

TEXAS TECH UNIVERSITY SCHOOL OF LAW
Employment Law
Spring 2013

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Visiting Associate Professor of Law

SPECIAL ALTERNATE EXAMINATION

You must complete this examination in accordance with all requirements and conditions prescribed by the registrar's office.

Notes and Instructions

1. Assume that today's date is in June 2013.
2. These instructions are not comprehensive. You will be given specific instructions by the registrar's office on how to format your answer and when and how to turn it in.
3. Your goal is to show your mastery of the material presented in the course and your skills in analyzing legal problems within the scope of the course's subject matter. It is upon these bases that you will be graded.
4. During the period you are taking the exam: You may not consult with anyone about the exam, your answer, or any applicable law.
5. This exam is open-book. You may have and use any materials that you like, including books, outlines, printouts, notes, etc., including any files you have stored digitally. But you may not use online resources during the exam period, nor may you communicate with any other person, however indirectly, to aid you on the exam. You may use a computer to write your exam, including using a word processor program.
6. After the exam, you may discuss the exam with anyone, except that you must take reasonable precautions to prevent disclosure of exam information any person who is to take, but has not yet taken, this exam.
7. This exam will be graded anonymously. You may not waive anonymity. Do not write your name on any part of the exam response or identify yourself in any way, other than to use your examination I.D. number appropriately. Self-identification on the exam will, at a minimum, result in a lower grade, and may result in disciplinary action.
8. All facts take place in the United States in one or more unspecified or hypothetical states. Provide your answer on the basis of the federal law, typical common law, and typical state statutory law in the United States, including all rules, procedures, and cases as presented in class.
9. Do not reproduce or re-distribute this exam booklet.
10. Note all issues you see. More difficult issues will require more analysis. Spend your time accordingly.
11. Organization counts.
12. Read the entire exam question before beginning to draft your answer – that way you can be sure to put all of your material in the right place. Please clearly label each subpart of your answer.
13. Be complete, but avoid redundancy. By way of example, do not repeat the exact same analysis with substituted parties. You probably should not cut and paste text. Instead, to the extent called for, you may incorporate analysis by reference to another portion of your answer.
14. Feel free to use reasonable abbreviations.
15. **The word limit for your response to the exam is 2,500 words. Do not exceed the word count.** You are responsible for ensuring that you do not exceed the word count. Material written in excess of the word count will not receive credit.

Cantwell Reid LLP

It was a beautiful June day. Hailey Haydensen looked off into the distance. Her career at Cantwell Reid was behind her. What the future held, she wasn't sure.

Back during her 3L year of law school, Hailey was just about to get on a plane after a full-day call-back interview at Cantwell Reid – a big, if not terribly prestigious, law firm in downtown Farapolis. Hailey's phone buzzed. It was the managing partner. They were calling to offer her a job as an associate. It wasn't Hailey's dream law-firm job. But at least Cantwell Reid paid well. And, at any rate, it was the only call-back interview Hailey got during the formal interview process that year. She figured that meant it was likely her only shot to get a job with one of the big Farapolis firms. So she said yes as she handed her ticket to the gate agent. She walked down the jetway with a tremendous sense of relief. Her first day of employment was slated to be October 1 in the autumn following her graduation.

Hailey graduated in May, took the bar exam in July, and then took an extended trip to South America. When she returned in late September, a week before starting work, she was given a letter agreement and told to sign it. Although it contained some provisions she was uncomfortable with, she signed it without complaining.

