

**JULY 2006**  
**PENNSYLVANIA BAR EXAMINATION**

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**Essay Questions and Examiners' Analyses  
and  
Performance Test**



Pennsylvania Board of Law Examiners  
5070A Ritter Road, Suite 300  
Mechanicsburg, PA 17055  
(717) 795-7270  
[www.pabarexam.org](http://www.pabarexam.org)

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## Question No. 1: Facts and Interrogatories

Frank, a successful real estate developer, owned three townhouses in a row known as Northacre, Middleacre, and Southacre. Frank lived in Middleacre with Wilma, his independently wealthy spouse. For years, Frank rented Northacre to Mr. and Mrs. North who became great friends of Frank and Wilma. Frank rented Southacre to Sam, an independent insurance agent operating as a sole proprietorship. Sam's only insurance office was on the first floor of Southacre. Sam used one half of the first floor exclusively for business, and used the remaining one half of the first floor and the entire second floor for living. Each year Sam deducted on his federal income tax return all of the rent paid to Frank for that year as a business expense of his insurance agency. Over the years Sam also became great friends of Frank and Wilma.

In 2000 Frank went to his attorney Able, and through him properly prepared and executed a will leaving Northacre to “. . . the Norths as my good friends and neighbors. . .” and leaving Southacre to “. . . Sam as my good friend and neighbor. . .”. Frank left the residue of his estate, which was at least ten times the value of his rental properties, to Wilma.

In 2003 Frank raised the rents substantially on Northacre and Southacre for the first time in many years causing both the Norths and Sam to become very distressed. In late 2004 the Norths and Sam moved to different buildings in different neighborhoods. They have not seen or talked to Frank or Wilma since.

In early 2006 Frank was about to retire from his real estate business. While cleaning out his desk on his last day of work in January 2006, Frank found three quarterly dividend checks from 2005, payable to him from Big Board, Inc., which he had received in 2005. He had intended earlier in 2005 to give his Big Board stock and the checks to his faithful secretary, Sally, but forgot to do so. He handed Sally the checks, which he had endorsed over to her, and explained that after receiving the last dividend check in December 2005 he had sent his Big Board stock certificates endorsed over to her to Big Board requesting in writing that the certificates be sent back to him reissued in her name. Sally thanked Frank.

In February 2006 Frank died still married to Wilma and still owning his three townhouses. Frank remained in good physical and mental health until his death. A few days before his death, Frank had received back from Big Board the stock certificates for Sally, issued in her name, but he had not delivered the stock certificates to Sally.

The executor of Frank's will has sent copies of Frank's will to the Norths, Sam, and Wilma. The Norths and Sam have all survived Frank. They did not know of the devises before Frank's death, but now expect to receive their respective devises. Following the proper procedures, Wilma has filed an objection to the devises through her attorney on the ground that they were conditional. Sally claims entitlement to the Big Board stock, but Wilma maintains it belongs to Frank's estate.

1. Was it permissible for Sam to deduct his rental payments as a business expense on his federal income tax returns?
2. What is the likelihood of success on Wilma's objection to the devises?
3. Assuming Frank and Sally are on the cash method of accounting and calendar year basis for federal income tax purposes, who should report the three Big Board 2005 quarterly dividends as gross income and in what year for federal income tax purposes?

4. Is Sally entitled to the Big Board stock?

### Question No. 1: Examiner's Analysis

1. **Sam was only entitled to deduct that portion of his rental payments that were ordinary and necessary expenses that related to carrying on his business.**

Generally, there are no deductions in the Internal Revenue Code (IRC) except those specifically provided. The applicable section for a rental deduction is IRC Sec. 162(a) (3) which provides:

- (a) There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business including-

\* \* \*

- (3) rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.

The deductible expenses must be paid during the tax year in which the deduction is taken, and must be ordinary and necessary in relation to the business and industry.

Since rent for a taxpayer's personal residence is not deductible (See IRC Sec. 262) and rent for a business is deductible, an allocation of the total rent paid by Sam to Frank must be made between the ordinary and necessary business portion and the personal portion. A taxpayer can choose an allocation as long as it is made on some reasonable basis. *Rev. Rul. 62-180, 1962-2 CB 52*. Allocations based on square footage, number of rooms, relatively equal floors of space, etc. have gained approval under various cases. See *Moretti, Gene*, (1982) TC Memo 1982, 552 and *Green, James*, (1989) TC Memo 1989, 599 for examples of allocations based on rooms used for business versus total of rooms. See *Rhoades, Cecil*, (1987) TC Memo 1987, 335 and *Mills, Albert*, (1991) TC Memo 1991, 592 for cases allocating on the basis of square footage. Assuming that the floors in Southacre are of the same size, have the same number of rooms and each is used exclusively for its indicated purpose, then one-fourth of the total rent would reasonably be deducted for the business portion of the first floor (which the facts state was one-half). See IRC Sec. 280A.

It is clear from the facts that Sam has an at-home office and the proportional share of rent for it is deductible the same as a separate office provided the office is used exclusively and regularly as the principal place of business for his trade or business as the facts state. IRC Sec. 280A(c)(1). Deductions for an at-home office are limited to the excess of income over other deductions. IRC Sec. 280A(c)(5).

2. **Wilma's challenge to both the devise to the Norths and the devise to Sam on the basis that the devises were conditioned upon devisee's continued status as "friends and neighbors" will not be successful.**

Although devises, bequests and wills as a whole can be made expressly conditional, devises cannot be said to have implied conditions. The conditions must be manifested in express terms or by clear implication. *Estate of Rozanski*, 356 Pa. Super. 234, 514 A.2d 587 (1986); *In Re: Wachstetter's Estate*, 420 Pa. 219, 216 A.2d 66 (1966). Frank has made otherwise unconditional devises to the Norths and Sam but with the attendant phraseology, ". . . as my good friends and neighbors. . ." . The description of the Norths and Sam could be argued to be an express condition to the devises with respect to the continuance of the relationship. The fact that the Norths and Sam are no longer neighbors at

Frank's death and arguably are no longer friends since they are out of touch after a negative experience (the raising of the rent) could constitute a failure of these conditions. The critical word in these devises is "as". Wilma will assert that the entitlement of the Norths and Sam to their devises was thus contingent upon their status as friends and neighbors at Frank's death since the devise to them was to them in their status as such friends and neighbors.

The Norths and Sam will assert to the contrary that the subject phraseology only described them generally and not conditionally, arguing that the description was an explanation of the reason for the devise rather than a condition imposed on the devise. See *Cooper v. Milikovsky*, 382 Pa. 30, 112 A.2d 616 (1955). This interpretation of the language that Frank used is also reasonable. Conditions tending to destroy estates, such as conditions subsequent, are not favored in law and are strictly construed so that such a condition will not be found if the language will bear any other reasonable interpretation. *Id.* at 616. Pennsylvania courts have held in construing conditions in wills that a reasonable construction of the language must be given in favor of the beneficiary, *Estate of Schwarzbarth*, 320 Pa. Super. 191, 466 A. 2d 1382 (1983), and if the language is ambiguous there is a presumption in favor of vesting of the interest. *Rozanski*, supra., 514 A.2d at 590.

They could also assert that a will with respect to the identity of devisees speaks as of its execution when they were indisputably friends and neighbors of Frank rather than as of his later death. *Solm's Estate*, 253 Pa. 293, 98 A. 596 (1916). Although Pennsylvania courts have held that conditions created by the words "provided", "if", "in case", "during", "while", "so long as", "until" or similar words can create valid and express conditions (See *Appeal of Roberts*, 59 Pa. 70 (1868), *Cooper v. Milikovsky*, supra.), it is less likely that the phrase "as my good friends and neighbors" would be interpreted in the same way since the possible condition is not manifested in express terms and a different interpretation in favor of the beneficiary is reasonable.

### **3. The three Big Board 2005 quarterly dividends are taxable to Frank in 2005 when he received them.**

Since Frank is on the cash basis of accounting, income is reportable when received. Internal Revenue Code (IRC) Sec. 446 (c) (1). The receipt of a check constitutes gross income to a cash basis taxpayer upon receipt, unless the payor has imposed some restriction upon the payee's use of the check. *Estate of Kamm v. Commissioner*, 349 F.2d 953 (3d Cir. 1965). Dividends are included in gross income except in certain instances not specified in the facts. IRC Sec. 61. Since the dividends were received by Frank in 2005, they are reportable in Frank's 2005 calendar year return since he utilizes the calendar year basis of accounting. IRC Sec. 441 (a). Furthermore, when the dividends were received by Frank, they were in his name and the stock was still registered in his name. Although he was intending to give the stock to Sally, he had not yet taken any steps to consummate the gift. Therefore, the dividends, although given to Sally, are not reportable by Sally and remain reportable by Frank.

A gift of the dividends is not included as income to the donee, since the receipt of a gift is not considered gross income. IRC Sec. 102 (a). However, here the dividends might be includable by Sally as income if they were considered to be a transfer from an employer to or for the benefit of an employee rather than a personal gift. See IRC Sec. 102(c)(1).

Finally, it cannot be said that Frank received the dividends as Sally's agent since the gift of stock had not then been completed. Only when the transfer of the stock is complete will dividends following thereafter become reportable by Sally as dividend income.

**4. Sally is entitled to the stock because the gift of the Big Board stock to Sally was complete when Frank sent the stock certificates to Big Board endorsed over to Sally with a request that they be issued in her name and registration of stock ownership was changed on the books of Big Board.**

The issue is simply whether delivery of the gift was complete since intent to make a gift was clear. These are generally factual issues and the facts here support a completed gift.

To establish a gift inter vivos there must be an intention to make the gift and an actual or constructive delivery at the same time of a nature sufficient to divest the giver of all dominion and invest the recipient therewith. *Titusville Trust Co. v. Johnson*, 375 Pa. 493, 100 A.2d 93 (1953). Here Frank took steps to evidence both intent and delivery when he endorsed the stock certificates and sent them to Big Board with a request that they be reissued in Sally's name. His intent would have been clearer if he had requested that Big Board send the certificates directly to Sally. However, once Big Board put the certificates in her name, her signature would be required to cancel the gift and thus delivery of the gift is complete. In addition, the transfer of the dividends to Sally and her acceptance of them further evidenced factually Frank's donative intent and delivery of the stock.

Acceptance of a gift is required but is usually presumed. The fact that Frank told Sally about the gift and she responded positively support both the gift and her acceptance of it. She did not reject the gift when told about it; she accepted the dividend checks and thanked Frank.

Furthermore, the subject matter of any gift has a bearing on how donative intent and delivery are evidenced. While the clearest form of delivery of a gift of corporate shares is registration of the shares in the name of the donee on the stock ledger of the company coupled with physical delivery to the donee of stock certificates in the name of the donee representing the shares so registered, less formal modes of delivery have been held to be sufficient. *Wagner v. Wagner*, 466 Pa. 532, 353 A.2d 819 (1976). The transfer of the registration of stock ownership on the books of the corporation has been held to constitute legal and sufficient delivery even though the certificates of ownership have not actually been delivered. *McClements v. McClements*, 411 Pa. 257, 191 A.2d 814 (1963). In this case the evidence indicates that Frank had donative intent to make the gift. He told Sally about his letter to Big Board and she thanked him (indicating acceptance). The gift should be considered completed even though at Frank's death the actual certificates now in her name had not yet physically been delivered to her.

### **Question No. 2: Facts and Interrogatories**

Fred owed Bob money on a loan that Bob had made to him. After waiting several months for payment, Bob approached Fred outside Fred's residence in C County, Pennsylvania, and demanded payment in full of the loan. When Fred laughed at the demand, Bob became angry, pulled out a loaded gun, pointed it at Fred, and ordered Fred to give him his jewelry and wallet. Fred was in fear of being injured and gave Bob his ring, watch, and wallet which contained \$500. Bob then drove away in his blue van. Fred immediately called the police to report what had happened and provided a description of Bob and his vehicle.

A police officer (Officer) received a report that a male had just taken a ring, watch, and wallet from an individual at gun-point and had departed in a blue van from Fred's residence which was several minutes from Officer's location. As Officer was driving to Fred's residence, the only vehicle he observed on the road was a blue van being driven by a male which was traveling in the direction away from Fred's residence. Officer stopped the van, ordered Bob out of the vehicle, and conducted a pat down search of Bob.

In conducting the pat down search, Officer felt what he believed to be a watch and ring in Bob's shirt pocket. Officer removed a watch and ring, which were later determined to be Fred's, from Bob's shirt, handcuffed Bob, and placed him under arrest.

1. Officer has identified theft by unlawful taking, robbery, simple assault, and recklessly endangering another person as possible criminal charges that could be filed against Bob. Which of these charges are supported by the above facts?

Criminal charges on the above incident were filed against Bob last month. Bob read an advertisement that attorney Alan had placed in a local newspaper which stated that every client Alan had defended in a criminal matter had been acquitted. Bob hired Alan to represent him in defending the criminal charges that had been filed against him. Alan had been successful in obtaining acquittals for the only two individuals he had previously defended in criminal matters.

Bob has been married to Cindy for five years, but recently they have been experiencing marital difficulties. Last month, when Cindy learned of the criminal charges against Bob, she moved out of the marital residence and retained a lawyer to represent her in obtaining a divorce and property settlement. Cindy owns stock in a mining company. She had purchased 100 shares of the stock at \$1 per share shortly before her marriage to Bob and inherited another 100 shares last year then worth \$10 each, as a beneficiary under her father's will. Both the purchased and inherited shares have increased in value each year since Cindy received them.

2. If Alan argues that the seizure of the watch and ring violated Bob's rights under the Fourth Amendment of the United States Constitution in an attempt to suppress the watch and ring as evidence in Bob's criminal trial, how should the prosecutor respond and how would the court rule on the admissibility of such evidence?
3. How should the court treat Cindy's stock in the mining company in the equitable distribution of the parties' assets in a divorce action?
4. Has Alan violated any of the Pennsylvania Rules of Professional Conduct by his advertisement?

### Question No. 2: Examiner's Analysis

1. **Bob should be charged with theft, robbery, recklessly endangering and simple assault in connection with the incident outside of Fred's residence.**

Bob should be charged with theft. The crime of theft by unlawful taking, 18 Pa. C.S.A. Section 3921, is established where a person unlawfully takes or exercises unlawful control over movable property of another with intent to deprive him thereof. Here, even if Fred owed Bob some money for a loan that had been given, Bob had no arguable claim of right to the watch and ring that Fred was wearing. Bob's action to satisfy a general debt by taking property that was not the subject matter of the loan will not be recognized as a defense. See *Commonwealth v. Sleighter*, 495 Pa. 262, 433 A.2d 469 (1981). Bob unlawfully took control of Fred's watch, ring and money with the intent to deprive Fred of the property. Bob used the threat of force to obtain these items to satisfy his claim for a loan that had been made. Bob was guilty of theft regardless of the fact that Fred may have owed Bob some money for a loan.

