
Applicant Number

Georgia Essay Questions

Do not touch this packet or start the exam until you are instructed to do so.

- Once the exam begins, you may work on the four essay questions in any order, but remember to type your answers in the appropriate answer window (or write your answer in the appropriate answer book if you are handwriting).

- For each of the four attached essay questions, there is one blank sheet for your use as scratch paper, and you may take notes on any of the attached pages if you wish. You may remove the staple or tear out any pages, but you will need to put the packet back in order when the exam session is over.

- On each essay question, remember to demonstrate not merely your memory but also your ability to think clearly and to analyze the issues.

- Assume the questions arise under the laws of Georgia unless otherwise indicated.

ESSAY 1

Laptop applicants: Answer this question in the **FIRST** answer window.

Handwriting applicants: Answer this question in the **BLUE** answer book.

Joe Rome has retained our firm to assist him in determining whether he has a claim against Rick Tesla—his former attorney and business associate—for fraud, breach of fiduciary duty, or other action arising out of their co-ownership of several pizza restaurants. Rome would also like to know the likelihood of success of a grievance filed with the State Bar against Tesla for violations of any Rules of Professional Conduct.

Rome is the founder of Italian Pizza Restaurant, LLC ("IPR") and the owner and developer of the related intellectual property. Tesla is the attorney who drafted the paperwork to establish IPR for Rome in 2009.

While Rome is a successful restauranter, whose skills have received domestic and international acclaim, he has limited business experience outside of operating pizza restaurants. He is unfamiliar with complex business transactions, and he has always relied on Tesla as his legal counsel and business advisor. Tesla graduated from Prestige Law School and has been a member of the State Bar of Georgia since 1991. During his business career, Tesla has overseen the acquisition, development, and management of over $5 billion in commercial real estate.

In 2010, Tesla approached Rome and told him that there were "sharks" who would try and take advantage of him due to his inexperience. Tesla promised that, as Rome's lawyer, he would protect Rome and help him open several additional IPR restaurants. At that time, the restaurant was generating large profits and was situated on a valuable piece of real property, and the success of the restaurant had increased the value of the intellectual property associated with it. Rome agreed to join Tesla in the venture to open more restaurants but insisted that he would have to retain control of the business.

Tesla presented Rome with an "Amended Limited Liability Company Agreement of Italian Pizza Restaurant, LLC" (the "Amended Agreement") to sign, and he assured Rome that Rome would have control of IPR as the

majority owner. The Amended Agreement provided that the members of the LLC were Tesla (25%) and Rome (75%) and that the manager was Rome. IPR owned Rome's original restaurant, the real property that it occupied, and the associated intellectual property. The Amended Agreement required Tesla to locate potential restaurant sites and negotiate leases and other agreements related to the new restaurants. Tesla did not discuss with Rome the provision in the Amended Agreement that required the new restaurants to be on property leased from multi-use shopping centers owned by Tesla. Rome was also unaware that the leases were priced above market value and that he was named as a personal guarantor in them. The Amended Agreement also contained second-member consent rights that benefited Tesla by limiting Rome's control. While Tesla was acting as legal counsel to Rome, Tesla did not identify or review these provisions with him. Nor did he advise Rome of his conflict of interest in becoming financially interested in IPR while acting as Rome's lawyer.

Rome relied on Tesla as his counsel, including when Tesla assured him that he was looking out for Rome's interest and encouraged him to sign the Amended Agreement. But the shopping centers did not attract the type of diners who ate at IPR restaurants, and Rome was unable to keep up with the lease payments. And the intellectual property associated with the restaurants is now of little value.

At the time he encouraged Rome to sign the Amended Agreement, Tesla had plans to sell the shopping centers where the new restaurants would be located, and he knew that the IPR leases would enhance the market value of those properties. Tesla recently sold all the new restaurant properties and assigned the leases to the new owners. The new owners have sued Rome for breach of the leases and seek to recover costs for over $5 million in leasehold improvements.

Prepare a memorandum of law that discusses whether the above facts state a claim against Tesla for (i) fraud and deceit and (ii) breach of fiduciary duty and (iii) whether they show a violation of the Georgia Rules of Professional Conduct. Also discuss what would have to be included with any complaint for breach of fiduciary duty related to professional malpractice and any additional issues that might arise relating to the types of damages that Rome might seek to recover.

[scratch paper for notes]

ESSAY 2

Laptop applicants: Answer this question in the **SECOND** answer window.

Handwriting applicants: Answer this question in the **YELLOW** answer book.

A year ago, Anna, Bill, and Carrie decided to open a mobile dog grooming business. They filed articles of organization in Georgia to form a limited liability company. They also entered into a written operating agreement. The articles of organization and the operating agreement are silent with respect to the rights of members to sell or transfer their member interest, and with respect to how a member may withdraw from the LLC.

The operating agreement contains the following provision with respect to the transfer of LLC property:

> Unanimous consent of the members is required for any sale or other transfer of any item of LLC tangible or intangible property used or useful in the ordinary course of the LLC's business.

Anna and Carrie paid for their LLC member interests by each contributing $50,000 to the LLC. Bill paid for his LLC member interest by conveying title to a van and a ski boat, each valued at $25,000.

Three weeks ago, Anna signed a contract on behalf of the LLC agreeing to sell the van and the boat to a third-party buyer, who has agreed to pay $35,000 cash for each item, well above their fair market value. Bill and Carrie were not aware of the sales prior to the time Anna signed the contract, and they object to the sales.

Two weeks ago, Bill sold his member interest to David. He did not discuss the transfer with Anna or Carrie, and they learned of the transfer only after it had taken place and David showed up at their office to propose changes to the LLC's operations. David also provided them with his bank account information and instructed them to deposit his share of future LLC distributions. Anna and Carrie each have their own reasons for not wanting to be involved in a business venture with David. Anna had to

fire David last year when she was his supervisor at a different business because he repeatedly made significant accounting errors; Carrie's reasons for not liking David are strictly personal.

One week ago, Carrie wrote an email to Anna and Bill, saying she wanted out of the business. Her email said, "I'm starting a company that makes homemade dog treats, and I don't have time to be part of the dog grooming business. Please send me a check for my member interest."

Applying Georgia law:

1. Is the LLC bound by the sales of the van and the boat? Explain.

2. What are David's rights with respect to managing and sharing in the profits of the LLC? Explain.

3. Does Carrie's email have her intended effect of withdrawing her from the LLC? Explain.

[scratch paper for notes]

ESSAY 3

Laptop applicants: Answer this question in the **THIRD** answer window.

Handwriting applicants: Answer this question in the **PINK** answer book.

