

**Employment Law:  
New Challenges In The Business Environment  
Sixth Edition**

**Instructor's Manual**

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*To Mom and Johnny*

## **Preface**

Employment law is an emerging area, the study of which is useful to managers and employees. Some of the Employment Law topics lend themselves to stimulating discussions. It is an emotionally charged energetic field of study that can be taught at several different levels. Through the course of an academic year, I teach Employment Law on the undergraduate level, in the MBA program and in the Executive MBA program. Each level gives me the opportunity to present the material with a different perspective.

I invite your comments and criticisms. They can be addressed to me at [jmoran@wagner.edu](mailto:jmoran@wagner.edu) or Wagner College, Department of Business, One Campus Road, Staten Island, New York 10301. Alternatively, you can call me at (718) 390-3255.

JJ Moran

## **PART I—Employment Relationship and Procedure**

### **CHAPTER 1 Employment Relationship**

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#### **SCENARIO ANSWERS**

1. Employment Scenario #1 is an introduction.
2. Susan ponders the information given and suggests that Martha, Stephanie, and Lucy would all appear to be independent contractors. They set their own hours, control how the work is to be performed, and will be held liable if the work is not done properly. Martha, Stephanie, and Lucy have a significant investment in their own materials, to wit: sewing machine, computer, and cleaning apparatus, respectively. They can employ others to assist them in conducting their business. Although their work is important, the store will not fail without them. An argument can be presented that each worker exhibits some traits of being an employee, because the employer designates where the work is to be performed, as with Martha and Lucy, and have control over the compensation for Stephanie's consulting services. However, these traits pale in comparison, both in number and significance, to those traits of an independent contractor, which they exhibit. Long and Short graciously thank Susan for elucidating the difference between an employee and independent contractor. L&S promises Susan that it will implement her advice.
3. Susan cautions that the result might be to depress the morale of the sales staff because the covenant evidences a lack of trust in them. The restriction may also force them to refuse the job. The salespeople may consider that if they are unhappy working for L&S, their freedom to work elsewhere will be restricted. L&S counters with a compromise that restricts the salespeople from establishing their own large, tall, or short men's clothing store or working for another clothing establishment that specializes in this line of work. Susan agrees to draft a "noncompete" agreement, which integrates these stipulations.
4. Susan states that liability is determined by whether the tort was committed within the scope of employment, or in other words, "on the job." Susan tells L&S that Grant should have requested the customer to leave the store and to escort him out in the process. L&S will be liable to Fred for the injuries he received.

The word employment may be defined as the rendering of personal service by one person on behalf of another in return for compensation. The person requesting the service is the employer. The person performing the service may be either the employee or an independent contractor. Employment law has its roots in the law of agency.

Agency is a contractual relationship, involving an agent and a principal, in which the agent is given the authority to represent the principal in dealings with third parties. The most common example is an employer-employee relationship wherein an agent (employee) is given the power by a principal (employer) to act on his or her behalf. An agent may be an employee or an independent contractor. A principal is a person who employs an agent to act on his or her behalf.

A principal (employer) has full control over his or her employee. The employee must complete the work assigned by following the instructions of the employer. An independent contractor is an individual hired by an employer to perform a specific task. The employer has no control over the methods used by the independent contractor. The following are among those who act independently of an employer: electricians, carpenters, plumbers, television repairpersons, and automobile mechanics. Independent contractors also include professional agents such as lawyers, physicians, accountants, securities brokers, insurance brokers, real estate brokers, and investment advisors. Independent contractors may also employ others in their field who will be bound to them as employees.

Employment is a contractual relationship wherein the employee or independent contractor is given authority to act on behalf of the employer. All the requirements of contract law are applicable to the creation of employment. Both the employer and the employee or independent contractor must have the capacity to contract.

An employment contract may be created expressly, through a written or a verbal conversation, or impliedly, through the actions of the parties. However, when the employee's or independent contractor's duties involve entering into a contract on behalf of the employer, which is required to be in writing under the statute of frauds, then the employment contract must also be in writing. The statute of frauds is a list of those contracts required to be in writing.

## **TYPES OF AUTHORITY**

### **Actual Authority**

The employer usually determines the scope of an employee's authority. Actual authority is the express authority conveyed by the employer to the employee, which also includes the implied authority to do whatever is reasonably necessary to complete the task. This implied authority also gives the employee power to act in an emergency. Implied authority is authority, which the employer has given to the employee. It comes with the job.

### **Apparent Authority**

Apparent authority is the authority the employee professes to have which induces a reasonable person to believe in the employee. The reliance on apparent authority must be justifiable. With apparent authority, the employee appears to have the authority to act, but he or she actually does not.

## **DUTIES OF EMPLOYEES AND INDEPENDENT CONTRACTORS**

### **Duty of Loyalty**

The relationship between employers and employees or independent contractors is a fiduciary one, based on trust and confidence. Inherent in this relationship is the employee's or independent contractor's duty of loyalty. An employee has a duty to inform, to obey instructions, and to protect confidential information. An employee or independent contractor has a duty to disclose all

pertinent information he or she learns of that will affect the employer, the employer's business, or the task at hand. An employee or independent contractor must not take advantage of the employer's prospective business opportunities or enter into the contracts on behalf of the employer for personal aggrandizement without the employer's knowledge. An employee, and in some cases an independent contractor (lawyer, investment banker, sports-team scout), may not work for two employers who have competing interests.

### **Duty to Act in Good Faith**

An employee or independent contractor has an obligation to perform all duties in good faith. He or she must carry out the task assigned by using reasonable skill and care. The employee or independent contractor has a further duty to follow the employer's instructions and not to exceed the authority delegated to him or her.

### **Duty to Account**

An employee or independent contractor has a duty to account for all compensations received, including kickbacks. Upon the employer's request, an employee or independent contractor must make a full disclosure, known as an accounting, of all receipts and expenditures. The employee or independent contractor must not commingle funds, but rather must keep the employer's funds in an account separate from his or her own. Furthermore, an employee or independent contractor must not use the employer's funds for his or her own purposes.

## **EMPLOYER'S DUTIES**

### **Duty to Compensate**

An employer has the duty to compensate the employee or independent contractor for the work performed. An employee or independent contractor will be entitled to the amount agreed upon in the contract; otherwise, he or she will be entitled to the reasonable value of the services rendered. Sales representatives are usually paid according to a commission-based pay structure, which incorporates a minimum level of compensation against which the sales representatives are entitled to draw. An employer must also reimburse an employee for the expenses incurred by the employee during the course of conducting the employer's business. For tax purposes, an employer has a duty to keep a record of the compensation earned by an employee and the reimbursements made for expenditures. Employers are required to withhold payroll taxes from employees' paychecks. This is not so with fees paid to independent contractors.

### **Duty to Maintain Safe Working Conditions**

The maintenance of safe working conditions is another obligation placed on the employer. Any tools or equipment furnished to the employee must be in proper working order; otherwise, the employer may be liable for the harm resulting to an employee under the Occupational Safety and Health Act.

An employer's liability is not always based on strict liability and is therefore not always absolute. There are circumstances where an employee's own negligence will bar recovery.

## **NONCOMPETE AGREEMENTS**

A noncompete agreement is a contract wherein the employer provides employment or a severance package (in the case where the noncompete agreement is entered into upon termination) in return for the employee's promise not to work for a competitor or open a competing business within the geographic area in which the employer transacts business for a reasonable length of time. A noncompete agreement may be a separate document or it may be a clause or covenant contained in an employment contract. The latter is often identified as a noncompete clause, restrictive covenant, or covenant not to compete. Enforcement of these deprives the employee of being able to work in his or her area of expertise. Courts will restrict the employee only when the employer has established harm to its business. The limitations set forth in the contract must be reasonable. The courts will not enforce restrictions upon employees that are unduly harsh and permit employers to derive more protection than that necessary to guard their secrets or to protect their business interests.

In most states, noncompete agreements are enforceable within the confines set forth above. Some states place restrictions on them. In California, noncompete agreements are restricted to the sale of a business and cannot be used in employment.

## **NONDISCLOSURE AGREEMENTS**

An employee's sale or use of trade secrets, confidential information, and/or a work in progress, which has commercial value or will result in harm to the employer, may be restricted through a nondisclosure agreement. Courts will enjoin an employee where the employer is protecting its legitimate business interests. The Uniform Trade Secrets Act provides guidelines for employers in those states that have ratified it.

Noncompete and nondisclosure agreements are often used in high-tech industries, in product development, or in sales and financial services where employees have proprietary information or access to customer lists. Under the inevitable disclosure doctrine, employees may be restricted even where they have not signed a noncompete and/or a nondisclosure document under the theory that it is inevitable that the employees will use the information gleaned from their employer to benefit themselves or a competitor. This doctrine is predominantly applicable to intellectual property.

### **Sample Noncompete and Nondisclosure Agreement**

Employee agrees that during a one-year period following the termination of employment with X Corp., employee agrees to refrain from the following:

- 1) Conduct business, which would place employee in competition with X Corp.
- 2) Work for an employer who is in competition with X Corp.
- 3) Entice coworkers and/or customers to cease their relationship with X Corp.

4) Disclosing to a competitor of X Corp. any confidential information belonging or pertaining to X Corp.

**Case 1.1 Boston Scientific Corporation v. Mikelles Mabey  
2011 U.S. App. LEXIS 22106 (10th Circuit)**

**Facts:** In 2009, after Mabey had worked for Boston Scientific for three years, the company asked her to sign a noncompete agreement. If she signed, she would remain eligible for her quarterly bonus under a program substantially identical to the 2008 program. If she did not sign, Boston Scientific would reduce her bonus eligibility by \$1,000 for each of the final three quarters of 2009; however, she would remain employed at-will and would continue to receive the same base salary. Mabey signed the agreement on March 2, 2009. As a result, she earned \$3,000 more in bonus pay than if she had not signed the agreement.

