February 2024 MEE Questions

MEE Question 1

In February, Wendy opened Kibble, a store selling dog food made from organic ingredients as well as dog toys and dog grooming products. Wendy operated Kibble as a sole proprietorship. Kibble soon ran into financial difficulties, and Wendy could not pay its bills.

In early April, Wendy asked her friends Mary and Angelo for financial assistance.

On May 1, in response to Wendy's request, Mary delivered to Wendy a check payable to "Kibble." In exchange for this contribution, Wendy agreed in a signed writing to pay Mary 15% of Kibble's monthly profits for as long as Kibble remained in business. Mary also agreed that, if Kibble suffered losses, she would share 15% of those losses with Wendy.

As part of their deal, Mary began working at the store with Wendy and helped Wendy with business planning for Kibble.

On May 2, also in response to Wendy's request, Angelo delivered to Wendy a check payable to "Kibble." On the memo line of this check, Angelo wrote "loan to Kibble." Angelo agreed in a signed writing to accept 15% of the monthly profits of Kibble as repayment of the loan until the total loan amount, including interest, was repaid.

Wendy used the proceeds of the checks from Mary and Angelo to purchase equipment, supplies, and a delivery van in Kibble's name.

Beginning in June, Wendy paid 15% of Kibble's previous month's profits to Mary and another 15% to Angelo.

On October 1, Mary wrote a letter to her son Bob stating that she was assigning to Bob, as a gift, all her interest in Kibble effective immediately. Later that day Mary handed a copy of that letter to Wendy, who immediately read it and said to Mary, "I don't want Bob involved with Kibble." Mary continued to be active in the business operations of Kibble.

Early in November, Wendy distributed the appropriate October profits of Kibble to Mary and Angelo but distributed nothing to Bob.

On November 10, Bob demanded that Wendy distribute Mary's share of Kibble's profits to him and that she also allow him to inspect the books and records of Kibble.

On November 15, Mary learned that Wendy was using Kibble's delivery van on Sundays to transport her nieces to their softball games. Mary demanded that Wendy stop doing so, but Wendy refused, noting that the van was not being used for Kibble's business on Sundays.

1. What legal relationships have the parties established through their dealings? Explain.

2. Is Bob entitled to Mary's share of the monthly profits of Kibble? Explain.

3. Is Bob entitled to inspect the books and records of Kibble? Explain.

4. Is Wendy entitled to use the delivery van on Sundays to take her nieces to their softball games? Explain.

MEE Question 2

A wealthy art collector recently died, leaving her entire collection of artworks to Grandson. After receiving the artworks from the estate, Grandson, who did not share his grandmother's interest in art, decided to sell them. With the help of art appraisal experts, he prepared a catalog describing each of the artworks that he hoped to sell. The catalog, a copy of which was given to each person who expressed interest in buying any of the artworks, identified one painting as an early work by Artiste, a prominent American artist who died in 1956 at the age of 78.

Buyer, an art collector who loves the work of Artiste, read the catalog and was intrigued by the possibility of acquiring the painting described as one of Artiste's early works, so he asked to see it in person. Grandson allowed Buyer to examine the painting only visually for up to 30 minutes.

Buyer visually examined the painting for 30 minutes and did not notice anything that caused him to doubt that the painting was a genuine Artiste.

Buyer then told Grandson that he would be willing to pay $350,000 for "the Artiste painting." Grandson agreed to that price. Grandson and Buyer then executed an "Art Purchase Agreement" prepared by Grandson's lawyer. The Art Purchase Agreement identified the item being sold as a "painting by Artiste" and stated the price as $350,000. The Art Purchase Agreement also contained a number of conspicuous provisions labeled "Terms and Conditions of Sale." One of those provisions stated that "Seller disclaims all warranties, express or implied."

Shortly after Buyer and Grandson executed the Art Purchase Agreement, Buyer electronically transferred $350,000 to Grandson's bank account, and Grandson delivered the painting to Buyer.

Three weeks later, Buyer read a news article reporting that several counterfeits of Artiste paintings had recently been sold. The article reported that these counterfeit paintings were of such high quality that mere visual inspection could not detect the counterfeiting; only a chemical analysis could do so. Buyer consulted a professor of art history, who arranged for a chemical analysis of the paints used in the painting bought from Grandson. The analysis revealed that the painting was not the work of Artiste. Because it was not an authentic Artiste painting, it was worth only $500.

Buyer has sued Grandson, seeking either to recover damages on the theory that Grandson breached an express warranty that the painting was the work of Artiste or, alternatively, to rescind or avoid the purchase contract on the basis of a mutual mistake of fact. Each party has stipulated that the other believed in good faith that the painting was a genuine work of Artiste.

1. Has Grandson breached an express warranty? Explain. (Do not address any remedies to which Buyer may be entitled.)

2. Does Buyer have the right to rescind or avoid the contract on the basis of a mutual mistake of fact? Explain.

MEE Question 3

Cara filed a civil suit against Dana, her former coworker, alleging that Dana had stolen Cara's cell phone from her locker at a gym. The jurisdiction has adopted rules of evidence that are identical to the Federal Rules of Evidence.

At trial, Cara testified during her case-in-chief, stating:

> On October 18, I worked out at the gym. After I completed my workout, I returned to the locker room to change clothes and retrieve my belongings from my assigned locker (#344). My locker (#344) was near the entry door to the locker room, and when I walked into the locker room, I saw Dana hurriedly closing the door to my locker. I am positive it was Dana because it was cold and rainy that day and Dana was wearing a heavy, bright orange coat. I had seen Dana wearing that coat several times before at work and the gym. When I got to my locker, my cell phone was not there.

Dana also testified at trial during her case-in-chief, stating:

> I definitely worked out at the gym on October 18 because I was training for a marathon. I don't recall seeing Cara at the gym that day. For several reasons, I am also positive that I was not wearing a heavy, bright orange coat. First, I ran on the outdoor track that day because the weather was overcast but not cold and not rainy. Second, as I always do for my track workouts, I ran in shorts and a T-shirt; I never wear a coat or jacket while running on the track. Third, I never take my coat or jacket into the gym; I always leave it in my car so it doesn't take up space in my locker.

Dana also testified as follows:

> I'm not surprised that Cara lost her cell phone at the gym. She's pretty careless. At work she often misplaced it, or forgot it in the conference room after a meeting or in the break room after lunch.

Cara objected to this testimony, asserting that it constituted inadmissible character evidence. The judge overruled the objection.

During her rebuttal case, Cara asked the court to take judicial notice of the weather on October 18 based on a certified public record from the federal government's National Weather Service agency. The record was a weather report for October 18 in the area where the gym was located and at the time Cara testified that she was at the gym. According to the record, on October 18 it had rained all day and the high temperature was 41 degrees Fahrenheit (5 degrees Celsius) in the area of the gym.

Dana objected to Cara's request and asked for the opportunity to present an argument that taking judicial notice would be improper. The court immediately overruled Dana's objection and denied her request to be heard. The court took judicial notice of the weather as detailed in the public record.

1. Did the trial court err by denying Dana an opportunity to be heard before it took judicial notice of the weather on October 18? Explain.

2. Assuming that the trial court did not err by denying Dana an opportunity to be heard, did the trial court err by taking judicial notice of the weather on October 18? Explain.

3. Was Dana's testimony that Cara was "careless" inadmissible character evidence? Explain.

4. Was Dana's testimony that Cara often misplaced or forgot her cell phone inadmissible character evidence? Explain.

MEE Question 4

On November 1, 2020, a landlord leased an apartment to Tom for $1,300 per month based on a signed, written "term-of-years lease" for a three-year term to begin on January 1, 2021, and end on December 31, 2023. The lease provided that Tom could neither assign nor sublet the apartment "without the landlord's prior written consent." The lease included no provision stating what would happen if Tom remained in possession beyond the term.

On January 1, 2021, Tom attempted to move into the apartment but could not do so because the prior tenant, Helen, whose lease term had ended on December 31, 2020, still occupied the apartment. Tom immediately notified the landlord that Helen remained in possession. The landlord responded, "I will get rid of her as soon as possible." Tom then booked a hotel room expecting that he would be able to move into the apartment within the next few days. On January 4, the landlord told Tom, "The apartment is now vacant, so you can move in immediately. Also, I will reduce the February rent by $100 for your inconvenience." Tom promptly moved into the apartment.

About one year later, in January 2022, Tom found a house that he wanted to rent and told the landlord that he wanted to assign his apartment lease to a friend. The landlord conducted a background check on the friend and learned that the friend had a very low credit rating. The landlord told Tom that she would not consent to Tom's proposed assignment. Tom said, "Okay," and he continued living in the apartment.

On January 1, 2024, the day after the lease termination date, Tom was still in possession of the apartment. On January 4, the landlord sent Tom a letter telling him that she was treating him as a periodic tenant subject to all the terms of their original lease, "including the monthly rent of $1,300," which substantially exceeded the then-current market rate for comparable units. Tom wrote back, "That's unfair. I should have to pay only the current market value. I have remained in the apartment only a few days beyond the lease termination date." The landlord rejected Tom's suggestion and told him that, as a periodic tenant, he would be liable for rent at the rate of $1,300 for each month of the periodic tenancy.

No statute or local ordinance affects either party's position on any issue.

1. (a) If a court were to hold that Tom could have rightfully terminated the lease because Helen held over on January 1, 2021, what rule would the court apply and what would be the rationale for that rule? Explain.

   (b) If a court were to hold that Tom could not have rightfully terminated the lease because Helen held over on January 1, 2021, what rule would the court apply and what would be the rationale for that rule? Explain.

2. Did the landlord rightfully refuse to consent to Tom's proposed assignment of the lease to his friend? Explain.

3. Following Tom's failure to vacate the apartment, could the landlord rightfully treat Tom as a periodic tenant, subject to the provisions of the expired lease? Explain.

MEE Question 5

City is located in State A adjacent to the border with State B. One evening, a City police officer stopped a driver.

The next day, the driver posted a social-media video, alleging the following:

> Late last night a City police officer stopped my car in City near the state border, supposedly for speeding, and ordered me to get out of the car. The officer made disparaging remarks about a religious sticker on the bumper of my car and ridiculed my religious beliefs. He picked up a rock, threatened me, and asked how fast I could run. I ran about 50 feet and turned to see if he was chasing me. He wasn't, but he threw the rock at me, and it struck me in the face. He laughed and shouted, "Look where you are! There's nothing you can do about it!" I saw that I was standing in State B and the officer was still standing in State A. My lip is busted and swollen. I had to get stitches. I want justice.

The officer was charged with committing various crimes.

City Criminal Charge. A City ordinance provides that "any person who assaults another person because of that person's religious expression commits a serious misdemeanor punishable by up to six months in jail." The City attorney filed a charge alleging that the officer had violated this ordinance by striking the driver with a rock because of the driver's religious beliefs and religious expression.

The officer admitted that the driver's allegations were true and pleaded guilty to the charge filed by the City attorney. The municipal court sentenced the officer to three days in jail.

After his conviction for violating the City ordinance, the officer was charged with four additional crimes. All the additional charges were based on the same incident that led to the officer's prosecution for violating the City ordinance.

State B Criminal Charge. Claiming jurisdiction because the rock thrown by the officer struck the driver in State B, a prosecutor in State B has charged the officer with violating State B's hate-crime statute, which, like City's ordinance, provides for the punishment of "any person who assaults another person because of that person's religious expression." This conduct is a felony punishable by one to two years in prison.

State A Criminal Charges. A prosecutor in State A has charged the officer with two different state-level offenses. First, the officer is charged with violating State A's hate-crime statute, which provides that "any person who assaults another person because of that person's religious expression and thereby causes injury to that person commits a felony punishable by one to five years in prison." Second, the officer is charged with violating a State A assault statute that provides that "any person who assaults another person with intent to cause injury is guilty of a felony punishable by not more than two years in prison."

Federal Criminal Charge. The United States Attorney for the federal district of State A has filed a criminal charge against the officer, alleging that the officer violated a federal statute that makes it unlawful for "any person, acting under color of state or local law, to assault another person because of that person's religious expression." The federal crime is punishable by a term of imprisonment of not more than two years.

1. Is the State B hate-crime prosecution barred by the United States Constitution's double jeopardy clause? Explain.

2. Is the federal hate-crime prosecution barred by the United States Constitution's double jeopardy clause? Explain.

3. Is the State A hate-crime prosecution barred by the United States Constitution's double jeopardy clause? Explain.

4. Is the State A assault prosecution barred by the United States Constitution's double jeopardy clause? Explain.

MEE Question 6

On September 4, 2010, Testator, who had two living children, George and Harriet, properly executed a valid will. The will contained only these dispositive provisions:

1. I give my 200 shares of ABC Corp common stock, which I inherited from my grandfather, to my cousin, Donna.

2. I give my home to my brother, Edward.

3. I give my grand piano to my sister, Faye.

4. I direct that all my just debts be paid before distributing the foregoing devises.

None of the devises were subject to a survivorship contingency. The will contained no residuary clause.

