Trial Academy

Gorman v. Sterling & Morgan

Student Hypothetical
(Wrongful Discharge)

INTRODUCTORY NOTE

This hypothetical will be one of the problems used for the student demonstrations during the afternoon sessions at the International Association of Defense Counsel Trial Academy. This hypothetical problem is designed to simulate the material you would receive on the eve of trial. You should read and study this case as soon as possible. Advance preparation will serve you well during the Trial Academy.

All years in this problem are stated in the following form:

YR-0 indicates the actual year in which the case is being tried (i.e., the present year);

YR-1 indicates the next preceding year (i.e., the present year minus one);

YR-2 indicates the second preceding year (i.e., the present year minus two); etc.

TRIAL ACADEMY

Gorman v. Sterling & Morgan

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Harvey Gorman v. Sterling & Morgan, P.A.

STATEMENT OF THE CASE

This case involves a wrongful discharge claim arising out of the plaintiff's termination from his employment as an associate at the law firm of Sterling & Morgan in Metropol, New State on December 20, YR-2. The Plaintiff filed his Complaint and Demand for Jury on January 30, YR-1, in the Metropol County Court of Common Pleas for New State.

The Plaintiff, Harvey Gorman, was born on November 25, YR-33. He and his wife, Juanita, were married on December 1, YR-10. They have two children: Vicki was born in YR-7 and Norman was born in YR-5. The children attend the P. N. Harkins Preparatory School in Rocky Mount.

Mr. Gorman attended high school in Rocky Mount, Home State where his father had been a successful farmer. A National Merit semi-finalist, Mr. Gorman was admitted to Dartmouth but shortly before the end of his senior year in high school, his father suffered a debilitating heart attack. Because of the resulting financial pressure, he was forced to attend the University of Home State. After college, Mr. Gorman entered the Peace Corps and received a two-year assignment to the Philippines, where he met and married Juanita. In the middle of his second year in the Philippines, Gorman was arrested for possession of marijuana. He agreed to enter a plea equivalent to "no contest" in the States. He agreed to leave the country immediately in return for a reduced sentence. He was required to resign from the Peace Corps six months early.

Upon his return to the U.S., Mr. Gorman was accepted to and attended law school at the University of Home State, where he served as associate editor of the Environmental Law

Quarterly. Upon graduation from law school in YR-6, he took and passed the New State bar exam and began to work as an associate with Sterling & Morgan, P.A., the third largest firm in New State. His starting salary was $100,000.

Mr. Gorman was immediately assigned to the firm's litigation department. During the first three years of his practice, he gained the respect and affection of both the partners and associates in the firm. He received a raise and year-end bonus almost every year of his employment with the firm. Several times during his third year he was contacted by headhunters but each time, he declined to pursue other opportunities. In early YR-2, he mentioned to a younger partner the possibility of applying for a job with the United States Attorney's Office. The partner told him to "wait until you make partner and then take a leave to go there so you can come back after a few years and make the big money here."

In the fall of YR-2, Mr. Gorman was assigned to work with Bill Sterling, Jr., a partner whose work consisted primarily of products liability defense. Mr. Sterling's major client, and third largest client for the firm overall, was CyLab, Inc., a major pharmaceutical manufacturer. Four partners, nine associates, and six paralegals worked primarily on CyLab's cases. Assignment to the "CyLab team" was considered a plum within the firm and a sign that an associate was highly regarded by the partners.

CyLab's in-house attorney for litigation management was Michael Evans. Contrary to the general practice of lawyers at Sterling & Morgan, Mr. Evans insisted on an extremely aggressive litigation posture on all cases assigned to the firm. CyLab's consistent approach was to defend each and every case brought against the company with the most strident defense possible. Mr. Evans adamantly believed that no extensions of time should ever be requested or granted by lawyers working on his cases. CyLab's reputation for commitment to quality and

safety in its manufacturing operations and its "take no prisoners" approach to litigation had resulted in the company enjoying relatively few adverse verdicts and an extremely low suit rate compared to others in the industry.

On Tuesday, November 29, YR-2, Mr. Evans forwarded the file of *Malaguer v. CyLab* to Bill Sterling, with instructions to defend the matter. The file contained the Complaint, in which Mr. Malaguer alleged that he had ingested one of CyLab's products, that he had an adverse reaction, and that he had been rendered permanently and totally disabled from his job as a brakeman for the B & S Railroad. The Complaint was accompanied by the Plaintiff's First Set of Interrogatories. The pleadings had been served on CyLab's agent for service of process on November 4, YR-2. Therefore, pursuant to the New State Rules of Civil Procedure, the answers to the Interrogatories were due on December 20, YR-2. The file also contained extensive medical information on Mr. Malaguer that had been obtained during pre-suit negotiations between CyLab and plaintiff's counsel. It also contained a surveillance videotape of Mr. Malaguer engaging in a number of physical activities that were inconsistent with some of the damage allegations made by Mr. Malaguer's counsel in his demand letters submitted prior to filing suit.

