

MPT 1 - Sample Answer # 1

III. Legal Argument

A. THE IMMIGRATION OFFICER'S DECISION IN THIS CASE WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD BEFORE HIM AS A WHOLE AND MR. ROWAN HAS SATISFIED THE 'GOOD FAITH' MARRIAGE REQUIREMENT.

The record in this case establishes that Mr. Rowan was married to Ms. Cole in good faith and unfortunately the couple has irreconcilable differences which lead to their divorce. Mr. Rowan is able to show that his application for waiver should have been granted based upon the requirements set forth in 8 CFR § 216.5(2). I have specifically listed those requirements and the applicable facts below:

(i) Mr. Rowan has provided documentation relating to the degree to which the financial assets and liabilities of the parties were combined by providing documentation of his and Ms. Cole's lease on a house, promissory note for \$20,000, printouts of their joint bank account, and Joint tax returns. See Lamm Report.

(ii) Mr. Rowan has provided documentation relating to the length of time that they cohabitated after the marriage. See Affidavit of Ms. Cole.

(iii) Other evidence by way of witness statements that announce that the couple announced to others that they were married, and lived as a married couple for many months prior to the divorce. Furthermore, Ms. Cole's

According to the above cited code the application must be considered as a whole to determine if Mr. Rowan and Ms. Cole entered into the marriage in good faith. Furthermore, The cases of *Hua v. Napolitano*, and *Connor v. Chertoff* bracket for the court how to make such a determination. Both cases instruct that a determination of whether the marriage was entered into in good faith is to be viewed by the totality of the evidence and circumstances. Here, the investigator has only considered a few portions of the entire evidence, but even what was considered is sufficient to establish that the marriage was entered into in good faith. The record is silent as to any evidence that would suggest that Mr. Rowan had any ulterior motives for marrying Ms. Cole with the exception of the statements of Ms. Cole herself. The statements of Ms. Cole that Mr. Rowan had a "lack of commitment to the relationship" or that he "carefully evaded any long-term commitments, including children, property ownership, and similar obligations" are not supported by the record. Mr. Rowan was not married to Ms. Cole for any length of time that one would normally expect to see the couple setting down firm roots, having children, buying a home, and establishing careers. Furthermore, Ms. Cole admits that she was "shocked and angered" when Mr. Cole stood his ground and refused to quit his job to follow her. She admits that she "fully expected" that he would follow her. Ms. Cole admits that Mr. Rowan's objection to moving was because he was afraid that it would have a negative impact on the marriage and his career. See Affidavit of Ms. Cole. Mr. Rowan has stated that she told him that if he refused to move with her so that she could pursue her goals, she would fight his establishing permanent residency. She now seeks to use the United States Government and Mr. Rowan's desire for permanent citizenship as a tool to exact her revenge on her ex-husband

as she attempted to use it to attempt to coerce him to move. Had Mr. Rowan gone with Ms. Cole under such duress the chances are high that they would be divorced today anyway. Reading the record as a whole the investigator should have concluded that this was a marriage much like any other, where two people met, fell in love, made mutual concessions, and eventually stopped making those concessions and grew apart. There is nothing to suggest that Mr Rowan had some other motive besides his love for Ms. Cole.

B. THE TOTALITY OF THE EVIDENCE IN THIS CASE SUPPORTS GRANTING MR. ROWAN'S PETITION

First, the Mr. Rowan met the requirement for "Timely Petition and Interview for Removal of Condition" and the conditions for "Waiver of Requirement to File Joint Petition" as set forth in 8 USC § 1186a.(c)(4)(B) and 8 CFR § 216.5. Mr. Rowan is able to demonstrate that he has met all three elements of this code section which are as follows:

- (1) His marriage to Ms. Cole was entered into in good faith as discussed above.
- (2) The qualifying Marriage has been terminated by legal divorce. See Lamm Report (Certified copy of judgment of divorce).
- (3) Mr. Rowan was not at fault in failing to meet the requirements of paragraph (1) because Mr. Rowan is no longer married to Mrs. Cole and he cannot force her to "jointly" file the petition on his behalf.

Second, Mr. Rowan has met his burden that he intended to establish a life with his spouse at the time he married her. *Hau v. Napolitano*. In the Hau case the court weighed the evidence and the preponderance of evidence established that Hau acted in good faith in entering the marriage. Here, Mr. Rowan likewise acted in good faith and can show many of the same things that the court in Hue relied upon in making its decision. Rowan can show that he was engaged and married prior to ever coming to the United States, that the decision to move to the united states was made by the couple. Ms. Cole admits that the two lived together, announced their selves as married, made joint purchases, and held joint accounts. She further admits that they moved to Franklin so the she could resume her studies. Furthermore, that she wanted to move to Olympia to follow her goals. Finally, Ms. Cole admits that she filed for divorce, not Mr. Rowan. See Cole Affidavit. Therefore, the evidence most strongly suggests that Mr. Rowan intended to be married, was married, remained faithful and continued to live with Ms. Cole as a married couple until she filed for divorce.