In 2012, ABC Corp distributed 100 shares of its common stock to Testator as a stock dividend.

In 2015, Testator borrowed $125,000 to make home renovations. The 20-year loan was secured by a mortgage on Testator's home. Testator was personally liable on this debt.

In 2020, Testator gave $30,000 to her son, George.

In 2022, Faye, the named beneficiary of the piano in the will, died intestate leaving Testator and Edward as her only heirs.

Three months before Testator died in 2023, her grand piano was substantially damaged. She filed a $10,000 casualty-loss claim with her insurer for the damage, and the insurer approved the claim. The insurer had not made any payment on the claim at the time of Testator's death, and the damaged piano remained in Testator's home. The insurer agrees that Testator's estate is entitled to $10,000 on Testator's claim.

Two months before her death, Testator wrote George a letter informing him that the $30,000 she had given him in 2020 was intended "as an advancement" that would reduce "any share of my estate to which you might ever be entitled."

One month before Testator died, George died survived by his only child, Isaac.

Testator is survived by four relatives: her cousin, Donna; her brother, Edward; her daughter, Harriet; and her grandson, Isaac (George’s son).

Testator’s estate consists of 300 shares of ABC Corp common stock (the 200 shares she inherited and the 100 shares received as a stock dividend), her home, her piano, $200,000 in cash, and the $10,000 owed by the insurer. Testator’s only debt at her death was the mortgage loan on the home she devised to Edward.

Faye’s estate is still in administration. Her estate's debts are greater than its current assets, and Faye's personal representative is seeking to recover the piano and the insurance proceeds payable to Testator's estate.

The jurisdiction has adopted the Uniform Probate Code.

How should the assets of Testator’s estate be distributed? Explain.

February 2024
MPT-1 Item

State of Franklin v. Iris Logan

State of Franklin v. Iris Logan

FILE

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

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

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

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

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

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

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

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

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

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

Direct Examination of Tara Owens by District Attorney Deanna Gray

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

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

Q: Did you try to stop the person?

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

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

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

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

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

Q: Were you injured?

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

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

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

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

A: Yes.

* * *

Direct Examination of Jed Rogers by District Attorney Deanna Gray

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

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

Q: What exactly did you see?

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

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

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

Q: Was there anyone else with her?

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

Q: Did you call the police?

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

* * *

Direct Examination of Officer Maria Torres by District Attorney Deanna Gray

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

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

Q: Did you determine the ownership of the sedan?

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

Q: What did you do next?

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

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

A: 45 miles per hour.

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

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

Q: What happened next?

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

Q: What did you do next?

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

Q: Did you notice anything else?

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

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

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

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

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

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

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

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

A: Yes.

* * *

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

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

A: I was chasing her for a robbery.

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

A: Right, it came over as purse snatching.

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

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

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

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

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

A: Yes, that is correct.

* * *

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

INTERSECTION OF STATE ROUTES 50 AND 75

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

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

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

FRANKLIN CRIMINAL CODE

§ 901 ROBBERY

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

§ 970 FIRST-DEGREE FELONY MURDER

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

State v. Driscoll
Franklin Court of Appeal (2019)

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

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

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

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

Affirmed.

State v. Clark
Franklin Court of Appeal (2007)

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

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

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

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

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

For the foregoing reasons, the conviction is affirmed.

State v. Finch
Franklin Supreme Court (2008)

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

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

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

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

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

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

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

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

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

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

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

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

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

Affirmed.

MULTISTATE PERFORMANCE TEST DIRECTIONS

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

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

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February 2024
MPT-2
Item

Randall v. Bristol County

Randall v. Bristol County

FILE

LIBRARY

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

MEMORANDUM

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

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

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

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

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

Law Offices of Michael Carter

OFFICE MEMORANDUM

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

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

I. Captions

[omitted]

II. Statement of Facts

[omitted]

III. Legal Argument

Your legal argument should make your points clearly and succinctly, citing relevant authority for each legal proposition. Do not restate the facts as a whole at the beginning of your legal argument. Instead, integrate the facts into your legal argument in a way that makes the strongest case for our client.

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

You should analyze applicable legal authority and persuasively argue how both the facts and the law support our client's position. Supporting authority should be emphasized, but contrary authority should also be cited, addressed in the argument, and explained or distinguished.

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

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

October 27, 2023

Ms. Olivia Randall
610 Surrey Lane
Derby, Franklin 33203

Sent by certified mail

Dear Ms. Randall:

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

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

Sincerely,

Jean Pearsall

Jean Pearsall
Director, Personnel Office

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

November 4, 2023

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

RE: Matter of Olivia Randall

Dear Attorney Carter:

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

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

Sincerely,

Susan Burns

Susan Burns, Esq.
Assistant Corporation Counsel

Content of Posts on Olivia Randall's Facebook Page

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

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

Excerpts from Deposition of Olivia Randall
January 15, 2024

Examination by Bristol County Assistant Corporation Counsel Susan Burns

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

A: Yes.

Q: Tell me about the program.

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

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

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

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

A: No, it was not.

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

A: Yes, I did.

Q: Why did you make these Facebook posts?

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

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

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

Q: Why did you make the posts public?

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

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

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

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

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

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

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

* * * * *

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

Examination by Plaintiff's Attorney Michael Carter

Q: Explain your position as county executive.

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

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

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

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

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

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

A: I did.

Q: Why did you make that decision?

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

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

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

Q: Is that economic growth office in place?

A: We are working on it.

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

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

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

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

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

A: No.

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

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

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

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

Q: How did she embarrass you?

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

Q: How did Ms. Randall embarrass the county?

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

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

A: Yes, and all the trouble they caused.

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

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

Q: How many public inquiries have you had?

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

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

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

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

A: Not that I know of.

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

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

* * * * *

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The district court properly granted summary judgment to the department.

Affirmed.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Affirmed.

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February 2024

New York State
Bar Examination

Sample Essay Answers

FEBRUARY 2024 NEW YORK STATE BAR EXAMINATION

SAMPLE ESSAY ANSWERS

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ANSWER TO MEE 1

1. Legal Relationships of the Parties

The first issue is whether Mary became a partner of Kibble through her contribution and subsequent sharing of profits and losses, as well as her engagement in the business activities.

A partnership is the entering into a business venture for the purpose of making a profit. There need not be proof of subjective proof that the individuals call each other "partners" or to call the business a partnership in order to form a partnership. Additionally, there need not be a partnership agreement or any filings to form a partnership. Rather, a court will look at the totality of the circumstances to determine whether a partnership has been formed. Sharing of profits creates a rebuttable presumption that the parties have entered into a partnership. However, this presumption may be overcome. Courts will look to other items regarding the relationship, including the intent to share losses, whether the payment of profits was to repay a loan, and whether the parties share in business decisions.

Here, Mary made a check payable to "Kibble." She thereby continued to receive 15% of the monthly profits for as long as Kibble remained in business. Because she retained profits indefinitely, and not just for the repayment of the loan, it is unlikely that Mary would be able to overcome the presumption of partnership. Additionally, Mary shared in 15% of the losses of Kibble. Finally, Mary worked at the store and helped Wendy with the business planning for Kibble. These factors all suggest that Mary was a part of Kibble and working with Wendy for the purpose of the profit of Kibble.

Therefore, Mary is a partner of Kibble.

The second issue is whether Angelo's loan would make him a partner of Kibble.

See rules above regarding formation of a partnership and becoming legally classified as a partner. When sharing in profits is only done to the extent of paying off a loan to a business venture, and the creditor has no other stake with respect to the business' losses or management decisions, they will likely overcome the presumption that sharing of profits makes one a partner.

Here, Angelo made a loan to Kibble and agreed in a signed writing to accept 15% of the monthly profits of Kibble as repayment of the loan until the total loan amount, including interest, was repaid. Therefore, Angelo had no stake in the business beyond regaining the amount he loaned. Angelo did not hold himself out to be a partner in any other capacity--he did not engage in any other business decisions or agree to share in any losses Kibble faced. Therefore, Angelo is not a partner to Kibble, but merely a creditor.

Mary and Wendy have formed a partnership for Kibble. Angelo is not a partner to that partnership but rather a creditor.

2. Bob's entitlement to Mary's share of the monthly profits

The issue is whether a partner to a partnership may unilaterally transfer their interest in profits.

Unless there is a partnership agreement that speaks to the contrary, the RUPA states that a partner to a partnership may unilaterally transfer their partnership interests in the profits of the partnership. However, a partner may not unilaterally transfer their management rights under a partnership. Because this may be unilateral, under the RU PA, a transfer of a partner's rights to income under a partnership is valid regardless of the dissent of another partner.

Here, Mary effectively assigned to Bob her interest in the income through the share of the monthly profits. Though her letter suggests an intent to transfer "all of her interests," this would be construed only to read as her share in the profits and not in managerial rights. Because Mary may unilaterally assign her interest in the profits, it is irrelevant that Wendy said she did not want Bob involved with Kibble. Bob would not be involved in the management decisions, only taking Mary's share (15%) of the profits, which Wendy may not object to without a partnership agreement.

Bob is entitled to Mary's share of the monthly profits.

3. Bob's entitlement to inspect the books and records

The issue is whether Bob has managerial rights under the partnership and may therefore inspect the books and records.

As stated above, a partner may unilaterally convey *only* their interest in the profits, not managerial rights. While a partner to a partnership has a right to inspect the books and records of a partnership, and other partners have a duty to provide that information and to account to other partners, that right cannot be held by someone who does not have managerial rights in the partnership.

Here, Mary's unilateral conveyance of her interest only transferred her interest in the share of profits. It did not convey any interest in managerial rights. Therefore, Bob has no right, and Wendy has no legal obligation to provide, for inspection of the books and records of Kibble, since that is a right of a partner.

Bob is not entitled to inspect the books and records of Kibble.

4. Wendy's entitlement to use the delivery van on Sundays

The issue is whether a partner may use partnership property for personal use. Property for a partnership is presumptively the partnership's property. As such, the individual partners have a right to use the property for partnership, but not personal, purposes. This presumption usually comes about when the property was purchased for use by the partnership, with partnership funds, the partnership is listed as the owner of title, and/or the property is such that would ordinarily be used by such a partnership. This presumption may be overcome if the property was purchased for a personal need and is allowed to be used occasionally by the partnership. To overcome this presumption, the partner must show that they bought this property on their own and with their own money, for their own use, and that the partnership is incidentally entitled to its use. If a partner is using property for personal uses, any other partner has the right to demand they stop using it in such a capacity.

Here, Wendy purchased the delivery van in Kibble's name, therefore the property is listed as Kibble's property in the title for the van. She purchased the van from the proceeds of the checks from Mary and Angelo. These checks both contained "Kibble" on the memo line to some capacity. The funds were intended to be used for Kibble based on the demand from Wendy for financial assistance for Kibble. Therefore, the money was partnership property. There are no facts which state that Wendy purchased the van for personal use. Rather, it is clear that she purchased the van, along with equipment and supplies in order to effectuate earning profits for Kibble. Because Wendy will not be able to overcome the presumption that this is partnership property, her personal use of it by transporting her nieces to their softball games is improper. Additionally, Mary's demand that Wendy stop using the van for personal use is proper.

Therefore, Wendy is not entitled to use the delivery van on Sundays to take her nieces to their softball games.

ANSWER TO MEE 1

1. Legal Relationships

The issue is what legal relationships the parties have established through their dealings. This issue turns on whether the parties formed a partnership.

Wendy and Mary

The issue is whether Mary and Wendy formed a partnership.

A partnership is formed by an agreement between at least two people to run a for-profit business as co-owners. In general, a partnership involves shared profits and shared control. A partnership does not have to be formed by writing (so they can be formed orally) and the partners do not have to have the specific intent to form a partnership for a partnership to be formed. If two people agree to share profits, there is a presumption that the agreement formed a partnership. However, this presumption does not exist if the agreement to share profits was for the repayment of a debt.

Here, Mary's May 1 check made payable to "Kibble" she gave to Wendy created a partnership with Mary and Wendy as partners because Mary and Wendy thereafter agreed to run a for-profit business (Kibble) as co-owners (partners). The agreement between Mary and Wendy included an agreement that Mary receive 15% of Kibble's net profits for as long Kibble remained in business, and as this is an agreement to share profits not for the repayment of a debt, this profit-sharing agreement creates the presumption that Mary and Wendy are co-owners and formed a partnership. This shows shared profits, and Mary and Wendy also shared control because Mary began working at the store and helped Wendy with business planning. The formation of a partnership is further strengthened by the fact that Mary agreed to share the losses to the same extent as sharing the profits (15%). Therefore, Mary and Wendy formed a general partnership and are both partners of Kibble.