Bob the Butcher catered a vegetarian supper party at the home of Vic the Bon Vivant. When the evening ended, Bob presented Vic with an invoice for $2,000. Vic claims that he mailed Bob a letter the very next day, enclosing a check for $2,000. Vic has a copy of an envelope addressed to Bob and a copy of a letter, which reads as follows:

> Dear Bob: I know that vegetarian dishes are not your strong suit, but last night you knocked it out of the park. Fantastic job. Enclosed is my check for $2,000. Cheers, Vic.

Bob claims he never received Vic's letter. A week after the supper party, Bob sent a letter to Vic, which reads as follows:

> Dear Vic: I know you enjoyed the Veg-Fest, but you said you were going to send me a check! No check has arrived. This might have slipped the mind of a tipsy coachman like you. Just kidding. But seriously, please send me a check. I had to bring home the bacon to buy all those veggies, and I need to re-stock my piggy bank soon. All the best, Bob.

Vic received Bob's letter but never replied. Nor did Vic respond to any of the voicemails or texts Bob sent over the next three weeks. Frustrated, Bob has filed a civil suit against Vic in the State Court of Fulton County, seeking payment of his invoice, plus interest, and demanding a trial by jury. Vic has filed an Answer asserting as an affirmative defense that he paid the invoice by sending Bob a check. Vic attached to his Answer a copy of the letter, the check, and the postage-stamped envelope he alleges he placed into a U.S. Postal Service mailbox.

The case is now being tried. During the trial, various evidentiary issues have arisen. You are the Law Clerk for Judge Solomon, who is presiding over the trial. Please address each of the issues below:

1. The parties agree that, under Georgia law, when there is evidence that a sender put a letter in a properly addressed, stamped envelope, and placed

the letter in a mailbox, there is a rebuttable presumption that the intended recipient received the letter. Please address how this presumption is likely to play out at trial, including (a) whether Vic has the evidence needed to establish that the rebuttable presumption arises here, (b) who bears the burden of persuasion, (c) who bears the burden of production of rebuttal evidence, (d) whether rebuttal evidence exists on these facts, and (e) what occurs if sufficient evidence is submitted to rebut the presumption (i.e., what happens to the presumption and how should the court instruct the jury?).

2. Bob argues that Vic has access to his own bank account and could easily produce his bank statement or a copy of the cancelled check to prove whether the bank paid the check. Vic refuses to produce either form of evidence and insists on relying on the rebuttable presumption in his favor that Bob received his letter and the check. Bob, in turn, relies on OCGA § 24-14-22, which effectively provides that if a party has access to more probative evidence to prove a fact and fails to produce it, it shall be rebuttably presumed that the unproduced evidence goes against the party who fails to produce the evidence. Vic introduces no evidence to explain his failure to produce his bank statement or a cancelled check. How should the Court instruct the jury on the presumption of receipt relied upon by Vic and the presumption about a failure to produce evidence relied upon by Bob? Explain your answer.

3. Vic seeks to introduce his letter as an admissible exhibit while he is on the stand. Bob raises a hearsay objection. Should the Court sustain or overrule the objection? Please explain your answer.

4. Vic seeks to testify that he always pays his bills, and Bob seeks to testify that Vic has a reputation for habitually forgetting to mail letters, often finding them in the pockets of his jackets or on the dashboard of his Tesla. How should Judge Solomon deal with these issues of character/habit evidence in this case?

5. Bob seeks to call Vic's wife as a witness to testify that Vic privately admitted to her that he forgot to mail the letter. Vic objects to Bob calling his wife as a witness against him. Vic's wife is ready and willing to testify. How should the Court rule? Please explain your answer.

[scratch paper for notes]

ESSAY 4

Laptop applicants: Answer this question in the **LAST** answer window.

Handwriting applicants: Answer this question in the **TAN** answer book.

John and Martha Smith jointly owned a home in Americus, Georgia, where they resided with their child, Sarah, until she moved to Atlanta to attend college and start her career. John passed away in 2010, and Martha continued to live in the home until 2022, when she moved to live closer to Sarah. Martha and Sarah have scheduled an appointment with you to seek legal advice and to discuss the following real estate matters impacting the Americus property:

In 2007, John and Martha hired a contractor to install a fence around the property. When the fence was constructed, the contractor inadvertently built the fence three feet over the property line of the neighbor, Nick, without Nick's consent, and the Smiths utilized the fenced-in section as their own. The fence remained on Nick's property without issue until 2023, when Nick had a survey performed of his property. Nick is now demanding that the fence be removed.

After Martha moved in 2022, she found a tenant, Tyler, to rent the home. Tyler executed a written lease agreement with Martha that included a one-year rental term and a requirement that he pay monthly rent in the amount of $1,000 on the first day of each month during the term of the lease (commencing on December 1, 2022). Tyler paid monthly rent to Martha in the amount of $1,000 through May 2023. Starting with the rent payment that was due on June 1, 2023, Tyler stopped paying rent to Martha, but he continues (as of today) to reside in the Smith home while showing no signs that he plans to vacate.

Once the matter with Tyler is resolved, Sarah would like to assist Martha in selling the property. A developer is interested in constructing a new home on the property, but to do so in compliance with the local zoning

code, the property must be at least one acre in size. The Smith property is less than one acre unless the three-foot area along the property line with Nick is included. Finally, the original deed of conveyance of the property to John and Martha provided, in relevant part, "to John Smith and Martha Smith as joint tenants with survivorship…." When John died in 2010, he did not make any conveyance of the property in his will to Martha, but the will did provide that half of John's interest in the property would go to his brother Brandon.

Please prepare a memo to Martha and Sarah addressing the following issues:

1. Does Martha have a valid claim that she has obtained title (ownership) to the three-foot area of land along the shared property line with Nick where the fence was constructed?

2. As to the dispute with Tyler:

> (i) Is Martha required to mitigate her damages by, for example, seeking a new tenant?
>
> (ii) What damages does Tyler owe as a result of his failure to pay rent or vacate the premises?
>
> (iii) What type of tenancy has Tyler created by failing to vacate?
>
> (iv) Is Martha permitted to remove Tyler from the property by changing the locks or other measures of self-help? If not, what process must she invoke to remove Tyler and what are the general steps in that process?