Finally, the evidence suggests that this marriage was entered into in good faith. Under the substantial evidence standard that governs the review of waiver determinations, there is such relevant evidence that reasonable minds might accept as adequate to support it. *Connor* (15 Cir. 2007). Like in Connor, Mr. Rowan met and married a citizen of the United States, and that marriage ended in divorce. However, Mr. Rowan has provided ample evidence that the marriage was entered into in good faith by the showing that he had entered into many agreements, and had peacefully cohabitated with Ms. Cole during their marriage. In contrast Connor provided only limited documentation with unexplained inconsistencies, and no indication that they made any major purchases or held joint

contracts. Mr. Rowan is able to show that he was making such purchases and entering into such agreements as would suggest that the couple intended to remain a couple for an extended time.

To Conclude, Mr. Rowan has met all necessary requirements, and has provided sufficient evidence to establish that he entered into the marriage with good faith and his appeal should be granted on the grounds that there is insufficient contrary evidence to make a showing that Mr. Rowan acted in bad faith. Reasonable minds can differ but Mr. Rowan has met the substantial evidence standard.

MPT 1 - Sample Answer # 2

TO: Jamie Quarles
FROM: Examinee
RE: Matter of William Rowan

Brief: Appeal of Denial of I-751 Petition to Remove Conditions on Residence of William Rowan

I. Petitioner Met the Burden of Proof for Removal of Condition and therefore Denial was in Error.

(A) Applicable Law for Petition:

Under 8 USC §1186(a), a conditional basis for the status of an alien admitted for permanent residence can be removed by a timely petition and interview for the removal of the condition. This can be achieved by both the alien spouse and a petitioning spouse jointly submitting the petition to the Secretary of Homeland Security and which requests the removal of the conditional basis. However, in situations where one spouse does not consent to the removal of the alien-spouse's condition and does not wish to jointly submit to the removal of the condition, the alien spouse can petition on his own behalf via a Hardship Waiver under 1186a(c)(4). In doing so, the alien spouse may remove the conditional basis of his permanent resident status by demonstrating that: a) his or her qualifying marriage was entered into in good faith, but was terminated (other than by death of the other spouse), and b) that he was not at fault in failing to meet the requirements of jointly filing a petition in paragraph 1) of 1186(a).

Under 8 C.F.R. 216.5, in determining whether to grant a resident alien's petition via Hardship Waiver, the director shall consider evidence that the marriage was entered into in good faith by: (i) documentation of the degree of financial assets and liabilities of the parties combined, (ii) documentation concerning the length of time the parties cohabited, (iii) birth certificates of children born to the marriage, and (iv) other evidence deemed pertinent.

(B) William Rowan Met the Burden of Proof in Establishing a Hardship Waiver by Providing Substantial Evidence That His Marriage was In Good Faith

For Mr. Rowan to successfully establish that he has met the requirements necessary for a Hardship Waiver under USC §1186(c)(4), he must show that he was not at fault in being unable to jointly file a petition with his now divorced spouse under 1186(a), and he must show that the marriage upon which his status was based was entered into by good faith on his part. Mr. Rowan has the burden of proving the good faith marriage requirement by a preponderance of evidence. *Connor v. Chertoff* (15 Cir. 2007). Mr. Rowan must present evidence that he "intended to establish a life with his spouse at the time [he] married [Ms. Cole]" (*Hua v. Napolitano*)(15 Cir. 2011)). Mr. Rowan has provided substantial evidence that he entered into his marriage with Ms. Cole with the intent to establish a life with her, and was not solely for any immigration benefit.

In support of his Petition, Mr. Rowan provided the testimony of two witnesses, George Miller and Anna Sperling. Mr. Miller testified that Mr. Rowan and Ms. Cole held each other out to others as being husband and wife, and he had heard them discussing leasing property together, borrowing money for car purchases, and buying real estate as part of their marriage. Ms. Sperling testified that she overheard that Ms. Cole felt gratitude for Mr. Rowan in moving to the U.S. and that he "did it out of love." Furthermore, Mr. Rowan provided documents in support of his good faith marriage such as a lease signed by him and Ms. Cole, a promissory note co-signed by Ms. Cole, and evidence of a joint bank account and joint tax returns he had with Ms. Cole.

In evaluating whether the Board of Immigration Appeals improperly denied Mr. Rowan's petition for Hardship Waiver, the Court should look to see if there was such relevant evidence as reasonable minds might accept as to support their denial, even if it were possible to reach a contrary result on the basis of such evidence (*Connor v. Chertoff*). In this circumstance, the BIA's decision lacked the substantial evidence to show that Mr. Rowan did not marry in good faith. The only substantive evidence to show that Mr. Rowan had ulterior motives for his marriage, is in the Affidavit of Ms. Cole. It was her testimony that Mr. Rowan evaded long term commitments, and his primary reason for marriage was because he had been actively looking for a position in the U.S. for several years. Furthermore, Ms. Cole and Mr. Rowan were apart for long periods of time due to Ms. Cole's employment. In *Connor v. Chertoff*, the Court held that the alien spouse spending a majority of his time away from his wife and other evidence of his lack of commitment evidenced that his marriage was not entered into with the intent to establish a life with his spouse, and therefore was not in good faith. Connor presented evidence of joint checking accounts, and co paying bills with his spouse in support of his showing good faith, as well as testified on his behalf. However, the Court determined the Connor was not a credible witness because of his failure to list his children on the SCIS forms. Furthermore, he did not have any corroborating witnesses, and provided no signed leases or applications of life insurance in both spouses names. Therefore, the Court upheld the BIA's decision.

