EMPLEYMENT LAW

Three hour closed book exam with multiple choice and short answer questions. Permitted to bring in 1 8.5x10 piece of paper with whatever you want on both sides. (Tues December 5) 36 multiple choice (1hr 12 minutes)(40%) 15 short answer (60%)(1.75 hours). Start each short answer in a new question field. In theory, you could have one concise, well written paragraph for each of the short answer. Use complete sentences.

I Chapter I: Origins

A The Meaning of Work

i Why do people value work?
   a Identity
   b Livelihood (wages AND fringe benefits like insurance)
   c How to spend time
   d Sense of how you fit into the community
   e Opportunity—chance to move up the social ladder
   f Independence and Security

i Why do employers value work?
   a Production/labor
   b Loyalty—training save costs
   c Reputation is related to quality of the labor
   d Creativity

i How work was seen in the past
   a At one time, it was based on status based on birth right
   b Master/Servant
   c Free labor vs. Slavery/Indentured Servitude

A The Historical Roots of Employment at Will

i Payne v. The Western & Atlantic Railroad Co.
   a Business threatens to fire their employees if the employees buy goods from Payne. Payne sues for interference with business dealings.
   b Under the common-law the basic view of employment is the “at will doctrine.” This is fundamentally a contract issue. Is any kind of agreement being violated? On what grounds could the contract be terminated?
   c “At will employment” is where either party can terminate the relationship at any time for good cause, for no cause, or even for an immoral reason.
   d Court says that there is nothing to the contrary to at-will employment (like term-employment)
   e Free competition means you are free to come and go from employment agreements as you see fit.
   f The rule is symmetrical. The employer can fire the employee at any time, and the employee can quit at any time.
   g Exception to At Will Employment is an explicit agreement for a fixed term. Also, other law that specifically make certain reason for firing illegal
   h D wins because D had a right to fire employees for any reason.
   i Dissent:
     • If the reason for firing is MORALLY wrong, then it SHOULD be LEGALLY wrong.
     • Antitrust point of view—need to keep these large aggregations of capital in check to protect the free market.
     • Slippery slope—employment is powerful, and this could allow employer to force employees to do things like vote a certain way. Don't want to hinder the individual rights of others. Don't want employers to have power to effect the operation of public institutions.
     • Unequal bar ginning power has an effect on the welfare of the individual worker and on the public

j Late 19th Century is where we shift from master & servant to a contractual agreement

i What Responses Does the Employee have?
   a Unionization/Collective bargaining (common for low/no skill workers)
   b Highly skilled workers can negotiate their own contracts (not going to happen for unskilled/low skilled employees)
   c Quit
   d Suck it up
   e Invest in skills and then leave or make yourself more valuable
   f Go to your legislature and lobby for a bill that prevents being fired for certain reasons

i Problems with these options at the time of Payne
   a Courts thought collective action was illegal conspiracy
A Rise and Fall of the Freedom of Contract

i Lochner v. New York—Bakers maximum hour law is struck down.

a Problem is unequal bargaining power! Labor surplus causes this.

b Problem of incomplete information (think about people who worked with asbestos)

c Significance is that it took the idea of freedom of contract from Payne and constitutionalized it. Not only does the court assume a freedom of contract, the court says that there is a constitutional right under the 14th amendment that prevents the legislature from interfering with the freedom to contract.

d The effect of this was that it was very difficult for state legislatures and congress to establish any sort of labor laws. Then the 1930s killed the Lochner Era. Then the FLSA was able to be passed, as were various state labor laws.

A The New Deal Labor Legislation

i NLRB v. Jones & Laughlin Steel Corp.

a Steel company was interfering with right of workers to unionize. The Board said that they had to give back-pay, post notices, and cease and desist. The company appealed, and it went all the way to the Supreme Court.

b Issue: Is the NLRA constitutional under the interstate commerce clause?

c Primary Rights protected by NLRA:

• Right of workers to organize
• Right to select own representatives.

d Goals of the NLRA:

• Prevent disruptions to interstate commerce
• Solve the unequal bargaining power problem to allow for more equality in negotiations and better outcomes.
• Theory that democracy in the work place is related to the grander democracy. Work shapes who people are. Workplace as an industrial democracy.

e Doesn't say the parties have to agree, it just says they have to negotiate in good faith. The idea is to provide a mechanism to get the parties to the bargaining table, and then to rely on that process to reach an agreement, but the law does not mandate that an agreement be reached. (p 32 has statute)

i The Philosophy of Unionism, Industrial Pluralism and the Practice of Collective Bargaining

a Two ways to deal with problems

• Exit to the market—exit the relationship and move on
• Voice—opening up a dialog

b Advantages of each

• Exit
  • If employers keep losing employees, they may change their ways.
• Voice
  • Makes employer aware of conditions that are objected to

c Disadvantages of each

• Exit
  • High turnover, high transaction costs to both employers and employees
  • Might not get a chance at re-entry
• Voice
  • If employees feel vulnerable, they may not take advantage of voice for fear of reprisals.
  • Public goods problem in a case where we are dealing on an individual basis . . . solved by collective action.

d At Will Rule is really a legal application of the exit option. Unions are a mechanism for enabling collective voice. They are a way of promoting the voice alternative.

i NLRA relies on a contractual approach. Theory is if employees form a union, then we resolve the inequality of bargaining power problem, and then we can fall back on the contractual approach. This is sort of the NLRA saying that we don't know what the best terms are for every single business in the country, and the parties themselves are better able to reach a flexible solution attuned to the needs of the parties themselves and crafted to fit into their communities.

ii NLRA Sec 7 Basic Rights

a right to self-organization
b right to form, join, or assist labor organizations
c to bargain collectively through representatives of their own choosing
d to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection
e right to refrain from all such activities.

i If complaint is filed, the NLRB will investigate, and then prosecute in front of an administrative law judge who will
then issue an order. This can be appealed to the full board. From there it can be appealed to the federal courts of appeals, and then to the US Sup. Ct.

ii Typical remedy is back-pay, cease and desist order, and reinstatement for a worker who is fired for trying to start a union. The NLRA does not provide for any sort of damages, however, so some say that the deterrent effect of the law is not that great.

iii What happened to Unions?
   a Reached peak of their strength in the 1950s, and they were setting lots of awesome trends, even in the non-unionized sector.
   b 1954 35% of the workforce that can be unionized is unionized. Today its 12%, and only 8% in the private sector.
   c Some people blame the decline on the law's inability to adequately provide remedies.
   d Some blame the unions themselves for becoming corrupt and producing products in dying industries, while they ignored the service industry, women, and people of color.
   e Some blame the movement into a global market place, increase in mobility in capital, and the movement toward a service industry killed the unions.
   f Some argue that the problem is that the NLRA has not changed as the economy has changed.

I Chapter 2: Balancing Employer/Employee Interests
   A Shift from internal labor market to a free agency market--in modern era employees are valued by skills and don't get job security
   B Controversies
      i How much of this shift has happened?
      ii What should the policy response be?
         a A lot of social welfare has been tied to employment, like insurance and retirement. This won't work in a spot market model.
         b Who trains? Who pays for training?
   A Contingent Employment
      i Refers to many relationships that are different from traditional 40/week long term career employment
      ii They are a substitution for normal situation.
      iii Harder to regulate
      iv Issues that workers care about most are more difficult to bargain over.
      v In terms of individual rights and collective bargaining, it is harder to figure out who employers and employees are.

