Representative Passing Answers

Below are the Multistate Performance Test (MPT), Multistate Essay Examination (MEE), and Indian Law Question (ILQ) questions for the listed South Dakota bar examination and a representative passing answer to each question.

The representative passing answers have been reprinted without change, except for minor formatting. They were written by examinees under time restraints and without access to legal materials. The examinees authorized the Board of Bar Examiners to publish the answers anonymously for the benefit of future South Dakota bar applicants.

The answers are not “model answers.” They do not, in all respects, accurately reflect South Dakota law and/or its application to the facts. They do not always correctly identify or respond to the issues raised by the question and may contain extraneous or incorrect information. The answers demonstrate the general length and quality that earned an above average score. They are not intended to be used as a means of learning the law tested; their use for such purpose is strongly discouraged.

Applicant Number

MPT-1
224

MPT®
Multistate Performance Test

State of Franklin v. Iris Logan

By breaking the seal on this test booklet, I certify that I am taking the Multistate Performance Test (MPT) for admission to the bar and for no other purpose, and I affirm that I have read, understand, and agree to the following:

NCBE COPYRIGHT NOTICE AND PENALTIES. I will not copy or otherwise reproduce any MPT questions or answers by any means or disclose any MPT questions or answers to any unauthorized individual or entity before, during, or after the examination, whether orally, in writing, electronically, or otherwise. I acknowledge that the MPT is owned by NCBE and protected by US copyright laws, and that any unauthorized disclosure of its contents—in whole or in part—could result in civil liability, criminal penalties, cancellation of my test scores, denial of my bar application on character and fitness grounds, and/or other consequences, including disciplinary action if I have been admitted to practice law.

NCBE DATA USE. MPT testing information and data, including personally identifiable information, may be shared by your testing jurisdiction with NCBE for scoring, research, exam security, and statistical and other purposes. Such information and data are held by NCBE in accordance with the NCBE Privacy Policy (http://www.ncbex.org/privacy-policy), which also applies to information found in or provided by way of NCBE Accounts. NCBE may contact you via email after the test administration to ask you to participate in a voluntary survey regarding your testing experience.

NCBE LIMITATION OF LIABILITY. Each jurisdiction is responsible for handling test registration, test administration, requests for testing accommodations, and the reporting of scores for its bar examination. In the unlikely event that an error or mistake occurs or a claim arises relating to any of these activities, you agree that any remedy will be determined and provided under the exclusive authority and discretion of your jurisdiction. NCBE is not responsible for any such errors, mistakes, or claims.

If you do not agree to any of the above policies and procedures, do NOT break the seal on this test booklet and do not proceed with taking the MPT.

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

NCBE National Conference of Bar Examiners

302 S. Bedford St. | Madison, WI 53703 | 608-280-8550 | www.ncbex.org

State of Franklin v. Iris Logan

FILE

LIBRARY

FILE

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

LIBRARY

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

You will be instructed when to begin and when to stop this test. Do not break the seal on this booklet until you are told to begin. This test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.

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

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

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

Your response must be written in the answer book provided. If you are using a laptop computer to answer the questions, your jurisdiction will provide you with specific instructions. In answering this performance test, you should concentrate on the materials in the File and Library. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.

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

Do not include your actual name anywhere in the work product required by the task memorandum.

This performance test will be graded on your responsiveness to the instructions regarding the task you are to complete, which are given to you in the first

memorandum in the File, and on the content, thoroughness, and organization of your response.

February 2024
MPT 1
Representative Passing Answer

TO: Deanna Gray, District Attorney

FROM: Examinee

DATE: February 27, 2024

RE: State v. Iris Logan

Please see below for my analysis of the strength of both the robbery and the felony murder charges.

Robbery

According to the Franklin Criminal Code, robbery is defined as "the intentional or knowing theft of property from the person of another by violence or putting the person in fear." Robbery is a felony.

The state of Franklin's statute for robbery has been further clarified by *State v. Driscoll*. According to this case, although the statute requires violence, "Franklin case law has clarified that...'violence' is coextensive with 'force.'" Furthermore, this case cites other recent case law that states "the force necessary to constitute robbery is the posing of an immediate danger to the owner of the property." *State v. Schmidt.* The *Driscoll* court stated that "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." The court determined that because the owner of the item being stolen "tried to prevent" the defendant from taking her property, this struggle for control of the item being stolen "was sufficient use of force to constitute robbery" under the state statute.

As per the direct examination of Tara Owens by District Attorney Deanna Gray, the victim, Ms. Owens, stated that the defendant said "let me have that purse" and so she "let her have the purse." Ms. Owens stated that she did not try to stop the defendant from taking her purse, and in fact she did not fight it. Ms. Owens said she was not in fear when the defendant took her purse. Nonetheless, Ms. Owens was injured as a result. Thus, our analysis lies on the determination of whether the injury Ms. Owens sustained was a result of the kind of "violence" necessary to satisfy the elements of robbery.