Bob should also be charged with robbery. The elements of the crime of robbery are set forth at 18 Pa. C.S.A. Section 3701 which provides:

A person is guilty of robbery if in the course of committing a theft he threatens another with or intentionally puts him in fear of immediate serious bodily injury.

The facts establish that in the course of unlawfully obtaining control over Fred's ring, watch and money, Bob threatened Fred by using a gun to accomplish the theft. Fred felt threatened by the display of the gun and turned over his property to Bob. Brandishing a firearm is sufficient to inflict the fear of immediate serious injury required for a robbery conviction. *Commonwealth v. Hopkins*, 747 A.2d 910 (Pa. Super. 2000).

Another charge that should be filed against Bob would be simple assault. Simple assault is defined at 18 Pa. C.S.A. § 2701 as follows:

(a) Offense defined – A person is guilty of assault if he:

\* \* \*

(3) Attempts by physical menace to put another in fear of imminent serious bodily injury . . .

Bob would likely be found guilty of assault because by pulling a loaded gun and pointing it at Fred he placed Fred in fear of imminent serious injury. See *Commonwealth v. Savage*, 275 Pa. Super. 96, 418 A.2d 629 (1980) – pointing a gun at another sufficient to support crime of assault.

The final charge that should be approved for filing against Bob is recklessly endangering another person. 18 Pa. C.S.A. §2705 provides that a person commits a misdemeanor of the second degree if he recklessly engages in conduct which places or may place another person in danger of serious bodily injury. Because Bob pointed a loaded gun at Fred, he was guilty of recklessly endangering Fred. See *Newcomer v. Civil Service Commission of Fairchance Borough*, 100 Pa. Cmwlth. 559, 515 A.2d 108 (1986), *appeal denied*, 522 A.2d 51 (1987) – pointing a loaded firearm at another person constitutes the crime of recklessly endangering another person; *Hopkins*, supra., 747 A.2d at 916 – brandishing a loaded firearm during commission of a crime provides sufficient basis to establish the conscious disregard for the safety of others and the present ability to inflict great bodily harm, which are required to sustain a conviction for recklessly endangering another person.

**2. The prosecutor should argue that the watch and ring were properly seized as part of a pat down search conducted in conjunction with an investigative detention and the court would likely deny the motion to suppress the watch and ring as evidence.**

The Fourth Amendment to the United States Constitution establishes the right of individuals to be free from unreasonable searches and seizures. Subject to certain exceptions, searches and seizures conducted without a warrant are generally deemed to be unreasonable. *Minnesota v. Dickerson*, 508 U.S. 366, 113 S.Ct. 2130 (1993). Defense counsel has argued that the ring and watch were obtained as a result of an unreasonable search and seizure in an effort to suppress these items from use as evidence in Bob's criminal trial.

Although not every encounter with police amounts to a seizure, the temporary detention of an individual by a show of authority for investigative purposes is considered to be a non-custodial detention

or seizure. *Commonwealth v. Lewis*, 535 Pa. 501, 636 A.2d 619 (1994); *Terry v. State of Ohio*, 392 U.S. 1, 88 S. Ct. 1868, (1968). The test is whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officer's request or otherwise terminate the encounter. *Florida v. Bostick*, 501 U.S. 429, 111 S. Ct. 2382 (1991). An investigative detention occurred when Officer stopped Bob and ordered him out of his vehicle in order to question him.

The prosecutor should argue that an exception to the warrant requirement is provided for the temporary detention of an individual by a police officer for investigative purposes where the officer had reasonable suspicion that the person was involved in criminal activity. *Terry*, supra., 88 S. Ct. at 1884, *Commonwealth v. Ellis*, 541 Pa. 285, 662 A.2d 1043 (1995).

Officer had reasonable suspicion to suspect that Bob was involved in criminal activity because he observed Bob's van which matched the description of the vehicle reported to have been used in the crime a short distance from the crime scene within minutes of the reported crime. Additionally, Bob's van was the only vehicle observed on the road, a male was driving the van and the van was traveling away from the scene. Under these circumstances, Officer had reasonable suspicion of criminal activity to support stopping Bob for purposes of an investigative detention.

An officer conducting an investigative detention, who has reasonable grounds to believe that a person is armed and dangerous, may conduct a pat down search for weapons. *Terry*, supra., 88 S. Ct. at 1884. Officer had received information that the property had been taken at gun-point; therefore, he had a reasonable basis to conduct the limited pat down search of Bob for his own safety.

In conducting the pat down search Officer felt what he believed to be a watch and ring in Bob's shirt pocket. The Officer knew that a ring and watch had been taken from Fred. This fact coupled with the facts that supported a reasonable suspicion to stop Bob's vehicle would constitute probable cause to seize the items if it became immediately apparent to Officer that he felt seizable items. An officer may seize items during a pat down search under the plain-feel doctrine if he immediately recognizes the incriminating character of the item by his plain feel; however, if after feeling the object the officer lacks probable cause to believe that the item is contraband without conducting a further search, the seizure of the object is not justified. *Minnesota v. Dickerson*, 508 U.S. 336, 113 S. Ct. 2130, (1993); *Commonwealth v. Stevenson*, 560 Pa. 345, 744 A.2d 1261 (2000). It appears that the Officer was able to immediately recognize the incriminating character of the watch and ring while he was patting Bob down for a weapon. There are no facts to suggest that the Officer manipulated the ring or watch. Rather it appears that Officer identified them by feel during his pat down search. The ring and watch seized from Bob will not be suppressed because they were lawfully seized as stolen items during a pat down search for weapons conducted in conjunction with a lawful investigative detention.

**3. The value of property acquired prior to marriage and property received by inheritance during the marriage is not marital property subject to equitable distribution. Any increase in the value of either type of property occurring during the marriage and prior to final separation or as close to the date of the hearing on equitable distribution as possible, whichever date results in a lesser increase, is marital property and may be included in the equitable distribution of assets.**

In an action for divorce the court equitably divides the marital property after considering the relevant factors. 23 Pa. C.S.A. § 3502. Any increase in the value of premarital assets, during the marriage of the parties and prior to final separation or as close to the date of the hearing on equitable distribution as possible, whichever date results in a lesser increase, is marital property. *Anthony v. Anthony*, 355 Pa. Super. 589, 591, 514 A.2d 91, 92 (1986); 23 Pa.C.S.A § 3501(a.1). The appreciation

in value does not have to be attributable to the joint efforts or financial contributions of both spouses, in order to be considered marital property. *Id.* at 93; *Aletto v. Aletto*, 371 Pa. Super. 230, 537 A.2d 1383 (1988).

The value of the 100 shares of Cindy's stock as of the time of her marriage to Bob would not be marital property subject to equitable distribution. However, the subsequent appreciation in value until the time of separation or as close to the date of the hearing on equitable distribution as possible, whichever date results in a lesser increase, would be. This is so even though there are no facts to show that Bob's efforts played any role in the appreciation of the stock or, in fact, that he even knew of its existence.

The value of the 100 inherited shares of stock as of the date of her father's death would not be marital property subject to equitable distribution because the value of property acquired by bequest during the marriage is not considered marital property. 23 Pa. C.S.A. § 3501(a)(3). However, the increase in value of the inherited stock during the marriage and prior to final separation or as close to the date of the hearing on equitable distribution as possible, whichever date results in a lesser increase, would be marital property subject to equitable distribution. 23 Pa. C.S.A. § 3501(a.1); *Smith v. Smith*, 439 Pa. Super 283, 653 A.2d 1259 (1995), *appeal denied*, 663 A.2d 693 (Pa. 1995).

**4. Alan has violated the Pennsylvania Rules of Professional Conduct by making a misleading communication about his legal services.**

Alan utilized an advertisement which stated that all of the clients he had represented in criminal matters had been acquitted of the crimes for which they had been charged. Although a lawyer may advertise through a newspaper, such advertisement is subject to certain restrictions. Pennsylvania Rule of Professional Conduct 7.1 prohibits a lawyer from making a false or misleading communication about the lawyer's services. The comment to the rule identifies a misleading statement as one that would lead a reasonable person to form an unjustified expectation that the same result could be obtained for other clients in similar matters without reference to the circumstances of each client's case. The comment further provides that a truthful statement is misleading if it omits a fact necessary to make the lawyer's communication as a whole not materially misleading.

Alan's advertisement could be found misleading because it could create an unjustified expectation about the results that can be achieved for Bob because of Alan's prior success record. The advertisement is also misleading because Alan had only represented two clients in criminal matters and this fact which was omitted from the advertisement was necessary to make Alan's communication as a whole not misleading.

**Question No. 3: Facts and Interrogatories**

Mel, the owner and sole proprietor of Mel's Muscleman Gym, located in C City, Pennsylvania, was seeking new clients for his fitness facility. Notices of an open house to be held at the gym were posted in apartment and office buildings in C City and advertised in the C City daily newspaper. Prospective clients were invited to a free workout using the exercise equipment. Paula saw the notice and went to the open house dressed in workout clothes.

When Paula arrived at the gym, she was welcomed by Mel who encouraged her to try any of the exercise equipment. Paula walked over to a rack of weights and selected some hand barbells. Above the rack of weights was the following sign: "Be courteous to other patrons. Do not exercise near the rack

of weights!” Paula read the sign but didn’t see anyone seeking access to the rack, so she began lifting the weights near the rack. Soon thereafter the rack collapsed on her, causing serious injuries. Paula neither bumped nor dislodged the weights nor the rack, which had been designed, built, and installed by Mel.

The rack of weights which collapsed on Paula collapsed under similar circumstances on two other occasions, once before, and once after Paula’s injury. Each time the rack fell, Mel had re-attached it as it had previously been attached. After the first occasion, the rack stayed in place for several days, then gave way, injuring Paula. After Paula’s incident, the rack again stayed in place for several days before giving way. No one had been injured on the other two occasions.

Three months after the rack collapsed on Paula and she recovered from her injuries, Paula contacted Alice, a local attorney, to find out her legal rights against Mel. Assume that there was no express or implied contract between Paula and Mel’s Gym.

1. What must be proven at trial for Paula to establish a cause of action in negligence against Mel, and what will be the likely result?
2. If Mel’s attorney raises as a defense that Paula’s exercising near the rack was negligent, what effect, if any, could the defense have on Paula’s recovery, and what would be the likelihood of prevailing on that defense?

Assume that Alice brought a timely negligence suit, *Paula v. Mel*, on Paula’s behalf against Mel in the appropriate county court in C City, Pennsylvania, and that the case proceeded to trial. At trial, Alice attempted to introduce evidence of the other two collapses.

3. If Mel’s attorney objects to the introduction of evidence of the pre-injury and post-injury collapses on the basis of relevance, how should Paula’s attorney respond?

Assume that at the conclusion of the trial the jury returned a verdict in favor of Paula and awarded her damages of \$60,000. Judgment was entered for Paula in the amount of \$60,000, and Mel’s attorney filed an appeal, raising several meritorious issues. While the appeal was pending, Mel’s attorney sent Alice a check for \$30,000, made out to Paula, conspicuously marked “In full and final settlement of *Paula v. Mel*.”

4. What effect, if any, will Paula’s cashing the check have on her ability to recover the \$30,000 balance of the judgment?

### Question No. 3: Examiner’s Analysis

1. **Paula, a business invitee, will have to prove that either Mel created the harmful condition or Mel knew or reasonably should have known of the dangerous condition that caused Paula’s injuries and failed to exercise reasonable care to protect her against the danger. Paula will likely succeed on these facts.**

Mel’s duty to Paula arises as a result of her status as a business invitee, since she was on the premises by the express invitation of Mel, in connection with his business promotion. In *Swift v. Northeastern Hospital of Philadelphia*, 456 Pa. Super. 330, 690 A.2d 719 (1997) *appeal denied*, 701 A.2d 577 (Pa. 1997), the Court summarized the current law in Pennsylvania governing business invitees as follows:

The mere fact that an accident occurred does not give rise to an inference that the injured person was the victim of negligence. *McDonald v. Aliquippa Hospital*, 414 Pa.Super. 317, 321, 606 A.2d 1218, 1220 (1992). Pennsylvania law places the burden on the plaintiff to establish the existence of negligence on the part of the defendant by proving four elements: (1) a duty or obligation recognized by law; (2) a breach of that duty; (3) a causal connection between the conduct and the resulting injury; and (4) actual damages. *Pittsburgh National Bank v. Perr*, 431 Pa.Super. 580, 584, 637 A.2d 334, 336 (1994). . . .

The nature of the duty which is owed in any given situation hinges primarily upon the relationship between the parties at the time of the plaintiff's injury. *Pittsburgh National Bank v. Perr, supra*. The standard of care that a possessor of land owes to one who enters upon the land depends upon whether the entrant is a trespasser, a licensee or an invitee. *Carrender v. Fitterer*, 503 Pa. 178, 184, 469 A.2d 120, 123 (1983). . . . A business visitor is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land. *Palange v. City of Philadelphia Law Department*, 433 Pa.Super. 373, 378, 640 A.2d 1305, 1308 (1994). . . . Applying section 343 of the Restatement (Second) of Torts, this court has explained that a party is subject to liability for physical harm caused to an invitee only if:

he knows of or reasonably should have known of the condition and the condition involves an unreasonable risk of harm, he should expect that the invitee will not realize it or will fail to protect themselves against it, and the party fails to exercise reasonable care to protect the invitees against the danger.

*Blackman v. Federal Realty Investment Trust*, 444 Pa.Super. 411, 415, 664 A.2d 139, 142 (1995).

An invitee must prove either the proprietor of the land had a hand in creating the harmful condition, or he had actual or constructive notice of such condition. *Moultrey v. Great Atlantic & Pacific Tea Co.*, 281 Pa.Super. 525, 535, 422 A.2d 593, 598 (1980).

Here Mel knew, or should have known, of the condition of the weight rack and that it involved an unreasonable risk of harm because the weight rack had previously collapsed and was reattached by Mel in the same manner as it had been constructed originally. The risk that caused Paula's injury, the collapse of the weight rack, was one that she could not reasonably have been expected to anticipate because neither the sign nor any other circumstances provided notice that the weight rack was unsafe. Paula should be able to show that Mel failed to exercise reasonable care to protect invitees against the known danger by failing to repair or warn of the condition which Mel created due to his faulty installation of the weight rack. Mel owed Paula the duty to exercise reasonable care in the circumstances by correcting any unsafe condition that was discoverable by the exercise of reasonable care and diligence. *Lanni v. Pennsylvania Railroad Company*, 371 Pa. 106, 88 A.2d 887 (1952). It is likely that Mel's conduct in reattaching the rack of weights in the same manner, which did not properly function previously, amounted to a failure to correct an unsafe condition. Mel's failure to properly repair the weight rack or adequately warn of its dangerous condition will likely be deemed to be the cause of Paula's injury. It would also be found to be the proximate cause of Paula's injury as it was a substantial factor in causing Paula's harm. The facts also indicate that Paula was injured as a result of the collapse. Since all of the elements of negligence have been satisfied Paula should be able to prevail on her negligence claim.

