Maryland State Board of Law Examiners

FEBRUARY 2024 UNIFORM BAR EXAMINATION (UBE) IN MARYLAND – REPRESENTATIVE GOOD ANSWERS

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MPT 1

Representative Good Answer No. 1

MEMORANDUM

Statement of Facts

[omitted]

Argument

I. Ms. Logan committed robbery when she took the victim's purse by force.

Under Franklin Criminal Code §901, robbery is a felony and is defined as the "intentional or knowing theft of property from the person of another by violence or putting the person in fear." The Franklin Court of Appeal details the four elements required to prove robbery: "(1) intentional or knowing nonconsensual taking of (2)

money or other personal property (3) from the person or presence of another (4) by means of force, whether actual or constructive." (State v. Driscoll, 2019). To prove that the defendant used force, there must be a showing that the force "constitute[d]...the posing of an immediate danger to the owner of the property." Id., citing State v. Schmidt (Fr. Ct. App. 2009). In Driscoll, the Court affirmed the defendant's guilt because the defendant grabbed the victim's arm and pushed the victim away. Id. While the victim was not injured in Driscoll, the Court held that the defendant's struggle with the victim gave rise to a "sufficient use of force to constitute robbery." Id. The distinction between theft and robbery is that robbery requires the "use of force or threat of physical harm." Id. Theft requires the "taking of something stealthily without the owner's knowledge," in contrast to robbery, which includes "shaking the owner or struggling with the owner while trying to take the item." Id.

Here, Ms. Logan approached the victim, Ms. Owens, from behind and demanded Ms. Owens's purse. Ms. Logan then pulled the purse off of Ms. Owens's arm. The first, second, and third elements of robbery, as detailed above, are satisfied because Ms. Logan intentionally took Ms. Owens's personal property, Ms. Owens's purse, from her person. The fourth element requires that Ms. Logan take the purse by means of force. While Ms. Owens was walking down the street, she felt Ms. Logan grab her purse. Ms. Owens said she heard Ms. Logan demand the purse saying, "Let me have that purse." Ms. Owens testified that she did not try to stop Ms. Logan because "money is hardly worth getting hurt over," and she allowed Ms. Logan to take the purse. When Ms. Logan took the purse off of Ms. Owens's person, Ms. Logan took the purse with enough force that the purse got twisted and hurt Ms. Owens's arm badly. While Ms. Owens did not struggle with Ms. Logan as the defendant and victim struggled in Driscoll, Ms. Owens clearly understood the danger in engaging in such a struggle when she testified that "money is hardly worth getting hurt over." Ms. Owens's testimony at the preliminary hearing shows that Ms. Owens understood that if she did not comply with Ms. Logan's demand for the purse, Ms. Owens would be placed in peril of physical harm. Ms. Logan constructively used force to take Ms. Owens's purse from her person.

Ms. Logan may argue that the victim, Ms. Owens, was not in fear when Ms. Logan took Ms. Owens's purse. Ms. Logan did not put Ms. Owens in immediate danger. Ms. Logan did not struggle with Ms. Owens when taking her purse. These arguments would allow Ms. Logan to argue that she is not guilty of robbery and Ms. Logan may try to argue that she should not be guilty of more than theft. However, this argument is likely a weak argument because Ms. Logan did not take the purse stealthily or without Ms. Owens's knowledge. There was a threat of force from Ms. Logan if Ms. Owens did not comply with Ms. Logan's demand.

Ms. Logan's actions satisfy all four elements of robbery; therefore, the District Attorney should seek an indictment for robbery.

II. Ms. Logan is not responsible for her accomplice's death under the felony murder rule

First-degree felony murder is defined as "a killing of another committed during the perpetration of, attempt to perpetrate, or immediate flight from the perpetration of or attempt to perpetrate...robbery." FR. CRIM. CODE §970. The Franklin Court of Appeal expounds on the timeline in the foregoing statute in holding that the "felony-murder rule still applies if the killing occurs during the defendant's flight." State v. Clark, 2007. A defendant is fleeing from a felony until the defendant has reached "a place of temporary safety." In Clark, the defendant argued that the defendant had completed the burglary and "was on her way to a place of temporary safety." Id. The Court held that there was "no break in the chain of events" as the defendant was yet fleeing from the crime. Id. The court distinguishes this case from State v. Lowery, where the defendant had arrived home after the completion of a robbery and an officer's gun went off and killed the defendant's wife. Id. The defendant was not criminally responsible for the death as the felony had been completed. Id.

