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Legal Research I - 2006
Project #2 – Scenario A

Research Log

Preliminary Analysis

Relevant Facts

Ethel is a stellar employee of 20 years at Rainer National Bank. Her boss of 6 months, a brother of an old friend, has been asking her to go on a date. She has refused him. On September 30th, he accused her in front of the whole staff of stealing blank cashier's checks. He gave her written notice that she must take a lie detector test. Ethel complied and the results, unknown to her, show she hasn't stolen from the bank. Coworkers have gone from teasing her to taunting her about the incident. She reported this to her supervisor on October 6th. On October 13th, she told HR about all her difficulties and asked for a transfer. HR referred her back to her supervisor to work it out, violating company policy by not taking it seriously. He retaliated by assigning her menial tasks and removing her from public service. Her preexisting anxiety and depression have since increased. She is receiving treatment, both counseling and medication. Ideally, Ethel would like to stay on at the bank. If she did have to leave, she fears losing her pension.

Words and Phrases

"Who"

- Woman
- Man
- Manager
- Employee
- Bank teller
- Coworker(s)
- Supervisor
- Therapist
- Counselor
- Human Resources

"What"

- Polygraph test
- Lie detector test
- Harassment
- Medical condition
- Preexisting medical condition
- Dating
- Accusations
- Unpaid leave
- Pension

"When"

- September 30th
- October 2nd
- October 6th
- October 13th
- Within the last 2 months
- Before 2004
- When Ethel was 14
- The last 6 months

"Where"

- Rainer National Bank
- Seattle
- King County
- Washington State
- United States of America

"Why"

- Spite
- Revenge
- Retaliation
- Fear
- Taunting
- Anxiety
- Depression

Updated Terms

- Hostile work environment
- Intentional infliction of emotional distress

Issues

- Because of the medical conditions, can she leave and still get her pension?
- Did the supervisor (Jack) violate policies and/or law by a) administering the test, b) assigning menial tasks, c) forcing unpaid leave?
- What are the repercussions of HR failing to follow company policy?
- Is workman's compensation available to Ethel in this situation?

Jurisdiction

State and Federal Law (but we are supposed to focus on state law)

Knowledge Assessment / Developing Background Knowledge

- West's Encyclopedia of Law, 2nd Edition (E-book format from public library)

- Searched for "polygraph" and read related entry, but it merely described standard procedures and the history of the test's admissibility in court.

- Also searched for “hostile work environment” and the only entry that showed up was “sexual harassment”. At first when I read the U.S. Equal Employment Opportunity Commission definition (which is the basis for most court cases), Ethel’s situation did not seem to be sexual harassment per se. But the dictionary text did include verbal request for dates as a form of sexual harassment. Also of potential use was information about “the concept of a hostile work environment.” The Supreme Court upheld it as actionable under 1964 Civil Rights Act in *Meritor Savings Bank v Vinson*, 477 U.S. 57, 106 S. Ct. 2399, 91 L.Ed. 49 (1986). Specifically, Title VII of the Civil Rights Act is a guiding rule of workplace equality that requires employers prevent a hostile work environment.

- Another concept presented in the dictionary definitions was that of “agency law” which describes the responsibilities of employers and employees to each other and to third parties.

- Westlaw – Labor & Employment – Treatises & Practice Guides
    - Employment Law (EMPLOYLAW)

Error message that I couldn’t access this under my subscription.

    - Employment Coordinator (EMPC)

I searched “hostile & work & environment” and received 114 hits. I added “& Washington” to limit to 9 hits.

- § 51:13 *Demonstrating harassment involving a “tangible job benefit”.*
Although this was brought up in a search simply because a plaintiff’s name was Washington, it did have some useful insights into sexual harassment cases where adverse employment action was taken. Jack’s changing of her tasks could be see this way.

- § 51:15 *Demonstrating the pervasiveness of harassment.*
Again, this wasn’t WA specific, but lays out necessary steps to proving hostile work environment. The more severe conduct, which lie detector tests could be seen as, the less a plaintiff would have to show a repetitive series of incidents. Entry also notes that tangible job benefit harassment has no persuasiveness requirement.

- § 51:87 *Washington*
Discusses WA Law Against Discrimination found in WA Rev Code § 49.60.010 which allows a hostile work environment claim based on racial, sexual or physical disability harassment.
Still in EMPC, I searched “polygraph & Washington & state”.

- § 53:55 *Washington*
Lie detector test are not allowed in WA to obtain or continue employment with 3 exceptions, none of which apply to Ethel. Cites RC Wash 49.44.120.