2. **If Paula's negligence is raised as a defense it could limit her ability to recover based on the percentage of her contributory negligence but such a defense here is unlikely to substantially limit or bar her claim.**

42 Pa. C.S.A. Section 7102 entitled *Comparative Negligence* provides in pertinent part as follows:

(a) General Rule. – In all actions brought to recover damages for negligence resulting in death or injury to person or property, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery by the plaintiff or his legal representative where such negligence was not greater than the causal negligence of the defendant or defendants against whom recovery is sought, but any damages sustained by the plaintiff shall be diminished in proportion to the amount of negligence attributed to the plaintiff.

If Paula is found to have been contributory negligent, her recovery will be reduced by the percentage of her negligence, unless she is found to have been more than 50% causally negligent, in which case, she is barred from any recovery. Contributory negligence is neglect of the duty imposed upon a person to exercise ordinary care for his or her own protection and safety which is a legally contributing cause of an injury. *Trayer v. King*, 241 Pa.Super. 86, 359 A.2d 800 (1976). The contributory negligence of a plaintiff, like the negligence of a defendant, is lack of due care under the circumstances. *Argo v. Goodstein*, 438 Pa. 468, 265 A.2d 783 (1970). A plaintiff is guilty of contributory negligence with respect to injuries which are received as a result of a failure on her part to observe and avoid an obvious condition which ordinary care for her safety would have disclosed. *Skalos v. Higgins*, 303 Pa.Super. 107, 449 A.2d 601 (1982).

Mel's attorney could argue that Paula may be found to have been negligent in failing to heed the warning not to exercise near the weight rack. However, it is also possible that her actions could be found by a jury to have been unrelated to the cause of her injury especially since the sign made no mention of the rack being unstable or unsafe and thereby presenting a dangerous condition. Rather, the sign appeared to be aimed at being courteous to other customers. It could be argued that Paula was injured simply because she was near the rack of weights, and she would have been injured if she were merely walking by the rack of weights. Although Paula's damage award would be reduced if she were found to be contributorily negligent it is unlikely that her recovery would be substantially limited or barred.

**3. If Mel's attorney objects to the introduction of evidence of the prior occurrence based on its lack of relevance, Paula's attorney should respond that since the prior occurrence was identical it may serve both to establish notice to Mel of the dangerous condition of the rack of weights and a breach of his duty of care in reinstalling the rack. If an objection to introduction of evidence of the subsequent occurrence is made based on relevance, Paula's attorney could argue that the subsequent identical faulty repair serves as additional evidence that due care was not used in the repair of the dangerous condition.**

Rule 402 of the Pennsylvania Rules of Evidence provides that relevant evidence is admissible except as otherwise provided by law. Relevant evidence is defined in Rule 401 as "...evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Mel's attorney could try to argue that just because the rack failed on one prior occasion is not sufficient to show that the rack would likely fail again and the evidence of that one prior failure should not be admitted. Paula's attorney should counter that the prior collapse of the weight rack at Mel's under identical conditions should be admitted by the trial court to show that Mel had notice of the dangerous condition that caused Paula's injury, and to establish that his subsequent re-installation of the rack in the same way constituted a breach of Mel's duty of care to his patrons. See *Ringelheim v. Fidelity Trust Co. of Pittsburgh*, 330 Pa. 69, 198 A. 628 (1938); *Stormer v. Alberts Construction Co.*, 401 Pa. 461, 165 A.2d 87 (1960).

As to the second collapse Mel's attorney could argue that evidence of subsequent similar occurrences are ordinarily not admissible to show that a defendant had notice of a condition prior to the subject accident. *Crance v. Sohanic*, 344 Pa. Super. 526, 496 A.2d 1230 (1985). However, Paula's attorney could counter that evidence of subsequent occurrences may be admissible for purposes of determining whether the defendant exercised reasonable care with respect to repairing the condition. *Yoffee v. Pennsylvania Power & Light Co.*, 385 Pa. 520, 123 A.2d 636 (1956); *Fisher v. Pomeroy's, Inc.*, 322 Pa. 389, 185 A. 296 (1936). Thus, it can be argued that evidence of the subsequent faulty repair should be admissible as additional evidence to show that Mel failed to exercise reasonable care in properly constructing and maintaining the rack for the safety of his customers.

**4. If Paula cashes the check, it would likely be held to constitute an accord and satisfaction of a disputed debt, and Paula would not be able to recover the \$30,000 judgment balance.**

Mel has attempted to satisfy the \$60,000 judgment against him by paying \$30,000 by check conspicuously marked "In full and final settlement of *Paula v. Mel*." A court would likely conclude that cashing the check was an accord and satisfaction of a disputed debt, thereby barring her recovery of the remainder of the judgment amount.

The same elements are necessary to show an accord and satisfaction as are required for any contract, including a meeting of the minds and consideration. *Brunswick Corporation v. Levin*, 442 Pa. 488, 276 A.2d 532 (1971). Legal consideration for an accord exists when the parties have a legitimately disputed claim and the creditor accepts an amount less than claimed to be due. *Nowicki Construction Co. v. Panar Corp.*, 342 Pa. Super. 8, 492 A.2d 36 (1985).<sup>1</sup>

Although there is a \$60,000 judgment against Mel, the facts indicate that an appeal raising several meritorious issues has been filed which has not yet been decided. Accordingly, the debt may be viewed as disputed, and Paula's acceptance of \$30,000 would likely be deemed to waive her right to the remaining \$30,000.

#### **Question No. 4: Facts and Interrogatories**

Tom and his wife Wendy were employed by C City. Tom worked as a computer programmer in C City's Fiscal Office and Wendy was a police officer with the C City police department. During her ten years with the C City police department, Wendy and other female police officers had repeatedly been passed over for promotions and higher paying special assignments for which they were qualified in favor of their male coworkers.

The lack of promotional opportunities for females in C City government was the subject of several newspaper articles in recent months and was also the subject of a public hearing held by C City Council last month. The hearing was prompted by Wendy's complaint filed with the Equal Employment

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<sup>1</sup> The Uniform Commercial Code, which governs commercial transactions, in Article III, 13 Pa. C.S.A. §3311, "Accord and Satisfaction by Use of Instrument," sets forth statutory principles, similar to the common law rule of accord and satisfaction, which could possibly be advanced in addressing this issue. However, since Article III is not a subject covered by the bar examination, applicants are not expected to be aware of or reference its provisions.

Opportunity Commission alleging that C City discriminated against her in its police department's salary and promotion practices because she was female.

Tom, being dissatisfied with the discriminatory treatment of his wife, wrote a letter which was published in the local newspaper criticizing the mayor for the unequal salary and promotional opportunities available to females in the C City police department. Tom did not identify himself as a C City employee in the letter. As a result of his comments in the newspaper, a disciplinary hearing compliant with procedural due process was held after which Tom was suspended from his job for three days.

Stan was Tom's supervisor. During Tom's suspension, Stan entered Tom's office and opened Tom's desk to look for a disc containing a computer program that was needed for office operations. While looking through Tom's desk, Stan discovered an envelope marked "confidential" which he opened. The envelope contained a letter written by Tom supporting his wife's claims of discrimination that Tom had sent to the Equal Employment Opportunity Commission. The letter provided the salaries and ranks for all members of the C City police department, all of which was public information. Tom was dismissed from employment solely because of the letter that Stan discovered.

Tom approached Attorney Adam to represent him in suing C City and appropriate C City officials because of the actions that had been taken against him. In addition to his private practice, Adam was a part-time solicitor for C City. Adam's representation of C City was limited to the collection of delinquent taxes. Adam reasonably believed that neither his duties to C City or Tom would be affected if he represented Tom because he did not represent C City in litigation or personnel matters; however, Adam did not want to take Tom's case because he feared it might affect his relationship with C City officials. Based on these fears, Adam referred Tom to his law partner (Partner). Partner was aware of Adam's concerns but decided to represent Tom since Partner did not represent C City in any matters.

1. What federal constitutional claim should Tom raise to challenge his suspension and with what likelihood of success?
2. Was the search of Tom's desk and the seizure of the letter valid under the United States Constitution?
3. Would Partner's representation of Tom in a suit against C City be permissible under the Pennsylvania Rules of Professional Conduct?
4. What claim under Title VII of the Civil Rights Act of 1964 should Tom make to challenge his discharge?

#### **Question No. 4: Examiner's Analysis**

- 1. Tom should challenge his three day suspension on the grounds that it was in violation of his First Amendment right of free speech, which challenge will probably be successful.**

The constitutional right to freedom of speech set forth in the First Amendment is applicable to government employees where the speech involves matters of public concern. *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731 (1968). However, speech by a public employee that involves purely matters of personal interest or grievances with respect to their employment or which is made

pursuant to their official duties is generally not afforded constitutional protection. *Connick v. Myers*, 461 U.S. 138, 103 S.Ct.1684 (1983); *Garcetti v. Ceballos*, \_\_\_ U.S. \_\_\_, 126 S.Ct. 1951 (2006).

Where the speech involves a matter of public concern, a balancing test is used to weigh the employee's interest in commenting on the matter of public concern against the government employer's interest in promoting the efficiency of the public service that it provides. *Pickering, supra.*, 88 S.Ct. at 1734. In balancing the competing interests, factors such as the disruption of the efficiency of the office, the manner, time and place of the speech, whether the context of the speech arose out of an employment dispute and the manner in which the speech touches on the public interest should be considered. *Connick, supra.*,103 S.Ct. at 1692, 1693.

Tom's statements in a letter to the newspaper, criticizing the mayor for the discriminatory employment practices of the C City police department, concerned matters of public interest. This issue was the subject of several newspaper articles and a public hearing before C City Council. However, the issue was one in which Tom also had a personal interest because of C City's treatment of his wife. Tom's motivation in writing the letter is not determinative in deciding whether the speech concerned matters of public interest where the content, form and context of the speech reflect a matter of public concern. *Rode v. Dellarciprete*, 845 F.2d 1195 (3d Cir. 1988). Although Tom was an employee of C City the statements which led to his suspension were made as a citizen and made outside of the workplace. There are no facts indicating that the statement directly affected or related to his work as a computer programmer or disrupted the work in his office since the criticism was directed at the mayor who was not his direct supervisor. Thus his speech was likely protected by the First Amendment and the three day suspension that was imposed as a result of his protected speech was improper under the First Amendment.

## **2. The search and seizure of the letter from an envelope in Tom's desk was unreasonable in violation of the Fourth Amendment to the United States Constitution.**

Searches and seizures by government employers or supervisors of the property of employees are subject to the restraints of the Fourth Amendment, which protects individuals against unreasonable searches and seizures. *O'Connor v. Ortega*, 480 U.S. 709, 107 S.Ct. 1492 (1987). Thus, the search by Stan was state action subject to constitutional constraints.

The Fourth Amendment is implicated when a person's expectation of privacy, which society is prepared to consider as reasonable, is infringed. *United States v. Jacobson*, 466 U.S. 109, 104 S.Ct. 1652 (1984). Employees have a reasonable expectation of privacy in a desk or file cabinets found in the workplace where there are no policies, practices or procedures supporting a contrary expectation. *O'Connor, supra.*, 107 S.Ct. at 1497. In this case there are no facts presented to support a reduced expectation of privacy by Tom in his desk.

Even though an employee may have a reasonable expectation of privacy in their desk, a warrant is not required by a government employer to conduct a work related search that is reasonable under the circumstances. *O'Connor, supra.*, 107 S.Ct. at 1502. A work related search includes a search for work related misconduct or a non-investigatory search for a work related purpose such as to recover a file. In this case, the search of the desk by Stan was work related because he was looking for a disc containing a computer program that was needed for the operation of the office.

In order for the search to be reasonable under the circumstances it must be reasonable both at its inception and in its scope. *Id.* at 1502. The search of the desk was reasonable at its inception, where as here, there are reasonable grounds to believe that the search will turn up the needed computer program. However, the search was not reasonable in scope since the search of the envelope was not reasonably

related to the work purpose of locating the disc containing the needed computer program and the search became excessively intrusive when the supervisor looked into an envelope marked confidential.

Since the letter which caused Tom's termination was found in an envelope marked "confidential" in the desk, the search of the envelope and seizure of the letter was unreasonable and invalid under the Fourth Amendment of the United States Constitution even though the search of the desk was reasonable at its inception.

**3. Partner's representation of Tom in his suit against C City would not violate the Pennsylvania Rules of Professional Conduct if the informed consent of both parties was obtained.**

Pennsylvania Rule of Professional Conduct 1.10, which sets forth an imputed disqualification rule, provides:

- (a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm, or unless permitted by Rules 1.10 (b) or (c).

Under the rule since Partner is associated in a law firm with Adam, Partner would be precluded from representing Tom in his suit against C City if Adam were precluded from representing Tom in his suit against C City under any of the listed rules.

A lawyer owes a duty of loyalty to a client. This duty is embodied in Pennsylvania Rule of Professional Conduct 1.7 which provides:

- (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
  - (1) the representation of one client will be directly adverse to another client;\*\*\*
- (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
  - (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
  - (2) the representation is not prohibited by law;
  - (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal, and
  - (4) each affected client gives informed consent.

In the present case Adam currently represents C City in tax collection matters. Adam's representation of Tom in a lawsuit against C City to recover damages would clearly be directly adverse to the interests of C City. Therefore, a concurrent conflict of interest exists and Adam would have to determine whether the conflict is consentable and, if so, consult with the clients affected and obtain their informed consent.

A conflict would be nonconsentable if the lawyer could not reasonably conclude that the lawyer will be able to provide competent and diligent representation. Rule 1.7 (b) (1). This is not the case here where Adam's representation of C City was limited to tax collection matters and he did not feel that his duties to C City or Tom would be affected by the representation. Adam's concern was more that his relationship with C City officials would be affected. Therefore, Adam could represent Tom if Adam consulted with both C City and Tom to explain the conflict and the possible adverse effects on the interests of each client and obtained their informed consent.