Franklin law considers both cause in fact and proximate cause in determining whether the death was caused by the commission of a felony. State v. Finch, Fr. Sup. Ct. (2008). Cause in fact is the "but-for causation," where "but for the actions of the defendant, the death would not have occurred." Id. Proximate cause is the legal cause where a "reasonable person would see as a likely result of that person's felonious conduct." Id. A superseding cause can break the chain of causation as an intervening independent cause. Id. If the superseding cause "supplants" a defendant's actions as the cause of death, the "defendant is not legally responsible for the cause of death." Id., citing Craig v. Bottoms. Gross negligence may be a superseding cause, but ordinary negligence will not. Id. Gross negligence is the "wantonness and disregard of the consequences to others that may ensue." Id.

The District Attorney must show that the death occurred during the commission of a felony and that the defendant's actions were the cause of the death.

(a). Ms. Logan was still fleeing from the robbery when the accident occurred, so the accident occurred during the commission of a felony and can be considered felony murder.

Ms. Logan's accomplice, Mr. Stewart, died in a car accident while fleeing from the robbery that is detailed above. Mr. Stewart was present during the robbery, standing about ten feet away from Ms. Logan. An officer received a "be on the lookout"("BOLO") notification matching Ms. Logan's description getting into a green sedan. The officer followed the sedan. When the sedan threw an object on the shoulder of the road, which was later discovered to be Ms. Owens's purse, the officer activated on her sirens and blue lights.

Here, it is clear that Ms. Logan was fleeing from the crime. Ms. Logan's accomplice, Mr. Stewart, waited for her as she robbed Ms. Owens. Mr. Stewart and Ms. Logan then entered the green sedan together. As in Clark, there was no break in the chain of events as Ms. Logan and Mr. Stewart were fleeing from the scene of the robbery.

Ms. Logan may argue that the robbery was complete at the time of the accident and, therefore, Ms. Logan was no longer fleeing. However, the Court in Clark is clear that a felon must reach a place of temporary safety and not be in the act of fleeing. There must be no break in the chain of events as seen here. There was no break in between the robbery and fleeing in the green sedan.

The accident occurred during the commission of a felony and Ms. Logan can be considered liable for Mr. Stewart's death under the felony-murder rule.

(b). The malfunctioning traffic lights are not a superseding cause and cut off Ms. Logan's liability.

The officer following the sedan observed the sedan continue through and intersection and collide with an SUV. The sedan was traveling within the speed limit when it went through the intersection. Mr. Stewart had been driving and was not wearing his seatbelt. Mr. Stewart died from his injuries. Ms. Logan had been wearing her seatbelt and was minimally injured. The traffic lights at the intersection were malfunctioning at the time of the car accident and were green in all directions. The lights had last been inspected on December 1st, 2023, which was about six weeks before the accident on January 17, 2024.

Here, Ms. Logan may argue that the malfunctioning traffic lights broke the chain of causation. However, the superseding cause does not supplant the defendant's conduct as the legal cause of death here. There was only ordinary negligence on the inspection of the traffic lights as they seem to be inspected with some regularity. They were only inspected six weeks ago and there had been no incidents since then. Because the accident was caused by Ms. Logan and Mr. Stewart fleeing from the officer instead of stopping, the malfunctioning lights do not break the chain of causation, and the accident is caused by fleeing from the felony.

The malfunctioning traffic lights did not cause Mr. Stewart's death, but fleeing from the robbery caused his death; therefore, Ms. Logan is liable.

Conclusion

In conclusion, the supporting case law and statutes show that there is strong evidence supporting a charge of robbery and a charge of felony murder. The District Attorney should seek indictments for both robbery and felony murder.

Representative Good Answer No. 2

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

TO: Deanna Gray, District Attorney

FROM: Examinee

DATE: February 27, 2024

Maryland State Board of Law Examiners

FEBRUARY 2024 UNIFORM BAR EXAMINATION (UBE) IN MARYLAND – REPRESENTATIVE GOOD ANSWERS

RE: State v. Iris Logan

Introduction:

I have been asked to evaluate whether you, the District Attorney of Hamilton County, should proceed with charges of robbery and felony murder against defendant Iris Logan. As a matter of charging policy, our office does not over-charge in cases where evidence is weak. The following is my recommendation and analysis of the strengths of each charge and any possible arguments that Ms. Logan may raise in response.