3. Does Martha own valid title to the property so that she can sell it? If not, what are the steps she needs to take?

[scratch paper for notes]

February 2024
MPT-1 Item

State of Franklin v. Iris Logan

State of Franklin v. Iris Logan

FILE

LIBRARY

OFFICE OF THE DISTRICT ATTORNEY
COUNTY OF HAMILTON
805 Second Avenue
Centralia, Franklin 33705

TO: Examinee
FROM: Deanna Gray, District Attorney
DATE: February 27, 2024
RE: State v. Iris Logan

Iris Logan is in pretrial custody in the Centralia City Detention Facility. She was arrested on January 17, 2024, and charged with robbery and felony murder. A preliminary hearing was held on January 26. At the conclusion of the preliminary hearing, the judge found probable cause to believe that both crimes had occurred and that Ms. Logan had committed those offenses. Consequently the judge bound her case over to the Hamilton County Grand Jury.

As District Attorney, I now have to decide whether to seek an indictment on each of the charges. Under Franklin law, the District Attorney has the discretion whether to proceed with charges, even when probable cause has been found by the judge.

I need you to draft a memorandum evaluating whether we should charge Iris Logan with robbery and with felony murder. Your memorandum should assess the strength of each charge and any possible arguments that Ms. Logan may raise in response. As a matter of charging policy, our office does not over-charge in cases where the evidence is weak, and so I want to make sure that we are charging consistently with our policy.

Do not write a separate statement of facts, but be sure to integrate the facts into your legal analysis.

TRANSCRIPT OF "BE ON THE LOOKOUT" (BOLO) NOTIFICATION

The following is a verbatim transcript of the BOLO issued at 5:25 p.m. on January 17, 2024, by the dispatcher of the Centralia Police Department:

> Attention, all vehicles and officers. There has been a report of a purse snatching in the vicinity of Broadway and 8th Avenue, in Centralia, Franklin. This purse snatching has resulted in bodily injury to the victim. The suspect is a white female approximately five feet six inches tall, of thin build with blonde hair. She was wearing dark jeans and a gray T-shirt. There may be a male accomplice, although we have no description of him. Proceed with caution. Please be on the lookout for the suspect. Also, please respond if you are in the vicinity.

Excerpts from Preliminary Hearing in State v. Logan, January 26, 2024

Direct Examination of Tara Owens by District Attorney Deanna Gray

Q: Ms. Owens, I'd like to ask you a few questions about the events late in the afternoon on Wednesday, January 17, 2024. What happened on that date?

A: I was running my errands and was walking down the street on Broadway, near 8th Avenue, here in Centralia. And suddenly I felt someone grab my purse from behind.

Q: Did you try to stop the person?

A: No, I learned long ago: Money is hardly worth getting hurt over. I just let the person have it.

Q: Did the person who took your purse threaten you?

A: I heard a voice say, "Let me have that purse." And so I did—I let her have the purse.

Q: You are saying "her." Was it a woman who took the purse?

A: Yes. It was a woman's voice. I didn't see her because she was behind me. But I screamed for help. I later heard that a bystander saw the woman and gave her description to the police.

Q: Were you injured?

A: I sprained my wrist when she pulled the purse off my arm. It was a shoulder bag, so even though I didn't fight, I got twisted up getting the bag off my shoulder and giving it to her.

Q: Were you in fear of the woman who was taking your purse?

A: Not really . . . I didn't know whether she had a weapon. I just wanted to give her my purse and be done with her. But then my arm hurt really bad when it got twisted.

Q: And this all happened in the City of Centralia, County of Hamilton, State of Franklin?

A: Yes.

* * *

Direct Examination of Jed Rogers by District Attorney Deanna Gray

Q: Mr. Rogers, I draw your attention to the events late in the afternoon on January 17, 2024, at the intersection of Broadway and 8th Avenue, in Centralia.

A: Yes, I remember. I saw a woman steal a purse from another woman.

Q: What exactly did you see?

A: I saw a woman who I now know to be Ms. Owens walking down Broadway. All of a sudden a woman ran up behind her and grabbed her purse.

Q: Could you give a description of the woman who grabbed the purse?

A: She was white, medium height, and skinny, with blonde hair. She was wearing jeans and a gray T-shirt.

Q: Was there anyone else with her?

A: I saw a man standing about 10 feet from her, but he had his back to me, so I can't tell you what he looked like or what he was wearing. I did see the woman hand the purse to the man before they ran away.

Q: Did you call the police?

A: Yes, I called 911. I told the operator what I had seen and gave a description of the woman who robbed Ms. Owens.

* * *

Direct Examination of Officer Maria Torres by District Attorney Deanna Gray

Q: Tell me what happened late in the afternoon on January 17, 2024.

A: I heard a "be on the lookout" notification that a woman had snatched a purse in the area of Broadway and 8th Avenue in Centralia. Since I was in the general area, I contacted the dispatcher with my location. I was told to proceed to Broadway and 8th Avenue. When I reached Broadway and 9th Avenue, I observed a woman matching the description of the BOLO and a man getting into a green sedan with the license plate number DDD555.

Q: Did you determine the ownership of the sedan?

A: Yes, I ran the license plate and learned that the sedan was registered to a Jeremy Stewart. The sedan did not show up as stolen.

Q: What did you do next?

A: I followed the sedan for a couple of miles to see if it did anything unusual. The sedan was traveling within the speed limit. About 10 minutes later, I saw the driver of the sedan throw an object onto the shoulder of the road. The sedan was traveling westbound on State Route 50. I activated the sirens and blue lights on my police cruiser. At that moment, the driver of the sedan was going through the intersection of State Route 50 and State Route 75. The sedan was immediately struck on the driver's side by an SUV crossing the same intersection, going northbound on State Route 75. The SUV came to a full stop. The sedan spun around and came to rest just past the intersection.

Q: What was the speed limit on State Route 50 at that point?

A: 45 miles per hour.

Q: Was that also the speed limit for State Route 75?

A: Yes, and it appeared that the SUV was traveling within the speed limit as it went through the intersection.

Q: What happened next?

A: I pulled over next to the sedan. I looked into the sedan and saw a man in the driver's seat who I later identified as Jeremy Stewart. He was not wearing a seat belt and was unresponsive. I called for an ambulance. The woman passenger, who I later determined to be Iris Logan, appeared to be minimally injured. She was wearing her seat belt. Ms. Logan immediately surrendered to me. I handcuffed her and locked her in the police cruiser while I attended to the two drivers.

Q: What did you do next?

A: The driver of the SUV was conscious and appeared to have minor injuries.

Q: Did you notice anything else?

A: I noticed that the traffic lights at that intersection were malfunctioning because they were green in all directions. This was really unfortunate. Those lights have always worked properly before.

Q: Do you know what happened to the driver of the SUV?

A: His name is Michael Curtis. He recovered from his injuries.

Q: Do you know what happened to Mr. Stewart, the driver of the sedan?