In May 2010, Mabey left Boston Scientific to work for its competitor, St. Jude. Boston Scientific filed suit in Utah federal district court to enforce the non-compete agreement.

**Issue:** The issue in this case is whether the noncompete agreement was unenforceable due to a lack of consideration.

**Decision:** Judgment for Boston Scientific.

**Reasoning:** In exchange for signing the noncompete, Mabey received a benefit to which, as an at-will employee, she had no legal right. This was sufficient to form a valid agreement. The judgment of the district court is REVERSED and the case is REMANDED for reconsideration consistent with this order and judgment. The 10th Circuit ruled that the compensation given to the employee for signing the noncompete agreement was valuable consideration.

**Case 1.2 Dawn Renae Diaz v. Jose Carcamo  
253 P.3d 535 (Cal. 2011)**

**Facts:** Plaintiff Dawn Renae Diaz was driving south on U.S. Highway 101 near Camarillo, Ventura County. Defendant Jose Carcamo, a truck driver for defendant Sugar Transport of the Northwest, LLC, was driving north in the center of three lanes. Defendant Karen Tagliaferri, driving in the center lane behind Carcamo, moved to the left lane to pass him. As Tagliaferri, without signaling, pulled back into the center lane, her vehicle hit Carcamo's truck, spun, flew over the divider, and hit plaintiff's SUV. Plaintiff sustained severe, permanent injuries. Plaintiff sued Tagliaferri, Carcamo, and Sugar Transport. She alleged that Carcamo and Tagliaferri had driven negligently and that Sugar Transport was both vicariously liable for employee Carcamo's negligent driving and directly liable for its own negligence in hiring and retaining him. In their answer, Carcamo and Sugar Transport denied any negligence.

**Issue:** The issue is whether an employer is liable for injuries sustained by another, as a result of the negligent driving of its employee.

**Decision:** Judgment for Carcamo.

**Reasoning:** The California Supreme Court ruled that an employer will be liable for injuries sustained by individuals that occur because of the negligent driving of one of its employees.

**Case 1.3 Schultz v. Capital International Security, Inc.  
460 F.3d 595 (4th Cir. 2006)**

**Facts:** The plaintiff-agents provided security services for the Prince and his family at the Prince's Virginia residence in twelve-hour shifts. The agents were paid a daily rate for each shift; they received no extra pay for overtime. The agents had a command post at the residence, from which they observed security camera monitors, answered the telephone, and kept a daily log of all arrivals and departures. They also made hourly walks of the property, ensured that members of the Prince's family were safe when departing and arriving, sorted mail, and performed various tasks upon request of the Prince's family. In addition to their security duties, the agents were responsible for having the household's vehicles washed and fueled, making wake-up calls, moving furniture, and doing research on the Internet.

The Prince's long-time driver and travel agent, Sammy Hebri, formed a company called Capital International Security, Inc. (CIS). Hebri started CIS for the purpose of replacing FAM as the Prince's security contractor.

Hebri sent a memo (dated July 24, 2002) to the agents directing them to obtain their own private security business licenses from the VDCJS and individual liability insurance so they could be classified as independent contractors.

**Issue:** The issue is whether the bodyguards were considered to be employees or independent contractors for the purpose of the Fair Labor Standards Act.

**Decision:** Judgment for Schultz.

**Reasoning:** The five plaintiff-agents were employees under the FLSA. Because defendant CIS was one of their joint employers along with the Prince, CIS is jointly and severally liable for the payment of any overtime required by the FLSA during the agents' employment.

The Fourth Circuit applied the Silk test to determine the employment status of the Prince's bodyguards. It reasoned that most of the factors pointed to the conclusion that the bodyguards were not acting independently, but rather were employees entitled to the protection of the FLSA.



**Case 1.4 Carco Group, Inc. v. Drew Maconachy**  
**644 F. Supp. 2d 218; 2009 U.S. Dist. LEXIS 33585 (NY Eastern District)**

**Facts:** Maconachy and Murphy are long time friends and former FBI agents with investigative experience. They founded *Murphy and Maconachy (MMI)*, a security-consulting firm, which was then acquired by Carco. In 1998, MMI hired Merrill Lynch to assess the fair market value. ML then projected increased annual revenue of 5%, which was heavily dependent on Maconachy and Murphy. In 2000, Carco acquired MMI for \$7.2 million, with \$2 million up front and the remaining to be paid in 32 equal payments over the next 8 years. Both Maconachy and Murphy were named to executive levels. At the time of the acquisition, Carco had Maconachy sign an employment agreement which stated “render exclusive and full-time services in such capacities and perform such duties as the Members of the Company may assign, in accordance with such standards of professionalism and competence as are customary in the industry of which the Company is a part.” The EA further provided: “If the Employee is convicted of any crime or offense, is guilty of gross misconduct or fraud, or materially breaches material affirmative or negative covenants or agreements hereunder, the Company may, at any time, by written notice to the Employee, terminate this Employment Agreement, and the Employee shall have no right to receive any Annual Salary, Incentive Compensation, or other compensation or benefits under this Employment Agreement on and after the effective date of such notice.” After just a few months, Chase Bank realized that MMI revenues were far below ML’s projections of roughly \$3.5 million. As of October 31, 2000, MMI had incurred losses of \$1.3 million for the year. A meeting took place on November 17, 2000 to discuss this loss and what needed to be done to turn the business around. O’Neill, Maconachy, Murphy, and Giordano all attended the meeting and came up with a plan of 20 sales meetings a week and cut costs in order to make this work. Maconachy did not like to be considered a “salesman”, but sent in his plan for his division to increase revenues. In May 2002, Slattery directed Maconachy to terminate his wife because he had refused to reduce her hours as directed by O’Neill. Maconachy then terminated his wife with the intention to restore Colleen to the payroll the following year when he could slip her under the nose of his bosses.

**Issue:** The issue is whether Maconachy breached his contract with Carco along with his duty of loyalty and duty to act in good faith.

**Decision:** The U.S. District Court, Eastern District, decided that Maconachy had breached his contract with Carco along with his fiduciary duties. The Court awarded Carco \$889,711.

**Reasoning:** Maconachy was found on numerous occasions to be insubordinate of the orders of his bosses and refused to follow through with firing his wife and Brendan Kertin. Maconachy also hired a direct competitor to Carco to conduct background checks. In another instance, Maconachy had his assistant remove Kertin’s name from all weekly reports. In late October 2005, Carco found a discrepancy with the weekly reports and found that Kertin’s name had been removed to show that he no longer worked there. On December 28, 2005, Maconachy was fired for insubordination, poor performance, and falsification of business records. Maconachy’s insubordination was described as his failure to follow corporate directives and his failure to follow company policy with respect to employment of family members.

**Case 1.5 Herrmann v. Gutterguard Inc.**

**2006 U.S. App. LEXIS 23361 (11th Cir.)**

**Facts:** During the time that Kaspers was a member of the law firm of Fisher & Phillips' (F&P) Team One, Jennifer B. Sandberg, an associate on the team, was working on a compliance audit and employment law review for Dixie HomeCrafters, a Georgia home improvement company, and its affiliated companies. One of those affiliated companies was Gutterguard Inc., a gutter fabrication and installation business, which had recently been incorporated and also had the same ownership and management as Dixie HomeCrafters. On February 7 and 28, 2000, Sandberg visited Dixie HomeCrafters' facilities and spoke with the officers and managers. Neither Sandberg nor Brannen remembered whether Kaspers was in attendance at any of the meetings during which Dixie HomeCrafters was discussed.

During the week of January 19, 2004, George Herrmann, a crew chief for Gutterguard, called a number of law firms to discuss a dispute he had with his employer about overtime pay. Kaspers & Associates was the first firm to take an interest in Herrmann's problem. Herrmann spoke with a paralegal and told him the basic facts, including the name of his employer, and the paralegal relayed this information to Kaspers. At some point during the next week or so, Kaspers visited Gutterguard's website and learned that the company was affiliated with Dixie HomeCrafters. Kaspers insists that at that time, he still did not know that Dixie HomeCrafters had ever been a client of F&P.

On April 21, 2004, Dixie HomeCrafters and Gutterguard sent a letter to Kaspers demanding that he withdraw because he was violating Rules 1.9 and 1.10 of the Georgia Rules of Professional Conduct. Kaspers responded that he had acquired no protected information regarding the defendants' or F&P's representation of them, as a result of his former association with F&P.

**Issue:** The issue is whether the plaintiff's attorney has a conflict of interest that will impede his duty to act in good faith.

**Decision:** Judgment for Gutterguard.

**Reasoning:** The information Kaspers acquired during F&P's representation of Dixie HomeCrafters was material because it has a bearing on what Dixie HomeCrafters and Gutterguard knew about wage and hour law. The district court did not err in determining that the information Kaspers acquired was material. In sum, the defendants adequately proved the substantial relationship, confidentiality, and materiality components of Kaspers' Rule 1.9(b) violation.

**Case 1.6 DCS Sanitation Management v. Castillo**  
**435 F.3d 892; 2006 U.S. App. LEXIS 1758 (8th Cir.)**

**Facts:** As a condition of employment with DCS, each of the former employees signed identical employment agreements (Agreements) with DCS. The Agreements contained the following noncompete provision: NONCOMPETITION AFTER TERMINATION: For a period of one (1) year following the date of termination of employment for any reason, I will not directly or indirectly engage in, or in any manner be concerned with or employed by any person, firm, or corporation in competition with [DCS] or engaged in providing contract cleaning services within a radius of one-hundred (100) miles of any customer of [DCS] or with any customer or client of [DCS] or any entity or enterprise having business dealings with [DCS] which is then providing its own cleaning services in-house or which requests my assistance or knowledge of contract cleaning services to provide its own cleaning services in-house.