Analysis:

I. Robbery.

Under Franklin law, robbery is defined as the "intentional or knowing theft of property from the person of another by violence or putting the person in fear." Fr. Crim. Code §

901. Robbery requires proof of four elements: (1) intentional or knowing nonconsensual taking of (2) money or other personal property (3) from the person or presence of another (4) by means of force, whether actual or constructive. Driscoll. While Franklin Criminal code § 901 requires "violence," Franklin case law has clarified that, as it pertains to

robbery, "violence" is coextensive with "force." Driscoll. The force necessary to constitute robbery is the posing of an immediate danger to the owner of the property. Driscoll citing Schmidt. Immediacy of danger can be demonstrated by either putting the victim in fear or by bodily injury to the victim. Driscoll. The critical difference in distinguishing theft from robbery is the use of force or threat of physical harm. Driscoll. Taking something without the owner's knowledge is theft, whereas the use of any amount of force to take the item from the owner is robbery. Driscoll.

In Driscoll the Franklin Court of Appeal affirmed the defendant's conviction for robbery because the defendant pushed the owner of a laptop when the owner tried to grab the defendant's arm to prevent him from stealing her item. Driscoll. The court found that the struggle was sufficient use of force to constitute robbery under Franklin law. Driscoll.

In the case at hand Iris Logan (Logan) did not use a threat of force or put the victim, Tara Owens (Owens), in fear of injury. Instead Logan approached Owens from behind and said "Let me have that purse" and snatched it from Owens' arm. As a threshold matter, Logan approaching Owens' from behind and telling her to give her the purse demonstrates that she knowingly, and intentionally took the purse (property) from Owens. Owens let Logan have the purse with no struggle. Any charge of Robbery would thus focus on the physical harm caused to Owens and the use of force to take the item from Owens. Owens has testified during the preliminary hearing that she did not put up any fight and let Logan have the purse. However, Logans snatched the purse from Owens shoulder and in the process Owens arm got twisted up in getting the bag off and resulted in a sprained wrist.

Based on Franklin jurisprudence, that violence is coextensive with force, and § 901 of the Franklin Criminal code requiring violence, and the fact that Logan knowingly and intentionally taken the property (purse) from Owens, it appears as though the elements of Robbery are present and thus Logan can be properly charged with the crime of Robbery.

IIa. Felony Murder.

Under Franklin law felony murder is a killing of another committed during the perpetration of, attempt to perpetrate, or immediate flight from the perpetration of or attempt to perpetrate any first-degree murder, act of terrorism, arson, rape, robbery, burglary, kidnapping, aggravated child abuse, aggravated child neglect, or aircraft piracy. Fr. Crim. Code. § 970. Franklin's definition of felony murder includes death occurring while the

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

In Clark the Franklin Court of Appeal affirmed a felony murder conviction holding that the defendant was in the process of fleeing to a place of safety but had not yet arrived and thus there was no "break in the chain of events." Clark.

The Clark case was distinguished from Lowery where the court found a break in the chain of events and reversed a felony murder conviction, finding that the defendant was not criminally responsible for the death of his wife, because the defendant had left the scene of the crime and arrived home when the police officers arrived and the wife was accidentally shot. Lowery.

According to witness Jed Rogers (Rogers) he observed Logan take the purse from Owens and immediately thereafter give the purse to a man nearby. Rogers was unable to get a good description of the man who received the purse but was able to provide a very detailed description of Logan and promptly reported what he saw to 911, and dispatchers shortly after issued a be on the lookout (BOLO).

Immediately after the BOLO was issued, indicating a purse snatching with injury, which responding Officer Torres (Torres) recognized as qualifying for robbery, Torres observed a woman matching the description of Logan get into a vehicle with a man. Torres than began to follow the vehicle. A few miles and about ten minutes later Torres observed the drive throw an object out of the car so she activated her lights. Immediately after Torres activated her lights the car crash occurred which resulted in the death of Jeremy Stewart (Stewart), the driver of the vehicle in which Logan was riding.

The car crash occurred just slightly more than ten minutes after the robbery of Owens. Stewart and Logan had not yet arrived anywhere and were still in their vehicle. As such, there are no facts to suggest that Logan had gotten to a place of safety to sufficiently "break the chain" from the robbery and the death of Stewart. This case is much more analogous to Clark than to Lowery. Logan had not yet arrived to a place of safety and thus not broken the chain from the criminal act of felony robbery to the death of Stewart and she can thus be properly charged with felony murder, if the causation elements are satisfied.

IIb. Causation.

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

Cause in Fact:

"Cause in fact" is commonly referred to as "but-for causation," and is found when "but- for" the acts of the defendant, the death would not have resulted. Finch. Cause in fact is an essential element, but not itself sufficient to establish guilt for felony murder because this type of analysis would itself cast too large a net, and it is therefore limited by the proximate, or "legal cause" which adds the requirement of foreseeability. Finch.

