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Empire College of the Law
Employment Law
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ISSUES OUTLINE

PART I: 25 POINTS

1. Other Facts Which Might Be Needed:
    a. How many employees does Tip-Top Telephone Company ("TTTC") have? Jurisdictional requirement under the Age Discrimination in Employment Act ("ADEA") - 20 employees and Fair Employment and Housing Act ("FEHA") – 5 employees.
    b. Did Harry Hasben ("HH") and Louie Loser ("LL") meet their sales quotas? If not, might indicate mixed-motive case.
    c. Did their sales quotas change after Arnie Aggressive ("AA") was hired? Might indicate AA bias.
    d. What types of sales techniques did they use? Might indicate they were/were not using current/best sales techniques.
    e. How often were age-disparaging remarks made? Did other employees hear them?
    f. Were other, older employees fired or forced to resign?
    g. What are TTTC's policies and procedures? Is there an Employee Handbook? May show progressive discipline process or Company's policies on termination of employment.
    h. Any contractual or sales commission agreements with HH or LL.
    i. Any conversations with AA or GG about their emphasis on "youth?"
2. Prerequisites to Filing Suit:
    a. **ADEA** – file charge with Equal Employment Opportunity Commission ("EEOC") within 300 days and state claim under FEHA with the Department of Fair Employment and Housing ("DFEH") within one year. Protects employees 40 years of age and over. Once waiting period is over (60 days), plaintiff can request "right to sue" letter. Separate charges should be filed for retaliation and harassment claims.
    b. **Intentional Infliction of Emotional Distress** – no prerequisite to filing cause of action; two year statute of limitations.
3. Where You Would File Suit/Why
    a. ADEA incorporates the remedial structure of the Fair Labor Standards Act ("FLSA") which allows back pay, reinstatement and equitable relief.

Liquidated damages are available for willful violations equal to assessed back wages. Compensatory and punitive damages are only allowed for retaliation. Suit would be filed in federal court.

b. The FEHA provides for back pay, front pay, declaratory and injunctive relief and attorney's fees and there is no limit on damages.
c. In most circumstances, suit should be filed in state court.

4. Viability of Lawsuits (see 5 below)
   a. **TTTC** – Suit may be filed for age discrimination under FEHA; retaliation under FEHA; age harassment under FEHA; and Intentional Infliction of Emotional Distress.
   b. **AA** – Cannot sue for age discrimination; may be able to sue for retaliation and harassment.
   c. **GG** - Cannot sue for age discrimination; may be able to sue for retaliation and harassment.
5. Causes of Action/Viability
   a. **Age Discrimination** – for HH, good chance of success (depending on answers to 1.*supra*). Using the *McDonnell Douglas v. Green* formula, HH must prove that he was (1) a member of a protected class (over 40); (2) that he was qualified for his job; (3) that he was fired from his job; and (4) that he was replaced by a younger worker. TTTC then must articulate a legitimate, non-discriminatory reason for the discharge. It is then up to plaintiff to prove that "but for" the discriminatory motive, TTTC would not have fired HH. HH does not have to prove that age was TTTC's only motivation.

      HH was fired for "poor performance." If there is documentary evidence of poor performance, it will raise a mixed-motive issue (see *infra* under Defenses). If there is no or little documentation of poor performance, HH can point to a "systematic" attempt to change the sales force population to younger individuals. He can point to the illegal advertising ("recent college graduates in "their early 20's and 30's") and AA's offer of a $500.00 bonus for referrals of "friend's younger brother or sister" implying that older siblings should not be referred. There were also GG's comments about his sales methods and his "drive," and AA's statements that he wanted to "put young guys on the street," and that "sales was a young man's game." This may be sufficient evidence that HH's "poor performance" was created to get him out of the company after 25 years of service. If there are other instances of older sales people being forced out of the company, this will bolster HH's case.
   b. **Retaliation** – HH can argue that his firing was for opposing TTTC's and AA's systematic removal of older sales people. We need more facts to determine if this cause of action is viable.
   c. **Harassment** – HH and LL can argue that the concerted effort to bring younger sales people into the company, coupled with the negative

statements made to them by GG, and the unwarranted criticism of their work (assuming they made their sales quotas) constitute hostile environment harassment. Hostile work environment harassment requires: (1) an oppressive atmosphere (behavior sufficiently severe or pervasive to alter conditions of employment); (2) a causal link between the conduct and the protected class; and (3) conduct and motivation attributable to TTTC. This is a close case. The comments and recruitment standing alone do not reach the level of severe and pervasive but if they can be linked to GG's unjust criticisms of their work, they might state a cause of action. This evidence would also go toward LL's claim of Constructive Discharge although it is minimal.

