THE MPT

MULTISTATE PERFORMANCE TEST

February 2014 MPTs and Point Sheets

www.ncbex.org

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Contents

Preface

The Multistate Performance Test (MPT) is developed by the National Conference of Bar Examiners (NCBE). This publication includes the items and Point Sheets from the February 2014 MPT. The instructions for the test appear on page iii.

The MPT Point Sheets describe the factual and legal points encompassed within the lawyering tasks to be completed. They outline the possible issues and points that might be addressed by an examinee. They are provided to the user jurisdictions to assist graders in grading the examination by identifying the issues and suggesting the resolution of the problem contemplated by the drafters.

For more information about the MPT, including a list of skills tested, visit the NBCE website at www.ncbex.org.

Description of the MPT

The MPT consists of two 90-minute items and is a component of the Uniform Bar Examination (UBE). User jurisdictions may select one or both items to include as part of their bar examinations. (UBE jurisdictions use two MPTs as part of their bar examinations.) It is administered by participating jurisdictions on the Tuesday before the last Wednesday in February and July of each year.

The materials for each MPT include a File and a Library. The File consists of source documents containing all the facts of the case. The specific assignment the examinee is to complete is described in a memorandum from a supervising attorney. The File might also include transcripts of interviews, depositions, hearings or trials, pleadings, correspondence, client documents, contracts, newspaper articles, medical records, police reports, or lawyer's notes. Relevant as well as irrelevant facts are included. Facts are sometimes ambiguous, incomplete, or even conflicting. As in practice, a client's or a supervising attorney's version of events may be incomplete or unreliable. Examinees are expected to recognize when facts are inconsistent or missing and are expected to identify potential sources of additional facts.

The Library may contain cases, statutes, regulations, or rules, some of which may not be relevant to the assigned lawyering task. The examinee is expected to extract from the Library the legal principles necessary to analyze the problem and perform the task. The MPT is not a test of substantive law; the Library materials provide sufficient substantive information to complete the task.

The MPT is designed to test an examinee's ability to use fundamental lawyering skills in a realistic situation. Each test evaluates an examinee's ability to complete a task that a beginning lawyer should be able to accomplish. The MPT requires examinees to (1) sort detailed factual materials and separate relevant from irrelevant facts; (2) analyze statutory, case, and administrative materials for applicable principles of law; (3) apply the relevant law to the relevant facts in a manner likely to resolve a client's problem; (4) identify and resolve ethical dilemmas, when present; (5) communicate effectively in writing; and (6) complete a lawyering task within time constraints.

These skills are tested by requiring examinees to perform one or more of a variety of lawyering tasks. For example, examinees might be instructed to complete any of the following: a memorandum to a supervising attorney, a letter to a client, a persuasive memorandum or brief, a statement of facts, a contract provision, a will, a counseling plan, a proposal for settlement or agreement, a discovery plan, a witness examination plan, or a closing argument.

Instructions

The back cover of each test booklet contains the following instructions:

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.

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.

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▶ *FILE*

MPT-1: *In re Rowan*

Law Offices of Jamie Quarles
112 Charles St.
Franklin City, Franklin 33797

TO: Examinee
FROM: Jamie Quarles
DATE: February 25, 2014
RE: *Matter of William Rowan*

We represent William Rowan, a British citizen, who has lived in this country as a conditional permanent resident because of his marriage to Sarah Cole, a U.S. citizen. Mr. Rowan now seeks to remove the condition on his lawful permanent residency.

Normally, a married couple would apply together to remove the conditional status, before the end of the two years of the noncitizen's conditional residency. However, ten months ago, in April 2013, Ms. Cole and Mr. Rowan separated, and they eventually divorced. Ms. Cole actively opposes Mr. Rowan's continued residency in this country.

However, Ms. Cole's opposition does not end Mr. Rowan's chances. As the attached legal sources indicate, he can still file Form I-751 Petition to Remove Conditions on Residence, but in the petition he must ask for a waiver of the requirement that he file the petition jointly with his wife.

Acting pro se, Rowan timely filed such a Form I-751 petition. The immigration officer conducted an interview with him. Ms. Cole provided the officer with a sworn affidavit stating her belief that Rowan married her solely to obtain residency. The officer denied Rowan's petition.

Rowan then sought our representation to appeal the denial of his petition. We now have a hearing scheduled in Immigration Court to review the validity of that denial. Before the hearing, we will submit to the court the information described in the attached investigator's memo, which was not presented to the immigration officer. We do not expect Cole to testify, because she has moved out of state.

Please draft our brief to the Immigration Judge. The brief will need to argue that Mr. Rowan married Ms. Cole in good faith. Specifically, it should argue that the immigration officer's decision was not supported by substantial evidence in the record before him and that the totality of the evidence supports granting Rowan's petition.

I have attached our guidelines for drafting briefs. Draft only the legal argument portion of the brief; I will draft the caption and statement of facts.

Law Offices of Jamie Quarles
112 Charles St.
Franklin City, Franklin 33797

TO: Attorneys
FROM: Jamie Quarles
DATE: March 29, 2011
RE: Format for Persuasive Briefs

These guidelines apply to persuasive briefs filed in trial courts and administrative proceedings.

I. Caption
[omitted]

II. Statement of Facts (if applicable)
[omitted]

III. Legal Argument

Your legal argument should be brief and to the point. Assume that the judge will have little time to read and absorb your argument. Make your points clearly and succinctly, citing relevant authority for each legal proposition. Keep in mind that courts are not persuaded by exaggerated, unsupported arguments.

Use headings to separate the sections of your argument. In your headings, do not state abstract conclusions, but integrate factual detail into legal propositions to make them more persuasive. An ineffective heading states only: "The petitioner's request for asylum should be granted." An effective heading states: "The petitioner has shown a well-founded fear of persecution by reason of gender if removed to her home country."

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. The body of your argument 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.

Finally, anticipate and accommodate any weaknesses in your case in the body of your argument. If possible, structure your argument in such a way as to highlight your argument's strengths and minimize its weaknesses. If necessary, make concessions, but only on points that do not concede essential elements of your claim or defense.

Law Offices of Jamie Quarles
112 Charles St.
Franklin City, Franklin 33797

TO: File
FROM: Jamie Quarles
DATE: November 25, 2013
RE: Interview with William Rowan

I met with William Rowan today. Rowan is a British citizen and moved to the United States and to Franklin about two and a half years ago, having just married Sarah Cole. They separated in April 2013; their divorce became final about 10 days ago. In late April, after the separation, Rowan, acting pro se, petitioned to retain his permanent residency status. After that petition was denied by the immigration officer, Rowan called our office.

Rowan met Cole in Britain a little over three years ago. He had been working toward a graduate degree in library science for several years. He had begun looking for professional positions and had come to the realization that he would have better job opportunities in the United States. He had two siblings already living in the United States.

He met Cole when she was doing graduate work in cultural anthropology at the university where he was finishing his own academic training as a librarian. He says that it was love at first sight for him. He asked her out, but she refused several times before she agreed. After several weeks of courtship, he said that he felt that she shared his feelings. They moved in together about four weeks after their first meeting and lived together for the balance of her time in Britain.

Soon after they moved in together, Rowan proposed marriage to Cole. She agreed, and they married on December 27, 2010, in London, England. Cole subsequently suggested that they move to the United States together, to which he readily agreed. In fact, without telling Cole, Rowan had contacted the university library in Franklin City, just to see if there were job opportunities. That contact produced a promising lead, but no offer. He and Cole moved to Franklin City at the end of her fellowship in May of 2011.

Rowan soon obtained a job with the Franklin State University library. He and Cole jointly leased an apartment and shared living expenses. At one point, they moved into a larger space, signing a two-year lease. When Cole needed to purchase a new car, Rowan (who at that point had the more stable salary) co-signed the loan documents. Both had health insurance

through the university, and each had the other named as the next of kin. They filed two joint tax returns (for 2011 and 2012), but they divorced before they could file another.

Their social life was limited; if they socialized at all, it was with his friends. Rowan consistently introduced Cole as his wife to his friends, and he was referred to by them as "that old married man." As far as Rowan could tell, Cole's colleagues at work did not appear to know that Cole was even married.

Cole's academic discipline required routine absences for field work, conferences, and colloquia. Rowan resented these absences and rarely contacted Cole when she was gone. He estimates that, out of the approximately two and a half years of cohabitation during the marriage, they lived apart for an aggregate total of seven months.