As the Franklin Courts have indicated, cause in fact is a broad analysis. Applied here, but- for Logan's action of committing robbery, stealing a purse from Owen by the use of force causing bodily injury, Stewart would not have been in his vehicle with her at the time, thrown out the purse, and driven through the intersection.

But-for causation is established in this case.

Legal Cause:

The relevant inquiry under "legal cause" is whether the death is of the type that a reasonable person would see as a likely result of the defendant's felonious conduct. Finch. The foreseeability aspect of causation reduces the unfair application of guilt on a defendant when the outcome(s) are totally outside of their contemplation when committing the offense in question. Finch. The Franklin Supreme Court has held that it is within sound public policy to hold that when a felon's attempt to commit a forcible

felony sets in motion a chain of events that were or should have been within his contemplation when he motion was initiated, he should be held responsible for any death that by direct and almost inevitable sequence results from the initial criminal act. Finch. Failing to apply a guilt when the death was a result of foreseeable action would "thwart" the intent behind the felony-murder doctrine. Finch citing Lamb.

Logan robbed Owens just before 5:30 pm on January 17, 2024. During this time of year it may have been starting to get dark outside, but the robbery occurred in the middle of the intersection of Broadway and 8th Avenue, in plain enough fashion for their to be at least one witness. In committing a robbery in as open a public forum as seen here it is reasonably foreseeable that within a relatively short period of time the police would be called and they would be looking for the suspect(s). It is further foreseeable that an

officer could have heard the description of Logan and be following the vehicle which she was seen entering. When police pursue suspects the intention is to stop them for questioning of the suspected crime. Unfortunately there are situations in which suspects do not stop and violence, and or death, have resulted. If pursuit by the police is in the form of a vehicle "chase" it is reasonably foreseeable that the resulting chase could end in a vehicle accident, which poses the risk of injury and/or death.

The resulting car crash, after Torres activated her lights, within ten minutes of the crime, is a reasonably foreseeable result of committing the crime, and thus Logan's commission of robbery is the proximate cause of Stewarts' death.

Superseding Cause:

A subsequent intervening independent cause that breaks the chain between a defendant's actions and the death is known as a "superseding cause." Finch. The factors necessary to demonstrate a superseding cause are (1) the harmful events of the superseding cause occur after the original criminal act, (2) the superseding cause must not have been brought about by the original criminal acts, (3) the superseding cause must have actively worked to bring about a result that would not have followed from the original acts, and (4) the superseding cause must not have been reasonably foreseen by the defendant. Finch. If all four elements are met in a case the superseding cause "breaks the chain of proximate causation and "supplants" the defendant's conduct as the legal cause of death and removes criminal liability from the defendant for the death. Finch citing Craig. Under Franklin jurisprudence "ordinary negligence" is insufficient to serve as a superseding cause. Finch. However, "gross negligence" (wantonness and disregard of the consequences to others) will generally be considered a superseding cause that breaks the chain.

In Finch the Franklin Supreme Court affirmed a conviction for felony murder against Finch, one of two individuals committing armed robbery, because they found that the security guards response and subsequent wrestling with the deceased co-robber was a foreseeable occurrence from the conduct of committing armed robbery.

The Finch Court distinguished that case with Knowles but analogized to Johnson which were both heard in neighboring Olympia. In Knowles the Olympia Supreme Court reversed a conviction for armed robbery because they found a superseding cause when the robbery victim, who had been stabbed twice, later died of an infection

which was the result of an operation conducted by an intoxicated physician. Knowles. The Court held that while medical treatment was foreseeable that the physician's intoxicated state was gross negligence, not foreseeable, and broke the criminal liability of Knowles. Knowles. In Johnson the court affirmed a felony murder conviction holding that the physician's simple negligence in missing bullet fragments was an insufficient intervening act to break the chain of causation. Johnson.

The potential superseding event in this case is the malfunctioning traffic lights which led to the collision at the intersection and Stewart's death. The first element for a superseding event is present, the accident occurred after the robbery. Element number two that the superseding even not be caused by the commission of the crime, is also present. Logan's robbery in no way influenced the malfunctioning traffic lights. The fourth element related to the traffic light not being reasonably foreseeable is also present, the light had been inspected less than two months previously and was working fine, with no complaints in the interim.

The third element for a superseding cause requires that the result, Stewart's death in a car crash, must be a result that would not have followed directly from the original acts. This is the element where the court would likely find that the lights did not act as a sufficient superseding cause. As noted above the result of a police chase in a vehicle is that an auto accident could have occurred resulting in injury or death. That is exactly what happened here.

As such the lights are unlikely to be determined by a court to be a sufficient superseding cause as all elements required are not present.

