-examination. The immigration judge commented on Connor's departure for Alaska within eight months of his marriage to Moore, and on the lack of any corroborating testimony about the bona fides of the marriage by family or friends. The immigration judge concluded that the marriage had not been entered into in good faith and denied Connor the statutory waiver. The BIA affirmed.

Under the substantial evidence standard that governs our review of § 1186a(c)(4) waiver determinations, we must affirm the BIA's order when there is such relevant evidence as reasonable minds might accept as adequate to support it, even if it is possible to reach a contrary result on the basis of the evidence. We conclude that there was substantial evidence in the record to support the BIA's adverse credibility finding and its denial of the statutory waiver.

Adverse credibility determinations must be based on "specific, cogent reasons," which

the BIA provided here. The immigration judge's adverse credibility finding was based on Connor's failure to inform USCIS about his children during his oral interview and on the pertinent USCIS forms. Failing to list his children from a prior relationship undercut Connor's claim that his marriage to Moore was in good faith. That important omission properly served as a basis for an adverse credibility determination.

Substantial evidence supports the determination that Connor did not meet his burden of proof by a preponderance of the evidence. To determine good faith, the proper inquiry is whether Connor and Moore intended to establish a life together at the time they were married. The immigration judge may look to the actions of the parties after the marriage to the extent that those actions bear on the subjective intent of the parties at the time they were married. Additional relevant evidence includes, but is not limited to, documentation such as lease agreements, insurance policies, income tax forms, and bank accounts, as well as testimony about the courtship and wedding. Neither the immigration judge nor the BIA may substitute personal conjecture or inference for reliable evidence.

In this case, inconsistencies in the documentary evidence and the lack of corroborating testimony further support the agency's decision. Connor provided only limited documentation of the short marriage. Unexplained inconsistencies existed in the documents, such as more addresses than residences. Connor provided no signed leases, nor any indication of any filed applications for life insurance or automobile title. No corroboration existed for Connor's version of events from family, friends, or others who knew Connor and Moore as a couple. Connor offered only a letter from a nurse, who knew him only as a patient.

Finally, Connor claims that Moore's affidavit was inadmissible hearsay, and that it amounted to unsupported opinion testimony on the ultimate issue. Connor misconstrues the relevant rules at these hearings. The Federal Rules of Evidence do not apply; evidence submitted at these hearings must only be probative and fundamentally fair. To be sure, Moore's affidavit does contain opinion testimony on Connor's intentions. However, the affidavit also contains relevant factual information drawn from firsthand observation. The immigration judge was entitled to rely on that information in reaching his conclusions.

It might be possible to reach a contrary conclusion on the basis of this record. However, under the substantial evidence standard, the evidence presented here does not compel a finding that Connor met his burden of proving that the marriage was entered into in good faith.

Affirmed.

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The problem is set in the fictitious state of Franklin, in the fictitious Fifteenth Circuit of the United States. Columbia and Olympia are also fictitious states in the Fifteenth Circuit. In Franklin, the trial court of general jurisdiction is the District Court, the intermediate appellate court is the Court of Appeal, and the highest court is the Supreme Court.

You will have two kinds of materials with which to work: a File and a Library. The first document in the File is a memorandum containing the instructions for the task you are to complete. The other documents in the File contain factual information about your case and may include some facts that are not relevant.

The Library contains the legal authorities needed to complete the task and may also include some authorities that are not relevant. Any cases may be real, modified, or written solely for the purpose of this examination. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read them thoroughly, as if they all were new to you. You should assume that the cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page references.

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Although there are no restrictions on how you apportion your time, you should allocate approximately half your time to reading and digesting the materials and to organizing your answer before you begin writing it. You may make notes anywhere in the test materials; blank pages are provided at the end of the booklet. You may not tear pages from the question booklet.

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In re Peterson Engineering Consultants

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In re Peterson Engineering Consultants

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Lennon, Means, and Brown LLC
Attorneys at Law
249 S. Oak Street
Franklin City, Franklin 33409

TO: Examinee
FROM: Brenda Brown
DATE: February 25, 2014
RE: Peterson Engineering Consultants

Our client, Peterson Engineering Consultants (PEC), seeks our advice regarding issues related to its employees' use of technology. PEC is a privately owned, non-union engineering consulting firm. Most of its employees work outside the office for over half of each workday. Employees need to be able to communicate with one another, the home office, and clients while they are working outside the office, and to access various information, documents, and reports available on the Internet. PEC issues its employees Internet-connected computers and other devices (such as smartphones and tablets), all for business purposes and not for personal use.

