

**UNIVERSITY OF MARYLAND
SCHOOL OF LAW**

**Employment Law
(3 Hours)**

**Professor Weiss
Day Division**

**Wednesday, May 10, 2000
1:30 - 4:30 p.m.**

No. _____

Signature: _____

Printed Name: _____

INSTRUCTIONS:

Signing and numbering:

Sign and print your name in the blanks above. Put the number found above on each of your answers to the examination and on the envelope. Both the envelope and your answers should contain your exam number, the course name, and the instructor. Do NOT put your name anywhere on the envelope or on the answers.

Submission:

Upon completion of the examination, put your answers to the examination in the envelope, fasten the flap with the clasp, and hand in the envelope to the exam administrator. Be sure to enclose all of your answers — you will be graded only on what is inside the envelope. Do not put the exam questions in the envelope. Hand in the questions separately to the exam administrator.

Time:

You will be graded only on examination papers received at the announced time. Each student is responsible for ensuring that all the completed examination papers and the examination question sheets are handed in to the examination administrator.

- INSTRUCTIONS CONTINUE ON PAGE TWO -

SPECIAL INSTRUCTIONS:

This examination is **OPEN BOOK, MODIFIED**. You may use your casebook and supplement, hard copy versions of your classnotes, and any other hard copy, non-commercial materials you have prepared alone or with your classmates. You may not have with you any hornbooks, commercial outlines or other published materials, nor any published materials xerographically reproduced, nor any materials purchased from any source for money or any other form of consideration other than a mutual exchange between class members of study materials.

For grading purposes, each question will be weighted approximately in proportion to the time allocated for the answer. If your examination is handwritten, please write only on one side of the page, and only on every other line. If your examination is typewritten, it is to be triple spaced with ample margins.

Computers:

Students may use computers on this examination. Computers may be used for wordprocessing only. Students must supply their own equipment. Students using computers must take the exam in the assigned typing room — the TAL Center, the clinic and other law school equipment and facilities are not available for student use. Examination papers must be completed and returned to the exam administrator according to the normal exam administration rules.

Students using computers may not access any computer stored information during the exam; that is, students may use the computer only for word processing from a diskette (which also may not include any stored information) and printing out the final product, not for accessing any files on their hard drives. Nor will students be allowed to use any typing assistance programs such as SpellCheck.

NO ALLOWANCE FOR ADDITIONAL TIME WILL BE GIVEN FOR PRINTING, EQUIPMENT FAILURE, ETC. Students must submit either hard copy or a floppy disk in WORDPERFECT 8.0 or lower, MS Word 97 or lower, or ASCII text format. A student who chooses to submit the exam on floppy disk must keep a duplicate, backup floppy disk, with no other files on it, made simultaneously with the original.

PLEASE NOTE that students choosing to submit the exam on floppy disk bear the entire risk of disk failure or other cause of inability of the instructor's computer to read, or printer to print, the contents of the disk.

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Question I

A.

(80 minutes)

Alphabeta Co. is a three year old internet retailer specializing in selling flowers, gifts, and greeting cards for special occasions over the internet. It employs a staff of 85 full-time and 30 part-time employees, all of whom work on the premises of the company's offices in Bawlmerr, Merrylande, the Fifty-First State. The staff is utilized in the following positions.

Five full-time employees are customer service troubleshooters, who answer a toll-free telephone number provided on the billing and order form accompanying every shipped item. They have a rotating six day a week work schedule, with one person each week assigned to work that Saturday instead of Monday. They are paid a salary of \$500 per week (\$26,000 annually), and are entitled to two weeks of paid vacation per year.

Ten employees are internet “shopping assistants.” The website is set up so that a customer confused or in need of advice about an appropriate purchase may send an instant message to a “shopping assistant,” who will act as a personal shopping assistant for the customer, sending an instant message in reply with suitable advice about appropriate choices available for order from Alphabeta. Three shopping assistants work Sunday-Thursday, 9 a.m.-5 p.m.; three work Tuesday-Saturday, 9 a.m.-5 p.m., one works Sunday-Thursday, 5 p.m.-1 a.m., one works Tuesday-Saturday, 5 p.m.- 1 a.m., one works Sunday-Thursday, 1 a.m.-9 a.m., and one works Tuesday-Saturday, 1 a.m.-9 a.m. On days when the employee is the only one on duty for that shift, she or he is expected to take minimal breaks for bathroom, coffee or lunch, and to set up the automated reply system to send an instant message reply to any customer who might inquire, indicating that the shopper is occupied with another customer and will reply shortly. The shopping assistants are paid a salary of \$500 per week (\$26,000 annually). These employees are treated as salaried employees, and when co-workers call in sick or at times of peak demand, such as Christmas and other holidays, they are expected to work extra hours without additional compensation.