In the present case, Mr. Rowan's Petition can be distinguished from that of Connor. Mr. Rowan provided his own testimony to the marriage as well as providing corroborating witnesses. His testimony contradicts that of Ms. Cole's in that he was only marrying for purposes of employment. In his Interview, he admits that he was looking for a job opportunity in Franklin City, but received no offer before entering into the marriage and moving to the U.S. There is nothing in Mr. Cole's interview, or his petition to suggest that he was lying as in the case of Connor. Furthermore, Mr. Cole provided evidence of a lease co-signed with Ms. Cole as well as a promissory note, in addition to evidence of a joint bank account. Although, Ms. Cole stated that the two often didn't spend time together, this was admittedly due to her demanding job requirements, as opposed to in Connor where the petitioner simply did not spend time with his spouse because he did not appear to be taking the marriage seriously. The evidence suggests that Mr. Rowan and Ms. Cole divorced not because Mr. Rowan was disinterested in the marriage, but because Ms. Cole's differences in job employment and the offer she received to move to Olympia. Although Mr. Rowan expressed his discontent with leaving the job he had acquired, it should be noted that at that point, he had already committed to an apartment lease and loan with Ms. Cole which shows that he wanted to spend his life with her at the time he had moved to Franklin. Ms. Cole's testimony that Mr. Rowan married for reasons outside of intending to stay with her, is contradicted by her own statement which was overheard by

Ms. Sperling, in which she admitted that she was convinced that Rowan "did it for love" (referring to the marriage). Ordinarily, this would be considered hearsay, but in *Connor v. Chertoff* the Court affirmed that the Federal Rules do not apply to evidence admitted at hearings (such evidence only need to be probative and fair). Finally, even though the fact that Mr. Rowan applied for his conditional residency soon after his marriage proposal, the Court has held that this alone does not tend to show that the marriage was not entered into in good faith (see *Hua v. Napolitano*). The Court, in reviewing the BIA's decision, should assess the entirety of the record when determining whether petitioner met the burden of proof (*Id.*). In conclusion, the record will show that Mr. Rowan presented substantial evidence that his marriage was entered into in good faith and therefore he should be allowed a hardship waiver pursuant to §1186(a)

MPT 1 - Sample Answer # 3

III. The Petitioner's Application for a "Hardship Waiver" Should be Granted Based on Petitioner's Good Faith in Entering Marriage and Lack of Fault in Divorce.

As a general rule, an alien spouse obtains permanent resident alien status only on a conditional basis. 8 USC § 1186a. To have their conditional status removed, the resident alien and their spouse must jointly petition to the Secretary of Homeland Security, 8 USC § 1186c. However, the law allows gives the Secretary discretion to remove the conditional basis of the resident alien upon the alien showing: 1) they entered the marriage in good faith; 2) and the resident alien was not at fault in the parties divorce and subsequent inability to jointly apply. 8 USC § 1186(c)(4).

In reviewing waiver determinations under the statute, an appellate court applies the substantial evidence standard. Connor v. Chertoff. Consequently, if there is "such relevant evidence [that] reasonable minds might accept as adequate to support it," the decision should be affirmed, even if it were possible to reach a different result. *Id.* The petitioner has the burden to establish that he intended to establish a life with Ms. Cole at the time she married him. Hua v. Napolitano. "If [he] meets this burden, [his] marriage is legitimate, even if securing an immigration benefit was one of the factors that led [him] to marry." *Id.* William Rowan both entered into his marriage to Sarah Cole in good faith and was not at fault in their later divorce, and consequently, the Secretary should grant his Hardship Waiver for permanent residency.

A. Petitioner Has Shown Good Faith Based on Financial, Social, and Other Actions Taken During Marriage, and Was Not at Fault in the Divorce.

William Rowan married Sarah Cole in good faith with full intent to create a life with her. "To determine good faith, the proper inquiry is whether [the parties] intended to establish a life together at the time they were married." Connor. In making the determination of parties' good faith, the reviewing judge may consider such factors as the actions of the parties after the marriage to show subjective intent, financial actions taken by the parties, and testimony about their courtship and life together while married. *Id.*

In Connor, the Court of Appeals upheld a denial of petitioner's application for permanent resident status, because he did not provide sufficient corroborating support and evidence of his good faith, nor did he dispel the adverse finding regarding petitioner's credibility. In Connor, the petitioner presented evidence of unfiled financial documents (lease, applications for life insurance and car title) as support for their good faith in marriage. However, the court found his omission of reference to previously sired children in both his written application and in a subsequent interview to be evidence that he was not a credible witness. Further, the court found that the petitioner failed to overcome his lack of credibility because he did not provide corroborating testimony.

