

February 2014 MPT

▶ *POINT SHEET*

MPT-2: In re Peterson Engineering Consultants

DRAFTERS' POINT SHEET

The task for examinees in this performance test is to draft a memorandum to the supervising attorney to be used to advise the president of Peterson Engineering Consultants (PEC) concerning the company's policies on employee use of technology. PEC is a privately owned, non-union firm in which most employees work outside the office for part of the day. Employees are issued Internet-connected computers and other similar devices to carry out their duties and communicate with one another, the office, and clients. The current employee manual addressing use of these devices was issued in 2003, and the president wants to update it with an eye to revisions that will provide the greatest possible protection for PEC. In particular, the president has identified three goals in revising the manual: (1) to clarify ownership and monitoring of technology, (2) to ensure that the company's technology is used only for business purposes, and (3) to make the policies reflected in the manual effective and enforceable.

The File contains the task memorandum from the supervising attorney, relevant excerpts from PEC's current employee manual, and a summary of a survey about use of technology in the workplace. The Library includes three Franklin Court of Appeal cases.

The task memorandum instructs examinees to consider "Internet-connected (or any similar) technology." This terminology is purposefully used to avoid the need for constantly updating the employee manual to reflect whatever technology is current. Examinees may identify specific technology in use at the time of the exam, but it is not necessary to do so.

The following discussion covers all the points the drafters intended to raise in the problem.

I. FORMAT AND OVERVIEW

Examinees' memorandum to the supervising attorney should accomplish two things:

(1) Explain the legal bases under which PEC could be held liable for its employees' use or misuse of Internet-connected (or any similar) technology.

(2) Recommend changes and additions to the employee manual to minimize PEC's liability exposure based on the president's stated goals and the attached materials. Examinees are instructed to explain the reasons for their recommendations but not to redraft the manual's language.

No organizational format is specified, but examinees should clearly frame their analysis of the issues. In particular, they should separate their analyses of the two tasks listed above.

II. DISCUSSION

A. Legal bases under which PEC could be held liable for its employees' use or misuse of Internet-connected (or any similar) technology

Employers may be liable for their employees' use or misuse of technology under either the theory of ratification or the theory of vicarious liability. Employee misconduct, such as sexual harassment or defamation, could result in employer liability to other employees or third parties. *Fines v. Heartland, Inc.* On the other hand, employers may be vulnerable to claims brought by an employee for invasion of privacy and/or wrongful discharge unless employers take steps to avoid that liability. *Hogan v. East Shore School; Lucas v. Sumner Group, Inc.*

- *Ratification.* An employer may be liable for an employee's willful or malicious misconduct after the fact if the employer ratifies the employee's conduct by the employer's voluntary election to adopt the conduct as its own. The failure to discipline an employee after knowledge of his or her wrongful acts may be evidence supporting ratification. *Fines v. Heartland, Inc.* For example, if an employer learns that an employee is sending harassing emails or posting defamatory blog entries about a coworker and does nothing about it, it could be argued that the employer ratified the employee's conduct and so is liable in tort to those injured as a result of the employee's conduct.
- *Vicarious liability or respondeat superior.* An employer is vicariously liable for its employees' torts committed within the scope of the employment. This includes not only an employee's negligent acts, but could extend to an employee's willful and malicious torts, even if such acts contravene an express company rule. *Fines.* For example, an employer may be liable in tort for the actions of an employee who texts information that invades the privacy of a coworker. This could be true even if the employer prohibits that very type of misconduct.
- However, the employer's vicarious liability is not unlimited. Employers will not be liable for an employee's tortious or malicious conduct if the employee substantially deviates from the employment duties for personal purposes. Thus, if an employee inflicts an injury out of personal malice unconnected with the employment, the employer will not be liable. *Fines.*