About 40 full-time, and all 30 part-time employees, are order fillers. The computerized ordering system verifies all information on the order form, including the credit card information, ensures that the credit card has been charged and the price credited to Alphabeta's account, and, using bar code and computer robot sensing equipment, selects the appropriate stock items from the warehouse shelves, loads them into a conveyer basket, and sends them down the belt, along with a printed order form,

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including the mailer for the package. An order filler receives the conveyer basket, verifies the stock items it contains against the listing on the order form, packs the items in a box of the appropriate size, seals the box, and inserts the order form in the outside plastic packaging, recipient's address side up.

All order fillers, whether full or part time are paid \$10.00 per hour for working their regularly scheduled hours. The full-time employees work Monday-Friday, 8 a.m.-5 p.m., with an hour break for lunch. If business demands that they work extra hours, they are paid \$15.00 per hour. The part-time employees work 20 hours per week, starting work at 5 p.m. and working until 11:30 p.m., with one half hour break in the middle. If they are kept over, or called in for extra hours, they, too, are paid \$15.00 per hour. The order fillers are all women, and 25 of the 30 part-time order fillers are African-American, while only 2 of the full-time order fillers are African-American. Except for the Vice President for Marketing, who is African-American, the remainder of the workforce is all white, despite the fact that the metropolitan area around the company's offices is 25% African-American.

Ten of the full-time employees are managers or supervisors. One is the Chief Executive Officer, earning \$1 million per year. One is the Chief Financial Officer, earning \$750,000 per year.

One, Harry Helpful, is Vice President for Marketing. Helpful is an African-American. He oversees a staff of 3 (non-managerial) full-time computer technicians who design and maintain the company's web site. The computer technicians are paid \$65 per hour for working a 48 hour weekly schedule, 9 a.m.-6 p.m., Monday-Saturday, with a one hour break for lunch.

One manager is Vice President for Human Resources. One is Vice President for Operations, responsible for making sure the company orders appropriate stock from its wholesale suppliers, and properly fills orders from its customers. One is General Counsel and Vice President for Legal Affairs. She has a staff of two lawyers who report to her, but litigation work and many specialized legal matters are referred to a large, corporate law firm that Alphabeta has retained as their regular outside counsel. All Vice Presidents earn \$250,000 per year.

Four other managerial employees are supervisors, who supervise the order fillers, the five customer service troubleshooters and the ten internet shopping assistants. Each supervisor earns \$150,000.

All of the supervisors and all of the Vice Presidents, except Helpful, are white. Since the company began, two order fillers have been promoted into the supervisory

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ranks, both of them white. All other supervisory or managerial openings have been filled from outside the company. About half of the employees at all levels have been with the company since its inception.

The company has a personnel policy manual which its prior General Counsel drafted and disseminated two years ago, about a year after the company started operations. The original version included, among others, the following provisions:

Article 5 – All employees are expected to be at work at all times when regularly scheduled. A salaried employee who misses more than one day every two months will be subject to salary reduction in proportion to the amount of time missed. An hourly employee will not be paid for hours missed, and will be subject to discipline if he or she misses more than one day every two months, regardless of excuse. When less than a full day of work is missed, it will be counted as a half-day for purposes of this rule, except if more than 4 hours are missed, it will be counted as a whole day.

Article 10 – Alphabeta highly values all of its employees. While a young company cannot promise that it will succeed and stay in business, we can assure our employees that if you invest in us, we will likewise stand behind you. Your jobs are as secure as the company's future. If we succeed, you, too, will succeed, and your job will continue. So long as you work diligently and obey the rules, this company will maintain your employment, to the maximum extent economically feasible.

One year ago, on May 1, 1999, the manual was revised, and each employee was provided with a copy of the new manual. They were required to sign a form acknowledging that they had received the new manual and that, by their continued employment at the company, they accepted all of its terms. Most of the provisions were unchanged, but one modification added the following language, prominently displayed, in larger type size, on the first page of the document.

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ALL EMPLOYEES OF ALPHABETA COMPANY ARE EMPLOYEES-AT-WILL. THE COMPANY HAS THE RIGHT UNDER LAW TO TERMINATE ANY EMPLOYEE AT ANY TIME FOR ANY REASON WHATSOEVER IN ITS SOLE AND EXCLUSIVE DISCRETION. THIS PROVISION OF THE EMPLOYMENT RELATIONSHIP MAY NOT BE MODIFIED OR ALTERED EXCEPT IN WRITING, SIGNED BY THE CHIEF EXECUTIVE OFFICER OF THE COMPANY.

In addition, a new section was added at the end, which read as follows:

Section 12 – Arbitration. The employer and the employee or applicant for employment mutually agree to settle all claims arising out of or relating to his or her application for employment, his or her employment, or the cessation of his or her employment with Alphabeta Company, by final and binding arbitration before a neutral arbitrator and in accordance with Alphabeta’s “Dispute Resolution Rules and Procedures.”