In March of 2013, Cole announced that she had received an offer for a prestigious assistant professorship at Olympia State University. She told Rowan that she intended to take the job and wanted him to move with her, unless he could give her a good reason to stay. She also had an offer from Franklin State University, but she told him that the department was not as prestigious as the Olympia department. He made as strong a case as he could that she should stay, arguing that he could not find another job in Olympia comparable to the one that he had in Franklin.

Cole chose to take the job in Olympia, and she moved there less than a month later. Rowan realized that he would always be following her, and that she would not listen to his concerns or needs. He told her that he would not move. She was furious. She told him that in that case, she would file for a divorce. She also told him that she would fight his effort to stay in the United States. Their divorce was finalized on November 15, 2013, in Franklin.

Rowan worries that without Cole's support, he will not be able to keep his job in Franklin or stay in the United States. He does not want to return to the United Kingdom and wants to maintain permanent residency here.

In re Form I-751, Petition of William Rowan to Remove Conditions on Residence
Affidavit of Sarah Cole

Upon first being duly sworn, I, Sarah Cole, residing in the County of Titan, Olympia, do say:

1. I am submitting this affidavit in opposition to William Rowan's Form I-751 Petition to Remove Conditions on Residence.

2. I am a United States citizen. I married William Rowan in London, England, on December 27, 2010. This was the first marriage for each of us. We met while I was on a fellowship in that city. He was finishing up his own graduate studies. He told me that he had been actively looking for a position in the United States for several years. He pursued me and after about four weeks convinced me to move in with him. Shortly after this, William proposed marriage and I accepted.

3. We decided that we would move to the United States. I now believe that he never seriously considered the option of remaining in Britain. I later learned that William had made contacts with the university library in Franklin City, Franklin, long before he proposed.

4. Before entering the United States in May 2011, we obtained the necessary approvals for William to enter the country as a conditional resident. We moved to Franklin City so that I could resume my studies.

5. During our marriage, William expressed little interest in my work but expressed great dissatisfaction with the hours that I was working and the time that I spent traveling. My graduate work had brought me great success, including the chance at an assistant professorship at Olympia State University, whose cultural anthropology department is nationally ranked. But William resisted any idea of moving and complained about the effect a move would have on our marriage and his career.

6. Eventually, I took the job in Olympia and moved in April 2013. While I knew that William did not like the move, I had asked him to look into library positions in Olympia, and he had done so. I fully expected him to follow me within a few months. I was shocked and angered when, instead, he called me on April 23, 2013, and informed me that he would stay in Franklin.

7. I filed for divorce, which is uncontested. It is my belief that William does not really care about the divorce. I believe now that he saw our marriage primarily as a means to get

U.S. residency. I do think that his affection for me was real. But his job planning, his choice of friends, and his resistance to my career goals indicate a lack of commitment to our relationship. In addition, he has carefully evaded any long-term commitments, including children, property ownership, and similar obligations.

Signed and sworn this 2nd day of July, 2013.

Sarah Cole

Sarah Cole

Signed before me this 2nd day of July, 2013.

Jane Mirren

Jane Mirren
Notary Public, State of Olympia

Law Offices of Jamie Quarles
112 Charles St.
Franklin City, Franklin 33797

TO: File
FROM: Victor Lamm, investigator
DATE: February 20, 2014
RE: Preparation for Rowan Form I-751 Petition

This memorandum summarizes the results of my investigation, witness preparation, and document acquisition in advance of the immigration hearing for William Rowan.

Witnesses:

— George Miller: friend and coworker of William Rowan. Has spent time with Rowan and Cole as a couple (over 20 social occasions) and has visited their two primary residences and has observed them together. Will testify that they self-identified as husband and wife and that he has heard them discussing leasing of residential property, purchasing cars, borrowing money for car purchase, and buying real estate, all together and as part of the marriage.

— Anna Sperling: friend and coworker of William Rowan. Has spent time with both Rowan and Cole, both together and separately. Will testify to statements by Cole that she (Cole) felt gratitude toward Rowan for moving to the United States without a job, and that Cole was convinced that Rowan "did it for love."

Documents (Rowan to authenticate):

— Lease on house at 11245 Old Sachem Road, Franklin City, Franklin, with a two-year term running until January 31, 2014. Signed by both Cole and Rowan.

— Promissory note for $20,000 initially, designating Cole as debtor and Rowan as co-signer, in connection with a new car purchase.

— Printouts of joint bank account in name of Rowan and Cole, February 1, 2012, through May 31, 2013.

— Joint income tax returns for 2011 and 2012.

— Certified copy of the judgment of divorce.

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▶ *LIBRARY*

MPT-1: *In re Rowan*

EXCERPT FROM IMMIGRATION AND NATIONALITY ACT OF 1952
TITLE 8 U.S.C., Aliens and Nationality

8 U.S.C. § 1186a. Conditional permanent resident status for certain alien spouses and sons and daughters

(a) In general

(1) Conditional basis for status: Notwithstanding any other provision of this chapter, an alien spouse . . . shall be considered, at the time of obtaining the status of an alien lawfully admitted for permanent residence, to have obtained such status on a conditional basis subject to the provisions of this section.

. . .

(c) Requirements of timely petition and interview for removal of condition

(1) In general: In order for the conditional basis established under subsection (a) of this section for an alien spouse or an alien son or daughter to be removed—

(A) the alien spouse and the petitioning spouse (if not deceased) jointly must submit to the Secretary of Homeland Security a petition which requests the removal of such conditional basis . . . .

. . .

(4) Hardship waiver: The Secretary . . . may remove the conditional basis of the permanent resident status for an alien who fails to meet the requirements of paragraph (1) if the alien demonstrates that—

. . .

(B) the qualifying marriage was entered into in good faith by the alien spouse, but the qualifying marriage has been terminated (other than through the death of the spouse) and the alien was not at fault in failing to meet the requirements of paragraph (1).

EXCERPT FROM CODE OF FEDERAL REGULATIONS

TITLE 8. Aliens and Nationality

8 C.F.R. § 216.5 Waiver of requirement to file joint petition to remove conditions by alien spouse

(a) General.

(1) A conditional resident alien who is unable to meet the requirements . . . for a joint petition for removal of the conditional basis of his or her permanent resident status may file a Petition to Remove the Conditions on Residence, if the alien requests a waiver, was not at fault in failing to meet the filing requirement, and the conditional resident alien is able to establish that:

. . .

(ii) The marriage upon which his or her status was based was entered into in good faith by the conditional resident alien, but the marriage was terminated other than by death . . .

. . .

(e) Adjudication of waiver application—

. . .

(2) Application for waiver based upon the alien's claim that the marriage was entered into in good faith. In considering whether an alien entered into a qualifying marriage in good faith, the director shall consider evidence relating to the amount of commitment by both parties to the marital relationship. Such evidence may include—

(i) Documentation relating to the degree to which the financial assets and liabilities of the parties were combined;

(ii) Documentation concerning the length of time during which the parties cohabited after the marriage and after the alien obtained permanent residence;

(iii) Birth certificates of children born to the marriage; and

(iv) Other evidence deemed pertinent by the director.

. . .

Hua v. Napolitano

United States Court of Appeals (15th Cir. 2011)

Under the Immigration and Nationality Act, an alien who marries a United States citizen is entitled to petition for permanent residency on a conditional basis. *See* 8 U.S.C. § 1186a(a)(1). Ordinarily, within the time limits provided by statute, the couple jointly petitions for removal of the condition, stating that the marriage has not ended and was not entered into for the purpose of procuring the alien spouse's admission as an immigrant. 8 U.S.C. § 1186a(c)(1)(A).

If the couple has divorced within two years of the conditional admission, however, the alien spouse may still apply to the Secretary of Homeland Security to remove the conditional nature of her admission by granting a "hardship waiver." 8 U.S.C. § 1186a(c)(4). The Secretary may remove the conditional status upon a finding, *inter alia*, that the marriage was entered into in good faith by the alien spouse. 8 U.S.C. § 1186a(c)(4)(B).