III. Conclusion.

For the foregoing reasons, based on Franklin Jurisprudence and the Franklin Criminal Code, it appears as though logan could and should be charged with both robbery and felony murder for the death of Stewart. Charging both crimes is consistent with our offices approach to not over-charge based on weak facts, since the facts here support both charges.

Thank you for the opportunity to have conducted this research and analysis. If additional information is required I am happy to supplement this memorandum.

Examinee

MPT 2

Representative Good Answer No. 1

To: Michael Carter

From: Examinee

Date: February 27, 2024

Re: Randall v. Bristol County

The memorandum below sets forth the "Legal Argument" section of a brief in favor of a motion for summary judgment, which is to be filed in the U.S. District Court for the District of Franklin (the "Court") in the case of *Randall v. Bristol County*.

Legal Argument

Maryland State Board of Law Examiners

FEBRUARY 2024 UNIFORM BAR EXAMINATION (UBE) IN MARYLAND – REPRESENTATIVE GOOD ANSWERS

A public employee does not surrender all First Amendment rights merely because of employment status. *Dunn v. City of Shelton Fire Department* (citing *Garcetti v. Ceballos*). To garner First Amendment protection, a public employee must show that "(1) the employee made the speech as a private citizen, and (2) the speech addressed a matter of public concern." *Dunn*. After establishing both elements, an employee must show that her interest in expressing the speech outweighs the employer's interest in promoting effective and efficient service and that the speech was a motivating factor in the adverse employment action against her. *Dunn*.

In the current case, Olivia Randall ("Randall") spoke as a private citizen with her Facebook posts to her personal account outside of her official job duties. Moreover, the speech addressed a matter of public concern: the non-renewal of the grant needed to fund the WRP (as defined below). Randall's interest in such speech outweighed the interest of Bristol County (the "County") in promoting effective and efficient service because the County Executive did not act pursuant to such interest (rather personal motive) in taking adverse employment action against Randall. Finally, the County concedes that such speech was a motivating factor in the 2-week suspension that Randall incurred.

A. Randall Spoke as a Private Citizen Because Facebook Posts Were Not Part of Her Official Duties and Were Made to Her Personal Facebook Page

In *Dunn*, the U.S. Court of Appeals for the Fifteenth Circuit (the "Fifteenth Circuit") cited *Lane v. Franks* for the holding that speech made "pursuant to [] ordinary job duties" is not speech as a private citizen. However, just a few years earlier, in *Smith v. Milton School District*, the Fifteenth Circuit recognized that "posting on a personal social media account typically is not [speech related to ordinary job duties]." There, the Fifteenth Circuit affirmed a teacher's 42 U.S.C. § 1983 claim against his school district alleging that the school district violated his First Amendment rights when it failed to renew his teaching contract because of tweets the teacher posted on his personal Twitter account.

Here, according to the testimony of Randall in her deposition, posting to Facebook was not part of her job duties as director of Bristol County's Workforce-Readiness Program (the "WRP"). Moreover, Randall's posts were to her "personal Facebook page." Given that Randall's posts were not part of her ordinary job duties and were made to her personal social media account, such posts were Randall speaking as a private citizen for purposes of her § 1983 claim.

B. Randall's Speech Addressed a Matter of Public Concern Because the Content Was Designed to Inform the Public, the Posts Were to a Public Audience, and She Did Not Have an Improper Motive

According to the Fifteenth Circuit in *Dunn*, there are three factors that must be considered when deciding if speech is on a matter of public concern: "the speech's content (what the employee was saying); the speech's nature (how the employee spoke and to whom); and the context in which the speech occurred (the employee's motive and the situation surrounding the speech)." Each factor is addressed, in turn, below.

The content of Randall's speech primarily concerned a matter that might be of interest to the public, i.e., the renewal of a grant to fund the WRP. According to Randall's testimony, grant funds were being used by the County to help residents who did not complete their GED to take such GED tests and finish their high-school education. As a result, 40 Bristol County residents had utilized the program, many of whom were now employed. Other members of the public might be interested in knowing about the program or even signing up for the program itself. The testimony from County Executive Marie Cook ("Cook") appears to support this. Cook

indicated that, following Randall's Facebook posts, she was contacted by "[m]aybe a dozen" members of the public."