- § 61.6 *When is conduct outrageous and extreme*

Again, not WA specific, but brings up idea of "intentional infliction of emotional distress." This is under the section about challenges to termination. It cites examples of when the court has ruled employer conduct outrageous. This included "unfounded accusations of misconduct that an employer knew to be untrue" and "actual or attempted administration of a polygraph test." It also acknowledges that employer's knowledge of an employee's vulnerable state of mind can affect how outrageous court holds the actions.

Followed a Results Plus link to Corpus Juris Secundum: Torts

- § 75 Extreme and Outrageous Conduct – Employment
This entry says most employment disputes don't go to the "extreme & outrageous" claim for intentional infliction of emotional distress unless there's a pattern of harassment over time, except in the most unusual cases. But if you read the description for a cause of action it seems that what happened to Ethel could fit.

- Also in EMPC, I tried searching "work* & compensation & Washington & state" and "'human resources' & procedures", but didn't get good results (too many and a quick scan showed nothing relevant).

I feel ready to look at WA PRAC now, but two things are bugging me:
1) I'm having a bit of trouble searching across databases in Westlaw. Some aren't allowed to be use in multiple searches.
2) I'm having trouble constructing a query around how HR handled the situation and also the issue with Ethel's pension. I'm hoping these will show up in other ways, particularly in the WA specific materials.

- Westlaw – Washington Practice

Initial search with "polygraph & test*" turned up 26 hits, but most were around admissibility and lawyer conduct. Added "& employ*" but only got two results, both on appeals. Changed my search to "lie detector" and the first 13 hits were relevant to employment.

- 1B WAPRAC § 61.6
This states that federal and state laws prohibit employers from using lie detector tests, again with exceptions that don't apply to Ethel. Also cites RCWA 49.44.120

Tried searching again with "polygraph & employment' and Result Plus led me to additional information.

- 23 A.L.R. 4th 187. *Validity and construction of statute prohibiting employers from suggesting or requiring polygraph or similar tests as condition of employment or continued employment.*
In each of the cases presented the court upheld the validity of the state statutes. Unfortunately, a WA case wasn't listed.

There were more Results Plus, but the merely echoed more on polygraph testing I'd already found. My next search in WAPRAC was "hostile & work & environment".

- 1B WAPRAC § 61.22
This is one of the best finds of all my searching. It defines the two types of sexual harassment, quid pro quo and hostile work environment, and outlines the 4 factor test for the latter. It also cites RCW 49.60.

- 6A WAPRAC WPI 330.00 (introduction)
Another great find because it discusses the relevant RCW chapters, burden of proof, how federal law fits into WA law and gives cases. It also cites examples of common law claims to redress employment discrimination.

- 6A WAPRAC WPI 330.21
Continuation of Jury Instructions, but notes that federal cases have moved away from distinction of hostile work environment versus quid pro quo towards determining "tangible employment action", but that WA has stuck with the distinction. Also cites cases.

- 6A WAPRAC WPI 330.23
Describes burden of proof for hostile work environment.

- 6A WAPRAC WPI 330.24
Defines "manager".

- 16 WAPRAC § 3.7
Points out that an employer is responsible for a supervisor's actions (torts) in hostile work environment if the employer is informed. Since Ethel informed them through HR, they can be held liable.

- 16A WAPRAC § 24.8
Describes what employer must show to overcome presumptive liability for a supervisor's sexual harassment. Based on this, Rainer Bank would not be able to overcome liability. Cites cases.

- 16A WAPRAC § 24.10
Describes hostile work environment and cites WA cases.

At this point I feel I have a solid background in hostile work environment. I need more around the intentional infliction of emotional distress and/or outrage since these could be a claim under common law. In WAPRAC I searched "intentional infliction of emotional distress" and got 8 hits. Only 1 applied.

- 16 WAPRAC § 13.21
Great resource! Explained (to my legally untrained mind) that tort of outrage is the same as IIED. Damages are recoverable for mental/emotional distress, but only if damages are not recoverable under another theory. According to the entry, outrage should allow recovery only in the absence of other tort remedies. It sounds like if Ethel's situation didn't fall under sexual harassment/discrimination, this would be an option.

Feeling like I need more background on the polygraph issue, I looked back at Exercise C. I reviewed 18 Am Jur Proof of Facts 3d 627 and 42 Am Jur Trials 313. The latter was more understandable to me, but I'm not sure that either is directly applicable.

- Westlaw – Investigating Employee Conduct

I searched for "'lie detector' & stress"

- IEMPC § 4:18 *Common Law -- Intentional inflection of emotional distress and outrageous conduct*
Points out that other jurisdictions have recognized that employees have a greater protection from outrageous conduct when it comes from an employer. Also that employees with a favorable work record have even greater protection. But yelling and accusing are not enough in this tort. It must be deliberate infliction of distress with little evidence of employee wrong doing. This seems to describe Jack's behavior.