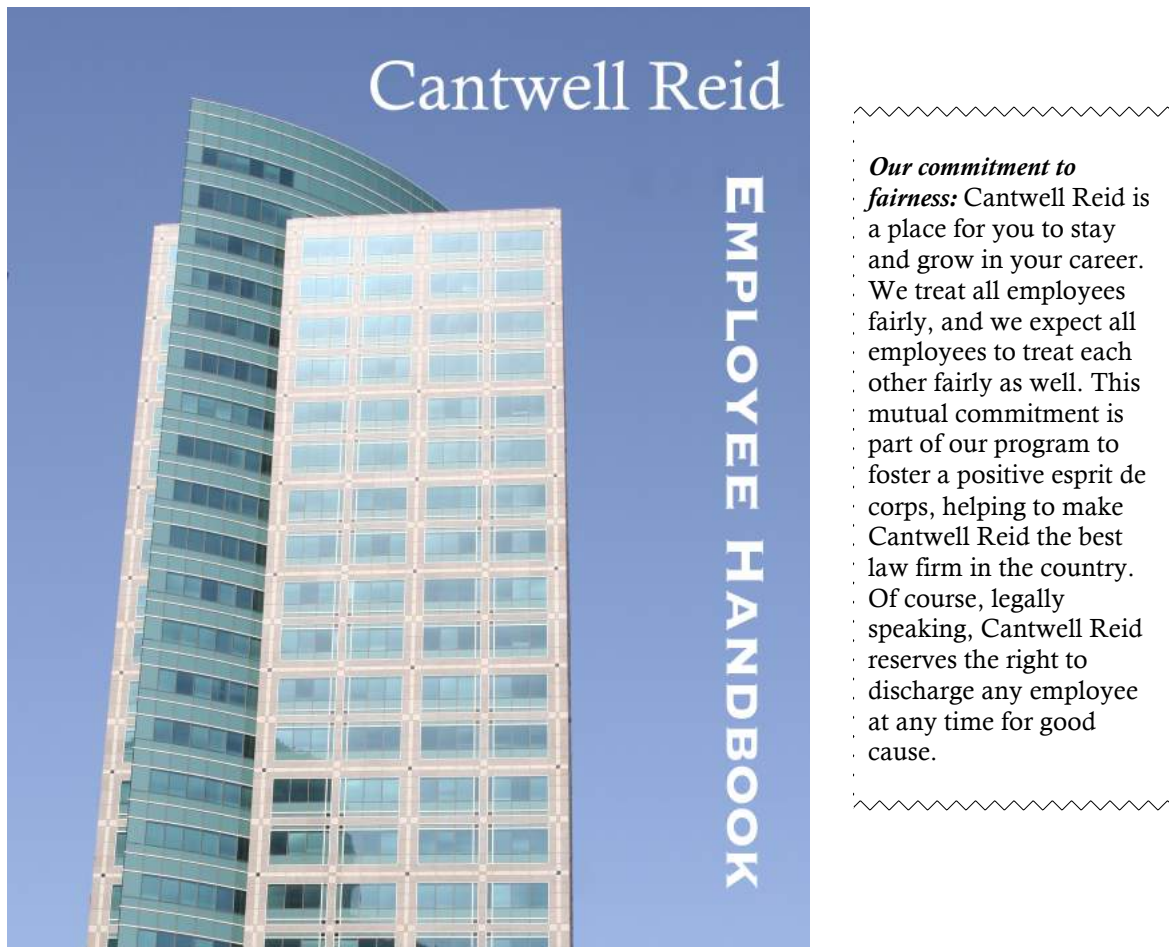


Fig. 1: The cover (left) and a portion of the text (right) of the Cantwell Reid Employee Handbook, which all employees receive on their first day at the firm.

Cantwell Reid

CANTWELL REID ORWRIGHT LLP
ATTORNEYS AT LAW

FARAPOLIS
NASHLANTA
BALITDELPHIA
SAN FRANGELES
KYOKYO
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TEL 280-730-7300 FAX 280-730-7373 CANTWELLREID.COM

PAULINA PAHLAVI, PARTNER
DIRECT TEL 280-730-7619

September 26, 2004

Re: Hiring Letter for Hailey Haydensen

Dear Ms. Haydensen,

As managing partner of the Farapolis office of Cantwell Reid, it is my pleasure to welcome you to our firm as an associate. This letter contains the formal terms of our employment agreement with you.

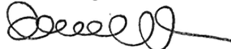
You will be paid an annual salary of \$90,000, subject to raises and bonuses to provided in the sole discretion of Cantwell Reid. You also will be eligible for the firm's benefits, including pension, health plan, and life insurance.

