

EMPLOYMENT LAW

FINAL EXAMINATION

Fall, 2007

Ms. Baker

Instructions

1. This is a three-hour unrestricted open-book examination. You may use any materials that you have brought.
2. The examination consists of 7 pages, including this page. Count them to be certain that you have them all.
3. Suggested time allocations are indicated next to each question. There should be sufficient time to read each question carefully and to organize your answers before beginning to write. Points will be allocated proportionately to the suggested time allocations.
4. Spend some time organizing and outlining your answer. You may use scrap paper or the back of the exam pages.
5. If you are taking your exam by hand, try to write legibly. I do not take points off for bad handwriting. But if I can't read it by the second try, it doesn't get credit.
6. If you are taking your exam by hand, I have a strong preference for pen over pencil.
7. If you are taking your exam by hand, write on one side of the page only, and use every other line.
8. Write your blind grading number on each bluebook before turning it in. If you have forgotten your blind grading number, write a *four*-digit number on the exam, and tell the Registrar your phony number immediately after you finish the exam.
9. You need not return the exam when you are finished.

GOOD LUCK!

Students who are using this as a practice exam can refer to the following opinions to see how real courts addressed fact patterns raising similar issues:

Question #1: *Shaffer v. Potter*, 499 F.3d 900 (8th Cir. 2007).

Question #2: *Scarborough v. Morgan County Bd. of Educ.*, 470 F.3d 250 (6th Cir. 2006).

Question #2: *Brady v. Curators of the University of Missouri*, 213 S.W. 3d 101 (Mo. Ct. App. 2006).

Fact Pattern #1: Going Postal
Suggested time – 1:30

You are house counsel for Acme Delivery Services, a nationwide package delivery service that is similar to FedEx or UPS. Acme’s main offices, as well as its largest hub of shipping operations (“the Hub”), are located in Cincinnati, Ohio. Packages slated for overnight delivery to anywhere in the United States are flown to the Cincinnati facility, sorted by destination, and then flown to their destination cities. Once a package arrives in its destination city, it is placed on a delivery truck and taken to the recipient.

The corporate office has presented you with the following information about some recent problems in the Cincinnati facility, and has asked for your advice on how to proceed.

Acme delivers about 20,000 packages within Cincinnati each day. Packages that are slated for ultimate delivery within Cincinnati itself are sent to the Cincinnati Delivery Annex (“CDA”), which is located on the same premises as the Hub. The CDA’s director is Troy Troutner. There are several package delivery employees; these include Jennifer Jordan and Keith Knapp.

The package delivery employees are subject to a collective bargaining agreement specifying that:

Disciplinary action shall be taken only for just cause. The normal corrective disciplinary procedure shall consist of three (3) steps. Both parties agree that the order of discipline below is the progressive order of discipline; however, situations may arise where it will be appropriate to depart from this order.

1. An oral warning shall be given to the employee specifying the nature of any incorrect work-related behavior and pointing out that non-correction will result in further disciplinary action.
2. A written warning shall be given to the employee specifying the nature of any continuing incorrect work-related behavior and pointing out that non-correction will result in further disciplinary action.
3. A notice of suspension shall be given to the employee with a written explanation specifying the nature of any continuing incorrect work-related behavior and pointing out that non-correction will result in further disciplinary action.

The Employer shall have the right to discharge an employee who:

1. Is judged by the Employer to be guilty of continuing non-correction of improper work-related behavior after suspension as specified above;
2. Endangers in a willful or careless manner, the safety of the public, himself/herself or other employees;
3. Is judged by the Employer to be guilty of serious violations of generally accepted standards of employee conduct such as, but not limited to, theft, fraud, willful or careless destruction of Employer property, gross insubordination or falsifying of documents;
4. Engages in behavior other than 1-3 above which in the Employer's judgment meets accepted just cause termination tests.