- IEMPC § 12:33 *Employee Polygraph Protection Act of 1988 -- Remedies*
Applies to Federal Statute, but it's good to know that remedies include reinstatement of employee, which should include duties and lost wages.

- IEMPC § 14.6 *Emotional Distress*
Points out employees whose claims of mistreatment are not investigated may sue for emotional distress.

I also peeked again at RCW 51.24.020 which we referred to in Exercise C.

Before I move to statutes I feel there is one last background knowledge piece I need. I know Ethel wants to stay in her position and all the secondary sources I've looked at so far talk about trails and such. I don't know how the mediation process would be started.

Typing "mediation" in WAPRAC gave too many results as well as typing "mediation & employment". A quick Google search gave me some interesting results, but I don't have enough context to interpret them. I did discover the term "alternate dispute resolution". The most useful site was for the North Virginia Mediation Service at George Mason University which had FAQ's (http://www.gmu.edu/departments/nvms/faq_civ.htm) From this I got the general layout of how mediation works.

I then went to Westlaw and searched for mediation in Black's. This led to 18 mostly helpful entries. It helped clarify mediation versus arbitration. Also, one entry was for the Equal Employment Opportunity Commission because they recommend mediation before litigation.

Search for Statutes

My preliminary research in secondary sources had pointed to at least two statutes, so I went back through my notes and, using Westlaw, looked these up in RCWA.

- RCWA 49.44.120 *Requiring lie detector tests -- Penalty*
This statute is "on point." It clearly states that subjecting an employee to a lie detector test is a misdemeanor. Unfortunately, none of the decisions listed at the bottom were relevant to Ethel's situation. Entry did point to 18 Am Jur POF 3d 627 again.

- RCWA 49.60 *Discrimination -- Human Rights Commission*
This chapter is to be known as the "law against discrimination" and establishes an agency (Human Rights Commission) to "eliminate and prevent" discrimination in employment. Sex is listed as factor for discrimination. While I think this is also "on point" this statute doesn't seem as clear cut as the last one does, at least to me. There is more room for debate. I also had trouble finding cases relevant to Ethel in the notes on decisions.
Since this chapter of the RCWA is large, I searched for "sexual harassment" within the results to narrow it down. This led me to § .030 *Freedom from discrimination -- Declaration of Civil Rights.* The notes on decisions here were of more interest and I am starting to see the same cases again. But none seem like a good match for the specific legal issues in Ethel's situation. The encouraging part was that in the annotation were mentioned secondary sources I'd already found.

I also looked back at Exercise C & the RCW mentioned there.

- RCWA 51.24.020 *Action against employer for intentional injury*
Points out how employer is liable if the employee had told of her supervisor's action and that is doesn't count against Worker's Compensation.

This also reminded me that I didn't look much at worker's compensation, so I searched the RCWA but the most relevant results referred back to sections I had already reviewed.

Search for Cases

At this point, I know I'm looking at three main focus points of law for Ethel's situation: the illegal use of polygraph testing, a hostile work environment/sexual harassment issue and a tort of outrage. For the first point, the statute is very clear, so I mostly need case support on the harassment and outrage issues.

Mandatory Authority

While looking at the discrimination law, I finally found a case that stated that the bar on litigation from the Industrial Insurance Act (under which Worker's Compensation falls) does not apply when the employer does intentional damage. This means she could get worker's compensation and still pursue legal action.
Hinman v. Yakima School Dist. No. 7 (1993) 69 Wash.App. 445, 850 P.2d 536.

Three cases were cited that demonstrate that in general the analysis used for federal discrimination law around employment is used at the state level because the laws are parallel. And, federal law is persuasive in some areas where state cases are not established, though state law isn't bounded by federal.
Kees v. Wallenstein, C.A.9 (Wash.)1998, 161 F.3d 1196.

Kahn v. Salerno (1998) 90 Wash.App. 110, 951 P.2d 321.
Xieng v. Peoples Nat. Bank of Washington (1993) 120 Wash.2d 512, 844 P.2d 389.

Two cases show the four pieces that must be proved for sex discrimination, though the later is a negative example. An important piece is that employer is informed.
Kahn v. Salerno (1998) 90 Wash.App. 110, 951 P.2d 321.
Coville v. Cobarc Services, Inc. (1994) 73 Wash.App. 433, 869 P.2d 1103.

Also, the employer must make reasonable attempts to end the harassment.
Herried v. Pierce County Public Transp. Ben. Authority Corp. (1998) 90 Wash.App. 468, 957 P.2d 767.

An employer is liable for supervisor's actions if discrimination (again, negative example).
Brown v. Scott Paper Worldwide Co. (2001) 143 Wash.2d 349, 20 P.3d 921.

