

ISSUES OUTLINE

PART I: 25 POINTS

1. Harvey Grunt – Possible causes of Action (Liabilities)
 - a. Lawsuit under American with Disabilities Act (ADA) and the ADA Amendments Act of 2008 (ADAAA) and/or the Fair Employment and Housing Act (FEHA) for disability discrimination – Grunt fired because armed guards triggered his PTSD
 - i. Under the ADAAA an individual is disabled if he has an “episodic condition” such as PTSD which would substantially limit a major life activity (working) when active; under FEHA there is no requirement for “substantial” limitation – Grunt has such an impairment
 - ii. Both the ADA and FEHA have administrative filing requirements; ADA follows Title VII and charge must be filed within 300 days; must file within one year under FEHA
 - iii. Jury trials permitted under both statutes
 - iv. Compensatory and punitive damages would be limited to \$300,000 under ADA; no limit under FEHA
 - b. Failure to provide reasonable accommodation under ADA or FEHA – summarily firing Grunt without determining if there was a reasonable accommodation
 - c. Failure to engage in interactive process – required under FEHA
 - d. Intentional and negligent 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 Baer should have anticipated that armed guards would trigger Grunt’s PTSD.

Mr. Baer may argue that Grunt was a danger to other employees and he was unable to engage in an interactive process with him because he was irrational and incapable of having such a discussion. Recommendation: Reinstate Grunt with back pay and grant

him a leave of absence until he is able to return to work; should require doctor's clearance to return to work

2. Fanny Faint – Possible causes of Action (Liabilities)
 - a. Retaliatory Discharge in violation of Cal-OSHA – There is no private right of action under Cal-OSHA but Faint can file a complaint within 30 days with the DLSE.- probably not upheld as workplace was protected
 - b. Retaliatory discharge in violation of public policy (complaint to Cal-OSHA) – there is a public policy cause of action under Petermann v. Teamsters and it is valid even if the underlying claim (that workplace was unsafe) is found to be invalid
 - c. Intentional and negligent infliction of emotional distress – not viable – doesn't meet requirements 2 and 3 of Wallis

There is no real defense to retaliatory discharge in violation of public policy. Recommendation: Reinstate Faint with back pay.

3. Roxy Rambo – Possible causes of Action (Liabilities)
 - a. Roxy's employment is at-will. Mr. Baer was not required to bring in guards to protect her or the facility. There does not appear to be any exception to the at-will doctrine that applies to her.
 - b. Retaliatory discharge in violation of public policy – public policy must be based upon refusing to commit unlawful acts; exercising statutory rights; performing public functions or reporting an alleged violation of statute or regulation. Roxy does not have a claim.

Recommendation: There is no legal reason to reinstate Roxy.

PART II: 15 POINTS

- A. Title VII of the Civil Rights Act of 1964 (Title VII) and the Fair Employment and Housing Act (FEHA) both prohibit discrimination on the basis of sex. "Sex" includes childcare and childbearing. Questions concerning the number of children an applicant has or about childcare arrangements is discriminatory under both federal and state law. It could subject Mary's company to a charge of sex discrimination, possible litigation and damages.
- B. Mary can emphasize diversity but under Title VII and FEHA she cannot ask applicants what their race is or any specific questions about their race, national

origin or ancestry (FEHA). She can “emphasize” diversity by advertising the position in media which target minorities as well as main stream media.

