

Plaintiff, a management trainee, brought a sex discrimination lawsuit against her employer for wrongful termination of her employment. At trial, the plaintiff is prepared to testify that a janitor at the company told her that he had heard her supervisor say to other male coworkers about her, "Make it hard for her. Maybe she'll go home where she belongs."

Is the plaintiff's proposed testimony admissible?

- A. No, because the janitor's statement is hearsay not within any exception.
- B. No, because the statements of both the janitor and the supervisor are hearsay not within any exception.
- C. Yes, because the janitor's statement is a present sense impression, and the supervisor's statement is a statement of his then-existing state of mind.
- D. Yes, because the statements of both the janitor and the supervisor are statements concerning a matter within the scope of their employment.

Explanation:

Under the **rule against hearsay**, out-of-court statements offered for the truth of the matter asserted therein are generally inadmissible. And when testimony consists of **double hearsay**—ie, a hearsay statement contained within another hearsay statement—**each statement** must be **independently admissible** before a jury can consider that testimony. This requires that *both* statements fall within a:

hearsay **exclusion**—eg, a statement made by the opposing party's employee within the scope of employment and offered against the opposing party *or*

hearsay **exception**—eg, a statement describing an event or condition made while or immediately after the declarant perceived it (ie, a **present sense impression**).

Here, the plaintiff seeks to testify about the janitor's statement regarding the supervisor's statement. Both out-of-court statements are being offered for their truth. But since the *supervisor's* statement was made within the scope of his employment and is being offered against the employer (a party-opponent), it is excluded from the hearsay rule (**Choice B**).

However, the *janitor's* out-of-court statement was made *outside* the scope of his employment because the statement was not relevant to his work duties (**Choice D**). Therefore, it does not fall within this hearsay exclusion (or any other exclusion). And the statement is not a present sense impression because it was not made while or immediately after the janitor heard the supervisor (**Choice C**). And since the statement does not fall within any other hearsay exception, the plaintiff's proposed testimony is inadmissible.

Educational objective:

Hearsay within hearsay (ie, double hearsay) is inadmissible unless *both* statements fall under a hearsay exclusion or hearsay exception.

References

Fed. R. Evid. 805 (hearsay within hearsay).

Fed. R. Evid. 803–04 (hearsay exceptions).

Fed. R. Evid. 801 (hearsay exclusions).

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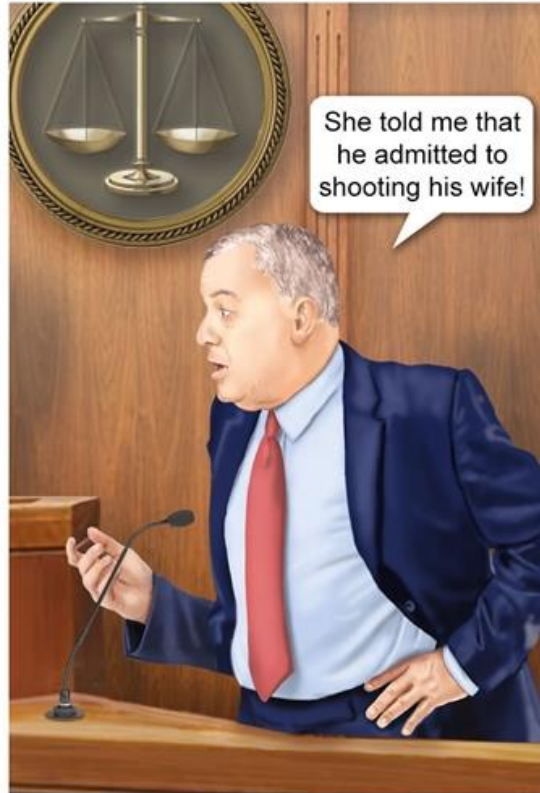
Hearsay within hearsay (FRE 805)

Woman's statement is hearsay



FRE = Federal Rules of Evidence

Witness's statement is hearsay within hearsay



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