Looking back at the section on industrial insurance and intentional injury, cases show that this is interpreted strictly and intentional injury must be made clear. I'm not sure if you could say Jack intentionally hurt Ethel beyond his intention to embarrass her. There were several cases to back this up, but not one showing how intentional injury was proved. One case points out that even if employer knows the action could cause injury (Jack must have known this would increase Ethel's anxiety), that's not enough to prove it was intentional. Another case shows that even assault wouldn't count as intentional injury on employer's part. Birklid seems unique as a successful intentional injury case.
Byrd v. System Transport, Inc. (2004) 124 Wash.App. 196, 99 P.3d 394.
Birklid v. Boeing Co. (1995) 127 Wash.2d 853, 904 P.2d 278.

To get at more mandatory cases, I went back to Washington Practice. Most cases I found were on the harassment aspect.

Glasgow v. Georgia-Pacific Corp., 103 Wn.2d 401 (1985).
This appears to be a significant case where an employer failed to correct hostile working environment. In one entry it is listed as a case that established the rules for workplace harassment.

Robel v. Roundup Corp., 148 Wn.2d 35, 43, 59 P.3d 611 (2002)
This has strong case parallels because co-workers behavior led to an outrageous conduct claim against employer. It is also a case where actions are intentionally hurtful. Because the plantiff was not successful, it shows what is needed for such cases.

Francom v. Costco Wholesale Corp., 98 Wn.App. 845, 991 P.2d 1182 (2000)
This one came up several times, but I didn't think it was particularly applicable until I read that is discussed reasonable responses to harassment by employer.

There are some cases on harassment I saw over and over but didn't find them on point enough. For example Antonius v King County and Washington v Boeing Co.

Contreras v. Crown Zellerbach Corp., 88 Wash. 2d 735, 565 P.2d 1173 (1977).
This case involved an employee in good standing who suffered discrimination to the level of outrage.

Persuasive Authority

Even though I have some solid cases, I feel the need to double check some cases that came up with my secondary sources search.

Norman v. General Motors Corp., 628 F. Supp. 702, 1 I.E.R. Cas. (BNA) 1219, 1 I.E.R. Cas. (BNA) 1221, 122 L.R.R.M. (BNA) 2717, 122 L.R.R.M. (BNA) 2719 (D. Nev. 1986) (applying Nev law).
In this case, an employer's behavior was found outrageous because they accused an employee without foundation.

Gibson v. Hummel, 688 S.W.2d 4, 118 L.R.R.M. (BNA) 2943 (Mo. Ct. App. E.D. 1985)
Appeal court ruled that polygraph tests were outrageous conduct.

Kentucky Fried Chicken Nat. Management Co. v. Weathersby, 326 Md. 663, 607 A.2d 8, 7 I.E.R. Cas. (BNA) 865, 126 Lab. Cas. (CCH) ¶; 57534 (1992).
Case deals with employer's knowledge of employee's vulnerable state of mind which adds to outrageousness of tort.

Alcorn v. Anbro Eng'g, 2 Cal. 3d 493, 86 Cal. Rptr. 88, 468 P.2d 216 (1970)
California case affirms that employee has right to great protection from emotional distress from their employer.

Casas v. Wornick Co., 818 S.W.2d 466 (Tex. App. 1991).
Bolton v. Department of Human Servs., 527 N.W.2d 149 (Minn. App. 1995)
Cases supports that employees in good standing have greater degree of protection.

Burlington Indus. v. Ellerth, 524 U.S. 742, 752- 54, 765-66, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998).
Frequently quoted case on harassment and employment.

Refine, Double-Check and Update

At this point I've gathered a lot of data (perhaps too much?) and need to pull back to the essentials. I know the statutes I have are current because I double checked the dates in Westlaw. I then Shepardized cases that best support Ethel's options.

Hinman v. Yakima School Dist. No. 7 (1993) 69 Wash.App. 445, 850 P.2d 536.
This case verifies that Worker's Compensation can still be used if Ethel would like it while still allowing her the right to litigation. The decision has no negative treatments but one positive analysis.

Kahn v. Salerno (1998) 90 Wash.App. 110, 951 P.2d 321.
This decision has been followed ten times. It is a defining case for hostile work environment with sexual harassment.

Glasgow v. Georgia-Pacific Corp., 103 Wn.2d 401 (1985).
This is perhaps an even more important case for hostile work environment. It has three cautionary analyses, but has also been followed 34 times.

Birklid v. Boeing Co. (1995) 127 Wash.2d 853, 904 P.2d 278.
This is the case that deals with the tort of outrage. It has eight cautionary analyses but has been followed 37 times. I think this makes it still solid law.

Robel v. Roundup Corp., 148 Wn.2d 35, 43, 59 P.3d 611 (2002).
Another case dealing with the tort of outrage, in this case unsuccessfully proven. It has four cautionary analyses but has been followed ten times.

Armed with the statutes and cases, I think I'm ready to write my memo.