Angelo

The issue is whether Angelo became a partner of Kibble.

Applying the rule for partnership formation stated above, Angelo did not join the partnership of Kibble as a partner, but rather is a creditor to Kibble. Unlike with Mary's check (payable to Kibble), Angelo's check included in the memo like that the check is a "loan to Kibble." Because Angelo's check was intended as a loan, rather than contribution as a partner, there is no presumption of a partnership from Angelo's 15% share of the profits because the profit-sharing agreement is for the purpose of repaying a debt (and

indeed will end when the debt, including interest, is repaid). Therefore, Angelo is a creditor to Kibble.

Accordingly, Mary and Wendy are partners to Kibble, and Angelo is a creditor to Kibble.

2. Mary's Share of Monthly Profits

The issue is whether Bob is entitled to Mary's share of the monthly profits of Kibble. This issue turns on whether Mary's assignment of her partnership interest to Bob was an assignment of her position as a partner or her financial interest in Kibble.

A partner in a partnership may freely assign her financial interest to a third party. If a partner does so, the partner remains a partner, and the third party remains a third party. A partner who assigns her financial interest to a third party does not necessarily assign the right to be a partner (which would require the consent of all other partners).

Here, Mary's letter indicated that Mary assigned to Bob "all her interest" in Kibble. However, Mary did not assign her right to be a partner because she continued to be active in the business operations of Kibble. However, Mary's letter did validly assign her financial interest in Kibble (15% of the monthly profits) to Bob. Because this is an assignment of financial interest (rather than the right to be a partner), Wendy's disapproval of the assignment does not void the assignment, and Bob still has Mary's rights to 15% of the monthly profits.

Accordingly, as Mary validly assigned her financial rights to Bob, Bob is entitled to Mary's share of Kibble's monthly profits.

3. Inspection of Books and Records

The issue is whether Bob is entitled to inspect the books and records of Kibble. This issue turns on whether Bob is a third party or a partner in Kibble.

Partners are entitled to inspect the books and records of the partnership, and this right cannot be infringed upon or denied by the partnership or other partners. As mentioned above, if a partner assigns her financial interest in a partnership to a third party, the partner remains a partner and the third party remains a third party.

Here, as explained above, Mary assigned to Bob her financial interest in Kibble. However, this did not make Bob a partner (which would require the consent of all other partners - here, Wendy, who denied consent by saying she did not want Bob involved with Kibble), as explained above and as indicated by Mary's continued involvement with Kibble's business. Mary assigned her financial interest to Bob, as explained in detail

above. However, Mary is still a partner and Bob is still a third party. As a third party, Bob is not entitled to inspect Kibble's books and records.

Accordingly, because Bob is a third party and not a partner, Bob is not entitled to inspect Kibble's books and records.

4. Use of Delivery Van

The issue is whether Wendy is entitled to use the delivery van on Sundays to take her nieces to their softball games.

A partnership is a legal entity that can sue and be sued in its own name and can own property separate from the partners. Partnership property must be used for the benefit of the partnership and cannot be used by partners for personal reasons absent consent by all other partners.

Here, Wendy's use of Kibble's delivery van on Sundays to transport her nieces to their softball games is a personal use of Kibble's property because it is outside of the ordinary course of Kibble's business. This use by Wendy is not for the benefit of Kibble, because there is no indication that Kibble is gaining anything by Wendy's transportation of her nieces to her softball games. As Mary does not consent to this use of partnership property, indicated by Mary's demand that Wendy stop using the delivery van in such a manner, Wendy is not entitled to use the delivery van to transport her nieces to softball games.

Accordingly, as Wendy's use of Kibble's delivery van to transport her nieces to their softball games on Sundays is not for the benefit of the partnership and because Mary does not consent to such a use, Wendy is not entitled to use the delivery van in such a manner.

ANSWER TO MEE 2

Did Grandson breach an Express Warranty:

At issue is whether grandson's catalogue and subsequent art sale contract constitute an express warranty.

This is a contract for the sale of goods over $500, governed both by the UCC and the Statue of Frauds. Generally, an express warranty is one made by a seller wherein the seller relays facts or describes the product, makes promises about the product, or uses models or samples about a product such that it conveys certain assurances about the product to the buyer. An express warranty is distinguishable from the mere puffery that is often found in salesmanship, which includes expressions using terms such as "best" and the like. Express warranties generally cannot be disclaimed, though the remedy associated with the breach of an express warranty can be conditioned. However, the conditioning of the warranty cannot be unconscionable, that is, it cannot fail its essential purpose.

Here, Grandson sold a painting by Artiste that he admittedly did not know much about. He rightfully consulted art appraisal experts and prepared a catalogue describing the pieces he intended to sell, including the piece by Artiste that he sold to Buyer. The catalogue described this particular work as having been made by Artiste. The subsequent contract likewise described the piece as the "painting by artiste." In two separate writings, Grandson made affirmative descriptions of the product as being a painting by artiste; these constituted express warranties. Grandson's general disclaimer as to express or implied warranties is not effective for an express warranty. The painting was not what it was described to be, regardless of whether or not Grandson believed that to be true or not, and thus, an express warranty was breached.

Grandson made an express warranty about the painting, which turned out to be incorrect, and therefore, he breached.

Does the buyer have the right to rescind or avoid the contract on the basis of a mutual mistake of fact:

At issue is whether there is a mutual mistake sufficiently material to the contract so as to grant a revision or an avoidance.

To rescind or avoid a contract for mutual mistake, there must be a fact that existed at the time the contract was made that is material to the contract. The nonexistence of this fact must be a basic assumption of the parties and the contract, and the risk associated with this fact must not have been allocated. Allocation of the risk can occur when a party has superior knowledge or skill (i.e. a homebuilder versus a homebuyer). Generally, a mistake in price is not sufficient to constitute a mutual mistake sufficient to avoid a contract.

Here, there is a material fact that existed when the contract was entered into: the painting is an extremely well made fake-it is not an authentic work by Artiste. Both parties assumed in good faith that this was an authentic when they entered into this agreement. The risk, moreover, cannot be said to have been allocated. Grandson is not an expert and he had the help of art appraisal folks when selling the pieces. While buyer is a collector, who loves the work of this particular artist, and while he had time to inspect the piece (30mins), the fakes were of such high quality that only specialized analysis could reveal them. It would be unfair to impute this specialized skill to a buyer, no matter how much they know about the art in question. The mistake here, moreover, is not about price: it is not that the worth of the price is $350K versus $500, although that is, of course, important; but rather that the piece was or was not made by Artiste. It was not - and neither of the parties knew that.

As a result, sufficient evidence exists to rescind or avoid the contract because of mutual mistake.

ANSWER TO MEE 2

1 . Has Grandson breached an express warranty?

The issue is whether an express warranty can be waived.

This is a contract for the sale of goods, and therefore it is governed by the UCC. The definition of goods include movable things such as paintings.

The rule is that in the sale of goods there are express warranties and implied warranties. The implied warranties are the warranty of merchantability and the warranty of fitness for a particular purpose. An express warranty is the facts that the seller indicates to the buyer that are not mere commercial puffery, that are essential characteristics of the goods. The implied warranties can be disclaimed in the contract (for instance, if it's being sold "as is") but the express warranties cannot be disclaimed.

Here, the fact that the paint was painted by Artiste was an express warranty. It is a material characteristic of the contract that it was painted by him. The fact that the buyer and Grandson signed an agreement labeled "Terms and Conditions of Sale" in which Grandson disclaimed all warranties, express or implied, only works to disclaim implied warranties. Buyer told Grandson that he was willing to pay $350,000 for the "Artiste painting" which shows that the fact that it was painted by Artiste is a material term of the contract.
Therefore, since the express warranties cannot be waived, Grandson breached the express warranty.

However, some jurisdictions establishes that only merchants that deal with goods of the kind can be held liable for the breach of warranties, such as the express warranty.

Here, Grandson was not a merchant, he was only selling the artwork collection because he got the art from the will of a wealthy art collector. He usually does not deal with goods of the kind and was only incidentally selling the paintings.

Therefore, if the jurisdiction follows the rule that non merchants cannot be held liable for warranties in the sale of goods, Grandson will not have breached the express warranty because he was only an incidental seller, not a merchant.

2. Does buyer have the right to rescind or avoid the contract on the basis of a mutual mistake of fact

The issue is whether a mutual mistake renders a contract rescindable or avoidable.

The rule is that a contract made under a mutual mistake of fact is rescindable or avoidable because there was not meeting of the minds. If the parties did not establish that one of them would assume the risk of the mistake, the mistake makes the contract unenforceable. Moreover, it would be unfair to hold a party responsible for the mutual mistake.

Here, both parties were mistaken respecting the painting that was the subject matter of the contract, while Grandson had an honest belief that the painting was genuine and he did not intent to commit fraud, the contract is avoidable because the painting was not what he thought it was, he even got help from art appraisal experts when he prepared the catalog. Grandson and buyer both in good faith believed that the painting was a genuine work of Artiste. Therefore, since the basic assumption of the contract was mistaken, that the painting was original, there was not meeting of the minds.

Moreover, while the art collector loved the work of Artiste, Grandson only allowed him to inspect the painting for 30 minutes, and since the counterfeit painting were of such high quality, the visual inspection could not detect the counterfeiting, only a chemical analysis of the painting could do so. Therefore, the seller could not have reasonably foresee that the paintings would be fake, nor the contract put the risk on him. Therefore, it would be unfair to enforce a contract for a painting costing $500 for the price of it as it was original, worth $350,000.

Therefore, since the contract was based on an assumption that was not true and therefore it was based on a mutual mistake of fact, the contract is rescindable or avoidable.

ANSWER TO MEE 3

1. The issue presented is whether the trial court erred by denying Dana an opportunity to be heard before it took judicial notice of the weather on October 18. The answer is yes.

Before a court takes judicial notice of a fact, a party has a right to be heard on the issue. This is important because once a trial court takes judicial notice of a fact in a *civil* lawsuit, like here, it is conclusively established. Dana objected to Cara's request and asked for the opportunity to present an argument that taking judicial notice would be improper. The court overruled that objection and denied her request to be heard. That was improper because Dana should have been given an opportunity to be heard on the issue.

2. The issue presented is whether the trial court erred by taking judicial notice of the weather on October 18. The answer is no.

A court may take judicial notice of any fact of consequence that is generally known in the community or that is within a reliable, trustworthy, and verifiable source. Here, Cara asked the court to take judicial notice of the weather on October 18 based on a certified public record from the federal government's National Weather Service agency. The weather is an important and relevant matter for this case because both Cara and Dana rely on the weather to corroborate their story. A certified public record from the federal government's National Weather Service agency is reliable and trustworthy, and it is a reasonable source to get the weather from because it has a duty to take note of the weather each day. For these reasons, the trial court did not err by taking judicial notice of the weather on October 18.

3. The issue presented is whether Dana's testimony that Cara was "careless" is inadmissible character evidence. The answer is that this was inadmissible character evidence.

In a civil lawsuit, character evidence is generally inadmissible to prove conduct in conformity with one's character. Character evidence is admissible in a civil lawsuit only if character is directly at issue in the case. Character is directly at issue in the case in a small handful of civil lawsuits, such as in a child custody cases, negligent hiring/entrustment cases, or defamation cases. Here, the lawsuit between Cara and Dana is a civil lawsuit, and character is not directly at issue in a theft case. Therefore, to the extent Dana was trying to say that because Cara is generally careless, she must have been careless on October 18, then Dana's testimony is inadmissible because Dana seeks to admit the testimony to prove conduct in conformity with Cara's character. However, the testimony may be admissible for some other purpose, such as motive, identity, lack of mistake, intent, and common scheme. To the extent Dana was referring to Cara as "careless" to show one of these other purposes like identity or perhaps a lack of mistake, it

would be admissible evidence. But it does not appear that Dana was trying to do that, so the answer is that the testimony was inadmissible character evidence, meaning the court erred by overruling Cara's objection that this testimony was inadmissible character evidence.

4. The issue presented is whether Dana's testimony that Cara often misplaced or forgot her cell phone is habit evidence or inadmissible character evidence. The answer is that this testimony was inadmissible character evidence (and likely not habit evidence).

Habit evidence is evidence of a person's repeated response to a specific set of circumstances. Habit evidence is generally admissible. An example of habit evidence is "Every day, Bobby always stops by the local beer garden on 14th Street on his way home from work and orders three Coronas from the waitress who stands at the far corner of the bar." That example stands in contract to the testimony at issue here. The testimony at issue here likely does not qualify as habit evidence because it is not specific enough. It is more of a general statement that Cara often misplaces or forgets her cellphone. The conclusion as to habit evidence likely would have been different if Dana had said Cara *always* leaves her phone in the conference room after a meeting or she a/ways leaves her phone in the break room after lunch. But that is not the case here. The testimony that Cara often misplaced or forgot her cell phone is not admissible habit evidence.