**Issue:** The issue is whether the geographic restriction in the noncompete clause is too broad.

**Decision:** Judgment for Castillo.

**Reasoning:** The Eighth Circuit concluded the district court properly held the noncompete agreements were overbroad and unenforceable. The district court recognized that the noncompete agreements prohibit the former employees from, directly or indirectly, being concerned in any manner with any company in competition with DCS, and from providing contract cleaning services within one hundred miles of any entity or enterprise “having business dealings” with DCS, including attorneys, accountants, delivery services, and the like. The breadth of the noncompete agreements effectively put the former employees out of the cleaning business within an extensive region.

**Case 1.7 Caring Hearts Personal Home Services, Inc., v. Hobley**  
**130 P.3d 1215 (Kan. Ct. of App)**

**Facts:** Hobley and Hardy chose to work for Caring Hearts as independent contractors as opposed to employees.

As a condition of working for Caring Hearts, Hobley and Hardy also signed noncompetition agreements which bar them, for a period of 2 years after leaving Caring Hearts, from treating patients they treated during the time they contracted with Caring Hearts. The agreement also contained a 100-mile radius restriction, which is of no moment in this appeal since it was not considered by the district court when it enjoined the competitive activities of Hobley and Hardy.

In December 2003, Hobley and Hardy expressed concerns about whether the patient referral fees violated federal Medicare laws and regulations. They also questioned whether their independent contractor status violated Medicare regulations. When the issues were not resolved to their satisfaction, they terminated their contracts with Caring Hearts in July 2004 and began working for another home health care agency called MPSS, where they continued to treat patients they had

treated while under contract with Caring Hearts. Caring Hearts brought this action to enjoin them from this.

**Issue:** The issue is whether an employer can enforce a noncompete agreement against an independent contractor.

**Decision:** Judgment for Caring Hearts.

**Reasoning:** The noncompetition agreements do not extend only to patients referred to Caring Hearts by Hobley and Hardy, but to all Caring Hearts' patients they cared for during the course of their relationship with Caring Hearts. This attack on the viability of the noncompete agreements based upon claims of illegal kickbacks fails. What troubled them was the label on their relationship with Caring Hearts, regardless of how that relationship played out in their daily contact with patients. Their argument is one of form over substance. The home health services they provided were properly supervised in accordance with Medicare standards.

**Case 1.8 Jamie Evans v. Washington Center for Internships and Academic Seminars  
587 F. Supp. 2d 148; 2008 U.S. Dist. LEXIS 94260 (District of Columbia)**

**Facts:** Plaintiff worked as an unpaid intern in the summer of 2007 at a health practice in Washington, D.C. She has now filed suit alleging that one of her supervisors, Steven Kulawy, committed the tort of battery and sexual harassment in violation of the District of Columbia Human Rights Act. In addition, she has sued the Washington Center for Internships and Academic Seminars for negligently placing her with Dr. Kulawy without adequately investigating his past. Also, she has sued Physical Medicine Associates LLC. Plaintiff claims that Dr. Kulawy engaged in inappropriate and offensive behavior during her internship by making advances towards her, commenting on her appearance, massaging her shoulders, and wrapping his arm around her waist. She did not report this behavior to anyone until mid- July 2007, when she talked to a TWC employee who was conducting a site visit. As a result, on the recommendation of TWC, plaintiff stopped her internship at CIBT/PMA. Plaintiff claims that this experience forced her to change her career plans and has caused emotional and physical distress. To establish liability for the tort of battery in the District of Columbia, a plaintiff must plead and establish that the defendant caused 'an intentional, unpermitted, harmful, or offensive contact with his person or something attached to it. Plaintiff 's complaint incorporates all of these elements, as she alleges "Dr. Kulawy intentionally touched [her] in an offensive manner each time he came up behind her and massaged her shoulders while she was typing or filing and each time he put his arm around her waist." Defendants argue that the contact was not "unpermitted," because plaintiff failed to object to Dr. Kulawy's touching until her last day at work. However, whether plaintiff consented to Dr. Kulawy's physical contact is a question of fact. Likewise, defendants' argument that the contact could not possibly be construed as harmful or offensive is also a factual question. Accordingly, the battery count states a claim upon which relief can be granted.

**Issue:** The issue is whether an internship placement program can be held liable for battery for placing an intern with a physician who touches her in an inappropriate manner.

**Decision:** Judgment for the plaintiff on some not all charges.

**Reasoning:** Defendants first argue that they are not liable because plaintiff was contributorily negligent for failing to notify them about Dr. Kulawy's behavior. However, as defendants acknowledge, "[only] in the exceptional case is evidence so clear and unambiguous that contributory negligence should be found as a matter of law." Defendants have failed to show that this is one of those exceptional cases. Defendants cite several cases that find that a plaintiff is contributorily negligent when she repeatedly or continuously exposes herself to a known hazard. However, none of these cases is remotely similar to this case. Accordingly, the Court cannot find that plaintiff was contributorily negligent as a matter of law. Defendants suggest that Storck cannot be held personally liable because he was not actively participating in the tortious activity. However, defendants' attempt to differentiate between "nonfeasance" and "malfeasance" is without legal support. A corporate officer need not have been actively involved in the tortious activity; he can be liable for merely failing to act. Finally, defendants argue correctly that CIBT cannot be sued because it is merely a trade name and not a legal entity.

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## REVIEW ANSWERS

1. These terms are defined in this chapter.
2. Express authority is given through written or verbal communication. Implied authority is assumed through the nature of the job or the actions of the parties.
3. Apparent authority is the authority the employee professes to have that induces a reasonable person to believe in him or her.
4. An employee's duty of loyalty encompasses the obligation of the employee to disclose all pertinent information he or she learns that will affect the employer, his or her business, or the task at hand. An employee must take advantage of the employer's prospective business opportunities.

An employee has a duty to perform all of his or her duties in good faith by using reasonable care and skill.

An employee or independent contractor has a duty to account for all compensations received. An example is on page 8 of the text.

5. An employer has the duty to compensate the employee or independent contractor for the work performed.

Any tools or equipment furnished to the employee must be in proper working order.

6. The employee must complete the work assigned by following the instructions of the employer. An independent contractor is an individual hired by an employer to perform a specific task.

7. The employment relationship is a fiduciary one because it is based on trust and confidence.
8. A restrictive covenant will be enforced only when the employee's knowledge of trade secrets or the future of the business is at issue.
9. An employer is contractually liable to a third party when the employee or independent contractor acted with actual authority, either express or implied, or with apparent authority.
10. An employer is liable for any tort committed by its employee if the tort is committed within the scope of employment. A tort is a private civil wrong. Fraud, misrepresentation, and negligence are examples.

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## CASE PROBLEMS

1. Judgment for Leonhardt in part and A Place for Mom in part.

**Reasoning:** The Court will not grant the sweeping injunction sought by plaintiff. Defendant will, however, be enjoined from initiating contact with any individuals or institutions with whom he developed a business relationship while working for. This prohibition does not extend to contacts which defendant does not initiate; i.e., if he receives an unsolicited contact from such a party, he is not prohibited from entering into discussions with them.

Defendant will also be required to create and maintain business records which track his individual clients, his referral sources, the elder care facilities with which he makes placements, and the income which his referrals generate for his business. Those records will be produced for inspection upon satisfactory proof by plaintiff that defendant is violating any of the terms of this preliminary injunction.

Plaintiff shall post a minimal bond of \$10,000 with the Clerk of the Court, which shall stand as security against any possible damages arising out of the issuance of this injunction during the pendency of the litigation.

2. Judgment for Carcaise.

**Reasoning:** Here, Cemix "anticipated the need for some specific precaution," with regard to the risk of substrata pockets of water. Moreover, Cemix knew that "the particular method... [Minserco would] adopt" involved maintaining a high degree of proximity to the spoil side edge absent warning of substrata instability. Therefore, a heightened risk that the Dragline would tumble into the spoil pit was one Cemix should have "recognized as likely to arise" where Cemix failed to assure the terrain was stable at a dragline site and failed to warn Minserco that said terrain remained untested.

3. Judgment for Summers. We conclude that an application of the Spirides test, however ill suited to an analysis of whether an employee of an independent contractor is also an employee of the contractor's client, suggests that Redd is not an employee of the Bureau.

4. Judgment for U.S. Karagiorgis was not working the entire time he was in Hawaii, and was, in fact, off-duty when the accident occurred. He was not engaged in any errand for his employer, but was leaving work and free to do whatever he wished. The fact that the United States reimbursed the cost of his rental car is more indicative of the inconvenience of working on an island in the middle of the Pacific Ocean (which makes it difficult for a temporary employee to bring his own car to work) than an indication that the employer considered all actions taken while driving that car to be within the scope of employment. The United States derived no benefit from Karagiorgis' activities once he stopped working on the U.S.S. Los Angeles and left for the day, any more than it does when any other employee departs for the evening. (Test is whether conduct was related to employment or if enterprise derived benefit from the activity.) Accordingly, Karagiorgis was not acting within the scope of his employment under Hawaii law.

5. Judgment for Warren. Under Mississippi law, an agent for a disclosed principal can be held personally liable for his own tortious acts committed within the scope of his employment, and a tort claim can be maintained against that agent.

6. Judgment for Express Sixty-Minute Delivery Service Inc. The District Court concluded that no violation of FLSA occurred because the courier delivery drivers were independent contractors. The investigation focused on five factors and determined whether or not the persons were considered as employees or independent contractors. The first is being the degree of control they possess. Express had minimal control over its drivers compared to the workers it considered to be employees. This is in favor of independent contractor status. Next is the relative investment of the worker, meaning how much the worker invested into the company. This weighs in favor of employee status. Third was the degree to which employee's opportunity for profit and loss is determined by the alleged employee. They found that drivers were compensated using commission and was in favor of being an independent contractor. Fourth was the skill and initiative required, which was in favor of employee status. And finally, the permanency of the relationship was in favor of being independent contractors. Therefore, the court ruled the drivers were independent contractors.