On September 15, 2003, petitioner Agnes Hua, a Chinese citizen, married a United States citizen of Chinese descent and secured conditional admission as a permanent United States resident. The couple later divorced, and Hua applied for a hardship waiver. But the Secretary, acting through a U.S. Citizenship and Immigration Services (USCIS) immigration officer, then an immigration judge, and the Board of Immigration Appeals (BIA), denied Hua's petition. Hua appeals the denial of the petition.

Hua has the burden of proving that she intended to establish a life with her spouse at the time she married him. If she meets this burden, her marriage is legitimate, even if securing an immigration benefit was one of the factors that led her to marry. Hua made a very strong showing that she married with the requisite intent to establish a life with her husband. Hua's evidence, expressly credited by the immigration judge and never questioned by the BIA, established the following:

(1) She and her future husband engaged in a nearly two-year courtship prior to marrying.

(2) She and her future husband were in frequent telephone contact whenever they lived apart, as proven by telephone records.

(3) Her future husband traveled to China in December 2002 for three weeks to meet her family, and she paid a 10-day visit to him in the United States in March 2003 to meet his family.

(4) She returned to the United States in June 2003 (on a visitor's visa which permitted her to remain in the country through late September 2003) to decide whether she would remain in the United States or whether her future husband would move with her to China.

(5) The two married in a civil ceremony on September 15, 2003, and returned to China for two weeks to hold a more formal reception (a reception that was never held).

(6) The two lived together at his parents' house from the time of her arrival in the United States in June 2003 until he asked her to move out on April 22, 2004.

Hua also proved that, during the marriage, she and her husband jointly enrolled in a health insurance policy, filed tax returns, opened bank accounts, entered into automobile financing agreements, and secured a credit card. *See* 8 C.F.R. § 216.5(e)(2)(i).

Nevertheless, the BIA cited four facts in support of its conclusion that Hua had failed to carry her burden: (1) her application to secure conditional permanent residency was submitted within two weeks of the marriage; (2) Hua and her husband married one week prior to the expiration of the visitor's visa by which she came to the United States in June 2003; (3) Hua's husband maintained an intimate relationship with another woman during the marriage; and (4) Hua moved out of the marital residence shortly after obtaining conditional residency. Hua's husband's extramarital affair led to cancellation of the reception in China and to her departure from the marital home.

We do not see how Hua's prompt submission of a conditional residency application after her marriage tends to show that Hua did not marry in good faith. As we already have stated, the visitor's visa by which Hua entered the country expired just after the marriage, so Hua had to do something to remain here lawfully.

As to the affair maintained by Hua's husband, that might offer an indication of Hua's marital intentions if Hua knew of the relationship at the time she married. However, the uncontradicted evidence establishes that Hua learned of the affair only after the marriage.

The timing of the marriage and separation appear at first glance more problematic. Ordinarily, one who marries one week prior to the expiration of her visitor's visa and then moves out of the marital home shortly after the conditional residency interview might reasonably be thought to have married solely for an immigration benefit.

But well-settled law requires us to assess the entirety of the record. A long courtship preceded this marriage. Moreover, Hua's husband, and not Hua, initiated the separation after Hua publicly shamed him by retaining counsel and detailing his affair at her conditional residency interview.

We conclude that the Secretary's decision lacks substantial evidence on the record as a whole, and thus that petitioner Hua has satisfied the "good faith" marriage requirement for eligibility under 8 U.S.C. § 1186a(c)(4)(B). Remanded for proceedings consistent with this opinion.

Connor v. Chertoff

United States Court of Appeals (15th Cir. 2007)

Ian Connor, an Irish national, petitions for review of a decision of the Board of Immigration Appeals (BIA), which denied him a statutory waiver of the joint filing requirement for removal of the conditional basis of his permanent resident status on the ground that he entered into his marriage to U.S. citizen Anne Moore in bad faith. 8 U.S.C. § 1186a(c)(4)(B).

Connor met Moore in January 2002 when they worked at the same company in Forest Hills, Olympia. After dating for about one year, they married in a civil ceremony on April 14, 2003. According to Connor, he and Moore then lived with her family until November 2003, when they moved into an apartment of their own. In January 2004, Connor left Olympia to take a temporary job in Alaska, where he spent five weeks. Connor stated that in May 2004, he confronted Moore with his suspicion that she was being unfaithful to him. After Moore suggested they divorce, the two separated in June 2004 and divorced on November 27, 2004, 19 months after their wedding.

U.S. Citizenship and Immigration Services (USCIS) had granted Connor conditional permanent resident status on September 15, 2004. On August 16, 2005, Connor filed a Petition to Remove Conditions on Residence with a request for waiver. *See* § 1186a(c)(4)(B).

Moore voluntarily submitted an affidavit concerning Connor's request for waiver. In that affidavit, Moore stated that "Connor never spent any time with [her] during the marriage, except when he needed money." They never socialized together during the marriage, and even when they resided together, Connor spent most of his time away from the residence. Moore expressed the opinion that Connor "never took the marriage seriously" and that "he only married [her] to become a citizen." Connor's petition was denied.

At Connor's hearing, the government presented no witnesses. Connor testified to the foregoing facts and provided documentary evidence, including a jointly filed tax return, an unsigned lease for an

apartment dated November 2003, eight canceled checks from a joint account, telephone bills listing Connor and Moore as residing at the same address, an application for life insurance, and an application for vehicle title. There was no evidence that certain documents, such as the applications for life insurance and automobile title, had been filed. Connor also provided a letter from a nurse who had treated him over an extended period of time stating that his wife had accompanied him on most office visits, and letters that Moore had written to him during periods of separation.

Other evidence about Connor's life before and after his marriage to Moore raised questions as to his credibility, including evidence of his children by another woman prior to his marriage to Moore. Connor stated that Moore knew about his children but that he chose not to list them on the Petition for Conditional Status and also that the attorneys who filled out his I-751 petition omitted the children due to an error. Connor testified that he did not mention his children during his interview with the USCIS officer because he thought that they were not relevant to the immigration decision as they were not U.S. citizens.

In a written opinion, the immigration judge found that Connor was not a credible witness because of his failure to list his children on the USCIS forms or mention them during his interview and because of his demeanor during cross-examination. The immigration judge commented on Connor's departure for Alaska within eight months of his marriage to Moore, and on the lack of any corroborating testimony about the bona fides of the marriage by family or friends. The immigration judge concluded that the marriage had not been entered into in good faith and denied Connor the statutory waiver. The BIA affirmed.

Under the substantial evidence standard that governs our review of § 1186a(c)(4) waiver determinations, we must affirm the BIA's order when there is such relevant evidence as reasonable minds might accept as adequate to support it, even if it is possible to reach a contrary result on the basis of the evidence. We conclude that there was substantial evidence in the record to support the BIA's adverse credibility finding and its denial of the statutory waiver.

Adverse credibility determinations must be based on "specific, cogent reasons," which

the BIA provided here. The immigration judge's adverse credibility finding was based on Connor's failure to inform USCIS about his children during his oral interview and on the pertinent USCIS forms. Failing to list his children from a prior relationship undercut Connor's claim that his marriage to Moore was in good faith. That important omission properly served as a basis for an adverse credibility determination.

Substantial evidence supports the determination that Connor did not meet his burden of proof by a preponderance of the evidence. To determine good faith, the proper inquiry is whether Connor and Moore intended to establish a life together at the time they were married. The immigration judge may look to the actions of the parties after the marriage to the extent that those actions bear on the subjective intent of the parties at the time they were married. Additional relevant evidence includes, but is not limited to, documentation such as lease agreements, insurance policies, income tax forms, and bank accounts, as well as testimony about the courtship and wedding. Neither the immigration judge nor the BIA may substitute personal conjecture or inference for reliable evidence.

In this case, inconsistencies in the documentary evidence and the lack of corroborating testimony further support the agency's decision. Connor provided only limited documentation of the short marriage. Unexplained inconsistencies existed in the documents, such as more addresses than residences. Connor provided no signed leases, nor any indication of any filed applications for life insurance or automobile title. No corroboration existed for Connor's version of events from family, friends, or others who knew Connor and Moore as a couple. Connor offered only a letter from a nurse, who knew him only as a patient.

Finally, Connor claims that Moore's affidavit was inadmissible hearsay, and that it amounted to unsupported opinion testimony on the ultimate issue. Connor misconstrues the relevant rules at these hearings. The Federal Rules of Evidence do not apply; evidence submitted at these hearings must only be probative and fundamentally fair. To be sure, Moore's affidavit does contain opinion testimony on Connor's intentions. However, the affidavit also contains relevant factual information drawn from firsthand observation. The immigration judge was entitled to rely on that information in reaching his conclusions.