In Hua, the Court of Appeals reversed a denial of permanent resident status of a Chinese national after the petitioner established good faith in entering the marriage. Hua. There, the petitioner presented evidence of a lengthy courtship including visits to each other's country of residence, a consideration to reside in either parties' home country, cohabitation for approximately one year, and joint account and financial activity during the marriage.

To show subjective good faith in entering the marriage, petitioner must establish that, when he entered the marriage, he intended to establish a life together. Petitioner has met this burden. William Rowan will testify that when he saw Sarah Cole, it was "love at first sight." He asked her out immediately, and the two began dating a few weeks later. The two met in the fall of 2010 and married on December 27, 2010. While the length of the parties' courtship was not lengthy and cuts against petitioner's argument, his subsequent actions during the marriage establish his good faith. See Connor ("The immigration judge may look to the actions of the parties after the marriage to the extent those actions bear on the subjective intent of the parties at the time they were married.")

After the two were married, Cole suggested they move to the United States to pursue her career. While it is true that Rowan did inquire about potential jobs in the US before their marriage, he had valid reason to do so. He had family living in the States and believed that there were better job opportunities for him here. Further, if he had received a job opportunity in the States, he could have obtained a work VISA rather than seek marriage. Having already lived together for six months, the two parties moved to the US in May 2011 and lived together until their separation in April 2013. Cole frequently traveled for work and based on her travel, the two were apart for about seven months of their marriage. This was through no fault of Mr. Rowan, and he resented her absences from their home.

While they were living together, they held themselves out to friends as being married. Witnesses will testify that they frequently socialized with the couple, visited their residences, and will further testify that they self-identified as husband and wife. Another friend of the couple, Anna Sperling will also testify that Cole was grateful for Rowan moving to the US without a job and that she was convinced that he "did it for love." Further, in a sworn affidavit, Sarah Cole has stated that, "I believe now that he saw our marriage primarily as a means to get U.S. residence. *I do think that his affection for me was real.*" (emphasis supplied) Cole Affidavit.

The parties also took financial actions that indicate a good faith interest in marriage. They signed a two year lease on a house in Franklin City. Rowan co-signed a \$20,000 loan for Ms. Cole. They had joint bank accounts and filed joint tax returns. They shared living expenses and named each other as next of kin in their health insurance policies. George Miller will also testify that they considered buying real estate together. Ms. Cole believed that Rowan has avoided long term commitments including property ownership and similar obligations, but the evidence suggests otherwise. Further, due to her travel schedule, likelihood of a move to another city, and other reasons, Rowan may have had justification for not wanting to buy a house or start a family yet.

Ms. Cole initiated discussions of moving to another city, which Rowan opposed, as was his right as an equal partner in the marriage. Rowan believed the two, in the best interests of both of them, should remain in Franklin City. Both had jobs there, and they had a stable life with friends. Married couples can disagree about the course and future of their families without creating an assumption that the opposing spouse is acting in bad faith. Upon Cole's insistence the couple move and against the desires of her husband, she moved to Olympia shortly after presenting him with the opportunity. After he refused to move, she immediately filed for divorce.

William Rowan's activities after he married Sarah Cole indicate that he married her in good faith and had every intention of remaining married to her. He was in love and her actions and placing priority in her job affected his feelings in the marriage. He entered the marriage in good faith and was not primarily at fault in the resulting divorce. For these reasons, his hardship application should be granted.

B. The Secretary's Decision was not Supported by Substantial Evidence in the record.

In Hua, the Court of Appeals reversed a denial of permanent resident status of a Chinese national after she presented evidence of a lengthy courtship, consideration by the parties to live in either the US or China, cohabitation for more than a year, and joint accounts and financial activity during marriage. Hua. The government raised concerns about the timing of petitioner's application vis-a-vis their marriage, the timing of the marriage in relation to the expiration of petitioner's VISA and the fact that Hua moved out of the marital home. The Court addressed each of these concerns in kind and found that petitioner met her burden based on a review of the entirety of the record. Id. The court also found important the fact that petitioner's husband initiated the separation and divorce, and not the petitioner. Id.

In reviewing the entirety of the record, there is insufficient information to support the Secretary's denial of William Rowan's hardship application. As established above, he entered the marriage in good faith. While it is true that seeking permanent resident status may have been a factor in Rowan's marriage to Cole, Hua established that such a marriage can still be legitimate.

The only evidence to support the Secretary's decision is the shortness of their courtship, Cole's testimony, and his refusal to move to Olympia. All have been addressed above. However, Rowan produced ample evidence to support his application. For these reasons, the Secretary's decision should be reversed.