7. Judgment for Franco. The conclusion that GPS has no present interest in restricting Dr. Franco's employment is inescapable. The physicians who are affiliated with GPS chose to practice medicine under corporate form and they must live with the consequences of their choice. "Combining" rather than merging with WMG may be the way that GPS found to "expand" its practice into Connecticut, but that combination came with a cost--the cost of losing the benefit of the restrictive covenant barring Dr. Franco from practicing at Greenwich Hospital. Indeed, had this Court been confronted with the facts now before it two years ago, no injunction would have issued.

8. Judgment for Managed Health Care Assoc. Here, Kethan was an at-will employee who was free to resign at any time. Consequently, the noncompetition clause does not require any affirmative action on the part of Kethan, and is thus assignable.

9. Judgment for Robinson. When a term is ambiguous, it is within the court's discretion to clarify its meaning. In this case, the Supreme Court of the United States ruled that the term "employee" includes former employees. Thus, Charles Robinson can proceed with his case for retaliatory discrimination against Shell Oil in the District Court.

10. The judgment was for Guidry. The trial judge ruled that the appellant could not show that his damages were proximately caused by appellee's failure to properly train Jones or investigate his background. A careful reading of the court's comments reveals that this ruling was also based upon the federal court's finding that Jones's actions were reasonable. In light of the holding, this part summary judgment must also be reversed because the state trial court should not decide the issue of tortious conduct based on a federal court's reasoning, which was predicated on whether Jones had a qualified immunity.

11. Judgment for WMATA concerning negligent hiring. Decisions concerning the hiring, training, and supervising of WMATA employees are discretionary in nature, and thus immune from judicial review. These functions are choices susceptible to policy judgment and they involve employee privacy rights, the need to ensure public safety, and other decisions involving the exercise of political, social, or economic judgment. Therefore, it is concluded that these functions are governmental and immune from suit for negligence in performing them, according to the WMATA Compact.

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## **HUMAN RESOURCE ANSWERS**

1. The test outlined in the *Herman v. Express Delivery Service* case would seem to support Pharmedix's argument that the workers are independent contractors.

2. In most states, the noncompete clause will be enforced if the employer can show it will suffer from the employee's competition. California is a notable exception, in that it will not enforce noncompete clauses.

3. Bright Light will be liable since Melinda was in a company vehicle. Bright Light may implead the negligent driver who sideswiped its vehicle if he or she can be located. Although Todd acted outside the scope of his employment, Bright Light's argument to this effect will probably not hold up because Todd willingly gave her a ride.

4. If Soho Express had no prior knowledge of violent behavior by Bruce, if it had security precautions to screen visitors, and if Bruce did not exhibit any anger or threatening behavior when leaving, then the injured employees will receive only workers' compensation and medical benefits.

5. Mighty Motors is liable for the fraud perpetrated by its sales agent, Roy.

## **CHAPTER 2**

### **Selection**

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## **SCENARIO ANSWERS**



1. Susan replied, "I am sorry to disappoint you, but you are disillusioned in believing your actions are vindicated. First, asking a woman about having small children presupposes that she has not arranged for their care and will not be committed to her job. Believing that the mother will leave work every time her children are sick, lonely, or in trouble is an outdated stereotype. Day care centers house most children of working mothers. The centers are well equipped to handle children and the problems that confront them." Susan cautions "questioning Martha in this manner amounts to sex discrimination in violation with the Civil Rights Act if she was not hired and if there were fifteen or more employees in their business."

Second, Susan states, "asking Lucy about what country she is from is tantamount to national origin discrimination. Acting in a discriminatory manner is not an intelligent way to enhance the reputation of your business." The question is not job related; therefore, it serves no purpose other than to satisfy Mark's curiosity. Although many people have trouble distinguishing among various ethnic backgrounds, making inquiries regarding such matters is not appropriate in a job interview.

Third, even though the Civil Rights Act has not been extended to protect homosexuals from employment discrimination, they may be covered under individual state or local statutes. Furthermore, the gay and lesbian lobby is a powerful foe once antagonized. Presupposing Bruce is gay may have dire consequences, because if he is not, their statement to that effect may be defamatory.

Fourth, denying a woman a sales position in a men's clothing store is not justified as a bona fide occupational qualification. Women are potentially as knowledgeable about men's fashion as men. This is another example of sex discrimination. However, the fifteen-employee requirement of the Civil Rights Act will preclude Mildred from pursuing her legal cause of action in federal court. In the future, Tom and Mark should guard themselves against repeating these mistakes and should judge candidates based on their job qualifications. For some employers, deleting all personal questions renders the job interview sterile. Susan pontificates, although that may be true, "it is better to err on the side of caution."

2. Susan pleaded with Tom and Mark to seek her counsel before making such rash judgments and explained that prior convictions related to the job at hand are the only ones that need be revealed. In this case, one's prior convictions for arson, burglary, larceny, robbery, and receipt of stolen goods would be appropriate questions to pose. Susan continued to say that refusal of employment to a person of a class is protected under Title VII of the Civil Rights Act based on an unrelated conviction could be considered discriminatory. In this case, it could constitute as race discrimination.

3. Susan sanctions their plan as a sound idea for a small company, but she cautions that as L&S grows, this plan may have a disparate impact against certain classes of people. At that time, L&S should consider advertising to create a pool of candidates from diverse backgrounds. Tom retorts that that is exactly what he wants to guard against. Susan rebukes Tom, stating that L&S can forestall the inevitable for a while, but eventually L&S may be confronted with litigation. She advises Tom to get "with it" by adopting an open-minded attitude.

4. Susan defended L&S. On its behalf, she claimed that Dan's theft occurred outside the scope of employment. She admonished Tom and Mark that this defense was weak due to the negligent hire

of Dan, who they knew had a propensity to steal based on his prior conviction of larceny. After losing the case and paying damages, Tom and Mark resolved to consult Susan when a potential candidate has a prior conviction.

## **Discrimination in Selection**

The purpose of recruitment and selection is to obtain the best possible workers for a business. Discrimination is permissible because employers can discriminate among candidates based on interpersonal relations, communication skills, training, and education. It is not permissible because of suspect classifications such as race, religion, gender, and national origin. Because employees are valuable assets to a business, employers must be able to choose those employees who will perform the best work for the business. Education, training, communication skills, and interpersonal relations are key qualities that employees must possess to help a business be more successful.

The easiest way to discriminate against individuals is to do so in the recruitment and selection process. Employers may use a myriad of methods to evaluate an individual and his or her particular traits. Testing, interviews, writing samples, demonstrations, and role-playing are a few examples. If these methods are job-related, then the employer has every right to use them. What an employer may not do is discourage potential candidates who belong to a particular suspect classification as defined by Title VII of the Civil Rights Act, Age Discrimination in Employment resumes Act, and the American Disabilities Act.

## **Selection Process**

The selection process must be free of discrimination. Great care must be taken to ensure that statements, overtures, and advertisements are not suspect. References to age must not be made because age is not a qualitative criterion to be used in the selection process. In an advertisement of a job description, the use of terms such as high school student, college student, recent college graduate, boy, girl, and only those under forty need apply are all examples of possible violations of the Age Discrimination in Employment Act.

Recruiting at colleges, graduate schools, and professional schools has long been a practice followed by many companies. This is a process in which a large pool of people seeking professional and office work are located and, for the most part, are unemployed. This practice may not in and of itself be discriminatory unless done exclusively. A company or professional firm that recruits only students at graduation is discriminating against people already in the labor force and possibly those without the mandated degree. Recruiting candidates solely from colleges for a position wherein a degree is not a justifiable necessity is discriminatory.

## **Uniform Guidelines on Employee Selection Procedures**

Uniform Guidelines on Employee Selection Procedures was enacted in 1978 to provide counsel in the proper methodology used in the selection process to avoid infringement of Title VII, Equal Employment Opportunity Act (Affirmative Action), and the Equal Pay Act. While not applying directly to the Age Discrimination in Employment Act and the American Disabilities Act, other guidelines are available for consultation in these areas.

## **Selection Procedure**

The term Selection Procedure encompasses the use of aptitude testing, physical evaluations, educational credentials, employment experience, training programs, probationary terms, interviews, and application forms to evaluate prospective candidates. These guidelines apply to employers, employment agencies, testing organizations, and labor unions.

The employer's right to investigate the employee's background including past criminal records is based on the employer's showing of a justifiable business necessity.

## **Disparate Impact**

Disparate impact may be defined as having an adverse or detrimental effect on a particular group. The main thrust of the Uniform Guidelines is to recognize and encourage the discontinuance of selection procedures that have a disparate impact on minorities and women. Men are also covered in situations where gender is a determining factor in the selection process. Minority groups include Blacks, Hispanics, Asians, and American Indians.

To eliminate a disparate impact, records must be kept of the number of each minority group and gender that apply and the number of each group selected. If the percentage of minorities selected is at least 80-percent of the percentage of whites selected, there is no adverse effect. If the 80-percent rule is not met, then a detriment in employment selection exists against the particular group of minority or women applicants.

## **Disparate Treatment**

Disparate treatment arises when an individual is not selected because of a suspect classification. Whereas disparate impact is directed against the group, disparate treatment is directed against the individual.

## **Investigation and Record-Keeping**

To properly conduct an investigation, the EEOC has the right to evidence, which has a bearing on the alleged unlawful employment practice. This would include the right of access to documentation, as well as to the coworkers, superiors, and subordinates of the employee alleging a Title VII violation for the purpose of questioning them.

Employers are obligated to keep records relating to their methods of selection, compensation, promotion, training, and termination of employees. Test scores and the chronological order of applications for hiring, training, and promotion must be part of the record keeping.

