

TEXAS TECH UNIVERSITY SCHOOL OF LAW
Employment Law
Spring 2013

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FINAL EXAMINATION

Write your exam number here: _____

All exam materials (including this booklet and your response) must be turned in at the end of the period. You will not receive credit unless you return this booklet with your exam number written above. Do not turn the page until instructed to begin.

Notes and Instructions

1. Assume that today's date is May 9, 2013.
2. You may write anywhere on the examination materials – e.g., for use as scratch paper. Only answers and material recorded in the proper places, however, will be graded.
3. Your goal is to show your mastery of the material presented in the course and your skills in analyzing legal problems within the scope of the course's subject matter. It is upon these bases that you will be graded.
4. During the exam: You may not consult with anyone – necessary communications with proctors being the exception. You may not view, attempt to view, or use information obtained from viewing materials other than your own.
5. This exam is open-book. You may have and use any materials on paper that you like, including books, outlines, printouts, notes, etc. Non-paper materials are not permitted. No electronic or interactive resources (such as a tablet computer, smart phone, etc.) may be used or referenced, except that you may use a laptop running exam software to write your exam. If using a laptop, you may not reference files stored thereon during the examination session. No materials may be shared during the exam.
6. After the exam: You may discuss the exam with anyone, except that you may not communicate regarding the exam with any enrolled member of the class who has not yet taken the exam, and you must take reasonable precautions to prevent disclosure of exam information to the same.
7. This exam will be graded anonymously. You may not waive anonymity. Do not write your name on any part of the exam response or identify yourself in any way, other than to use your examination I.D. number appropriately. Self-identification on the exam will, at a minimum, result in a lower grade, and may result in disciplinary action.
8. All facts take place in the United States in one or more unspecified or hypothetical states. Provide your answer on the basis of the federal law, typical common law, and typical state statutory law in the United States, including all rules, procedures, and cases as presented in class.
9. All exam materials, including without limitation this booklet, any scratch paper you use, and any and all bluebooks, must be turned in at the conclusion of the period for taking this exam.
10. Note all issues you see. More difficult issues will require more analysis. Spend your time accordingly.
11. Organization counts.
12. Read the entire exam question before beginning to draft your answer – that way you can be sure to put all of your material in the right place. Please clearly label each subpart of your answer.
13. Be complete, but avoid redundancy. By way of example, do not repeat the exact same analysis with substituted parties. Computer users should probably not use the cut-and-paste function. Instead, to the extent called for, you may incorporate analysis by reference to another portion of your answer.
14. Feel free to use reasonable abbreviations.
15. **The word limit for your response to the exam is 2,500 words. Do not exceed the word count.** You are responsible for ensuring that you do not exceed the word count, whether you are handwriting or typing on a computer. Material written in excess of the word count will not receive credit.
16. Bluebooks: Make sure your handwriting is legible. I cannot grade what I cannot read. Write only on one side of the page and use a pen with blue or black ink.

Who is Responding?

Working as a first-year associate has been great for you. If there could be one thing you would change, however, it would be that you would like to have some employment law matters to work on. You mentioned this to the managing partner last week, and she told you that you should try to make a name for yourself with employment law. If you do that, she said, you won't have to find the work – the work will come to you.

Well, you think, easier said than done. How can you get your name out there without any actual clients?

At that moment, the phone rings. It's the radio talk show host you met last weekend at the home-and-garden show.

"Hey," he says in his radio baritone. "You know how you told me that employment law is one of your areas? How would you like to go on the air later today to talk about this blog, *Who is Responding?* Do you know what I'm talking about? Have you seen this blog? It's gone viral."

"Well, I haven't seen the blog," you start.

"Google it, okay? Then we'll go live after the news at noon, and you can explain all this. I want to know: Do the people griping on this blog have any real legal claims? Has this company done anything illegal? Anything they could get sued over?"

"Okay," you say. "Noon. You got it. I'll be ready to talk about it."



Fig. 1: The high-rise where your office is located. Your firm shares the building with the law firm of Cantwell Reid Orwright LLP.

Who is Responding?

a blog about working at Hexmart

oldest post on top [\[click to view by newest\]](#)

I am Responding

Posted by Andrew Ailo, April 26, 2013 at 3:57 p.m.