I Chapter 3: Contracting for Individual Job Security
   A The Presumption of Employment At-Will
      i Historical Background—
         a Blackstone's Rule: If you are hired for an indefinite period of time, the agreement will be construed to be for employment for one year. The presumption is one year.
            • This way there is no tension between the planting season and the non-planting season.
            • Protects worker from being dropped during off-season when they need it most, and protects employer from paying benefits over the winter and then having the worker quit. This is a fairness concern. Protect the interests of both parties.
            • The investment in the relationship by each party happens at different times—asymmetrical.
            • Exception: If the parties contract for a different amount of time.
         b Wood's Rule (1887, USA)--If the contract is for an indefinite period of time either party can terminate at any time for any reason unless they contract otherwise.
            • Controversial because it wasn't the rule before Wood said it was
            • Controversial because Wood's statement may not have been necessary
            • MONTANA IS AWESOME AND IN 1987 LIMITED ABILITY TO DISCHARGE WITHOUT CAUSE.
         c Default Rules--Rules that are gap fillers that establish a presumption where the parties have not provided for a particular concern in their contract.
            • Immutable or substantive rules are ones that set the terms that parties cannot contract around.
            • Does it really matter what the default rule is if the parties can contract around it? Yes, because
               • bargaining is expensive and information may not be fully available at the time of contract, and the default rule is going to frequently be the rule.
               • The default rule also determines who's going to have to raise the issue. If you are the one who doesn't like the default rule you will have the burden of raising the issue.
         d Savage v. Spur Distributing Co. (typical of early 20th Century cases)
            • Case for breach of contract for damages . He was hired for “permanent” employment.
            • Court says that permanent employment is indefinite employment and thus is at will.
• Court never makes a finding as to what the reason for the discharge was, because they never get to the issue. Because its employment at will, it doesn't matter WHY he was fired.
• If there had been independent consideration given by the employee then he would have in essence bought a property right to his job. Savage claims his moving expenses was such consideration, but the court says that all employees do this and it was of no benefit to the employer.
• Adequate consideration for a good cause provision being read in would include things such as (1) giving up a competing business or (2) Giving up a right to sue for personal injury.
• Mutuality of obligation: Unless both are bound, neither are bound. If employee can quit, employer can fire. (But we normally don't require an equivalence of consideration under contract law, so this is kind of bullshit)
• The impact is that courts almost never found a reason for anything other than at-will. This basically meant that at-will was the substantive rule, not a default rule, in the early 20th Century. This plays out in practice in a very different way today, because what is required to overcome the default has changed.

Alternative Models

The Union Sector

• Doesn't fall within the at-will presumption because there is a contract here that replaces “at will” with “Just Cause” under most circumstances.—Just cause only if you don't conform to the known code of conduct. There is also procedural due process component made up of notice and a hearing. Also, employer has a burden of showing there is just cause for the dismissal.
• Abrams & Nolan Toward a Theory of “Just Cause” in Employee Discipline Cases—This is a typical example of what is allowed for in these cases in arbitration.
  • Just cause for discipline exists only when an employee has failed to meet his obligations under the fundamental understanding of the employment relationship. The employee is required to provide satisfactory work, which has four components.
    • Regular attendance
    • Obedience to reasonable work rules
    • A reasonable quality/quantity of work
    • Avoidance of conduct, either at or away from work, which would interfere with the employer's ability to carry on the business effectively.
  • For there to be just cause, the discipline must further one or more of management's three illegit interests
    • Rehabilitation
    • Deterrence
    • Protection of employer's ability to operate the business successfully
  • The concept of just cause includes certain employee protections that reflect the union's interest in guaranteeing “fairness”
    • Industrial due process
      • notice
      • hearing
      • progressive discipline
    • Industrial equal protection—like treatment in like cases
    • Individualized treatment—look at distinctive facts like employee's record and reason for discipline

Public Employment

• Board of Regents of State Colleges v. Roth (1972)

The Contemporary Era—have removed the obstacles of mutuality and additional consideration, but at-will presumption still exists

Express Agreements

Written Contracts

• Giuliano v. Cleo

Oral Contracts

• Toussaint v. Blue Cross & Blue Shield of Mich.
  • Where the employment is for a definite term, it is implied that the employee can only be fired for good cause.
  • Therefore an oral agreement promising employment “as long as I did my job” satisfies the test to overcome at-will presumption
  • By making it easier to overcome the at-will presumption, there is more burden put on the employer. Also, it benefits employees to know all the terms of their contract.

Rowe v. Montgomery Ward & Co.--
Different from *Toussaint* because didn't negotiate regarding job security during pre-employment negotiations. “Oral statements of job security must be clear and unequivocal to overcome the presumption of employment at-will”

Also different because the employee wasn't uniquely recruited for a unique job like the P in *Toussaint* was.

This means that high skilled upper level employees are probably the only ones who can make these sorts of oral-agreement claims

A Implied Agreements--

i Employee Handbooks
   a See In-Class Assignment #1
   b Tension between employer wanting to build loyalty and not wanting to be bound.
   c *Anderson* test for disclaimers: (other jurisdictions require more/less)
      * Is the disclaimer clear?
      * Is the coverage of the disclaimer ambiguous?

   d *Asmus v. Pacific Bell*
      * Court allows Pac Bell to alter handbook contract
      * The court looks at three things:
         * Not interfering with vested benefits
         * Notice of change
         * Kept original program in place for a reasonable period of time
      * This is trying to walk a middle ground between *Govier* illusory problem and the AZ mandatory consideration approach discussed below.
      * Reasonable notice and reasonable time have a huge role, so the key is what the court finds “reasonable.”

   e *Govier v. North Sound Bank*—
      * an employer can modify the handbook at any time.
      * This approach is reasonable under a theory of unilateral contract.
      * But if the employer can modify the contract on a whim without any additional consideration then what the employee bargained for is completely lost, because they either have to give it up under unilateral theory or quit. So the contract is illusory.

   f The other option is bilateral contract with additional consideration from both sides. The AZ court takes this approach. This means the employer can't change the handbook unilaterally.
      * Problem with this is that its time consuming and costly for the employer.
      * This restricts the employer's ability to be flexible in response to market forces.
      * Takes away the employer's ability to work with the entire workforce as a whole in absence of a collective bargaining agent.

   g Majority rule is like in *Wooley* and will recognized implied promises from handbooks. NY will only do this if you can show reliance. MO won't recognize at all.

i Promissory Estoppel
   a *Goff-Hamel v. Obstetricians & Gynecologists, PC.*
      * Company convinced chic to quit her current job and come work for them. But then the day before she was supposed to start the new job she got a phone call saying “hey, don't bother coming in at all.”
      * Her first theory was a breach of contract theory, but that doesn't work, because she was an at-will employee and thus could be fired at any time.
      * Here second theory was promissory estoppel, and she won on this one.
      * Elements of Promissory Estoppel:
         * A promise
         * reasonable expected to induce action or forbearance
         * action or forbearance in reliance on the promise
         * justice requires there be a remedy
      * Elements Applied to Facts
         * Promise of job
         * She told them that she would have to quit her current job
         * She did quit her current job
         * She got screwed
      * Difficult question is whether it reasonable for someone to rely on a promise of at-will employment? It seems a little anomalous to give her a cause of action here, where if she had worked one day she wouldn't have any cause of action.
      * What we are trying to protect with promissory estoppel is RELIANCE interest.
• Lots of courts don't want to deal with drawing the line, so they just write this off as a harsh result of the crappy at-will doctrine.

b One area where this is a big issue is damages

• Breach of contract damages are based on expectancy—based on pay from new job
• Promissory estoppel damages are based on reliance—based on pay from old job
• You of course subtract any mitigation in both cases
• Problem is that with at will employment you don't know how long she would have had her old job.

i Implied-in-Fact Contracts--*Pugh v. See's Candies, Inc.*

a Employee was fired after 32 years. There was no reason given for his termination. He was told if he was loyal and did a good job he would keep his job. It was also an ongoing practice that administrative personnel were only fired for good cause. He claims breach of K even though there was no written/oral K. He had always gotten raises and had never been reprimanded.

b Court says that the facts here can show an implied-in-fact contract.

c Key is reliance. Where these factors are present it makes sense that the employee would rely.

d Does longevity matter?