Since under Rule 1.7 Adam could represent Tom in his suit against C City, there would be no imputed disqualification for Partner representing Tom, provided the informed consent of both C City and Tom was obtained. Since Adam is not a former employee of C City, the special conflict of interest rules of Rule 1.11 for former employees would not apply.

#### **4. Tom should make a claim under Title VII for retaliatory discharge.**

Title VII, 42 U.S.C. § 2000e – 3 (a) provides:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees... because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted or participated in any manner in an investigation, proceeding or hearing under this subchapter.

To support a claim of retaliation plaintiff must first establish a prima facie case of retaliation which requires proof that: (1) he was engaged in an activity protected by Title VII; (2) defendants subsequently took action adverse to him; and (4) a causal connection existed between the protected activity and the action. *Abramson v. William Patterson College*, 260 F.3d 265, 286 (3d Cir. 2001), *Burlington Northern & Santa Fe Railway Co. v. White*, \_\_\_ U.S. \_\_\_, 126 S.Ct. 2405 (2006).

Tom engaged in protected activity by submitting a letter to the Equal Employment Opportunity Commission in support of his wife's claim of sex discrimination. *Van Richardson v. Burrows*, 885 F.Supp.1017 (N.D. Ohio 1995). Tom's activity in supporting his wife's claim of discrimination became known to his supervisor when Stan discovered the letter. Termination of Tom's employment clearly constitutes a material adverse action prohibited by the anti-retaliation provision of Title VII. *Id.*, 126 S.Ct. at 2415. A causal connection between the protected activity and the termination existed because the facts indicated Tom was dismissed because he wrote the letter in support of his wife's claim. Based on the facts, Tom will be able to establish a prima facie case of retaliatory discharge in violation of Title VII.

#### **Question No. 5: Facts and Interrogatories**

In January 2005 two brothers, Andy and Bill, purchased Blackacre, an apartment complex located in Big City, Pennsylvania, with cash, receiving a valid deed which conveyed title to them as joint tenants with right of survivorship. Learning that Big City was designated as a casino gambling site

under a new state law, Andy borrowed a substantial sum of money and executed a mortgage on his interest in Blackacre as collateral for the loan on February 1, 2005. Bill had no knowledge about the mortgage. Andy used the loan proceeds to purchase Whiteacre, a large tract of undeveloped land along Big City's riverfront, which he hoped to eventually sell at a profit to a future casino operator.

In March 2005 Andy and Bill rented a Blackacre apartment to Donna, a graduate student at a local university, for a two (2) year term under a written lease agreement. Donna tutored Christine, a minor who was living on her own against the wishes of her parents. Christine, who solely supported herself as a night shift waitress at a local diner in a crime-ridden area of Big City, told Donna that she was in danger of losing her job due to transportation problems. Christine stated that she was afraid to walk the long distance to the diner alone at night and that public transportation was too unreliable. Feeling sorry for Christine and also needing money, Donna agreed to sell her car to Christine for \$1,000. The written agreement between Christine and Donna, which was executed on March 10, 2005, provided that Christine would pay Donna \$100 upon execution of the agreement and the remainder on November 1, 2005, when Donna's next semester's tuition was due.

On April 1, 2005, Christine turned 18 years of age. On November 1, 2005, Christine returned the car to Donna saying that she had found a ride to the diner with a co-worker, and she could no longer afford the high cost of gasoline and insurance.

In mid-November 2005 the furnace in Donna's apartment on Blackacre started to operate erratically. The apartment was without heat for long periods of time and Donna kept warm by wearing heavy clothes and using borrowed kerosene heaters. On several occasions in January 2006 when the outside temperature fell below zero, Donna was forced to leave her apartment and temporarily move in with a friend.

Donna frequently called Andy and Bill to complain about the lack of heat at her apartment, but Andy and Bill failed to send someone to repair the furnace. Finally, when the pipes in the apartment froze in early February 2006 leaving Donna without any running water, Donna moved out of her apartment and refused to pay any further rents to Andy and Bill.

Due to the large number of applicants, the state gambling commission announced a two year moratorium on the award of a gambling license in Big City. When Andy's health started to fail, he decided to give Whiteacre to his niece, Ellen. To prevent Ellen from selling Whiteacre until the gambling license was awarded, Andy's deed conveying Whiteacre to her, which was properly signed and recorded, contained the following clause: "Any conveyance of Whiteacre by Ellen until a gambling license is awarded in Big City shall be null and void."

Andy died on July 1, 2006, and left his entire estate by will to Ellen.

1. Donna sued Christine for breach of contract for the remaining monies owed by Christine on the agreement for the sale of the car. What defense should Christine raise and what arguments should Donna make in response to this defense?
2. Prior to Andy's death, he and Bill filed suit against Donna for remaining unpaid rent due under the lease. What common law theories should Donna raise to defend against the claim for the unpaid rent, and with what likelihood of success?

3. Ellen is against gambling and wants to immediately sell Whiteacre to “Losing Bet,” an anti-gambling organization. Can Ellen legally convey Whiteacre?
4. Who owns Blackacre after Andy’s death?

### **Question No. 5: Examiner’s Analysis**

1. **Christine should assert the defense of minority, but Donna should argue that this defense will not succeed because the car is considered a “necessary” and Christine ratified the contract by failing to make a timely disaffirmance after reaching majority.**

In Pennsylvania, only individuals who are 18 years of age or older have the right to enter into binding and legally enforceable contracts. 23 Pa. C.S.A. § 5101 (a). Contracts of a minor, other than contracts for necessities, are voidable by the minor but not void. *Aetna Casualty & Surety Co. v. Duncan*, 972 F.2d 523, 526 (3d Cir. 1992). This means that a minor can render a contract a nullity and avoid liability by disaffirming the contract within a reasonable time after the minor attains his or her majority. *Milicic v. Basketball Marketing Co., Inc.*, 857 A.2d 689, 694 (Pa. Super. 2004). As explained by the Pennsylvania courts, the purpose of the rule rendering contracts of a minor voidable is “to protect minors from contracts which may not be advantageous to them and to protect them ‘against their own lack of discretion and against the snares of designing persons.’” *Pankas v. Bell*, 413 Pa. 494, 501-02, 198 A.2d 312, 315 (1964), quoting, *O’Leary’s Estate*, 352 Pa. 254, 256, 42 A.2d 624, 625 (1945).

There are no formal requirements that a minor must follow to disaffirm a contract. John Edward Murray, Jr., *Murray on Contracts*, 4th ed., § 24. A minor’s return of a purchased object, as Christine did here, is a clear manifestation of intent not to be bound by the contract. *Musser v. Schock*, 95 Pa. Super. 406 (1928).

Donna can raise two arguments in opposition to Christine’s disaffirmance of the contract. Like other jurisdictions, Pennsylvania recognizes that contracts made by minors for what are known as “necessaries” are enforceable. *The Frank Spangler Co. v. Haupt*, 53 Pa. Super. 545, 549 (1913). What constitutes a necessary, however, has no hard and fast meaning. *Smitti v. Roth Cadillac Company*, 145 Pa. Super. 292, 299, 21 A.2d 127, 129 (1941). The meaning of this term depends upon such factors as the minor’s standard of living and particular circumstances, as well as the ability and willingness of the minor’s parent or guardian, if one exists, to supply the needed services or articles. Ultimately, what constitutes a necessary for a particular minor is a question of fact to be decided by a jury based upon all of the circumstances of the case. *Rivera v. Reading Housing Authority*, 819 F. Supp. 1323 (E.D. Pa. 1993). Given the fact intensive nature of the question, Pennsylvania courts have reached different conclusions regarding whether a car is a necessary for purposes of a minor’s disaffirmance of a contract. *Compare State Farm Mutual Automobile Insurance Co. v. Skivington*, 28 D.& C. 4<sup>th</sup> 358 (C.P. Cumberland 1996) (car used by minor to go back and forth to work a necessary preventing disaffirmance of insurance contract) with *Musser v. Schock*, 95 Pa. Super. 406 (1928) and *Dobson v. Rosini*, 20 Pa. D.& C. 2d 537 (C.P. Northumberland 1959) (minor’s purchase of car disaffirmed).

In this particular case, Donna can assert that the car was a necessary for Christine so that she could safely get to her job and continue to live independently of her parents. A court or a jury would have to determine whether these particular facts support the conclusion that a car for a person in Christine’s particular situation is in fact a necessary.

Donna also can contend that Christine failed to disaffirm the contract to purchase the car within a reasonable time and thus ratified the contract. What constitutes “a reasonable time” for disaffirming a contract is dependent upon all of the surrounding circumstances including whether the parties have performed the contract when the minor attained majority and the degree of prejudice to the adult in permitting a longer or shorter reasonable time. *Murray on Contracts, supra*. A thirteen month delay in disaffirming a contract made by a minor has been held to be unreasonable, where the minor repeatedly recognized the contract after attaining majority. *Campbell v. Sears, Roebuck & Co.*, 307 Pa. 365, 161 A. 310 (1932). The lapse of three months after reaching majority before disaffirming a contract has been held to be reasonable. *Haines v. Fitzgerald*, 108 Pa. Super. 290, 165 A. 52 (1933).

The facts here state that Christine did not disaffirm the contract with Donna until seven months after reaching her eighteenth birthday. Additionally, Donna can claim that she was financially prejudiced by Christine’s action because Donna needed the remaining money from the sale of the car to pay her next semester’s tuition. Whether Christine’s delay in disaffirming the agreement by returning the car to Donna was unreasonable also would constitute a question to be decided by the trier of fact in this case.

**2. Donna should defend the claim for the unpaid rent by raising the breach of the implied warranty of habitability and constructive eviction based upon the breach of the implied covenant of quiet enjoyment and will probably prevail.**

Donna can defend the claim for the remaining unpaid rent by raising two common law theories: breach of the implied warranty of habitability and constructive eviction for breach of the implied covenant of quiet enjoyment.

A warranty of habitability is implied in all residential leases in the Commonwealth of Pennsylvania. Under this implied warranty, a landlord does not implicitly promise to provide a perfect or aesthetically pleasing dwelling, but rather to provide leased premises that are free of defects “of a nature and kind which will prevent the use of the dwelling for its intended purpose to provide premises fit for habitation by its dwellers.” *Pugh v. Holmes*, 486 Pa. 272, 289, 405 A.2d 897, 905 (1979). A tenant can use a breach of the implied warranty of habitability either as the basis for a complaint or as a defense or counterclaim to a landlord’s action for rent or possession. *Kuriger v. Cramer*, 345 Pa. Super. 595, 498 A.2d 1331 (1985).

To establish a claim of breach of the implied warranty of habitability in Pennsylvania, a tenant must follow the guidelines described by the Pennsylvania Supreme Court in the landmark case of *Pugh v. Holmes*. First, a tenant must show that the defect or condition at the leased residential premises is “material.” Materiality of the defect or problem is a question of fact to be decided by the trier of fact on a case-by-case basis and takes into consideration such factors as the existence of regulatory violations and the nature, seriousness and duration of the defect or problem. *Pugh v. Holmes, supra*, 486 Pa. at 289, 405 A.2d at 905-06. Second, a tenant must show that he gave notice to the landlord of the defect or condition. Third, the landlord must be afforded a reasonable opportunity to make repairs and have failed to do so. *Id.* at 290, 405 A.2d at 906.

In this case, Donna’s apartment had no heat during the coldest time of the year. The lack of heat at the leased premises forced Donna to keep warm by wearing heavy clothes and using borrowed kerosene heaters. On several occasions, Donna even left her apartment and temporarily moved in with a friend. Donna frequently gave Andy and Bill notice of the lack of heat over a period of several months. Despite Donna’s constant complaints, Andy and Bill failed to send someone to repair the furnace. In *Kuriger v. Cramer, supra*, the Pennsylvania Superior Court held that a tenant whose heating system operated erratically and resulted in frozen pipes stated a claim under *Pugh v. Holmes*. Given these facts,

Donna most likely will be able to successfully defend against the claim for unpaid rent based upon Andy and Bill's breach of the implied warranty of habitability in the lease agreement.

There also is an implied covenant for the quiet enjoyment of the leased premises implied in every lease in Pennsylvania. Under this implied covenant, a landlord promises that neither the landlord nor anyone with a paramount title will wrongfully interfere with the tenant's enjoyment and possession of the leased premises. Boyer, Hovenkamp and Kurtz, *The Law of Property, An Introductory Survey*, 4<sup>th</sup> Ed. § 9.7.

In Pennsylvania, the wrongful actions of the landlord which interfere with the tenant's enjoyment and possession of the leased premises, in whole or in part, are considered to be an eviction. *Kelly v. Miller*, 249 Pa. 314, 94 A. 1055 (1915). Forcible or physical expulsion of a tenant from the leased premises, however, is not necessary to constitute an eviction. *Adler v. Sklaroff*, 154 Pa. Super. 444, 36 A.2d 231 (1944). The modern view is that an eviction can constructively occur when a landlord "deprives a tenant of the beneficial enjoyment of the demised premises. . . ." *Walnut-Juniper Co. v. McKee, Berger & Mansueto, Inc.*, 236 Pa. Super. 1, 5, 344 A.2d 549, 551 (1975).

To properly assert the defense of constructive eviction, the tenant must prove two things. First, the tenant must show that the interference by the landlord with the tenant's enjoyment of the leased premises is of a substantial nature and so injurious to the tenant that it deprives him of all or part of the leased premises. Second, the tenant must in fact give up or abandon possession of the premises. *Kuriger v. Cramer, supra.*, 345 Pa. Super. at 609, 498 A.2d at 1338.

In this case, Donna can show that the apartment was without heat for long periods of time and that she was forced to keep warm by wearing heavy clothes, using borrowed kerosene heaters and moving in temporarily with a friend. Donna frequently complained to Andy and Bill about the lack of heat, but they failed to remedy the problem. After the pipes froze leaving Donna with no running water, she finally moved out of her apartment. Based upon these facts, Donna can demonstrate not only that the lack of heat at her apartment substantially interfered with her enjoyment of the leased premises but also that she abandoned the leased premises. Thus, Donna probably will be successful in asserting a defense of constructive eviction based upon Andy and Bill's breach of the covenant of quiet enjoyment and will not be liable for the unpaid rent on her lease.

**3. Ellen can legally convey Whiteacre because the provision in the deed prohibiting her from transferring the property until a gambling license is awarded in Big City is invalid as a disabling restraint on alienation.**

The power of an owner to dispose of his property is one of the principal incidents of fee simple ownership. *Grossman v. Hill*, 384 Pa. 590, 122 A.2d 69 (1956). An attempt by a testator or a grantor to fetter a fee simple owner by placing absolute restrictions on the sale or transfer of real property constitutes a disabling restraint on alienation. Restatement (Second) of Property, Donative Transfers, § 3.1. Disabling restraints on alienation are against public policy and have no legal effect. *Lauderbaugh v. Williams*, 409 Pa. 351, 186 A.2d 39 (1962).