- *Invasion of privacy.* Unless the employer is clear and unambiguous about ownership of the equipment and records of use of the equipment and about its right to monitor that use, it may be liable for invasion of its employees' privacy. Clarity in the employee manual about the ownership and right to monitor use of technology can forestall any claims by an employee that he or she has any privacy interest in activities conducted on/with technology owned or issued by the employer.
 - Examinees should recognize that there can be no invasion of privacy unless there is an expectation of privacy. *Hogan v. East Shore School*. Thus in *Hogan*, the court rejected an employee's claim that a search of the Internet browsing history (including deleted files) on his work computer invaded his privacy. The employee manual plainly stated that the employer, a private school, owned the computer, the software, etc., that the equipment was not to be used for personal purposes, and that the school reserved the right to monitor use of the equipment.
 - In addition, the *Hogan* court rejected the employee's claim that because the school had not previously monitored computer use, it had waived the right to do so and had "established a practice of respect for privacy." The school's prohibition on personal use was clearly stated in the manual, and it was unreasonable to conclude, in light of the bar on personal use, that use of a personal password had created a privacy right.
- *Wrongful discharge.* Unless the employer is clear about its policies and consistently enforces them, and is clear about its disciplinary procedures for failure to comply with the policies, it may be liable for wrongful discharge (also referred to as "wrongful termination"). In *Lucas v. Sumner Group, Inc.*, the employee admitted violating company policy prohibiting personal use of the Internet, but claimed that there was an expectation of progressive discipline and sued for wrongful termination. The court found that the employee manual expressly provided for disciplinary action, including the possibility of termination for those violating the policy. Thus the language in the manual was sufficient to put the employee on notice as to the possibility of being discharged; while penalties short of discharge were mentioned, there was no promise of progressive discipline.

B. Changes and additions to the employee manual that will minimize liability exposure and that incorporate the president's stated goals

The second component of examinees' task is to carefully read PEC's current employee policies and then recommend what revisions are needed to minimize liability arising from employee misconduct as well as those that address the president's goals of emphasizing PEC's ownership of the technology, ensuring that such technology is to be used only for business purposes, and making the policies reflected in the manual effective and enforceable.

The current manual is ineffective in what it fails to do, rather than in what it does; it has not been updated since 2003 and is quite out of date. In *City of Ontario v. Quon* (cited in *Hogan*), Justice Kennedy observed the reluctance of the courts to risk error by elaborating too fully on the implications of emerging technology. This reluctance argues in favor of employers such as PEC ensuring that their policies are kept current. Note that examinees are expressly directed not to redraft the manual's language. Also, as there is no format specified, examinees may present their suggestions in different ways: bulleted list, numbered items, or a general discussion of deficiencies in the current manual.

- The client's first goal is to clarify ownership and monitoring of technology. PEC's manual addresses only phone use, computer use, and email use. Because PEC is likely to issue new equipment at any time as technology changes, the manual needs to be rewritten to include *all* technology. In *Lucas*, the employer used the term "all related technologies," a term that is more inclusive and provides for advances in technology.
 - The current manual is ineffective because it fails to make clear that PEC owns the computer software and records of the use of the software, including records of deleted materials; fails to warn against any belief that a privacy interest exists in the use of the technology, including the mistaken belief that use of passwords creates an expectation of privacy; uses the term "given," which may be ambiguous; addresses only ownership of equipment intended for use outside the office and not all equipment, wherever it is used; and identifies only certain types of equipment. In addition, the current manual fails to warn that PEC (or third parties contracted by PEC) will monitor use of the technology, and that it will monitor current, past, and deleted use as well. *Hogan*.
 - PEC must make clear that it owns the technology, including the equipment itself, any software, and any records created by use of the technology, including any

electronic record of deleted files; that it will monitor use of the technology; and that use of employee-specific passwords does not affect PEC's ownership rights or create any implied expectation of privacy.

- Taking these steps should bring PEC's manual into compliance with the ruling in *Hogan*.
 - Likewise, PEC must make clear that it will monitor employee use of its equipment through any number of methods (e.g., review of data logs, browser histories, etc.), even if a third party does the monitoring. For example, in *Hogan*, the court found no invasion of privacy, even when a computer forensic company was hired to search the files on the employee's computer, because the employee manual stated that the school reserved the right to monitor the equipment. Also, in *Hogan*, the court rejected the employee's argument that using a private password created a privacy interest.
 - PEC need not be concerned about any Fourth Amendment restriction on its ability to monitor because PEC is not a public entity. *Hogan*.
- The president's second goal is to ensure that the company's technology is used only for business purposes. While some employers may permit some limited personal use as noted in the Survey, PEC's president has indicated a goal of establishing a bright-line rule prohibiting any non-business use of its technology. Here, the current employee manual is inconsistent with the president's goal in several ways:
 - Most obviously, it expressly permits use of technology for personal purposes.
 - Although the policy states that employees are not to incur costs for incoming or outgoing calls unless the calls are for business purposes, it goes on to state that personal calls are fine as long as no cost to PEC is incurred.
 - The policy permits incidental personal use of PEC's email system by employees. First, what constitutes "incidental personal use" is ambiguous. Second, by allowing a certain amount of personal use, this section of the manual may support a ratification or waiver argument. At a minimum, this sentence in the manual should be eliminated.