• Once you've been somewhere a long time its harder to find a different job.
• Age discrimination playing a role?
  • Age is not the same thing as the gap between productivity and wage
  • Requires that the P prove that the motivation for termination was age
  • Sup. Ct. has said that laying off or firing employees because they cost more is not age discrimination, even if they cost more because they have more experience and thus are old.
  • Matters, but not by itself. Has to be taken in tandem with other factors
• They have given more to the firm than they have gotten, while new employees have gotten more than they have given.

e Important not to interfere with employer discretion

f Financial reasons can be considered “good cause” to fire someone under an implied-in-fact contract, while this is NOT the case in fixed-term contract (where business reasons are not sufficient to provide cause unless explicitly stated).


a Claimed implied contract based on pre-employment negotiations. Judgment was for P because he did not commit sexual harassment (which is what he was fired for)

b Issue is whether the jury should determine whether the facts occurred, or whether its the jury's job to only determine whether the employer reached their decision to terminate in good faith.

c You use the objective reasonableness test—how objectively reasonable was the employer's conduct was. This is the relevant inquiry for the jury. This is an “objective good-faith standard”

d Reasonableness requires notice and an opportunity to be heard—its like procedural due process. Good faith goes to the reasons actually being valid—business reasons/misconduct/etc.

e Court will not require objective proof of the misconduct itself.

A Good Faith and Fair Dealing

i Take notes from book

I Chapter 4: Public Policy Protections for Individual Job Security

A The Public Policy Exception--*Sheets v. Teddy's Frosted Foods*

i Guy gets fired for hassling boss about the company violating the food code.

ii In earlier cases the P was trying to say that they couldn't be fired because of their agreement with the employer. But here Sheets isn't claiming he's not at-will. He's just saying that an employer shouldn't be able to fire him when doing so would violate public policy.

iii This isn't just about the employer and the employee. Its also about the public. If we really want to encourage the enforcement of the food laws, maybe we should allow this exception.

iv Abuse of discharge, retaliatory discharge, and wrongful discharge in violation of public policy or public policy tort all mean the same thing.

v Types of Public Policy Exception

a (1) refuse to commit a crime—*Peterman v. International Brotherhood of Teamsters*—don't want someone to be forced to commit a crime

b (2) filing a workers comp claim—*Frampton v. Central Indiana Gas Co.*—person should be able to assert their rights without fearing termination

c (3) performing jury duty—*Nees v. Hock*—don't want to prevent people from fulfilling their public duties

d (4) Whistle-blowing—what we have here. Its closely related to the first one, but isn't the same.

i Public policy does in fact impose limitations on the at-will presumption. The court recognizes such an exception
here.

ii  Dissent: Reasons against
   a  erosion of at-will rule
   b  erodes the legislative function because the legislature should articulate public policy

i  Overwhelming rule has been to recognize this policy. There have been a couple of cases where the legislature has defined public policy.

ii  This isn't about private interests, its about public interests. The practical implication of that is that this is a tort, and is irrespective of anything the parties agreed to. Greater damages are available for torts, and tort claims can be brought by a wider range of workers (only rich folks bring contract claims, because low-paid workers cases just aren't worth taking)
   a  A cause of action to vindicate private interests is a contract claim—expectation damages
   b  A cause of action to vindicate social interests is a tort claim—compensatory damages

A  What Constitutes Public Policy—Hayes v. Eateries, Inc.
   i  Guy was fired for investigating embezzlement within his company and reporting that his manager was embezzling.
   ii  Embezzlement is bad, crime is bad, we want to encourage people to report crime. So shouldn't his firing be a violation of public policy?
   iii  Nope, the court says that this is a private business concern, not a public concern, so no public policy violation. He was only vindicating a private interest—that of the business.
      a  But what about a publicly traded company, or when people's pensions are at stake? Shouldn't the facts matter?

A  Preclusion
   i  Take own notes

A  Constructive Discharge
   i  Strozinsky v. School District of Brown Deer
      a  Woman turned in school for improperly computing taxes. Her employers confronted her a lot and made her environment very uncomfortable by yelling at her and throwing papers at her. Then, after her vacation she was getting left out of meetings and stuff, so she claims she was forced to quit.
      b  She argues that her discharge violates public policy. How could she do this (review)? She would argue that she was trying to process the checks in a way that conformed with the tax code. She could argue that the termination of her employment was because she wouldn't break the law. OR it could be a whistle-blowing case. OR there might be ethical rules. OR there's a public interest at stake because she works for the public and there is a public interest in people paying their taxes.
      c  Purpose of recognizing constructive discharge is to make sure that employers can't get around discharge protections.
      d  There has to be some underlying cause for the discharge that is unlawful for constructive discharge to be actionable. Constructive discharge is not a generic, free-flowing cause of action.
      e  Working conditions so intolerable that an employee would be forced to resign. This is a question for the jury. There is a “reasonable worker” objective standard.
      f  Employer knew or “should have known” that the conditions were so pervasive that they would force the employee to leave.
      i  CA says the employer actually has to know about the intolerable conditions. This puts the burden on the employee. This facilitates communication between employer and employee and makes sure that the employer has an opportunity to cure the conditions.

A  Statutory Protections for Whistle-blowers
   i  Have to look at statutes
   ii  Fed generally covers public employees
      iii  Sarbans-Oxly Act—take own notes
         a  applied to publicly traded companies

A  The Special Case for Attorneys
   i  Balla v. Gambro, Inc.
      a  In house counsel was fired for saying he would go to the FDA if his employer sold medical equipment that wasn't up to specs.
      b  Ethical rules that prevent public policy tort:
         •  Because there are attorney rules of professional conduct, we don't need the public policy tort to apply.
         •  Client gets to choose who their attorney is, so they can fire an attorney at any time.
         •  Confidentiality—In MO the rules of professional conduct say that a lawyer MAY leak confidential info if she believes its necessary to prevent bodily harm, whereas under IL law they MUST reveal the info. This is an IL case. In MO, however, there's a stronger argument for the public policy tort. But the MO rule might show more of a concern for confidentiality, so who knows?
• If the law being broken isn't a bodily harm threat, then the lawyer must withdraw under the model rules.
  
  i **Crews v. Buckman Laboratories International, Inc.**
    a Case where one independent counsel was fired for turning in another for practicing w/out a license.
    b Court found that she had a cause of action.
    c Public interest isn't protected by rules of professional conduct because lawyers are people too
    d Says that the in house counsel is not an independent professional, and instead is a true employee with no
      diversification of risk.
    e How do you litigate a wrongful discharge claim against your client—how do you reconcile the requirements of
      litigation with confidentiality rules?
    f Model rules allow use of confidential info in these types of cases, so the court adopts the model rule.
  i Who has it right for in-house counsel? You could say both courts got it wrong, because the first case was a required
    reporting and the second was a permissive reporting. Also, the first one was about public health, the second wasn't
    about health or safety.

I **Chapter 5: Revisiting the Presumption of At-Will Employment**
  i If individual employees don't know they are covered by at will, they won't bargain about it.
  ii Even if they understand, they may not properly examine the risks because of lack of information
  iii Job security is a public good, so individual employees can't bargain about it. Collective bargaining almost always
    gets just cause, whereas except for executives, individuals rarely get this.
  iv So do we change the default rule? Well, it would be better at putting employees on notice as to their rights.
  v Montana 1987 statutory good cause law.

