

What Is It Worth?

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What is Your Answer?

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- What is a reasonable amount for the parties to agree on to settle this dispute without litigation?
- *Answer:* \$ _____

Question #1: Breach of Employment Agreement

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- Two software engineers decide to start a company to market their new software. As the company grows, they have lawyers prepare Employment Contracts and Dave becomes CEO and Pete becomes President. Dave is in charge of product development and Pete is in charge of marketing, sales, finance, and investor relations. After about a year, Dave goes to Pete and says that the Board is not happy, that sales and profits are not growing sufficiently, and that Pete should focus on more on finances and that Dave is going to take over the marketing and sales forces (this is a 20-employee company with 8 people employed in the sales and marketing departments who now would answer to Dave). Pete objects and says that this is a material diminution of his job duties and thus triggers an obligation to pay him one year of severance pay. **The contract provision at issue says:**
- Executive [Pete] shall be employed as President with the duties and benefits associated with that position. Should Executive's title, pay or duties be materially diminished without Executive's consent, such diminution shall be considered a "Resignation with Good Reason" and Executive shall be entitled to receive one (1) year of severance pay.

Damages for Question 1: \$100,000 “maximum”

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- Dave and the Company state that Pete’s pay did not diminish; that his job title did not change; that his job duties were not materially diminished; and that it only intended for this change to last one year while new investors were lined up. Pete sues the company for \$100,000, representing one year’s severance pay.

What is Your Answer?

5

- What is a reasonable amount for the parties to agree on to settle this dispute without litigation?
- *Answer:* \$ _____

Answers to #1: Breach of Contract

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- Average for Employee/Plaintiff lawyers: **\$59,062**
- Plaintiff-Side Range: \$100K to \$25K

- Average for Employer/Defendant lawyers: **\$47,222**
- Defendant-Side Range: \$80K to \$10K

Question #2: Retaliation/Discrimination

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Plaintiff is Hispanic and is employed as a school bus driver for a school district. On February 15, plaintiff complained to Human Resources that the Hispanic bus drivers got fewer opportunities to earn overtime and that her supervisor (Anglo) did not treat her with respect. After she filed her grievance, the Director of Human Resources told her, “Look around you, people who complain do not stay around here very long.” On March 15, plaintiff is fired for having a minor backing-up accident that dented her side view mirror (there were only 2 students on the bus at the time and neither even knew that there had been an accident). The plaintiff says that she was fired in retaliation for making her complaint and that many bus drivers have had similar minor accidents in the past and had not been fired. The school district says that after a fatal bus accident last December, when a student was struck and killed (the plaintiff was not involved in that accident and that driver was terminated), that it has a new “zero tolerance” policy and will fire a bus driver for any accident no matter how small to show the public that it has a “Zero Tolerance Policy” and is super-vigilant about child safety.

Damages for Question #2

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- At the time of the settlement discussions, plaintiff has actual lost back pay of \$50,000 and is also seeking \$50,000 in compensatory damages (she is taking anxiety medication for the first time after the termination and is seeing a psychologist) and attorney's fees of \$10,000 which you should assume are validly supported by time records (**plaintiff is thus seeking a total of \$110,000**).

Answers to #2: Retaliation/Discrimination

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- Average for Employee/Plaintiff lawyers: **\$48,500**
- Plaintiff-Side Range: \$ 80K to \$20K

- Average for Employer/Defendant lawyers: **\$46,764**
- Defendant-Side Range: \$85K to \$15K

#3: Gender Stereotyping (I)

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- Plaintiff is a lesbian and is employed as a sales person for a medical supply company. Plaintiff says that she is “very butch” or masculine in her appearance. On January 15, plaintiff got a new supervisor who, she says, told her “I do not like homosexuals of either gender.” This supervisor terminates her in March, after quarterly sales figures show that she dropped in the rankings from “number two” out of eight sales people to the fifth ranked sales person. One of the sales people who was retained is a gay male. But, the plaintiff says that he is very masculine in his appearance. Plaintiff claims that she was fired for “gender stereotyping” and for not comporting with the supervisor’s ideas of what is “feminine” and for what her supervisor imagines “what customers want to see in a sales rep.”
- This termination does not occur in a locale that protects workers based upon sexual orientation (like a city ordinance).