“Assistance needed in Electronics? Who is responding?” That’s what I hear, over and over. Not from another person, but from the synthetic robot voice that comes over the walkie clipped to my belt. I’m bossed around by a robot. It’s dehumanizing, and I hate it!!! Well, I’ve decided that I AM RESPONDING! RESPONDING WITH THIS BLOG! And the snotty sounding robot’s not even close to the worst of it. Working at Hexmart sucks, and I think we ought to talk about it. Join to post.

The Lingo

Posted by Andrew Ailo, April 29, 2013 at 6:18 p.m.

I realize I should do a post explaining some of the jargon Hexmart employees use. Ha! Case in point – I said “employees,” but, actually, “Team Member” is Hexmart-speak for employee. School spirit, I know!

Okay, here’s my list:

Building Services Technician – a custodian, someone who cleans floors, restrooms, etc.

coaching – getting a talking-to from a manager (or “Coach”); basically being made to answer questions about why you didn’t sign anyone up for the store credit card that day, etc.

Corporate Coaching Note – a memorandum from corporate headquarters

Executive Coach in Charge (ECIC) – general manager, paid by salary; highest ranked supervisor on site, in charge of the entire store; boss to the ETCs and the person who makes the final decision about hirings, firings, raises, and promotions.

Executive Team Coach (ETC) – a store manager, paid by salary; typically in charge of a section of the Hexmart store; supervisor of Team Members; tasked with scheduling work shifts and assigning duties, as well as reviewing performance and making recommendations for raises, promotions, and discharges

Team Members – employees, paid hourly

walkie – a handheld electronic communication device, notorious for giving commands and saying, “Who is responding?”

Buddy Buddy with “That Other Store”

Posted by Brenda B., April 29, 2013 at 11:21 p.m.

Andrew, I think this blog is a great idea. I'm a Team Member at a Hexmart – but I don't want to say where. I saw a very interesting print-out of a Corporate Coaching Note on the desk of our store's ECIC (let's just call her “Tina T.”), and I snapped a picture of it with my phone. I think people ought to take a look at it. It was addressed to Tina:

As part of Hexmart's continuing commitment to keep prices low for our customers, we need to make sure that Hexmart is not needlessly losing money on Team Member turnover. Thus, we commend you for working with general-manager-equivalents at competing stores in your area to exchange information about job applicants, making sure that current employees of one store aren't induced to leave by a higher wage at another store. Cooperating with our competitors in this way helps to keep personnel costs under control, and that helps keep prices low for our customers. That means everybody wins! Job well done!

No wonder when I applied for a job at another store in town they offered me the same wage *exactly* – down to the penny! How naïve was I? Since I didn't put my wage on my application, how else would they have known? And I didn't even figure it out when I saw Tina playing miniature golf with the general manager from over there. But now I know. So watch out Team Members, you may be screwed next!

My Hexmart Store

Posted by Andrew Ailo, April 30, 2013 at 7:13 p.m.

Here's a photo I took of my Hexmart store in Texlahoma:



I Paid the Price for Speaking My Mind

Posted by Cathy Chardella, May 2, 2013 at 2:01 p.m.

I live in a small town where there is a huge Hexmart distribution center. They have a lot of influence on the municipal government. You don't ever want to cross them.

I was a police officer – a veteran of 15 years. One day at the station I was venting to some of the other officers about how horribly Hexmart treats their workers. The chief overheard me and told me never to say anything negative about Hexmart again. Well, I never said anything else at work. But a few weeks later, when I was at the local Thai restaurant with my husband – and I was not even in uniform – I was talking to him about some of the horror stories I'd heard about Hexmart workers. Next thing I know, I see my old high school friend, Will Wugner, who is a Hexmart shift supervisor, get up out of the next booth and glare at me. He then walks across the restaurant and comes back with the chief, who I never noticed was there. The chief then fired me on the spot. Right in the middle of the restaurant.

So, yeah, you could say I hate Hexmart.

Literally Crushed By His Job

Posted by Andrew Ailo, May 4, 2013 at 10:43 a.m.

I have a journalism degree, and I'm hoping to stop being a Hexmart lackey as soon as I can. This blog is satisfying some of my journalistic leanings, but I would like to get something published in print. So I've started writing an article that I'll be submitting to magazines on a freelance basis. It tells the true story of something that happened at our store. I'd love anyone's comments.

A few more minutes until quitting time for the week. Don Delfini, an Executive Team Coach at Hexmart, was trying to will the clock to move faster.