It might be possible to reach a contrary conclusion on the basis of this record. However, under the substantial evidence standard, the evidence presented here does not compel a finding that Connor met his burden of proving that the marriage was entered into in good faith.

Affirmed.

February 2014 MPT

▶ *FILE*

MPT-2: *In re Peterson Engineering Consultants*

Lennon, Means, and Brown LLC
Attorneys at Law
249 S. Oak Street
Franklin City, Franklin 33409

TO: Examinee
FROM: Brenda Brown
DATE: February 25, 2014
RE: Peterson Engineering Consultants

Our client, Peterson Engineering Consultants (PEC), seeks our advice regarding issues related to its employees' use of technology. PEC is a privately owned, non-union engineering consulting firm. Most of its employees work outside the office for over half of each workday. Employees need to be able to communicate with one another, the home office, and clients while they are working outside the office, and to access various information, documents, and reports available on the Internet. PEC issues its employees Internet-connected computers and other devices (such as smartphones and tablets), all for business purposes and not for personal use.

After reading the results of a national survey about computer use in the workplace, the president of PEC became concerned regarding the risk of liability for misuse of company-owned technology and loss of productivity. While the president knows that, despite PEC's policies, its employees use the company's equipment for personal purposes, the survey alerted her to problems that she had not considered.

The president wants to know what revisions to the company's employee manual will provide the greatest possible protection for the company. After discussing the issue with the president, I understand that her goals in revising the manual are (1) to clarify ownership and monitoring of technology, (2) to ensure that the company's technology is used only for business purposes, and (3) to make the policies reflected in the manual effective and enforceable.

I attach relevant excerpts of PEC's current employee manual and a summary of the survey. I also attach three cases that raise significant legal issues about PEC's policies. Please prepare a memorandum addressing these issues that I can use when meeting with the president.

Your memorandum should do the following:

(1) Explain the legal bases under which PEC could be held liable for its employees' use or misuse of Internet-connected (or any similar) technology.

(2) Recommend changes and additions to the employee manual to minimize liability exposure. Base your recommendations on the attached materials and the president's stated goals. Explain the reasons for your recommendations but do not redraft the manual's language.

PETERSON ENGINEERING CONSULTANTS

EMPLOYEE MANUAL
Issued April 13, 2003

Phone Use

Whether in the office or out of the office, and whether using office phones or company-owned phones given to employees, employees are not to incur costs for incoming or outgoing calls unless these calls are for business purposes. Employees may make calls for incidental personal use as long as they do not incur costs.

Computer Use

PEC employees given equipment for use outside the office should understand that the equipment is the property of PEC and must be returned if the employee leaves the employ of PEC, whether voluntarily or involuntarily.

Employees may not use the Internet for any of the following:

- engaging in any conduct that is illegal
- revealing non-public information about PEC
- engaging in conduct that is obscene, sexually explicit, or pornographic in nature

PEC may review any employee's use of any company-owned equipment with access to the Internet.

Email Use

PEC views electronic communication systems as an efficient and effective means of communication with colleagues and clients. Therefore, PEC encourages the use of email for business purposes. PEC also permits incidental personal use of its email system.

* * *

NATIONAL PERSONNEL ASSOCIATION

RESULTS OF 2013 SURVEY CONCERNING COMPUTER USE AT WORK

Executive Summary of the Survey Findings

1. Ninety percent of employees spend at least 20 minutes of each workday using some form of social media (e.g., Facebook, Twitter, LinkedIn), personal email, and/or texting. Over 50 percent spend two or more of their working hours on social media every day.

2. Twenty-eight percent of employers have fired employees for email misuse, usually for violations of company policy, inappropriate or offensive language, or excessive personal use, as well as for misconduct aimed at coworkers or the public. Employees have challenged the firings based on various theories. The results of these challenges vary, depending on the specific facts of each case.

3. Over 50 percent of all employees surveyed reported that they spend some part of the workday on websites related to sports, shopping, adult entertainment, games, or other entertainment.

4. Employers are also concerned about lost productivity due to employee use of the Internet, chat rooms, personal email, blogs, and social networking sites. Employers have begun to block access to websites as a means of controlling lost productivity and risks of other losses.

5. More than half of all employers monitor content, keystrokes, time spent at the keyboard, email, electronic usage data, transcripts of phone and pager use, and other information.

While a number of employers have developed policies concerning ownership of computers and other technology, the use thereof during work time, and the monitoring of computer use, many employers fail to revise their policies regularly to stay abreast of technological developments. Few employers have policies about the ways employees communicate with one another electronically.

February 2014 MPT

▶ *LIBRARY*

MPT-2: *In re Peterson Engineering Consultants*

Hogan v. East Shore School

Franklin Court of Appeal (2013)

East Shore School, a private nonprofit entity, discharged Tucker Hogan, a teacher, for misuse of a computer provided to him by the school. Hogan sued, claiming that East Shore had invaded his privacy and that both the contents of the computer and any electronic records of its contents were private. The trial court granted summary judgment for East Shore on the ground that, as a matter of law, Hogan had no expectation of privacy in the computer. Hogan appeals. We affirm.

Hogan relies in great part on the United States Supreme Court opinion in *City of Ontario v. Quon*, 560 U.S. 746 (2010), which Hogan claims recognized a reasonable expectation of privacy in computer records.

We note with approval Justice Kennedy's observation in *Quon* that "rapid changes in the dynamics of communication and information transmission are evident not just in the technology itself but in what society accepts as proper behavior. As one *amici* brief notes, many employers expect or at least tolerate personal use of such equipment because it often increases worker efficiency." We also bear in mind Justice Kennedy's apt aside that "[t]he judiciary risk error by elaborating too fully on the . . . implications of emerging technology before its role in society has become clear." *Quon*.

The *Quon* case dealt with a government employer and a claim that arose under the Fourth Amendment. But the Fourth Amendment applies only to public employers. Here, the employer is a private entity, and Hogan's claim rests on the tort of invasion of privacy, not on the Fourth Amendment.

In this case, the school provided a computer to each teacher, including Hogan. A fellow teacher reported to the principal that he had entered Hogan's classroom after school hours when no children were present and had seen what he believed to be an online gambling site on Hogan's computer screen. He noticed that Hogan immediately closed the browser. The day following the teacher's report, the principal arranged for an outside computer forensic company to inspect the computer assigned to Hogan and determine

whether Hogan had been visiting online gambling sites. The computer forensic company determined that someone using the computer and Hogan's password had visited such sites on at least six occasions in the past two weeks, but that those sites had been deleted from the computer's browser history. Based on this report, East Shore discharged Hogan.

Hogan claimed that East Shore invaded his privacy when it searched the computer and when it searched records of past computer use. The tort of invasion of privacy occurs when a party intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, if the intrusion would be highly offensive to a reasonable person.

East Shore argued that there can be no invasion of privacy unless the matter being intruded upon is private. East Shore argued that there is no expectation of privacy in the use of a computer when the computer is owned by East Shore and is issued to the employee for school use only. East Shore pointed to its policy in its employee handbook, one issued annually to all employees, that states:

> East Shore School provides computers to teachers for use in the classroom for the purpose of enhancing the educational mission of the school. The computer, the computer software, and the computer account are the property of East Shore and are to be used solely for academic purposes. Teachers and other employees may not use the computer for personal purposes at any time, before, after, or during school hours. East Shore reserves the right to monitor the use of such equipment at any time.

Hogan did not dispute that the employee policy handbook contained this provision, but he argued that it was buried on page 37 of a 45-page handbook and that he had not read it. Further, he argued that the policy regarding computer monitoring was unclear because it failed to warn the employee that East Shore might search for information that had been deleted or might use an outside entity to conduct the monitoring. Next, he argued that because he was told to choose a password known only to him, he was led to believe that websites accessed by him using that password were private. Finally, he argued that because East Shore had not

conducted any monitoring to date, it had waived its right to monitor computer use and had established a practice of respect for privacy. These facts, taken together, Hogan claimed, created an expectation of privacy.