A: As I said, he wasn't wearing his seat belt. Sadly, he died from his injuries caused by the accident.

Q: Did you go back to find out what the driver had thrown out of the sedan?

A: I went back to the shoulder of the road, where I had seen Mr. Stewart throw something from the sedan. I found Ms. Owens's purse on the ground there.

Q: And this all happened in the State of Franklin, County of Hamilton, City of Centralia?

A: Yes.

* * *

Cross-Examination of Officer Maria Torres by Asst. Public Defender Victor Glenn

Q: Let's turn to the purse snatching. You were chasing Ms. Logan and the driver for a purse snatching, correct?

A: I was chasing her for a robbery.

Q: Purse snatching is how it came over the radio, correct?

A: Right, it came over as purse snatching.

Q: The dispatcher didn't use the word "robbery," is that correct?

A: The dispatcher did not use the word "robbery." I heard "purse snatching." And the BOLO mentioned an injury.

Q: And the injury to the victim of the purse snatching—you had no idea how severe it was, is that correct?

A: Yes, that is correct. I did not know the extent of the injury.

Q: So you had a purse snatching, with an injury of a degree you didn't know, and you made the decision to chase the sedan and to continue the pursuit?

A: Yes, that is correct.

* * *

STATE OF FRANKLIN, DEPARTMENT OF HIGHWAY SAFETY
MAINTENANCE RECORD
TRAFFIC LIGHTS

INTERSECTION OF STATE ROUTES 50 AND 75

There was a collision at the intersection of State Routes 50 and 75 in Hamilton County, Franklin, on January 17, 2024. An officer reported that the traffic lights at the intersection were malfunctioning. These lights had been inspected on December 1, 2023, and were in good working order. Until January 17, 2024, there had been no complaints or reports of malfunctioning of these traffic lights.

Immediately on receipt of the report of malfunction, a team was sent to the affected intersection to investigate the traffic lights. The team reported that the lights were green in all directions. The team immediately fixed the lights, and they are now in working order.

Submitted on January 18, 2024
Joanne McDaniel
Maintenance Supervisor
Franklin State Dept. of Highway Safety

FRANKLIN CRIMINAL CODE

§ 901 ROBBERY

Robbery is the intentional or knowing theft of property from the person of another by violence or putting the person in fear. Robbery is a felony.

§ 970 FIRST-DEGREE FELONY MURDER

First-degree felony murder is a killing of another committed during the perpetration of, attempt to perpetrate, or immediate flight from the perpetration of or attempt to perpetrate any first-degree murder, act of terrorism, arson, rape, robbery, burglary, kidnapping, aggravated child abuse, aggravated child neglect, or aircraft piracy.

State v. Driscoll
Franklin Court of Appeal (2019)

Defendant Fred Driscoll appeals from his conviction for robbery. His sole argument on appeal is that his charged conduct—taking a laptop computer from a student in the library at Franklin State University—did not meet the statutory definition of robbery. We affirm.

Under Franklin law, robbery is defined as "the intentional or knowing theft of property from the person of another by violence or putting the person in fear." Fr. Crim. Code § 901. Driscoll does not contest that he had the state of mind or mens rea necessary for the crime. He concedes his intent or knowledge. But he does claim that he neither put the victim in fear nor used violence in the theft.

Robbery requires proof of four elements: (1) intentional or knowing nonconsensual taking of (2) money or other personal property (3) from the person or presence of another (4) by means of force, whether actual or constructive. While the Franklin statute requires "violence," Franklin case law has clarified that, for purposes of defining robbery, "violence" is coextensive with "force." The force necessary to constitute robbery is the posing of an immediate danger to the owner of the property. *State v. Schmidt* (Fr. Ct. App. 2009). The immediacy of the danger can be demonstrated either by putting the victim in fear or by bodily injury to the victim. In sum, the distinction between theft and robbery is the use of force or threat of physical harm. Taking something stealthily without the owner's knowledge is simply theft, but shaking the owner or struggling with the owner while trying to take the item from the owner is robbery.

In this case, it was undisputed that the owner of the laptop tried to prevent Driscoll from taking her property. She grabbed his arm after he picked up her laptop, and he pushed her away. Although she was not injured, Driscoll's struggle with her for control over the laptop was sufficient use of force to constitute robbery under § 901 of the Franklin Criminal Code.

Affirmed.

State v. Clark
Franklin Court of Appeal (2007)

Defendant Sheila Clark appeals from her conviction for felony murder, claiming that she was no longer engaged in the burglary when the death occurred. We affirm the conviction.

On May 8, 2006, Clark burglarized a residence in Franklin City, Franklin. At approximately 9:00 p.m., she left the residence and was driving away from it when she hit a pedestrian who was crossing Elm Street. There was no evidence that Clark was driving recklessly. The pedestrian died of his injuries.

Clark claims that she was no longer engaged in the burglary at the time of the pedestrian's death and therefore the conviction for felony murder cannot be upheld. In her arguments she admits, as she must, that Franklin's definition of felony murder also includes death occurring while the felon is fleeing from commission of the felony. *See* Fr. Crim. Code § 970.

Even if it is clear beyond question that the crime was completed before the killing, the felony-murder rule still applies if the killing occurs during the defendant's flight. We note that Franklin's statute is consistent with those of many other states, which contain language extending liability for felony murder to deaths occurring "in immediate flight from" the felony. In assessing whether a defendant is still engaged in fleeing from the felony, it is critical to determine whether the fleeing felon has reached "a place of temporary safety."

Here Clark had just completed the burglary and was on her way to a place of temporary safety. But she had not yet reached that place. Thus there was no break in the chain of events—she was still engaged in fleeing from the crime. This case is distinguishable from *State v. Lowery* (Fr. Sup. Ct. 1998) in which the defendant had robbed a store, left the store, and arrived at home when a police officer came to the front door to arrest him. The officer's gun went off, killing the defendant's wife. Because Lowery was no longer fleeing from the robbery at the time of the killing, the court concluded that he was not criminally responsible for the death of his wife under Fr. Crim. Code § 970.

For the foregoing reasons, the conviction is affirmed.

State v. Finch
Franklin Supreme Court (2008)

Defendant David Finch was convicted of attempted armed robbery and felony murder. The conviction was affirmed on appeal. We granted certiorari to determine the definition of "causation" in the context of our felony-murder statute, Fr. Crim. Code § 970. We affirm the conviction.