Damages for Question #3

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- At the time of the settlement discussions, plaintiff has actual lost back pay of \$75,000 and is also seeking \$50,000 in compensatory damages (she is taking anxiety medication for the first time after the termination and is seeing a psychologist) and attorney's fees of \$10,000 which you should assume are validly supported by time records **(Plaintiff is thus seeking a total of \$135,000).**

Answers to #3: Gender Stereotyping (I)

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- Average for Employee/Plaintiff lawyers: **\$39,218**
- Plaintiff-Side Range: \$ 90K to \$10K

- Average for Employer/Defendant lawyers: **\$32,222**
- Defendant-Side Range: \$90K to \$10K

Question #4: Gender Stereotyping (II)

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- Same facts as #3, but the plaintiff has obtained a “**cause finding**” from the E.E.O.C. ?

#4: Answers to Gender Stereotyping (II): Cause

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- Average for Employee/Plaintiff lawyers: **\$57,031**
- Plaintiff-Side Range: \$ 95K to \$15K

- Average for Employer/Defendant lawyers: **\$53,055**
- Defendant-Side Range: \$100K to \$10K

- Both sides agree that the “cause finding” increases the value about \$20, 000 (\$19-\$21K)

Question #5: Religious Discrimination

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- Plaintiff is a sales person at a large computer company and is a member of an evangelical Christian church. The plaintiff's supervisor at a large computer company is a member of a different evangelical Christian church. Plaintiff's supervisor asks the plaintiff to attend a service at their church to "see how at home it makes you feel." When the plaintiff does not attend, the supervisor asks the plaintiff several more times. When the plaintiff says that "he is happy with where he worships now," the plaintiff claims that he began being treated differently, written up and then terminated for purely subjective reasons such as "not doing enough to close a particular sale." The plaintiff claims that his results were comparable to many other sales people. The Company then posts the plaintiff's job and the supervisor recommends a candidate from his church who gets hired.

#5: Religious Discrim: Damages

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At the time of the settlement discussions, plaintiff has actual **lost back pay of \$75,000** and is also seeking **\$50,000 in compensatory damages** (he is taking anxiety medication for the first time after the termination and is seeing a psychologist) and **attorney's fees of \$10,000** which you should assume and validly supported by time records (**plaintiff is thus seeking a total of \$135,000**)

#5: Religious Discrim: Answers

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- Average for Employee/Plaintiff lawyers: **\$55,937**
- Plaintiff-Side Range: \$ 100K to \$15K

- Average for Employer/Defendant lawyers: **\$60,588**
- Defendant-Side Range: \$135K to \$20K

#6: Governmental Whistleblower

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- Plaintiff works in the Food Services Department of a large Texas school district. On January 15, plaintiff made a report to the F.B.I. that some school district employees received a kick-back from the manufacturer of the fish sticks that, previously, had been served only on Fridays, but now were appearing on the school's menu much more often. Plaintiff made this report in good faith and it did turn out to be true. On February 15, the F.B.I. served a subpoena on the school district for all financial records related to school cafeteria purchasing. On March 2, the plaintiff was fired. Plaintiff was fired for not wearing a hair net and failure to wash her hands after returning from the restroom. Plaintiff says these reasons were pretextual and that many employees violated these rules (but it is not contested that plaintiff did violate them this time). But, the administrator who made the decision to fire plaintiff can establish that he did not know that the report was made by the plaintiff at the time he made the decision (he was told that the FBI report was made anonymously) and says that he did not try and find out who made the report.

#6: Whistleblower: Same Damage Model

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- At the time of the settlement discussions, plaintiff has actual lost **back pay of \$75,000** and is also seeking **\$50,000 in compensatory damages** (she is taking anxiety medication for the first time after the termination and is seeing a psychologist) and **attorney's fees of \$10,000** which you should assume and validly supported by time records (**plaintiff is thus seeking a total of \$135,000**)

#6: Whistleblower Answers

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- Average for Employee/Plaintiff lawyers: **\$38,906**
- Plaintiff-Side Range: \$ 100K to \$0K

- Average for Employer/Defendant lawyers: **\$26,911**
- Defendant-Side Range: \$100K to \$2,500

Disc. Rule 3.07: Trial Publicity

The General Rule

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(a) In the course of representing a client, a lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public **communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing** an adjudicatory proceeding. A lawyer shall not counsel or assist another person to make such a statement.