Instead, it is inadmissible character evidence. As noted above, character evidence in a civil lawsuit is generally inadmissible to prove conduct in conformity with one's character. Character evidence is admissible in a civil lawsuit only if character is directly at issue, such as in a child custody case, negligent hiring/entrustment case, or defamation case. Here, the lawsuit between Cara and Dana is a civil lawsuit, and character is not directly at issue. In addition, character evidence may be admissible for some other purpose, such as motive, identity, lack of mistake, intent, and common scheme, but it does not appear that any of those other purposes are relevant here. In conclusion, Dana's testimony that Cara often misplaced or forgot her cell phone is inadmissible character evidence (and likely *not* habit evidence).

ANSWER TO MEE 3

1. Opportunity to be Heard on Judicial Notice

The issue is whether a party in a civil case must be given an opportunity to be heard before the court takes judicial notice of a fact.

The effect of judicial notice in a civil case is that the court must take that fact to be true and the trier of fact must accept the fact to be true when making their decision on the case. In any situation of judicial notice, the court must allow a rebuttal when one party seeks to have the court take judicial notice of a fact when that fact is essential to the case and is not collateral. The inquiry as to whether an opportunity to be heard must then turn on whether the fact was essential to the case.

Here, the fact that Cara was requesting to take judicial notice of was the weather. This fact is likely essential to the case because Cara's identification of Dana on the day in question relied on the fact that Dana was wearing a bright orange rain coat that Cara had seen her wear in the rain before. Additionally, this fact is disputed in the case because Dana argues that the weather was not cold and rainy and was not wearing her bright orange coat that day because of that fact. Therefore, because this fact was essential to the case, the court must have allowed Dana to be heard before judicial notice of it was taken and the weather conditions were presumed to be cold and rainy on the day in question, October 18th.

Pursuant to the above, the court did likely err when it did not allow Dana to present an argument that the taking judicial notice would be improper. However, this is likely a harmless error if the weather conditions were properly authenticated and Dana could not show that the result of the case would be different without this error.

2. Judicial Notice of the Weather

The issue presented is whether there was sufficient authentication and foundation for the court to take judicial notice of the weather conditions. Here, judicial notice was proper because evidence of the weather conditions came from a certified public record.

As mentioned above, judicial notice of a fact instructs the trier of fact to take that fact as true when deciding the case. Judicial notice of a fact may be taken when a fact is either common knowledge in a jurisdiction, or is known to be true because it is recorded in the public record by a government agency. Furthermore, public records of this type, though hearsay, are admissible because they fall under the hearsay exceptions for public records and records of regularly conducted business activities. Public records can be authenticated by a certification from the record keeper, and records of a regularly conducted activity are admissible when the person that made them was under a legal duty to report and the report

was made at or near the time of the event when the person had personal knowledge of the event.

Here, judicial notice of the weather was proper because judicial notice was taken from a properly authenticated public record. The public record was taken by the National Weather Service who is under a legal duty to correctly and accurately record the weather. Reports regarding the weather from the National Weather Service and known to be reliable public records that judicial notice is allowed to be taken from. Additionally, they are admissible hearsay under the public records exception and under the exception for records of a regularly conducted activity. The weather report, as mentioned above, was taken under a legal duty to report, and it describes the weather in the area of the gym on that day when the recorder, the National Weather Service, would have had personal knowledge of the weather at that time.

Therefore, judicial notice of the weather was proper because it came from a properly certified public record from the National Weather Service.

3. Dana's testimony that Cara was "Careless"

The issue is whether character evidence of this kind is admissible in civil case. Dana's testimony that Cara was careless is inadmissible character evidence.

In civil cases, character evidence to show propensity to act in conformity with that character trait is generally inadmissible unless character is directly in issue. Character is directly in issue in cases like negligent entrustment, negligent hiring, defamation, and civil fraud actions. The only character evidence that is admissible when character is not directly in issue is that of a person's truthfulness to impeach their credibility once they have testified.

Here, character is not in issue because this is a civil suit regarding conversion of property. Furthermore, this evidence is not admissible as impeachment evidence because it does not speak to Cara's truthfulness or untruthfulness. Thus, Dana's testimony that Cara is "careless" is inadmissible character evidence.

4. Dana's testimony that Cara misplaced/forgot her cell phone

The issue is whether Cara's testimony is admissible habit evidence or if it is inadmissible character evidence. Here, this is likely not admissible as habit evidence and is therefore inadmissible character evidence.

Even though character evidence is generally inadmissible in civil cases, evidence of a person's habit may be admissible to show that they likely acted in conformity with that habit on a specific occasion. Proper character evidence requires a showing that the

person whom it's about engages in the same conduct to the same stimulus repeatedly on every occasion that stimulus is present.

Here, Dana may try and argue that this is habit evidence because she is trying to show that when Cara leaves an area she repeatedly leaves her phone behind. However, this is not enough to show evidence of habit. Frequently leaving an item behind when one leaves the room is not sufficient to show that it is one's habit to leave their phone behind. This is missing a repeated reaction to the reoccurring stimulus.

Thus, this is likely being offered to show that Cara has the character trait of forgetfulness and acted in accordance with that trait on this occasion. As mentioned above, character evidence to show propensity to act a certain way is generally inadmissible in civil cases. Therefore, this testimony is likely inadmissible.

In sum, Dana's testimony that Cara often misplaced her phone or left it behind is likely inadmissible character evidence.

ANSWER TO MEE 4

1(a). The issue is what rule applies if the court holds Tom could have rightfully terminated the lease because Helen held over on January 1, 2021.

The rule that majority of jurisdictions apply to a tenant's right to possess the property requires a landlord to deliver both title and possession to the tenant on the date of the lease term. Under such rules, a tenant, if he cannot obtain lawful possession on the date of the lease term could treat the lease as breached and rightfully terminate.

Thus, under such modern rules, the landlord would have a duty to deliver title and possession. Thus, when Helen held over until January 4, 2021, prohibiting Tom from possessing the premises as of January 1, 2021, the court would be applying the majority rule if it held that Tom could have rightfully terminated the lease because he could not possess the property.

1(b). The issue is what rule applies if the court holds Tom could not have rightfully terminated the lease because Helen held over on January 1, 2021.

Under the American rule (minority rule), the landlord had a duty only to deliver title to a tenant. Thus, once title was given, the landlord had no further duties to ensure that a tenant could obtain possession of the premises. Thus, a tenant who obtained title but was prevented from obtaining possession had no remedy in terms of the contract with the landlord.

Here, Tom's lease was to begin January 1, 2021 and the parties executed the term of years agreement. Thus, under the American rule, on January 1, 2021 when Tom was legally entitled to the premises, the landlord would have had no further duty to ensure possession. Thus, if the court holds Tom could not rightfully terminate the lease, it would be applying the American rule.

2. The issue is whether the landlord rightfully refused to consent to Tom's proposed assignment of the lease to his friend.

Generally, clauses prohibiting alienation are disfavored because courts want people to be free to distribute and manage property efficiently. Thus, clauses that completely bar alienation are void as a matter of public policy. However, mere restraints on alienation are permissible so long as they are reasonable. Thus, an anti-assignment clause in a lease that requires the landlord's consent to proposed assignments generally will be upheld. In some jurisdictions, a landlord's denial may be arbitrary or based on personal animosities. However, in most jurisdictions, failure to consent to assignments must be in good faith, reasonable, and based on articulable standards for denial.

Here, Tom's lease includes a restraint on alienation, which requires the landlord to consent prior to a valid assignment. Thus, a court will not find the restraint void as a matter of public policy. Here, Tom found a house he wanted to rent and told the landlord he wanted to assign the apartment to his friend. The landlord subsequently conducted a background check on the friend and learned that he had a very low credit rating and would not consent to the assignment. In a minority of jurisdictions, the landlord's denial to rent to friend is ok. Under majority rules that require a good faith basis for denial, the landlord refused to consent based on the low credit rating. Such refusal was not arbitrary and was based on a good faith assumption that a tenant with low credit worthiness was not someone he wanted to risk having the apartment's lease assigned to. Thus, his decision will not be void as a matter of public policy or unenforceable as unreasonable.

Thus, the landlord rightfully refused to consent to Tom's proposed assignment of the lease to his friend.

3. The issue is whether the landlord could rightfully treat Tom as a periodic tenant following his failure to vacate from the apartment.

A lease for a term of years is permissible upon a signed writing stating the term for occupancy. Such leases do not require notice of termination and terminate automatically as of the last day of the expressed lease term. A tenant who remains on the property after the agreed upon lease term ends is considered a hold over tenant. When a tenant holds over, a landlord may either bring an action for eviction against the tenant or if he chooses to accept payment, a period lease is created. A periodic lease may then be terminated upon written notice prior to the beginning of the last month of the lease period.

Here, Tom had a term of years lease for 3 years that was signed and automatically terminated on December 31, 2023. Thus, no notice was required for termination. As of January 1, 2024, when Tom remained on the property, he became a holdover tenant. Thus, the landlord was allowed to bring an eviction action against him or treat the obligation as a periodic tenancy and accept further rent payments. The landlord is permitted to either accept rent payments equal to the amount previously charged by the lease as a continuation of the lease, or at fair market value.

Thus, though the lease provisions would continue at higher than fair market value rates, the landlord could rightfully treat Tom as a periodic tenant subject to the provisions of the expired lease and is required to give him notice of termination prior to the first day of the last month of the desired periodic lease term.

ANSWER TO MEE 4

1(a): A court would have applied the majority rule that a Landlord is required to give actual possession to Tenant on the start of the lease

When a landlord and tenant sign a lease agreement, the majority rule is that the landlord is required to give the Tenant actual possession of the premises on the start date of the lease. The rationale for this rule is that it comports with the expectation of the parties that the tenant be permitted to move in on the start date of the lease. Further, the covenant of quiet enjoyment states that the landlord shall not unreasonably interfere with the tenant's right to use and enjoyment of the premises.

Here, a court would rationale that Tom (T) had the right to immediately terminate the lease because Landlord (L) owed Tom (T) the right to immediate possession of the premises, and owed him a covenant of quiet enjoyment to possession. Since L had not evicted or caused Helen to move out and she was still in possession at the start of T's lease, L had failed to deliver actual possession of the premises to T. As a result, L had breached the lease agreement and covenant of quiet enjoyment. Therefore, **T** would be able to terminate the agreement immediately.

1(b): A court would apply the minority rule that a Landlord is only required to give legal possession to Tenant at start of the lease

The minority rule is that the landlord is only required to give the tenant the legal possession of the premises on the start date of the lease. The rationale for this rule is that since the tenant still has the legal right to possess the premises, the covenant of quiet enjoyment is not breached because the tenant's right to possess is not being interfered with by the landlord but by the holdover tenant. This is not a breach of the lease agreement in a minority jurisdiction.

Here, while T does have legal possession, he does not have actual possession. In a minority jurisdiction, this is all that is required to make the lease enforceable. Therefore, although T may have a claim against paying the rent because he is not in actual possession, he does not have the right to terminate the lease because L's failure to remove Helen is not a breach.

2: The issue is whether the landlord's withholding of consent was commercially reasonable.

Generally, tenants have the ability to assign or sublease their leases freely. But where the lease agreement provides otherwise, it is permissible to restrict the tenant's ability to assign or sublease, or to require landlord consent prior to assignment or sublet. However, where a landlord's consent is required to assign or sublease, the landlord may only deny the assignment/sublease if the denial is commercially reasonably.

Here, the lease properly limited T's ability to assign/sublease, making such assignment/sublease contingent on L's prior written consent. As stated, L's consent could only be denied if it were commercially reasonable. **L** denied the assignment when he ran a background check on the proposed assignee and discovered that they had poor credit. This is a commercially reasonable reason to deny assignment because it reflects on the assignee's ability to pay the rent and impact's L's ability to recover from assignee in the event of a breach. Therefore, L's withholding of consent was commercially reasonable.

3: The issue is whether the Landlord could rightfully subject Tom to provision of the expired lease

A tenant who remains in possession beyond the expiration of the lease is known as a holdover tenant. When a holdover tenant remains in possession, it creates a tenancy by sufferance and the landlord may evict or remove the tenant from the premises. A landlord may also create a new tenancy for years by agreement with the tenant. Or, the landlord may allow the tenant to remain in possession and create a periodic tenancy subject to the terms of the original lease.

Here, **T** remained in possession after the expiration of the lease agreement. Therefore, L was permitted to pursue any course of action as described above. L decided to treat **T** as a periodic tenant and charge rent pursuant to the original lease agreement. This is permitted. As such, since the original lease agreement was for $1300/month, month periodic tenancy will be created with a rent of $1300, despite the decreased market rate for such a unit.