In the spring of 2006, Finch took part in a string of armed robberies with his colleague Martin Blanford. On April 12, the two attempted to rob a convenience store in Franklin City. Finch was unarmed, but Blanford was carrying a handgun. When they arrived at the convenience store, they demanded that the cashier give them the cash in the register. Unbeknownst to Finch and Blanford, the store's security guard had entered the store behind them. The security guard ultimately wrestled the gun from Blanford. In the struggle, the gun went off, and the bullet hit Blanford, killing him. Finch was charged with attempted armed robbery and felony murder for the death of Blanford. He was convicted of both charges. Finch now argues that he cannot be held liable for felony murder in connection with Blanford's death because the death was not caused by any action that Finch initiated.

In general, Franklin law provides that a defendant may be charged with felony murder when the defendant's actions in the course of committing, attempting to commit, or fleeing from certain felonies were the cause of the death. *See* Fr. Crim. Code § 970. The causation required by the felony-murder statute encompasses two distinct requirements: "cause in fact" and "legal cause" (sometimes referred to as "proximate cause").

Cause in fact: "Cause in fact" is commonly referred to as "but-for causation." In other words, but for the acts of the defendant, the death would not have resulted. While an essential prerequisite for culpability, "cause in fact" is not by itself sufficient to establish guilt. Indeed, "cause in fact" analysis alone would cast too large a net. Thus, "cause in fact" must be limited by proximate or "legal cause," which adds the requirement of foreseeability.

Legal cause: Under "legal cause," the relevant inquiry is whether the death is of a type that a reasonable person would see as a likely result of that person's felonious conduct. Foreseeability is added to the "cause in fact" requirement because it would be unfair to hold a defendant responsible for outcomes that were totally outside his

contemplation when committing the offense. Thus, it is consistent with reason and sound public policy to hold that when a felon's attempt to commit a forcible felony sets in motion a chain of events that were or should have been within his contemplation when the motion was initiated, he should be held responsible for any death that by direct and almost inevitable sequence results from the initial criminal act. Moreover, the intent behind the felony-murder doctrine would be thwarted if felons were not held responsible for the foreseeable consequences of their actions. *State v. Lamb* (Fr. Sup. Ct. 1985).

Superseding cause: Finch argues that the arrival of the security guard was an intervening independent cause that broke the causal chain between his actions in robbing the store and the death of his accomplice, Blanford, and therefore he should be relieved of criminal responsibility for the death. That is, the security guard's actions constitute an intervening event that became the superseding cause of Blanford's death. The factors necessary to demonstrate a superseding cause are (1) the harmful effects of the superseding cause must have occurred after the original criminal acts, (2) the superseding cause must not have been brought about by the original criminal acts, (3) the superseding cause must have actively worked to bring about a result that would not have followed from the original criminal acts, and (4) the superseding cause must not have been reasonably foreseen by the defendant. If all four elements are present, then the intervening cause is said to be a superseding cause that breaks the chain of proximate causation. Because the superseding cause therefore "supplants" the defendant's conduct as the legal cause of the death, the defendant is not legally responsible for the death. *See Craig v. Bottoms* (Fr. Sup. Ct. 1996).

Although this court has not had occasion to analyze superseding cause in the context of felony murder, cases from our sister jurisdiction offer guidance. In *State v. Knowles* (Olympia Sup. Ct. 2000), the Olympia Supreme Court held that "gross negligence will generally be considered a superseding cause but ordinary negligence will not be regarded as a superseding cause because ordinary negligence is reasonably foreseeable." In criminal jurisprudence, gross negligence means "wantonness and disregard of the consequences to others that may ensue."

In *Knowles*, the defendant committed an armed robbery during which the victim received two stab wounds. Although the victim was taken to a local hospital and received

medical care, she later died of an infection. It was subsequently learned that the surgeon who sutured the victim's wounds had been intoxicated at the time of the operation and had failed to properly disinfect the wounds or the instruments. The infection was a direct result of the surgeon's failure to follow disinfection procedures. The Olympia court held that the surgeon's intoxication constituted gross negligence and therefore was a superseding cause that broke the causal chain between the defendant's felonious acts and the death of the victim.

When a person engages in a dangerous felony, that person should foresee that others might be harmed and need medical care. However, while negligent medical care could be foreseen, gross negligence could not be. *See also State v. Johnson* (Olympia Ct. App. 1999) (physician's simple negligence in missing bullet fragment insufficient intervening act to break chain of causation). Therefore, in applying the fourth factor, grossly negligent or reckless conduct is sufficiently unforeseeable to supersede a felon's initial causal responsibility.

Applying the four factors above leads us to conclude that the security guard's actions were not a superseding cause of Blanford's death. It is true that, under the first factor, the guard's intervention occurred after Finch and Blanford entered the store. At the same time, under the second factor, their entry and their actions directly brought about the guard's intervention. It is also true that, under the third factor, the guard's intervention "actively worked to bring about" Blanford's death. However, under the fourth factor, a reasonable person would foresee that entering a store with a weapon, intending to rob it, would lead to the intervention of a security guard and the violence that ensued.

For these reasons, we conclude that the guard's intervention did not constitute a superseding cause. There is sufficient evidence to support Finch's felony-murder conviction.

Affirmed.

MULTISTATE PERFORMANCE TEST DIRECTIONS

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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.

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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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February 2024
MPT-2
Item

Randall v. Bristol County

Randall v. Bristol County

FILE

LIBRARY

Law Offices of Michael Carter
1300 W. Cherry St.
Derby, Franklin 33205

MEMORANDUM

To: Examinee
From: Michael Carter
Date: February 27, 2024
Re: Randall v. Bristol County

Our client, Olivia Randall, has worked for the Bristol County Library for 10 years. Last October, Randall's employer, the county, suspended her without pay for two weeks for "insubordination." The suspension followed Randall's making two posts on her Facebook page criticizing the county executive's decision not to seek a renewal of grant funding for a workforce-development program Randall directed.

I filed a lawsuit against Bristol County in US District Court, pursuant to 42 U.S.C. § 1983, alleging that the county had violated Randall's First Amendment rights. Although Randall has already served the suspension, the complaint seeks relief in the form of restoration of her pay and expungement of the suspension from her employment record. A successful suit would help repair Randall's reputation and deter the county from future retaliatory actions.

Both Randall and Marie Cook, the county executive, have been deposed for this case. The facts are undisputed, and the county has conceded that Randall was suspended because of her Facebook posts. I am now drafting a Motion for Summary Judgment.

I need you to prepare the section of the supporting brief that argues that the county violated Randall's First Amendment rights by suspending her. In making the argument that Randall engaged in protected speech, be sure to address all elements of her claim. In addition, you should anticipate and respond to the arguments that the county may make. In drafting your argument, follow the attached guidelines. Do not draft a separate statement of facts but be sure to integrate the facts into your argument.