Perhaps East Shore could have written a clearer policy or could have had employees sign a statement acknowledging their understanding of school policies related to technology, but the existing policy is clear. Hogan's failure to read the entire employee handbook does not lessen the clarity of the message. Perhaps East Shore could have defined what it meant by "monitoring" or could have warned employees that deleted computer files may be searched, but Hogan's failure to appreciate that the school might search deleted files is his own failure. East Shore drafted and published to its employees a policy that clearly stated that the computer, the computer software, and the computer account were the property of East Shore, and that East Shore reserved the right to monitor the use of the computer at any time.

Hogan should not have been surprised that East Shore searched for deleted files. While past practice might create a waiver of the right to monitor, there is no reason to believe that a waiver was created here, when the handbook was re-issued annually with the same warning that East Shore reserved the right to monitor use of the computer equipment. Finally, a reasonable person would not believe that the password would create a privacy interest, when the school's policy, read as a whole, offers no reason to believe that computer use is private.

In short, Hogan's claim for invasion of privacy fails because he had no reasonable expectation of privacy in the computer equipment belonging to his employer.

Affirmed.

Fines v. Heartland, Inc.

Franklin Court of Appeal (2011)

Ann Fines sued her fellow employee, John Parr, and her employer, Heartland, Inc., for defamation and sexual harassment. Each cause of action related to electronic mail messages (emails) that Parr sent to Fines while Parr, a Heartland sales representative, used Heartland's computers and email system. After the employer learned of these messages and investigated them, it discharged Parr. At trial, the jury found for Fines and against defendants Parr and Heartland and awarded damages to Fines. Heartland appeals.

In considering Heartland's appeal, we must first review the bases of Fines's successful claims against Parr.

In emails sent to Fines, Parr stated that he knew she was promiscuous. At trial Fines testified that after receiving the second such email from Parr, she confronted him, denied that she was promiscuous, told him she had been happily married for years, and told him to stop sending her emails. She introduced copies of the emails that Parr sent to coworkers after her confrontation with him, in which Parr repeated on three more occasions the statement that she was promiscuous. He also sent Fines emails of a sexual nature, not once but at least eight times, even after she confronted him and told him to stop, and Fines found those emails highly offensive. There was sufficient evidence for the jury to find that Parr both defamed and sexually harassed Fines.

We now turn to Heartland's arguments on appeal that it did not ratify Parr's actions and that it should not be held vicariously liable for his actions.

An employer may be liable for an employee's willful and malicious actions under the principle of ratification. An employee's actions may be ratified after the fact by the employer's voluntary election to adopt the employee's conduct by, in essence, treating the conduct as its own. The failure to discharge an employee after knowledge of his or her wrongful acts may be evidence supporting ratification. Fines claims that because Heartland delayed in discharging Parr after learning of his misconduct, Heartland in effect ratified Parr's behavior.

The facts as presented to the jury were that Fines did not complain to her supervisor or any Heartland representative until the end of the fifth day of Parr's offensive behavior, when Parr sent the emails to coworkers. When her supervisor learned of Fines's complaints, he confronted Parr. Parr denied the charges, saying that someone else must have sent the emails from his account. The supervisor reported the problem to a Heartland vice president, who consulted the company's information technology (IT) department. By day eight, the IT department confirmed that the emails had been sent from Parr's computer using the password assigned to Parr during the time Parr was in the office. Heartland fired Parr.

Such conduct by Heartland does not constitute ratification. Immediately upon learning of the complaint, a Heartland supervisor confronted the alleged sender of the emails, and when the employee denied the charges, the company investigated further, coming to a decision and taking action, all within four business days.

Next, Fines asserted that Heartland should be held liable for Parr's tortious conduct under the doctrine of respondeat superior. Under this doctrine, an employer is vicariously liable for its employee's torts committed within the scope of the employment. To hold an employer vicariously liable, the plaintiff must establish that the employee's acts were committed within the scope of the employment. An employer's vicarious liability may extend to willful and malicious torts. An employee's tortious act may be within the scope of employment even if it contravenes an express company rule.

But the scope of vicarious liability is not boundless. An employer will not be held vicariously liable for an employee's malicious or tortious conduct if the employee *substantially* deviates from the employment duties for personal purposes. Thus, if the employee "inflicts an injury out of personal malice, not engendered by the employment" or acts out of "personal malice unconnected with the employment," the employee is not acting within the scope of employment. *White v. Mascoutah Printing Co.* (Fr. Ct. App. 2010); RESTATEMENT (THIRD) OF AGENCY § 2.04.

Heartland relied at trial on statements in its employee handbook that office computers were to be used only for business and not for personal purposes. The Heartland handbook

also stated that use of office equipment for personal purposes during office hours constituted misconduct for which the employee would be disciplined. Heartland thus argued that this provision put employees on notice that certain behavior was not only outside the scope of their employment but was an offense that could lead to being discharged, as happened here.

Parr's purpose in sending these emails was purely personal. Nothing in Parr's job description as a sales representative for Heartland would suggest that he should send such emails to coworkers. For whatever reason, Parr seemed determined to offend Fines. The mere fact that they were coworkers is insufficient to hold Heartland responsible for Parr's malicious conduct. Under either the doctrine of ratification or that of respondeat superior, we find no basis for the judgment against Heartland.

Reversed.

Lucas v. Sumner Group, Inc.

Franklin Court of Appeal (2012)

After Sumner Group, Inc., discharged Valerie Lucas for violating Sumner's policy on employee computer use, Lucas sued for wrongful termination. The trial court granted summary judgment in favor of Sumner Group. Lucas appeals. For the reasons stated below, we reverse and remand.

Sumner Group's computer-use policy stated:

> Computers are a vital part of our business, and misuse of computers, the email systems, software, hardware, and all related technology can create disruptions in the work flow. All employees should know that telephones, email systems, computers, and all related technologies are company property and may be monitored 24 hours a day, 7 days a week, to ensure appropriate business use. The employee has no expectation of privacy at any time when using company property.
>
> Unauthorized Use: Although employees have access to email and the Internet, these software applications should be viewed as company property. The employee has no expectation of privacy, meaning that these types of software should not be used to transmit, receive, or download any material or information of a personal, frivolous, sexual, or similar nature. Employees found to be in violation of this policy are subject to disciplinary action, up to and including termination, and may also be subject to civil and/or criminal penalties.

Sumner Group discovered that over a four-month period, Lucas used the company Internet connection to find stories of interest to her book club and, using the company computer, composed a monthly newsletter for the club, including summaries of the articles she had found on the Internet. She then used the company's email system to distribute the newsletter to the club members. Lucas engaged in some but not all of these activities during work time, the remainder during her lunch break. Lucas admitted engaging in these activities.

She first claimed a First Amendment right of freedom of speech to engage in these

activities. The First Amendment prohibits Congress, and by extension, federal, state, and local governments, from restricting the speech of employees. However, Lucas has failed to demonstrate any way in which the Sumner Group is a public employer. This argument fails.

Lucas also argued that the Sumner Group had abandoned whatever policy it had posted because it was common practice at Sumner Group for employees to engage in personal use of email and the Internet. In previous employment matters, this court has stated that an employer may be assumed to have abandoned or changed even a clearly written company policy if it is not enforced or if, through custom and practice, it has been effectively changed to permit the conduct forbidden in writing but permitted in practice. Whether Sumner Group has effectively abandoned its written policy by custom and practice is a matter of fact to be determined at trial.

Lucas next argued that the company policy was ambiguous. She claimed that the language of the computer-use policy did not clearly prohibit personal use. The policy said that the activities "should not" be conducted, as opposed to "shall not."[1] Therefore, she argued that the policy did not ban personal use of the Internet and email; rather, it merely recommended that those activities not occur. She argued that "should" conveys a moral goal while "shall" refers to a legal obligation or mandate.

In *Catts v. Unemployment Compensation Board* (Fr. Ct. App. 2011), the court held unclear an employee policy that read: "Madison Company has issued employees working from home laptops and mobile phones that should be used for the business of Madison Company." Catts, who had been denied unemployment benefits because she was discharged for personal use of the company-issued computer, argued that the policy was ambiguous. She argued that the policy could mean that employees were to use only Madison Company–issued laptops and phones for Madison Company business, as easily as it could mean that the employees were to use the Madison Company equipment only for business reasons. She argued that the company could

[1] This court has previously viewed with approval the suggestion from PLAIN ENGLISH FOR LAWYERS that questions about the meanings of "should," "shall," and other words can be avoided by pure use of "must" to mean "is required" and "must not" to mean "is disallowed."

prefer that employees use company equipment, rather than personal equipment, for company business because the company equipment had anti-virus software and other protections against "hacking." The key to the *Catts* conclusion was not merely the use of the word "should" but rather the fact that the entire sentence was unclear.