- The manual’s limitation on Internet use is open to interpretation. As written, it states that employees may not use the Internet for certain purposes: illegal conduct, revealing non-public information, or “conduct that is obscene, sexually explicit, or pornographic in nature.”
 - By covering only use of the Internet, and not use of the other technology likely available such as email, tablets, or smartphones, the manual may be read to permit personal use of non-listed items. And by listing certain prohibited conduct and not *all* non-business conduct (e.g., online gambling), the manual may implicitly condone conduct not specifically prohibited.
 - In sum, by identifying some forms of technology, the manual may suggest that other forms may be used for personal purposes. Likewise, by identifying some prohibited forms of use, the manual suggests that some other forms of personal use *are* allowed.
- There is no question that PEC has the right to limit use of its technology to business purposes. *See Lucas; Fines; Hogan* (employee policy permitted use of school computers only for academic purposes). PEC need not be concerned about First Amendment implications because the First Amendment applies only to public entities, and PEC is a private entity. *See Lucas*.
- In redrafting the manual, PEC must make its prohibition against personal use clear and unambiguous. The prohibition should be conspicuously displayed. This will help avoid results such as in *Catts v. Unemployment Compensation Board* (cited in *Lucas*), in which the court found that the policy manual was not clear that no personal use was permitted. Rather, the language permitted two ways to read the policy—that for company business, employees were to use only the company’s computer, or that employees were to use the company computer only for business reasons.
 - PEC can increase the likelihood that its policies will be interpreted and applied as it intends if, in drafting a clear and unambiguous prohibition against personal use, PEC takes care to use “must not” rather than “shall not,” “should not,” or “may not.” This is consistent with the footnote in *Lucas* approving use of mandatory, as opposed to permissive, language.

- When revised, the manual should use more inclusive terms in referring to the forms of technology and should avoid itemizing certain kinds of devices but instead refer to all Internet-connected or similar technology.
 - As another means of limiting personal use of its equipment (and the related loss of productivity), PEC may consider blocking websites for shopping, social media, games, etc.
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- The president's third goal is to make the policies reflected in the manual effective and enforceable. One key omission in the current manual is that there is no requirement that employees sign to acknowledge that they have received, read, and understood the policies in the manual. Nor does the manual provide for discipline for those employees who violate the policies.
 - To help protect itself from liability, PEC should have its employees sign a statement each year that they have read, understood, and agreed to abide by PEC's policies on technology. In *Hogan*, the court rejected an employee's claim that because the manual was lengthy, he had not read it and so was not bound by its terms. While the employer prevailed, it would have had an even stronger case if it could have pointed to the employee's signature as acknowledgment that he had read the computer-use policy.
 - The policy on employee use of Internet-connected computers and similar technology should be conspicuously placed in the manual.
 - PEC should review and, if needed, update the manual yearly. In *Hogan*, the manual was issued annually, and that may have helped to persuade the court that the employee was on notice of the school's policies.
 - Equally important is that PEC ensure that its supervisory employees know and enforce the policies consistently and avoid creating any exceptions or abandonment. For example, in *Lucas*, the employee argued that even though the written policy was clear that personal use of email and the Internet was prohibited, the employer had abandoned that policy because such use was permitted in practice.
 - Likewise, PEC must be careful not to waive the policy by inaction. In *Hogan*, the court rejected a claim that because the employer had never monitored computer

use, it had waived that right. To avoid the risk that the claim of abandonment or waiver might prevail, PEC must not only state its policy clearly in writing but must ensure that the policy is enforced and that all personnel understand that they may not create exceptions or ignore violations of the policy.

- PEC must be clear that it will discipline employees for violation of its policies. The manual must state that misuse of the technology will subject the employee to discipline and must not create an expectation of progressive discipline unless PEC intends to use that approach. *Lucas*.
- Additionally, to avoid liability for employees who ignore the policies, PEC needs to provide a means by which coworkers and others can complain about employee misuse of technology. PEC needs to adopt a policy of promptly investigating and acting on these complaints. *See Fines* (employer's prompt action on complaint defeated claim that it had ratified employee's misconduct).

Following the recommendations above will produce policies that clearly prohibit personal use and provide for discipline for those who violate the policies. At the same time, implementing these changes should insulate PEC against claims based on ratification, respondeat superior, invasion of privacy, or wrongful discharge.