After reading the results of a national survey about computer use in the workplace, the president of PEC became concerned regarding the risk of liability for misuse of company-owned technology and loss of productivity. While the president knows that, despite PEC's policies, its employees use the company's equipment for personal purposes, the survey alerted her to problems that she had not considered.

The president wants to know what revisions to the company's employee manual will provide the greatest possible protection for the company. After discussing the issue with the president, I understand that her goals in revising the manual are (1) to clarify ownership and monitoring of technology, (2) to ensure that the company's technology is used only for business purposes, and (3) to make the policies reflected in the manual effective and enforceable.

I attach relevant excerpts of PEC's current employee manual and a summary of the survey. I also attach three cases that raise significant legal issues about PEC's policies. Please prepare a memorandum addressing these issues that I can use when meeting with the president.

Your memorandum should do the following:

(1) Explain the legal bases under which PEC could be held liable for its employees' use or misuse of Internet-connected (or any similar) technology.

(2) Recommend changes and additions to the employee manual to minimize liability exposure. Base your recommendations on the attached materials and the president's stated goals. Explain the reasons for your recommendations but do not redraft the manual's language.

Phone Use

Whether in the office or out of the office, and whether using office phones or company-owned phones given to employees, employees are not to incur costs for incoming or outgoing calls unless these calls are for business purposes. Employees may make calls for incidental personal use as long as they do not incur costs.

Computer Use

PEC employees given equipment for use outside the office should understand that the equipment is the property of PEC and must be returned if the employee leaves the employ of PEC, whether voluntarily or involuntarily.

Employees may not use the Internet for any of the following:

- engaging in any conduct that is illegal
- revealing non-public information about PEC
- engaging in conduct that is obscene, sexually explicit, or pornographic in nature

PEC may review any employee's use of any company-owned equipment with access to the Internet.

Email Use

PEC views electronic communication systems as an efficient and effective means of communication with colleagues and clients. Therefore, PEC encourages the use of email for business purposes. PEC also permits incidental personal use of its email system.

* * *

NATIONAL PERSONNEL ASSOCIATION

RESULTS OF 2013 SURVEY CONCERNING COMPUTER USE AT WORK

Executive Summary of the Survey Findings

1. Ninety percent of employees spend at least 20 minutes of each workday using some form of social media (e.g., Facebook, Twitter, LinkedIn), personal email, and/or texting. Over 50 percent spend two or more of their working hours on social media every day.

2. Twenty-eight percent of employers have fired employees for email misuse, usually for violations of company policy, inappropriate or offensive language, or excessive personal use, as well as for misconduct aimed at coworkers or the public. Employees have challenged the firings based on various theories. The results of these challenges vary, depending on the specific facts of each case.

3. Over 50 percent of all employees surveyed reported that they spend some part of the workday on websites related to sports, shopping, adult entertainment, games, or other entertainment.

4. Employers are also concerned about lost productivity due to employee use of the Internet, chat rooms, personal email, blogs, and social networking sites. Employers have begun to block access to websites as a means of controlling lost productivity and risks of other losses.

5. More than half of all employers monitor content, keystrokes, time spent at the keyboard, email, electronic usage data, transcripts of phone and pager use, and other information.

While a number of employers have developed policies concerning ownership of computers and other technology, the use thereof during work time, and the monitoring of computer use, many employers fail to revise their policies regularly to stay abreast of technological developments. Few employers have policies about the ways employees communicate with one another electronically.

LIBRARY

Hogan v. East Shore School

Franklin Court of Appeal (2013)

East Shore School, a private nonprofit entity, discharged Tucker Hogan, a teacher, for misuse of a computer provided to him by the school. Hogan sued, claiming that East Shore had invaded his privacy and that both the contents of the computer and any electronic records of its contents were private. The trial court granted summary judgment for East Shore on the ground that, as a matter of law, Hogan had no expectation of privacy in the computer. Hogan appeals. We affirm.