Bill Sterling reviewed the file, prepared and filed the Answer, and prepared draft interrogatory responses. He forwarded the file to Mr. Gorman on Friday, December 2, YR-2 with a cover memo asking him to proofread the responses and obtain the necessary verification prior to the due date. The memo also requested that a Notice of the Plaintiff's Deposition be served scheduling the Plaintiff's deposition for the first week of January YR-1.

Mr. Gorman did not work on the CyLab file between December 2 and December 5. On December 5, YR-2, Mr. Sterling sent a rush research project to Mr. Gorman. The question

involved the applicability of the preemption doctrine to a claim filed against EST Pharmaceutical Company, a significant client of Mr. Sterling's. Mr. Sterling instructed Mr. Gorman that the research project was to be completed before he left on vacation. He asked Mr. Gorman whether he would have enough time to do both the research project and to complete the work on the CyLab file by the December 20, YR-2 deadline. Mr. Gorman assured him that he could get all the work done within the deadlines. The research project was more complex than Mr. Gorman had originally anticipated. He was not able to complete the project until December 16, YR-2.

On December 17, YR-2, Mr. Sterling left for a two-week skiing vacation in Europe. On December 19, YR-2, Mr. Gorman reviewed the draft responses. In the draft answer to an interrogatory requesting a list of all photographs, Mr. Sterling had objected to the request and then added that there were no such documents or materials in the defendant's possession, custody or control other than those protected by attorney work product. Mr. Gorman was concerned that the surveillance videotape might be discoverable and not subject to the attorney work product exception.

Mr. Gorman researched the matter and found a very recent New State decision holding that surveillance tapes were not protected from discovery and sanctioning lawyers for failing to disclose the existence of and produce such tapes. Mr. Gorman attempted to contact Bill Sterling to discuss the matter on his cell phone, but he was unable to reach him. Mr. Gorman sent an e-mail to Mr. Sterling on his Blackberry, although he was unsure if the Blackberry would receive the message where Mr. Sterling was vacationing. Late in the day on December 19, YR-2, Mr. Gorman received a call from Michael Evans. Mr. Evans inquired about the status of the discovery responses and wanted to be assured that they would be completed by the December 20, YR-2 deadline. Mr. Gorman told Mr. Evans that he had reviewed the draft that Mr. Sterling had

left with him, but he had questions that he wanted to discuss with Mr. Sterling before the answers were filed. Mr. Evans instructed Mr. Gorman to forward the draft to him for his review.

On December 20, YR-2, Mr. Evans called Mr. Gorman and told him that he was satisfied with the draft that Mr. Sterling had prepared and approved the draft for filing. Mr. Gorman did not discuss with Mr. Evans his ongoing concern regarding the accuracy of the answers and his desire to review the answers with Mr. Sterling in light of his research.

Later that same day, Mr. Gorman attempted to reach Mr. Sterling by both telephone and e-mail. He did not attempt to leave a message with him at the hotel where he was staying. Although Mr. Gorman was aware of CyLab's position with respect to obtaining extensions of time, he concluded that he needed to confer with Sterling before submitting the final discovery responses. He therefore called opposing counsel on December 20th and received a two-week extension of time to serve the discovery responses or objections until January 5, YR-1.

On December 20, YR-2, Mr. Gorman received a call from Michael Evans asking for confirmation that the answers had been filed. Mr. Gorman explained that he had been unable to reach Sterling to confer and therefore had obtained a two-week extension of time to serve the responses. Mr. Evans became extremely upset. Although Mr. Gorman explained that the extension would not prejudice the case in any way, Evans abruptly terminated the call.

Michael Evans immediately called Lawrence Morgan, the firm's senior partner, and informed him of the matter. Evans advised Morgan that he considered Gorman's actions not only utterly incompetent but a direct violation of Bill Sterling and his specific instructions. Evans advised Morgan that he was so upset that he could no longer have confidence in the firm if Gorman were allowed to continue as an associate with the firm. Morgan attempted to assuage

Evans, but the call ended with Evans vowing to never send another file to Sterling & Morgan as long as Gorman was associated with the firm.

Later that afternoon, Gorman was summoned to Morgan's office. Mr. Morgan asked Gorman whether he was aware of the very explicit instructions of CyLab that no extensions were requested or given in CyLab's cases. Gorman replied that he was aware, but that this case presented a unique situation. Morgan advised him that his handling of the file had placed the firm's relationship with one of its most important clients in very serious jeopardy. He advised him that his employment with the firm was terminated, effective immediately.

Sterling deposed Malaguer during the morning of January 5, YR-1 and immediately thereafter served the Answers to Interrogatories which had been revised with the addition of a "privilege log" to the objection to Interrogatory No. 2, identifying the surveillance videotape.

Mr. Gorman's annual salary at the time he was terminated was $161,504. In addition, his benefits included life insurance and major medical coverage. Mr. Gorman claims that as a result of his termination, he has been unable to find another job. He applied to six other firms in the three months after his discharge, but none has offered him a position.

In March YR-1, Gorman decided to move back to Rocky Mount, where he planned to open a law office. He took the Home State bar examination in July YR-1 and was admitted to the Home State bar in December YR-1. He could not practice in Home State before he was admitted to practice. Rocky Mount is a town of 17,000 people. Its economy is primarily farm-based.