Disc. Rule 3.07: Trial Publicity

The Exceptions

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- (c) A lawyer ordinarily will not violate paragraph (a) by making an extrajudicial statement of the type referred to in that paragraph when the lawyer merely states:
 - (1) the general nature of the claim or defense;
 - (2) the information contained in a public record;
 - (3) that an investigation of the matter is in progress, including the general scope of the investigation, the offense, claim or defense involved;
 - (4) except when prohibited by law, the identity of the persons involved in the matter;
 - (5) the scheduling or result of any step in litigation;
 - (6) a request for assistance in obtaining evidence, and information necessary thereto;

#7: Free Speech Retaliation

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- Plaintiff is a high school history teacher for a large Texas public school district. Right before a bond election, plaintiff writes a letter to the editor of the local newspaper urging voters to vote against the bonds because “the district does not spend its money efficiently as it is.” One of the examples the teacher gives is that “there are too many teachers here that don’t know what they are doing” and are only still teaching because all of the supervisors are “dumb, dumb, dumb.” Plaintiff is fired at the very next semester break. The school district alleges that even if the letter was protected speech, it could still fire the teacher because the teacher’s speech attacked not only the administration but also the other teachers she would have to interact with every day. The district claims that she was fired because her speech was “disruptive in that it hindered efficient operations, adversely affected discipline and morale, and fostered disharmony.” The teacher alleges that she can still perform her duties “in the classroom” and so can the other teachers. Several teachers have told the principal that they will not serve on the Homecoming or Graduation Committees with the teacher.

Elements of a Free Speech Claim

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- (1) The speech at issue involved matters of public concern;
- (2) The spoke as a citizen and not as an employee: Stated another way “Was the Speech part of the Employee’s official duties?”
- **(3) Plaintiffs’ interest in the speech outweighs the government’s interest in the efficient provision of public services;**
- (4) Plaintiff suffered an adverse employment action;
- (5) The speech precipitated the adverse employment action (causation).
- *See, Nixon v. City of Houston, 511 F.3d 494, 497 (5th Cir. 2007); Alexander v. Eeds, 392 F.3d 138, 142 (5th Cir. 2004).*

Element #3: “Pickering Balance”

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- Pickering test requires the Court “to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.” In doing so, **the Court must consider whether [a plaintiff’s] statements impaired “discipline by superiors or harmony among coworkers, ha[d] a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impede[d] the performance of the speaker's duties or interfere[d] with the regular operation of the enterprise”**
- *Smith v. Coll. of the Mainland*, 2014 WL 5500704, at *3 (S.D. Tex. Oct. 30, 2014)

#7: Free Speech: Answers

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- Average for Employee/Plaintiff lawyers: **\$31,875**
- Plaintiff-Side Range: \$ 152K to \$10K

- Average for Employer/Defendant lawyers: **\$38,529**
- Defendant-Side Range: \$100K to \$15K

#8: Sexual Harassment (I)

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- Plaintiff works for a national soft drink company. Plaintiff is a female and was originally hired to work in Dallas, then was transferred to Austin, and is now transferred back to Dallas to work for her first supervisor. This male supervisor tells the plaintiff, “I am glad you are back because I could never get you out of my mind.” The plaintiff says she refused his advances to sleep with her and as a result has been denied the opportunity to earn overtime (she says she otherwise consistently earned \$20,000 of overtime a year).

#8: Sexual Harassment: Damages

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- At the time of the settlement discussions, plaintiff has actual **lost back pay of \$75,000** and is also seeking **\$75,000 in compensatory damages** (she is taking anxiety medication for the first time after the termination and is seeing a psychologist) and **attorney's fees of \$10,000** which you should assume are validly supported by time records (**plaintiff is thus seeking a total of \$160,000**).

#8: Sexual Harassment: Answers

29

- Average for Employee/Plaintiff lawyers: **\$70,625**
- Plaintiff-Side Range: \$ 135K to \$10K

- Average for Employer/Defendant lawyers: **\$63,823**
- Defendant-Side Range: \$150K to \$10K

#9: Sexual Harassment (II)

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- Same facts as in #8, but the plaintiff and the supervisor had a consensual affair when she was previously working for the supervisor during her first stint in Dallas.

#9: Sexual Harassment (II): Answers

31

- Average for Employee/Plaintiff lawyers: **\$49,687**
- Plaintiff-Side Range: \$ 135K to \$10K

- Average for Employer/Defendant lawyers: **\$47,794**
- Defendant-Side Range: \$150K to \$5K

The Most Important Question We All Face

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Q: “Honey, do these pants make me look fat?”