Hogan relies in great part on the United States Supreme Court opinion in *City of Ontario v. Quon*, 560 U.S. 746 (2010), which Hogan claims recognized a reasonable expectation of privacy in computer records.

We note with approval Justice Kennedy's observation in *Quon* that "rapid changes in the dynamics of communication and information transmission are evident not just in the technology itself but in what society accepts as proper behavior. As one *amici* brief notes, many employers expect or at least tolerate personal use of such equipment because it often increases worker efficiency." We also bear in mind Justice Kennedy's apt aside that "[t]he judiciary risk error by elaborating too fully on the . . . implications of emerging technology before its role in society has become clear." *Quon*.

The *Quon* case dealt with a government employer and a claim that arose under the Fourth Amendment. But the Fourth Amendment applies only to public employers. Here, the employer is a private entity, and Hogan's claim rests on the tort of invasion of privacy, not on the Fourth Amendment.

In this case, the school provided a computer to each teacher, including Hogan. A fellow teacher reported to the principal that he had entered Hogan's classroom after school hours when no children were present and had seen what he believed to be an online gambling site on Hogan's computer screen. He noticed that Hogan immediately closed the browser. The day following the teacher's report, the principal arranged for an outside computer forensic company to inspect the computer assigned to Hogan and determine

whether Hogan had been visiting online gambling sites. The computer forensic company determined that someone using the computer and Hogan's password had visited such sites on at least six occasions in the past two weeks, but that those sites had been deleted from the computer's browser history. Based on this report, East Shore discharged Hogan.

Hogan claimed that East Shore invaded his privacy when it searched the computer and when it searched records of past computer use. The tort of invasion of privacy occurs when a party intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, if the intrusion would be highly offensive to a reasonable person.

East Shore argued that there can be no invasion of privacy unless the matter being intruded upon is private. East Shore argued that there is no expectation of privacy in the use of a computer when the computer is owned by East Shore and is issued to the employee for school use only. East Shore pointed to its policy in its employee handbook, one issued annually to all employees, that states:

> East Shore School provides computers to teachers for use in the classroom for the purpose of enhancing the educational mission of the school. The computer, the computer software, and the computer account are the property of East Shore and are to be used solely for academic purposes. Teachers and other employees may not use the computer for personal purposes at any time, before, after, or during school hours. East Shore reserves the right to monitor the use of such equipment at any time.

Hogan did not dispute that the employee policy handbook contained this provision, but he argued that it was buried on page 37 of a 45-page handbook and that he had not read it. Further, he argued that the policy regarding computer monitoring was unclear because it failed to warn the employee that East Shore might search for information that had been deleted or might use an outside entity to conduct the monitoring. Next, he argued that because he was told to choose a password known only to him, he was led to believe that websites accessed by him using that password were private. Finally, he argued that because East Shore had not

conducted any monitoring to date, it had waived its right to monitor computer use and had established a practice of respect for privacy. These facts, taken together, Hogan claimed, created an expectation of privacy.

Perhaps East Shore could have written a clearer policy or could have had employees sign a statement acknowledging their understanding of school policies related to technology, but the existing policy is clear. Hogan's failure to read the entire employee handbook does not lessen the clarity of the message. Perhaps East Shore could have defined what it meant by "monitoring" or could have warned employees that deleted computer files may be searched, but Hogan's failure to appreciate that the school might search deleted files is his own failure. East Shore drafted and published to its employees a policy that clearly stated that the computer, the computer software, and the computer account were the property of East Shore, and that East Shore reserved the right to monitor the use of the computer at any time.

Hogan should not have been surprised that East Shore searched for deleted files. While past practice might create a waiver of the right to monitor, there is no reason to believe that a waiver was created here, when the handbook was re-issued annually with the same warning that East Shore reserved the right to monitor use of the computer equipment. Finally, a reasonable person would not believe that the password would create a privacy interest, when the school's policy, read as a whole, offers no reason to believe that computer use is private.

In short, Hogan's claim for invasion of privacy fails because he had no reasonable expectation of privacy in the computer equipment belonging to his employer.

Affirmed.

Fines v. Heartland, Inc.