These records must be made available to the EEOC to enable them to determine whether unlawful employment practices have been committed. An employer may seek an exemption from the EEOC if it can prove the burden of record keeping presents undue hardship. A notification of excerpts of Title VII is required to be posted by each employer in a conspicuous setting to apprise current employees as well as applicants of the existence of Title VII.

Record keeping can be burdensome, especially for small firms that do not have a human resources department. In addition to keeping records denoting the number of persons who applied and the

number of persons who were selected in each job category for each suspect classification, similar record-keeping must be kept for promotions and terminations as well.

### **Samples**

Where the number of applicants and those selected are so numerous that maintaining records on every individual would be too burdensome, the Uniform Guidelines on Employee Selection Procedures permits the company to select samples and maintain records on them. The sample must be adequate in size and representative of the various groups. If it is not, then the sample may be challenged and an inference of discrimination may be drawn. If the sample is viable but results in a disparate impact, the company is bound by it. The company may not dispute the authenticity of its own sample.

### **The Bottom Line**

The Uniform Guidelines on Employee Selection Procedures adopts the bottom line approach where a myriad of selection procedures is utilized. If one criterion is tainted, the selection process will not be found to be discriminatory where other criteria have offset it and the final results do not violate the 80-percent rule.

### **Questioning**

Questioning an applicant about his or her religion, national origin, race, and age is discriminatory. Inquiries regarding marital status, the number of children, or the prospects of having children are also suspect. An employer may not require an applicant to state whether he or she has a disability or to submit information concerning the disability. This would be an unfair employment practice. However, the employer may require the applicant to undergo a physical or mental examination to determine whether the person has the ability to perform the job. The examination must relate only to the essential job-related functions and must not be a fishing expedition. It must be required of all applicants, not just those with a perceived disability.

The American Disabilities Act (ADA), along with most state Civil Rights Acts, prohibits discriminating against an individual in the selection process because of a disability. A disability is defined as a physical or mental condition that results in a substantial handicap. The employer may be required to reasonably accommodate disabled individuals and to enable them to perform the jobs that before their handicap they were qualified to perform.

### **Discrimination in Promotions**

The reason that certain groups are promoted less frequently is due in part to discrimination and in part to social factors. Promotions often entail more responsibility, longer hours, travel requirements, attendance at social affairs, decision-making requirements, and greater stress. Young people, a greater number of who are single, may welcome the traveling and may not mind the longer hours. Older individuals with families, especially women who are mothers, may find the benefits of the promotion outweighed by their presumption that their quality of life will decline. The Equal Employment Opportunity Act presumes an equal percentage of all groups seek promotions. Overcoming this premise is a difficult task for the employer.

## **Promotion Criteria**

When a possibility exists within a firm for a promotion or transfer, the employer must post the job along with its description in a conspicuous manner, and a formal evaluation procedure must be followed. The procedure must utilize criteria, which are job-related, and the imposition of these criteria must be uniformly applied to every applicant. The managers who are in charge of recommending candidates for promotion must be judged on the basis of their recommendations to determine whether they are acting in conformity with equal employment opportunity guidelines. Finally, the racial, ethnic, and gender composition of the manager will be looked into where a breach of equal opportunity employment occurs.

## **Nepotism and Promoting from within**

Nepotism is the hiring of family members. Some companies forbid this action; others allow it if the employed family member does not take part in the decision process. Still others encourage it wholeheartedly. This approach, as well as the concept of promoting from within, is incestuous because it may discourage diversity. If that is so, discrimination exists. Employers argue that promoting from within allows the company to reward an individual who is known and respected. While there is substance in that argument, if the result is the creation of a disparate impact against a suspect class, the tradition will be held to be discriminatory and will need to be abandoned.

## **Negligent Hiring**

Many job applications and résumés contain false representations made by prospective applicants specifically with regard to their employment history and educational background. Many candidates resort to this falsification to improve their prospects of being hired. Employers must be diligent in confirming the authenticity of the offered information. If the individual is hired and causes damage or injury to a third party, the employer will be liable.

## **References**

Employers should consult applicants' references for information regarding their character, skill, knowledge, and experience. Many firms refuse to cast aspersions on former employees, preferring to limit their response to position held and dates of service. A few states grant qualified immunity to the prior employer when statements are made without malice. Employers who choose to refrain from disclosing knowledge of a former employee's theft or violent behavior may run the risk of being sued by a future employer, co-worker, or customer who is the victim of theft or a violent act by the employee in question. The prior employer's refusal could amount to negligent misrepresentation. Although some states recognize this as a cause of action, many have not had the occasion to address the issue. On the other hand, employers run the risk of suits for defamation, invasion of privacy, and/or interference with contractual relations in which the employee believes the information disclosed was confidential, untrue, or given with the intent to prevent the prior employee from gaining future employment. For such reasons, employers should obtain a written release from the employee before providing a reference. Employers should provide only the information requested, ensuring that it is accurate and documented. Regarding the disclosure of information concerning theft, violence, insubordination, or incompetence, an employer should determine whether a qualified immunity exists in the state in which it conducts business. This affords protection when the reference is made in good faith.

## **Workplace Violence**

Violent acts in the workplace including assaults, rapes, and murders must be guarded against by the employer for the safety of its workers as well as to avoid liability and harm to its reputation. An employer will be civilly liable in tort for the criminal acts of its employee where it knew of the danger presented by the employee. An employer may also be liable where an extensive background check would have revealed the employee's propensity for violence.

## **Background Checks**

Background checks are essential to ensure that the information provided by the applicant is true. An employer must discern whether the individual poses a financial risk through a credit check and a safety risk based on the existence of a criminal conviction report. Licenses, college degrees, prior employment, and references should be confirmed along with their corresponding dates. An employer would be wise to limit the investigation to information that is related to the job. The employer's right to investigate the employee's background is based on the employer's showing of a justifiable business necessity. With criminal background checks, the seriousness of the offense, its relatedness to the position, and its proximity in time should be kept in mind by the employer. This will avoid invasion of privacy suits. The information requested may differ based on the position, but all individuals applying for the same position should be treated equally. If an applicant is treated differently because of race, sex, or national origin, then discrimination may be claimed. There are varying degrees of background checks. Some are very extensive and check all domestic jurisdictions, and possibly international ones. Naturally, the more extensive reports are more expensive. Economics comes into play. How much can the employer afford?

**Case 2.1 Robert M. Nelson v. National Aeronautics and Space Administration**  
**530 F.3d 865; 2008 U.S. App. LEXIS 13205 (9th Circuit)**

**Facts:** The named appellants in this action (“Appellants”) are scientists, engineers, and administrative support personnel at the Jet Propulsion Laboratory (“JPL”), a research laboratory run jointly by the National Aeronautics and Space Administration (“NASA”) and the California Institute of Technology (“Caltech”). Appellants sued NASA, Caltech, and the Department of Commerce (collectively “Appellees”), challenging NASA’s recently adopted requirement that “low-risk” contract employees like themselves submit to in-depth background investigations. The district court denied Appellants’ request for a preliminary injunction, finding they were unlikely to succeed on the merits and unable to demonstrate irreparable harm. Because Appellants raise serious legal and constitutional questions and because the balance of hardships tips sharply in their favor, we reverse and remand.

**Issue:** Whether the background check of low-risk contract employees is an invasion of privacy.

**Decision:** Judgment for Nelson.

**Reasoning:** Unlike monetary injuries, constitutional violations cannot be adequately remedied through damages and therefore, generally constitute irreparable harm. Moreover, the loss of one’s job does not carry merely monetary consequences; it carries emotional damages and stress, which cannot be compensated by mere back payment of wages.

On the other side of the balance, NASA has not demonstrated any specific harm that it will face if it is enjoined for the pendency of the adjudication from applying its broad investigatory scheme to “low-risk” JPL contract employees, many of whom have worked at the laboratory for decades. Caltech’s threat to terminate non-compliant employees is central to the harm Appellants face and creates the coercive environment in which they must choose between their jobs or their constitutional rights. Moreover, with the government enjoined, Caltech faces no independent harm to itself, so the balance of hardships tips overwhelmingly in Appellants’ favor. Therefore, we hold that preliminary injunctive relief should apply both to Caltech and to Federal Appellees.

Appellants have raised serious questions as to the merits of their informational privacy claim and the balance of hardships tips sharply in their favor. The district court’s denial of the preliminary injunction was based on errors of law and hence was an abuse of discretion. Accordingly, we reverse and remand with instructions to fashion preliminary injunctive relief consistent with this opinion.

The 9th Circuit decided that an extensive background check of employees who present a low risk is an invasion of privacy.

**Case 2.2 William F. Raedle v. Credit Agricole Indosuez**

**670 F.3d 411; 2012 U.S. App. LEXIS 4000 (2nd Circuit)**

**Facts:** This cross-appeal arises out of the trial and retrial of plaintiff William F. Raedle's claim against his former employer, Credit Agricole Indosuez ("CAI"), and Lee Shaiman, his supervisor at that firm, for tortious interference with a job offer from another firm. Following the first trial, the United States District Court for the Southern District of New York (Griesa, J.) vacated a defense verdict and granted Raedle a new trial. Upon retrial, a second jury returned a verdict in Raedle's favor and awarded substantial monetary damages. We hold that the district court abused its discretion in granting the new trial. Accordingly, we reverse the order of the district court granting the new trial; vacate the judgment entered on the basis of the second verdict; and remand the case to the district court with instructions to reinstate the first verdict and to enter judgment in defendants' favor in accordance with that verdict.