I **Chapter 6: Collective Job Security**
  A **Common Law Contract, Property, and Tort Claims**
    i Kent Greenfield's Article
      a Investors and Employees both invest in company.
      b Unlike investors, however, workers are not protected by a federal statute protecting them from statements that
        would seemingly be at the core of anti-fraud protection.
    i **Local 1330, United Steel Workers of America v. United States Steel Corp.**
      a Collective bargaining agreement doesn't help the steel workers because the agreement gave US Steel the ability
        to make business decisions
      b Workers claim promissory estoppel. They claim that they were told by newspapers and other employees that if
        they worked hard and made the plant profitable, they would keep their jobs. They claim they relied on these
        statements.
      c Community Property Claim—
        • court says that the company owns the plant and that's that because there's no authority for such a claim.
        • But what about marital property. Property acquired during a marriage is subject to equitable distribution at
          divorce even if formally titled to only one person.
        • Singer argues that “The goal should be to identify flexible remedies that are appropriate to protect the
          workers' reliance interests.”
        • What would it mean to recognize a community property interest.
  A **Worker Adjustment and Retraining Notification Actionable**
    i The Statute
      a Take own notes
    i Issues of Statutory Interpretation
      a take own notes
  A **Collective Job Security Under the National Labor Relations Actionable**
    i Union Organizing Drives
      a take own notes
    i Threats to Close in Response to Union Organizing Activity
      a take own notes
    i Plant Closing Where the Workforce is Already Unionized
      a Take own notes
      b Take own notes

I **Chapter Seven: Employee Mobility**
  i **Covenants not to Compete**
  ii Trade Secrets
    a Protecting Trade Secrets
    b Inevitable Disclosure
    i **The Duty of Loyalty—Augat, Inc. v. Aegis, Inc.**
a Employee has no duty to tell employer that he is going to leave and compete
b Duty of Loyalty, however, prevents him from taking info or clients, and he is also prevented from taking steps to compete while still employed that cause harm to the employer.
c Greenspan solicited the four managers to leave the company, so he was violating his duty of loyalty.
d Also, Greenspan's job duties required him to make sure all of the management positions were staffed.
e This case doesn't talk about solicitation of clients. The rule is that the former employee may inform clients of the new competing business, but you can't actively solicit said clients.
f The protection provided by the trade secrets doctrine is narrower because it protects only specific trade secrets, where as duty of loyalty is a more broadly defined doctrine. Duty of loyalty is narrower in that it only applies to current employees, not former employees.

I Chapter Eight: Dignitary Interests
A Avoiding Emotional Harm
i Wornick Co. v. Casas
a Case for intentional infliction of emotional distress (IIED)
b Salaried employee was fired and escorted out of her office by numerous security guards, and only giving five minutes to pack up her things in the presence of the security guards.
c She would only have a public policy claim in Texas if she refused to commit an illegal act which could subject her to criminal prosecution.
d The elements of IIED are
  • D acted intentionally or reckless
  • D's conduct is extreme and outrageous
  • D's actions cause P emotional distress
  • The resulting emotional distress is severe.
e Court says no IIED here because the employer's conduct was not outrageous
f If she had a claim under public policy, she could get emotional distress damages under that claim, but she doesn't have a public policy claim in TX. TX thinks that the employer had a legal right to discharge her at will, so their actions were not outrageous.
g Merely termination doesn't seem to give rise to an IIED claim, but if there is something else that is outrageous added on, then there can be such a claim.

i Bodewig v. K-Mart, Inc.
a Customer accused checker of stealing from her. There was a huge fight, which eventually led to the manager requiring a strip search of the checker in front of the customer.
b Two versions of IIED Tort
  • Intentional conduct (intentional)--court says that where there is no special relationship that the conduct must be intentional
  • Breach of Special Obligation (reckless)--if a special relationship (like employment) exists, then merely reckless conduct is enough to satisfy this element of IIED.
c Later, the court changed their minds and said that special relationship was relevant with regards to the extreme and Outrageous element, but not the first element
d D argued consent to the search. This court said that consent wasn't real because of the power relationship between employer and employee and that she may have felt she would be fired if she didn't consent.
e Does she have a constructive discharge claim? The circumstances were definitely bad enough, but is there a bad motive behind them? Well, she COULD claim that the employer was infringing on her privacy rights . . . come back to this later

i Hollomon v. Keadle
a Boss repeatedly cursed at employee, demeaned all women, and threatened to assault her in a veiled manner. This affected her sleep and gave her stomach problems.
b D argued consent by continuing to work for this abusive asshole for two years.
  • Why shouldn't consent be an excuse? Unequal bargaining power is part, but not all of it. There is an idea that some duties and rights are so fundamental that we don't allow people to contract around them. This includes dignitary interests arguably.
c The temperament of the plaintiff is also important to this court. The court says that because the employer was not on notice that the employee was especially susceptible to emotional damages that he should not be held liable. The court makes it appear that absence any sort of individual susceptibility weakens her claim. Meanwhile, up in Bodewig, the court took the shy nature of the clerk into consideration even though that wasn't necessarily expressed to the employer.
d While the Bodewig court took the power imbalance of the work place into consideration, this court wants to give employers a lot of latitude in dealing with employees.
Didn't have a constructive discharge claim because constructive discharge requires another cause of action (i.e. Discrimination) that would show that the motivation for the poor treatment was bad.

What level of emotional distress is necessary. What is severe emotional distress. Courts have differed as to whether objective evidence is required. Did the plaintiff seek medical treatment? (Have to in MO)

A Privacy

i Constitutional Protection for Public Employees--O'Connor v. Ortega

a 14th Amendment Protections for Government Employees

b Doctor was accused of sexual harassment and other inappropriate conduct, and he was suspended during the investigation. His office was searched. He is suing over infringement of his right to privacy. He was a state employee.

c What do we look to in order to determine if there is a reasonable expectation of privacy? Policies/regulations, the actual practices in the workplace,

d You don't have to have a warrant, but you need to evaluate the reasonableness of the search under all the circumstances. You weigh the balance of employer/employee by asking:

• Was the search justified at its inception?
• Given that motivation, was the scope of the search reasonable?

e Not in this case, but the 14th Amendment gives public employees other privacy rights:

• Informational privacy—right to avoid disclosure of personal matters—not an absolute protection, but it requires balancing—some courts say this requires the government to maintain adequate safeguards to protect this type of privacy
• Autonomy—right to make your own fundamental personal decisions—rarely succeed

i Common-law Protections for Private Employees

a A number of states have very specific, narrow statutes protecting various privacy rights.

b Prongs for common-law invasion of privacy claim

• unreasonable intrusion upon the seclusion of another, or
• appropriation of the other's name or likeness, or
• unreasonable publicity given to the other's private life, or
• publicity that unreasonably places the other in a false light before the public

c K-mart Corp. Store No. 7441 v. Trotti

• Woman puts her own lock on her work locker, and her manager still searches her locker and goes through her purse that was in the locker. She was allowed under store policy to have her own lock, and was not required to give her boss a key or the combo.
• She is suing under an unreasonable intrusion theory
• D appeals saying that the intrusion is required to be highly offensive to a reasonable person, and the trial judge didn't include this in the instructions. This is a critical element of the tort, in order to create an objective standard rather than a subjective standard. You can't say as a matter of law that this was highly offensive to a reasonable person.
• The court remands this for a new trial, and analyzes the intrusion. The facts they think are material is that K-mart allowed her to use her own lock—that created a reasonable expectation of privacy.--reminiscent of the 14th Amendment case.
• What's K-mart's interest? Preventing theft, business reasons. Employer's motivation will affect whether this is a highly offensive intrusion.
• DAMAGES will follow if a highly offensive intrusion is shown, even if there are no physical damages.

d Borquez v. Robert C. Ozer, P.C.