This language was also added one year ago to the bottom of the employment application, and all subsequent applicants were required to sign that portion of the document as a condition of being considered for employment.

A separate document was disseminated among management, but not to applicants or employees, containing Alphabeta’s “Dispute Resolution Rules and Procedures.” Some key provisions included that the parties would share the cost of the arbitrator, with each party responsible for his or her own attorney’s fees; that the burden of proof by a preponderance of the evidence is on the employee; that claims must be filed within 90 days of when the employee knew or should have been aware of their existence; that no class actions are permitted, and all claims must be processed as individual claims; and, that available relief may include (1) injunctive relief against any violation of law; (2) back pay and benefits minus mitigation of damages; (3) reinstatement; (4) compensatory damages in accordance with applicable law; (5) punitive damages in an amount no greater than the sum of other monetary relief awarded under (2) and (4) above, or \$5,000, whichever is greater. The employer is to request a list of five potential arbitrators from the National Arbitration Association, a well-respected organization providing arbitration services, and then the employer is entitled to select the arbitrator from those on the list.

You are a labor and employment law expert, who recently joined the outside law firm retained to handle Alphabeta’s complicated employment law matters. As your first assignment, you have been asked to review the company’s employment manual. Write a

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memo reviewing the above portions of the manual, indicating each area which may cause potential legal or practical problems, identifying the problem that the provision could cause, explaining the legal and practical ramifications of the problem, and recommending either that the provision nevertheless remain unchanged or that it be modified, and if so, how. Justify all of your recommendations.

B. **(50 minutes)**

Legal counsel for Alphabet decided to retain all terms and conditions of employment, including the manual, as set forth in Part A above, except that Section 12, Arbitration, was rescinded in its entirety.

Since then, the stock market has nosedived on the internet stocks, and Alphabet is finding itself in a liquidity squeeze. The market is saturated by too many competitors. In what it claimed was a cost-cutting move, Alphabet last month fired Harry Helpful, its Vice President for Marketing, laid off the three website computer technicians who worked under him, and retained an independent contractor firm to handle the work. Helpful had been with the company since the day it began.

A week before the firing, two of the technicians overheard a conversation between their boss, the Vice President for Marketing, and his boss, the Chief Executive Officer, Prunella DeVille. In it, Harry vigorously questioned a new marketing strategy DeVille was ordering him to implement, since it required the website to display and describe merchandise in ways which misrepresented and overstated their value and quality. "I refuse. That would be perpetrating a fraud on our customers," Helpful was heard to say. "So what," said DeVille, "They won't return most of the stuff they buy anyway, and then our profit margins will go up enough so that we can stay in business. If you won't do this, I'm going to get rid of you and replace you with someone who will. You have 48 hours to think about it."

Later that day, DeVille had a conversation with the Vice President for Human Resources, in which she commented that "We have one uppity black man in this management, and maybe it is time to change some things around here." Unbeknownst to DeVille, however, the human resources department was that day trying out some taping equipment for handling interviews with future employment applicants, and it had accidentally been left on. One of the African-American order fillers happened to be in the human resources department and overheard the tape as that portion of it was replayed. She recognized DeVille's distinctive voice and reported it immediately to Helpful, to whom she was sympathetic. Two days later, Helpful was fired, with the company claiming the

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work could be done cheaper by an outside company.

You are a lawyer specializing in representing workers in employment litigation. The law is still unsettled in your jurisdiction as to employment matters; it was historically an employment-at-will state, but in recent cases, the state's highest court has given broad hints that change may be on the horizon. Helpful has approached your firm, seeking representation in his potential lawsuit.

Write a memo to the file recommending whether to take Helpful's case. Outline each possible cause of action, evaluate the proofs suggested by the facts, or those which might be likely to be developed through discovery, and assess the chances of success. Estimate probability of recovery, and amount of probable recovery. On this basis, recommend for or against accepting the case.

Question II (50 minutes)

You are Chief Counsel to the Majority Leader of the Maryland State Senate. A great deal of furor has erupted in the public press recently over a series of cases, some in the public sector and some in the private sector, involving employee privacy rights, on and off the job. The Majority Leader has asked you to formulate a bill which could be adopted and would cover issues of employee privacy when at the workplace and when away from the workplace.

Write a memo to the Majority Leader, first outlining the basic elements of the bill you recommend, and then justifying its contents. Be sure to discuss those areas in which your bill would merely codify existing law and those respects in which it would change it. Indicate those areas in which it would increase protection of employee interests, those in which it would protect employers, and those in which some separate public interest would be at stake. Explicitly describe the interests you are balancing, the balance you strike, and why. If there are issues you choose to omit from the legislation, identify them and justify your decision.

- E n d o f E x a m i n a t i o n -