Law Offices of Michael Carter

OFFICE MEMORANDUM

To: All associates
From: Litigation supervisor
Date: September 5, 2020
Subject: Persuasive briefs

The following guidelines apply to briefs filed in support of motions in trial courts.

I. Captions

[omitted]

II. Statement of Facts

[omitted]

III. Legal Argument

Your legal argument should make your points clearly and succinctly, citing relevant authority for each legal proposition. 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.

Use headings to separate the sections of your argument. Headings should not state abstract conclusions but should integrate the facts into legal propositions to make them more persuasive. An ineffective heading states only: "The underlying facts establish the plaintiff's right to due process." An effective heading states: "Upon admission, the plaintiff acquired a property interest in education, thus entitling the plaintiff to due process prior to dismissal."

You 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.

Do not assume that we will have an opportunity to submit a reply brief. Be sure to anticipate and respond to opposing arguments. Structure your argument in such a way as to highlight your case's strengths and minimize its weaknesses.

Personnel Office of Bristol County
450 Main St.
Derby, Franklin 33201

October 27, 2023

Ms. Olivia Randall
610 Surrey Lane
Derby, Franklin 33203

Sent by certified mail

Dear Ms. Randall:

I have been directed by the County Executive to inform you that you have been suspended without pay for 14 calendar days from your job as Workforce-Readiness Program Director, effective tomorrow. The reason for the suspension is insubordination.

Do not report to work tomorrow and for 13 calendar days following the effective date. Your compensation will be adjusted accordingly.

Sincerely,

Jean Pearsall

Jean Pearsall
Director, Personnel Office

Office of Legal Counsel of Bristol County
450 Main St.
Derby, Franklin 33201

November 4, 2023

Attorney Michael Carter
Law Offices of Michael Carter
1300 W. Cherry St.
Derby, Franklin 33205

RE: Matter of Olivia Randall

Dear Attorney Carter:

I have received your letter on behalf of your client, Olivia Randall, demanding that Bristol County rescind her suspension.

Ms. Randall was suspended because of her Facebook posts. After a careful review of the law, I am convinced that the Facebook posts at issue do not deserve First Amendment protection. I am also convinced that the employer's interest in the efficient operation of county government and good relations among its departments and department personnel is stronger than any interest Ms. Randall may have had in speaking out.

Sincerely,

Susan Burns

Susan Burns, Esq.
Assistant Corporation Counsel

Content of Posts on Olivia Randall's Facebook Page

October 15, 2023. Hey, fellow Bristol County residents! For the past couple of years, the county has had great success in helping citizens who didn't finish school obtain their GED—the equivalent of a high school diploma—and start looking for work, all thanks to a grant from the State of Franklin. Now the county has decided it doesn't want to renew the grant. Bad call!!! If you want the county to renew the state grant, call the county executive, Marie Cook.

October 17, 2023. More information: the county received a "workforce development" grant from the state and, with this grant, created a Workforce-Readiness Program—that I direct—to help Bristol County residents get "job-ready." Thanks to this grant, we helped 40 Bristol County residents get their GED, and I am ready to help even more. It is time to renew the grant for another three years. But for reasons unclear to me, the county decided not to apply to renew the grant. This grant helps people get jobs. The county executive needs to get her priorities straight!

Excerpts from Deposition of Olivia Randall
January 15, 2024

Examination by Bristol County Assistant Corporation Counsel Susan Burns

Q: At the time of your Facebook posts, were you in charge of Bristol County's Workforce-Readiness Program?

A: Yes.

Q: Tell me about the program.

A: This program is funded by a workforce-development grant from the State of Franklin. The county applied for this grant. When we received this three-year grant, I became the director of the program funded by the grant but kept some of my other responsibilities at the library. We used the grant funds to help county residents who did not finish high school prepare to take the GED tests; if they pass, they receive the equivalent of a high school diploma. With a GED, these residents are more likely to get jobs. We are nearing the end of the initial grant. We have helped 40 Bristol County residents earn the GED and attain basic employment skills. Many of these residents are now employed. We were anticipating renewal of the grant for another three years when I received notice from the county that it did not want to renew the grant.

Q: Could you describe your duties as the program's director?

A: Yes. I developed the curriculum and lesson plans for our GED program. I created materials describing the program eligibility requirements. Once the program was up and running, I was responsible for scheduling classes and assessments. I also trained support staff who taught the classes. I created policies and procedures for connecting participants with other county services and resources, such as transportation assistance. And of course, I made sure that all the proper reports were prepared to comply with the grant requirements.

Q: Was posting on Facebook about the Workforce-Readiness Program part of your job duties?

A: No, it was not.

Q: Did you make the Facebook posts dated October 15, 2023, and October 17, 2023?

A: Yes, I did.

Q: Why did you make these Facebook posts?

A: Because I believe that the county should apply to renew the workforce-development grant. We have done a lot of good but could do even more with another three years of funding. I was very disappointed that the county would not seek to renew the grant.

Q: When you posted on Facebook, the postings were public, right?

A: Yes, anyone could read them. I posted them on my personal Facebook page, but Facebook lets you make your posts open to everyone.

Q: Why did you make the posts public?

A: I called the county executive and left numerous messages but got no reply. I assumed she did not want to talk with me. I thought the public should know that the application deadline was about to pass, and this program would end if the county did not apply to renew it.

Q: Is disappointment with seeing your position end the reason you made the Facebook posts?

A: Of course not. This grant is important. Helping people get ready for the GED and get jobs is important.

Q: So when you did not get your messages to the county executive returned, you decided to go public to embarrass the county?

A: I was not trying to embarrass anyone. I was trying to ensure that we renewed this grant.

Q: You are still employed by the county, right? Your job is not threatened?

A: I am still employed. I assume I will receive new duties in the library. But my reputation has been hurt, and I have lost the prestige that goes with directing the Workforce-Readiness Program. Not to mention, I have also lost two weeks' pay. My employment record was excellent. Now it is blemished. It's one thing to see the grant program end. It is another to see my work record and my reputation hurt.

* * * * *

Excerpts from Deposition of Marie Cook, County Executive, Bristol County
January 15, 2024

Examination by Plaintiff's Attorney Michael Carter

Q: Explain your position as county executive.

A: I am charged with operating all county functions. I report to the county board, whose members are elected.

Q: Why did you suspend Olivia Randall for two weeks in October 2023?

A: Because she failed to be a team player, failed to accept decisions made by the county, and failed to show respect for me and the county. In general, she was insubordinate.

Q: How did she fail to be a team player?