Thus the question here is whether Sumner Group's policy was unclear. When employees are to be terminated for misconduct, employers must be as unambiguous as possible in stating what is prohibited. Nevertheless, employers are not expected to state their policies with the precision of criminal law. Because this matter will be remanded to the trial court, the trial court must further consider whether the employee policy was clear enough that Lucas should have known that her conduct was prohibited.

Finally, Lucas argued that even if she did violate the policy, she was entitled to progressive discipline because the policy stated, "Employees found to be in violation of this policy are subject to disciplinary action, up to and including termination . . . ." She argued that this language meant that she should be reprimanded or counseled or even suspended *before* being terminated. Lucas misread the policy. The policy was clear. It put the employee on notice that there would be penalties. It specified a variety of penalties, but there was no commitment or promise that there would be progressive discipline. The employer was free to determine the penalty.

Reversed and remanded for proceedings consistent with this opinion.

February 2014 MPT

▶ *POINT SHEET*

MPT-1: *In re Rowan*

DRAFTERS' POINT SHEET

This performance test requires examinees to write a persuasive argument. Specifically, it asks examinees to write a legal argument to an Immigration Judge in support of an application by a noncitizen spouse, William Rowan, to remove the conditions on his permanent residency in the United States. Because he and his wife are now divorced, he must seek a waiver of the requirement that both spouses request the removal of these conditions. Rowan's ex-wife, Sarah Cole, actively opposes Rowan's continued residency in the United States. Examinees must make the case that Rowan entered into his marriage with Cole in "good faith."

The File contains a task memorandum from the supervising attorney, a "format memo," a memo containing notes of the client interview, an affidavit by Cole, and a memorandum to file describing evidence to be submitted at the immigration hearing.

The Library contains selected federal statutes and regulations on the requirements for conditional residency for spouses; *Hua v. Napolitano*, a federal Court of Appeals case addressing the basic process and standards for seeking a waiver of the joint filing requirement; and *Connor v. Chertoff*, a federal Court of Appeals case addressing the substantial evidence standard of review and including dicta on the weight to be given to an affidavit provided by a spouse who opposes waiver of the joint filing requirement.

The following discussion covers all the points the drafters intended to raise in the problem.

I. FORMAT AND OVERVIEW

The supervising attorney requests that the examinee draft a portion of a persuasive brief to an Immigration Judge. The File includes a separate "format memo" that describes the proper form for a persuasive brief.

The format memo offers several pieces of advice to examinees:

- Write briefly and to the point, citing relevant legal authority when offering legal propositions.
- Do not write a separate statement of facts, but integrate the facts into the argument.
- Do not make conclusory statements as arguments, but instead frame persuasive legal arguments in terms of the facts of the case.

- Use headings to divide logically separate portions of the argument. Do not make conclusory statements in headings, but frame the headings in terms of the facts of the case.
- Anticipate and accommodate any weaknesses, either by structuring the argument to stress strengths and minimize weaknesses, or by making concessions on minor points.

II. FACTS

The task memorandum instructs examinees *not* to draft a separate statement of facts. At the same time, they must integrate the facts thoroughly into their arguments. This section presents the basic facts of the problem. Other facts will appear below in the discussion of the legal argument.

- William Rowan and Sarah Cole met in London, England, in 2010.
- Cole was and is a U.S. citizen, present in England for graduate study. Rowan was and is a British citizen.
- Rowan and Cole began a relationship and moved in together within a few weeks.
- Rowan proposed marriage shortly afterward. Cole agreed and suggested that they move to the United States.
- Even before meeting Cole, Rowan had begun looking for work as a librarian and had decided that he had better job opportunities in the United States, where two of his siblings lived. Without telling Cole, he contacted the university library in Franklin City about a job, but no offer materialized.
- Rowan and Cole married in December 2010, in London.
- Rowan and Cole then moved to Franklin City. Rowan obtained a job as a librarian at Franklin State University, while Cole returned to her graduate studies at the university.
- Rowan and Cole lived together throughout the next two years. Cole traveled extensively for her work; she was absent from Franklin City for a total of seven months during this period. Rowan rarely contacted her during these absences.
- Rowan and Cole socialized primarily with friends that Rowan made at his library job. Two of these friends will testify that they observed the couple holding themselves out as husband and wife. One of these two will testify to Cole's gratitude to Rowan for moving to the United States without a job, and Cole's belief at that time that he "did it for love."

- Rowan and Cole engaged in the following transactions together:
  - They leased a residence for two years in both of their names.
  - They opened a joint bank account.
  - They filed joint income tax returns for 2011 and 2012.
  - Cole purchased a car, and Rowan co-signed the promissory note for the related loan.
- Eleven months ago, Cole faced a choice whether to take an assistant professorship at Franklin State University or a more prestigious position at Olympia State University in the State of Olympia. Rowan argued that she should stay in Franklin, presumably because he thought it would be difficult for him to find a comparable library job in Olympia.
- Eventually, Cole decided to accept the Olympia State University position and moved to Olympia in April 2013 without getting Rowan's agreement.
- Rowan decided that he would not move to Olympia and told Cole this in a phone call.
- Cole responded angrily and told him that she would file for a divorce and that she would oppose his continued residency in the United States.
- Cole and Rowan were divorced about three months ago, on November 15, 2013.
- Acting pro se, Rowan timely filed a Petition to Remove Conditions on Residence (Form I-751) and a request to waive the usual requirement of a joint petition by both spouses.
- Rowan's request was denied by the immigration officer, in part based on an affidavit filed by Cole.
- Rowan then hired attorney Jamie Quarles for help with the immigration issues.
- Quarles requested a hearing on the denial before the Immigration Court.

III. ARGUMENT

In the call memo, examinees are instructed to make two arguments: first, that Rowan has met his burden of proving that he married Cole in good faith; and second, that the decision denying Rowan's petition lacks substantial evidence in the record. The major points that examinees should cover in making these two arguments are discussed below.

A. "Good Faith"

Under the Immigration and Nationality Act, an alien who marries a United States citizen may petition for permanent residency on a conditional basis. *See* 8 U.S.C. § 1186a(a)(1).

Generally, the couple must jointly petition for the removal of the conditional status. *See* 8 U.S.C. § 1186a(c)(1)(A). If the couple does not file a joint petition, the alien is subject to having his or her conditional residency revoked, and to being deported. This might occur, for example, if the couple has divorced within two years of the conditional admission, or if they have separated and the citizen spouse refuses to file jointly with the noncitizen spouse. *See Hua v. Napolitano*.

If the alien spouse cannot get the citizen spouse to join in a joint petition, the alien spouse may still apply to the Secretary of Homeland Security to remove the conditional nature of his residency by granting a "hardship waiver." 8 U.S.C. § 1186a(c)(4). This statute permits the Secretary to remove the conditional status upon a finding, inter alia, that the marriage was entered into by the alien spouse in "good faith." 8 U.S.C. § 1186a(c)(4)(B).

To establish "good faith," the alien spouse must prove that he or she intended to establish a life with the other spouse at the time of the marriage. The burden of proof rests on the alien spouse to present evidence relating to the amount of commitment by both parties to the marital relationship. *Id.* Such evidence may include (1) documentation concerning their combined financial assets and liabilities, (2) documentation concerning the amount of time the parties cohabited after the marriage and after the alien obtained permanent residence, (3) birth certificates of children born to the marriage, and (4) any other relevant evidence. 8 C.F.R. § 216.5(e)(2).

Here, examinees can integrate several different items of evidence into the argument that Rowan entered into a marriage with Cole in "good faith," that is, with the intention to establish a life with Cole at the time of the marriage. This evidence includes

- the couple's cohabitation from before the marriage through the time of separation;
- the couple's socializing as husband and wife;
- the extent of the couple's financial interdependency, including a joint lease, a joint bank account, co-signing on a loan, and two joint income tax returns; and
- Rowan's own conduct before the marriage, and after the marriage up until the time that Cole requested a divorce.