MPT 2 - Sample Answer # 1

To: Brenda Brown
From: Examinee
Date: Feb. 25, 2014
Re: Peterson Engineering Consultants

Our client, Peterson Engineering Consultants, is considering revising its technology use policies in light of the results of a recent survey concerning computer use at work. Peterson would like us to determine when it can be held liable for its employees use or mis-use of its internet-connected technology. It would also like us to recommend changes and additions to its current policies. Peterson's goals include: (1) clarifying ownership of equipment, (2) clarifying monitoring policies, (3) ensuring technology is only used for business purposes, and (4) ensuring that its policies are effective and enforceable.

Circumstances in Which PEC Can be Held Liable for its Employees Use or Misuse of Inter-Connected Technology

Peterson may be held liable to third parties for its employees acts that were committed while using company equipment. Such liability is normally found through (1) ratification or the (2) doctrine of respondeat superior.

In order to be held liable to a third party through ratification, Peterson would have to adopt the employees conduct, which can be established by a failure to discharge an employee within a reasonable amount of time. *Fines*. The 15th Circuit has found that a four-business-day turn around for an IT investigation into the use of work email is acceptable. Although Peterson does not necessarily need an internal policy setting forth a deadline by which it must investigate potential misconduct relating to use of its computers, Peterson should attempt to ensure it can make such an investigation within a similar time frame (four business days). *Fines*.

Under the doctrine of respondeat superior, an employer is vicariously liable for its employee's torts committed within the scope of employment. *Fines*. However, an employer will not be subject to liability if the employee "substantially" deviates from his employment duties for personal purposes. *Fines*. Accordingly, Peterson's computer policies should be very clear about the type of use that is permissible and impermissible. This should give Peterson the ability to argue in Court that an employees misfeasance is so outside the bounds of the employees job description that the doctrine of respondeat superior does not apply.

Peterson may also be subject to liability to its employees purely on the basis of monitoring its own computer/electronic equipment. Peterson is a private company and could be subject to tort suits for an invasion of privacy. In contrast, *public* employers are subject to the privacy right set forth in the Fourth Amendment, a higher standard than *private* employers. [Footnote: Similarly, First Amendment protections regarding the restriction of an employee's speech do not apply to private companies. *Lucas*.] The tort of invasion of privacy "occurs when a party intentionally intrudes . . . upon the solitude or seclusion of another or his private affairs or concerns, if the intrusion would be highly offensive to a

reasonable person." *Hogan*. However, if Peterson follows the guidelines/recommendations set forth below, it should lower its risk of any "invasion of privacy" claim against it.

Recommended Changes and Additions to the Employee Manual

The following constitute a list of proposed additions to or changes of the existing Peterson policies concerning use of Peterson-owned computer equipment. In the event Peterson decides to adopt these changes, we recommend that further review be given to the exact wording of the policy, as any ambiguity may result in adverse legal decisions. See *Catts*.

1. Block and/or Ban Social Media and Recreational Websites and Personal Email

Peterson should block/ban social media and recreational websites. This would ensure that its employees are more productive at work, and spend less time than the average employee engaging in social media/shopping/sports browsing during work time. This would address Peterson's concerns as set forth in the informal survey.

2. Clarify "incidental" use

In the event that Peterson does not want to block or ban recreational sites and email, it must clarify what "incidental" use means. As set forth above, ambiguous statements can be fatal to restrictions contained in policies. Examples of improper v. proper conduct would be useful.

3. Install monitoring software to track content, keystrokes, time spent, electronic usage and disclose such monitoring

Peterson should install monitoring software on its computers/cell phones/equipment to ensure that it is able to effectively enforce its standards. Peterson should also advise its employees of the same. Such new standards will meet Peterson's goal of clarifying monitoring of its equipment. These standards should also include a well-defined scope of "monitoring." Although it may not be necessary to go into detail concerning the mechanics of monitoring, the Fifteenth Circuit has expressed a preference for a defined standard. *Hogan*.

4. Disclose that computers without monitoring software may be searched

Similar to recommendation number seven, Peterson should advise that even without monitoring, the work-supplied equipment may subsequently be searched/examined. This would meet Peterson's goals of ensuring its policies are effective and enforceable, as well as clarifying its monitoring standards. Again, in *Hogan*, the 15th Circuit advised that it would have been preferable (though not required) if the employer at issue warned its employees that it had the ability to search work-provided computers prior to doing so. Thus, out of an abundance of caution, we would recommend including such a disclosure in Peterson's new policy.

5. Restrict use of computers/equipment to business

Peterson should revise its policy manual to explicitly restrict the use of computer equipment to business use. This would satisfy its stated goal of ensuring that business use is the only use allowed. It would also set forth a clear ground upon which Peterson could punish or even fire an employee on the basis of personal use of equipment.

This restriction may also assist Peterson in potential lawsuits wherein a third party is trying to hold Peterson liable for the acts of its employees. For example, in *Fine*, the Court found that a company policy restricting computer use to business purposes allowed an employer to avoid liability under the respondeat superior doctrine because the policy made clear that any misuse was outside the scope of the employees duties. Thus, as the subject employees misuse of the employer's computers was purely personal and violated the use policy, the employer could not be held liable to the damaged third party.

