Representative Passing Answers

Below are the Multistate Performance Test (MPT), Multistate Essay Examination (MEE), and Indian Law Question (ILQ) questions for the listed South Dakota bar examination and a representative passing answer to each question.

The representative passing answers have been reprinted without change, except for minor formatting. They were written by examinees under time restraints and without access to legal materials. The examinees authorized the Board of Bar Examiners to publish the answers anonymously for the benefit of future South Dakota bar applicants.

The answers are not "model answers." They do not, in all respects, accurately reflect South Dakota law and/or its application to the facts. They do not always correctly identify or respond to the issues raised by the question and may contain extraneous or incorrect information. The answers demonstrate the general length and quality that earned an above average score. They are not intended to be used as a means of learning the law tested; their use for such purpose is strongly discouraged.

MPT1
ANSWER

CONFIDENTIAL MEMORANDUM

TO: Hannah Timaku, Supervising Attorney

FROM: Examinee

RE: Laurel Girard Matter; Landlord-Tenant Dispute

DATE: July 30, 2024

ISSUE

The prominent issue is whether Laurel Girard's noncompliance with the terms of her residential lease entered into by and between herself and Hamilton Place, LLC constitutes a material breach of the terms and therefore permits Hamilton Place, LLC to properly file an eviction suit to vacate the premises.

BRIEF ANSWER

Yes, Hamilton Place, LLC may commence legal proceedings against Ms. Girard for her failure to comply with the rental increase as failure to pay constitutes a material breach of the residential lease terms. However, the presence of Mr. Girard's emotional support cat, Zoey, does not constitute a material breach of the residential lease terms as she is within her right to have said assistance animal under Franklin Civil Code Section § 756.

DISCUSSION

(A) Hamilton Place, LLC abided by the terms of its residential lease and did not violate Franklin Civil Code § 505 when it implemented a 10% rent increase.

Ms. Girard's failure to pay the rent increase implemented by Hamilton Place, LLC will constitute a material breach of her residential lease. *See Westfield Apartments LLC v. Delgado* (2021). This case is similar to Franklin Court of Appeal's analysis in *Westfield Apartments LLC v. Delgado* (2021). In *Westfield Apartments LLC*, a landlord attempted to evict a tenant for failure to comply with a term contained in a residential lease agreement. *Id.* The tenant, having agreed to obtain and pay for renter's insurance, failed to comply with this condition for over two years. *Id.* At that time, the landlord provided the tenant with a three-day "notice to perform or quit." *Id.* When the tenant failed to adhere to the notice, the landlord brought suit seeking forfeiture of the lease. *Id.* The court ultimately held that the tenant's failure to maintain renter's insurance for the premises did not constitute a material breach. *Id.* It reasoned that a material breach "must 'go to

the root' or 'essence' of the agreement between the parties, such that it defeat the essential purpose of the contract or makes it impossible for the other party to perform under the contract." *Id.* (citing to *Kilburn v. Mackenzie (*Fr. Sup. Ct. 2003). Furthermore, the court held that "payment of the rent in accordance with the terms of the lease is one of the essential obligations of the tenant, and failure of the tenant to properly discharge this obligation is a legal cause for dissolving the lease." *Id.* (citing *Vista Homes v. Darwish* (Fr. Ct. App. 2005)). Ms. Girard had an essential obligation under her residential lease with Hamilton Place, LLC and her failure to abide by said term constituted a material breach therefore giving Hamilton Place, LLC legal cause to bring forth a suit of forfeiture/eviction.

In *Westfield Apartments LLC v. Delgado* (2021), the court also acknowledged that the Franklin legislature sought to reduce the unequal bargaining power that is often found between a landlord and tenant. *Westfield Apartments LLC v. Delgado* (2021). Pursuant to that initiative, the Franklin Legislature implemented the Franklin Tenant Protection Act in an effort "to safeguard tenants from excessive rent increases." *Id.; see also* Franklin Civil Code § 500 *et seq.* Under §505(a) of the code, a landlord is not permitted to increase a tenant's rent, within any 12-month period, more than 10 percent. Franklin Civil Code §505(a). Under the present facts, Hamilton Place, LLC did not violate the Franklin Tenant Protection Act. Pursuant to the terms of the residential lease agreement, Ms. Girard permitted Hamilton Place, LLC to "raise [] rent no sooner than 12 months after the commencement of [the] lease." Residential Lease Agreement (3). Ms. Girard received notice of the rent increase 17 months after the commencement of the lease. The notice provided to Ms. Girard indicated that rent would be increased by $150.00. In doing so, and as acknowledged by Ms. Girard, the rent increase did not exceed the 10% parameters as dictated under Franklin Civil Code §505(a). Therefore, Hamilton Place, LLC did not violate the lease terms under which Ms. Girard agreed to be subject to and her argument believing that the rent increase was unfair will likely be found to be unsubstantiated.