The Restatement (Second) of Property, Donative Transfers, states:

§ 4.1 Validity of Disabling Restraint

- (1) A disabling restraint imposed in a donative transfer on an interest in property is invalid if the restraint, if effective, would make it impossible

for any period of time from the date of the donative transfer to transfer such interest.

Andy's deed of Whiteacre to Ellen contained an express clause that absolutely prohibits Ellen from conveying the property for a stated period of time – the time period until the gambling license in Big City is awarded. This restriction constitutes a disabling restraint on alienation of Whiteacre and is void. Therefore, Ellen takes Whiteacre free of the restraint and can lawfully convey Whiteacre to Losing Bet.

**4. Because the joint tenancy with right of survivorship was severed by Andy's mortgage, after Andy's death Blackacre is owned by Bill and Ellen as tenants in common.**

Andy and Bill received title to Blackacre as joint tenants with right of survivorship. A joint tenancy with right of survivorship is created by the co-existence of the unities of interest, title, time and possession. *Allison v. Powell*, 333 Pa. Super. 48, 481 A.2d 1215 (1984). The essence of title as joint tenants with the right of survivorship is to vest in two or more persons joint ownership during lifetime, with sole ownership and control passing to the survivor upon the death of the other joint tenant or tenants. *In Re Parkhurst's Estate*, 402 Pa. 527, 167 A.2d 476 (1961). The interests of joint tenants are equal. *Cochrane's Estate*, 342 Pa. 108, 20 A.2d 305 (1941). Each joint tenant holds an undivided share of the whole estate. *Nicholson v. Johnston*, 855 A.2d 97 (Pa. Super. 2004).

A joint tenancy is severable by the action, voluntary or involuntary, of either one of the joint tenants that destroys one of the four required unities. *Sheridan v. Lucey*, 395 Pa. 306, 149 A.2d 444 (1959). Upon the destruction of any of the four unities, the joint tenancy with right of survivorship becomes a tenancy in common. *Hays v. Stephenson*, 192 Pa. Super. 392, 161 A.2d 900 (1960). At the death, the interest of a tenant in common descends or passes by will to his heirs or devisees. Ladner, *Conveyancing in Pennsylvania*, § 1.07 (1979).

In other states, one joint tenant's execution of a mortgage is regarded as simply a lien on title and does not by itself cause a severance. Pennsylvania law, however, provides that an execution of a mortgage by less than all of the joint tenants effectuates a severance of a joint tenancy with right of survivorship. *General Credit Co. v. Cleck*, 415 Pa. Super. 338, 609 A.2d 553 (1992).

The facts state that Andy executed a mortgage on Blackacre. By executing the mortgage, Andy caused a severance in the joint tenancy and resulted in Andy and Bill each owning an undivided one-half interest in Blackacre as tenants in common. When Andy died, his interest in Blackacre passed by will to his niece, Ellen. Therefore, Ellen and Bill are the owners of Blackacre as tenants in common.

**Question No. 6: Facts and Interrogatories**

Al, Ben, and Carol are the sole directors of Small Equipment Company, Inc. ("Smallco"), a Pennsylvania business corporation engaged in the sale and service of construction equipment. Al and Ben, who together with their spouses and children own 900 of Smallco's 1,000 outstanding shares, have worked for Smallco since its formation. Carol is the widow of John, who formed Smallco with Al and Ben. Carol owns the remaining 100 Smallco shares. Carol's involvement with Smallco has been limited to attending shareholder's and director's meetings.

Two weeks ago Paul visited Smallco looking to buy a used bulldozer. Al, Smallco's top salesman, showed Paul a bulldozer sitting on Smallco's sales lot. Al told Paul that the bulldozer previously had been extensively damaged in an accident at a construction site. Al further advised that

the bulldozer had been a trade-in and that Smallco had made extensive repairs to the bulldozer prior to placing it on the sales lot. Al provided Paul with a copy of a certificate signed by Smallco's service manager certifying that the bulldozer was mechanically sound and ready for normal use. Paul asked Al if, in fact, the bulldozer had passed their inspection and was mechanically sound and Al confirmed these facts. Al also told Paul that the bulldozer was being sold "as is—where is." Paul agreed to purchase the bulldozer. Al prepared a confirming letter that was signed by Al and Paul in which Al acknowledged the accuracy of the certificate of the service manager and in which Paul acknowledged receipt of the certificate and the "as is—where is" nature of the sale.

Last week the bulldozer was delivered to Paul's job site. Paul had his mechanic immediately inspect the bulldozer. Paul's mechanic advised Paul that the bulldozer had major defects that would require over \$10,000 in repairs to correct and that the bulldozer should not even be started without first effectuating the repairs.

For the last few months the President of Big Equipment Company, Inc. ("Bigco"), a Pennsylvania corporation, has been engaged in discussions with Al and Ben hoping to convince Al and Ben to merge Smallco into Bigco. Al and Ben have agreed to a merger of the two companies with Bigco to be the surviving corporation. As part of the plan of merger, Smallco's shareholders will receive 1,000 shares of Bigco stock to replace the 1000 existing shares of Smallco stock. Additionally, Bigco has agreed to provide Al and Ben with lucrative employment contracts. Given the value of their employment contracts, Al and Ben are not concerned that the stock Smallco's shareholders are to receive is not of sufficient value to properly compensate for the value of the Smallco shares being replaced in the merger.

When informed of the merger at last week's board meeting, Carol strongly protested. Carol feels the merger will dilute the value of her shares because Bigco is not providing enough stock given the higher current value of Smallco's shares. Al and Ben nonetheless approved the merger at the board meeting and have called a shareholders meeting to ratify the merger as required by Smallco's bylaws.

1. If Paul files an action against Smallco with respect to the defective bulldozer, other than the warranty of good title, what warranties under the Uniform Commercial Code are potentially available for Paul to assert, and will Paul be able to prove what is required to establish a breach of each warranty?
2. If Smallco raises a defense of disclaimer with respect to the available warranty claims, what will be the likelihood of success?
3. Upon receipt of her notice of the shareholder's meeting concerning the merger, what rights does Carol have regarding the diminished value of her shares and what steps should she take to protect her interests?
4. What effect, if any, will a merger, if it occurs, have upon Paul's ability to file a breach of warranty suit?

#### **Question No. 6: Examiner's Analysis**

1. **Paul could assert a claim of breach of express warranty, and breach of the implied warranty of merchantability and fitness for a particular purpose, but would likely only be able to establish a breach of the first two warranties.**

Article II of the Pennsylvania Uniform Commercial Code (the “Code”) generally applies to transactions involving the sale of goods. 13 Pa. C.S.A. §2102. The bulldozer sold by Smallco is a “good” under the Code. 13 Pa. C.S.A. §2105. The Code contains sections dealing with the creation of express warranties as well as warranties that are impliedly created. 13 Pa. C.S.A. §§2313, 2314 and 2315.

Section 2313 of the Code provides, *inter alia*:

(a) General rule.—Express warranties by the seller are created as follows:

(1) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

\* \* \*

(b) Formal words or specific intent unnecessary.—It is not necessary to the creation of an express warranty that the seller use formal words such as “warrant” or “guarantee” or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the opinion of the seller or commendation of the goods does not create a warranty.

13 Pa. C.S.A. §2313.

Al made an express affirmation that the bulldozer was mechanically sound and ready for normal use. Al further provided Paul with a certificate from Smallco’s service manager indicating the bulldozer was mechanically sound and ready for normal use. Al also acknowledged the accuracy of the certificate in the confirming letter. Paul can make a viable argument that these affirmations of fact became part of the basis of the bargain between him and Smallco therefore creating an express warranty. If an express warranty was created the experience that Paul had with the bulldozer should support a claim that the warranty was breached. The bulldozer could not be started without necessary repairs. Additionally, Paul will have to incur significant expense to get the bulldozer back in working order.

The Code also provides for two implied warranties. Section 2314 implies a warranty of merchantability and 2315 a warranty of fitness for particular purpose. It is unlikely that the implied warranty of fitness for particular purpose would be implicated under the facts. For this warranty to apply Smallco would have to have had reason to know the particular purpose for which the bulldozer was required by Paul and that Paul was relying on the skill and judgment of Al to select or furnish a suitable bulldozer. 13 Pa. C.S.A. §2315. The facts do not suggest that this was the case and, therefore, this warranty would not likely be applicable.

Section 2314 provides:

(a) Sale by merchant.—Unless excluded or modified (section 2316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. . . .

(b) Merchantability standards for goods.—Goods to be merchantable must be at least such as:

(1) pass without objection in the trade under the contract description;

\* \* \*

(3) are fit for the ordinary purposes for which such goods are used;

Smallco clearly is a merchant and the bulldozer is not fit for the ordinary purposes for which it is to be used; i.e., a used and reconditioned bulldozer. It clearly appears that this warranty would apply.

**2. If Smallco asserts a disclaimer defense, it will be successful with respect to the claim for breach of the implied warranty of merchantability but not with respect to the claim for breach of express warranty.**

The Code addresses the manner in which a merchant may disclaim express and implied warranties. 13 Pa. C.S.A. §2316. Smallco will try to assert a disclaimer defense to Paul's claim of breach of express warranty. Al clearly stated and Paul acknowledged that the sale was "as is—where is." Section 2316 of the Code addresses exclusion or modification of warranties. Subsection (a) of 2316 provides:

Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this division on parol or extrinsic evidence (section 2202) negation or limitation is inoperative to the extent that such construction is unreasonable.

Since the certificate was referenced in the confirming letter, a parol evidence issue should not arise. The issue, therefore, becomes whether the attempted disclaimer and the express warranty can be read as reasonably consistent. In their treatise on the Code White and Summers comment:

A 'disclaimer' of an express warranty may seem an oxymoron. . . . If the factfinder determines that the seller's statement created an express warranty, words purportedly disclaiming that warranty will still be 'inoperative,' for the disclaiming language is inherently inconsistent. Thus a seller who explicitly 'warrants' or 'guarantees' that a car is without defects may not set up a disclaimer of express warranties when sued for the cost of repairing the clutch.

*White and Summers Uniform Commercial Code*, §12-2 (4<sup>th</sup> Ed. 1972). Accordingly, Paul should be successful in asserting an express warranty claim. See *Morningstar v. Hallett*, 858 A.2d 125 (Pa. Super. 2004) – "as is" clause is inconsistent with the express warranty created by the description of the item as provided in the sales agreement.

If Smallco asserts a disclaimer defense to the implied warranty claim it will be successful. Section 2316(c)(1) provides "unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is," "with all faults" or other language which in common understanding calls the attention of the buyer to the exclusion of warranties and makes plain that there is no implied warranty." The effect of this section will be to exclude all implied warranties as the facts clearly state that the bulldozer was sold "as is—where is". Paul was aware of this language and, thus, his implied warranty claim should fail.

**3. Carol can exercise dissenters' rights and receive fair value for her shares from Smallco provided that she follows certain procedural steps.**

Section 1930 of the Pennsylvania Business Corporation Law of 1988 provides,

If any shareholder of a domestic business corporation that is to be a party to a merger or consolidation pursuant to a plan of merger or consolidation objects to the plan of merger or consolidation and complies with the provisions of Subchapter D of Chapter 15 (relating to dissenters rights), the shareholder shall be entitled to the rights and remedies of dissenting shareholders therein provided, if any.

15 Pa. C.S.A. §1930(a). The BCL does contain certain exceptions to dissenters' rights which are not implicated by the facts since shareholder approval of the merger was required by the bylaws. If the rules are followed the dissenting shareholder is entitled to a valuation of his shares and a buyout by the corporation. 15 Pa. C.S.A. §1571.

In order to avail herself of dissenters rights Carol must (1) prior to the shareholder vote on the proposed merger file with the corporation a written notice of intention to demand fair value for her shares if the proposed action is effectuated, (2) not effect a change in the beneficial ownership of her shares, and (3) not vote her shares to approve the merger. 15 Pa. C.S.A. §1574. If the merger is approved the corporation is then required to provide notice to those who exercised their dissenter's rights that the merger was approved and advise the shareholder on how to demand payment for her shares. 15 Pa. C.S.A. §1575. Upon receipt of this notice Carol should make the required demand to receive fair value for her shares.

Although dissenter's rights would normally be Carol's exclusive remedy, the BCL does provide that in cases of "fraud or fundamental unfairness" one might also seek injunctive relief to prevent the fraud or unfair situation from proceeding. 15 Pa. C.S.A. §1105. Carol might argue that the merger is fundamentally unfair to her because it will result in a diminution in the value of her shares. If, however, those supporting the merger can show a legitimate business reason for consummating the merger the court would likely refuse to grant the injunction.

**4. The merger will not impact Paul's ability to file suit as Bigco as the surviving corporation will become liable on Paul's claim.**

Upon the effectiveness of a merger the constituent corporations become a single corporation and the disappearing corporation ceases to exist as a separate entity. The surviving corporation thereafter becomes entitled to all the rights and benefits of each of the constituent corporations as well as becoming responsible for all of the liabilities of the merged corporation. 15 Pa. C.S.A. §1929. The successor company is responsible for the other company's liabilities where the transaction amounted to a consolidation or merger. *Continental Insurance Co. v. Schneider, Inc.*, 810 A.2d 127 (Pa. Super. 2002), affirmed, 582 Pa. 591, 873 A.2d 1286 (2005). Therefore, if the merger occurs prior to Paul filing suit he will be permitted to file suit against Bigco.

## Grading Guidelines

### Question No. 1

#### 1. Deductibility of Rent

Deductibility of personal residence vs. office rent.

Allocation of rent between business and personal expenses.

4 points

Comments: Candidates should recognize that the personal residence portion of Sam's rent is not deductible, but that the business portion of the rent is deductible as an ordinary and necessary business expense and that Sam's rent must be fairly allocated between his residence and office. Candidates should recognize that as an at-home office it must be used exclusively and regularly as Sam's principal place of business.

#### 2. Conditional Devise

Conditional devise must be strictly construed and reasonable construction of language must be given in favor of beneficiary.

A condition to a devise must be express and not implied.

5 points

Comments: Candidates should discuss how Frank's devises at issue may be conditional and provide an informed discussion of whether the applicable language is in fact conditional.

#### 3. Receipt of Income

Cash basis taxpayers report income when received or under the dominion and control of the taxpayer.

Dividends are included in gross income.

Receipt of a gift is not income.

5 points

Comments: Candidates should recognize that dividends are generally included in gross income and that a cash basis/calendar year taxpayer is required to report income in the year received. Candidates should recognize that the dividends were a gift and, as such, are not included in income. Only if the dividends

were considered to be a transfer by an employer to or for the benefit of an employee, would they be considered income.