This restriction would also provide nearly a complete bar to any invasion of privacy tort actions. For example, in *Hogan*, the computer policy stated that the subject computers were not to be used for personal purposes at any time. Based on that language, the Fifteenth Circuit found that there was no expectation of privacy attendant to the use of the subject computers. Accordingly, any personal use of the computer was open to the employer, and any search of the computer did not constitute a tort or violate any laws. The *Hogan* court accordingly approved of the search and of the firing of the employee who used the computer personally.

However, Peterson should be advised to consider whether such a draconian standard will actually benefit the company and its employees. Indeed, the Supreme court has even recognized that personal use of work-owned equipment "often increases worker efficiency. *Ontario v. Quon*. It is of importance to all businesses, including Peterson, that its employees work efficiently and productively. In order to ensure that Peterson's employees are still productive after the implementation of the above-recommendations, we should recommend continual monitoring, likely through surveys, to ensure that the recommendations are neither too strong nor too weak.

6. Actual Enforcement of Policies & Set Terms

In order to ensure that its policies are given full effect and remain enforceable, Peterson must regularly enforce these policies. Indeed, if Peterson were to "abandon" its policies through custom and practice, it effectively changes the policy to permit the forbidden conduct. *Lucas*. Thus, Peterson must actually enforce these rules in practice. In the event that the rules become unenforceable, Peterson should change the policies in writing, rather than abandoning them in practice.

It may be beneficial for Peterson to have specific guidelines concerning *potential* punishments for malfeasance, or specific times a review of the monitoring software may occur. Setting forth punishments would not prevent immediate termination. *Lucas*. In addition, Peterson should, at minimum, have a term setting forth that any non-enforcement decisions are made on a case by case basis and do not constitute an abandonment or waiver of the policy in any way. *See Fines*. This term should be noted conspicuously and

should probably be placed right before the employee's signature block.

MPT 2 - Sample Answer # 2

To: Brenda Brown
From: Examinee
Date: February 25, 2014:
RE: Peterson Engineering Consultants

Memorandum

1. Legal Bases Under Which PEC Could Face Liability

(a) Actions of PEC Employees

There are some bases of liability PEC could face as a result of the actions of its employees. Tort theory has always allowed employers to face liability for damages caused by employee actions taken within the scope of employment. This standard still applies in the current digital age.

The first possible basis of liability is vicarious liability for the willful and malicious acts of an employee. According to *Fines v. Heartland, Inc.* ("Fines"), an employer may be held liable for its employee's willful and malicious actions if the employer ratifies those actions. An employer ratifies employee actions when the employer voluntarily elects to adopt the employee's conduct by treating it as its own. A claim of ratification must be supported by evidence, potentially including evidence that the employer failed to fire the offending employee. Using company e-mails for improper purposes could potentially pass liability to PEC, so it is important to guard against this with good policy.

The second possible basis of liability for employee actions is that of respondeat superior. This action is related to the one above, in that it is also based on vicarious liability. As *Fines* explains, the doctrine of respondeat superior holds an employer vicariously liable for employee torts if those torts are committed within the scope of employment. It is possible to extend the liability to an employee's willful torts, so long as they are committed within the scope of employment. A deviation from a company rule does not necessarily remove the acting employee from his or her scope of employment. Rather, the deviation from a rule must be substantial in that it goes outside employee duties and into personal purposes. As a result, PEC should make sure its policies are complete and comprehensive.

(b) Actions of PEC Itself

In addition to potential liability for employee actions, PEC could face liability for its own. While some applicable precedent in our jurisdiction mentions First Amendment claims, PEC does not have to concern itself with this; First Amendment claims apply only to government employers, which PEC is not.

More relevant would be claims based on the wording of and omissions from PEC's employee manual. The first possible claim is that PEC monitoring of computer use is a tortious invasion of privacy. According to *Hogan v. East Shore School* ("Hogan"), an invasion of privacy occurs when "a party intentionally intrudes, physically or otherwise,

upon the solitude or seclusion of another or his private affairs or concerns, if the intrusion would be highly offensive to a reasonable person." Since computer use monitoring could potentially include examination of e-mails and web browsing, this concern is relevant to PEC. The best way to avoid this liability is included in the discussion below. Additionally, in the absence of clear policies, it is possible that PEC could face a wrongful termination suit from an employee who unknowingly committed a violation.

2. Recommendations For Changes To The Manual That Would Minimize Liability

The president stated three goals in evaluating the PEC policies. This memo will address each of these in turn, and explain the appropriate recommendations. In closing, this memo will recommend additions to the manual beyond the president's inquiries.