(B) Hamilton Place, LLC violated Franklin Civil Code Section §756 when it threatened to evict Ms. Girard due to the presence of her emotional support animal.

Due to the superior bargaining power held by landlords, the Franklin legislature by way of the Franklin Fair Housing Act prevents landlords from evicting tenants without "just cause" despite the presence of a contractual provision in a residential lease. *See Westfield Apartments LLC v. Delgado* (2021). Under the Franklin Fair Housing Act, Ms. Girard is permitted to have her emotional support animal, Zoey, on the premises she is renting from Hamilton Place, LLC. *See* Franklin Civil Coe § 750 *et seq.* Ms. Girard has been diagnosed with an emotional disability of anxiety as recognized under the Act. Franklin Civil Code § 755(c). Due to her condition, Franklin Civil Code § 756(a) permits Ms. Girard to have an assistance animal at her residence despite the fact that there is a no-pets provision in her residential lease agreement. Franklin Civil Coe §756(a). Although the code does not require confirmation of her disability-related need, Ms. Girard's provider gave Hamilton Place, LLC such confirmation on July 26, 2024 three days prior to Ms. Girard's receipt of its Notice to Quit. The contents of that document provided by Ms. Girard's psychiatrist came from a reliable third party who was in the position to know of Ms. Girard's disability as she has been Ms. Girard's provider for the past four years. Therefore, Hamilton Place, LLC violated the Franklin Fair Housing Act when it attempted to evict Ms. Girard based upon the presence of her assistance animal, Zoey. If a court permits Hamilton Place, LLC to act in such a manner, its conduct would violate the public policy considerations the Franklin legislature sought to protect when enacting the Franklin Fair Housing Act. *Westfield Apartments LLC v. Delgado* (2021).

CONCLUSION

Because the rent increase implemented by Hamilton Place, LLC did not constitute a violation of the Franklin Tenant Protection Act, Ms. Girard's failure to comply with the term resulted in a material breach of the residential lease. Therefore, Hamilton Place, LLC has legal cause to bring an action of eviction against her. Hamilton Place, LLC may not however bring a cause of action against Ms. Girard for the presence of her assistance animal as the presence of said animal is valid pursuant to the Franklin Fair Housing Act.

MPT 2
ANSWER

Breen & Lennon LLP

Attorneys at Law

520 Jackson Blvd.

Bristol, Franklin 33708

MEMORANDUM

TO: Damien Breen

FROM: Examinee

DATE: July 30, 2024

RE: Sidecar Design Matter - Liability and Damages under CFAA

Dear Damien,

Below is my analysis of the claim that Sidecar Design LLC violated the federal Computer Fraud and Abuse Act (CFAA), Sidecar's liability, as well as potential damages that CDI can recover from Sidecar under the CFAA.

(1) Sidecar Design is likely liable to Conference Display Innovations Inc. (CDI) under the CFAA because John Smith exceeded his authorized access on July 5, 2024, after Sidecar completed its contractual relationship with CDI on July 2, 2024, but we will need to see the contract for more information.

Congress enacted the CFAA in 1986 to address a growing public concern with access to computers by hackers. *HomeFresh LLC v. Amity Supply Inc.* The Act was later expanded to cover information from any computer "used in or affecting interstate or foreign commerce or communication," a provision now uniformly held to apply to any computer that connects to the internet. 18 U.S.C. Section 1030(e)(2)(B); *Van Buren v. United States*, 141 S.Ct. 1648, 1652 (2021), While the CFAA initially imposed criminal penalties, Congress later amended it to permit civil actions against a violator. 18 U.S.C. Section 1030(g). Courts have uniformly held that courts should apply the statute consistently in both civil and criminal contexts. *U.S. v. Nosal*, 676 F.3d 854, 858 (9th Cir. 2012).