ANSWER TO MEE 5

In criminal law, double jeopardy provides that a defendant may not be tried for the same crime twice. This serves to prevent the trial and conviction of the same crime more than once, and to prevent the double punishment of crimes. Double jeopardy attaches when the jury is sworn in for a jury trial or, in a bench trial, when the first witness is sworn in. Under the doctrine of separate sovereigns, double jeopardy is not offended if an act is tried both in state and federal courts; it is also not offended if an act is tried both in a civil case and in a criminal case. For double jeopardy, a crime is different from another/not the same if each crime requires an element to be proven that the other crime does not.

Here, the defendant was charged and properly convicted by the city in state A of violating a law that criminalizes an act by (1) any person who assaults another person (2) because of that person's religious expression. The crime is characterized as a misdemeanor and is punishable by up to 6 months in jail. The officer here served three days in jail

1. Issue is whether double jeopardy was violated by the state B hate crime prosecution

The state B hate crime statute that the man was charged with for the same conduct details that it is a hate crime for "any person [to] assault another person because of that person's religious expression." The elements of this crime are the same as those for the crime for which the man was convicted for in city criminal charge: (1) assault and (2) due to one's religious beliefs. Neither crime has an element that the other doesn't, so they are the same crime. However, city is located in state A and state B is considered a separate sovereign from state A. Therefore, state B is also permitted to charge defendant with the crime in their state and the state is not barred from doing so by the double jeopardy clause.

2. Issue is whether the federal hate crime prosecution is barred by the double jeopardy clause of the constitution

The federal statute requires the proof that the defendant (1) assaulted another person, (2) because of that person's religious expression, (3) while acting under color of state law. While the elements of this crime include an additional state action element, there is no element in the city's crime that is not contained in the federal crime definition. This is because both elements of the city crime (1) assault (2) because of a person's religious beliefs, are included in this statute. This makes the crime the city prosecuted for a lesser-included offense of the federal crime, for which double jeopardy would apply. However, the federal government is considered a separate sovereign from state A, and thus its prosecution of this charge would not violate double jeopardy.

3. Issue is whether state A's hate crime charge violates double jeopardy

The state a hate crime for which the defendant was charged with requires the proof that the defendant (1) assault another person (2) because of that person's religious expression and (3) cause injury. Each of the elements of the City's charge is included in the definition of this offense: (1) assault and (2) because of a person's religious beliefs. Thus, city A's criminal charge is a lesser included offense of the hate crime charge and double jeopardy applies. Because city, located in State A already charged the defendant with the city offense, charging him with this offense too would violate double jeopardy.

4. Issue is whether state A's assault charge violates double jeopardy

The State A assault charge requires proof that the defendant (1) assault another person (2) with an intent to cause injury. Here, each of the crimes at issue, the city criminal charge and the State A assault statute contain an element that the other crime does not. The city crime requires that the defendant assault someone because of that person's religious expression and this element is not in the State A assault charge. The State A assault charge requires that the defendant intend to cause injury, which is not an element of the city criminal charge. Thus, the crimes are different and double jeopardy does not apply. State A is permitted to charge the defendant with this crime without violating double jeopardy.

ANSWER TO MEE 5

The Fifth Amendment, which is applicable to the states through the Due Process Clause of the Fourteenth Amendment prohibits anyone from being put into double jeopardy. Double jeopardy means being charged for two crimes requiring the same elements and arising from the same conduct by the same sovereign. Two crimes are not the same for double jeopardy purposes where each crime requires proof of an element that the other crime does not. The same sovereign aspect means that a person can still be tried for a crime in a different state or by a federal rather than a state court based on the same conduct. Jeopardy attaches in bench trials when the first witness is sworn in and in jury trials when the jury are sworn in. Double jeopardy only applies after jeopardy has attached. It does not prevent two crimes from being tried together.
Here, the officer has been charged with violating the City ordinance. City is located in State A. Therefore, jeopardy has attached in State A. Where there is no trial at which to attach jeopardy, a person's guilty pleas and sentencing means that jeopardy has attached for that crime and that conduct. All of the below crimes are charged based on the same conduct, being the injury that occurred to the driver by the City police officer. Therefore, all of the charges arise from the same conduct and the key issue in each question is whether the jeopardy is by the same sovereign and whether the offenses constitute the "same offense" for double jeopardy purposes.

1. Is the State B hate crime prosecution barred by the United States Constitution?

The State B hate crime prosecution is not barred by the US Constitution. The issue is whether the prosecution by State Band the conviction by State A constitute the same sovereign.

Double jeopardy only protects a person from being double jeopardy by the same sovereign. States are not the same sovereign. Therefore, a person may be tried in one state for the same conduct and crime as they have already been tried for in another state. This type of situation occurs where multiple states have an interest in punishing the wrongdoer for their actions. The victim began his journey in State A but was chased into State B by the officer. The two states are adjacent to each other. The officer was still standing in State A at the time, but he threw a rock into State B which injured the driver. Therefore, State B has an interest in prosecuting the police officer under its own statute because the injury occurred in State B.

The State B hate crime statute and the City Criminal Charge statute both require the same elements -they both require that the defendant assaulted someone for their religious beliefs. Ordinarily this would present a double jeopardy problem because they would constitute the same offense for 5th Amendment purposes. However, because State A and State Bare separate sovereigns, there is no double jeopardy issue.

Therefore, the State B hate crime prosecution is not barred by the US Constitution.

2.Is the federal hate crime prosecution barred by the United States Constitution?

The federal hate crime prosecution is not barred by the US Constitution. The issue is whether the prosecution by the United States Attorney for the federal district of State A and the conviction by State A constitute the same sovereign.

Double jeopardy only protects a person from being double jeopardy by the same sovereign. States and the federal government are not the same sovereign. Therefore, a person may be tried in one state for the same conduct and crime as they have already been tried for in federal court and vice versa.
The federal hate crime statute and the City Criminal Charge statute both require the same elements -they both require that the defendant assaulted someone for their religious beliefs. Ordinarily this would present a double jeopardy problem because they would constitute the same offense for 5th Amendment purposes. However, because State A and the federal government are separate sovereigns, there is no double jeopardy issue.

Therefore, the federal hate crime prosecution is not barred by the US Constitution.

3.Is the State A hate crime prosecution barred by the United States Constitution?

The State A hate crime prosecution is barred by the US Constitution. The issue is whether the State A hate crime statute and the City Criminal Charge each have an additional element that the other does crime does not.

The State A hate crime statute provides that "any person who assaults another person because of that's person's religious expression and thereby causes injury to that person commits a felony punishable by one to five years in prison".

The City Criminal Charge which the officer pled guilty under provides that "any person who assaults another person because of that person's religious expression commits a serious misdemeanor punishable by up to six months in jail.

Jeopardy has already attached in State A pursuant to the officer's charge for violation of the City Criminal Charge. The city and the state are the same sovereign for double jeopardy purposes. Therefore, this prosecution would be by the same sovereign. Therefore, there is a double jeopardy issue and the issue is whether the State A hate crime statute and the City Criminal Charge each require an additional element to each other.

The State A hate crime statute has an additional element of "causing injury" that the City Criminal Code does not have. However, the City Criminal Code does not have an additional element that is not included in the State A hate crime. Therefore, for double

jeopardy purposes, this would constitute charging the officer with the same offense for which jeopardy has already attached.

Therefore, the State A hate crime prosecution is barred by the US Constitution.

4. Is the State A assault prosecution barred by the United States Constitution?

The State A assault prosecution is not barred by the US Constitution. The issue is whether the State A assault statute and the City Criminal Charge each have an additional element that the other does crime does not.

The State A assault statute provides that "any person who assaults another person with intent to cause injury is guilty of a felony punishable by not more than two years in prison".

The City Criminal Charge which the officer pled guilty under provides that "any person who assaults another person because of that person's religious expression commits a serious misdemeanor punishable by up to six months in jail.

Jeopardy has already attached in State A pursuant to the officer's charge for violation of the City Criminal Charge. Therefore, this prosecution would be by the same sovereign. Therefore, there is a double jeopardy issue and the issue is whether the State A assault statute and the City Criminal Charge each require an additional element to each other.

The assault statute requires an "intent to cause injury" and does not require that the assault be due to a "person's religious expression". The City Criminal Code does not require an intent to cause injury and does require the religious motivation. Therefore, these two crimes are not the same for double jeopardy purposes. Therefore, the officer may be prosecuted under the State A assault statute despite already pleading guilty to a crime under the City Criminal Charge and spending three days in jail.

The State A assault prosecution is not barred by the US Constitution.

ANSWER TO MEE 6

How should Testator's assets be distributed?

Edward should get the home. subject to Testator's mortgage.

The issue here is whether Edward takes the home subject to Testator's mortgage.

The home is a piece of real property and thus is a specific bequest. Specific bequests are the first to be satisfied. Therefore, Edward will take the home under Testator's will.

In general, the majority of states do not provide for exoneration of liens on property taken under a will. This means that a mortgage on a house received as a testamentary gift, such as here, will not be paid out of the other estate assets so that the beneficiary will take the property free of encumbrances. If the UPC has an opposite rule, then part of the $200,000 in cash that makes up part of the rest of Testator's estate can be used to pay off the mortgage currently on the house. However, under the majority rule, Edward will take the house subject to the mortgage because it is not entitled to exoneration.

Donna should receive all 300 shares of ABC Corp common stock

The issue here is whether a gift of stock includes any stock dividends received after the execution of the will.

Typically, the beneficiary of a gift of stock under a will is entitled to receive the proceeds of any stock splits that occur after execution of the will. However, the UPC also provides for the inclusion any stock dividends in that gift as well. Therefore, Donna should receive not only the 200 stocks that she was expressly given under the will, but also the 100 shares received as part of the stock dividend.

Faye. having predeceased Testator. should receive nothing to her estate.

The issue here is the application of anti-lapse to the gift of the grand piano to Faye. Lapse occurs when a named beneficiary under a will predeceases the Testator. Anti-

lapse statutes in most jurisdictions protect gifts to close family members from lapsing and instead directing those gifts to any living issue. Issue include any direct descendants. Survivorship language can take a bequest out of the anti-lapse statute in UPC jurisdictions.

Here, there is no survivorship language in the gift to Faye, so anti-lapse statutes likely apply. Further, because she is the Testator's sister (a close family member) the statutes would apply to this gift of the piano to her. However, Faye left no living issue for the

statute to protect, and therefore her estate will receive nothing. Although the facts note that Faye's intestate heirs were Testator and Edward, neither of them are issue for purposes of the anti-lapse statute, because they are not her descendants. Therefore, the gift to Faye will lapse and her estate will receive nothing- not the piano nor the insurance proceeds.

Isaac and Harriet should split the remainder of the estate as it passes through intestacy.

The issue here is how the rest of Testator's estate will pass since there is no residuary clause.

When a will only partially disposes of a testator's property, the remaining assets will pass through the laws of intestacy. The jurisdiction here has adopted the UPC, which uses the method of "representation" to distribute intestate assets. Representation involves going to the first level of descendants where there are living members, dividing equally by the number of living members and any deceased members leaving issue, giving the equal share to the living member. Then, at the next lowest level of descendants, all of the remaining assets are pooled together, and they are divided again- equally, by number of living members in that generation and deceased members leaving living issue. And so on and so forth.

Here, this means that Harriet and Isaac, George's son will take equally because the assets will be split in half at the level of Testator's children and Harriet will take her half. Isaac is the only remaining descendant in the next level so he will take the half that is left. (Note - the same result would occur under the traditional per stirpes method and the modern per capita by representation method).

Isaac will be able to take in George's place because the "advancement" to George was likely not effective. An advancement occurs when a testator makes an inter vivos gift to a person who likely would take under intestacy, intending that to be an advancement on the gift they would receive after Testator dies. However, an advancement (or satisfaction in the context of a testamentary gift), usually must be in writing, and when the writing is made by the grantor, it must be contemporaneous with the gift. Only if the writing demonstrating an intent to have the gift act as an advancement is made by the beneficiary can the writing be made at a later point.

Here, Testator gave George $30,000 in 2020, ten years after the execution of her will, which left him nothing, and 3 years before her death. Nothing was said at the time, under the facts, about it being an advancement of George's intestate share. Then, 2 months before her death, Testator wrote a letter to George informing him that the $30,000 was intended as an "advancement" on any share of her estate to which he might be entitled. Because this writing was not contemporaneous with the gift- it was almost 3 years later- this will not be effective in showing the intent to treat the inter vivos gift as an

advancement. Therefore, George's share under intestacy (which Isaac will take as his heir) will not be affected by the gift.

ANSWER TO MEE 6

The jurisdiction has adopted Uniform Probate Code (UPC.)

300 shares of ABC Corp common stock will go to cousin, Donna.