(a) Clarifying Ownership of PEC Computers

In order to clarify the ownership of computers used by PEC employees, the best approach would be one similar to that illustrated in *Lucas v. Sumner Group, Inc.* ("Lucas"). The company in the Lucas case had text in its employee handbook dedicated to the ownership of the devices. Specifically, it clarified that the devices are "company property." Currently, the PEC has language that refers to PEC ownership hidden within a longer sentence. I would recommend even more specific language that appears at the beginning of the relevant section in emphasized print, such as, "**All computers, mobile phones, and other electronic devices issued to PEC Employees are the property of PEC.**" This would avoid a complaint similar to the one in Hogan that found fault with policies being hidden within other texts. Additionally, it would eliminate any ambiguity caused by the complicated grammar of the current sentence.

(b) Ensuring Use for Business Purposes Only

In order to prohibit personal use of PEC computers, there should be clear, specific language indicating the policy. I would recommend adding a section to the Computer Use and E-mail Use portions of the manual, clearly prohibiting personal use. For example, "Use of this device is strictly limited to PEC Business. Violations of this policy will result in [a punishment deemed appropriate]." I would also add clear policies regarding social networking, online shopping, and other activities. The National Personnel Association summary indicated that a large percentage of employees spend work time on these activities. Having clear policies on the matter should help reduce the problem.

Ensuring Enforceability

For your policies to be effective and enforceable, they must be clear and complete. The first recommendation for achieving this goal would be to make sure that this section of the manual is situated prominently. In the event that an employee simply "skims" a manual, she will be less likely to miss this important section. While, as the Hogan case states, a failure to notice a policy rests with the employee herself, ensuring that the section is adequately noticeable serves to stop potential issues before they arise.

Further, as the Lucas court stated, the terms must be "as unambiguous as possible." Use imperative adverbs, rather than permissive. In other words, in the current Computer Use, section, the language should be altered to be more direct. The first sentence would be more effective if it was something to the effect of, "PEC employees who are given equipment for use outside of the office do so with the understanding that the equipment is the property of PEC. It must be returned if the employee leaves the employee of PEC, whether voluntarily or involuntarily."

Additionally, it would be more clear to replace "PEC may review any employee's use" with "PEC reserves the right to review any employee's use." The language as it stands could indicate that PEC has not yet decided whether it will review activity. As stated in Lucas, a common company practice can override ambiguous written rules, so it is important to be clear. An employee could argue that the language appears uncertain, and she has never been monitored in the past, so she assumed PEC decided against a monitoring policy. Further, as expressed in Hogan, PEC should give its employees adequate notice that monitoring of their activities is possible. Somewhere in this section, PEC should emphatically indicate that PEC employees have no expectation to privacy as to their activities on PEC devices. This addition would substantially reduce the privacy concern discussed in Section 1.

(d) Additional Recommendation

In addition to the adjustments discussed above, PEC should consider adding a section specifically denouncing use of PEC equipment for the purpose of harassment or other improper reasons. As the Fines case indicates, e-mail is a very powerful tool for sexual harassment, defamation, and other wrongful conduct. Therefore, PEC should add a new section with a title similar to "Conditions of Use." This section should explain a clear prohibition against use of PEC devices for wrongful conduct, including but not limited to harassment and defamation. This section should include a clear explanation of the discipline process for reports of improper conduct. As indicated in Fines, a short delay in termination is permissible for investigation purposes. However, it would be wise to put all employees, including potential victims, on notice of how the investigation works, how long it takes, and the levels of discipline that could result.

Finally, PEC should be diligent in frequently updating and reissuing its computer and e-mail policies. Considering the dynamic nature of business communications, policies might have to be adjusted for new and updated technologies. Additionally, as explained in Hogan, re-issuing the manual on a regular basis (annually, in Hogan) puts employees on continued notice of PEC's policies and procedures.

MPT 2 - Sample Answer # 3

To: Brenda Brown
From: Examinee
Date: February 25, 2014
RE: Peterson Engineering Consultants

Brief Statement of Facts

Employees at PEC rely on the use of technology to effectively conduct business on a daily basis. Specifically, the employees use PEC-issued technology to communicate with one another, the home office, and clients, and to access information, reports, and other documents over the internet. Recently, PEC has become concerned regarding the risk of liability associated with employees misusing company-owned technology and loss of productivity.

Goals in Revising the PEC Employee Manual

The purpose of this memo is to address potential liability issues for PEC with respect to its employees' use of company technology and provide recommendations with respect to revising the PEC Employee Manual in order to (1) clarify ownership and monitoring of technology, (2) ensure that the company's technology is used only for business purposes, and (3) make the policies reflected in the manual effective and enforceable.

Legal Bases under which PEC Could be Held Liable for Employees' Use or Misuse of Technology

Because PEC is a privately-owned company, there is a low probability of liability for claims of invasion of privacy under the Fourth Amendment and infringement on freedom of speech under the First Amendment. The First and Fourth Amendments apply only to public employers.