From the summer of 2006 until a few weeks ago, package deliverers Jennifer Jordan and Keith Knapp had a romantic relationship. In July 2007, Jordan complained to CDA director Troutner that Knapp's wife and son were in the employee parking lot, which had a "No Trespassing" sign posted, and that Knapp's wife and son appeared to be about to vandalize Jordan's vehicle. Employees emerging from the CDA building frightened the trespassers away before any vandalism occurred. After Troutner learned of the romantic relationship between Jordan and Knapp, he did not investigate further, treating the incident as a private matter. Troutner told Jordan that if she chose to have an affair with Keith Knapp and that upset Knapp's wife, allowing her personal problems to come into the workplace could potentially have an impact on her job in the future and she needed to stop that. Troutner did not talk with Knapp about the incident.

In early September 2007, Jordan and Knapp planned a vacation to Colorado together. Three days before they planned to leave, Jordan approached Knapp to confirm their vacation plans. At the time of the encounter, Jordan was off duty, and Knapp was on a delivery route. Knapp told Jordan that he had decided to cancel the vacation and restore his relationship with his wife. Jordan. Jordan started to leave, then turned around and said, "Next time I'll put a bullet in your head."

Later that day, Jordan left Knapp a voicemail message, the contents of which are the subject of some dispute. Unfortunately, Knapp deleted the message, and it is not recoverable. Knapp claims that Jordan's message was: "If I ever stop crying long enough to come back, you better run like a motherf@#\$%^!" Jordan claims that her message was: "I can't stop crying. Why do you always run away, motherf@#\$%^?"

Knapp reported the two encounters to Troutner. Troutner swore out a criminal complaint against Jordan and had her arrested. (Knapp had refused to press criminal charges.) Those charges were ultimately dropped.

On September 21, 2007, Troutner fired Jordan for “improper conduct.” On two separate occasions around the time he was investigating the incidents, Troutner told Jordan: “You know, Jenny, if you had just stayed away from Keith none of this would have happened, and, “If you hadn’t been fooling around with a married man none of this would have happened.”

On October 1, 2007, Troutner received a telephone call from Eagle Emporium. Jordan had applied for a job at Eagle Emporium, and Eagle’s HR director was conducting a background check. Troutner told the HR director that Jordan was a “lunatic who got all ‘Fatal Attraction’ with married men.” Eagle did not offer Jordan a job.

Jordan was unemployed for over two months. On November 27, 2007, she got a job working in the mailroom at Friendly Financial Services. On December 3, 2007, Knapp encountered Jordan while he was making a delivery at Friendly. Jordan approached Knapp and accused him of getting her fired from Acme. Knapp tried to leave, but Jordan blocked the doorway and then hit Knapp with a stepladder. Knapp was treated for minor injuries at the local emergency room.

Acme would like to know if it should be prepared for any possible legal claims arising out of these facts. What issues do you notice? What claims should Acme be prepared for? What are Acme’s best defenses? How do you evaluate Acme’s chances on the merits?

Fact Pattern #2: Our Town
Suggested time – 1:30

You are a mid-level associate at a plaintiff-oriented employment firm. You have just completed an initial interview with Paul Putnam, who would like to retain the firm to represent him in connection with the matter described below. Does Putnam have any viable claims? Against whom? What defenses do you have to be ready for? How do you evaluate Putnam’s chances on the merits? Will you recommend to the senior partners that your firm take the case?

Paul Putnam has worked in the Morgan County, Nebraska school system since 1988. Between 1988 and 2002, he taught physical education and was the head baseball and softball coach at Morgan County High School. His teams had a winning record every year.

At the end of the 2001-02 academic year, Putnam was appointed as the Morgan County school superintendent. As school superintendent, Putnam was employed under a five-year contract, which was renewable at the end of its term (July 1, 2002-June 30, 2007). The Morgan County school superintendent is appointed by a six-member School Board, which consists of Ann Armstrong, Brian Blum, Carol Chung (chair), David Dunbar, Elizabeth Eastman, and Frank Fleming. Historically, Armstrong, Blum, Chung, and Dunbar have been Putnam’s supporters. Eastman and Fleming have historically opposed Putnam.