Here, the Franklin court will apply the CFAA because of the civil nature of the case and its direct issue with a computer using the internet.

To maintain a civil action under the CFAA, a plaintiff must show, among other things, that the defendant accessed a computer either "without authorization" or in a way that "exceeds authorized access." 18 U.S.C. Section 1030(a)(2), 1030(a)(4). In 2021, the United States Supreme Court decided *Van Buren*, which resolved a circuit split as to the meaning of the phrase "exceeds authorized access." In *Van Buren,* a police sergeant in Georgia was convicted under the CFAA after he used his work computer and login credentials to search a police database for a woman's license plate in exchange for payment from a third party. *HomeFresh*. Through his work computer, the sergeant could reach the departmental database, and his login

credentials gave him access to license plate information. *Id.* No technical barrier to accessing that information existed. Rather, it was only a departmental policy that barred him from using that data for non-law-enforcement purposes. *Id.*

The Supreme Court reversed Van Buren's conviction, concluding that an individual "exceeds authorized access" only when a person accesses data that the person does not have the technical right to access. *Id.* "[A]n individual 'exceeds authorized access' when he accesses a computer with authorization but then obtains information located in particular areas of the computer--such as files, folders, or databases--that are off limits to him." 141 S.Ct. at 1662. Because Van Buren had a computer and login credentials that gave him access to license plate data, he did not violate the CFAA, even if the purpose for his access violated departmental policy. Similarly, in *HomeFresh*, Flynn was permitted to use computers that gave him access to data that included customer information. Since Flynn was not a hacker and had valid password access, his actions did not violate the CFAA.

Here, John Smith worked for Sidecar beginning on June 5, 2024. His work involved entering credit card information into customers' accounts. On June 28, 2024, during Smith's employment, he used his access to CDI's payment system and charged a CDI customer $25,000, which Smith then deposited into his own personal bank account. Because Smith was permitted to use CDI's payment system and it was during the contractual relationship between Sidecar and CDI, Smith had the technical right to access, and his use did not exceed his authorized access under the Supreme Court's definition of authorized access under the CFAA. This is comparable to Flynn in *HomeFresh* who had access to customer information during the course of his work and had valid password access; the case here with Smith is very similar. Thus, while Smith was working under the contract between CDI and Sidecar, his actions did not violate the CFAA.

Conversely, in *HomeFresh*, the court held that once an employee leaves a job, the employee no longer has the legal right to use the employer's computers or to use the passwords or login credentials that allow the employee access to those computers. An employee who does so may be held liable under the CFAA. *Id.*

Here, Sidecar ended its contractual relationship with CDI on July 2, 2024. On July 5, 2024, Smith charged $50,000 to the same CDI customer and deposited that amount into his own bank account. Smith then resigned on July 8, 2024 and left no forwarding information. While Smith still had the right to use Sidecar's passwords and login credentials, the contract between Sidecar and CDI had ended when Smith used password information to take customer funds. CDI would likely argue that because its contractual relationship had ended, access by Smith had also ended, and I believe this would be very persuasive.

Conversely, the Supreme Court in *Van Buren* left a question explicitly unresolved: whether liability under the CFAA turns "only on technological (or 'code-based') limitations on access or instead also looks to limits contained in contracts or policies."

Here, to provide comprehensive counsel, we would need to see the contract between Sidecar and CDI. If Smith had technological access and was still employed by Sidecar, Sidecar might be able to prove that it is not liable under the CFAA. If the contract between CDI and Sidecar shows that access after the contract was done and Sidecar was no longer allowed to use access CDI's information, then Sidecar would be liable for the $50,000 charge under the CFAA.

(2) Assuming that Sidecar Design is liable, CDI can recover the following damages under the CFAA:

Here, the losses were within a one-year period, spanning June 28 to July 9 of 2024. CDI is claiming total losses of $606,000.

Costs of Investigation and Remedy

To the extent that the issue of whether a defendant violated the CFAA involves the interpretation of the CFAA, it is a question of law that courts review de novo. *Slalom Supply v. Bonilla*. The CFAA permits recovery of "losses" only if the claimant's losses exceed a threshold amount of $5,000 during any one-year period. 18 U.S.C. Section 1030(g). In *Bonilla*, Bonilla argued that any employee time or the amount spent to upgrade company computer systems do not meet the CFAA's definition of compensable "losses." Under Section 1030(e)(11), losses include "the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense."