Testator made a specific bequest to Donna by stating that she is giving her 200 shares of ABC Corp common stock. Under common law, when a testator makes a gift of stocks, only the additional stocks caused by stock split were included, and the stocks received as dividends were not part of the gift. However, under UPC, stocks caused by stock split or by dividends are all included in the specific bequest. Because Testator received 100 shares as stock dividends for the 200 shares she owned, all 300 will go to cousin Donna under UPC.

Testator's home will go to her brother, Edward.

Testator made a specific bequest of general nature (generic bequest) to Edward by stating that she is giving her home to Edward. Under the doctrine of exoneration, a will beneficiary of real property does not bear the responsibility to satisfy liens (such as the mortgage here.) The beneficiary of the testator's personal property under the will has the responsibility to satisfy such liens and payments on land contracts. Here, Testator expressed no intent in the will that Edward take the house subject to the mortgage. In fact, she specifically stated in the will that all just debts be paid before distributing the devises stated in the will. Therefore, the mortgage must be satisfied by Testator's estate prior to the conveyance, and Edward will take the house free of the mortgage.

Testator's grand piano will go to her sister, Faye.

Testator made a generic bequest to Faye by stating that she is giving her grand piano to Edward. Because Testator did not describe the piano with particularity (such as stating the model number or name), the circumstances existing at the testator's death govern. The grand piano currently is significantly damaged, and Testator filed a casualty-loss claim with her insurer for the damage. The insurer agreed to pay 10,000 for the claim.

Faye predeceased Testator. Generally, when a will beneficiary predeceases the testator, the gift fails. However, if the jurisdiction has an anti-lapse statute, it may save the gift. Anti-lapse statutes allow courts to save the gift when there is some relationship by blood between the beneficiary and testator. Anti-lapse statute will allow the heirs of the beneficiary to take. Here, depending on whether the jurisdiction has an anti-lapse statute, either Testator and Edward will take as Faye's only heirs, or the gift will fail and the piano will be included in Testator's residue estate.

Anyone taking over Faye's interest may argue the doctrine of ademption. Under ademption, when a gift is no longer in the testator's estate at the time of testator's death, the gift "adeems" and fails. The subjective intent behind the nonexistence of the gift is irrelevant. Partial ademption is when only part of the gift exists. When partial ademption occurs, the beneficiary takes only the remaining part of the gift. Most courts do not allow beneficiaries to trace the proceeds or the whereabouts of the gift. However, there are some states that allow some type of recovery. For example, UPC allows the beneficiary to take the replacement property if the testator replaced the gift with a similar replacement item. In some states, the beneficiary is allowed to recover claims against the gift. Faye's heir may argue that the gift partially adeemed because it is significantly damaged to the point that part of it and its value does not exist anymore. If this argument is successful, the court may allow Faye's heir to obtain the pending payment of the casualty-loss claim of 10,000. Testator and Edward may take the 10,000 pro rata.

Harriet and Isaac will take under intestacy as descendants.

An advancement is when an inter vivos gift to an heir or beneficiary is intended to apply against the intestate share or testamentary gift of that person. At common law, any substantial gift was presumed to be an advancement. However, under UPC, an inter vivos gift is not an advancement unless it can be shown as such. Generally, the conveyance of gift and the expression of intent to have the gift operate as an advancement must be contemporaneous.

Here, there was no bequest made by Testator to her son, George. Therefore, George would have taken his intestate share under intestacy as her son. In 2020, Testator gave 30,000 to George. No expression was made regarding the purpose of the gift or whether she intended the gift to apply against his intestate share. Therefore, in a UPC jurisdiction such as this one, it cannot be shown that Testator intended the gift as an advancement. The fact that Testator stated 3 years after the gift that she intended the gift to be an advancement does not govern, because the intent must be generally contemporaneous with the gift. Therefore, George will take his untouched intestate share from Testator.

However, George predeceased Testator, leaving his only son, Isaac. Grandchildren do not inherit under intestacy when their parents are still alive. Because George has deceased, Isaac is entitled to his intestate share as Testator's closest descendant. Under intestacy, spouse and descendants receive priority, and only when there are no surviving spouses or descendants, ancestors and collaterals inherit. Here, because Testator is survived by cousin Donna, brother Edward, daughter Harriet and grandson Isaac. Because Testator's descendants (Harriet and Isaac) are alive, the collaterals (Donna and Edward) do not take under intestacy, and their gifts are limited to the bequests in the will.

After paying the mortgage and satisfying the specific bequests of home, stocks and piano (and assuming Faye's heirs take the casualty claim), $75,000 remains in the residue.

Under the majority approach of per capita with representation, the division is always made at the first generation of living takers. Because Testator's daughter Harriet is still alive, the division is made at that level, and George and Harriet each take 1/2 of the residue. George's share passes onto Isaac by representation, and both Isaac and Harriet receive 37,500. Note that the same result is reached under any approach- per stirpes or per capita at first generation.

ANSWER TO MPT 1

From: Examinee

TO: Deanna Gray, District Attorney

DATE: February 27, 2024

RE: State v. Iris Logan

I. DEFENDANT IRIS LOGAN SHOULD BE CHARGED WITH ROBBERY AS THERE IS SUFFICIENT EVIDENCE TO PROVE THAT ALL REQUISITE ELEMENTS OF ROBBERY HAVE BEEN MET AND SATISFIED.

There is sufficient evidence to charge Iris Logan with robbery as she has satisfied all the required elements of the crime under Franklin law. Under Franklin law, 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. State v. Driscoll. In determining what satisfies as "force," courts have clarified that the term is coextensive with "violence." The force necessary to constitute robbery refers to the posing of an immediate danger to the owner of the property. State v. Schmidt. Further, the immediacy factor can be demonstrated by either putting the victim in fear or by bodily injury to the victim. Here, it is undisputed that Iris has satisfied the first three elements of robbery as described above. Iris Logan has (1) intentionally taken (2) the purse from (3) Tara Owens. However, at issue now is whether Iris has satisfied the fourth element, that is, whether or not she has taken the purse by means of force.

In Driscoll, defendant, Fred Driscoll, had claimed that while he had taken a laptop from the student in the library, he did not meet the statutory definition of robbery because he did not satisfy the element of force. Driscoll argued that because he neither put the victim in fear nor used violence in the theft, he should not be convicted of robbery. Similarly, in this case, defendant Iris Logan will likely argue that no violence or forced was used towards Tara Owens when she snatched the bag. Iris and her counsel will refer to Ms. Owens testimony, during her direct examination as evidence that she was not in fear of the woman taking her purse, and as such no force was present.

However, following the ruling in Driscoll, which as noted above, declared that force can be demonstrated by putting victim in fear or by causing bodily injury to victim, it is clear that force was used because the snatching of the purse caused bodily injury to the victim. There is sufficient evidence to satisfy element of force because Ms. Owens had sprained her wrist when Iris pulled the purse off her arm. Additionally, Ms. Owens had testified that her arm hurt really bad when it got twisted. Thus, Iris Logan has satisfied all the

required elements of constitute robbery under Franklin law. Further, this charge will align with the DA's office charging policy because the evidence is clear, strong, and most importantly, sufficient to constitute robbery.

II. DEFENDANT IRIS LOGAN SHOULD NOT BE CHARGED WITH FELONY MURDER AS THERE IS INSUFFICIENT EVIDENCE TO PROVE THAT SHE WAS THE PROXIMATE CAUSE OF MR. STEWART'S DEATH.

Ms. Logan should not be charged with felony murder as there is insufficient evidence to prove that she has satisfied all the required elements under felony murder. As a result, the evidence presented is weak and would significantly go against the DA's charging policy.

Under Franklin law section 970, first-degree felony murder is defined as a killing of another committed during the perpetration of or immediate flight from the perpetration of certain felonies. Additionally, under Franklin law section 901, robbery constitutes a felony. As addressed previously, there is certainly sufficient evidence to charge Ms. Logan with robbery.

a. Immediate Flight

While it is clear beyond question that the crime of robbery by Ms. Logan was completed before the death of Mr. Stewart, felony-murder rule will still apply if the death occurred during her flight. State v. Clark. Thus, it is critical to first determine whether Ms. Logan was in immediate flight, or in other words, engaged in fleeing from the robbery. In Clark, the defendant had completed her burglary and was driving away from it when she hit a pedestrian who was crossing the street and killed him. In assessing whether the defendant was in immediate flight, the court looked at whether the defendant had reached a "place of temporary safety." Because the defendant, Sheila Clark was on her way to the place of safety, but had not yet reached that place, the court held that she was still engaged in fleeing from the crime. In other words, there was no break in the chain of events as Clark had not yet reached a place, where she was no longer fleeing from the crime she committed. As such, Clark was convicted of felony murder.

Here, following the ruling in Clark, it will likely be held that defendant Ms. Logan was still engaged in fleeing from the robbery when Mr. Stewart's death occurred. Based on the evidence from the hearing, the robbery had occurred in the vicinity of Broadway and 8th Avenue and officer Maria Torres followed Ms. Logan and Mr. Stewart from 9th Ave and Broadway all the way to the highway, at the intersection of State Route 50 and State Route 75. Thus, when the death of Mr. Stewart occurred on the highway, Ms. Logan was still in immediate flight because she had not reached a temporary place of safety. She was still fleeing from the robbery and from the scene of the crime she committed. Similar to the defendant in Clark, Ms. Logan will likely argue that she was no longer engaged in robbery at the time of Mr. Stewart's death and therefore the conviction of felony murder

cannot be upheld. However, this is false because as noted, she was still engaged in fleeing and under Clark's ruling, if the death occurred during the flight, then it still constitutes felony murder. Unlike the defendant in State v. Lowery, Ms. Logan didn't complete the robbery and return home, but was still on her way to a temporary safe place and thus, still under immediate flight.

b. Cause in Fact

At issue remains whether Ms. Logan's immediate flight from the perpetration of robbery was the cause of death of Mr. Stewart. In State v. Finch. the court laid out two distinct requirements when assessing whether a defendant's actions constitutes felony murder, that is the "cause in fact" known as actual cause, and the "legal cause" known as proximate cause. Cause in fact follows the theory that but for the acts of the defendant, the death would not have resulted. Here, there is sufficient evidence to prove this elements of causation because but for the robbery, Mr. Stewart would not have picked up Ms. Logan from the scene, drove to the highway, and gotten killed when his sedan was struck on the driver's side by the SUV. Thus, but for Ms. Logan's commission of robbery, Mr. Stewart would not have been killed.

c. Legal Cause

Under the legal cause, at issue is whether the death is of a type that a reasonable person would see as a likely result of that person's felonious conduct. In other words, the relevant inquiry is whether the death was foreseeable. Additionally, if the outcome of the commission of robbery was outside the defendant's contemplation when committing the offense, the defendant would not be held responsible. In other words, when a defendant commits a felony, it sets in motion a chain of events that were or should have been within defendant's contemplation when the felony was initiated and thus, should be responsible for any death that occurs after. However, if there was an intervening independent cause that broke the casual chain between defendant's action and the death, that would relieve the defendant of criminal responsibility for the death. Finch.

In determining whether there was an intervening independent cause or in other words a superseding cause, the courts look at four factors: (1) the harmful effects of the superseding cause must have occurred after the original criminal acts (2) the superseding cause must have not been brought about by the original criminal acts (3) the superseding cause must have actively worked to bring about a result that would not have followed from the original criminal acts and (4) the superseding cause must not have been reasonably foreseeable by the defendant. Here, while it is clear that Mr. Stewart's death was foreseeable to Ms. Logan because a death is likely to occur when committing a felony, the evidence likely points to the argument that a superseding cause occurred, relating to the traffic lights malfunctioning. Here, (1) the malfunctioning of the lights occurred after the original robbery that was committed by Ms. Logan; (2) the malfunction

did not occur because of Ms. Logan's robbery and there was no record of any complaints or reports of the traffic lights prior to January 17th; (3) the malfunction of the lights caused the accident between the sedan and the SUV, which would not have occurred due to the original robbery because the officer noted that Mr. Stewart was driving within the appropriate and legal speed limit; and lastly (4) the fact that the lights were all green and malfunctioning, was not foreseeable by Ms. Logan because again, as officer Torres noted in her testimony, "those lights have always worked properly before." Thus, while the death was foreseeable, the malfunction of the lights broke the chain of events and as a result, the proximate cause element of felony murder will not be satisfied. As such, there is not enough evidence to charge Ms. Logan of felony murder and doing so would go against the DA's charging policy.

ANSWER TO MPT 1

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

Re: State vs. Iris Logan

I was asked to assess whether our office should charge Iris Logan with robbery and felony murder consistent with our charging policy. I have assessed both charges separately below.