In consideration for the training you will receive, you agree to certain restrictions following your employment with Cantwell Reid, as follows: You agree and covenant that during the Minnekota Restriction Period (as defined below), beginning on the date of the termination of your employment, whether such termination is voluntary or involuntary, you will not directly or indirectly engage in the practice of law anywhere within the state of Minnekota. The Minnekota Restriction Period shall consist of the number of months equal to the number of whole years you have been employed by Cantwell Reid. By way of example, if you have been employed for five years and 10 months at Cantwell Reid, The Minnekota Restriction Period would be five months. You further agree and covenant that for a period of five years, beginning upon the date of the termination of your employment, whether such termination is voluntary or involuntary, you will not work or provide legal services directly or indirectly for any person (including any non-natural person) who was a client of Cantwell Reid at any time during your employment. You agree and acknowledge that this non-compete provision will not adversely affect your livelihood or the public interest.

In the event of a dispute between the parties, it is hereby agreed that the dispute shall be referred to the Justice Forum of America for arbitration in accordance with the applicable rules of that organization. The arbitrator's decision shall be final and legally binding, and judgment may be entered thereon.

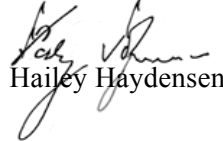
Please indicate your agreement to and acceptance of these terms by signing below.

Best regards,



Paulina Pahlavi

AGREED AND ACCEPTED



Hailey Haydensen

Fig. 2: The hiring letter Hailey signed.

Over the next several years, Hailey distinguished herself as a rising star in the firm, and she was consistently given positive signals that she would be offered partnership when her time came. Initially, Hailey loved Cantwell, and she could easily have envisioned spending the rest of her career there. But as she grew into her role as a senior associate and began to see how the firm operated internally, she became more and more disillusioned.

The first thing that upset Hailey was the way Ben Bartlett was treated. Ben was a paralegal with whom Hailey had worked closely through the years, and he was the person at the firm whom Hailey trusted the most to handle difficult tasks under tight deadlines. Incomprehensibly, Ben was summarily fired right after he was put on the jury for a toxic tort case that was projected to last as long as four months. The firm's managing partner, Paulina Pahlavi, had warned Ben that he should try to get out of serving on the jury. Yet Ben was picked. Hailey guessed that Ben played it straight in *voir dire* and did nothing to shirk jury service. But Hailey never got the chance to talk to him about it. He was fired the day after he had been selected, and the firm sent around an e-mail forbidding current employees from speaking with him until further notice. No explanation was offered for why he had been discharged. Hailey thought Ben's treatment was especially harsh since not only had he been with the firm for 21 years, but every other paralegal who'd been let go – even those who had been working for only a few months – had been given multiple warnings about how their performance was deficient before they were discharged.

The next thing that upset Hailey was the summer file-clerk program. Each summer for years the firm had hired several teenagers to serve as file clerks. The program – widely understood to be a boondoggle – was the darling of Ken Koltune, one of the older partners. This spring, Ken was finally told that the firm didn't have the money for the summer file clerks. But unwilling to let the program die, Ken arranged to have three of the regular file clerks furloughed over the summer so that there would be enough money to hire a full slate of 10 summer file clerks, each at a salary of \$500 per week.

Even before this summer, the program was shameful in Hailey's opinion. It more or less functioned as a summer camp for the spoiled kids of Ken's wealthy golfing buddies. But this year, the program has reached new lows. Ken hired the youngest file clerk ever – just 12 years old – and the rest of the "fileys," as they were called, seemed even more delinquent than usual.

The fileys workday begins at 8:00 a.m. and goes until 6:30 p.m. with a half-hour for lunch, which the firm, predictably, pays for. Although the fileys are never paid overtime, they happily agreed to waive their overtime pay in exchange for the lavish lunches, which, in monetary terms, are far more valuable.

The fileys deliver mail, do simple photocopying/scanning tasks, and generally shuffle files around as they are told. But mostly, their day is spent waiting to be assigned tasks in the "filey office" on the 43rd floor, a storage room where Ken left the fileys with a huge arsenal of nerf weapons. It didn't take long before the fileys began to act as if they owned the place. The fileys soon started to pick on one of the permanent file clerks, Debbie Dinstern. Debbie was a man (previously called "Dougie"), who was living as a woman in a preparation for undergoing gender re-assignment surgery. The fileys – all of whom were boys – teased Debbie mercilessly about her transgender status, and they soon escalated to firing nerf arrows and bullets at her every time she entered the storage room. Debbie complained to Ken about the treatment, but

Ken was not sympathetic. “Look Dougie or Debbie, or whatever I’m supposed to call you,” he said. “It’s not my fault that the summer file clerks are freaking out and don’t know how to react to you. The fact is, they are just trying to have some harmless fun. Here’s what I suggest: If you act like it’s not bothering you, then they’ll eventually stop.”