Ms. Owens stated in her direct examination that she sprained her wrist when the defendant pulled the purse off of her arm, and that "even though [Ms. Owens] didn't fight, [she] got twisted up getting the bag off [her] shoulder and giving it to her." This most certainly does not sound like the kind of violence that would "pose an immediate danger to the owner of the property." However, this also does not sound like "taking something stealthily without the owner's knowledge." Although this obviously is not a "struggle for control" since Ms. Owens stated she wanted to give the defendant her purse, there is evidence that the defendant was "struggling

with the owner while trying to take the item from the owner" considering that Ms. Owens said she "got twisted up."

Based on the language of the statute and its interpretation in *State v. Driscoll*, there is likely sufficient evidence to charge the defendant with the felony of robbery.

Felony Murder

According to the Franklin Criminal Code, 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, robbery, burglary, kidnapping, aggravated child abuse, aggravated child neglect, or aircraft piracy."

Here, it is likely that the elements for robbery will be satisfied. Even if it is not, it is likely that an attempted robbery may be satisfied. Thus, felony murder may be satisfied if it can be established that the defendant was in immediate flight from the perpetration or the attempt to perpetrate the robbery.

According to *State v. Clark*, assessing whether a defendant is still engaged in fleeing from the felony requires a determination of "whether the fleeing felony has reached 'a place of temporary safety.'" In *Clark*, the court determined that the defendant had completed her burglary but had not reached a place of temporary safety because she was on her way to that place, meaning that "there was no break in the chain of events" and that "she was still engaged in fleeing from the crime." This case is similar to the case at hand, and may also be distinguished from *State v. Lowery* where the defendant had arrived at home after the commission of his crime and later had a visit from a police officer resulting in death.

As in *Clark*, the Defendant here had not reached a place of safety and thus was still in the process of fleeing from the robbery.

Next, we must assess whether there is sufficient causation between the defendant's actions and the death to establish felony murder.

Franklin Supreme Court case *State v. Finch* is helpful in addressing the issue of whether we may find the Defendant, Ms. Logan, guilty of felony murder under the theory of causation.
In *Finch*, the court found that the causation required for a charge of felony murder requires both "cause in fact" and "legal cause."

"Cause in fact," according to *Finch*, is "but-for" causation, meaning if it were not for the actions of the defendant, there would not have been a resulting death. Although cause in fact is necessary to find causation for a successful charge of felony murder, it *must* be paired with a finding of legal cause, which the court states "adds the requirement of foreseeability."

Here, "but-for" causation is most certainly present. If the defendant and her accomplice had not committed or attempted to commit the robbery, they would not have been fleeing the robbery or attempted robbery, and would not have been in the accident that resulted in the death.

According to *Finch*, "legal cause" is present where "the death is of the type that a reasonable person would see as a likely result of that person's felonious conduct." The court states that foreseeability is such an important factor in the felony murder analysis because "it would be

unfair to hold a defendant responsible for outcomes that were totally outside his contemplation when committing the offense." The court cites *State v. Lamb*, stating that "the intent behind the felony murder doctrine would be thwarted if felons were not held responsible for the foreseeable consequences of their actions."

Here, the defendant was fleeing from a robbery or attempted robbery, which is an inherently dangerous felony. There is no indication that the driver of the vehicle was driving negligently to evade the police, so nothing can be said about the manner in which they were driving. It is likely that fleeing an inherently dangerous felony will be enough to establish legal cause because it is foreseeable that accidents can happen on the road, regardless of whether the driver is prudent. However, there is a chance the court could rule otherwise.

Even if the court finds both but-for and legal cause, we still have to consider whether a superseding cause may be found that could break the chain of causation.

If a superseding cause is found, then there will be a break in the chain of proximate causation, and the defendant cannot be legally responsible for the death. A superseding cause is present where (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. The court cites the Olympia Supreme Court to clarify 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." It is further clarified that gross negligence is defined as "wantonness and disregard of the consequences to others that may ensue." In *State v. Finch*, the court states that, under the fourth element, "grossly negligent or reckless conduct is sufficiently unforeseeable to supersede a felon's initial causal responsibility."

Here, the court may find that the lights being green from all sides would satisfy the requirements for a superseding cause. Based on the facts, (1) the death would have occurred after the original robbery, (2) the malfunction of the lights were not a result of the original criminal acts, (3) the lights malfunction worked to bring about a result that may not have followed from the original robbery, and (4) the lights malfunctioning would not have been reasonably foreseeable by the defendant. There is no indication that either the driver of the getaway car from the robbery was driving negligently, nor was there evidence that the driver of the car that struck theirs was driving negligently. Assuming the court finds that the accident would not have followed from the original crime if it were not for the lights malfunctioning, it is likely that it will find that it was a sufficient superseding cause to relieve the defendant of a felony murder charge.

Conclusion

Based on this analysis and your eagerness not to overcharge where evidence is weak, I would recommend charging the defendant with robbery, but not of felony-murder.