Don was being punished. Don's boss, Vince Ventnor (the Executive Coach in Charge), hadn't said Don was being punished. But it was pretty clear that's what was happening. For the past month, Don hadn't done a single managerial task – no assigning, no scheduling, no evaluating of Team Members. All he had done in that time was flatten cardboard boxes and put them in the baler.

It wasn't a real mystery to Don what he was being punished for. The banishment to the baler had come after Don's comment about the parking lot thing.

Don had been asked by Vince to go out into the parking lot and write down all the license plate numbers of cars with "Lyman for Congress" bumper stickers. Then, he was told to cross-check his notes against the Team Member Information Forms in the files in the Human Resources office. After Don found the Lyman supporters among the Team Members, he was to log into the e-mail system as an administrator and use an override passcode to get access to all of the e-mail messages to and from those Team Members' company e-mail accounts. Don was then to compile a list of any information that was "embarrassing" about these Team Members or that indicated a violation of Hexmart policy.

Though upset by the assignment, Don did as he was told. But when he presented the results to Vince, he worked up his nerve to ask a question.

"Why do we need to know who the Lyman supporters are?" Don asked.

“When it’s election day,” Vince explained, “we have to know who to keep here working overtime at the store, so they won’t be out voting for someone who wants to hurt this company. Are you aware that Lawrence Lyman supports raising the minimum wage? That could cost our company tens of millions.”

Don considered this. Then he made the decision to speak plainly. He told Vince he thought that manipulating Team Members’ shifts to influence an election was wrong. He called it “immoral.”

Vince screwed his mouth up into an angry frown and glared at Don. “Well, I certainly appreciate getting the benefit of your moral compass, Don. Go home and get some rest. Tomorrow may be a busy day for you.”

Up until that point, Don’s work had involved filling out forms, juggling schedules, and having “coaching sessions” with underperforming Team Members. The most physical thing Don had been required to do was walk around the store to check on what Hexmart calls the “Guest Experience.”

Don’s “busy day,” he found out, was baler duty.

The baler is a very large machine in the back of the store that crushes empty boxes. It consists of an open-topped pen that compresses the cardboard and then wraps it tightly with plastic strapping. Working the baler is hard physical work – typically it is assigned only to the lowest-skilled Team Members.

Don was humiliated. He had worked in one managerial role or another for more than four years. Now he was obviously being punished, and, since the baler was on the way to the breakroom, Don’s abasement was on display to all Team Members at the store. Some whispered and snickered. Others just looked away. All of the other Executive Team Coaches stopped talking to him.

Working a baler was hard enough, but Don was not even allowed to use the regular baler – the heavy-duty, fully modern MegaMaster 3000. That baler could handle any empty cardboard boxes – even if they were unflattened. Instead, Vince was required to use the Ram-O-Matic 63, a slow, decades-old baler that required the user to flatten the boxes before loading them in.

The Ram-O-Matic 63 was so inadequate, Don found he often had to climb into the baler to rearrange the boxes so they would fit.

Working 50 hours a week on the vintage baler was grueling for Don. It wasn’t so much the hours. Don was used to working a standard 50-hour week as an Executive Team Coach. It was the unceasingly physical work that made the baler so onerous. In addition, all the stress and humiliation kept Don from being able to sleep for more than an hour a night.

Don was beginning to think it wasn’t worth it just to keep his salary of \$500 a week.

One late afternoon, Don found himself struggling. *Just three more minutes to go*, he thought. *Just this last load of boxes to bale, and then I can go home*. Don leaned over and hit the big red button, twisting his body in an unfamiliar way to reach it.

Don was so fatigued, he didn’t even realize what he’d done at first. Standing upright, with cardboard boxes up to his waist, he shook his head to try to rid himself of the mental fog. That’s when he felt his legs being squeezed. He tried to get away, but his feet were pinned.

Don was being baled.

Suddenly alert with terror, Don started screaming. A Team Member immediately ran to Don and hit the machine's emergency shutoff. But there was already blood everywhere.

Even putting aside Don's exhaustion, the accident should never have happened. The Ram-O-Matic 63 had a safety mechanism: A foot pedal had to be engaged at the same time the start button was pushed. Otherwise, the baling sequence would not initiate. But at Don's store, the foot pedal safety mechanism had been defeated with a block of wood wedged between the strut and the unit housing. Had the foot pedal been operational, Don would have been incapable of activating the Ram-O-Matic 63 when he still had his legs inside the baling chamber.