A: She failed to accept the county's decision not to seek renewal of the state workforce-development grant, which funded the workforce-readiness program she directed.

Q: Who made the decision not to seek renewal of the grant?

A: I did.

Q: Why did you make that decision?

A: Even though grants bring in money, they cost us money, too: we have to hire and supervise staff, account for the funds, make reports, and so on. And the Workforce-Readiness Program's offices and classrooms were located in the main county library and in two of its branch facilities, taking up space and putting wear and tear on these facilities.

Q: This grant was administered through the library; did the library director want to renew it?

A: Yes. But I make the decisions, not the library director or employees like Ms. Randall. We have a newly elected county board here in Bristol County, and some of the new board members urged me to establish an economic growth office, specifically tasked with promoting economic development. That office would also work on reducing unemployment.

Q: Is that economic growth office in place?

A: We are working on it.

Q: Was the workforce-development grant fulfilling its purpose?

A: I think so. The grant was designed to help residents who didn't have a high school diploma or job skills get better prepared for the workplace. I think a number of people have been helped. But as I said, the county board wants to take a comprehensive approach to improving economic development in the county, and the new economic growth office will address these issues.

Q: Before Ms. Randall's posting on Facebook, did you have any problems with her?

A: No. I did not know her and still don't. She works in the main county library, not in the county office building. The county has a lot of employees—I can't know all of them.

Q: Before deciding not to renew the grant, did you consult Ms. Randall?

A: No.

Q: Are you aware that Ms. Randall sent you several messages by phone, email, and text, and you did not reply?

A: That could be true. I get a lot of messages, and I can't return them all. She should have waited for my office to get back to her. Instead, she goes public and tries to make a big deal out of losing the grant. She did not show respect for me and my decision-making authority.

Q: How did Ms. Randall fail to show respect for you?

A: By complaining and by putting those posts on Facebook and embarrassing me.

Q: How did she embarrass you?

A: By stirring up the public. I had to spend time answering queries about the grant.

Q: How did Ms. Randall embarrass the county?

A: When Ms. Randall made those Facebook posts, she embarrassed us and the county.

Q: Is your only complaint about Ms. Randall that she made two Facebook posts?

A: Yes, and all the trouble they caused.

Q: When you say "trouble," are you referring to the public inquiries about the grant?

A: Yes, and the time I wasted having to deal with the public.

Q: How many public inquiries have you had?

A: Maybe a dozen from the public. Some people called, some texted, a few sent emails. They all wanted to keep the grant.

Q: Were you able to respond to these inquiries and address the concerns?

A: I guess so. When I told these members of the public that we have a new plan to end unemployment, they seemed satisfied.

Q: After Ms. Randall made these posts on Facebook, were there any disruptions or problems in any county office?

A: Not that I know of.

Q: What will Ms. Randall do when the current grant ends?

A: When the grant ends, she will lose her position as director of the Workforce-Readiness Program and return to her old job at the library.

* * * * *

Dunn v. City of Shelton Fire Department
(15th Cir. 2018)

The sole issue on appeal is whether the City of Shelton Fire Department violated the constitutional rights of Kevin Dunn when it disciplined him in response to two social media posts. After the department demoted him from assistant fire chief to firefighter first class, Dunn filed this Section 1983 action, claiming that the department's actions violated his First Amendment right to free speech. The district court granted summary judgment to the department, and Dunn appealed.

The essential facts are undisputed. Dunn was an assistant fire chief in the City of Shelton Fire Department; one of his duties was conducting continuing education training for all fire personnel. In March 2017, Dunn made two posts to a Facebook page that was limited to an audience of first responders in Shelton—members of the fire, police, and paramedics departments in the city. In the first post, Dunn criticized the recently revised qualifications for new firefighters, stating that the fire chief was "pandering to the current generation of softies who have no discipline." Several other fire personnel "liked" this post. Dunn then made a second post, stating that the younger generation "need to toughen up if they plan to succeed in life." After seeing the posts, the fire chief told Dunn to stop posting on Facebook and removed him from the position of assistant fire chief.

A public employee does not surrender all First Amendment rights merely because of the employment status. *Garcetti v. Ceballos*, 547 U.S. 410 (2006). To show that the speech is protected under the First Amendment, a public employee must demonstrate that (1) the employee made the speech as a private citizen, and (2) the speech addressed a matter of public concern.

As to the first requirement, "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes." *Id*. The question is whether the employee made the speech pursuant to his ordinary job duties. *Lane v. Franks*, 573 U.S. 228 (2014).

As to the second requirement, that the speech be on a matter of public concern, the court should consider three things: the speech's content (what the employee was saying); the speech's nature (how the employee spoke and to whom); and the context in which the speech occurred (the employee's motive and the situation surrounding the speech).

If it is determined that the employee spoke as a citizen on a matter of public concern,

the inquiry moves to a balancing test. The court must weigh the interests of the employee in expressing the speech against the employer's interest in promoting effective and efficient public service. In addition, for an employee to prevail, the employee must show that the speech was a motivating factor in the adverse employment action.

Speaking as a citizen. The department, relying on *Garcetti*, argues that Dunn was not speaking as a citizen when he made his Facebook posts. In *Garcetti*, Ceballos, an assistant district attorney, was disciplined when he criticized the legitimacy of a search warrant in a memo advising his supervisor. The Court concluded that Ceballos, in writing the memo, spoke pursuant to his official duties as a prosecutor and not as a citizen. Therefore, Ceballos's speech was not entitled to protection. Similarly, in this case, the department argues that Dunn did not speak as a citizen because he was responsible for consulting with the fire chief and communicating information and updates concerning firefighter qualifications as part of his official continuing education duties, and thus his speech is not protected by the First Amendment.

Dunn argues that his Facebook posts were not made pursuant to his official duties and that his situation is akin to the protected speech in *Pickering v. Bd. of Education*, 391 U.S. 563 (1968). In *Pickering*, a public school teacher wrote letters to the editor that criticized his employer's use of tax revenues. The letters were published in the local newspaper. When *Pickering* was decided in the 1960s, most citizens got their news about local issues from their local newspaper or TV station. Pickering's letter informed residents of the school district about the district's budgeting decisions and financial matters.

In the instant case, we conclude that in his Facebook posts, Dunn spoke not as a citizen but as an employee. As with the prosecutor's speech at issue in *Garcetti*, when Dunn posted about firefighter education requirements in a Facebook page for first responders, Dunn's speech was made pursuant to his employment responsibilities as assistant fire chief, which included consulting with the chief and others on continuing education requirements and issues. *See Morales v. Jones*, 494 F.3d 590 (7th Cir. 2007) (police officer's conversations with prosecutors discussing an arrest were part of the officer's duties).