- C. Mary can have a discussion with the employee and explain that there have been complaints concerning his/her body odor. She can inquire if there is a reason for the odor. If the employee indicates that there is a medical problem, Mary can ask for a doctor’s note and engage in an interactive dialogue to look for a reasonable accommodation. (ADA and FEHA). If there is no medical problem, Mary should still dialogue with the employee to find a solution (such as rearranging seating in the office, requiring the employee to shower before coming to work or finding a more isolated location) but can, absent a disability, terminate the employment of an at-will employee.
- D. There is no legal requirement that Mary do non-work related tasks. If she refuses, her boss might retaliate against her. This retaliation, however, is not a violation of public policy nor is she being retaliated against for engaging in a protected activity. Although she may consider this harassment, it does not fall under the definition of sexual harassment. She might have a cause of action for violation of the implied covenant of good faith and fair dealing.
- E. The company pension plan is covered by the Employee Retirement Income Security Act (ERISA). If the plan document allows the company to make changes, it still may be liable under the Age Discrimination in Employment Act (ADEA). Under ADEA, the company cannot make changes to the pension plan which adversely affect only employees over 40. Employees who have been with the company for more than 25 years will, most likely, be over 40. Under Mary’s scheme, employees over 40 would lose a major benefit while employees under 40 (those with the company under 25 years) would not be affected. The company may argue that there are people over 40 in the latter category but that argument would probably not prevail. (Solon v. Gary Community School Corp.)
- F. Mary owes a duty of loyalty to her employer. That duty requires her to keep confidential, information deemed confidential by the company. Even if the company has not expressly stated that supplier information is confidential, would the company hand over that information to anyone who asked? If it would not, and the information is not otherwise publically available, Mary has an obligation not to divulge if or use the information for personal gain. (Lamorte Burns & Co. v. Walters) The company would probably not divulge their suppliers (competitive edge) or which suppliers they have dropped for second rate products (might be sued for libel or slander). Mary risks being fired for cause for revealing company information considered confidential.

PART III: 25 POINTS

1. Forum
 - a. Can sue for sexual harassment in both state and federal court – state court is better forum as damages are greater (no cap on compensatory and punitive damages)
 - b. Discrimination claims require exhaustion of administrative remedies; file charge with DFEH within one year and obtain “right to sue” letter
2. Possible defendants
 - a. Transcontinental Trucking and Transcontinental International as to all causes of action except assault
 - b. Larry Leech – sexual harassment; intentional infliction of emotional distress; assault
3. Causes of action and viability
 - a. Sexual harassment under FEHA (Title VII) –
 - i. Company - Sally complained to Blind, her supervisor) verbally about Leech and Hand. Blind did not contact HR and did not do an investigation. Sally complained in her resignation letter to the company that woman drivers were required to sleep with their co-drivers. The company has not responded after two months and it has not met its obligation under FEHA and Title VII to take timely action.
 - ii. Leech - He is not a supervisor and has no authority to hire, promote, discipline or terminate a trainee. But he has authority to not recommend her as a driver and an argument can be made that he was an agent of the company and that his ability to not recommend her gave him apparent authority as a “supervisor.”
 - b. Negligent and Intentional Infliction of Emotional Distress
 - i. Company - Under Wallis, the company abused its position which gave it the power to damage Sally’s interests and acted intentionally or unreasonably with recognition that the acts were likely to result in illness through mental distress. The argument can be made that the company was well aware of the problems women drivers faced and did nothing to ameliorate them.
 - ii. Leech – He abused his position as lead driver which gave him the power to damage Sally’s interests (by not recommending her) and acted intentionally or unreasonably with recognition that the acts were likely to result in illness through mental distress.

- c. Assault – Leech is liable for assault for his “rape” of Sally. This is a “he said, she said” situation and we need to obtain evidence of other instances. Obstacles include: she agreed to a single room with one bed; she did not report the rape in her evaluation of Leech and her verbal report and letter did not mention rape.
- 4. Burdens of proof – Sally bears burden of proof for sexual harassment (McDonnell Douglas) – she must show that she complained about sexual harassment and the company did not respond; intentional infliction of emotional distress – she must show that conduct was extreme and outrageous and company acted intentionally or recklessly – must also show that actions caused her severe emotional distress (no facts indicate that)
- 5. Potential defenses
 - a. Company – will argue that she resigned before they could act – Sally will cite constructive discharge; company will state that she never informed them of “rape”
 - b. Leech – will argue that sex was consensual
- 6. Evidence issues
 - a. Sally didn’t complain about Leech until well after her training and even then didn’t state that she was raped;
 - b. In her resignation letter she was vague about the sexual harassment and spent time on the financial issues
- 7. Potential damages
 - a. Back pay, front pay, compensatory and punitive damages; attorneys’ fees
- 8. Recommendation
 - a. Potentially strong case. We need to verify Sincere’s facts and interview potential witnesses. We also need to establish her claims of emotional distress.