Robbery

Franklin Criminal Code 901 defines Robbery as the intentional or knowing theft of property from the person of another by violence or putting the person in fear. Under this definition, Robbery requires the establishment of four elements: (1) intentional or knowing nonconsensual taking of (2) money or other personal property (3) from person or presence of another (4) by means of force, whether actual or constructive *(Driscoll/1 App Ct. 2019).*

In this case, Iris Logan took Tara Owen's purse without Ms. Owen's consent. Logan told Owen to let her "have that purse" suggesting that Logan took the purse intentionally. The purse constitutes a personal property. Owen was wearing the purse over her shoulder at the time and the purse was taken from her person. These elements can be reliably established. The fourth elements requires more analysis.

The issue is whether Logan took the purse by means of force, whether actual or constructive, when she told Owen to let her "have the purse" when Owen was not in fear but got injured as she tried to take the purse off her shoulder.

FCC 901 Robbery: Robbery is the intentional or knowing theft of property from the person of another by violence or putting the person in fear.

FCC 970 First-Degree Felony Murder: First-degree felony murder is a killing of another committed during the perpetration of, attempt to perpetrate, or immediate flight from the perpetration of or attempt to perpetrate any first-degree murder, act of terrorisms, arson,

rape, robbery, burglary, kidnapping, aggravated child abuse, aggravated child neglect, or aircraft piracy.

"Violence" is coextensive with "force". The force is posing of an immediate danger to the owner of the property *(Driscoll citing Schmidt).* The immediacy can be demonstrated either by putting the victim in fear or by bodily injury to the victim. In this case, Owens was not put in fear. She said she did not know if the Owen had a gun or not. However, she sustained a bodily injury. She sprained her wrist trying to hand the purse to Logan. This caused her arm to "hurt really bad". Since Owen suffered bodily injury as she was complying with Logan's instruction to hand over the purse, the fourth element can also be established.

Since all four elements of the robbery can be reliably established, our office should charge Iris Logan with robbery.

First-Degree Felony Murder

Franklin Criminal Code 970 defines first-degree felony murder as a killing of another committed during the perpetration of, attempt to perpetrate or immediate flight from the perpetration of or attempt to perpetrate of a list of felonies including robbery.

A person can be convicted of felony murder if these elements are established: (1) a killing of another, (2) during the immediate flight from the perpetration of a robbery. The felon's actions must be the cause in fact and proximate cause of the person's killing as well *(Flinch Sup Ct. 2008).*

In this case, Jeremy Stewart was killed as a SUV crashed into the sedan he was driving at the intersection. Moreover, as analyzed above, Stewart and Logan were fleeing from a robbery. However, there are two issues that need to be examined: first, whether the crash and death happed during the immediate flight from the robbery; and second, whether Logan's criminal acts were the factual and legal causes of Stewart's death.

I will turn to the first issue: whether the crash and death happed during the immediate flight from the robbery. According to *Clark (App 2007),* in determining whether a felon is in immediate flight from a felony, the court looks at whether the felon as reached "a place of temporary safety". In *Lowery (Sup Ct. 1998)* distinguished from *Clark,* the felon had reached home and therefore was no longer in immediate flight from felony when the felon's wife was accidentally killed by a police office. In this case, on the other hand, Logan and Stewart had not yet reached their home. They were driving on a public highway. The officer observed them throwing away the stolen purse suggesting that they did not feel safe and were aware that they are being chanced, therefore,
felt the need to dispose of the evidence. Therefore, it can be established that the killing occurred during the immediate flight from the robbery.

I turn to the second issue: whether Logan's criminal acts were the factual and legal causes of Stewart's death. According to *Flinch (Sup Ct. 2008),* a person can only be held accountable for a crime if their criminal acts is both the cause in fact and legal cause of the outcome. Cause is fact is very broad, it essentially means that but for the criminal's actions the result would not have occurred (id.). The cause in fact must be limited by the legal cause (id.). To establish the latter in the case of a felony murder, the relevant inquiry is whether the death is of a type that reasonable person would see as a likely result of that person's felonious conduct *(Flinch citing Lamp Fr. Sup 1985).*

In this case, Logan's actions are the cause in fact of the Stewart's death. But for the robbery and the subsequent flight, Stewart would not have been killed in the car accident. The question, however, remains whether a reasonable person would consider the death in a car crash while fleeing from a robbery as a likely result of a robbery. It can be strongly argued that a reasonable person would foresee that if they commit a crime, they would have to flee, and if pursued by the police, they may get into a car crash and die.

Logan is likely going to argue that Stewart's failure to wear a seatbelt and malfunctioning of traffic lights at the intersection constitute a superseding cause breaking the chain of causation between her actions and Stewart's death. Four factors must be present for an intervening event to constitute a superseding cause: (1) the harmful effects of the superseding cause must have occurred after the original criminal acts, (2) the superseding cause must not have been brought about by the original criminal acts, (3) must have actively worked to bring about a result that would not have followed from the original criminal acts, and (4) it must have been reasonably foreseen by the defendant. *(Flinch Sup Ct. 2008).*
In this case, both Stewart's not wearing his seatbelt and the malfunctioning of the traffic lights occurred after the robbery. The failure of the traffic lights were not brought about by the robbery, however, having to flee from a robbery could have caused Stewart to panic and not put on his seatbelt. The malfunctioning of the lights worked independently to cause the accidence and was not caused by the robbery, however, as argued before, the robbery likely contributed to Stewart not wearing his seatbelt. Finally, it is foreseeable that one may forget to put one's seatbelt on while fleeing from the robbery. However, it was not foreseeable that the traffic lights would be malfunctioning since this had almost never happened before. Therefore, Logan will not be able to establish that lack of seatbelt was unforeseen consequences of robbery but she may be able to establish that traffic lights malfunctioning was unforeseeable.

If the court considers the failure of the lights to be a determining factor in occurrence of car crash and the death of the Stewart, the court may consider that to be a superseding cause. And as such, the court may not find Logan liable for the death of Stewart. In light of this likelihood, I recommend that we do not charge Logan with first-degree felony murder.

In conclusion, in light of the applicable laws and facts of this case, I recommend that our office charge Iris Logan with robbery because the victim of robbery suffered bodily injury but not charge her with first-degree felony murder because the lights malfunctioning was unforeseeable making a superseding cause that broke the chain of causation between the robbery and the Stewart's death.

ANSWER TO MPT 2

I. Caption

Randall v. Bristol County

[Case number], U.S. District Court for the District of Franklin

II. Statement of Facts

[Omitted]

III. Legal Argument

Summary judgment should be entered in this matter for Ms. Randall. "A public employee does not surrender all First Amendment rights merely because of the employment status." *Dunn v. City of Shelton Fire Department* (15th Cir. 2018), citing *Garcetti v. Ceballos,* 547 U.S. 410 (2006). When a public employee speaks as a private citizen on a matter of public concern and the balance of the interests weighs in favor of their right to speak, they may not be penalized by the government for the contents of their speech. The plaintiff bears the burden of proving their speech is protected. *See Smith v. Milton School District* (15th Cir. 2015). To meet her burden, Ms. Randall will need to demonstrate that she was speaking 'as a citizen,' that she was addressing a matter of public concern, that a balancing test favors her speech, and that her speech was a motivating factor in her discipline. Ms. Randall can demonstrate all four. Accordingly, she is entitled to relief, and summary judgment should be granted in her favor.

1. Ms. Randall was speaking 'as a citizen' because it was not within her ordinary job duties to speak to the public about the grant program, even though it concerned a matter related to her employment.

A public employee may be disciplined for the contents of their speech if their speech is part of their ordinary job description. *See Garcetti; see also Morales v. Jones* (7th Cir. 2007) *and Dunn.* In *Garcetti,* a prosecutor was properly disciplined for writing a critical memo in the course of his ordinary employment; in *Morales,* a police officer was properly disciplined for statements he made about an arrest with a prosecutor, as a part of his ordinary employment; in *Dunn,* a firefighter was properly disciplined where his duties included "consulting with the chief and others on" the subject matter about which he spoke. However, an employee who speaks not pursuant to their ordinary job duties may not be punished for the contents of their speech, provided the other factors are met.

Ms. Randall's job duties definitely did not include posting about the program on Facebook. As Ms. Randall's uncontroverted deposition testimony states, she is charged

with developing curricula, scheduling program events, training support staff, creating policies and procedures, and complying with grant requirements. Unlike *Dunn,* where the assistant fire chief was charged with consulting with the chief, Ms. Randall was not responsible for reporting to the County Executive or any other person about whether the grant program should be reauthorized.

It is immaterial that Ms. Randall's speech concerned her public employment. A public employee may- and is often among the most qualified to-speak on matters related to their employment without fear of retribution, provided they satisfy the rest of the *Garcetti/Pickering* factors. *See Smith* (teacher was not acting within scope of his ordinary duties when he posted on Twitter about school system mandatory testing); *see also Pickering v. Ed. of Ed.,* 391 U.S. 563 (1968) (teacher not acting within scope of ordinary duties when sending letter to the editor about school district finances). Just as the teachers in *Smith* and *Pickering* were speaking about their jobs without speaking as a part of their job, Ms. Randall was speaking about the GED program but was not speaking as the program's spokesperson. It does not matter that Ms. Randall identified herself as the director of the program in the October 17 post; she was not responsible as director with making statements on behalf of the program or about the renewal of the grant. There is no contrary evidence that suggests Ms. Randall is, as a matter of her official duties, charged with speaking on behalf of the program or consulting about whether the program should be renewed. Therefore, summary judgment should be entered on this factor.

2. Ms. Randall's speech is on a matter of public concern because it concerned county policy, its public nature allowed anyone to read the post. and it appears similar to many "calls to action" about county legislative policy that would otherwise appear on Facebook.

Whether speech addresses a matter of concern implicates the "content, nature, and context of the speech." *Garcetti.* Each consideration will be addressed in tum.

Content. When speech addresses policy rather than personal complaints or work conditions, it is more likely to be a matter of public concern. *Smith.* The *Smith* Court collected issues that are likely to be matters of public concern, and that list is illustrative: school district finances, public corruption, discrimination, and sexual harassment. *Smith* holds that school district policy about mandatory testing is a matter of public concern. By contrast, comments that "sound more like those of a disgruntled employee" are less likely to be considered matters of public concern. *Dunn.* Explanations about the merits or demerits of a policy tilt the speech closer to matters of public concern.]*d.*

Here, Ms. Randall's posts spoke about a policy decision made by the County Executive and County Board-to not renew the Workforce-Readiness Grant. She explained in detail the merits of the program: how it works, what the results have been. This is a political policy decision that affects Bristol County residents who may seek to get a GED through the program and affects the whole community by allowing neighbors to seek higher

employment. While it is true that l\1s. Randall will likely be reassigned to the library after the grant has run out, her post is more detailed and nuanced than the post in *Dunn-the* "disgruntled employee" complaints were about new firefighters being "softies" with no explanation-and therefore is more likely to be a matter of public concern. Just because she is speaking on a matter of public concern that also implicates the continuation of her employment does not remove the speech from the realm of public concern.

Nature. The nature of l\1s. Randall's post is also similar to speech made about a matter of public concern. Ms. Randall's post calls for voters to "call the county executive." Her post "bore similarities to" other posts that could be made by voters every day, calling other citizens to action to protest government policies. *Dunn,* citing *Pickering.* Thus, l\1s. Randall's speech is of the nature of posts that address matters of public concern.

Context. The context of l\1s. Randall's post makes it more likely to be a matter of public concern. In *Dunn,* the firefighter's post was deemed not a matter of public concern in part because it was posted to a private Facebook group of only firefighters; the page was "known among the fire responders as a sounding board for gripes and complaints." Had Dunn "voice[d] his concerns through channels available to citizens generally," it may have come closer to a matter of public concern. Here, l\1s. Randall posted on her public Facebook page. The post was available for anyone to view. This is much like *Smith,* where the teacher's post was made publicly on Twitter for any parent or voter to read.

Because l\1s. Randall's speech addresses matters of public concern in its content and nature and through its choice of audience, summary judgment should be entered on this factor.

3. The balance of the interests weighs in favor of l\1s. Randall because her speech did not cause morale changes in the County government and mere annoyance is insufficient to constitute a burden on the state.

Even if speech is protected by the First Amendment, a particularly strong interest in regulating the speech on behalf of the state can justify allowing the discipline. The balance generally "tilts in favor of an employee when the employee calls attention to an important matter of public concern," as Ms. Randall has established she was doing. However, the government can still demonstrate that its interest in "promoting effective and efficient public service" outweighs the employee's interest in their speech.