**Issue:** The issue is whether the employer tortuously interfered with a prior employee's ability to secure a job offer from another employer by giving a negative reference

**Decision:** Judgment for Credit Agricole Indosuez.

**Reasoning:** In any event, given that three years elapsed between "what happened" and Raedle's lawsuit, and given that "what happened" consisted of two short Dreyfus-initiated phone calls to CAI, it is certainly not "impossible" to believe the defense witnesses' "total denial of any memory," the district court's assertions to the contrary notwithstanding. *Id.* The jury could reasonably have (1) credited Shaiman's testimony that he would never have impugned Raedle on such "personal" grounds given his son's behavioral and mental health issues; (2) accepted the defense's theory that if Shaiman said anything at all, it would have been an honest—albeit potentially damaging—assessment; or (3) credited Shaiman's testimony that he offered precisely this type of reference to Merrill Lynch, a reference he remembered giving because he was personally acquainted with the party seeking it. None of this testimony was bizarre, far-fetched, "patently incredible or defiant of physical realities." The jury was not compelled to accept it. But it was free to—and apparently did—accept all or a critical portion of it. The verdict, grounded in this fashion in the record, cannot be said to have been either egregious or a serious miscarriage of justice. The district court abused its discretion.

The order of the district court granting the new trial is reversed; the judgment entered on the basis of the second verdict is vacated; and the case is remanded to the district court with instructions to reinstate the first verdict and to enter judgment in defendants' favor in accordance with that verdict.



**Facts:** Melvin Reed claims that he was a victim of racial discrimination and retaliation during his brief employment as a car salesman at a dealership in Milwaukee, Wisconsin. He sued his former employer, named here as Ewald Automotive Group, under Title VII of the Civil Rights Act of 1964.

Reed, an African American, started his job at Ewald on November 2, 2005. On November 29 he and John St. Clair, a white salesman, threatened each other with physical harm during an argument, and both men were warned that any workplace violence or threats in the future would result in termination. This incident is one of several recounted in a charge of discrimination that Reed submitted to the Equal Employment Opportunity Commission and the Wisconsin Department of Workforce Development in early February 2006. Then on March 6, 2006, Reed argued with Jeffrey Halama, a white sales manager, and threatened to strike him. A coworker intervened and restrained Reed, who was fired the same day. In December 2006, he submitted another charge of discrimination to the EEOC and the Department of Workforce Development, this time alleging that he was fired because of his race and in retaliation for his February administrative charge. The EEOC dismissed both charges in May 2008, and Reed filed a separate Title VII suit for each. The two cases were consolidated in the district court, and we treat them as one action.

In his complaint Reed alleged that Ewald subjected him to a hostile work environment and ultimately fired him because of his race and to retaliate for complaining about discrimination.

Reed said that superiors disciplined him for perceived infractions that white employees committed without consequence, and he alleged that white coworkers were not reprimanded or verbally abused in front of peers as he had been.

**Issue:** The issue is whether the employee was terminated because of his race or for an act of workplace violence.

**Decision:** Judgment for Ewald Automotive Group.

**Reasoning:** On the evidence presented, the grant of summary judgment for Ewald was correct. It is undisputed that Reed was fired because he threatened his coworkers. A handful of episodes of yelling and stray racist remarks cannot sustain a claim of racial harassment or create an inference that race was the reason for Reed's termination. Accordingly, the judgment is affirmed.

**Facts:** In January 2008, Eric Myers filed a Chapter 7 bankruptcy petition with a bankruptcy court in North Carolina. In May 2008, the bankruptcy court discharged Myers' debts. While still a supervisor at Starbucks, Myers came across an advertisement for a managerial position at a local TooJay's Gourmet Deli restaurant. He expressed his interest in the position to Thomas Thornton, the regional manager of TooJay's Management Corporation.

In mid-July 2008, Myers had an interview with Thornton. At the end of the interview, a two-day, on-the-job evaluation of Myers was scheduled, beginning Thursday, July 31, 2008 and ending Friday, August 1.

The top of the personnel action form asked the TooJay's manager or corporate officer to "Check Appropriate Box(s)." The options given, among others, were "New Hire", "Rehire", and "Other (explain)." On Myers' form, the "Other (explain)" box was checked and the explanation written next to it was "OJE". Below that, information about Myers was written in the "Employee Information" area, and in the remarks section was written: "2 days of OJE (on-the-job evaluation) at \$100.00 per day."

On August 4, 2008, Myers gave Starbucks his two-weeks notice. That was also the date on a letter that TooJay's sent to Myers, informing him: "that we find it necessary to rescind our previous offer of employment. This decision was based in whole or in part, on the information provided us in a Consumer Report... The report was prepared pursuant to an authorization signed by you at the time of the application." Myers received the letter on August 12, 2008.

After Myers received that letter he called Thornton, who told him that he was not hired because of "a financial matter" and that he should contact Sharon Polinski in TooJay's human resources department. He did, and Polinski told him that the only reason he was not hired was that he had filed for bankruptcy, and it was TooJay's policy not to hire people who had done that. On August 13, 2008, Myers wrote a letter to William Korenbaum, TooJay's President and CEO, whom he had never met, asking him to reconsider the company's decision. Myers began by stating "I am writing to you in regard to my employment offer which was withdrawn by your company prior to the commencement of my employment." After explaining why he thought that TooJay's should hire him despite his bankruptcy, Myers closed the letter by expressing his hopes that TooJay's would change its mind and stated that he "look[ed] forward to hopefully becoming a member of the TooJay's family."

**Issue:** A section of the Bankruptcy Code prohibits employers from taking certain actions against people who are or have been in bankruptcy. The first subsection of that section applies to government employers and provides that they may not "deny employment to, terminate the employment of, or discriminate with respect to employment against" a person on that ground. The second subsection provides that a private employer may not "terminate the employment of, or discriminate with respect to employment against" an individual on that ground. The primary issue this appeal presents is whether that second subsection prohibits a private employer from denying employment to an individual on the ground that he is or has been in bankruptcy, even though it, unlike the first subsection, does not say that. Elementary principles of statutory construction and common sense persuade us to answer that question in the negative.

**Decision:** Judgment for TooJays

**Reasoning:** It was undisputed that two of the employment forms expressly stated that he was at the restaurant only for an “OJE”—an on-the-job evaluation. And he was paid for those two days less than half the amount he would have received for two days work if he had been an employee. There was also the letter Myers wrote afterwards to TooJay’s President and CEO acknowledging that the “employment offer” was “withdrawn by your company prior to the commencement of my employment,” and stating that he “look[ed] forward to hopefully becoming a member of the TooJay’s family” in the future.

That evidence was more than enough for the jury to discredit Myers’ contrary testimony and find that no employment relationship was formed. The district court did not err in denying Myers’ renewed motion for judgment as a matter of law.

**Case 2.5 C.A., a Minor v. William S. Hart Union High School District  
2012 Cal. LEXIS 2185 ( Cal. Supreme Court )**

**Facts:** Through a guardian ad litem, plaintiff C.A. alleged that while he was a student at Golden Valley High School in the William S. Hart Union High School District (the District) he was subjected to sexual harassment and abuse by Roselyn Hubbell, the head guidance counselor at his school. Plaintiff was born in July 1992, making him 14 to 15 years old at the time of the harassment and abuse, which is alleged to have begun in or around January 2007 and continued into September 2007.

Plaintiff was assigned to Hubbell for school counseling. Representing that she wished to help him do well at school, Hubbell began to spend many hours with plaintiff both on and off the high school premises and to drive him home from school each day. Exploiting her position of authority and trust, Hubbell engaged in sexual activities with plaintiff and required that he engage in sexual activities, including sensual embraces and massages, masturbation, oral sex, and intercourse. As a result of the abuse, plaintiff suffered emotional distress, anxiety, nervousness, and fear.

On information and belief, plaintiff alleges “[d]efendants knew that Hubbell had engaged in unlawful sexually-related conduct with minors in the past, and/or was continuing to engage in such conduct.” Defendants “knew or should have known and/or were put on notice” of Hubbell’s past sexual abuse of minors and her “propensity and disposition” to engage in such abuse; consequently, they “knew or should have known that Hubbell would commit wrongful sexual acts with minors, including plaintiff.” Plaintiff bases this belief on “personnel and/or school records of defendants [that] reflect numerous incidents of inappropriate sexual contact and conduct with minors by teachers, staff, coaches, counselors, advisors, mentors, and others, including incidents involving Hubbell, both on and off the premises of such defendants.” Plaintiff’s injuries were the result not only of the molestation, but of the District’s “employees, administrators, and/or agents” failing to “properly hire, train, and supervise Hubbell and... prevent her from harming” plaintiff.

**Issue:** The issue is whether the school district is liable for the negligent hire of its school counselor.

**Decision:** The judgment of the Court of Appeal is reversed, and the matter is remanded to that court for further proceedings consistent with our opinion.

**Reasoning:** Section 815.2, in turn, provides the statutory basis for liability relied on here: “(a) A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative.

**Case 2.6 Sharon Marie Evans v. Sir Pizza of Kentucky, Inc.  
2012 U.S. App. LEXIS 789; 2012 FED App. 0046N (6th Cir.)**

**Facts:** After Evans phoned in her order, deliveryman Brian Taylor brought it to her house. While making the delivery, he noticed a strong chemical odor coming from inside. Taylor thought the odor could be a byproduct of a meth lab, which worried him because he thought it might show up on a drug test he had to take. Later that night, he voiced his concern to Lexington Police Officer Dawn Dunn, when he ran into her at a gas station. Dunn, along with her colleagues Raymond Terry and Noel Warren, investigated. They determined that Evans had an outstanding arrest warrant for contempt of family court, then went to her house to serve her with the warrant and to investigate possible drug activity. When they got there, they too smelled a strong chemical odor, which Evans told them was a combination of Pine-Sol and bleach used to clean the house earlier in the day. The officers claim that Evans tried to close the door on them and physically harassed Officer Terry. They arrested her on the outstanding warrant and for harassment, but after searching the house (with Evans’s consent) they decided there was insufficient evidence to charge her with any other offense. The government prosecuted Evans on the harassment charge, but a jury acquitted her.