Franklin Court of Appeal (2011)

Ann Fines sued her fellow employee, John Parr, and her employer, Heartland, Inc., for defamation and sexual harassment. Each cause of action related to electronic mail messages (emails) that Parr sent to Fines while Parr, a Heartland sales representative, used Heartland's computers and email system. After the employer learned of these messages and investigated them, it discharged Parr. At trial, the jury found for Fines and against defendants Parr and Heartland and awarded damages to Fines. Heartland appeals.

In considering Heartland's appeal, we must first review the bases of Fines's successful claims against Parr.

In emails sent to Fines, Parr stated that he knew she was promiscuous. At trial Fines testified that after receiving the second such email from Parr, she confronted him, denied that she was promiscuous, told him she had been happily married for years, and told him to stop sending her emails. She introduced copies of the emails that Parr sent to coworkers after her confrontation with him, in which Parr repeated on three more occasions the statement that she was promiscuous. He also sent Fines emails of a sexual nature, not once but at least eight times, even after she confronted him and told him to stop, and Fines found those emails highly offensive. There was sufficient evidence for the jury to find that Parr both defamed and sexually harassed Fines.

We now turn to Heartland's arguments on appeal that it did not ratify Parr's actions and that it should not be held vicariously liable for his actions.

An employer may be liable for an employee's willful and malicious actions under the principle of ratification. An employee's actions may be ratified after the fact by the employer's voluntary election to adopt the employee's conduct by, in essence, treating the conduct as its own. The failure to discharge an employee after knowledge of his or her wrongful acts may be evidence supporting ratification. Fines claims that because Heartland delayed in discharging Parr after learning of his misconduct, Heartland in effect ratified Parr's behavior.

The facts as presented to the jury were that Fines did not complain to her supervisor or any Heartland representative until the end of the fifth day of Parr's offensive behavior, when Parr sent the emails to coworkers. When her supervisor learned of Fines's complaints, he confronted Parr. Parr denied the charges, saying that someone else must have sent the emails from his account. The supervisor reported the problem to a Heartland vice president, who consulted the company's information technology (IT) department. By day eight, the IT department confirmed that the emails had been sent from Parr's computer using the password assigned to Parr during the time Parr was in the office. Heartland fired Parr.

Such conduct by Heartland does not constitute ratification. Immediately upon learning of the complaint, a Heartland supervisor confronted the alleged sender of the emails, and when the employee denied the charges, the company investigated further, coming to a decision and taking action, all within four business days.

Next, Fines asserted that Heartland should be held liable for Parr's tortious conduct under the doctrine of respondeat superior. Under this doctrine, an employer is vicariously liable for its employee's torts committed within the scope of the employment. To hold an employer vicariously liable, the plaintiff must establish that the employee's acts were committed within the scope of the employment. An employer's vicarious liability may extend to willful and malicious torts. An employee's tortious act may be within the scope of employment even if it contravenes an express company rule.

But the scope of vicarious liability is not boundless. An employer will not be held vicariously liable for an employee's malicious or tortious conduct if the employee *substantially* deviates from the employment duties for personal purposes. Thus, if the employee "inflicts an injury out of personal malice, not engendered by the employment" or acts out of "personal malice unconnected with the employment," the employee is not acting within the scope of employment. *White v. Mascoutah Printing Co.* (Fr. Ct. App. 2010); RESTATEMENT (THIRD) OF AGENCY § 2.04.

Heartland relied at trial on statements in its employee handbook that office computers were to be used only for business and not for personal purposes. The Heartland handbook

also stated that use of office equipment for personal purposes during office hours constituted misconduct for which the employee would be disciplined. Heartland thus argued that this provision put employees on notice that certain behavior was not only outside the scope of their employment but was an offense that could lead to being discharged, as happened here.

Parr's purpose in sending these emails was purely personal. Nothing in Parr's job description as a sales representative for Heartland would suggest that he should send such emails to coworkers. For whatever reason, Parr seemed determined to offend Fines. The mere fact that they were coworkers is insufficient to hold Heartland responsible for Parr's malicious conduct. Under either the doctrine of ratification or that of respondeat superior, we find no basis for the judgment against Heartland.

Reversed.

Lucas v. Sumner Group, Inc.

Franklin Court of Appeal (2012)

After Sumner Group, Inc., discharged Valerie Lucas for violating Sumner's policy on employee computer use, Lucas sued for wrongful termination. The trial court granted summary judgment in favor of Sumner Group. Lucas appeals. For the reasons stated below, we reverse and remand.