In *Slalom Supply*, money spent to upgrade a security system did not meet the statutory requirement that costs relate to "restoring the . . . system . . . to its condition prior to the offense." 18 U.S.C. Section 1030(3)(11). The statute's plain language suggests that a victim of hacking cannot use the violation as a means of improving its own security or system capability. Here, CDI paid a security firm $500 for a computer system upgrade. Since this was likely not related to restoring the system to its condition prior to the offense, Sidecar does not owe this amount.

In *Slalom Supply*, Salom was able to recover the amount paid to its own employees to assist the cybersecurity firm during the investigation. Nothing in the statutory language requires a hacking victim to rely only on external help to remedy a breach. *Id.* Here, CDI paid a security firm $4,000 for investigating the breach and it was reasonable for CDI to rely on external help to remedy a breach. Thus, Sidecar is likely liable for the $4,000 if it is determined that Sidecar violated the CFAA.

Additionally in *Slalom Supply*, the district court found that the $1,500 for employee time related solely to working on the investigation and did not relate to the upgrade to Slalom's system, and thus was included in the investigation costs. Here, CDI paid its employees overtime of $1,500 to help with the security firm's investigation, and this amount would be recoverable if Sidecar is found to have violated the CFAA.

Lost Business

Case law supports a narrow reading of Section 1030(e)(11), as the plain text of the Act limits compensable losses to only those that result specifically from an "interruption of service." *Slalom Supply v. Bonilla.* "Lost revenues and consequential damages qualify as losses only when the plaintiff experiences an interruption of service." *Selvage Pharm. v. George* (D. Frank. 2018) (dismissing complaint that failed to allege facts constituting an interruption of service, e.g. installation of a virus that caused the system to be inoperable). *See also Next Corp. v. Adams* (D. Frank. 2015) ($10 million revenue loss resulting from misappropriation of trade secrets not a CFAA-qualifying loss because it did not result from interruption in service). Most cases based on lost revenue and consequential damages involve things such as the deletion of critical files that cost the plaintiff a lucrative business opportunity, *Ridley Mfg. v. Chan* (D. Frank. 2015), or the alteration of system-wide passwords, *Marx Florals v. Teft* (D. Frank. 2012).

Courts have awarded such damages even when the interruption is only temporary, provided that the alleged damages result from the interruption. *Cyranos Inc. v. Lollard* (D. Frank. 2017) (affirming award of damages specifically tied to deactivation of website for two days during peak sales).

In *Slalom Supply*, the hacking redirected customer payments but did not otherwise impair or damage the functionality of Slalom's computer systems. Slalom did incur, however, a four-hour interruption in service when its website was shut down at the recommendation of experts. Slalom offered no evidence of losses specifically tied to this shut down. Here, CDI has shown no evidence of losses specifically tied to its 5-day shut down, but it might be able to prove this by sales from previous years.

Also, *Slalom Supply* held that Slalom's business decision to fulfill two customer orders that happened before the service interruption was not a result of the interruption. The court reversed the payments made to reimburse the customer's money that was stolen. Here, CDI paid a customer $125,000 to reimburse the funds stolen from Smith. As explained above, $25,000 of this occurred before the contract finished and $50,000 after the contract finished. Since these funds were not due to the service interruption, it is unlikely that these could be attributed to lost business.

Punitive Damages

The CFAA limits the recovery of damages in civil cases to "economic damages." *Slalom Supply*. Courts have consistently refused to include punitive damages within the definition of "economic damages." *Id.* "[T]he plain language of the CFAA statute precludes an award of punitive damages." *Demidoff v. Park* (15th Cir. 2014).

Here, CDI is asking for $400,000 in punitive damages. Since the language of CFAA precludes an award of punitive damages, a court would not hold Sidecar liable to this amount if found to have violated the CFAA.

In sum, we need to see the contract between Sidecar and CDI to further our analysis on whether Sidecar might be liable for the $50,000 that Smith stole after the contract had ended. If Sidecar is found to have violated the CFAA, it would be liable for the $5,500 in costs that CDI incurred for its security investigation.

END OF EXAM