At the same time, examinees should also find ways to integrate and cope with less favorable factual information. This constitutes the primary focus of the second argument.

B. "Substantial Evidence"

In addition to making an affirmative argument that Rowan meets his burden of proof on "good faith," examinees must make an argument that the decision to deny Rowan's petition lacks "substantial evidence" in the record. In *Connor v. Chertoff*, the court defined "substantial evidence" as "such relevant evidence as reasonable minds might accept as adequate to support [the determination], even if it is possible to reach a contrary result on the basis of the evidence."

The factual discussion in *Connor* provides examinees with further grounds for argument. Specifically, examinees can distinguish *Connor* by arguing that here

- Rowan has not omitted any important information from his application;
- no internal inconsistencies exist in Rowan's version of events;
- the documentary evidence includes records of completed financial transactions, including a lease, a car loan, and two joint income tax returns;
- cohabitation ended at the citizen spouse's instigation, not the alien spouse's;
- Rowan has provided corroborating evidence from friends in the relevant community; and
- all the foregoing facts tend to corroborate Rowan's version of events, unlike the facts in *Connor*, where few if any of the supplemental facts provided persuasive corroboration.

The most significant evidence tending to support a denial of Rowan's petition for waiver is Cole's affidavit and in the statements it contains concerning Rowan's intentions before and during the marriage. The *Connor* decision addresses the issue of spousal opposition. Based on *Connor*, an examinee might argue either that the affidavit should not be admitted into evidence, or that if admitted, it should not constitute substantial evidence in opposition to Rowan's request.

In *Connor*, the court stated that the Federal Rules of Evidence do not apply in immigration hearings and thus admission of hearsay is permissible if the evidence is "probative" and admission is "fundamentally fair." The case gives examinees relatively little ground to support an argument for exclusion.

However, *Connor* provides an alternate ground for argument. In dicta, it distinguishes between "opinion testimony on Connor's intentions" and "relevant factual information drawn from firsthand observation." This provides examinees with an argument that Cole's statements also constitute an expression of opinion about Rowan's intentions and should not be considered.

Cole's affidavit expresses her belief that Rowan intended to use the marriage as a means of gaining permanent residency. She roots this argument in several assertions of fact, including that

- Rowan looked for work in Franklin City before proposing marriage;
- Rowan made friends only with people at his job, and not with her colleagues;
- Rowan resisted her career plans; and
- Rowan resisted commitment, including children and property ownership.

The File contains means for examinees to rebut some, but not all, of these assertions. It is true that Rowan had decided before he met Cole that his best options for a position in his field were in the United States, where two of his siblings already lived. Also, Rowan's decision to make friends with his coworkers and not with hers appears consistent with Cole's statement that Rowan showed little interest in her work. However, Rowan's resistance to her career plans is contradicted by his willingness to move to the United States without a job. Finally, Cole's allegation of Rowan's resistance to commitment is undercut by his willingness to enter into a long-term lease, to co-sign a car loan with her, and his efforts to persuade Cole to stay in Franklin City.

Finally, examinees might also take advantage of language that appears in *Hua v. Napolitano*: if an applicant meets her burden on good faith, her "marriage is legitimate, even if securing an immigration benefit was one of the factors that led her to marry." In this case, Cole acknowledges that Rowan's "affection for me was real." Examinees can successfully argue that Cole's opinion that Rowan was solely motivated by a desire to obtain U.S. residency matches neither her own experience of him nor the objective corroboration discussed earlier.

February 2014 MPT

▶ *POINT SHEET*

MPT-2: *In re Peterson Engineering Consultants*

DRAFTERS' POINT SHEET

The task for examinees in this performance test is to draft a memorandum to the supervising attorney to be used to advise the president of Peterson Engineering Consultants (PEC) concerning the company's policies on employee use of technology. PEC is a privately owned, non-union firm in which most employees work outside the office for part of the day. Employees are issued Internet-connected computers and other similar devices to carry out their duties and communicate with one another, the office, and clients. The current employee manual addressing use of these devices was issued in 2003, and the president wants to update it with an eye to revisions that will provide the greatest possible protection for PEC. In particular, the president has identified three goals in revising the manual: (1) to clarify ownership and monitoring of technology, (2) to ensure that the company's technology is used only for business purposes, and (3) to make the policies reflected in the manual effective and enforceable.

The File contains the task memorandum from the supervising attorney, relevant excerpts from PEC's current employee manual, and a summary of a survey about use of technology in the workplace. The Library includes three Franklin Court of Appeal cases.

The task memorandum instructs examinees to consider "Internet-connected (or any similar) technology." This terminology is purposefully used to avoid the need for constantly updating the employee manual to reflect whatever technology is current. Examinees may identify specific technology in use at the time of the exam, but it is not necessary to do so.

The following discussion covers all the points the drafters intended to raise in the problem.

I. FORMAT AND OVERVIEW

Examinees' memorandum to the supervising attorney should accomplish two things:

(1) Explain the legal bases under which PEC could be held liable for its employees' use or misuse of Internet-connected (or any similar) technology.

(2) Recommend changes and additions to the employee manual to minimize PEC's liability exposure based on the president's stated goals and the attached materials. Examinees are instructed to explain the reasons for their recommendations but not to redraft the manual's language.

No organizational format is specified, but examinees should clearly frame their analysis of the issues. In particular, they should separate their analyses of the two tasks listed above.

II. DISCUSSION

A. Legal bases under which PEC could be held liable for its employees' use or misuse of Internet-connected (or any similar) technology

Employers may be liable for their employees' use or misuse of technology under either the theory of ratification or the theory of vicarious liability. Employee misconduct, such as sexual harassment or defamation, could result in employer liability to other employees or third parties. *Fines v. Heartland, Inc.* On the other hand, employers may be vulnerable to claims brought by an employee for invasion of privacy and/or wrongful discharge unless employers take steps to avoid that liability. *Hogan v. East Shore School; Lucas v. Sumner Group, Inc.*

- *Ratification.* An employer may be liable for an employee's willful or malicious misconduct after the fact if the employer ratifies the employee's conduct by the employer's voluntary election to adopt the conduct as its own. The failure to discipline an employee after knowledge of his or her wrongful acts may be evidence supporting ratification. *Fines v. Heartland, Inc*. For example, if an employer learns that an employee is sending harassing emails or posting defamatory blog entries about a coworker and does nothing about it, it could be argued that the employer ratified the employee's conduct and so is liable in tort to those injured as a result of the employee's conduct.
- *Vicarious liability or respondeat superior.* An employer is vicariously liable for its employees' torts committed within the scope of the employment. This includes not only an employee's negligent acts, but could extend to an employee's willful and malicious torts, even if such acts contravene an express company rule. *Fines.* For example, an employer may be liable in tort for the actions of an employee who texts information that invades the privacy of a coworker. This could be true even if the employer prohibits that very type of misconduct.
    - However, the employer's vicarious liability is not unlimited. Employers will not be liable for an employee's tortious or malicious conduct if the employee substantially deviates from the employment duties for personal purposes. Thus, if an employee inflicts an injury out of personal malice unconnected with the employment, the employer will not be liable. *Fines*.

- *Invasion of privacy.* Unless the employer is clear and unambiguous about ownership of the equipment and records of use of the equipment and about its right to monitor that use, it may be liable for invasion of its employees' privacy. Clarity in the employee manual about the ownership and right to monitor use of technology can forestall any claims by an employee that he or she has any privacy interest in activities conducted on/with technology owned or issued by the employer.
    - Examinees should recognize that there can be no invasion of privacy unless there is an expectation of privacy. *Hogan v. East Shore School*. Thus in *Hogan*, the court rejected an employee's claim that a search of the Internet browsing history (including deleted files) on his work computer invaded his privacy. The employee manual plainly stated that the employer, a private school, owned the computer, the software, etc., that the equipment was not to be used for personal purposes, and that the school reserved the right to monitor use of the equipment.
    - In addition, the *Hogan* court rejected the employee's claim that because the school had not previously monitored computer use, it had waived the right to do so and had "established a practice of respect for privacy." The school's prohibition on personal use was clearly stated in the manual, and it was unreasonable to conclude, in light of the bar on personal use, that use of a personal password had created a privacy right.
- *Wrongful discharge.* Unless the employer is clear about its policies and consistently enforces them, and is clear about its disciplinary procedures for failure to comply with the policies, it may be liable for wrongful discharge (also referred to as "wrongful termination"). In *Lucas v. Sumner Group, Inc.*, the employee admitted violating company policy prohibiting personal use of the Internet, but claimed that there was an expectation of progressive discipline and sued for wrongful termination. The court found that the employee manual expressly provided for disciplinary action, including the possibility of termination for those violating the policy. Thus the language in the manual was sufficient to put the employee on notice as to the possibility of being discharged; while penalties short of discharge were mentioned, there was no promise of progressive discipline.