The County will likely assert that Randall's Facebook posts were personal in nature. In *Dunn*, in affirming the lower court's award of summary judgment to a city fire department that disciplined the plaintiff firefighter for his social media posts, the court found that the content of the firefighter's posts was "personal." The firefighter had complained that the current generation of firefighters were composed of "softies" who need to "toughen up." As a result, the *Dunn* court found that the plaintiff sounded more like a "disgruntled employee" than someone appealing to the public about a matter of public concern. Here, the County will point to the fact that Randall included certain editorial comments in her Facebook posts, such as "Bad Call!!!" and "The county executive needs to get her priorities straight!" This will be used to bolster the County's argument that Randall was not commenting on a matter of public concern and was merely sounding off on a personal vendetta.

However, the *Dunn* court also explained that the plaintiff in that case could have spoken to matters of interest to the public had he "explain[ed] how the new hiring qualifications affect the public" or "show[ed] how the new standards are lax or will lead to unqualified firefighters." Here, the majority of Randall's two posts were dedicated to exactly such purposes: explaining how the non-renewal of the grant would affect the public and showing how the non-renewal of the grant would adversely harm the County. Randall explained what the WRP does, how many residents were assisted, and who residents could contact (Cook) if such residents disagreed with the decision. Notably, Randall also addressed her October 15, 2023, post to "fellow Bristol County residents." On these facts, the content of Randall's social media posts was on a matter of public concern.

The court must also consider the speech's nature and context. Here, Randall can show that the nature of her speech was informative; she provided specific facts about the WRP and its purposes. As noted above, her October 15, 2023, post was addressed to her fellow County residents. Moreover, in assessing the speech's nature, the Fifteenth Circuit in *Smith* considered the fact that the plaintiff "changed his social media settings from private to public." On these facts, Randall made her posts "public," so that the widest possible audience could read them.

On the issue of context, the County will attempt to argue that Randall was acting with an improper motive, namely being upset that her position as director of the WRP was ending. However, Randall has testified that her disappointment with seeing her position end was not the reason she made the Facebook posts; rather, Randall was more concerned with helping residents attain their GEDs and get jobs, a cause she deemed worthwhile.

Thus, the content, nature, and context of Randall's speech establish that she was speaking on a matter of public concern which merited First Amendment protection.

C. <u>While the County May Have Had an Interest in Promoting an Effective Workplace, Such Interest Is Not Present Here</u>

In *Dunn*, the court recognized that a balancing test must be conducted to weigh the employee's interest in speaking against the employer's interest in promoting effective and efficient public service. While such interest is laudable, the facts do not show that the County suspended Randall for such a reason.

In her deposition, Cook testified that Randall was suspended for "not showing respect for [Cook] and [Cook's decision-making authority." When asked to clarify, Cook stated that Randall "embarrassed [her]" and stirred up

the public. A public official being embarrassed by a decision she made does not bear on the such public official's interest in seeking an efficient workplace. Moreover, stirring up the public, and, as a consequence, fielding a dozen or so calls, is within a County Executive's basic job description. It is doubtful the County can show any interest here at all in promoting an effective and efficient workplace because Cook conceded that there were no disruptions or problems in the county office following Randall's posts.

Given that Randall's right to speak must be balanced against the employer's interest in an efficient workplace, which was not at stake on these facts, Randall will prevail in the balancing test set forth in *Dunn*.

D. The County Has Admitted that Randall's Facebook Posts Were a Motivating Factor in Her 2-Week Suspension

The County has conceded that Randall was suspended because of her Facebook posts. The November 4, 2023, letter from Susan Burns, an attorney for the County, stated clearly that "Ms. Randall was suspended because of her Facebook posts." Thus, it is not disputed that Randall's Facebook posts were a motivating factor in her suspension, and she has proven this element of her claim.

For the foregoing reasons, summary judgment should be granted with respect to Randall's § 1983 claim against the County for the violation of her First Amendment rights.

Representative Good Answer No. 2

To: Michael Carter

From: Examinee

Date: February 27, 2024

Re: Randall v. Bristol County First Amendment Claims Assessment

Hello,

Thank you for allowing me to conduct this assessment for you. Please find below me analysis of Ms. Randall's first amendment claims for the Motion for Summary Judgement. Please let me know if you require anything further or if I can be of any further assistance.

I. Captions

[omitted]

II. Statement of Facts

[Omitted]

III. Legal Argument

A public employee does not surrender all First Amendment rights just because of their employment status. Garcetti v. Ceballos 547 U.S. 410 (2006). To show that speech is protected under the First Amendment, a public employee must demonstrate that 1) the employee made the speech as a private citizen and 2) the speech addressed a matter of public concern. Dunn v. City of Shelton Fire Department (15th Cir. 2018). Once it is determined that the employee spoken as a citizen on a matter of public concern, the inquiry moves to a balancing test. Id.

a. Ms. Randall was speaking as a private citizen when she made the relevant social media post and thus her First Amendment rights to Free Speech were violated when she was suspended without pay for two weeks for making the posts.