Tort of Invasion of Privacy

However, there is the possibility that an employee could have an invasion of privacy tort claim, to which PEC could be liable. See *Hogan v. East Shore School*. The tort of invasion of privacy occurs when a party intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, if the intrusion would be highly offensive to a reasonable person. *Hogan*. In *Hogan*, a teacher who had been fired from a private school for misuse of the school-provided computer sued the school for invasion of privacy. The issue was whether the teacher had a reasonable expectation of privacy in using the computer. The Franklin Court of Appeal held that there was no reasonable expectation of privacy and thus, no invasion of privacy.

In making its determination, the court examined the policies in the school's employee handbook and its custom of enforcement. While the court admitted that the school could have written a better policy, using clearer language, requiring signatures, including definitions and warnings, the handbook sufficiently notified the teacher that "the computer,

computer software, and account are property of East Shore (the school), and that East Shore reserved the right to monitor the use of the computer at any time." This meant that the teacher should have had no reasonable expectation of privacy.

As a side note, the court in Hogan noted that past practice on non-enforcement might create a waiver of the right to monitor.

Torts by Employees

An employer may be held liable for torts committed by its employees, such as defamation and sexual harassment (among others), through ratification or respondeat superior (vicarious liability). Under the doctrine of ratification, an employer may be liable for an employee's willful and malicious actions if the employer voluntarily elects to adopt the employee's conduct. Essentially, the employer is treating the employee's conduct as its own. *Fines v. Heartland*. The failure to discharge an employee after knowledge of his or her wrongful acts may be evidence that supports ratification. *Fines*.

An employer can be held vicariously liable for its employee's torts committed within the scope of employment under the doctrine of respondeat superior. For the employer to be vicariously liable, the torts must have been committed by an employee within the scope of his employment. The term "within the scope of employment" includes actions even in contravention of an express company rule. *Fines v. Heartland*. However, an employer will not be vicariously liable for an employee's malicious or tortious conduct if the employee substantially deviates from the employment duties for personal purposes. *Id.*

Wrongful termination

If the employee manual does not clearly provide for the possible causes of termination, an employer could be liable for wrongful termination if it fires an employee for a reason not listed in its manual. In *Lucas v. Sumner Group, Inc.*, an employee fired for violating the company's policy on computer use, sued the company for wrongful termination. The employee had used company internet, computer, and email system for personal use while at work and also off the clock. The issue was whether the policy was unclear as to restricted activities and the consequences of those activities. The Franklin Court of Appeal found that the policy was clear enough and remanded the employee's appeal to trial court. In making its determination, the court stated that when employees are to be terminated for misconduct, employers must be as unambiguous as possible in stating what is prohibited. *Lucas*. The court declined to make findings, it simply remanded the case to the trial court.

The *Lucas* court did, however, leave clues useful for our purposes. The court noted that even if a company policy exists, an employer may be assumed to have abandoned or changed even a clearly written policy if it is not enforced or if, through custom and practice, it has been effectively changed to permit the conduct forbidden in practice.

Recommendations

Based on a review of the PEC Employee Manual, taking into consideration the possibilities for incurring liability as stated above, please see the following recommendations.

1. Clarify Ownership and Monitoring of Technology

One way to clarify ownership would be to include a broad statement addressing that the ownership of the PEC-issued technology, using "shall" where possible instead of "should" or "should understand." It should unequivocally state that any technology issued by PEC is company property and remains company property during and after employment, and at all times (24 hours a day, 7 days a week, etc.). There should also be a definition of what "technology" includes so that the employee has proper notice. Included in the definition should be any hardware or accessories issued by PEC, but also software, internet, wireless, etc. If it is preferred, there could be multiple definitions for instruments and channels of technology. The point is that you want to be clear that PEC has ownership of it all to prevent any claims of invasion of privacy.

Once ownership is properly established, the manual should clearly and unambiguously state that PEC retains a right to monitor the technology at any and all times, including emails, deleted items, internet search history, and the like. Use stronger language than "may review," reserve a right to review. Furthermore, it should expressly say that employees should have no reasonable expectation of privacy with respect to company-issued technology (again to prevent claim of invasion of privacy). Furthermore, it would not be a bad idea to set up a systematic monitoring system to enforce the monitoring to prevent claims that the policy has been abandoned or is no longer in practice.

2. Ensure Company Technology Used Only for Business Purposes

There should be clear and unambiguous language as to the scope of use of PEC-issued technology. Again, using words such as "will," "must," or "shall" are clearer than words like "should" or "might." Rather than including a list of what employees may not use the internet for, I recommend using clear language that prohibits any non-business use, and state that non-business use "includes but is not limited to" any listed items. The point is that you do not want to close the list of prohibitions but rather leave it open. This will serve to guard against wrongful termination claims.

3. Make Policies Effective and Enforceable

To prevent any claim for wrongful termination, it should be clear what is not allowed and the consequences for prohibited actions. Any disciplinary reviews or procedures should be laid out so the employee is on notice as to what is expected and what will happen if he or she fails to abide by the handbook. Also, have the employees sign a statement acknowledging their understanding of the policies related to the technology. This adds to further aid in enforcing the policy handbook in the future.

Please review the above recommendations, and do not hesitate to contact me with questions.