#### **4. Gift of Stock**

A completed gift requires intent to make a gift and actual or constructive delivery sufficient to divest the giver of all dominion and invest the recipient therewith.

The transfer of the registration of stock ownership on the books of the corporation can constitute delivery even though the certificates of ownership have not actually been delivered.

6 points

Comments: Candidates should recognize that to make a valid gift there must be an intent to make a gift and actual or constructive delivery of the gift; and that acceptance is a factor. Candidates should apply these principles to the facts in reaching a well reasoned conclusion that Frank made a valid gift of the stock to Sally.

### **Question No. 2**

#### **1. Theft, Robbery, Simple Assault and Recklessly Endangering**

Theft by unlawful taking occurs where a person unlawfully takes or exercises unlawful control over movable property of another with intent to deprive him thereof.

Theft occurs when notwithstanding an existing debt there is no arguable claim of right to the specific property taken.

Robbery occurs where a person in course of committing theft threatens another or intentionally puts him in fear of immediate serious bodily injury.

Simple Assault occurs when one attempts by physical menace to put another in fear of imminent serious bodily injury.

Recklessly Endangering occurs when a person recklessly engages in conduct which places another person in danger of serious bodily injury.

8 Points

Comments: Applicants should discuss the elements necessary to establish the crimes of theft, robbery, recklessly endangering and simple assault and apply the law to the facts in reaching a well reasoned conclusion.

#### **2. Investigative Detention – pat down search**

Under Fourth Amendment temporary detention of person by show of force for investigative purposes constitutes seizure, which must be based on reasonable suspicion rather than a warrant.

Officer conducting investigative detention may conduct pat down search for weapons where officer has reasonable grounds to believe person may be armed and dangerous.

Officer may seize items in pat down search where he immediately recognizes the incriminating character of the item by plain feel.

6 Points

Comments: An applicant should recognize that under the Fourth Amendment the temporary detention of a person for investigative purposes must be supported by reasonable suspicion. An applicant should also recognize and discuss the standards for conducting a pat down search for weapons and seizing the stolen property and apply these principles to the facts in reaching a well reasoned conclusion.

### **3. Equitable Distribution**

The value of property acquired prior to marriage is non-marital property.

The increase in value of premarital assets during the marriage is marital property subject to equitable distribution.

The value of property received by inheritance during the marriage is non-marital property.

The increase in value of any inherited property during the marriage is marital property subject to equitable distribution.

3 points

Comments: Applicants should recognize that both the stock acquired prior to the marriage and the stock inherited during the marriage are considered non-marital property that would not be subject to equitable distribution. Applicants should recognize that the increase in value of both of these assets during the marriage and prior to final separation or as close to the date of the hearing on equitable distribution as possible, whichever date results in a lesser increase, is marital property that would be subject to equitable distribution.

### **4. Lawyer Advertising**

Advertisement cannot contain false or misleading statements about lawyer's services.

Creation of unjustified expectation about results to be achieved is misleading.

Truthful statement can be misleading if it omits a fact necessary to make the lawyer's communication as a whole not materially misleading.

Advertisement is misleading because reference to prior results creates an unjustified

expectation and because Alan omitted the fact that he only represented two prior clients, making the statement as a whole materially misleading.

3 points

Comments: An applicant should recognize that a lawyer's advertisement cannot contain false or misleading statements including ones which create an unjustified expectation about results or omit a fact necessary to make the advertisement not materially misleading.

### **Question No. 3**

#### **1. Negligence (Premises Liability)**

Candidate is expected to discuss the elements of negligence as it pertains to Paula's status as a business invitee of Mel.

Candidate is expected to apply the facts to the applicable principles of law.

7 Points

Comments: The candidate is expected to recognize that Paula was owed certain duties as a business invitee and that based on the facts a cause of action in negligence against Mel would likely be successful.

#### **2. Comparative Negligence**

Candidate is expected to identify the elements needed to support an argument that Paula was comparatively negligent.

Candidate is expected to apply the facts to the principles regarding comparative negligence.

4 Points

Comments: The candidate is expected to recognize that an argument could be made that Paula was comparatively negligent, discuss the effects if such argument was successful, and recognize that it would likely not be successful in substantially limiting or barring her action under these facts.

#### **3. Evidence**

Candidate is expected to identify the arguments that should be made in response to the objection to the introduction of the first failure of the rack based upon relevance grounds.

The candidate is expected to identify the arguments that should be made in response to the objection to the introduction of the subsequent rack failure based on relevance grounds.

4 Points

Comments: The candidate is expected to recognize the arguments in response to the objection to the introduction of the two failures of the weight rack on relevance grounds.

**4. Accord and Satisfaction**

Candidate is expected to identify the principles of accord and satisfaction.

The candidate is expected to apply the facts to the stated principles.

5 Points

Comments: The candidate is expected to identify the principles governing accord and satisfaction and apply the applicable facts to those principles.

**Question No. 4**

**1. First Amendment – Free Speech**

First Amendment right to free speech applies to government employees where speech involves matter of public concern.

Balancing test is used to balance employee interest in commenting vs. employer interest in promoting efficiency of public services.

Factors to be considered include the disruption of office, time and place of comments and the context of the speech.

5 Points

Comments: Candidates should recognize that the First Amendment right to free speech applies to government employees where the speech involves matters of public concern, such as the discrimination issues discussed by Tom and that a balancing test is used to weigh the competing interests of the employee and the government employer. Candidates should identify the factors considered in balancing the interests and apply these factors to the facts to reach the conclusion that the suspension was improper.

**2. The Fourth Amendment**

Searches and seizures by government employers are subject to Fourth Amendment.

Employees have reasonable expectation of privacy in desk, file cabinets absent any contrary practices.

Warrant not required for workplace search by Government employer – search must be reasonable.

Search must be reasonable at inception (i.e. related to investigation or work purpose.)

Search must be reasonable to scope (i.e. related to accomplish work related purpose.)

5 Points

Comments: Candidates should recognize that the Fourth Amendment is applicable to searches by government employers, that public employees can have a reasonable expectation of privacy in their desk and that a search must be reasonable under the circumstances. Candidates should recognize that the search must be reasonable at its inception and in scope and discuss the facts as they relate to these requirements in reaching a conclusion that the search was unreasonable.

### **3. Conflict of Interest**

Imputed disqualification rule.

If a conflict exists attorney must be able to provide competent and diligent representation to both clients.

Obtain informed consent of both clients.

6 Points

Comments: Candidates should recognize that a conflict of interest exists, discuss whether the conflict is consentable (i.e. whether Adam can competently and diligently represent both parties) and describe what must be done to obtain informed consent. Candidates should recognize that Partner is bound by the same requirement as Adam based on an imputed disqualification.

### **4. Title VII – Retaliatory Discharge**

Employer can not take adverse action against employee in retaliation for employee engaging in protected activity under Title VII.

Submission of letter in support of claim of discrimination is protected activity.

4 Points

Comments: Candidates should recognize that retaliation for engaging in protected activity is prohibited by Title VII, identify the elements for a prima facie case of retaliatory discharge and apply these elements to the facts in reaching a well reasoned conclusion.

## **Question No. 5**

### **1. Defense of Minority**

Minority or lack of capacity can be asserted as a defense to a contract.

Contract made by a minor is voidable.

Contract made by a minor involving a necessity or necessary, or which is not disaffirmed by the minor within a reasonable time after reaching majority will be enforceable.

4 Points

Comments: Candidates should recognize that minority can be asserted as a defense to a contract, and that contracts made by minors are voidable, not void. Candidates should also recognize that a contract made by a minor will be enforceable when the contract is for necessities or when the contract has not been disaffirmed by the minor within a reasonable time after reaching majority.

## **2. Implied Warranty of habitability, constructive eviction**

Warranty of Habitability is implied in all residential leases.

In order for the warranty of habitability to be breached, the defect or condition at the leased premises must be material, the tenant must give notice of the defect to the landlord and the landlord must have a reasonable opportunity to make repairs and fail to make the repairs.

There is a constructive eviction where the implied covenant for the quiet enjoyment of leased premises is breached.

To establish a constructive eviction, there must be substantial interference with quiet enjoyment of leased premises, such that it deprives the tenant of some or all of the leased premises, and the tenant must abandon the premises.

7 Points

Comments: Candidates should identify the warranty of habitability and constructive eviction based on a breach of the warranty of quiet enjoyment as defenses that should be raised, discuss the elements of each defense and apply these elements to the facts in reaching a well reasoned conclusion.

## **3. Restraint on Alienation**

A disabling restraint on alienation makes it impossible to transfer property within a period of time.

A disabling restraint is void, but the original transfer is valid.

4 Points

Comments: Candidates should recognize that the gift involves a disabling restraint on alienation, that as a result the restraint is void but the transfer valid, and reach the conclusion that Ellen can sell the property.

#### **4. Joint Tenancy with right of survivorship**

Andy and Bill held Blackacre as joint tenants with right of survivorship.

This interest is severable by the action of either joint tenant, and in Pennsylvania the mortgage on the property by one of the joint tenants operates to sever the joint tenancy with right of survivorship.

Upon severance, the joint tenancy with right of survivorship becomes a tenancy in common.

The interest of a tenant in common can be devised or bequeathed.

5 Points

Comments: Candidates should recognize that Andy and Bill held Blackacre as joint tenants with a right of survivorship, that such an interest can be severed by one of the joint tenants, and that a mortgage by one of the joint tenants severs the original interest converting it into a tenancy in common which can be devised, with the result that Ellen and Bill own Blackacre as tenants in common after Andy's death.

#### **Question No. 6**

##### **1. and 2. Warranties/Disclaimers**

Affirmations that become part of basis of bargain create express warranty.

Disclaimers of express warranties are only effective if consistent with warranty.

Warranty of fitness not likely applicable.

Warranty of merchantability would apply but is disclaimed by "as is" language.

12 points

Comments: The candidates should discuss the elements required for each of the warranties, and apply these elements to the facts in reaching a well reasoned conclusion as to the existence of each warranty. Candidates should also discuss the effect of the disclaimer language on each of the warranties.

##### **3. Dissenters' Rights**

Merger is a fundamental change giving rise to dissenters' rights.

Procedural steps must be followed to avail oneself of dissenters' rights.

6 points

Comments: The candidates should recognize the availability of dissenters' rights and discuss the steps to be followed to avail oneself of dissenters rights.

#### **4. Liability for Claims After Merger**

Liabilities of the disappearing corporation flow to the surviving corporation.

2 points

Comments: Candidates should discuss the effect of a merger on the outstanding liabilities of the corporation that ceases to exist.

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Supreme Court of Pennsylvania  
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Pennsylvania Bar Examination  
July 25 and 26, 2006

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PERFORMANCE TEST  
July 25, 2006

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**FILE**

**William Jones & Associates  
789 Main Street  
Springside, PA**

**MEMORANDUM**

To: Applicant

From: William Jones

Date: July 25, 2006

Subject: Barry Brown vs. Cool Cuts, Inc.

Our office represents Cool Cuts, Inc., which is owned by Orson Owens. Cool Cuts, Inc., operates a chain of barbershops in Pennsylvania. Owens recently received a demand letter from a law firm representing Barry Brown, a barber at one of Cool Cuts' shops. The demand letter states that Mr. Brown plans to file suit against the corporation if Cool Cuts does not satisfy his demands.

The demand letter alleges that Cool Cuts violated the Age Discrimination in Employment Act ("ADEA"). As you will see from the notes of my interview of Owens, he claims that Brown is not an employee of Cool Cuts, Inc., but is an independent contractor. I have explained to Owens that the ADEA only applies to "employees."

Your assignment is to draft an opinion letter to Owens addressing the following questions: (1) Is Mr. Brown an "employee" under the ADEA?; and, (2) If Mr. Brown was deemed an employee under the ADEA, would he be successful in establishing a claim of age discrimination under the ADEA? Be sure to fully discuss all aspects of the merits of the ADEA claim regardless of your conclusion as to Mr. Brown's status as an employee.

Owens would like to aggressively defend Mr. Brown's claim; however, Owens has advised me that he is concerned about possible future claims of discrimination that might arise as a result of an adverse decision. Cool Cuts wants to settle this matter expeditiously if there is a reasonable possibility that Mr. Brown will be found to be an employee for purposes of the ADEA, and that his age discrimination claim will be successful on the merits. Therefore, your opinion letter should include a recommendation concerning the settlement of Mr. Brown's claim.

The File and Library which are provided contain the only facts and legal principles you should consider and rely upon in completing this assignment. In preparing your opinion letter, you should follow the format for firm opinion letters as set forth in the attached memorandum.

**WILLIAM JONES & ASSOCIATES**  
**Attorneys At Law**

Date: January 1, 1995

To: All Associates

From: William Jones, Managing Partner

Re: Format for opinion letters

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All associates should use the following guidelines when preparing opinion letters for clients of William Jones & Associates.

1. Use an appropriate salutation to begin the letter.
2. At the beginning of the opinion letter, clearly identify and restate the question(s) raised. "You have asked for an opinion regarding . . ." is an example of an appropriate way to begin the body of the letter and introduce the client's question(s).
3. Briefly state your conclusion(s) to the question(s) raised by the client. Words such as "probably", "possibly" and "not likely" may be used to qualify your conclusion if the outcome is less than certain.
4. Following your conclusion(s) to the question(s) raised, provide an analysis of the issues raised by the question(s), showing how the relevant authorities as applied to the facts lead to your conclusions. If there are facts and/or legal principles relevant to any point or element in your analysis which could be argued to support a different conclusion, identify and discuss those principles/facts.
5. If more than one question has been raised, state your conclusion and analysis for each question independently. State the conclusion and analysis for the first question before you address the next question.
6. If you are asked to provide a recommendation regarding the possible settlement of a claim, your recommendation should be based on an assessment of the client's likelihood of success in asserting or defending the claim, the potential damages that could be awarded, the potential for future liability if the claim succeeds, and the client's interests in settling the claim. If settlement is recommended, the terms of the recommended settlement should be set forth.
7. The opinion letter should be straightforward, logical, and in language that a layperson can understand.
8. Any specific instructions provided by a managing partner in a particular case should be incorporated in your opinion letter.

**Askew, Burns and Cunningham**  
Attorneys at Law  
9876 Center Street  
Springside, PA

July 1, 2006

Orson Owens, President  
Cool Cuts, Inc.  
246 Village Square  
Springside, PA

Dear Mr. Owens:

Our firm represents Barry Brown, an employee of Cool Cuts, Inc. Mr. Brown has been discriminated against on the basis of his age in violation of the Age Discrimination in Employment Act. In December 2005, Mr. Brown was unlawfully transferred from the downtown Springside Cool Cuts barbershop to a barbershop in Lakeview. Mr. Brown was transferred because he was the eldest barber in the downtown Springside Cool Cuts barbershop, and also because Mr. Brown and his clientele no longer represented the downtown barbershop's desire for a more youthful image.