MPT-2
224

Applicant Number

MPT®
Multistate Performance Test

Randall v. Bristol County

By breaking the seal on this test booklet, I certify that I am taking the Multistate Performance Test (MPT) for admission to the bar and for no other purpose, and I affirm that I have read, understand, and agree to the following:

NCBE COPYRIGHT NOTICE AND PENALTIES. I will not copy or otherwise reproduce any MPT questions or answers by any means or disclose any MPT questions or answers to any unauthorized individual or entity before, during, or after the examination, whether orally, in writing, electronically, or otherwise. I acknowledge that the MPT is owned by NCBE and protected by US copyright laws, and that any unauthorized disclosure of its contents—in whole or in part—could result in civil liability, criminal penalties, cancellation of my test scores, denial of my bar application on character and fitness grounds, and/or other consequences, including disciplinary action if I have been admitted to practice law.

NCBE DATA USE. MPT testing information and data, including personally identifiable information, may be shared by your testing jurisdiction with NCBE for scoring, research, exam security, and statistical and other purposes. Such information and data are held by NCBE in accordance with the NCBE Privacy Policy (http://www.ncbex.org/privacy-policy), which also applies to information found in or provided by way of NCBE Accounts. NCBE may contact you via email after the test administration to ask you to participate in a voluntary survey regarding your testing experience.

NCBE LIMITATION OF LIABILITY. Each jurisdiction is responsible for handling test registration, test administration, requests for testing accommodations, and the reporting of scores for its bar examination. In the unlikely event that an error or mistake occurs or a claim arises relating to any of these activities, you agree that any remedy will be determined and provided under the exclusive authority and discretion of your jurisdiction. NCBE is not responsible for any such errors, mistakes, or claims.

If you do not agree to any of the above policies and procedures, do NOT break the seal on this test booklet and do not proceed with taking the MPT.

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

NCBE National Conference of Bar Examiners

302 S. Bedford St. | Madison, WI 53703 | 608-280-8550 | www.ncbex.org

Randall v. Bristol County FILE

LIBRARY

FILE

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 shedirected.

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.

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 efficientoperation.

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.

MULTISTATE PERFORMANCE TEST DIRECTIONS

You will be instructed when to begin and when to stop this test. Do not break the seal on this booklet until you are told to begin. This test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.

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

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

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

Your response must be written in the answer book provided. If you are using a laptop computer to answer the questions, your jurisdiction will provide you with specific instructions. In answering this performance test, you should concentrate on the materials in the File and Library. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.

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

Do not include your actual name anywhere in the work product required by the task memorandum.

This performance test will be graded on your responsiveness to the instructions regarding the task you are to complete, which are given to you in the first

memorandum in the File, and on the content, thoroughness, and organization of your response.

February 2024
MPT 2
Representative Passing Answer

I. Captions

[omitted]

II. Statement of Facts

[omitted]

III. Legal Argument

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)). 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. *Dunn*. Speech made as part of an employee's public duties are not afforded First Amendment protection. *Garcetti*. So the initial question is whether the employee made the speech pursuant to his ordinary job duties. *Lane v. Franks*, 573 U.S. 228 (2014). If the employee spoke as a citizen on a matter of public concern, then the court must balance the interests of the employee in expressing the
speech against the employer's interest in promoting effective and efficient public service. *Dunn*. For an employee to prevail, the employee must show that the speech was a motivating factor in the adverse employment action. *Id.*

> 1. When Ms. Randall made her Facebook posts she was posting as a citizen and not as an employee pursuant to her official duties because the Facebook posts were public and because posting on Facebook was not a part of her duties.

Ms. Cook admitted that Ms. Randall's posts were public and that she responded to a dozen public inquiries as a result. Cook Dep. Ms. Randall testified that when she posted on Facebook, the postings were public. Randall Dep. This case is similar to *Pickering v. Bd. of Education*, 391 U.S. 563 (1968), where a public school teacher wrote letters to the editor that criticized his employer's use of tax revenues. *Dunn* (citing *Pickering*). The letters were published in the local newspaper, and at the time the case was decided in the 1960's, most citizens got their news about local issues from their local newspaper or TV station. *Id.* Pickering's letter informed
residents of the school district about the district's budgeting decisions and financial matters. *Id.*

Ms. Randall was acting as a citizen because she posted on Facebook publicly. Facebook and social media are how most people get their news about local issues today. Furthermore, Ms. Randall's duties did not include posting on Facebook. Randall Dep. Ms. Randall's Facebook posts informed the public about the success of the grant from the State of Franklin and that the County did not want to renew the grant. Oct. 15, 2023 FB post. Ms. Randall's also posted additional information, that the grant helped 40 Bristol County residents get their GED, and pointed out that the county executive makes these decisions. Oct. 17, 2023 FB post.
Like *Pickering*, Ms. Randall is using the Facebook media to inform residents of the

county's budgeting decisions. The County may argue that Ms. Randall's acts are more similar to *Garcetti*. In that case, the assistant district attorney was disciplined when he criticized the legitimacy of a search warrant in a memo advising his supervisor. *Dunn* (citing *Garcetti*). However, the County would have to argue that Ms. Randall's actions were made in the ordinary course of her duties, and that they were private. *See Dunn* (affirming grant of summary judgement because plaintiff limited the audience for the Facebook page). Here, Ms. Randall's Facebook posts were public and they were not limited in any way. Ms. Randall was speaking as a citizen in alerting the public to concerns about the elimination of county programs. *See Smith v. Milton School District*, 15th Cir. 2015 (finding that the plaintiff spoke as a citizen when he alerted the public to his concerns about mandatory school tests). Therefore, Ms. Randall was posting as a citizen and not as an employee.