At the same meeting, Debbie asked to be able to take unpaid leave in the late autumn for her upcoming gender re-assignment surgery, but Ken denied the request on the spot.

Although Debbie attempted to follow Ken’s advice, the teasing and bullying didn’t stop. It actually got much worse. The next day, Jayden Jiu, a 17-year-old who was one of the ringleaders of the fileys, shot a foam-and-plastic arrow nearly point blank at Debbie’s face. When Debbie ducked her head, the arrow bounced off the wall and hit Jayden in the eye. Flailing around injured, Jayden knocked over some unsecured metal shelving. Several heavy car parts were stored on top of the shelving unit. (They are evidence in a products-liability lawsuit the firm is litigating.) The car parts fell and narrowly missed hitting Debbie and others. It was fortunate no one was hit, since the parts were easily heavy enough to have seriously injured or even killed someone. Unluckily for Jayden, he was hurt badly by the ricocheted foam arrow. At the hospital, he was found to have a detached retina.

It was only at this point that Ken signaled any displeasure with a filey. He phoned Jayden and fired him, at the same time warning him not to file a workers compensation claim, since the injury would not be covered.



Fig. 3: Some of the nerf weapons and ammunition in the filey office, including Nerf-brand foam dart guns and an Air Hunterz bow and arrow set.

While Ken's stated reason for firing Jayden was that he was too dangerous to have in the workplace, Hailey was skeptical, especially since Ken tolerated all of the other juvenile louts. She figured the firing had more to do with the fact Jayden's father, whose dry-cleaning chain had been an important client, had filed bankruptcy in the previous week and had terminated the firm's representation.

The summer file-clerk program and the firing of Ben Bartlett weren't the only things that caused Hailey to begin to dislike her firm. There was also Cantwell's hiring policy. One thing that came with being a senior associate at Cantwell was service on the firm's recruitment committee. Even as a new associate, Hailey had noticed a startling lack of ethnic diversity around the office. Once she was put on the recruitment committee, she understood why. Hailey found out that when it came to non-attorney staff, Cantwell's Farapolis office had an unannounced policy of only hiring people who had lived in Minnekota all their lives, but not hiring anyone who went to the Minnekota State University at Farapolis. This policy was an issue when it came to the hiring of African-Americans. The undergraduate student population at MSU-Farapolis was 75 percent African-American, while every other four-year college in the state was at least 90 percent white. And just about every non-attorney job at the firm required a bachelor's degree.

Despite her misgivings, Hailey did not let her displeasure at the firm show. In late June, when the partners met to make partnership decisions for Hailey's class, they voted unanimously to make Hailey a partner, effective July 1, 2013. Hailey was informed immediately, and she acted absolutely delighted, keeping her doubts to herself. For an outside opinion, she called up a law-school classmate of hers, Roger Riluah, who was a first-year partner at Luong & Lopez, a law firm in Las Viego, Nevizona. Roger didn't offer a disinterested opinion. Instead, he immediately started trying to recruit Hailey to come to work for L&L.

"L&L is growing like crazy, and we need great attorneys at your level of experience," Roger said. "Think about it, Hailey. It's sunny and warm out here all the time. And if you have a book of business you bring with you, I'm sure we could offer you partnership."

The next day, Hailey had lunch with her friend, Silena Santiago, senior vice president of legal affairs for Hexetron Systems, Inc., one of Cantwell's largest clients.

"Silena, this is hush-hush, but I am thinking about leaving Cantwell before they make me partner. They treat the non-attorney staff very unfairly, and they have policies which favor the hiring of white applicants." Hailey then described what had been happening at the firm. "I'm just not sure it's the kind of place I want to spend my career, Silena. So, I'm thinking about moving to Nevizona to join Luong & Lopez. Do you think if I made the jump I could take some of Hexetron's business with me?"

"I would be bummed if you moved out of town," Silena said. "But we like working with you, and if you go to another firm, we'd want to keep sending work to you no matter. Hexetron has a large presence in the Las Viego area, so that's actually a really good fit for us. And, frankly, with what you've said about Cantwell, I'm not sure that Hexetron would want to continue to use them as we have in the past."