Don had no memory of the rescue. He awoke to find himself in the hospital, a nurse explaining that his legs had been amputated.

After a couple of hours, Don was wheeled out of recovery and given a regular hospital room where he could receive visitors. He was surprised by the first person who dropped in. It was Vince.

Don expected Vince to be sympathetic – maybe even to say he was sorry. Instead, Vince said that since Don had caused his own injury, he was not eligible for workers compensation coverage for his surgery or his rehabilitation. Nor would he receive wage-replacement benefits while he was still in the hospital.

Trying to process everything, Don asked if he would be able to take an unpaid leave of absence for two or three weeks while he was in the hospital.

"I can't hold your place for that long," Vince said. "Besides Don, you know you can't do your job without your legs. Look, what I need to find out from you right now is whether you plan to challenge the Company's determination that you are ineligible for workers comp."

Don began to sob. "How do I have any choice, Vince? I have no health insurance. I have to put in a claim for workers comp."

Vince frowned. "If you plan to make frivolous claims, Don, then I have to fire you."

Pulling an envelope from a briefcase, Vince handed Don a pre-signed letter of termination. Among other things, it told Don he would be ineligible for unemployment insurance benefits since he was being fired for gross misconduct. The letter also informed Don that he would not be able to file a lawsuit against Hexmart, since Don had agreed in writing when he applied for his job to settle any dispute relating to his employment via binding arbitration.

After Vince left, Don started pulling off his bandages and screaming, demanding that he be allowed to die.

That's what I have written so far. This situation is ongoing, so I'll write more when there is more to write.

Confessions of a Corporate Vice President

Posted by Emma Estevez, May 5, 2013 at 9:32 a.m.

I realize this blog is probably not intended for Hexmart corporate officers, but I'd like to join in the conversation regardless, if that's okay.

I left an independent management-consulting firm two years ago to take a job as Hexmart's corporate vice president of strategy. I knew that Hexmart, as a general retailer with a discount-seeking customer base, would be vulnerable to cyclical business downturns. Additionally, corporate strategy work is not a core function of a company like Hexmart. For those reasons, I was concerned about the long-term stability of my position. When negotiating my contract with Jillian Jankoln, the company's executive vice president (reporting directly to the CEO), I asked for a written assurance that I would not be discharged unless it was for cause. Jillian was kind enough to provide exactly that written representation to me in an e-mail. I would not have taken the job at Hexmart without that assurance, and this was something I explained to Jillian at the time.

Three weeks ago, I was laid off. When I broached the subject of the written representation to me, I was told that Hexmart has a uniform company-wide policy that all hiring is on an at-will basis, and that this was disclosed to me in the Corporate Executive Handbook. It is true that the handbook – which I did not receive until four months after being hired – does carry a provision declaring all employment to be at will. However, it was not part of my deal as far as I am concerned.

Additionally, when I was laid off, my Hexmart-provided life insurance policy was cancelled. My hiring letter states, "The Company shall provide Ms. Estevez with a \$5 million life insurance policy and shall pay all the premiums therefor while Ms. Estevez continues her employment with the Company. If Ms. Estevez ceases to be employed by the Company, Ms. Estevez shall be given the option of continuing to pay the premiums on the policy herself." As soon as I was discharged, I expressed my desire to take over paying the premiums on the policy, but I was told that Hexmart "has now and has always had a corporate policy of terminating life insurance policies upon any discharge that is not voluntary on the part of the employee." In other words, Hexmart never intended to live up to their side of the bargain.

I will be initiating litigation against Hexmart, suing for fraud with regard to the life insurance policy and breach of contract with regard to my job.

Right now I am idle. A non-compete clause in my contract with Hexmart requires that for a 12-month period I not work for any business – whether for-profit or not-for-profit – in any role that calls upon me to provide strategic insight. Since this is what I do – it has been my entire career since business school – I am forced to take the year off. In the meantime, I will continue to appreciate the insight provided by this blog.

I work at Hexmart. I just wish I worked FOR Hexmart

Posted by Fedro Fernandez, May 6, 2013 at 7:37 p.m.

For all the troubles people are having, I think it is better to be a Team Member at Hexmart than to work there without Team Member status. I work in Hexmart stores as a Building Services Technician, but I only have "independent contractor" status. Also, I was hired by SparkleStar Services, not by Hexmart.