• Lawyer is gay and his partner has AIDS. Tells his boss, and his boss tells everyone at the firm. Lawyer then gets fired. Lawyer sues for wrongful discharge and for invasion of privacy.
• Invasion of privacy claim is based on unreasonable publicity. The elements of this are:

• (1) There must be publicity
• (2) The matter must be personal/private
• (3) Highly offensive to a reasonable person
• (4) No legitimate concern of the public
• D argues P waived right to privacy by telling his boss about the gayness/AIDS. The court responds that the employee limited the waiver just to his boss, and didn't waive his right to privacy with regards to everyone in the office.
• Publicity requires that the information be told to a lot of people. When the trial court instructed the jury it used the word publication, not publicity. Publication only requires that the info be communicated to a single third party, while publicity requires communication to numerous people. The court says this error is
harmless because a the boss told a lot of people. The Supreme Court of Colorado disagreed on this and remanded the case for new trial. They add a fifth element as well, but the CO Sup. Ct. is the only one that uses this, and they are high.

- There is a division between the courts as to whether publicity means the general public as a whole or if it can be a smaller public, like people in the work place, etc.

e **Smyth v. Pillsbury Co.**—*Don't Drink The Kool-Aide*
- Company said that e-mails wouldn't be monitored. Employee then gets fired for sending an inappropriate e-mail. Understandably, he's pissed. So he brings a public policy wrongful discharge claim. It's based on invasion of privacy.
- Did Smyth have a reasonable expectation of privacy? He voluntarily made the comments to a manager, he didn't disclose any private information, and the e-mail system was created and maintained by the company. So no reasonable expectation of privacy according to the Court.
- The employer actually promised not to use emails against its employees, and they violated that promise. But the court just doesn't seem to care.

i **Collective Approaches to Protecting Employee Activity:** *Colgate-Palmolive Co. and Local 15 International Chemical Workers Unionization*
   a Take your own notes

A **Off-Duty Conduct and Associations:** *McCavitt v. Swiss Reinsurance America Corp.*
   i Guy gets fired for dating a co-worker
   ii Sues under NY statute saying people can't be fired for legal recreational activity. “Just cause” is the standard
   iii Is dating recreational activity? Nope.
   iv Does the employer have a legitimate business interest in discharging him? Favoritism, sexual harassment, etc
   v If he had been fired for dating someone who wasn't a co-worker, it still wouldn't be covered. Dating still isn't a recreational activity under the statute.
   vi What exactly is the relationship between privacy and autonomy? Privacy torts that are recognized under the common law really don't have anything to do with autonomy. But in other aspects of the law they are synonymous. Philosophically the distinction is blurry. The autonomy interest of the private sector employee in the employment realm isn't really recognized because the four privacy torts don't cover it.

A **Reputation**
   i **Elements of Defamation**
      a False and defamatory statement—needs to be a false statement that harms someone's reputation so that others in the community don't want to deal with them—truth is a defense to this element.
      b Publication that is not privileged
      c Fault (negligence or recklessness) (subsumed under privilege discussion)
      d Harm (pretty obvious in employment context)
   i Interests in references being readily available
      a Employer's get information
      b Employees get credit for good work with previous employers
      c Society gets benefits of productivity and efficiency in the matching of people and jobs
   i **Zinda v. Louisiana Pacific Corp.**
      a Take own notes because we had a stupid in-class assignment and never went over it :-(
   i **Immunity Statutes**
      a Look at how much they change the common-law
      b Look at how they change employer behavior. To the extent we can tell, there hasn't been a significant impact on employer behavior and the trend toward not giving references or giving minimal references is continuing.
   i **Possibility of pooling references**
      a It would only work if the law got involved
      b Corporations normally recruit nationally. So how do you match the reference pool to the labor market pool in an effective way?

I **Chapter Nine: Employee Voice**

A **Employee Interests in Voice**
   i Intrinsic value in self expression
   ii Dialog in the workplace leads to efficiency
   iii Workplace is a diverse place for a political and social dialog. The workplace isn't just for work. Its less private than the home/family, but its not the general public either.
   iv Ability to ask for change in the work place (things like problems with working conditions)

A **The Public Sector Employee**
   i **Pickering v. Board of Education**
a Teacher was fired for complaining about the way the board was handling school funds in a letter to the editor.  
b Challenged the dismissal as a violation of his first amendment rights.  
c The first amendment says that government cannot punish citizens because of the content of their speech. Does a teacher have the same rights to talk about the school board as any other citizen? Not exactly. If he were speaking about his own job, he wouldn't have a right, but when he's speaking about an issue of public concern he does have the same rights and needs to have that right because he is a useful source of information.  
d The government has a different interest in his speech than they do in regular citizens' speech.  
e The government is the sovereign and the employer.  
f Self-governance underlies the first amendment, as does individual expression.  
g Solution is a Balancing Test: Balance the interest of the citizen to comment on matters of public concern against the employer's interest in promoting efficiency in the workplace.  
h Here the Court found that the teacher has a strong interest in informing the public and expressing his opinion that outweighs the employer's interests. The employer's interests weren't that weighty here because of a list of factors including the close relationships in workplace, maintaining discipline and harmony, and need for personal loyalty didn't really come into play.  
i **Connick v. Myers**  
a Woman was pissed that she was being transferred. She then gave out a survey to the other employees about their satisfaction. She was then fired, supposedly for refusing the transfer, but really because she gave out the survey. The survey was called insubordination by her boss.  
b Brings a first amendment claim. She was an at-will employee.  
c Creates a threshold test: Is the speech on a matter of public concern  
  • Content of speech—is it generally a subject matter of public concern  
  • Context—where did the employee speak, in what form, and to whom?  
d Here the court said that Question 11 (do you feel pressure to work on political campaigns) was a matter of public concern, but the others weren't.  
e Then we go to the balancing test, and she loses here.  

A **Collective Voice**  
i **Take own notes**  
ii **Public v. Private**  
a Private employees are more likely to be protected in collective action situations where they are talking about working conditions, and where it can fall under a public policy exception  
b Public employees are more likely to be protected where we are dealing with speech that is a matter of public concern.  
i NLRA doesn't cover government employees.  

I **Chapter 10: Employment Discrimination Law**  
A **Introduction**  
i Employer has the right to terminate for good cause, no cause, or no cause at the common law, so what's the justification for discrimination laws?  
a Historical and widespread discrimination against certain groups led to systematic disadvantage.  
b Although we talk about these as individual rights laws, the root rationale behind these laws is the congressional judgment that systematic discrimination exists.  
i **Statutory Framework**  
a Title VII of Civil Rights Act of 1964--No employment discrimination based on race, religion, sex, ethnicity, or national origin.  
b 1967—ADEA—ages 40 and over are a protected class  
c 1990—ADA passed  
i How do you know if there is discrimination going on?  
a Easiest way—direct evidence-- “I'm not hiring you because you are black.”  
b Pattern  
c Comparison to like qualified individuals who aren't in the protected class  
i **Defenses**—BFOQ—(can't be raised as defense in race case)--bona fide occupational qualification.  