Sumner Group's computer-use policy stated:

> Computers are a vital part of our business, and misuse of computers, the email systems, software, hardware, and all related technology can create disruptions in the work flow. All employees should know that telephones, email systems, computers, and all related technologies are company property and may be monitored 24 hours a day, 7 days a week, to ensure appropriate business use. The employee has no expectation of privacy at any time when using company property.
>
> Unauthorized Use: Although employees have access to email and the Internet, these software applications should be viewed as company property. The employee has no expectation of privacy, meaning that these types of software should not be used to transmit, receive, or download any material or information of a personal, frivolous, sexual, or similar nature. Employees found to be in violation of this policy are subject to disciplinary action, up to and including termination, and may also be subject to civil and/or criminal penalties.

Sumner Group discovered that over a four-month period, Lucas used the company Internet connection to find stories of interest to her book club and, using the company computer, composed a monthly newsletter for the club, including summaries of the articles she had found on the Internet. She then used the company's email system to distribute the newsletter to the club members. Lucas engaged in some but not all of these activities during work time, the remainder during her lunch break. Lucas admitted engaging in these activities.

She first claimed a First Amendment right of freedom of speech to engage in these

activities. The First Amendment prohibits Congress, and by extension, federal, state, and local governments, from restricting the speech of employees. However, Lucas has failed to demonstrate any way in which the Sumner Group is a public employer. This argument fails.

Lucas also argued that the Sumner Group had abandoned whatever policy it had posted because it was common practice at Sumner Group for employees to engage in personal use of email and the Internet. In previous employment matters, this court has stated that an employer may be assumed to have abandoned or changed even a clearly written company policy if it is not enforced or if, through custom and practice, it has been effectively changed to permit the conduct forbidden in writing but permitted in practice. Whether Sumner Group has effectively abandoned its written policy by custom and practice is a matter of fact to be determined at trial.

Lucas next argued that the company policy was ambiguous. She claimed that the language of the computer-use policy did not clearly prohibit personal use. The policy said that the activities "should not" be conducted, as opposed to "shall not."[1] Therefore, she argued that the policy did not ban personal use of the Internet and email; rather, it merely recommended that those activities not occur. She argued that "should" conveys a moral goal while "shall" refers to a legal obligation or mandate.

In *Catts v. Unemployment Compensation Board* (Fr. Ct. App. 2011), the court held unclear an employee policy that read: "Madison Company has issued employees working from home laptops and mobile phones that should be used for the business of Madison Company." Catts, who had been denied unemployment benefits because she was discharged for personal use of the company-issued computer, argued that the policy was ambiguous. She argued that the policy could mean that employees were to use only Madison Company–issued laptops and phones for Madison Company business, as easily as it could mean that the employees were to use the Madison Company equipment only for business reasons. She argued that the company could prefer that

[1] This court has previously viewed with approval the suggestion from PLAIN ENGLISH FOR LAWYERS that questions about the meanings of "should," "shall," and other words can be avoided by pure use of "must" to mean "is required" and "must not" to mean "is disallowed."

employees use company equipment, rather than personal equipment, for company business because the company equipment had anti-virus software and other protections against "hacking." The key to the *Catts* conclusion was not merely the use of the word "should" but rather the fact that the entire sentence was unclear.

Thus the question here is whether Sumner Group's policy was unclear. When employees are to be terminated for misconduct, employers must be as unambiguous as possible in stating what is prohibited. Nevertheless, employers are not expected to state their policies with the precision of criminal law. Because this matter will be remanded to the trial court, the trial court must further consider whether the employee policy was clear enough that Lucas should have known that her conduct was prohibited.

Finally, Lucas argued that even if she did violate the policy, she was entitled to progressive discipline because the policy stated, "Employees found to be in violation of this policy are subject to disciplinary action, up to and including termination . . . ." She argued that this language meant that she should be reprimanded or counseled or even suspended *before* being terminated. Lucas misread the policy. The policy was clear. It put the employee on notice that there would be penalties. It specified a variety of penalties, but there was no commitment or promise that there would be progressive discipline. The employer was free to determine the penalty.

Reversed and remanded for proceedings consistent with this opinion.

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