Evans filed this lawsuit against Taylor, Sir Pizza, the officers, and the city/county government on a bevy of grounds: violations of 42 U.S.C. § 1983; criminal conspiracy to violate her civil rights, see 18 U.S.C. § 241; criminal trespassing and assault; slander, libel, and defamation of character; invasion of privacy; a RICO violation; municipal and corporate liability for failure to train and negligent hiring and retention; false arrest and false imprisonment; intentional infliction of emotional distress; malicious prosecution; and negligence.

**Issue:** The issue is whether the county government was guilty of negligent hiring.

**Decision:** The district court granted summary judgment to all defendants on the ground that the lawsuit lacked merit. We affirm. Judgment for Sir Pizza.

**Reasoning:** The district court granted summary judgment to all defendants on all claims. It reasoned that Evans had failed to produce any evidence that the county government had a policy or custom of insufficient training or negligent hiring; that the supervising officers were not involved in the incident in question; that Evans’s arrest was lawful because it was made in connection with a valid arrest warrant; that the officers had not used excessive force in arresting her; that the criminal statutes under which Evans sought to bring claims do not provide for civil

liability; that RICO is inapplicable; that Taylor and Sir Pizza were not acting under color of state law for the purposes of § 1983; and that Evans had failed to produce sufficient evidence to create an issue of material fact on any of her other state-law claims.

**Case 2.7 S.H.C. v. Sheng-Yen Lu**  
**2002 Wash. App. LEXIS 2228**

**Facts:** S.H.C. became a follower of Grandmaster Lu in 1992. Sometime in 1996 she began to go to the Temple to receive blessings because she was not feeling well. During her stays there, she had headaches. According to S.H.C., Grandmaster Lu told her that he could cure the headaches. She also claims that he told her that she would die. According to her, Grandmaster Lu told her that he could save her life and cure her illness by the "Twin Body Blessing." The "blessing" was, in fact, sexual intercourse. S.H.C. sued Grandmaster Lu for negligent and/or intentional infliction of emotional distress, outrage, breach of fiduciary duty, and negligent pastoral counseling. Her suit against the Temple included claims for breach of fiduciary duty, negligent pastoral counseling, and negligent retention and supervision of Grandmaster Lu.

**Issue:** The issue in this case is whether a religious organization owes a duty to a follower victimized by one of its spiritual leaders.

**Decision:** Judgment for the Temple.

**Reasoning:** Washington case authority does not support the conclusion that an adult victim of sexual abuse has a special relationship with a religious organization associated with the alleged abuser.

S.H.C. has not shown that such a claim is viable against the Temple in this case.

**Case 2.8 Majed Subh v. Wal-Mart Stores Inc.**  
**2009 U.S. Dist. LEXIS 108565 (Delaware)**

**Facts:** Majed Subh worked as a photo center technician in Wal-Mart #5436 in Wilmington, Delaware for a little over a year before being transferred to store #5450 in Northeast, Maryland. A month after being transferred, Subh's employment was terminated for gross misconduct after he allegedly physically threatened Ruth McPherson, the co-manager back at store #5436. Subh spent several days in jail pending extradition from Maryland to Delaware. Subh complains that Wal-Mart has engaged in unlawful employment practices in violation of Title VII because of Mr. Subh's national origin. He claims he was subjected to harassment, more erroneous working conditions after he complained about the discrimination and harassment, and termination of employment in retaliation for opposing the hostile work environment. Wal-Mart responds that Subh voluntarily requested a transfer and that Subh suffered no retaliation.

**Issue:** The issue is whether Subh was terminated because of workplace violence or because of discrimination.

**Decision:** The U.S. District Court of Delaware ruled that Subh was terminated because of workplace violence, not discrimination or retaliation.

**Reasoning:** Majed Subh failed to offer sufficient admissible evidence in support of his Title VII claims. Subh failed to show whether the circumstances of the adverse employment action give rise to an interference of discrimination. Subh also did not identify similarly situated individuals of non-Middle Eastern descent who were treated differently or better than him. Subh was able to provide evidence of discrimination through his prior complaints, but was not able to connect that to his termination. Wal-Mart terminated Subh six weeks after his transfer because he returned to the Delaware store and aggressively threatened McPherson, thereby violating Wal-Mart's Workplace Violence Policy. The court ruled in the defendant's favor as it relates to Subh's claim of retaliation.

**Case 2.9 James Ayuluk, as Conservator for Ruth Ayuluk v. Red Oaks Assisted Living  
201 P.3d 1183; 2009 Alas. LEXIS 13 (Supreme Court of Alaska)**

**Facts:** Ruth Ayuluk is mentally impaired as a result from a brain injury. She lived in Red Oaks assisted living home in Alaska. Gary Austin is an employee at the assisted living home and he had sexual intercourse with Ruth on many occasions. Ruth's conservator sued Austin, Red Oaks, Red Oak's owners Susan and Richard Reeves, and Red Oak's designated administrator. A trial was conducted and it was found that Ruth often consented to sex with Austin but there were a series of ten times where she did not give her consent. Austin was found guilty of sexual battery for those ten occasions. Susan Reeves' mother, Leslie Orebaugh was the designated administrator of Red Oaks; however, she owned her own assisted living home so her involvement at Red Oaks is questionable. Gary Austin was hired to be a caregiver. He was a certified nurse's aide, but the parties disputed whether he was hired by Red Oaks in that capacity. Austin had a history that Orebaugh knew about. Orebaugh and Austin met at a different assisted living home that had closed down. Orebaugh knows that Austin had a shady past in which he brought pornographic tapes to work and also came to work under the influence. Reeves was pre-warned of Austin's past, but still hired him. While at Red Oaks, Austin made inappropriate sexual passes at Ruth's caregivers Cynthia York and Sarah Shine, which Reeves was also informed of. Ruth became mentally unstable and left Red Oaks, which is when she disclosed she had consensual sexual relations with Gary Austin. Ruth's conservator maintains that Ruth does not have the mental capacity to consent to sexual relations.

**Issue:** The issue is whether Red Oaks is liable for its employee's sexual conduct with a mentally impaired patient.

**Decision:** The Supreme Court of Alaska ruled that Red Oaks and its owners are liable for their employee's sexual misconduct with one of their residents. The final judgment is affirmed insofar as it dismisses Orebaugh and her other assisted living home, Parkside Assisted Living. The

judgment is reversed with regard to the Reeves' and Red Oaks Assisted Living. The judgment is vacated as to the compensatory and punitive damage award in favor of the plaintiff against Gary Austin. The judgment is also vacated with respect to \$74,416 award of fees and costs against the Reeves, Red Oaks, Orebaugh, and Parkside.

**Reasoning:** The only two grounds that might support liability against Orebaugh were based on her duty as designated administrator for Red Oaks and her alleged recommendation of Austin to Red Oaks. Orebaugh contacted legal counsel when Cynthia York made a formal complaint about Austin to her. She did not allow York and Austin to work the same shift unless the Reeves' were present. So the court failed to see how Orebaugh's conduct in this respect could serve as the basis for liability. When she passed on any relevant information to the Reeves', she met her legal obligation. Even if Ruth was capable of consenting to sex and did consent to sex with Austin, tort damages for physical and mental harm suffered by Ruth could have been assessed. Assuming that the standard of care is that no sexual contact between staff and residents is permitted, regardless of the consent of a resident that standard is imposed because of the vulnerability of residents and consent should not be a complete defense.

**Case 2.10 Edgar Uribe v. Kellogg's Snack/Keebler Inc.  
2009 U.S. Dist. LEXIS 33924 (Southern District NY)**

**Facts:** Uribe was employed by Keebler as a driver and warehouseman at Keebler's distribution center in Orangeburg, New York for several years. Apparently, Uribe was in the driver's break room when the door to the room opened and a breeze came through. Uribe told Smith to close the door because he was doing paperwork and then Smith (who is also the shop steward), used foul language and provoked the altercation. Smith attacked Uribe and then Uribe put his hands on Smith's arms. Two co-workers helped mend the situation and Uribe made a complaint to his supervisor about the incident. He later contacted Uribe and Smith to write statements on the altercation. The two statements were looked at, but they had conflicting sides of the story. After the phone interviews, it was decided that Uribe and Smith should both be suspended immediately pending final resolution of the investigation. After further investigation, it was concluded that both Smith and Uribe violated Keebler's Workplace Violence Policy. Due to this violation, they were both terminated from their positions. They were given a Memorandum that stated the conditions they would have to sign off on before going back to work. Smith signed the agreement, but Uribe decided to not. This only applied if both agreed, and since Smith only agreed, they let him go back to work. Uribe argued that Smith's actions were far worse than his, but they received the same punishment, which was unfair.

**Issue:** The issue is whether Uribe was terminated for workplace violence or because he was Hispanic.

**Decisions:** The case that was filed on behalf of Uribe was dismissed.

**Reasoning:** Edgar Uribe's case was dismissed because Keebler treated both men the same way since they both violated the Workplace Violence Policy and did not create discriminatory actions.

The rules are the rules and they both violated the rules, therefore they should both suffer the consequences.

**Case 2.11 Michael McGroarty v. American Background Information Services, Inc.  
2009 U.S. Dist. LEXIS 36460 (Central District CA)**

**Facts:** Michael McGroarty (“Plaintiff”) filed a lawsuit against American Background Information services, Inc. (“Defendant”), a pre-employment background checker. According to the plaintiff, the research conducted by the defendant on the Megan’s Law website, which has information on “persons convicted of crime,” facilitated the “the denial of employment to individuals who are required to register as sex offenders.” The plaintiff alleges this violates California Penal Code which prohibits the “use” of Megan’s Law website for any purpose related to employment.

The defendant argues that the definition of “use” of information does not apply to them because the decision to hire applies to the company that procures their services. The defendant provides “furnishing” of information to the employer as described by Investigative Consumer Reporting Agencies Act (“ICRAA”).