A **Claims of Intentional Discrimination: The Disparate Treatment Model**  
i **McDonnell Douglas Corp. v. (Percy) Green**  
a Black guy gets laid off. He then participated in an illegal stall-in and lock-in as part of civil rights demonstration. They then wouldn't rehire him.  
b **The Burdens**  
  • Step 1: Employee's original burden is prima facie case  
  • Belong to minority
• Qualified for job
• Denied Job
• Employer continues interviewing for that job
• Step 2: Burden then shifts to employer--Rebut prima facie case and show a legitimate non-discriminatory reason for the action
• Step 3: Then employee gets opportunity to show that the employer's reason is nothing more than a pretext and the true reason for the action was race based. The ultimate burden of proof always remains with the plaintiff.

i Desert Palace, Inc. v. Costa
   a Sex discrimination case. The employer says she was fired after she got into physical fight with other employee because she had a bad disciplinary record. The other (male) employee involved only got suspended for a few days.
   b Mixed-Motive Framework
      • Don't use McDonnell Douglas framework because that framework assumes either/or model and doesn't have room for mixed motive
      • More than one motive may come into play. Here, her getting in a fight was one motive, but her sex may have been another motive.
   c Price Waterhouse
      • Woman wasn't promoted supposedly because she had poor people skills, but there was also evidence that her bosses took place in sex stereotyping (told her she needed to walk/talk like a lady)
      • Employer can avoid liability in a situation like this if it can prove it would have made the same decision and taken the same action even without the discrimination
      • O'Connor concurred and said the mixed motive thing is tripped whenever there is direct evidence
   d Civil Rights Act of 1991
      • When protected class is motivating factor, that alone will lead to liability
      • But, the employer has a defense if they can show that they would have taken the same action w/out the impermissible motive, although that defense only limits the remedies available to the employee.
      • Also introduced Jury Trials—this means that McDonnell-Douglas is mainly important at the pre-trial stage.
   e Employee no longer needs to show direct evidence to get a mixed motive instruction.

A Disparate Impact Claims

I Chapter Twelve: Health and Pension Plans—ERISA Regulations
   A Health Benefits
      i Anti-discrimination under Section 510
         a McGann v. H & H Music Co.
            • Guy filed discrimination suit because his employer changed health plan to only cover $5,000 of AIDS bills after it had previously been a $1,000,000 lifetime benefit cap. AIDS is the only disease the change effects
            • He claimed under both provisions of Section 510
               • Retaliation for filing claims
               • Interfering with a right which he may become entitled to
            • To prove a 510 violation he has to prove specific discriminatory intent, and that intent must be for the purpose of denying him benefits
            • Employer here was motivated by desire to cut costs, so they lacked the requisite discriminatory intent.
            • He was only entitled to the benefits being offered at the time, so his second claim also fails. Employers need to have the right do design their own plans.
            • ERISA was passed right after a lot of people got screwed out of their pensions, so it makes sense that pension benefits vest and welfare benefits don't
            • What about the fact that the plan singled out AIDS as a disease. Is that impermissibly discriminatory? Nope. 510 forbids discrimination against individuals, not groups with certain diseases.
            • Is the outcome here consistent with the policies underlying ERISA?
            • If they had fired him, it would have been a 510 violation, but what they do here is not.
            • What if he had been represented by a union? Well, the difference in the health plan would have been subject to collective bargaining, but who knows if they union actually would have stood up for him. A union might at least be able to push the employer to provide information about the underlying financial info—would covering him really kill the plan for everyone else? Does he really need to be cut down to $5,000.
            • After ADA was passed in 1990, EEOC published guidelines but court didn't buy it and the ADA didn't
solve the problem we see here.

\textit{b \textbf{Sprague v. General Motors Corp.}}

- GM convinced people to take early retirement by telling them they would get lifetime health benefits. Then GM turns around and changes the plan and takes the benefits away. Fucking court lets them get away with it.

- District Court says general retirees didn't have a claim but early retirees did under bilateral contract or under estoppel because when they retired there was actually some conversation with the employer about the benefits of early retirement. Court of Appeals de-certifies the class. Court of Appeals says the health benefits aren't required to vest under ERISA, but they can vest if the employer intends them to. Default rule is that welfare benefits don't vest.

- So what does it take to overcome the default rule? P advances 4 legal theories
  - A. Plan itself creates vested benefits
    - Plan said things like “GM will provide you with health benefits for your lifetime with no cost to you.”
    - BUT GM unambiguously reserved the right to change or amend the plan in the future. However, some of the plan summaries didn't include this language. But for welfare benefits such a disclosure isn't required in the way a pension plan is required to do so. BUT a bunch of judges can't even agree as to whether there is ambiguity.
  - B. Early retirees had a bilateral contract
    - Employees claim that the benefits were part of their consideration for retiring early.
    - For this to stand there would need to be a written contract, so the oral promises don't mean shit. The written plan says the company can change this at any time. Thanks ERISA for requiring plans to be in writing. And to think, this was intended for the protection of employees . . .
  - C. Equitable Estoppel
    - Elements
      - (1) Representation of material fact
      - (2) Employer aware of true facts
      - (3) Employer intend that the representation be relied on
      - (4) Employee unaware of true facts
      - (5) Employee reasonably and justifiably relies on the representation to his/her detriment
    - Problem here is there is no JUSTIFIABLE reliance
  - D. Employer breached fiduciary duties in how it represented the plan to the early retirees.
    - The only thing the employer did wrong was just not remind the employees at all times that the plans could be changed, and that's not a breach of fiduciary duty.

- Would it have been any different if they had been union members? Well, former employees aren't covered by union. The union covers current employees interests, and the two might conflict.

- What's actually required to overcome the default rule? Must be clear evidence that employer really wanted the benefits to vest.

\textit{i \textbf{Preemption under Section 514}}

\textit{a \textbf{Metropolitan Life Insurance Co. v. MA}}

- MA law mandates that insurance include coverage for mental health. Is it preempted by ERISA?
- “relate to” means connects to or references to an employee benefit plan. Here, the MA law relates to an employee benefit plan. So under 514(a) the law would be preempted.
- However, there is an exception. 514(b)(1)(a) is the insurance savings clause. It says that ERISA doesn't prevent states from regulating insurance, banking, and securities.
- This law regulates insurance, therefore, no preemption. MetLife tried saying it was a health law, but the court said that was dumb.

- What constitutes insurance law?
  - transfer or spread risk
  - integral part of policy relationship
  - limited to entities within insurance industry
- Deemer clause says that an employee benefit plan is not deemed to be an insurance companies for purposes of the savings clause. So if an employer self-insures, they aren't covered by the exception.
- So states have basically been pushed out of regulation, and ERISA doesn't have real requirements.

\textit{b \textbf{Massachusetts v. Morash}}

- Whether a companies policy of paying its discharged employees for their unused vacation time constitutes an “employee welfare benefit plan” within the meaning of ERISA and whether a criminal action to enforce
that policy is preempted by ERISA.

c **Ingersol-Rand**
- Guy claims he was fired to prevent his pension from vesting. He claims this is wrongful discharge/public policy.
- Court says this is preempted. State laws that relate to a plan are preempted, even if they are judicial decisions.

A **Does ERISA Work?**

i ERISA does require employers who provide benefits to comply with reporting requirements, and creates fiduciary duties.

ii There are no substantive minimum benefits on welfare plans
   a Congress wasn't focused on such things
   b Congress didn't want to discourage employers from offering benefits

i The preemption clause really screws people w/ regards to welfare plans, because ERISA has no floor and ERISA preempts state laws that would try to solve the problem

ii More than 50% of employees have self-insured employers who aren't covered by the savings clause and thus aren't covered by State regulations.

iii Smaller firms are more likely to be subject to state regulations than larger firms.

iv In 1974 health insurance provided by employers was basically fee-for-service. Now HMO bastard pieces of shit pretty much dominate the market. They make coverage decisions prior to treatment, so the benefits plan becomes the treatment plan.

v Now there are more part-time employees so employers don't have to worry about benefits. The fact that health insurance is linked to employment gives employers an incentive not to employ unhealthy people.

vi In the last 5 years there has been a massive increase in the number of uninsured Americans.