When a public employee makes a statement pursuant to their official duties, the employees are not speaking as citizens for the purposes of the First Amendment. Garcetti. In order to determine if the employee was making the speech pursuant to their official duties, the question is whether the employee made the speech pursuant to their ordinary job duties. Lane v. Franks, 573 U.S. 228 (2014). Speech is not necessarily made as an employee just because it focuses on a topic related to an employee's workplace. Smith v. Milton School District (15th Cir. 2015). In Dunn the speaker was found to not be speaking as a private citizen because the speaker's job responsibilities were communicating information and updates concerning firefighter qualifications with the fire chief and he posted in a Facebook group consisting of first responders about continuing education requirements and issues for firefighters which mirrored his job responsibilities. Contrast Dunn with Smith where the speaker was found to be speaking as a private citizen because posting on a personal social media account is not a part of the duties of a school teacher.

Here, Ms. Randall was speaking as a private citizen when she made the relent social media posts because posting to Facebook is not a part of her job duties. She posted to her personal social media account, which was not part of her duties as Director of the Workforce-Readiness Program. Nor did the posts mirror any of her other job duties as discussions of the grant renewal was not listed in any of her job duties. She created policies and procedures for connecting participants with other county services and resources, but nothing in her job duties touches discussion of renewing grants. Thus, because the posts were made to Ms. Randall's personal social media account and because the posts did not mirror any part of her job description, she was speaking as a private citizen.

b. Ms. Randall was addressing a matter of public concern when she made the relevant social media posts and thus her First Amendment rights to Free Speech were violated when she was suspended without pay for two weeks for making the posts.

In order to determine whether speech was made about a matter of public concern, the court should consider three things: 1) the speech's content - what the employee was saying; 2) the speech's nature - how the employee spoke and to whom; and 3) the context in which the speech occurred - the employee's motives and the situation surrounding the speech. Dunn. Matters such as school district finances, public corruption, discrimination, and sexual harassment by public employees have been found to be matters of public concern, and a public employee's speech about these matters is protected. Smith. Complaints about work conditions are not public concerns. Id. In Dunn the speaker was found not to be addressing a matter of public concern because his motive appeared personal, he did not explain how the hiring qualifications at the heart of his content would affect the public, and he did not should how the new standards would lead to unqualified firefighters which would be a matter of interest to the public. Contrast Dunn with Smith where the speaker was found to be speaking on a matter of public concern because the speech focused on school policies, rather than personal complaints or issues, the social media posts were accessible to anyone, and he explained how focusing on test preparation can at the expense of other subjects.

Here, the content of Ms. Randall's speech was of a matter that interested the public because it essentially had to do with the county's finances and the administration of those public finances. It was not about personal grievances with her workplace or work conditions. Although she expressed dismay about the grant not being renewed and frustration with the county executive for choosing not to renew the grant, these personal

interjections do not overshadow the fact that the post was, at its core, about county finances, namely the grant, and that posting it was something that would be of interest to the public and likely to concern them. Additionally, the nature of the speech was public. Although the post was posted to Ms. Randall's personal social media account, the posts could be accessed by anyone, they were not limited to library employees or even just those who utilize the library. It was available to everyone. Further, as previously discussed, even though there was an injection of personal feeling on the posts, the posts were not an airing of personal grievances with the county, the library, or the program.

The posts were meant to alert the public about the fact that the grant was not renewed and to bring to the public's attention all the good the program the grant funded had done for the county. Ms. Randall was not concerned with keeping the prestige of her job title, though she admittedly enjoys that, it was about making sure the public could continue to be served by what she saw as a critical public service that was in jeopardy. Thus, the content, nature, and context of Ms. Randall's speech all show that she was speaking on a matter of public concern and thus her speech should be considered as speech addressing a matter of public concern.

c. Ms. Randall had a greater interest in expressing the relevant speech than her employer had in promoting an effective and efficient public service and the speech was the motivating factor in the adverse employment action and thus Ms. Randall is entitled to Summary Judgement on the violation of her First Amendment rights to Free Speech.

The court must weigh the interests of the employee in expressing the speech against the employer's interest in promoting effective and efficient public service. Dunn. For an employee to prevail, the employee must show that the speech was a motivating factor in the adverse employment action. Where there has been positive past performance reviews, the employee can generally show that the speech was the motivating factor for the adverse employment actions. Smith. While it is true that overtime, courts have tended to favor public employers over public employees (Kurtz v. Orchard Sch. Dis. (Fr. Ct. App.