2. Ms. Randall's Facebook posts were a matter of public concern

A. Ms. Randall's speech content was a matter of public concern because it dealt with County-funded programs

Ms. Randall addressed matters of public concern. She addresses that "the county has had great success in helping citizens who didn't finish school obtain their GED [...] and start looking for work, all thanks to a grant from the State of Franklin." Oct. 15 post. She also posted that the County decided not to renew the grant, and to call the county executive Ms. Cook if they wanted the county to renew the state grant. *Id.* In her second post, Ms. Randall gave details about the name of the grant, and the fact that she personally helped 40 residents get their GED. Oct. 17 post. In fact, other than a mention that she worked in the program, the posts do not refer to Ms. Randall or her feelings at all: *only to matters of public concern*. Ms. Randall's posts focused on policies and not personal complaints or issues related to her job. *See Smith*. Ms. Randall posted because it is important that people get ready for the GED and get jobs. Randall Dep. Therefore, Ms. Randall's speech content are a matter of public concern.

B. Ms. Randall's speech nature was directed at the public because she made her posts public and did not limit her audience

The nature of Ms. Randall's Facebook posts were public. Ms. Randall testified that she made her posts public (Randall Dep.) and Ms. Cook testified that Ms. Randall stirred up the public, and that she had to respond to inquiries from the public as a result of Ms. Randall's public posts. Cook Dep. Again, this case is more like *Pickering* than *Garcetti* because of the public nature of Ms. Randall's posts. Like in *Smith*, where the court found that the plaintiffs used Twitter as a "modern-day 'public square' [... to] reach parents and others in the community," Ms. Randall was using Facebook as a public square to inform residents of the County's funding decisions. Therefore, the nature of Ms. Randall's Facebook posts were public and not private.

C. Ms. Randall's speech context was directed at the public because it dealt with public issues and not personal issues

Ms. Randall's Facebook posts deal only with matters that would concern the public. Ms. Randall posted about the program, its success, and where the program got its funding. Oct. 15 post. Ms. Randall also gave more details surrounding the name of the grant, number of people helped, and that she worked in the program. Oct. 17 post. Although the County may argue that Ms. Randall posted that she was in charge of the group and would not have wanted to lose her job, Ms. Randall testified that she was not threatened by the loss of her job and

assumed she would get new duties at the library. Randall Dep. Ms. Cook also admitted that Ms. Randall would go back to "her old job at the library." Ms. Randall also only posted after she heard nothing from Ms. Cook (she had left numerous messages with no reply, and the deadline was about to pass). Randall Dep.; Cook Dep. Ms. Randall was acting in order to inform the public of the situation, not to vent her own personal problems. Therefore, the context of Ms. Randall's Facebook posts were public and not private.

3. Ms. Randall satisfies the balancing test because the public attention to the matter of public concern outweighs Ms. Cook and the County's embarrassment.

Although courts have tended to favor public employers over public employees (*Smith* (internal citations omitted), the balance tilts in favor of an employee calling attention to an important matter of public concern, such as a school district's ubdget and use of tax revenue. *Smith* (citing *Pickering*). In *Smith*, the plaintiff's speech did not disturb the school's morale or efficient operation. *Smith*. The defendant also did not have any evidence that the plaintiff's speech hhad such effect. *Id.* "While the superintendent may have been annoyed by [plaintiff's] tweets, annoyance is not enough to favor the employer." *Id.*

Here, the County's sole evidence is that Ms. Randall's Facebook posts caused public inquiries and Ms. Cook to respond to public inquiries. Cook Dep. Ms. Cook also testified that there were no other disruptions or problems in the county office. *Id.* However, Ms. Randall was addressing matters of public concern. In fact, the public inquiries that Ms. Cook had all had to do with people wanting to keep the grant Ms. Randall posted about. *Id.* Although the County may argue that Ms. Randall embarrassed Ms. Cook and the County by making the public Facebook posts (*see* Cook Dep.), "[a]lmost all public speech criticizing the government will incur some annoyance or embarrassment." *Smith* (finding that the balancing test weighted in favor of the plaintiff). On the other hand, citizens were well informed by Ms. Randall's posts, and informed enough to make their opinions and concerns known to the decision maker Ms. Cook. Cook Dep.; Oct. 15 and 17 posts. This is exactly what public speech is meant to be: informing citizens of the situation and their options. Therefore, Ms. Randall satisfies the balancing test.