I **Chapter 11: The Regulation of Wages and Hours**

A **The FLSA: Minimum Wage and Overtime Provisions**

i **Heath v. Perdue Farms, Inc.**
   a Perdue/Crew Leaders/Chicken Catchers
   b Six factor test is trying to determine if workers are independent or are they economically dependent on the principle
     - the degree of control which the putative employer has over the manner in which the work is performed
     - the opportunities for profit or loss dependent upon the managerial skill of the worker
     - the putative employee's investment in equipment or material
     - the degree of skill required for the work
     - the permanence of the working relationship
     - whether the service rendered is an integral part of the putative employer's business
   c Nine factor test says given that we know the chicken catchers are employees, who should be considered the employer for purposes of complying with FLSA—does the employer directly control the conditions/wages? This joint-employer test varies from circuit to circuit.
     - ownership of the property and facilities where the work occurred
     - degree of skill required to perform the job
     - investment in equipment and facilities
     - permanency and exclusivity of employment
     - nature and degree of control of the workers
     - degree of supervision, direct and indirect, of the work
     - power to determine the pay rates or the methods of payments of the workers
     - the right, directly or indirectly, to hire, fire, or modify the employment conditions of the workers
     - preparation of payroll and payment of wages
   d Most often comes up in agriculture, garment industry, and janitorial industry.

i **Davis v. Food Lion**
   a Davis argued that he couldn't possibly get his work done on the clock. Time card said 40 hours a week, but he was actually working 45-50 hours a week. He was working off the clock because of the scheduling system set up by Food Lion.
   b If someone is working off their time card, is that every going to be compensable time? If the employer has actual or constructive knowledge that the work was taking place, then yes.
   c Had a specific “no working off the clock” policy here. This makes proving constructive knowledge impossible.
   d Davis should have told his boss the performance standards were impossible. But he's an at-will employee, so it's pretty unreasonable to expect him to raise this issue.

i **Dinges v. Sacred Heart St. Mary's Hospitals, Inc.**
Should on-call time be counted as being on the clock?

There's a part of FLSA that allows a lower wage for on-call time.

**Aracular Test**
- The question turns on whether the worker is engaged to wait, or waiting to be engaged.
- Facts that really matter: Can they effectively use the time for personal pursuits?

This is a close case, and since these people knew up front about the on-call requirements, the compensation structure is fair.

Works against idea behind FLSA of spreading work and discouraging overtime

Overtime rules under FLSA are mandatory, not default, rules. So the court just going to what the parties agreed to is kind of sketchy.

**A Gaming Article**

i Why did they sue EA?
- Changes in external lives—not 22 anymore, have families, etc
- Nature of work has changed—type of work isn't as creative/cutting edge
- Stock options not as sweet a deal as they were in the 1990s.

Should they receive overtime protection?
- These engineers are not lacking in bargaining power. They have skills that are in demand. If they don't like what EA is giving them, they can go elsewhere.
- But they are becoming more like assembly line workers as the work becomes more repetitive

**I Chapter 13—Health & Safety**

**A Worker's Compensation**

i The Origins of Worker's Compensation Laws
- At turn of 20th Century LOTS of people were getting hurt on the job.
- In the 1970s there was another surge in workplace fatalities that lead to the passage of OSHA

c The Common-Law Approach—
- **Farwell v. The Boston and Worcester Rail Road Corp.**
  - Employee is injured due to coworker's negligence
  - Respondeat Superior only covers third parties/strangers
  - So this will be covered, if at all, by contract.
  - There was no express contract, so the court looks for an implied contract.
  - Fellow Servant Rule: Can't sue the employer for the negligence of a fellow employer.

- Other rules were assumption of risk and contributory negligence.
- Effect of the Unholy Trinity was to prevent employees from suing their employers for any injury they received on the job.
- By turn of the 20th Century, this scheme was untenable—the social costs of all the injuries were too great.
- Would getting rid of the unholy trinity and allowing suits do enough to get employers to prevent accidents and to compensate injured workers.
  - Destroys the relationship between the employer and employee
  - Tort process is expensive and lengthy
  - Access issues
  - May be cheaper to risk getting sued than it is to make the work place safer.

i The Compensation Acts

a **New York Central RR Co. v. White**
  - Widow brings suit against employer and is awarded compensation under NY compensation law.
  - RR challenges the constitutionality of the law
    - (1) Employer's $ being taken w/out due process
    - (2) Employee loses right to compensation through tort
    - (3) Both Employee and Employer denied right to contract.

  - **FX on Employers**
    - Required to compensate all injured employees, even if negligence is not shown. (intoxication and deliberate self-injury are exceptions)
    - Eliminates right to contract around this

b **Houser v. Bi-Lo, Inc.**
  - Guy had a stroke when he was working. He had just gotten an overly large shipment at the grocery store where he was manager, and it really pissed him off. He then later died from a second stroke. His wife sued, saying this should be compensable under Workman's Comp.
The injury must meet both prongs of the test here:
- (1) the injury happen in the course of employment. The injury here met this prong of the test, because it happened while he was at work. Was there a time/space connect to work? Yes.
- (2) the injury has to arise out of the employment. The injury here did not meet this prong of the test. For it to arise out of stress and be compensable, it must arise out of unusual or excessive circumstances. Injury caused by regular work-related stress is not covered. This guy had other risk factors. W/out the added requirements, how would we know the stroke was actually caused by the work situation. There needs to be a causal connection to work.
- A court in one of the notes cases found it was a compensable injury when a guy suppressed a sneeze during a meeting and suffered a detached retina.

i  Exclusivity of Remedies
   a  Eckis v. Sea World Corp.
      - Chic brings liability for dangerous animal, fraud, and negligence claims for injuries she sustained while riding Shamu in a swimming suit. She was a secretary for Shamu's trainer.
      - Jury awarded her damages, and then Sea World appealed saying the tort claims should be excluded by workers comp remedy.
      - Employer argues that this injury was proximately caused by the employment and happened during employment. She claims she was just hired to be a secretary, so it wasn't caused by her employment.
      - The court determines she was covered by workers compensation.
      - Is this decision compatible with the purposes of Workers Comp.

b  Whitaker v. Town of Scotland Neck—Exception for Intentional Acts
   - Dumpster falls on dude and he ultimately dies because the garbage truck was broken. The employees had told their boss that it was broken for two months.
   - The plaintiff is saying that this was willful and wanton negligence, so it should be treated like an intentional tort and shouldn't be preempted by workers comp.
   - Narrowest way of reading th exception is just intentional torts-->acting solely for the purpose of causing injury. Court doesn't use this.
   - Court here says there must be a substantial certainty that the employer's actions will cause serious injury of death.
   - Here, the exception doesn't apply. The city hadn't been cited before, the boss wasn't on the site to see the condition of the garbage truck, the garbage men weren't directly ordered to lift the dumpster themselves.
   - The test is more than negligence or gross negligence, but less than intentional tort . . . hard to apply the test.
   - Why expand the exception to include the substantial certainty cases? We want there to be proper incentives to create a safe work place.
   - Why not make an exception for everything beyond plain old negligence? Need to balance employer/employee interests.
   - If the conditions of compensation are not met, then exclusivity does not come up.

c  Millison v. E.I. Du Pont de Nemours & Co.
   - Claimed (1) that the employer intentionally exposed them to a dangerous (asbestos) environment, and (2) fraudulent concealment.
   - First claim fails because it falls within worker's comp b/c its about safety of workplace
   - Second claim is more of an intentional tort, so it is successful. So they can recover for the aggravation of the illness.
   - (1) is an ordinary risk, (2) is extraordinary. There is a substantial certainty that harm will result from (2).

i  Non-Physical Torts
   a  Cole v. Fair Oaks Fire Protection District
      - Guy has a stroke that was a result of harassment by the Assistant chief.
      - He alleges intentional infliction of emotional distress. Elements for IIED include:
        - intent or reckless
        - extreme and outrageous
        - caused ED
        - ED severe
      - Recklessness does not rise to the “intentional” requirement for the Workers' Comp exception.
      - The court says demoting someone will always be intentional and will always cause emotional distress. This is BS, though, because the intent in IIED is intent to injure.
   b  Workers comp does not bar defamation or malicious prosecution claims. These weren't part of the workers comp bargain.
Shoemaker v. Myers

- Investigator for Health Services finds out that the heads of the department were knowingly funding illegally operating health centers.
- Files claim for wrongful discharge/public policy and under whistle-blower statute.
- Alleged physical injury. Then took it out after dismissal. Ct. of Appeals said not good enough.
- CA Sup. Ct. says that the goals of the whistle-blower statute are “obviously” more narrow/specific than worker's comp, so whistle-blower trumps workers comp.
- Court came out in right place if you look at the purpose of the whistle-blower statute. If worker's comp trumped, whistle-blower would be toothless.
- So what about the wrongful discharge in violation of public policy claim. Court here didn't reach that issue. Court holds later that it isn't barred by workers comp exclusivity.