2009)), the balance tilts in favor of an employee calling attention to an important matter of public concern, such as a school district's budget and use of tax revenue (Pickering v. Bd. of Education, 391 U.S. 563 (1968)). In Kurtz, the balancing test weighed in favor of the employer because the speaker, a teacher, posted on social media disparaging students and the court found that such speech was not protected because it eroded trust. Contrast with Smith where the balancing test weighed in favor of the employee because the speech had merely annoyed the employer but had not disturbed morale or efficient operation or caused real issues between the speaker and the employer.

Here, Ms. Randall has a readily apparent interest in making sure the public is advised of the loss of this grant as it is a matter of public concern and she was speaking as a private citizen. She was not attempting to air personal grievances online, she was attempting to apprise the citizens of the county of what was happening with the funds in their county. Ms. Randall's employer, Ms. Cook readily admits that there have been no disruptions or problems in any county office, including the library, so there is no concern for disturbed morale or inefficient operation caused by the speech. Ms. Cook also readily admits that the reason she disciplined Ms. Randall for the speech was because she thought the speech embarrassed her (Ms. Cook) and the county. The court has already ruled that mere embarrassment is not a good enough reason to restrict a public employee's speech. Smith. Indeed, almost all public speech criticizing the government will incur some embarrassment but the First Amendment exists for the exact purpose of allowing citizens to criticize their government, and embarrassment is not a reason to restrict an employee's speech. Id. Finally, Ms. Randall's employer admits that before this incident, there had been no problems with Ms. Randall's work performance and the reason she disciplined Ms. Randall was because of her speech. Consequently, the speech made by Ms. Randall was the motivating factor for her suspension without pay. Thus, the balancing test weighs greatly in favor of Ms. Randall as against her

employer and the speech of Ms. Randall was the motivating factor in Ms. Randall's adverse employment outcome.

IV. Conclusion

Ms. Randall was speaking as a private citizen because posting to social media was not a part of her job description nor did it mirror any part of her job description. Ms. Randall was speaking about a matter of public concern because the content, nature, and context of the speech all point to her addressing an issue of public interest that was not an airing of private grievances, in a digital public forum. Further, the balance of interests weigh greatly in Ms. Randall's favor as she was speaking as a private citizen on a matter of public concern and her employer was merely concerned with the embarrassment the speech would cause her and the county and the speech did not disrupt the work environment. Finally, Ms. Randall's speech was the motivating factor for her adverse employment outcome. In conclusion, her speech was protected by the First Amendment and the Motion of Summary Judgement should be granted.

Thank you again for allowing me to conduct this analysis for you and for allowing me to draft the legal argument section of the Motion for Summary Judgement. Again, please let me know if there is anything I can do to be of further assistance.

Warm regards, Examinee

MEE 1

Representative Good Answer No. 1

1. The issue here is whether Wendy, Mary, and Angelo have formed a general partnership.

A general partnership is established where two entities intend to operate a for-proft business as co-owners. Such a partnership need not be expressly established, and the parties may indicate their intent through conduct. Where parties agree to share profits, there is a presumption that the parties intend to become partners. In the case of relieving a debt, profit-sharing does not presume a partnership.

Here, Wendy operated Kibble as a sole proprietorship, but offered Mary and Angelo the opportunity to join as a partnership. Kibble is a for-profit business. Mary sent Kibble a check, agreed to share 15% of Kibble's profits and losses, and began working at the store and business-planning, demonstrating her intent to operate Kibble as a co-owner with Wendy. Therefore, Mary and Wendy are likely partners in a general partnership. In contrast, Angelo sent Kibble a check, but did not so agree to share in Kibble's profits.

Rather, Angelo agreed to collect 15% of Kibble's profits as repayment of Kibble's debt to him in the amount of the check. Unlike Mary, Angelo did not engage in any activity that would indicate an intent to operate Kibble as a co-owner, and therefore Angelo is not a partner in Kibble.

Mary and Wendy are partners in the Kibble partnership, and Angelo is a creditor to Kibble, but not a partner.

2. The issue here is whether Bob is entitled to Mary's interest in Kibble by virtue of Mary's assignment.

Partners in a general partnership may freely convey their share of interest in the partnership. The beneficiary of this conveyance is entitled to the proceeds from the transferring-partner's interest, but may not exert control over the management of the business unless admitted via unanimous vote of all partners.

Here, Mary has a 15% interest in Kibble's profits, and she validly assigned her share to Bob via a signed writing. Therefore, Bob is entitled to Mary's share of Kibble's monthly profits.

3. The issue here is whether Bob may inspect Kibble's books and records by virtue of Mary's assignment of her interest.