d. **Intentional Infliction of Emotional Distress** - Under *Wallis v. Superior Court,* behavior may be outrageous if a defendant 1) abuses a relation or position which gives him power to damage the plaintiff's interest; 2) knows the plaintiff is susceptible to injuries through mental distress; or 3) acts intentionally or unreasonably with recognition that acts are likely to result in illness through mental distress. Could be argued that LL and HH were long-term employees who were nervous about their jobs and that GG intentionally fostered their apprehension by unjustly criticizing their performance. This is a very weak argument without more facts.

6. TTTC's Defenses
   a. **At Will Employment** – HH and LL are at will employees which means, in theory, they can be fired for any reason. TTTC will argue that LL resigned and that HH was fired for poor performance (not making his quotas).
   b. **Reasonable Factor Other Than Age ("RFOA")** – One of the defenses to an age discrimination claim is a RFOA. TTTC will argue that HH was fired for a legitimate, non-discriminatory reason – his poor performance. If TTTC can support this claim with contemporary documentation, they will have raised a mixed-motive defense as explained in *Harris v. City of Santa Monica.* If TTTC can prove by a preponderance of the evidence that HH would have been fired for a legitimate reason (poor performance), it is not liable for damages. It may be liable for injunctive or declaratory relief and attorney's fees if HH proves discrimination.
   c. **Comments Were Not Sufficient** – TTTC will argue that the random comments made by AA and GG were not sufficient to rise to the level of severe and pervasive necessary for hostile environment harassment or sufficient to prove age discrimination. Based on *Reid v. Google* there appear to be sufficient remarks to overcome a summary judgement motion with respect to age discrimination. Whether the remarks were severe and pervasive enough for hostile work environment appears unlikely.
7. Burdens of Proof – see above (5 and 6)
8. Potential Damages

a. Age Discrimination – Under FEHA, HH and LL could collect back pay, front pay or reinstatement, injunctive and/or declaratory relief and attorney's fees. If TTTC can prove mixed-motive, relief is limited to injunctive and/or declaratory relief and attorney's fees.
b. Harassment – If harassment can be proven, HH and LL may be entitled to compensatory and punitive damages against both TTTC and GG as well as injunctive and/or declaratory relief and attorney's fees.
c. Retaliation - If harassment can be proven, HH and LL may be entitled to compensatory and punitive damages against both TTTC and GG as well as injunctive and/or declaratory relief and attorney's fees.
d. Intentional Infliction of Emotional Distress – If proven, HH and LL may collect compensatory and punitive damages.

9. One can argue to take the case or not as long as it is backed by facts and law.

PART II: 25 POINTS

1. Current Employees
   a. Polygraph tests tend to be unreliable in the private sector although because of the already selected pool, they tend to be more accurate in law enforcement settings. The Employee Polygraph Protection Act of 1988 prohibits most uses in the private sector. Civil penalties include a $10,000 fine and injunctive relief by the Secretary of Labor as well private civil actions. The Act has exemptions, one of which allows testing of employees who are reasonably suspected of involvement in economic loss. Mr. Stein wants to test all employees who have access to the finished toys and this would not meet the Act's exemption and he should not hire Truth or Consequences to perform polygraph tests.
   b. While this is not per se illegal, I would advise Mr. Stein that this is not a good idea. Employees reporting on each other, especially when cash awards are given for tips, will contribute to poor employee morale, suspicion and might generate fights or hostility among the workforce.
   c. Article 1, section 1 of the California Constitution provides all residents with a reasonable expectation of privacy. A privacy violation is a common law tort which (1) requires a defendant to intentionally intrude into a person's place or conversation for which the person has a reasonable expectation of privacy; and (2) the intrusion must occur in a manner highly offensive to the reasonable person. As long as AA has a published and disseminated policy stating that employees, their lockers and their cars are subject to search, an employer may conduct a search. This is true of an employee's car if it is on AA's property. If Mr. Stein is going to have "pat-downs" of employees leaving work, he needs to be sure employees are notified in advance and the "pat-downs" are done by same-sex guards and in public to avoid any claims of sexual harassment. However, if he is going to

conduct "random" pat-downs, Mr. Stein needs to be concerned about certain races or ethnicities being singled out which might lead to a discrimination charge.