4. The only reason Ms. Cook had to suspend Ms. Randall was because of her protected Facebook posts.

Ms. Cook testified that "the only complaint about Ms. Randall [was] that she made two Facebook posts [...] and all the trouble they caused." Cook Dep. Ms. Cook further testified that the "trouble" was public inquiries about the state grant, and the questions Ms. Cook had to answer. *Id.* However, Ms. Cook is "charged with operating all county functions," *Id.*, it is her job to respond and deal with the public. Ms. Cook also testified that she never had any problems with Ms. Randall prior to her two Facebook posts. *Id.* This case is similar to *Smith*: until his three tweets, the plaintiff had always received positive performance reviews. *Smith*. Also, the defendant testified that, by posting on social media, the plaintiff was inviting inquiries for no good reason. *Smith*. In *Smith*, the court found that the plaintiff had shown that his speech was the motivating factor in the adverse action, and that it was undisputed that his past performance reviews were positive. *Smith*. Finally, the court reasoned that the defendant's testimony that the plaintiff's tweets supplied the nexus between the plaintiff's tweets and the adverse employment action. *Smith*.

Likewise, Ms. Cook's testimony that she was annoyed and that she thought Ms. Randall failed to show respect to her (Cook Dep.) is the nexus between Ms. Randall's Facebook posts and her suspension. The County can point to no evidence that Ms. Randall was

suspended for any reason other than her Facebook posts. The County has also admitted this fact in their November 4, 2023 letter. Therefore, Ms. Randall's suspension was because of her protected First Amendment speech in her Facebook posts.

Conclusion

Ms. Randall engaged in protected First Amendment activity when she posted publicly as a citizen on Facebook, talked about matters of public concern that was directed at the public. Randall also satisfies the balancing test because the attention she gave to the public outweighs the embarrassment of Ms. Cook and the County. Finally, Ms. Cook has admitted that Ms. Randall's suspension was because of her two, public Facebook posts.

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.

February 2024
MEE 1
Representative Passing Answer

---

1. General Partnership

This issue is whether a general partnership was formed and who are the partners.

A general partnership is an agreement between 2 or more people to carry-on a business for profit; no writing is required.

Mary is a partner with Wendy. The agreement and intent to agree can be manifested by a sharing of profits. A presumption of partnership exists when profits are shared.

Here, Mary agreed with Wendy to share profits (15% of the monthly profits and 15% of loses). Mary made an initial contribution with a check to "Kibble". This was in response to Wendy's request for financial assistance. Additional, Mary works at the store and helps with the business planning which shows co-ownership and carrying out a business. Wendy was selling dog food, toys, and grooming products which is a business.

Angleo is not a partner. Angelo made a check to Kibble but wrote in was "a loan". A lender alone to a business does not become a partner without further evidence. He agreed to accept 15% of profits only till the loan was repaid. There is no evidence Angelo works or plans for the business.

Bob is not a partner. He shares no profits and losses and has no duties with regard to the business. He is solely an assignee of Mary's financial rights.

2. Is Bob entitle to a share of monthly profits?

Partners share equally in the profits and losses of the business absent a agreement otherwise. Each partner also has an equal right to manage the business. A partner can assign only their financial rights to the business, they cannot assign their management rights.

Here, as a gift to her son Mary assigned "all her interest in Kibble." Wendy objected to this. The financial rights are assignable, but due to Wendy's lack of agreement otherwise, the management right are not.

Bob is entitled to Mary's monthly 15% of the profits because they are freely assignable. However, he is not a partner and the management rights are not assignable.

3. Bob's entitle to Inspect Books?

The issue is whether a non-partner with only financial rights may inspect the business books.

All partners have a right as managers to inspect the books. And each partner owes fiduciary duties to the other parties. Since Mary's management rights as a partner are not assignable, Bob has no right to inspect the books. This right is part of the management rights of partners.

4. Is Wendy entitled to use delivery van?

Partners are permitted to use partnership property for the purpose of the business of the partnership. The issue is whether Wendy's use is personal or for a partnership purpose.

Here, Wendy is using the van to take her nieces and nephew to softball games. Th business is for dog food, toys, and grooming products. Thus, Wendy's use of the van is not appropriate. It is for personal rather than partnership purposes.

Wendy is not entitled to use of the van.

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.

February 2024
MPT 2
Representative Passing Answer

---

1. Express Warranty

The Uniform Commercial Code applies to the sale of goods over $500. Goods are all movable things. The artwork is a good and it was over $500 ($350,000).

A contract was formed their was an offer (Buyer told Grandson he would be willing to pay $350,000 for the painting), acceptance (Grandson agreed), and consideration (Grandson received $350,000 and the buyer received the painting).

The contract satisfied the Statutes of Frauds, it was in writing, identified the painting ("painting by Artist"), included the price ($350,000) and quantity. There is an enforceable contract, and both parties performed (Grandson tendered the painting and Buyer electronically tendered the payment. The contract is enforceable absent a defense.