Mr. Brown was transferred despite having a large client base and high sales volume. Once transferred, he lost clients because some did not desire to travel to Lakeview to receive his services.

Prior to his transfer, Mr. Brown's annual income was approximately \$50,000 per year. During the first six months of this year, Mr. Brown's earnings declined by approximately 20%. He has earned \$20,000 as of June 30, 2006. It is expected that he will earn only \$40,000 for 2006.

I hope we can reach agreement on an appropriate resolution to compensate Mr. Brown for his loss of income. Our demand is for \$100,000 to compensate for the projected loss of earnings for the next 10 years until Mr. Brown reaches age 65, at which point he intended to retire. Alternately, Mr. Brown is willing to accept \$5,000 for his lost salary to this point and an immediate transfer back to the downtown barbershop. Resolution of this matter will avoid a costly and embarrassing lawsuit against Cool Cuts, Inc. I encourage you to resolve this matter.

Sincerely,

Mark Askew  
Mark Askew, Esq.  
For the Firm

Brown/Cool Cuts.ltr

**Notes of Interview with Orson Owens**  
**July 5, 2006**

Orson Owens, the owner and President of Cool Cuts, Inc., came to our office because he received a demand letter from an attorney representing one of Cool Cuts' barbers, alleging a violation of the Age Discrimination in Employment Act. Cool Cuts has grown by locating profitable independent barbershops and purchasing them from the owners. Owens focuses on barbershops with established clientele, staffed by properly licensed professionals, and located in attractive neighborhoods. For the past 18 months there have been 30 Cool Cuts barbershops operating in Pennsylvania. Cool Cuts barbershops are trend-setting barbershops. Cool Cuts' marketing efforts are largely directed to young, urban professionals ages 25-35. The barbershops provide a full range of hair care services and also sell hair care products to their customers.

Each barbershop is staffed by several employees that include a manager and a few unlicensed hair assistants. The hair assistants wash clients' hair, and perform other maintenance duties in the barbershops. Barbers do not have input into hiring decisions regarding managers and unlicensed hair assistants.

When purchasing a barbershop, Orson often enters into an arrangement to retain the barbers so that they continue to perform services for Cool Cuts. When he interviews a person for a barber position, Owens provides them with the attached Notice of Terms. Orson further informs them that, "You will not be considered a Cool Cuts employee. You will be an independent contractor responsible for paying your own taxes. You will be expected to provide your own clientele. Cool Cuts may provide you with some clients as new customers seek our services; however, you will be expected to maintain and increase the size of your client base." Cool Cuts does not enter into written agreements with barbers. Owens believes that barbers are

not employees of Cool Cuts and that only the salaried managers and unlicensed hair assistants are employees.

Cool Cuts' barbers in centrally located shops earn as much as 10% more than barbers in other Cool Cuts shops. In 1995, Mr. Brown sold his barbershop to Cool Cuts and began working in Cool Cuts' downtown barbershop. Mr. Brown was 45 when he became a Cool Cuts barber. Based on his excellent reputation, Mr. Brown was offered a position in Cool Cuts' prime location – its flagship barbershop in downtown Springside. From 1996 through December 2005, Mr. Brown worked only at the downtown shop.

Each Cool Cuts' barbershop has a station or seating hierarchy determined by Owens. Barbers at the rear are considered "first chair" barbers. Lesser skilled barbers work at the front of the shops. Only barbers with the highest skills work at the downtown barbershop; therefore, barbers working in the rear of that shop earn substantially more than their counterparts because new clients frequently request their services. Mr. Brown's first station was near the front of the barbershop, but by the year 2000 he was a first chair barber and remained so until his transfer.

When Mr. Brown began working for Cool Cuts, approximately 30% of his clients were in Cool Cuts' targeted age range, and he catered to their desires for the younger and trendier hair cuts, colors, and styles. Now for the most part, however, his clients are men over 40 who opt for more conservative and traditional styling. Clients within this group have grown to about 90% of his total client base. He maintained a large client base which entitled him to the highest commission rate. He was the second highest sales producer at the downtown shop.

Mr. Brown was the oldest barber at the downtown shop. None of the other barbers were over 40. They frequently joked that Mr. Brown and his clients were the "senior citizens" of the barbershop. Although Cool Cuts did not require it, in order to stay current with the latest hair

styling trends many of the younger barbers frequently attended hair demonstrations. Mr. Brown did not attend any hair demonstrations. The younger clients often requested the latest styles, which included different layering and coloring techniques.

Mr. Brown preferred to provide the classier, traditional styles and services to his clients. If a new client requested trendier services, Mr. Brown simply referred them to other barbers in the shop. It became clear that Mr. Brown only wanted to work with more conservative clients. Some barbers began to complain to Owens about Mr. Brown's refusal to "change with the times."

Owens spoke with Mr. Brown and confirmed that he refused to perform some services that younger clients requested. Owens informed Mr. Brown that he really did not want customers turned away. Mr. Brown replied that no customers were being turned away; instead they were simply referred to other barbers.

In late 2005, Owens had the opportunity to lease space in Springside's new corporate center, which was about 5 minutes from the existing downtown shop. If a new barbershop was located in the corporate center, Owens estimated that the sales would increase by approximately 30% over the existing downtown location. He also believed that the new facility would attract more young professionals, thus enhancing Cool Cuts' image as a trend-setting barbershop. Owens decided to relocate the downtown barbershop to the new space. The new facilities were somewhat smaller than the existing downtown barbershop. Therefore, Orson had to transfer two barbers from the downtown shop to other Cool Cuts' locations.

Owens decided to transfer Mr. Brown and another barber to other barbershops. The other barber had the lowest sales volume at the downtown barbershop. Both barbers were transferred to the Cool Cuts shop in nearby Lakeview, Pennsylvania. When Owens informed Mr. Brown of

his transfer, Mr. Brown objected and stated that other barbers should be transferred instead of him. Owens advised Mr. Brown that his decision was based on the fact that Brown did not want to provide the trendier cuts that would be requested by an increasing number of young patrons at the new facility. Owens also told Brown that his decision was final and indicated that although he sincerely wanted Mr. Brown to stay with the company, Mr. Brown could either transfer or leave Cool Cuts.

In an attempt to appease Mr. Brown, Owens assured Mr. Brown that although other barbers at the Lakeview shop would likely object, Mr. Brown would retain his first chair barber status when he was transferred to the Lakeview barbershop. Reluctantly, Mr. Brown agreed to the transfer. He transferred to the Lakeview shop in December 2005. Since then Mr. Brown has lost some of his existing customers because they did not want to travel to Lakeview, and his income has declined by approximately 20%. Nevertheless, Mr. Brown produces sales exceeding that of the other Lakeview barbers.

Owens concluded the interview by saying that age had nothing to do with his decision to move Mr. Brown. He questioned how Cool Cuts could possibly be liable for age discrimination when Mr. Brown is still employed as a first chair barber, and Owens's decision to transfer Mr. Brown was based on the fact that Mr. Brown preferred to cut in a traditional style which attracted older clientele, inconsistent with Cool Cuts' downtown barbershop's image as a trendsetter.

### **Notice of Terms for Cool Cuts Barbers**

1. **Graduated Commission Scale** – New barbers receive 50% of their sales; more experienced barbers with an established clientele receive the standard rate of 60% of their sales; very experienced barbers with the largest clientele receive 70% of their sales. Experience level is to be determined by Cool Cuts.
2. Barbers must wear Cool Cuts' uniforms while providing hair care services.
3. Barbers will provide their own styling tools, including clippers, scissors, etc.. Barbers may only use hair care products sold in Cool Cuts' barbershops.
4. Prices for all services are determined by Cools Cuts. Barbers shall not deviate from the standard price schedule.
5. Barbers retain complete discretion to style hair and to decide the type of services they will render to customers, based on customer requests.
6. Barbers will be paid by check weekly. No taxes or other deductions will be taken from paychecks. Annually, barbers will be issued I.R.S.1099 forms rather than W-2 forms.
7. Cool Cuts will provide professional liability insurance for all barbers. Each barber must pay Cool Cuts an annual premium of \$125 to cover this expense.
8. Cool Cuts will not provide any health and welfare benefits to barbers.
9. All Cool Cuts' barbershops are open Monday through Saturday from 9:00 a.m. to 8:00 p.m. Barbers are free to schedule their own hours; however, barbers must work a minimum of 30 hours per week. Barbers may work as many hours over 30 as they choose.
10. Barbers are encouraged, but are not required, to sell hair care products to customers.

# **LIBRARY**

Age Discrimination in Employment Act, 29 U.S.C. §621 et. seq.

**29 U.S.C. § 623. Prohibition of age discrimination**

(a) Employer practices

It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

\*\*\*

**29 U.S.C. § 630. Definitions**

For the purposes of this chapter—

\* \* \*

(f) The term "employee" means an individual employed by any employer except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision. The term "employee" includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country.

**29 U.S.C. § 631. Age limits**

(a) Individuals at least 40 years of age

The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age.

United States District Court  
E.D. Pennsylvania

Frank J. BATTISTONE, Plaintiff

v.

SAM JON CORPORATION, Defendant

**No. Civ.A. 00-5196**

Oct. 4, 2002

#### MEMORANDUM

Plaintiff Frank J. Battistone alleges discrimination on the basis of age by his former employer, defendant Sam Jon Corporation (“Sam Jon”), in violation of the Age Discrimination in Employment Act (“ADEA”), 29 U.S.C. §621 *et seq.* . . . Mr. Battistone also asserts a state law claim for unjust enrichment. Before the court is Sam Jon's motion for summary judgment, brought pursuant to Federal Rule of Procedure 56(c). For the following reasons, the motion will be granted in part and denied in part.

#### Factual and Procedural Background

From 1995 to 1999, Mr. Battistone worked for Sam Jon and two companies related to Sam Jon but not named as parties in this suit (Klein-Hardt, Inc. and Anthony Home Improvement, Inc.) as a telemarketer salesman. By all accounts, Mr. Battistone was originally employed as an independent contractor and paid on a commission basis. From his initial hiring through the termination of his employment in October 1999, Mr. Battistone's relationship with Sam Jon went through a series of changes in both job description and pay structure. Mr.

Battistone eventually was given responsibility for supervision of Sam Jon's telemarketing center, which involved hiring and training Sam Jon telemarketing employees. At the end of his tenure with Sam Jon, Mr. Battistone was receiving a paycheck and believed that he was considered a regular employee of Sam Jon. He alleges in this suit that Sam Jon owes him substantial sums for commissions he earned over the years. For its part, Sam Jon insists that Mr. Battistone's status as an independent contractor was still intact at the time he left the company, and that the pay Mr. Battistone received was a “draw on commissions.” Mr. Battistone denies any knowledge that the checks he received were merely an advance on unearned commissions and alleges that the regular checks represented his base pay, to be supplemented (not supplanted) by commissions earned.

\* \* \*

Just as the parties differ in their interpretation of Mr. Battistone's pay structure, so too is there considerable dispute regarding the circumstances of his separation from Sam Jon. Stephen Klein, a member of Sam Jon's management, avers that, in an October 1999 meeting, he (1) told Mr. Battistone that the telemarketing department (of which Battistone was the supervisor) was having problems with customer lists and complying with a client's regulations, and so was not profitable, (2) informed Mr. Battistone that he could not continue as the telemarketing supervisor, and (3) gave Mr. Battistone several options to work for corporations related to Sam Jon. Mr. Battistone admits that he was provided with some alternative employment choices, but complains that they were in an untested department with uncertain compensation. Ultimately, Mr. Battistone refused the

alternative positions and left the employ of Sam Jon. The telemarketing department, according to Sam Jon, operated for only a few more weeks before shutting down for several months.

Mr. Battistone brought the instant lawsuit in October 2000, alleging that he suffered from age discrimination while at Sam Jon. The complaint notes that a member of management made derogatory comments about older people, that Battistone's eventual replacement in the telemarketing department sabotaged Battistone's sales leads, and that Battistone was humiliated in front of subordinates. On September 10, 2001, Sam Jon filed a motion for summary judgment on a number of grounds: (1) Mr. Battistone was an independent contractor of Sam Jon and thus was not an "employee" within the meaning comprehended by the ADEA; . . . (3) Mr. Battistone was not terminated by Sam Jon, but voluntarily quit; (4) Mr. Battistone has not established a prima facie case for discrimination and, further, cannot prove pretext; (5) Mr. Battistone's unjust enrichment claim must be dismissed because his claim is based on an express contract; . . . (7) Mr. Battistone's claim for emotional distress damages is not permitted under the ADEA.

\* \* \*

#### *Battistone's Employment Status*

Sam Jon asserts that Mr. Battistone was an independent contractor, and thus precluded from obtaining relief under the ADEA, which provides redress only to "employees." *EEOC v. Zippo Mfg. Co.*, 713 F.2d 32, 35-36 (3d Cir. 1983); see 28 U.S.C. §§ 623(a), 630(f). In the absence of disputed material underlying facts, whether a worker is an "employee" for ADEA purposes is a question of law for the court. (citation

omitted) However, because the parties dispute a number of material facts relevant to the determination of Mr. Battistone's employment status, this court cannot rule as a matter of law that Mr. Battistone is not an "employee" entitled to ADEA protection.

Unfortunately, the ADEA's definition of "employee" is somewhat circular: "The term 'employee' means an individual employed by any employer..." 29 U.S.C. §630(f). Therefore, to determine whether Battistone was, in the eyes of the law, an "independent contractor" or an "employee" of Sam Jon, this court must rely upon the common-law agency test. *See Nationwide Mut. Ins. Co. v. Darden*, 530 U.S. 318, 112 S.Ct. 1344, 117 L.Ed.2d 581 (1992) (holding that whenever Congress does not helpfully define the term "employee," the common-law agency test is appropriate); (other citations omitted) *Darden* set forth the relevant factors under the test as:

- (1) the hiring party's right to control the manner and means by which the product is accomplished;
- (2) the skill required;
- (3) the source of the instrumentalities and tools;
- (4) the location of the work;
- (5) the duration of the relationship between the parties;
- (6) whether the hiring party has the right to assign additional projects to the hired party;
- (7) the extent of the hired party's discretion over when and how long to work;
- (8) the method of payment;
- (9) the hired party's role in hiring and paying assistants;
- (10) whether the work is part of the regular business of the hiring party;
- (11) whether the hiring party is in business;
- (12) the provision of employee benefits; and
- (13) the tax treatment of the hired party.