Sissela Bok, “Lying: Moral Choice in Public and Private Life” (1978)

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“Anyone who agrees to the rules cannot complain of unfairness when deception is used, so long as the rules permitted it. **In a game of poker, for instance, players accept the degree of deception allowed by the rules, just as in football they accept a degree of violence”**

Disc. Rule 4.01: Truthfulness in Statements to Others

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- In the course of representing a client a lawyer shall not knowingly:
- **(a) make a false statement of material fact or law to a third person; or**
- **(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid making the lawyer a party to a criminal act or knowingly assisting a fraudulent act perpetrated by a client.**

Model ABA Rule: §4.1: Truthfulness in Statements to Others

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- In the course of representing a client a lawyer shall not knowingly:
 - (a) make a false statement of material fact or law to a third person; or
 - (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

False Statements of Fact

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- “My client won’t take less than \$200,000.” In fact, the client has authorized the lawyer to accept half that amount.
- “If you don’t lower your price, my client will find a new supplier.” The client has told the lawyer that no one else can supply the particular product.
- “We have documentary proof of the claim.” None exists.
- “We have an eyewitness that heard the sexual harassment.” None exists.
- . . .
- “That benefit would cost the company \$200 per employee.” In fact, the company lawyer in a labor negotiation knows it will cost only \$20.
- **Based upon examples from Stephen Gillers, *Regulation of Lawyers* at 470 (9th ed. 2012)**

False Statements of Fact: “Defendant’s Policy Limits are \$100,000”

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- We decline to require attorneys to burden unnecessarily the courts and litigation process with discovery to verify the truthfulness of material representations made by opposing counsel. The reliability of lawyers’ representations is an integral component of the fair and efficient administration of justice. The law should promote lawyers’ care in making statements that are accurate and trustworthy and should foster the reliance upon such statements by others.
- We therefore reject the assertion of [defendant’s lawyers] that [plaintiff’s] attorney was, as matter of law, not entitled to rely upon their representations.
- *Fire Insurance Exchange v. Bell, 643 N.E.2d 310 (Ind. 1994)*

False Statements of Law *v.* Legal Opinions

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- Lawyer to Lawyer Settlement Phone Call:
- Plaintiff's lawyer: "I don't know of any reason how we could pierce the corporate veil, do you?"
- Defendants' Lawyer: "There isn't anything. PRG and Entolo are totally separate [entities]"
- Holding: Plaintiff has created a fact-question that this statement violates §4.1 and Duty of Candor.
- *Hoyt Properties., Inc. v. Production Resource Group, L.L.C.* (Minn. 2007).

When is a Fact or Legal-Statement *Material*?

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- While the term “material” is not defined in Rule 4.1 or its commentary, it is not a difficult concept to comprehend. A fact is material to a negotiation if it reasonably may be viewed as important to a fair understanding of what is being given up and, in return, gained by the settlement. While the legal journals engage in some hand-wringing about the vagueness of this aspect of Rule 4.1, in reality, it seldom is a difficult task to determine whether a fact is material to a particular negotiation.
- *Ausherman v. Bank of America Corp.*, 212 F.Supp. 2d 435 (D. Md. 2002)

Ethics Final Exam

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- A law firm and a corporate client reach an hourly fee agreement where the lawyer will charge \$350 an hour to answer discovery and \$450 an hour to avoid answering discovery. Is this term enforceable?
- A) As long as it is in writing and client has the sophistication to consent

Ethics Final Exam

41

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- A) As long as it is in writing and client has the sophistication to consent
- B) It does not matter, because a lawyer can always elongate the amount of time it takes to not-answer-discovery and collect a higher fee

Ethics Final Exam

42

- A law firm and a corporate client reach an hourly fee agreement where the lawyer will charge \$350 an hour to answer discovery and \$450 an hour to avoid answering discovery. Is this term enforceable?
- A) As long as it is in writing and client has the sophistication to consent
- B) It does not matter, because a lawyer can always elongate the amount of time it takes to not-answer-discovery and collect a higher fee
- C) It is unethical and an affront to the justice system

Ethics Final Exam

43

- A law firm and a corporate client reach an hourly fee agreement where the lawyer will charge \$350 an hour to answer discovery and \$450 an hour to avoid answering discovery. Is this term enforceable?
- A) As long as it is in writing and client has the sophistication to consent
- B) It does not matter, because a lawyer can always elongate the amount of time it takes to not-answer-discovery and collect a higher fee
- C) It is unethical and an affront to the justice system
- **D) Both B & C are correct.**