Buyer has sued seeking to recover for breach of express warranty. An express warranty is a representation made by seller that forms the basis of the bargain. AN express warranty can be made by specific words of warranty or by the conduct of the seller in as much as he provides a sample or model.

Here, Grandson distributed a catalog describing each of the artworks he hoped to sell. A copy was given to each of he people who expressed interest in buying. Buyer read the catalog and was intrigued by the Artist painting. The catalogue specifically identified the painting as an early work of Artist, who was a prominent artist. Since Buyer relied on these representations as part of the basis of the bargain, the fact that the painting was a counterfeit was a material breach of the contract and a breach of the express warranty.

Disclaimer – Disclaimers must be in conspicuous writing and are only effective as to implied warranties not express.

The disclaimer is not effective as to the express warranty. In the contract there is a provision labeled "terms and condition of sale" where Grandson disclaimed "all warranties" -it was conspicuous. Express warranties cannot be disclaimed under the UCC only implied warranties of merchantability and fitness for a particular purpose. The disclaimer is ineffective.

Mutual Mistake

Mutual mistake can invalidate a contract if 1) neither party was aware of the mistake, 2) reasonable inspection would not have revealed it, 3) it had a substantial effect and did not discover the inspection was reasonable. The defect was not

knowable even upon inspection. It took chemical analysis to discern. And, both parties believed it to be genuine. Lastly it materially effected the price, $350,000 vs. $500.

There is a right to rescind based on mutual mistake.

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.

The Board of Bar Examiners did not select a representative passing answer for this question.

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.

February 2020
MEE 4
Representative Passing Answer

---

1) The effect of Helen's holdover of the apartment on Tom's lease

The issue is what is the effect of Helen holding over on January 1, 2021 on Tom's lease. Courts may follow two laws regarding delivery of a leased property. The British Rule requires a landlord to give the tenant actual possession of the leased premises, meaning the tenant is able to move into and possess the leased property. If there is a holdover tenant, the landlord is in breach and is required to act to get the hold over tenant removed. The American Rule only requires the landlord to give a tenant constructive possession of the leased premises. Under the American Rule, the tenant, not the landlord is responsible for suing to get a hold over tenant removed, and the landlord has not breached the lease so long as constructive possession has transferred (the right that allows the new tenant to sue).

A) If Tom could have rightfully reminated lease.

Here, if Tom could have rightfully terminated his lease when Helen was a hold over tenant, the court would have been applying the British Rule. The British Rule requires the landlord to hand over actual possession, and failure to do so is a breach of the lease. Since Helen was still in the apartment on the start date of Tom's lease, the landlord was in breach of the lease to Tom because he did not deliver actual possession of the property. Therefore, if the Court applied the British Rule, Tom could have rightfully terminated his lease when Helen held over on January 1, 2021.

B) If Tom could not have rightfully reminated lease.

Here, if Tom could not have rightfully terminated his lease when Helen was a hold over tenant, the court would have been applying the American Rule. The American Rule requires the landlord to hand over constructive possession, and failure to do so is a breach of the lease. Here, the landlord gave Tom constructive possession, because he acknowledged that Tom was the rightful possessor of the property, but did not hand over actual possession. Despite this, the landlord does not breach under the American Rule, because the landlord delivered constructive possession: Tom, as the new tenant has the right to sue Helen to evict her because she was still in the apartment on the start date of Tom's lease. Therefore, if the Court applied the American Rule, Tom could not have rightfully terminated his lease when Helen held over on January 1, 2021.

2) Landlord Rightfully Refused to consent to Tom's proposed assignment of his Lease

The issue here is whether the landlord rightfully refused to consent to Tom's proposed assignment of his lease. Under the majority rule, when a lease contains a clause that

does not allow assignment or sublease of the property without a landlord's prior written consent, that landlord must act in good faith and consent cannot be unreasonably withheld. In order for a landlord to object for any reason, the lease must explicitly state that the landlord has such an absolute right of refusal. Otherwise, the refusal must be reasonable. A landlord is not required to accept a replacement tenant that impairs his rights, such as a party who is unlikely to be able to pay rent, but can be required to accept a replacement tenant that he personally finds objectionable for other reasons, such as having a child.

Here, Tom proposed his friend as an assignee to his lease. The landlord conducted a background check and found a very low credit rating. A low credit rating would be a justifiable reason for the landlord to deny the assignment, because landlord's right and ability to receive proper, timely payment could be impaired by the transfer to an applicant. Therefore, landlord did not unreasonably withhold assignment of the lease because the assignment would have impaired the landlord's rights in the lease.