(citation omitted)

Mr. Battistone has introduced significant evidence that would weigh in favor of a finding of employee status under the multi-factor test in *Darden*: Sam Jon played a role in determining how Mr. Battistone performed his work, . . . ; all of the equipment Mr. Battistone used was owned by Sam Jon or a related corporation, . . . ; the office space in which Mr. Battistone labored was owned by Sam Jon or a related corporation, . . . ; Mr. Battistone had been working for Sam Jon for five years, . . . ; Mr. Klein, while refusing to characterize Mr. Battistone's compensation as a "salary," has acknowledged that a document stating that Battistone "started salary" in October of 1997 was "accurate" and was prepared by his bookkeeper or office manager, . . . ; and the telemarketing department was part of Sam Jon's regular business (the department accounted for twenty percent of Sam Jon's sales) . . . .

To be sure, some of the *Darden* factors point toward characterizing Mr. Battistone as an independent contractor: he had some control over his hours, he never received benefits, and tax filings for him were submitted on IRS Form 1099 (which is appropriate for an independent contractor). Nonetheless, construing the facts in a light most favorable to Mr. Battistone, this court finds that Mr. Battistone has presented sufficient evidence from which a reasonable jury could determine that he was in fact an employee of Sam Jon, not an independent contractor.

\* \* \*

#### McDonnell Douglas *Framework*

The next ground for summary judgment that Sam Jon raises challenges Mr. Battistone's prima facie case for age discrimination. In addition, Sam Jon argues, even if the prima facie case has been adequately established,

Mr. Battistone has failed to show that Sam Jon's nondiscriminatory explanation for terminating his employment was pretextual. This court finds that Mr. Battistone has marshaled sufficient evidence to survive summary judgment on both issues.

The familiar framework established by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), governs ADEA cases such as this one. *McDonnell Douglas* and its progeny set out a three-step burden-shifting scheme: (1) the plaintiff must first show a prima facie case raising an inference of discrimination, (2) the burden of production then shifts to the defendant to advance a legitimate, nondiscriminatory reason for the alleged adverse employment action, and (3) if the employer meets its burden of production, the plaintiff must show that the nondiscriminatory reason was pretextual. (citation omitted)

Sam Jon alleges that the facts alleged by Mr. Battistone fail to present a prima facie case under *McDonnell Douglas*, which requires (in the ADEA context) that the plaintiff show (1) membership in a protected group, *i.e.*, that he was over forty years of age, (2) qualification for the job in question, (3) an adverse employment action, and (4) circumstances, *e.g.*, replacement by a younger person, supporting an inference of discrimination. (citation omitted) Specifically, Sam Jon asserts that Mr. Battistone was not actually discharged, and that Mr. Battistone was not replaced by a younger employee.

Because Mr. Battistone was offered the choice to stay on with Sam Jon in a different capacity when he was removed from his existing position, Sam Jon claims that a discharge never occurred. Therefore, the defendant insists, the parting of ways of

employer and employee was effected by Mr. Battistone's voluntary resignation. However, there is no question that Mr. Battistone's pay and job conditions were to change. Mr. Klein testified that Battistone's pay "would probably have to change," and that Battistone was told he would not be permitted to continue working for Sam Jon (or the other four corporations) in the same capacity. Mr. Battistone, for his part, claims that the alternative positions Klein mentioned were unacceptable, involving uncertain compensation in untested areas of the companies' business. Importantly, one need not be actually "discharged" to make out a claim under the ADEA. The text of the statute itself states that an employer may not discriminate with respect to "compensation, terms, conditions, or privileges of employment."<sup>29</sup> U.S.C. §623(a)(1). The case law makes explicit that a demotion constitutes an adverse employment action under the ADEA. (citation omitted). Therefore, by showing that Sam Jon sought to at least reduce his pay and reassign him, Mr. Battistone has shown that an adverse employment action occurred, even if he was not technically "discharged."

Sam Jon also claims that the department in which Mr. Battistone worked folded soon after his departure, so that there was no replacement by a younger employee. Mr. Battistone, however, testified that he was told by Mr. Klein that Mr. Battistone "was no longer the telemarketing manager" and that "Phil Flores was going to take over the telemarketing room." There is some evidence that, for at least some time after Mr. Battistone was removed from his telemarketing position, Phil Flores (then 31 years of age) was performing functions similar to those for which Mr. Battistone had been responsible.

Mr. Battistone has satisfied the prima facie showing required to overcome a summary judgment motion. As is appropriate in the second phase of the three-step burden-shifting *McDonnell Douglas* framework, Sam Jon has responded by alleging that a legitimate nondiscriminatory reason motivated its decision to alter Battistone's employment status. Specifically, the telemarketing department was losing money and had failed to comply with a client's regulatory audit. Once the defendant has proffered a nondiscriminatory reason for an action, the burden of production returns to the plaintiff, who must show pretext. The Third Circuit, in expounding upon the third step in the *McDonnell Douglas* framework, has established two means by which a plaintiff may defeat a motion for summary judgment. Namely, the plaintiff must submit evidence "from which a factfinder could reasonably either (1) disbelieve the employer's articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action." *Fuentes v. Perskie*, 32 F.3d 759, 764 (3d Cir. 1994). Mr. Battistone's submissions to this court appear to rely upon the first option mentioned by the *Fuentes* court.

When pursuing the first of the two *Fuentes* alternatives to overcome summary judgment, "the non-moving plaintiff must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder *could* rationally find them 'unworthy of credence'." (citation omitted) Mr. Battistone has pointed to certain aspects of Sam Jon's explanations that a fact-finder could find to be materially inconsistent. Telemarketing continued for some time after

Mr. Battistone's departure, and several months after it was discontinued, the department was re-established as a going concern. Felipe Flores testified that after Mr. Battistone left, Flores stepped in to supervise the telemarketing operation, and continued to do so until a crucial customer list became unavailable. From Flores's testimony, read in the light most favorable to Mr. Battistone, a fact-finder could conclude that the factors precipitating the folding of the telemarketing department were not present at the time Mr. Battistone left Sam Jon. Further, a fact-finder might find evidence of pretense in Mr. Klein's statement, contrary to his assertion that the telemarketing department folded because of problems with a client's customer lists, that Battistone was discharged for "lack of performance." Accordingly, summary judgment on this issue must be denied.

\* \* \*

## Conclusion

In an order accompanying this memorandum, defendant's summary judgment motion is granted on plaintiff's claim for unjust enrichment and plaintiff's claim for emotional distress damages based on the ADEA, and denied in all other respects.

## Performance Test Question – Grading Guidelines

### OVERVIEW

This Performance Test presents a situation where the Applicant’s law firm has been contacted by the owner of a chain of barbershops. The owner received a demand letter from a law firm representing a barber working in one of the corporation’s barbershops. The demand letter claims that the corporation violated the Age Discrimination in Employment Act by unlawfully transferring the barber to a less desirable location because of his age. The barber demands \$100,000 to compensate him for loss of earnings. The barber is also willing to accept \$5,000 and an immediate return to his former downtown location.

The assignment requires the Applicant to prepare an opinion letter to the client advising him: (1) whether the barber will be considered an “employee” instead of an independent contractor; and (2) whether the barber will be successful in establishing the age discrimination in employment claim. The applicant is also required to provide a recommendation for settlement.

This task requires the Applicant to objectively analyze the law to determine Mr. Brown’s employment status, and to determine whether he will be able to establish a claim of age discrimination under the ADEA. The Applicant must also make a recommendation, based on Mr. Brown’s employment status and the strength of his claim, regarding whether the client should settle the matter, and if so, on what terms.

### FORMAT

**1 Point**

Following directions is an important part of the Performance Test. The Applicant should follow the instructions that are provided for preparing a client opinion letter. Each question raised by the client should be separately identified, answered with a short conclusion, and followed by an objective analysis of the relevant legal authority and facts applicable thereto. The client letter should conclude with a recommendation regarding settlement.

### CONTENT

#### **Barry Brown will probably be found to be an employee of Cool Cuts. (8 Points)**

Owens’ statements to barbers that they are not employees of the corporation do not control the barbers’ employment status, rather, the determination of whether a worker is an employee for ADEA purposes will be based on the use of the common-law agency test and the factors promulgated thereunder. *Battistone*.

An objective analysis of Mr. Brown’s employment status will include identification of the factors that weigh both in favor of, and against, a finding that he is a Cool Cuts employee.

Factors that weigh in favor of concluding that Mr. Brown is an “employee” under the ADEA include:

1. The work Mr. Brown performed for Cool Cuts was provided at the corporation's facilities. The work was performed at a specific barbershop and chair within the barbershop as directed by Cool Cuts.
2. Cool Cuts exercises a large degree of control over the manner in which services were provided including requiring that uniforms be worn, establishing a minimum number of hours to be worked, exclusive use of Cool Cuts' hair care products, and setting prices for services rendered.
3. Mr. Brown worked for Cool Cuts for a substantial period of time - 11 years.
4. Cool Cuts pays its barbers weekly based on a commission scale reflecting experience levels determined solely by Cool Cuts.
5. Barbers have no discretion in hiring assistants and other Cool Cuts personnel.
6. Cool Cuts is in business, operating 30 barbershops, and the services provided by barbers, such as Mr. Brown, are a regular and integral part of the business.

Factors that weigh in favor of concluding that Mr. Brown is an independent contractor to whom the ADEA does not apply include:

1. Barbers are able to establish their own working hours.
2. Barbers exercise independent stylistic discretion in providing services to customers.
3. Barbers are expected to establish, maintain, and increase a client base.
4. Barbers are paid as a percentage of their sales, do not have deductions taken from paychecks and receive 1099's annually.
5. Barbers are not provided with health and welfare benefits.
6. Barbers provide their own tools.
7. Barbers pay for their own professional liability insurance.

Although there are factors that support a finding that Barry Brown is an independent contractor, there are other factors that more heavily weigh in favor of finding that Barry Brown will be an employee under the ADEA.

**It is possible that Mr. Brown will be successful in proving his claim of age discrimination. However, his claim will only survive summary judgment if a court determines that Cool Cuts' legitimate non-discriminatory reason for the transfer was pretextual.**

**(9 Points)**

There is a three-step burden shifting scheme applicable to ADEA cases whereby: (1) the plaintiff must first show a prima facie case raising an inference of discrimination, (2) the burden of production then shifts to the defendant to advance a legitimate, nondiscriminatory reason for the alleged adverse employment action, and (3) if the employer meets its burden of production, the plaintiff must show that the nondiscriminatory reason was pretextual. *Battistone*

The elements of a prima facie case of age discrimination are: membership in a protected class (i.e. he was over age 40); qualification for the job in question; an adverse employment action; and circumstances supporting an inference of discrimination. *Battistone*

Mr. Brown will be able to set forth a prima facie case of age discrimination pursuant to the ADEA because:

1. At 56 years of age, Mr. Brown is a member of the protected class.
2. Mr. Brown is qualified for his position because he was the second highest sales producer at the downtown barbershop and had worked there for 11 years. Cool Cuts may argue that Mr. Brown was not qualified for his position because he refused to perform services in keeping with Cool Cuts' image and referred clients requesting those services to other barbers. This argument will not likely succeed because despite refusing to perform certain services, Mr. Brown remained one of the highest producing barbers.
3. Mr. Brown suffered an adverse employment action in that he was transferred from the flagship barbershop to a less desirable location and suffered loss of income as a result. The transfer impacted a term, condition, or privilege of his employment because his income was reduced and also because of the loss of prestige by no longer working at the flagship barbershop. Cool Cuts may argue that Mr. Brown did not suffer an adverse employment action because he was not discharged or demoted but rather retained his first chair barber status upon transfer and was solely responsible for the size of his client base. This argument will not be successful because it can be argued that a term, condition, or privilege of his employment was working at the flagship barbershop and Mr. Brown suffered a loss of income because of the transfer.
4. There is an inference of discrimination because Mr. Brown was transferred despite his high sales volume when younger barbers with lower sales volumes remained at the new flagship barbershop.

Although Mr. Brown will be able to state a prima facie case of age discrimination, Cool Cuts will be able to meet its burden of producing a legitimate nondiscriminatory reason for its transfer of Mr. Brown. (i.e. its move to smaller facilities made it unable to accommodate two barbers; and Mr. Brown's refusal to service certain customers and to perform certain services).

In order to succeed on the age discrimination claim, Mr. Brown will have to establish that Cool Cuts' proffered reasons for his transfer are a pretext for discrimination. He can do this by

discrediting the employer's articulated legitimate reason by showing weaknesses, implausibilities, inconsistencies or contradictions in the reason or by showing that an invidious discriminatory reason was more likely the motivating or determinative cause of the action.

*Battistone*

To show pretext, Brown could offer evidence to show that he was the barber with the second highest sales volume at the flagship barbershop before his transfer even though he concentrated his efforts on older clientele; the Notice of Terms provided that he was allowed stylistic freedom in his work; no customers were turned away because of his preference; and, younger less productive barbers were retained.

In an effort to show that age was more likely the motivating cause of the transfer, he could argue that Cool Cuts viewed his age and the age of a majority of his clients as not fitting with Cool Cuts' trendy image, and that other barbers joked about his "senior citizen status".

In the alternative, it is possible to conclude that Cool Cuts' legitimate non-discriminatory reason for Mr. Brown's transfer was not a pretext for age discrimination. Cool Cuts' targeted market is young, urban professionals. It is within Cool Cuts' business providence to require its barbers to style in accordance with Cool Cuts' business goals. There is nothing inconsistent with Cool Cuts' business objectives and Mr. Brown's transfer. Furthermore, a few senior citizens jokes made by other non-supervisory barbers - not Orson Owens nor any of Cool Cuts' management personnel may not be sufficient evidence of pretext.

### **Recommendations for Settlement**

**(2 Points)**

Where there is a conclusion that there is a reasonable possibility that Mr. Brown will be found to be an employee under the ADEA and have a valid claim of age discrimination under the ADEA, settlement of his claim should be recommended.

Brown's demand of \$100,000 is unreasonable; however, Brown's demand of \$5,000 plus return to his former position in the new downtown barbershop is more reasonable and less costly than pursuing litigation, given the possibility of an unfavorable outcome and its precedent for future claims.

It is recommended that Cool Cuts settle the claim by offering Mr. Brown his first chair position in the new barbershop and paying him \$5,000 for lost income. Other settlement recommendations may include an offer for an amount less than \$100,000.

Where there is a conclusion that Mr. Brown will not be able to produce sufficient evidence of pretext, settlement should only be recommended to avoid the expenses of litigation. Otherwise settlement should not be recommended.