Here, there is scant evidence that Ms. Randall's speech interrupted the promotion of efficient or effective public service. County Executive Cook testified in her deposition that, as a result of l\1s. Randall's posts, she was forced to "spend time answering queries" from members of the public, and that the county was "embarrassed." Pushed further, l\1s. Cook testified that she had to "waste[] time having to deal with the public," which constituted about a dozen inquiries-some by call, some by text, and a few emails. These

apparent annoyances-which are part and parcel of the operation of a democratic, representative system of government-are insufficient as a matter of law to constitute a burden on the effective administration of government. "Annoyance is not enough to favor the employer," and"[a]lmost all public speech criticizing the government will incur some annoyance or embarrassment." *Smith.* Unlike in *Dunn,* where the derogatory comments could reasonably interfere with the teamwork that is essential to firefighters' success in life-threatening situations, there is no evidence that such an interest is at play here. There was no other evidence adduced that Ms. Randall's speech had any effect on staff morale; in fact, Ms. Cook testified that she did not previously have a problem with Ms. Randall and "still [doesn't."

The County may argue that Ms. Randall's post was more inflammatory than necessary to convey the proper message. However inflammatory the posts may be, the Court is not charged with considering the possible ramifications of Ms. Randall's speech. Speech that is unduly inflammatory may be regulated if the government is "justified in its concern" about the inflammatory nature, but given the nature and context of Ms. Randall's posts, any belief that they would cause morale problems in the County government would be unjustified.

Because there is no evidence that Ms. Randall's posts caused morale issues in the government and because the resulting complaints from members of the public are legally insufficient to constitute a burden, summary judgment should be entered on this factor.

4. Ms. Randall's speech was a motivating factor for her discipline because the County Executive admitted as much.

Ms. Randall was disciplined for no reason other than her speech. To raise a protected speech claim, an employee must show a "nexus" between their speech and the discipline. Here, the County Executive admitted that Ms. Randall was disciplined for being "insubordinate" by "fail[ing] to accept the county's decision" not to renew the grant. Ms. Cook did not point to any other source of Ms. Randall's insubordination besides her posts on Facebook. Ms. Cook admitted that she was not aware of Ms. Randall's messages besides the Facebook posts concerning the grant. Thus, the only logical inference the Court can draw is that Ms. Randall was disciplined because of her post. Accordingly, summary judgment should be entered on this factor.

Conclusion

Ms. Randall has established through uncontroverted evidence that she was speaking on matters of public concern when she posted on Facebook and that her posts were not pursuant to her job duties as director of the workforce-development grant program. She also established that the balance of the interests tilts towards her right to speak on the termination of the program and that she was disciplined because of that speech.

Accordingly, her speech is protected by the First Amendment, and summary judgment is appropriate.

ANSWER TO MPT 2

BRIEF IN SUPPORT OF OLIVIA RANDALL'S MOTION FOR SUMMARY JUDGMENT Ill. Legal Argument

This Court should grant the motion for summary judgment in favor of Olivia Randall because she posted on Facebook as a private citizen, concerning matters that are important to the public, and because the importance of her interest in free speech is much greater than the employer's interest and mere annoyance by the speech. In doing so, this Court should grant relief in the form of restoration of her pay and expungement of the suspension from her employment record. The Supreme Court has held that "a public employee does not surrender all First Amendment rights merely because of employment status. *Dunn v. City of Shelton Fire Dept.* (15th Cir. 2018) (citing *Garcetti v. Ceballos,* 547 U.S. 410 (2006)). For speech of a public employee to be protected under the First Amendment, they must demonstrate that "(1) the employee made the speech as a private citizen, and (2) the speech addressed a matter of public concern." */d.* A plaintiff in a public-employee free-speech case bears the burden of proving that their speech is entitled to First Amendment protections. *Smith v. Milton School Dist.* (15th Cir., 2015) (citing *Garcefft).* If they meet that burden, the court must balance the interests of the employee and employer. */d.*

I. RANDALL MADE SPEECH AS A PRIVATE CITIZEN BECAUSE HER OFFICIAL DUTIES DO NOT INCLUDE DISCRETIONARY FUNDING DECISIONS BUT RATHER THE OPERATION OF A PROGRAM.

This Court should find that Ms. Randall's speech was made not pursuant to her official duties because posting on Facebook was not part of her official duties and her purpose was not related to her job as director of the program. This court has held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes." *Dunn.* Ultimately, the question is "whether the employee made the speech pursuant to their ordinary job duties." */d.* (citing *Lane v. Franks,* 573 U.S. 228 (2014).

Ms. Randall's Facebook posts were not intended to, and did not, relate to her duties as director of Bristol County's Workforce-Readiness Program. Ms. Randall's duties included developing the curriculum and lesson plans for the GED program, and stating the program eligibility requirements. Additionally, Ms. Randall acted as an administrative agent for the program, by scheduling classes and assessments, training support staff, and ensuring that all proper reports were prepared to comply with the grant requirements. Ms. Randall's intention behind making the posts was not due to the disappointment in seeing the position end, but because she believed the grant to be important because it helps people get ready for the GED and get jobs.

This case can be contrasted with that the court's finding in *Dunn*. In *Dunn,* the court held that the firefighters private Facebook posts, criticizing the recently revised qualifications for new firefights, was pursuant to his official duties as assistant fire chief because his duties included "consulting with the chief and others on continuing education requirements and issues." */d.* (citing *Morales v. Jones,* 494 F.3d 590 (7th Cir. 2007). Unlike in *Dunn,* Ms. Randall's duties did not deal with the funding of which programs got to continue. Rather, her duties were the operation of the program if it were determined to be funded. Ms. Randall's speech is entirely specific to the funding decision, of which Ms. Randall has no official duties. Similarly, this case is not like *Garcetti.* In *Garcetti,* the employee's concern was about the legitimacy of a search warrant in a memo advising his supervisor. As an ADA, that was entirely within Ceballos' ordinary duties. However, it is undisputed that Ms. Randall had no decision-making authority, nor did she even know Ms. Cook personally. Therefore, her speech about whether the failure to fund the program was a good decision was not pursuant to her official duties, since she had no duties with respect to funding.

Indeed, Ms. Randall's speech is much closer to the speech in *Pickering* and *Smith.* In *Smith,* the court held that posing on a personal social media account is not part of a teacher's ordinary duties, and therefore the plaintiff was speaking as a citizen in alerting the public to his concerns about the mandatory testing. *Smith.* Similarly, Ms. Randall's duties did not include posting on a personal social media account. See *id.* In *Pickering* and in *Smith,* the plaintiff made communications for informing residents of the school district about the district's budgeting decisions and financial matters. This case is similar. Indeed, neither a teacher nor Ms. Randall have funding authority and their intention is to raise awareness of the impact of a decision to the community at large. Additionally, Ms. Randall's duties did not include posting on Facebook about the Workforce-Readiness Program.

II. RANDALL'S SPEECH, POSTS ON A PUBLIC FACEBOOK ACCOUNT, ADDRESSED A MATTER OF PUBLIC CONCERN BECAUSE SHE INTENDED TO INFORM THE PUBLIC ABOUT THE FAILURE TO RENEW THE GRANT AND ITS IMPLICATIONS TO OTHER RESIDENTS.

This Court should find that Ms. Randall's speech was a matter of public concern because she intended the general public to hear/see it and for them to have awareness of decisions impacting them. In determining whether speech was made as a matter of public concern, the court should consider three things: "the speech's content (what the employee was saying); the speech's nature (how the employee spoke and to whom); and the context in which the speech occurred (the employee's motive and the situation surrounding the speech." *Dunn.* Additionally, this should include the speaker's motive and audience. */d.*

Ms. Randall explicitly stated that she made the Facebook posts because she believed the county should apply to renew the workforce-development grant. She posted them to her

personal Facebook page, but the posts were made public and open to everyone. Ms. Randall said that she thought the public should know that the application deadline was about to pass, and was a call to action of the residents. Therefore, this is unlike the decision in *Dunn,* where the plaintiff's posts were made to a limited audience in his private Facebook page. *See id.* Additionally, this is unlike *Dunn* because the lack of funding to renew the program would be something that would impact citizens generally, whereas in *Dunn* the plaintiff's speech were particular to concerns about the training of fire department staff. *See id.* In *Dunn,* the speech was "essentially internal," but here, the speech is generalized to the community at large and a call to action for them. *See id.* Again, unlike *Dunn,* where there was a tenuous link between the complaint speech and the goal of having qualified firefighters, there is a direct link between the post, calling for people to contact the government, and the intended outcome, for funding of an important program. *See id.*

Ms. Randall's speech is a matter of public concern like that in *Smith* and *Pickering* because its intent was to reach the public to let them know of the impacts to the lack of government funding. *See Smith; Pickering.* In *Smith,* the court held that "[m]atters such as school district finances, public corruption, discrimination, and sexual harassment by public employees have been found to be matter of public concern." *Smith.* Here, Ms. Randall's speech is directly tied to government finances, and is therefore a matter of public concern. Indeed, Ms. Randall's speech is not about work conditions, which are not a matter of public concern, because they have no relation to her day-to-day work activities and treatment while working for the government. *See id.* The posts are entirely specific to the program and its lack of funding. Like in *Smith,* the posts were not about the employment situation but "rather to reach ... others in the community to let them know about the impacts of the ... policy." *See id.* Additionally, the nature of Ms. Randall's speech was public because her Facebook posts, like those of Mr. Smith, were public. *See id.* Like in *Pickering,* where the speech was related to how the community would be impacted by the district's decisions, Ms. Randall's speech was entirely specific to the impact to the community for the lack of funding of the program. *See Pickering*

III. RANDALL'S SPEECH HIGHLIGHTS THE IMPORTANCE OF EXPRESSING EMPLOYEE SPEECH AND HAS LITTLE EFFECT ON PROMOTING EFFECTIVE AND EFFICIENT PUBLIC SERVICE BECAUSE THE IMPACT OF THE SPEECH WAS TO ENCOURAGE RESIDENT PARTICIPATION IN LOCAL GOVERNMENT.

This Court should find that, on balancing the interests of Ms. Randall and other employees and the government, Ms. Randall's interest far outweighs that of the government because she was calling to attention the importance of a particular program to the community and encouraging community engagement with local government. To chill that speech would have ramifications far beyond this case. Once a court determines that an employee spoke as a private citizen on a matter of public concern, 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.*

In *Smith,* the court held that, in balancing, the balance "tilts in favor of an employee calling attention to an important matter of public concern, such as a ... district's budget ... ."*Smith* (citing *Pickering).* Additionally, in *Smith,* it was of critical importance that the speech did not criticize any co-workers, and only commented on the state's educational requirements. Similarly, Ms. Randall's speech was directly tied to the funding of a program and how that funding impacted the community. Ms. Randall states that she was not trying to embarrass anyone. *See id.* Additionally, the content of the speech is of critical importance. The speech shared with the public the defunding of an opportunity which had helped 40 Bristol County residents earn the GED and attain basic employment skills. Even Marie Cook conceded that the program was fulfilling its purpose, and that "a number of people have been helped."

The government here claims that their interest is the "efficient operation of county government and good relations among its departments and department personnel." In *Dunn,* the court held that the employer's interest in a unified firefighting team was greater than that of the employee complaining about a policy for training particularly because the speech directly would undermine that interest. *Dunn.* The government may claim that this case is similar to *Kurtz,* in which a teacher's social media post disparaging students were not protected by the First Amendment. *Kurtz v. Orchard Sch. Dist.* (Ft. Ct. App. 2009). This is a bad argument. There is no evidence that Ms. Randall's speech impacted staff morale or created any issues with her employer.

Indeed, like in *Smith,* mere annoyance is not enough to favor the employer on balance. *Smith.* Here, Ms. Cook states that the posts embarrassed the county, but that alone is not sufficient to weigh the balance in their favor. Indeed, Ms. Randall's speech was effective, in that it stirred up the public to engage on an important cause of where government funding goes. Therefore, if the court were to find in favor of the government here, it would likely chill future speech that would encourage increased participation in the local government process.

IV. RANDALL'S SPEECH WAS UNDISPUTEDLY A MOTIVATING FACTOR IN THE ADVERSE EMPLOYMENT ACTION, AS SEEN IN THE LETTER FROM SUSAN BURNS.

This Court should find that Ms. Randall's Facebook posts was more than just a motivating factor in the adverse employment action because the letter from Susan Burns directly states that the reason for Ms. Randall's suspension was because of her Facebook posts.

The government may argue that the real reason for the suspension was "insubordination," as outlined in the letter from Jean Pearsall. Regardless, in *Smith,* the court held that there

was a sufficient nexus between the speech and the adverse employment action where there was direct evidence about the superintendent being annoyed by the speech and prior past performance reviews which were positive. *Smith.* Here, the deposition of Marie Cook, County Executive, stated that she was annoyed and embarrassed by the speech because it stirred up the county. Additionally, Ms. Randall, in her deposition, stated that her employment record was excellent up to that point. Like in *Smith,* this court should find that the evidence of the two put together show that Ms. Randall's speech was a motivating factor in the adverse employment action.

For the above reasons, this Court should grant the motion for summary judgment in favor of Ms. Randall and find that she engaged in protected First Amendment Speech, and therefore should be granted relief in the form of restoration of her pay and expungement of the suspension from her employment record.