2. Future Employee
    a. There is no legal prohibition against "honesty questionnaires" as such. However, Mr. Stein needs to be careful that these questionnaires (or tests) do not have an adverse impact on racial or ethnic minorities. Under *Griggs v. Duke Power Company,* a neutral selection device such as a questionnaire cannot have a disparate impact on a protected group unless it can be justified by business necessity. As these questionnaires are notably unscientific and inaccurate, proving business necessity is virtually impossible.
    b. In California, you can only do a criminal background check (as of January 1, 2018) after you make an offer of employment. You may not have a box on your application form in which an applicant checks that he/she has a criminal record ("ban the box") or ask about criminal convictions until after you have made a conditional offer of employment. If the candidate (after offer tendered) has a criminal record you must do an individualized assessment and consider the candidate's qualifications and circumstances before making a decision. There are numerous notice requirements and time delays before you can make an offer to another candidate. Also, a candidate may sue the employer and may recover compensatory and punitive damages as well as attorney's fees and costs if you do not complete this process correctly. I would not recommend you pursue this requirement.
    c. I would not recommend that you join this consortium. If you distribute a list of employees who have left AA under suspicion of wrongdoing, you are leaving yourself and AA open to a lawsuit for defamation and/or libel. These are not employees for whom you have proof of wrongdoing; you merely suspect them. In essence, you are blackballing them from another position/company based on your suspicion. Although you have a qualified privilege for disclosing your opinion about an employee, this privilege is lost if there is malice or excessive publication. Distributing this list to a "employer consortium" may be considered excessive publication.
    d. I would advise against the company establishing the club. There is no legal prohibition against ~~establishing~~ a bible study group during lunch as long as it is completely voluntary and employees are not in any way favored or disfavored because of their attendance. This can be a difficult requirement because if you pass over an employee for promotion who is not attending the bible study, the employee may complain of religious discrimination; if you promote someone who attends the group, other employees may claim that you are favoring that employee based on religious grounds. Moreover, if employees feel pressured to join the bible

study group (i.e. they think it is required for advancement), an argument can be made that they did not get their 30-minute lunch break and you are in violation of wage-hour law.

PART III: 15 POINTS

1. Under the provisions of the California Fair Employment and Housing Act (FEHA), employers with at least five employees generally cannot limit or prohibit the use of any language in the workplace, except in rare circumstances when they can demonstrate a legitimate business necessity do so. A legitimate business necessity is defined as follows:
    a. An overriding and legitimate business purpose that makes language restriction necessary for the safe and efficient operation of the business.
    b. Language restriction effectively fulfills the business purpose it is supposed to serve.
    c. There is no existing alternative practice to the language restriction that would accomplish the business purpose equally well with a lesser discriminatory impact.

    Unless Emily can show that the English-only rule is necessary for her business (e.g. the employees in question need to interact with customers or other employees/supervisors who only speak English), she should not implement the rule. Even if the rule was justified by a legitimate business purpose, she could not restrict the language spoken in the cafeteria.
2. Emily needs to take action with regard to Cam's allegations of sexual harassment. She should immediately launch an investigation of the charges (or hire an outside investigator). Under California law, Cam is suggesting that there may be hostile work environment harassment caused by the "dirty pictures" on Daniela's computer and the remarks she has made to him. An investigation will show if these allegations are true and if they are severe and pervasive. If found to be true, even if they are not severe and pervasive, Emily must take disciplinary action and document her actions.
3. If, in fact, Emily's supervisors are supervisors in name only, she may have some serious liability issues. In order to be an exempt under California and federal law, a person must be exempt under one of five categories: executive, administrative, professional, computer or outside sales. We would need to know exactly what type of work the supervisors perform and what percentage of time they spend on each task ("duties test"). We would also need to know how much salary each one makes ("salary test"). Presently, in California exempt employees must earn a monthly salary equivalent to no less than twice the state's minimum wage for full-time employment (40 hours per week).