B. Changes and additions to the employee manual that will minimize liability exposure and that incorporate the president's stated goals

The second component of examinees' task is to carefully read PEC's current employee policies and then recommend what revisions are needed to minimize liability arising from employee misconduct as well as those that address the president's goals of emphasizing PEC's ownership of the technology, ensuring that such technology is to be used only for business purposes, and making the policies reflected in the manual effective and enforceable.

The current manual is ineffective in what it fails to do, rather than in what it does; it has not been updated since 2003 and is quite out of date. In *City of Ontario v. Quon* (cited in *Hogan*), Justice Kennedy observed the reluctance of the courts to risk error by elaborating too fully on the implications of emerging technology. This reluctance argues in favor of employers such as PEC ensuring that their policies are kept current. Note that examinees are expressly directed not to redraft the manual's language. Also, as there is no format specified, examinees may present their suggestions in different ways: bulleted list, numbered items, or a general discussion of deficiencies in the current manual.

- The client's first goal is to clarify ownership and monitoring of technology. PEC's manual addresses only phone use, computer use, and email use. Because PEC is likely to issue new equipment at any time as technology changes, the manual needs to be rewritten to include *all* technology. In *Lucas*, the employer used the term "all related technologies," a term that is more inclusive and provides for advances in technology.
    - The current manual is ineffective because it fails to make clear that PEC owns the computer software and records of the use of the software, including records of deleted materials; fails to warn against any belief that a privacy interest exists in the use of the technology, including the mistaken belief that use of passwords creates an expectation of privacy; uses the term "given," which may be ambiguous; addresses only ownership of equipment intended for use outside the office and not all equipment, wherever it is used; and identifies only certain types of equipment. In addition, the current manual fails to warn that PEC (or third parties contracted by PEC) will monitor use of the technology, and that it will monitor current, past, and deleted use as well. *Hogan*.
    - PEC must make clear that it owns the technology, including the equipment itself, any software, and any records created by use of the technology, including any

electronic record of deleted files; that it will monitor use of the technology; and that use of employee-specific passwords does not affect PEC's ownership rights or create any implied expectation of privacy.

- Taking these steps should bring PEC's manual into compliance with the ruling in *Hogan*.
- Likewise, PEC must make clear that it will monitor employee use of its equipment through any number of methods (e.g., review of data logs, browser histories, etc.), even if a third party does the monitoring. For example, in *Hogan*, the court found no invasion of privacy, even when a computer forensic company was hired to search the files on the employee's computer, because the employee manual stated that the school reserved the right to monitor the equipment. Also, in *Hogan*, the court rejected the employee's argument that using a private password created a privacy interest.
- PEC need not be concerned about any Fourth Amendment restriction on its ability to monitor because PEC is not a public entity. *Hogan.*

- The president's second goal is to ensure that the company's technology is used only for business purposes. While some employers may permit some limited personal use as noted in the Survey, PEC's president has indicated a goal of establishing a bright-line rule prohibiting any non-business use of its technology. Here, the current employee manual is inconsistent with the president's goal in several ways:
    - Most obviously, it expressly permits use of technology for personal purposes.
        - Although the policy states that employees are not to incur costs for incoming or outgoing calls unless the calls are for business purposes, it goes on to state that personal calls are fine as long as no cost to PEC is incurred.
        - The policy permits incidental personal use of PEC's email system by employees. First, what constitutes "incidental personal use" is ambiguous. Second, by allowing a certain amount of personal use, this section of the manual may support a ratification or waiver argument. At a minimum, this sentence in the manual should be eliminated.

- The manual's limitation on Internet use is open to interpretation. As written, it states that employees may not use the Internet for certain purposes: illegal conduct, revealing non-public information, or "conduct that is obscene, sexually explicit, or pornographic in nature."
    - By covering only use of the Internet, and not use of the other technology likely available such as email, tablets, or smartphones, the manual may be read to permit personal use of non-listed items. And by listing certain prohibited conduct and not *all* non-business conduct (e.g., online gambling), the manual may implicitly condone conduct not specifically prohibited.
    - In sum, by identifying some forms of technology, the manual may suggest that other forms may be used for personal purposes. Likewise, by identifying some prohibited forms of use, the manual suggests that some other forms of personal use *are* allowed.
- There is no question that PEC has the right to limit use of its technology to business purposes. *See Lucas; Fines; Hogan* (employee policy permitted use of school computers only for academic purposes). PEC need not be concerned about First Amendment implications because the First Amendment applies only to public entities, and PEC is a private entity. *See Lucas*.
- In redrafting the manual, PEC must make its prohibition against personal use clear and unambiguous. The prohibition should be conspicuously displayed. This will help avoid results such as in *Catts v. Unemployment Compensation Board* (cited in *Lucas*), in which the court found that the policy manual was not clear that no personal use was permitted. Rather, the language permitted two ways to read the policy—that for company business, employees were to use only the company's computer, or that employees were to use the company computer only for business reasons.
    - PEC can increase the likelihood that its policies will be interpreted and applied as it intends if, in drafting a clear and unambiguous prohibition against personal use, PEC takes care to use "must not" rather than "shall not," "should not," or "may not." This is consistent with the footnote in *Lucas* approving use of mandatory, as opposed to permissive, language.

- When revised, the manual should use more inclusive terms in referring to the forms of technology and should avoid itemizing certain kinds of devices but instead refer to all Internet-connected or similar technology.

- As another means of limiting personal use of its equipment (and the related loss of productivity), PEC may consider blocking websites for shopping, social media, games, etc.

- The president's third goal is to make the policies reflected in the manual effective and enforceable. One key omission in the current manual is that there is no requirement that employees sign to acknowledge that they have received, read, and understood the policies in the manual. Nor does the manual provide for discipline for those employees who violate the policies.
  - To help protect itself from liability, PEC should have its employees sign a statement each year that they have read, understood, and agreed to abide by PEC's policies on technology. In *Hogan*, the court rejected an employee's claim that because the manual was lengthy, he had not read it and so was not bound by its terms. While the employer prevailed, it would have had an even stronger case if it could have pointed to the employee's signature as acknowledgment that he had read the computer-use policy.
  - The policy on employee use of Internet-connected computers and similar technology should be conspicuously placed in the manual.
  - PEC should review and, if needed, update the manual yearly. In *Hogan,* the manual was issued annually, and that may have helped to persuade the court that the employee was on notice of the school's policies.
  - Equally important is that PEC ensure that its supervisory employees know and enforce the policies consistently and avoid creating any exceptions or abandonment. For example, in *Lucas*, the employee argued that even though the written policy was clear that personal use of email and the Internet was prohibited, the employer had abandoned that policy because such use was permitted in practice.
  - Likewise, PEC must be careful not to waive the policy by inaction. In *Hogan*, the court rejected a claim that because the employer had never monitored computer

use, it had waived that right. To avoid the risk that the claim of abandonment or waiver might prevail, PEC must not only state its policy clearly in writing but must ensure that the policy is enforced and that all personnel understand that they may not create exceptions or ignore violations of the policy.

- PEC must be clear that it will discipline employees for violation of its policies. The manual must state that misuse of the technology will subject the employee to discipline and must not create an expectation of progressive discipline unless PEC intends to use that approach. *Lucas*.
- Additionally, to avoid liability for employees who ignore the policies, PEC needs to provide a means by which coworkers and others can complain about employee misuse of technology. PEC needs to adopt a policy of promptly investigating and acting on these complaints. *See Fines* (employer's prompt action on complaint defeated claim that it had ratified employee's misconduct).

Following the recommendations above will produce policies that clearly prohibit personal use and provide for discipline for those who violate the policies. At the same time, implementing these changes should insulate PEC against claims based on ratification, respondeat superior, invasion of privacy, or wrongful discharge.

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