The plaintiff urges the Court to recognize the word “use” to apply when information is distributed for commercial purposes. The Court denies it. “Mere access to and distribution of the information, whether or not for a commercial or non-commercial purpose, are not bases for liability under the statute.”

**Issue:** The main point of contention is the word “use.” The plaintiff wants the court to recognize that gathering and distributing information from Megan’s Law website leads to denial of employment. When information on the website is used for profit, it should constitute to “use” and not merely furnishing of information.

Moreover, the case falls into murky water as California’s Penal Code could fail to prohibit the use of Megan’s Law website for employment purposes. Employers may simply employ services of the defendant and remain innocent through the whole process.

**Decision:** Judgment for the defendant. “The Court grants defendant’s motion for judgment on the pleadings and dismisses plaintiff’s complaint, with prejudice.”

**Reasoning:** The judgment’s ruling in favor of the defendant recognizes that its role to gather and deliver information does not constitute to “use” of information. The definition of “use” of information means to act upon with a decision to accept or reject employment. Since the decision to hire is not the responsibility of the defendant, it is not culpable of wrongdoing.

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**REVIEW ANSWERS**

1. Discrimination is permissible because employers can discriminate among candidates based on interpersonal relations, communication skills, training and education.

2. Uniform Guidelines on Employee Selection Procedures was enacted in 1978 to provide counsel in the proper methodology used in the selection process to avoid infringement of Title VII, the Equal Employment Opportunity Act (Affirmative Action), and the Equal Pay Act.



3. Yes. Many job applications and resumes contain false information. Employers must confirm the authenticity of this information. If the individual is hired and causes damage or injury to a third person, the employer will be liable.
4. It depends on company policy. Some encourage it. Others allow it if the employed family member does not take part in the decision. Still others forbid it.
5. Yes, if it results in the creation of a disparate impact against a suspect class.
6. No, unless it is done exclusively. If done exclusively, the employer is discriminating against those already in the labor force.
7. Records must be kept relating to the employer's methods of selection, compensation, promotion, training, and termination of employees. Test scores and the chronological order of applications for hiring, training, and promotion must be part of record keeping.
8. Generally, no. This is in violation of the Age Discrimination in Employment Act. The one exemption may be for employment agencies at or around the time of graduation to acquaint recent graduates with their services.
9. The employer must post the job in a conspicuous manner. A formal evaluation procedure must be followed utilizing criteria, which is job related. This must be applied uniformly to every applicant.
10. Yes. If an employer advertises in publications, media, or markets which predominantly one race and/or gender, this may have a disparate impact.

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## **CASE PROBLEMS**

1. Judgment for Wal-Mart. The U.S. District Court of Washington, Western District, decided that Wal-Mart's Employment Handbook served as a guideline and that Terry Knight was discharged in accordance with company policy. Furthermore, the court held that publication of a notice restricting entry onto the premises after an incidence of workplace violence is not defamatory.

Knight provided no facts or argument in opposition to defendant's Motion for Summary Judgment on the issue of defamation. He also can't prove that Wal-Mart didn't publish the

restriction notice, that Wal-Mart acted negligently, that Knight suffered actual damages, and that the restriction notice or the opposition to his unemployment benefits application are false.

2. Judgment for Schelhaus. The verdict is for Phillip Schelhaus because his statement is not conclusive evidence of wrongdoing and does not eliminate the plausibility of plaintiff's claim.

The judge ruled out for the plaintiff because the "written statement alone is not conclusive," and there are no policies identifying the meaning of "award fraud." Hence, "this court does not have before it the details of Sears' policies or the specifics of the sales program plaintiff is accused of violating nor has Sears offered its definition of award fraud."

3. Judgment for Western Distributing. This Court cannot conclude that Western should have foreseen Sasser and Meininger's violent conduct solely because of the positive results of Meininger's pre-employment drug screening. No evidence exists in the record that Meininger previously had been convicted of any crime related to drug use. Moreover, there is no evidence that Meininger tested positive for drugs while employed by Western before this incident occurred.

4. Judgment for Vernon. Vernon is able to establish a prima facie case of retaliation for the denial of the promotion. He satisfies the first three prongs of the prima facie case because he participated in a protected activity when he filed the complaint with the EEO, Port Authority was aware of this activity, and the denial of the promotion was an adverse employment action. A causal connection between the protected activity and the adverse action can also be shown. Vernon was denied the promotion only six months after the start of Port Authority's investigation into Vernon's complaint.

5. Judgment for Three Rivers. His employment with Three Rivers did not place him in a better position to accomplish the assault. Three Rivers had a policy against its drivers picking up hitchhikers. Myra Stalbosky voluntarily accepted a ride from Belew. In doing so, she assumed the risk. There was no way Three Rivers could have guarded against this.

6. Judgment for Van Meter. Van Meter was responsible for the hiring, work schedule, compensation, and malpractice insurance for Dr. Angelette. However, it is clear that Van Meter exercised no control relating to the manner and means in which Dr. Angelette performed his professional medical services while working at the TGMC emergency room. Accordingly, we agree with the trial court's finding that Van Meter was not vicariously liable for the actions of Dr. Angelette.

7. Judgment for Potter. Plaintiff does not deny that there was a confrontational incident on March 13, 2002 with a co-worker at the postal facility during work hours. Moreover, the zero-tolerance policy was in effect well before and after that date, and plaintiff was aware of its terms. Thus, plaintiff has available to him only the second method of showing pretext. "Under the second method, [the plaintiff] may not rely exclusively on his prima facie evidence, but instead must introduce some further evidence of discrimination."

Plaintiff has failed to meet his burden of supplying direct evidence that discriminatory animus, and not an innocent, legitimate business reason, actually motivated the Postal Service's challenged conduct.

8. Judgment for Shaw Industries. There is no dispute that plaintiff participated in a loud, yelling match with Munir. Indeed, at oral argument on January 5, 2006, counsel for Plaintiff admitted that the outbursts created an “incendiary” situation. Further, plaintiff has not shown that this altercation did not actually motivate his termination. Plaintiff points to Reid’s comments to him regarding his criminal complaint. However, the evidence indicates that Reid did not make the decision to terminate plaintiff. In fact, Reid testified that he recommended plaintiff receive a final warning rather than a termination. Consequently, his statements to plaintiff regarding his criminal complaint are insufficient to find that defendant Shaw’s reason for the discharge was pre-textual. Moreover, Munir was also fired because of the altercation.

9. Judgment for UPS. The District Court found that Blackburn’s conduct was not covered by CEPA, and therefore granted summary judgment for UPS. This was done because Blackburn could not prove UPS was in violation of CEPA, in which his lawsuit was based.

10. Judgment for LA Police. The California Appellate Court reasoned that the LAPRA exercised proper judgment in discerning that Ortiz’s relationship with a felon presented a conflict of interest, which would necessitate her discharge.

11. Judgment for Toshiba. Gray has not provided any evidence to support a claim that Toshiba’s proffered reason for her discharge was not the company’s actual motivation for discharging her. The evidence presented in this case did not even support a prima facie showing of gender discrimination, and Gray points to nothing beyond that evidence to support a claim that Toshiba really discharged her because of her gender and not because she deliberately provoked a fight with another employee.

12. Judgment for the Board of Education. The Board was not obligated to rebut the presumption of rehabilitation and was justified in considering the nature and seriousness of the crime as an overriding factor when issuing a high school teaching license. Also, there is nothing that showed that the Board didn’t weigh in the favorable factors of Arrocha.

13. Judgment for Dallas Fire Fighters. The court finds that the promotional goals adopted by the city in its AAP are not reasonably related to the applicable pools of qualified employees for each job classification in the Fire Department ranks. A single percentage for the promotional goal in each rank seems to be arbitrarily selected.

14. Judgment for Domino's. The court found Domino’s argument persuasive under Iowa Law. Ms. Poe wasn’t a customer of Domino’s and she was not an owner or resident of the house where Mr. Sturtz was going to leave the advertisement for Domino’s. She got into Sturtz’s car for the purpose of getting a ride to her destination. The employer has to be diligent in confirming the authenticity of the offered information, but since Ms. Poe voluntarily accepted a ride from Mr. Sturtz, there is no conceivable way that Domino’s could have prevented this.

15. Judgment for Stuke. We conclude that gender was a factor in the defendants’ decision not to hire Ms. Stuke. The legitimate reason offered by the defendants for her non-selection were not the true reasons for their actions, but rather as a pretext for discrimination. After carefully watching the videotape of Ms. Stuke’s presentation and the videotape of one of the male selectees, we

disagree. Despite being rattled by Mr. Spitzer's improper questions just prior to the start of the interview, Ms. Stukey gave a competent lecture on terminations for default. Although she was closely tied to her notes, Ms. Stukey was well-prepared and handled questions aptly. Ms. Stukey has sued, alleging that the defendants failed to select her for one of the AFIT teaching positions because of her gender in violation of Title VII, 42 U.S.C. 2000e (1991). We conclude that the defendants impermissibly used gender in not selecting the plaintiff for a position at AFIT.

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## **HUMAN RESOURCE ANSWERS**

1. Although Laura was bypassed for another woman, she may have a case based on sex plus discrimination. This means the discrimination occurred, not solely because she was a woman, but because she was a woman with small children.
2. Sparkey has a valid case of age discrimination based on the fact that Very Cool Music has a blatant policy of refusing to hire anyone over 25. His hearing disability never became an issue.
3. Legally, Sandra, and Scott are cousins. Their employer may terminate them unless a court determines that the term "cousin" was ambiguous in that 5<sup>th</sup> cousin is too far removed from what is normally considered to be a cousin.

4. A victim of a physical assault who neither intentionally provokes a physical assault nor participates in a fight should not be discharged by an employer under its zero-tolerance workplace violence policy.
5. The employer may be liable where the background check would have revealed the aggressor employee's past history of violence.