Addressing a public concern. Because we conclude that Dunn did not speak as a private citizen, our inquiry could end here. However, even if we assume that Dunn spoke as a citizen, his claim would fail because his speech did not address a matter of public concern. This involves an examination of the content, nature, and context of the employee's speech, including his motive and audience. Here the content of Dunn's speech, like his

motive, appears personal—he is not happy with the current generation, whom he calls "softies" who need "to toughen up." He does not explain how the new hiring qualifications affect the public, nor does he offer facts showing how the new standards are lax or will lead to unqualified firefighters, matters that might be of interest to the public. Dunn's comments sound more like those of a disgruntled employee than those alerting the public to a public issue.

Nor were the nature and context of his posts directed to the public. Because of the limits on the Facebook page, the audience for Dunn's posts was his fellow first responders—not the public. In fact, this Facebook page is known among the first responders as a sounding board for gripes and complaints. "Employees who make public statements outside the course of performing their official duties retain some possibility of First Amendment protection because that is the kind of activity engaged in by citizens who do not work for the government." *Garcetti*. Thus in *Pickering*, the teacher's letter to the editor was protected because it had no official significance and bore similarities to letters submitted by numerous citizens every day. But Dunn did not voice his concerns through channels available to citizens generally. His communication was essentially internal and therefore retained no possibility of constitutional protection.

Balancing test. Finally, even if we assumed that Dunn spoke as a citizen on a matter of public concern, the balance of the interests involved favors the fire department. Dunn's interest in speaking freely is outweighed by the department's interest in a team that is unified in firefighting. The department is justified in its concern that Dunn's posts could undermine the teamwork needed for firefighters to work safely.

The district court properly granted summary judgment to the department.

Affirmed.

Smith v. Milton School District
(15th Cir. 2015)

The Milton School District appeals from a summary judgment in favor of Damon Smith, who filed a civil rights complaint under 42 U.S.C. § 1983 alleging that the school district violated his First Amendment rights when it failed to renew his teaching contract because of tweets he posted on Twitter, a social media platform. For the reasons stated below, we affirm.

Smith, a teacher in the Milton School District (MSD), posted several times on Twitter about the nature of state-mandated standardized testing of students and the hours that teachers at his middle school devote to testing and test preparation. Initially, Smith posted to fellow teachers about what he called "crazy time," the weeks spent in the classroom preparing students for the statewide tests.

Later, Smith changed the setting on his account to permit the public to see his tweets. He then made three more tweets, complaining that the state's tests assess only reading, science, and math skills, and do not assess social studies, writing, or critical thinking. His final tweet read: "Parents: I spend three weeks teaching your children how to do well on Franklin's state-mandated standardized tests. Wouldn't you rather I teach them how to think critically, to write intelligently, and to distinguish rumor from fact?" A week later, MSD informed Smith that it would not renew his contract. Up to that point, Smith had always received positive performance reviews.

The school superintendent testified at his deposition that MSD and its teachers, like Smith, have no choice but to follow state requirements. By posting on social media, Smith was inviting parental inquiries for no good reason.

The district court held that Smith spoke as a citizen and not as a public employee in making his social media posts on a matter of public concern, and therefore Smith's rights to freedom of speech were violated by MSD's failure to renew his contract. On appeal, MSD argues that Smith's tweets were not protected speech, that the trial court failed to properly apply the balancing test, and that Smith failed to show that his speech was the motivation for the discipline.

A plaintiff in a public-employee free-speech case bears the burden of proving that his speech is entitled to First Amendment protections. If he meets that burden, the court must balance the interests of the employee and the employer. *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

Speaking as a citizen. Speech is not necessarily made as an employee just because it focuses on a topic related to an employee's workplace. Teaching a lesson in the classroom is part of a teacher's ordinary duties, but posting on a personal social media account typically is not. On these facts, we conclude that Smith spoke as a citizen in alerting the public to his concerns about the mandatory testing.

Addressing a public concern. We also conclude that Smith addressed a matter of public concern. In determining if matters are of public concern, the court must consider the content, nature, and context of the speech. *Garcetti*. The speech at issue focuses on school policies, rather than personal complaints or issues related to Smith's classroom. Matters such as school district finances, public corruption, discrimination, and sexual harassment by public employees have been found to be matters of public concern, and a public employee's speech about these matters is protected. In contrast, complaints about work conditions are not public concerns.

Smith's tweets were not about his employment situation. Rather, they focused on the effect test preparation has on classroom instruction. By using Twitter, a modern-day "public square," Smith could reach parents and others in the community and tell them about the tests' content, the classroom time spent preparing for them, and how this focus on test preparation came at the expense of other subjects.

Moreover, the nature of Smith's speech changed from personal to public when he changed his social media settings from private, which limited his audience to his fellow teachers, to public, which allowed anyone to read his posts. The content of his complaints broadened from being only about the tests themselves to discussing the effect of the mandatory testing on the curriculum—that it took time away from other classroom activities and subjects. Thus, both the content and context of his speech raised a public concern regarding the education of children.

Balancing test. MSD contends that, even if Smith's speech is protected by the First Amendment, a proper balancing supports MSD, which as the employer has the right to promote workplace efficiency and maintain employee discipline. Over time, courts have tended to favor public employers over public employees. *See, e.g., Kurtz v. Orchard Sch. Dist.* (Fr. Ct. App. 2009) (teacher's social media posts that disparaged students eroded trust and were not protected speech). However, the balance tilts in favor of an employee calling attention to an important matter of public concern, such as a school district's budget and use of tax revenue. *Pickering v. Bd. of Education*, 391 U.S. 563 (1968).

Here, Smith did not criticize his coworkers; had he done so, those criticisms might have disturbed the school's morale or efficient operation. Instead, he criticized the state's educational requirements. MSD's primary defense is that it, like Smith, is bound to follow state regulations. MSD did not present any evidence that Smith's tweets had an effect on staff morale or that they created issues between Smith and the school's administration. While the superintendent may have been annoyed by Smith's tweets, annoyance is not enough to favor the employer. Almost all public speech criticizing the government will incur some annoyance or embarrassment. We agree with the district court that the balance favors Smith; his interest in speech outweighs MSD's interest in an efficient operation.

Motivating factor. Finally, Smith has shown that his speech was the motivating factor in the decision not to renew his contract. It was undisputed that his past performance reviews were positive. The superintendent testified that Smith's tweets annoyed the school board. Thus, the superintendent's testimony supplies the nexus between Smith's speech and MSD's decision not to renew Smith's contract.

Affirmed.

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