3) Result of Tom's failure to vacate the apartment

The issue is can the landlord treat Tom as a periodic tenant subject to the provisions of the expired lease when he failed to vacate his apartment. Leases can be either a tenancy for years, a periodic tenancy, a tenancy at will, or a tenancy at sufferance. A tenancy for years is a lease for a set time period, and automatically expires at the end of the term stated in the lease. A periodic tenancy is a tenancy for a set period that automatically renews absent notice by the parties for an intent to terminate. Generally when a tenancy for years expires, a periodic tenancy for the period/term created in the tenancy for years is created. A tenancy for years can turn into a periodic tenancy is the parties continue to operate as if the prior lease was in effect. A tenancy at will occurs when there is no lease, and the "lease" restates each period and either party may terminate at any time with the appropriate notice. Payment by the tenant of the agreed lease amount, and acceptance by the landlord creates a tenancy at will. A tenancy at sufferance is rare, and generally without the consent of the landlord, but has occurred long enough that the tenants are legally entitled to some level of notice before eviction (slightly above the level of a trespasser).

Here, Tom did not vacate the apartment at the termination of his lease, which automatically terminated on December 31, 2023. Tom's failure to vacate caused him to breach his original lease. Despite this, consent of the parties in which both continue to operate as if the lease is in existence would result in a periodic tenancy being formed. The landlord could rightfully treat Tom's failure to move out as an indication that Tom intended to continue as a periodic tenant under the previous lease terms. Therefore, the landlord can rightfully treat Tom as a periodic tenant subject to the provisions of the expired lease.

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.

February 2024
MEE 5
Representative Passing Answer

The issue is which crimes, if any are barred by the United States Constitution's Double Jeopardy Clause. Protection from Double Jeopardy is a part of the Fifth Amendment, and protects a criminal defendant from multiple prosecutions. Double Jeopardy is a situation in which a party is charged multiple times for the same crime by the same jurisdiction arising out of the same course of conduct. Different "sovereigns" may charge for the same crime, so long as the sovereign has jurisdiction for the crime in question. This is called concurrent jurisdiction, and all entities with concurrent jurisdiction can try the same crime. Double Jeopardy prohibits the same entity from charging the same crime twice, when certain criteria have been met including when the party has already been convicted, or was already acquitted.

State B Prosecution

The issue is whether State B is a separate sovereign from the municipality, thus allowing State B to prosecute the officer without violating Double Jeopardy. A sovereign is a governmental entity separate from other government entities that has power to make and enforce laws through either an inherent right or through governmental grants. Here, the municipality is a "sovereign" in that it is a city with the right to create and enforce law. Likewise, State B is a separate sovereign with its own laws and ability to enforce the laws. State B claims jurisdiction because the injury occurred in State B. So long as the court is able to meet the requirements for Personal Jurisdiction, State B can prosecute without violating Double Jeopardy because State B and the municipality are separate sovereigns.

Federal Prosecution

The issue is whether the federal government can prosecute the officer or if it is barred by Double Jeopardy. Here, the federal government is a sovereign entity with the ability to make and enforce laws under the US Constitution. The municipality is also a government entity able to make and enforce laws, so both can act concurrently in prosecuting the officer. Therefore, the federal government and the municipality are both sovereign entities that have concurrent jurisdiction and therefore are able to prosecute the same crime arising from the same events.

State A Hate Crime and Assault Prosecutions

The issue is whether State A can prosecute officer without violating Double Jeopardy. When prosecuting crimes, a locality with concurrent jurisdiction may prosecute the same crime as another jurisdiction that also has jurisdiction. When a locality only has jurisdiction because the related sovereign has granted a part of it's own sovereignty to that jurisdiction, there will not be concurrent jurisdiction. Crimes that have different elements that rise out of the same events can be charged simultaneously or at different times without violating Double Jeopardy.
When crimes have the same basic elements that must be proven, those crimes are lesser and greater included offenses, and a defendant may only be convicted of one of

the other.

Hate Crime Prosecution

Here, the municipality is a sovereign government entity with the authority to enact and enforce laws, as is the state. Despite this, the municipality has gotten it's authority from a governmental grant from the state, and therefore both cannot prosecute the same crime. The hate crime elements in the city requires 1) an assault, 2) because of the other's religious expression. The state hate crime elements are 1) an assault, 2) because of the other's religious expression, and 3) the assault thereby causes an injury. The hate crime contains the same base elements and is a greater included offense of the city's hate crime. Therefore the state hate crime cannot be prosecuted without violating Double Jeopardy

Assault Prosecution

Here, the events of the hate crime prosecuted by the city contain different elements that the state's assault statute. The city requires a religious motivation, while the state requires an intent to cause injury. Since these are different crimes, the state is allowed to prosecute a different crime that arises from the same set of operative facts. Therefore the state would not violate double jeopardy by prosecuting the officer for the assault charge.

Indian Law Question:

Neveah is a healthy two-year old Native American child, enrolled with the Rosebud Sioux Tribe. Her little brother, J.R. is a healthy one-year old Native American child. J.R. is not enrolled in the Rosebud Sioux Tribe but is eligible for enrollment because he meets the tribal constitutional requirements for enrollment. Neveah and J.R. have different fathers. Their mother is an enrolled member of the Rosebud Sioux Tribe.