While Hailey thought she had kept up a perfect poker face during all this, Paulina actually had a hunch that Hailey was thinking about bolting. Because of this, the firm had begun a program of listening in on all of Hailey's phone calls and reviewing her e-

mails. The firm continued this surveillance through the summer. Then, on May 22, Cantwell's executive committee met to discuss the issue.

Paulina began the meeting.

"Even though we have found nothing to suggest that Hailey is thinking of leaving Cantwell," Paulina said, "I'm still concerned that she's getting ready to go. It's just my intuition, but I trust it. And anyway, the work from Hexetron has been drying up lately, and that's one of Hailey's main sources of billable hours. Let's face it, if Hexetron stops being a major client, our need for another partner is marginal. Here's what I propose: Let's put a written partnership agreement in front of Hailey this week. If she wants to stay here, I assume she will sign it right away. If she doesn't sign it by May 31, then let's fire her. That's the last good day to fire her, because, if we wait until June 1, then her Level 3 retirement benefits will vest, and that is going to be a substantial liability for the firm."

The executive committee agreed to the plan, and the written partnership agreement was given to Hailey with a note on top asking her to sign and return it as soon as possible. Hailey, who had yet to make up her mind about accepting the offer of partnership or moving to L&L, put the document in a corner of her desk so she could think about it. At 5:00 p.m. on May 31, she was surprised when Paulina showed up at her door with a security guard. Hailey was given 20 minutes to pack up her personal effects and leave.

As Hailey packed, Paulina informed her that all work product created during her employment was the intellectual property of Cantwell, protected by copyright and trade-secret law, and she would not be able to take any files or documents with her.

"Can I take the law review article I was working on?" Hailey asked. "It's 30,000 words, and it's already been accepted by the *Floribama Law Review*. I've gone through two rounds of edits with them already."

"No," Paulina said. "Cantwell owns the copyright in that article, and it also constitutes a trade secret of the firm. As is our prerogative, we will choose not to publish it."

"Well, that's pretty low, Paulina," Hailey said. "At least I'll be able to get access to virtually all of the pleadings, motions, and transactional documents I've worked on just by calling clients. They'll let me have them, and then I'll have a set of forms to work with as I continue to practice law."

"The copyrights in all of those documents belong to the firm, not the clients," Paulina said, "and we reserve all rights. Besides, thanks to the non-compete agreement you signed, you won't be practicing law for a while."

When Hailey got back home and called Roger with the news, he was delighted. "I took the liberty of already taking this to the partnership," Roger said. "I'm authorized to offer you a position as senior counsel, to begin Monday, with an early decision on partnership three-months from your start date."

Hailey expressed her extreme gratitude, but she regretfully explained the problem presented by the non-compete agreement.

Roger was nonplussed.

"Don't worry about it, Hailey. The Nevizona courts are very hostile to non-compete clauses. I think it's unlikely that it will be enforceable."

QUESTION

Word limit: 2,500 words

Analyze the parties' legal positions. Include analysis of the accuracy of the legal statements they have made, and explain how, going forward, they might seek to protect and advance their interests. Organize your response as follows, clearly labeling the subparts:

Subpart A: Discuss any issues revolving around Ben Bartlett.

Subpart B: Discuss any issues revolving around Debbie Dinstern and Jayden Jiu.

Subpart C: Discuss any issues revolving around Hailey Haydensen.

Subpart D: If there is anything else you wish to discuss, which does not belong in any of subparts A through C, please put it under this Subpart D.

A few things to keep in mind: The subparts will not all be given equal weight. The subpart structure is provided for organizational purposes only. Thus, it may be entirely appropriate for one subpart to be answered with considerable brevity, while other subparts might require very detailed analysis. Pace yourself appropriately, and plan ahead to put information where it belongs.

Also, avoid needless repetition. Do not repeat the exact same analysis with substituted parties. You may incorporate analysis by reference to another portion of your exam answer to the extent appropriate.

Finally, stick to the subject matter presented in the materials and lectures of this course. In particular, do not provide analysis based on what you may have learned in a course on professional responsibility.

CREDITS

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