In March or April 2007, Putnam’s friend invited Putnam to speak at a convention being hosted by the Metropolitan Community Church of Morgantown (“the Church”) on May 20, 2007. The Church has a predominantly homosexual congregation – a fact of which Putnam was unaware. Putnam initially agreed to speak, but later realized he had a scheduling conflict and notified his friend that he would be unable to attend.

On May 13, 2007, the Morgantown News-Sentinel newspaper published an article announcing – incorrectly – that Putnam would be a speaker at the Church-sponsored convention. The article further stated that the Church was a predominantly gay and lesbian Christian church. Putnam responded by writing a statement, which the newspaper published, stating that he had declined

the speaking engagement because of a scheduling conflict and further noted that he did not endorse, uphold or understand homosexuality, but that he would not refuse to associate with gay people or refuse the opportunity to share with them his beliefs.

Soon afterward, board members Chung, Dunbar, and Eastman received complaints about Putnam's stance on homosexuality. Some constituents expressed the concern that renewing Putnam's contract was putting the school district's "stamp of approval" on homosexuality as an acceptable alternative lifestyle.

Ultimately, the School Board voted, 4-2, not to renew Putnam's contract. Instead, they hired Teresa Tate as the new school superintendent. Tate had been the assistant superintendent of schools between 2002-2007. Armstrong and Blum had voted for Putnam. Putnam has heard that Chung said that she "could not vote for a man who would pray or speak in a place where gay people were present." Dunbar said: "I just can't support him going up there to that church up there for them gay people." Eastman stated that she could not vote for a person who associated with gay people.

After the School Board decided not to renew Putnam's contract, Putnam returned to his coaching position at the Morgan County High School. Between 1988 and 2002, Putnam's usual schedule had been as follows:

First Period	Coach Girls' JV Softball
Second Period	Coach Girls' Varsity Softball
Third Period	preparation hour
Fourth Period	Coach Boys' Fro/Soph Baseball
Fifth Period	Coach Boys' JV Baseball
Sixth Period	Coach Boys' Varsity Baseball

When Putnam returned, however, the High School informed him that he would be coaching only the Boys' baseball teams. The girls' softball teams would continue to be coached by Susan Simonson, who had taken over that duty when Putnam accepted the position as school superintendent.

Simonson, as the girls' softball coach, was considered a 33% full-time equivalent ("FTE") employee and paid \$10,000 per year. In addition to being the girls' softball coach, Simonson was the equipment manager, for which she was classified as a 66% FTE employee. This raised her total salary to \$2,000 per month and qualified her to receive health and retirement benefits. Although Simonson was supposed to be a full-time employee, in 2004 the High School allowed her to cut her hours back to accommodate caring for her three young children. Simonson was to work from eight until one, at which point she could leave and count her lunch hour as one to two in the afternoon. From two to four, she was to be "available by cell phone and electronic messaging," and available in the equipment room on game days. She continued to be classified as a full-time employee with full pay and benefits.

Putnam's new position, coaching only the boys' baseball teams, would be a half-time position. Putnam's salary would be reduced to half its previous level, with no medical benefits and no retirement participation. Putnam objected. He claimed that he, not Simonson, should be coaching the girls' softball team, because (a) Putnam had a degree in physical education and an earned teaching credential, while Simonson had been hired on an "emergency credential" and did not have a degree in physical education; (b) Putnam had a winning record every year, while Simonson had a losing record every year; and (c) Simonson was effectively working only five hours a day and being paid as a full-time employee. Putnam, on the other hand, would be working full time for his full-time salary. He claimed that it was unfair for the school to artificially inflate Simonson's working hours in order to classify her as a full-time employee, while at the same time denying him a full-time job.

The High School refused to return Putnam to his position coaching the girls' softball team. Part of the reason, the principal explained, was that women were underrepresented in the Athletic Department, and it was important for the girls to see female role models in that department. Putnam suspects the real reason is that he is 15 years older than Simonson (43 vs 28), and earns a considerably higher salary than she does. Putnam believes the principal is trying to provoke him to resign in order to open up both coaching positions for a younger (and cheaper) candidate.

What is your assessment of Putnam's claims? Will you take the case?