Neveah and J.R. were adjudicated as abused and neglected children and the Department of Social Services has legal and physical custody. Parental rights to Neveah and J.R. were terminated in 2022, by the 4th Judicial Circuit Court of South Dakota.

Neveah and J.R. are now in the adoptive custody of the Department of Social Services and have been placed together in South Dakota with the Cummings family, an Indian foster family within the Indian Child Welfare Act (ICWA) placement preferences. The Cummings are not related to either Neveah or J.R. but are enrolled members of the Rosebud Sioux Tribe.

While diligently searching to locate family members for Neveah, her paternal aunt and uncle, the Andersons, were located and identified as a potential adoptive placement for Neveah and later, approved for adoptive placement. The Andersons are not members of any federally recognized tribe but are considered extended family members under the Rosebud Sioux Tribal Code. The Andersons live in California.

Both the Andersons and Cummings wish to adopt Neveah and J.R. as a sibling set. Given their ages, Nevaeh and J.R. do not have a strong sibling bond and Nevaeh has not bonded with the Cummings.

The Rosebud Sioux Tribe's position is placement with the Cummings or separate the siblings, Neveah going with the Andersons and J.R. going with the Cummings. The Department does not want to separate the siblings and recommends placing both children with the Andersons. The childrens' attorney recommends placing both children with the Andersons.

How will the 4th Judicial Circuit Court rule? Please explain why.

February 2024
Indian Law Question
Representative Passing Answer

The issue is how the 4th Judicial Circuit Court will rule with regard to the placement of children under the Indian Child Welfare Act (ICWA). The Indian Child Welfare Act is a federal law, which gives tribal courts concurrent jurisdiction with states, with a preference towards the tribe in cases involving the adoption, foster care, and guardianship of Indian Children. ICWA was enacted to protect Indian Children from being separated from their families and tribes, as it was considered a threat to tribes to have the removal of children from tribal control.

Indian Children that fall under the act are children who are members of the tribes (or eligible to become members), reside on the reservation, or are wards of the tribe.

Whenever a state encounters a case with Indian children, the state must notify the tribe, and the tribe may elect to take jurisdiction of the case. There is an exception to this in emergency situations, such as child abuse and neglect.

When placement is selected by a state court for Indian Children, ICWA creates a preference for: 1) Extended family of the children; 2) Tribal Members; 3) Other Foster Families as approved by the tribe; and then 4) any foster family. The definition of extended family is determined by the tribe, and often includes aunts, uncle, and grandparents. Courts often consider bonding with siblings or any foster parents when determining if placements falling outside of ICWA may be more appropriate.

Neveah and JR are Indian Children

Here, Neveah is an Indian Child under ICWA because Neveah is an enrolled member of the Rosebud Sioux Tribe. A child who is an enrolled tribal member, will be classified as an Indian Child, and therefore ICWA will control Neveah's case.

J.R. is not enrolled in the tribe, but is eligible to be enrolled in the tribe. Since J.R. is eligible to be enrolled, he will meet the qualifications of an Indian child and the case must be governed by ICWA.

Tribal Jurisdiction

Here, there is no indication that the tribe was notified, although the emergency nature of an abuse and neglect proceeding may have at least initially eliminated the need for the tribal court to hear the case, thus placing Neveah and J.R. as wards of the state instead of wards of the tribe. There is no indication that the tribe demanded jurisdiction, and therefore their determination of the child custody does not need to control the placement of the children because they have given jurisdiction to the state.

4th Judicial Circuit Court

Here, the court is receiving different recommendations regarding the placement of the children. Two of the recommendations, that of the attorney and the State Department of Social Services, want the Andersons to receive custody of both children. In this case, following Rosebud's Tribal Code, the Andersons, as paternal aunt and uncle are considered extended family, but only to Neveah as the children have different fathers. The Andersons are extended family to Neveah, despite the fact that the Andersons are not enrolled members of any tribe. Since ICWA's preference is for extended family, the 4th Judicial Circuit Court will determine that Neveah should go to the Andersons.

Here, J.R. does not have any extended family that has been located. Under ICWA, the next preference is for an Indian Child to go to the family of other tribal members. Here, the Cummings are members of the Rosebud Sioux, the tribe at question. The tribe supports custody of J.R. going to the Cummings, and the placement would be consistent with the ICWA considerations.

Additionally, courts sometimes consider the level of bonding between parties. Here there is indication that there is not a strong sibling bond, so the separation of the two will not negatively impact either child, and Neveah has not bonded with the Cummings, which creates no potential issues with her going to the Andersons. In this case, thebonds do not exist, and will not interfere in the court using ICWA as the guiding principals for the determination of the adoption of Neveah andJ.R.

Therefore, the 4th Judicial Circuit Court, following the placement guidelines of ICWA, will place Naveah with the Andersons, her extended family, and J.R. with the Cummings, tribal members int he same tribe J.R. is eligible to be an enrolled member in.