Initially worker's comp decreased injuries, but they spiked again in the 1960s, so in 1970 OSHA passed.

OSHA

- Focus and goal is prevention of workplace injuries and fatalities. It creates an administration to promulgate regulations, set standards, and prosecute violations. OSHA itself doesn't contain regulations except the general duty clause.
- Three types of standards
  - interim
  - permanent
  - emergency
- General Duty Clause

Caterpillar, Inc. v. Occupational Safety and Health Review Commission

- General duty clause requires employers to keep the workplace free from recognized hazards that are causing or likely to cause death or serious physical harm. There has to be some feasible means of abating the standard and the employer doesn't employee said means.
- Here Caterpillar claimed that warning signs and blocking off the area was good enough since pieces had never flown that far. But the court says this isn't reasonably adequate.
- The employer also claims they put an experienced guy in the area with a good safety record. But employers can't shift their responsibility for safety to employees, and just putting someone in charge without any training isn't enough.
- The things OSHA tends to have standards about are reoccurring problems that are found in a number of different work places.
- If there is a specific standard that governs a specific situation, most of the time that standard applies and you can't cite under general duty, unless there is something specific about this particular work place that makes the specific standard inadequate.

Whirlpool Corp v. Marshall, Secretary of Labor

- Statute itself says you can't discharge employee for exercising any right under the Act. So what rights are afforded employees under OSHA. These rights include:
  - Inform OSHA of situation that needs to be inspected
  - Assist inspectors
  - Testify in court if asked to.
- OSHA does not afford a private cause of action to employees.
- The Secretary's Regulation allows:
  - The employee can quit working in a dangerous environment if there is no less drastic method of ensuring safety available.
  - If an employee believes there is an eminent risk of death or serious injury, and they can't call OSHA in time then they can refuse to work and they can't be fired.
- Is the Secretary's regulation authorized by the statute? Yes. The act is in accordance with the purpose of the Act.
- The rejected strike with pay provision is irrelevant because it would have dealt with a requirement to pay employees, not whether employees are required to work.

Trench case, where only fined $54,000 and there were no criminal charges filed.

I Chapter 14: Arbitration of Workplace Disputes

A Background

- Should substantive rights be enforced in courts, or is it ok to use a private system of justice?
- Union Context
  - Key Characteristics of arbitration in the collective bargaining context
• Binding decision (except VERY limited opportunity for judicial review)
• Purpose is to resolve disputes over interpretation of CBA
• The arbitrator is mutually agreed upon and neutral.

b Steel Worker's Trilogy
• All employer/union disputes go to arbitration
• Very little judicial review

i Now arbitration is moving into a non-union context


i Gilmer v. Interstate/Johnson Lan Corp.
  a In his application he agreed that he would arbitrate any disputes with his employer.
  b Are ADEA claims appropriately subject to mandatory arbitration clauses
  c Federal Arbitration Act (FAA)--
    • purpose is to reverse judicial hostility toward arbitration and put arbitration agreements on the same level as other contracts.
    • The act presumes they are valid, irrevocable, and enforceable unless they are invalid under existing contract law.
    • If someone tries to file a federal claim that should be arbitrated, the district court can be asked to stay the claim and issue an order that the claim be taken to arbitration.
  d There is no change in substantive rights, its just a change in forum.
  e Is there any situation where statutory rights shouldn't be done in arbitration? If Congress somehow indicates it was giving a right to a judicial forum and intended to prevent waiver of that right, then arbitration is inappropriate. (not the case here)
  f Stock Exchange Rules prevent bias.
  g Arbitration sucks if no written opinion, b/c
    • No precedent value
    • More difficult to appeal
  h Argues unequal bargaining power makes the mandatory arbitration agreement invalid. But then in theory everything in the contract would be invalid.
  i In another case (Alexander v. Gardner-Denver) the Court found that guy who lost in arbitration could bring Title VII case
    • Contractual rights under CBA are different than rights under Title VII---> source of rts different
    • The arbitrator's job was to interpret the CBA. They don't look at outside law.
    • Union controls the arbitration process, and there are times when union interests conflict or are in tension with the interests of an individual worker, especially in race discrimination cases
      • This case is different because no conflict of interest.

i Advantages of Arbitration
  a maybe cheaper (bullshit)
  b less formal procedurally (maybe can even do w/out a lawyer)
  c More incentive for lawyers to take cases w/low damage figures
  d May be able to have case resolved quicker

i Disadvantages of Arbitration
  a Devaluation of substantive rights as evidenced by decrease in procedural rules
  b Employee loses jury
  c Rules are written by the employer
  d Bias b/c company arbitrates all the time
  e Little judicial review
  f Lower costs lead to more claims
  g Unfair procedures decrease moral

i Result of Gilmer and Circuit City is a huge increase in arbitration agreements

A Limitations on the Enforceability of Arbitration Agreements

i Due Process Considerations—Cole v. Burns International Security Services
  a Differences between arbitration in the two contexts—got called on
  b Walks through that analysis because arbitration is so accepted and works so well in the CBA context, but there are differences in the individual context, so judges need to look at it a little differently. There needs to be more scrutiny in the individual context.
  c There are some circumstances where arbitration agreements aren't ok, like if it requires the waiver of the right to bring discrimination claims, and you can't require employees to give up the right to have some neutral forum
address their claims. The arbitration forum has to allow the employee to vindicate their rights.

d  *Gilmer* factors
  - (1) provides neutral arbitrators
  - (2) provides for more than minimal discovery
  - (3) requires a written award
  - (4) provides for all of the types of relief that would otherwise be available in court, and
  - (5) does not require employees to pay either unreasonable costs or any arbitrators fees or expenses as a condition of access to the arbitration forum

e  The agreement here said nothing about who pays. The court says the employer has to pay the arbitration costs for the agreement to be valid, because the employee wouldn't have to pay a judge if they went to court. (at least the arbitrator's fee of $500-$1000/day)

i  **Limitations of Enforceability Stemming from Contract Law Principles—*Hooters of America, Inc. v. Phillips***
  a  Chic gets sexually harassed. After she was hired, as a condition of any promotions or raises, she was agreed to sign an agreement to arbitrate. At the time, they didn't provide any of the rules of the arbitration. She quit after the harassment
  b  The validity of the arbitration agreement is a question for the court, not the arbitrator.
  c  The rules here were so one-sided that the forum is not neutral. Therefore, the contract was breached.
  d  Also, bad faith.
  e  Therefore, recision.
  f  Unconscionability wasn't brought up here, but that would have been that there was no contract at all because it was so one sided, rather than the breach we see here.

i  Courts have extended *Gilmer*. They are divided on whether progeny apply to common-law claims.