My situation is also problematic because I am not a U.S. citizen. I am a lawful permanent resident (LPR) from El Salvador. Since I have my green card, I am allowed to work. But each day at SparkleStar Services, when the boss is deciding who will be sent out for the day, he always sends the persons who “look American” first. LPRs and people with brown skin are the last to go. (I am both, so many days I get no work.) The boss says he has to do this because Hexmart might get raided by immigration authorities. But I don’t see how that should cut down on my hours, since I am documented and legally allowed to work.

Still, I am grateful for my job at SparkleStar. Work might be nicer if I was not told exactly how to do my job (clean this sink first, then work to the left, etc.). But they provide uniforms and all cleaning supplies – mops, buckets, chemicals, etc. This saves me money, since there is nothing I need to supply myself. Also, they always pay on time for all the hours I work.

When Will it Be Time to Go?

Posted by Andrew Ailo, May 7, 2013 at 6:02 p.m.

Watching the clock at Hexmart. Break’s almost over:



Warning: Hexmart is Monitoring This Blog: I Got Fired and I’ve Been Sued

Posted by Andrew Ailo, May 9, 2013 at 11:01 p.m.

Hexmart management has found out about this blog. Apparently, they don’t like it very much. They told me yesterday that, on the basis of this blog, I have been disloyal, and therefore I was being discharged. But it gets worse. Today I got served with a lawsuit for misappropriation of trade secrets. The complaint says that the information I put in the blog post about Don Delfini constituted Hexmart’s trade secrets. (So I won’t be saying anything more about that until further notice.) They also claim to own the copyright in anything I put on this blog up until the point I was fired.

Tomorrow afternoon there is a hearing on a temporary restraining order against me. Unfortunately, I cannot afford a lawyer, so I don’t really know what is going to happen. I’ll have to see what the judge says.

Anyway, I think this blog is a good resource for us. So I am going to keep it going as long as I can. But I recommend that you do not post with your real names!!!

Meanwhile, if anyone knows of a lawyer who will work for homemade cookies, let me know.☺

QUESTION

Word limit: 2,500 words

Analyze the parties' legal positions, with the following exclusion: Do not provide analysis about unemployment insurance compensation for anyone other than Don Delfini. Organize your response as follows, clearly labeling the subparts:

Subpart A: Discuss any issues revolving around Andrew Ailo.

Subpart B: Discuss any issues revolving around Brenda B.

Subpart C: Discuss any issues revolving around Cathy Chardella.

Subpart D: Discuss any issues revolving around Don Delfini.

Subpart E: Discuss any issues revolving around Emma Estevez.

Subpart F: Discuss any issues revolving around Fedro Fernandez.

Subpart G: If there is anything else you wish to discuss, which does not belong in any of subparts A through F, please put it under this Subpart G.

A few things to keep in mind: The subparts will not all be given equal weight. The subpart structure is provided for organizational purposes only. Thus, it may be entirely appropriate for one subpart to be answered with considerable brevity, while other subparts might require very detailed analysis. Pace yourself appropriately, and plan ahead to put information where it belongs.

Also, avoid needless repetition. Do not repeat the exact same analysis with substituted parties. Computer users should generally avoid the cut-and-paste function. You may incorporate analysis by reference to another portion of your exam answer to the extent appropriate.

Feel free to use these or other reasonable abbreviations:

| | | | |
|---------------|-----------------|-------------|----------------------|
| AA or Andrew | Andrew Ailo | MM | MegaMaster 3000 |
| BB or Brenda | Brenda B. | ROM | Ram-O-Matic 63 |
| CC or Cathy | Cathy Chardella | SS | SparkleStar Services |
| DD or Don | Don Delfini | TT or Tina | Tina T. |
| EE or Emma | Emma Estevez | VV or Vince | Vince Ventnor |
| FF or Fedro | Fedro Fernandez | WW or Will | Will Wugner |
| JJ or Jillian | Jillian Jankoln | | |

NOTE

This exam is a work of fiction, with the persons and events concocted for the purpose of providing hypothetical facts to serve as the basis for legal analysis. This exam draws some inspiration from the cultures, lingo, and practices of multiple real-world retailers, and thus is something of an amalgamative pastiche. Note that Hexmart is not meant to be a fictionalized version of a particular real-world retailer. To the contrary, it's meant to be none of them.

CREDITS

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(Note that the text in this box is not part of the hypothetical exam facts.)