Mr. Gorman claims damages for: (1) his lost wages from December YR-2 through December YR-1, when he was admitted to the Home State bar, (2) the difference thereafter between the lesser amount he will earn as a sole practitioner in Rocky Mount and the amount he

would have continued to earn as an attorney with Sterling & Morgan (through the time of his retirement); (3) the cost of the bar review course and exam; 4) relocation costs. These damages are itemized in the expert report of Luisa Monet, M.A. (a copy of which is included in the problem materials on page 67). Mr. Gorman's counsel retained Ms. Monet after seeing an advertisement for her services in the ATLA monthly newsletter, which announced that Ms. Monet's office would accept certain cases on an installment basis.

Mr. Gorman and his wife, Juanita, separated shortly after New Year's Day YR-1, and he subsequently shared a house with his college roommate, William Holliday, a dog groomer until he moved to Home State. Mrs. Gorman says she left her husband because after he was fired, he was cranky, depressed, and disinterested in life in general and her in particular.

STATEMENT OF LAW

A. Employment-At-Will Doctrine.

The Employment-At-Will Doctrine is well recognized in New State. Under that doctrine, an employer may fire an employee who has no contrary employment contract for a good reason, bad reason, or no reason at all. Under the law, both employer and employee reasonably expect employment to be at-will, unless stated to the contrary in explicit, contractual terms.

The doctrine of at-will employment is subject to only a number of limited exceptions. Among such exceptions is an employer's violation of public policy in dismissing an employee.

B. **Violation of Public Policy**

An employee-at-will has a cause of action for wrongful discharge when the discharge is "contrary to a clear mandate of public policy." The elements of a wrongful discharge claim based on public policy are as follows:

- Employer directed employee to perform an act that would violate a statute or clearly expressed public policy;
- Employee was terminated as a result of refusing to perform the act; and
- Employer was aware or should have been aware that employee's refusal was based upon employee's reasonable belief that the act was illegal or against public policy.

Traditionally, the sources of policy for a wrongful discharge claim are Constitutional or statutory provisions. However, in *New State*, a plaintiff may sustain a wrongful discharge claim based on a discharge contrary to a clear mandate of public policy from a non-legislative source. *See e.g., New State Hospital and Medical Service v. Diana Smith*.

C. Contract

Under certain circumstances, employment for an indefinite term (and the accompanying at-will employee status) can be transformed into an express or implied employment contract by promises contained in an employment manual or other writing indicating that an employee may only be fired for cause.

In this case, plaintiff Harvey Gorman argues that he was not an "at-will" employee, relying on his bonuses and assignment to the CyLab team, as well as statements allegedly made by the firm's partners at the end of his formal three-year evaluation to the effect that if he continued to develop in the manner in which he had, he would be a "partner in no time."

The trier of fact must look to the substance of the employer's general policy rather than the form in which it is expressed. However, plaintiff bears the burden of submitting adequate proof that an express or implied contract was formed.

The key consideration in interpreting the language of the company manual, other written policies, or in oral promises, is the employee's reasonable expectation. Habit or custom cannot be the basis of the contractual "promise" and "reasonable expectations." Instead, an explicit affirmation of definitive contractual terms is required. A major factor in the trier of fact's analysis is whether the statements rise to the level of promises on the part of an employer.

D. <u>Just cause</u>

Termination of an employee is never wrongful when an employer makes good faith determination that "just cause" is present. Just cause is defined in 16 New State Statutes '39-6 as:

> [a] fair and honest cause or reason, regulated by good faith on the part of the party exercising the power. A discharge for "just cause" is one based on facts that (1) are supported by substantial evidence and (2) are reasonably believed by the employer to be true and also (3) is not for any arbitrary, capricious, or illegal reason.

The employer does not have to be correct, and juries may not second guess the employer, so long as the termination was based on a good faith determination with credible support that good cause existed.

Under New State law, the determination of whether just cause existed involves weighing plaintiff's performance, the employer's reason for termination, and whether a reasonable employer, acting in good faith, would conclude that discharge had a good and sufficient basis.

Therefore, the trier of fact must determine just cause through the eyes of a reasonable employer, not from the viewpoint of the employee.

E. Damages

Plaintiff's lost wage claim is limited to that period of time within which plaintiff could or should have found equivalent work. The law provides that damages based on mere speculation or conjecture may not be recovered. Recognizing the contractual nature of a wrongful discharge action, recovery of damages is limited under controlling case law by the general principles that:

> (1) The damages are those arising naturally according to the usual course of things from the breach of the contract, or such as may fairly and reasonably be supposed to have been in the contemplation of the parties to the contract at the time it was made, as a probable result of the breach; and (2) there must be reasonably certain and definite consequences of the breach as distinguished from the mere quantitative uncertainty.

An employer does not insure future wages until retirement age for a wrongfully discharged employee. Prior to allowing a plaintiff to recover an extended period of pay the trier of fact must analyze whether the wrongful discharge has impaired the person's future earning capacity. The mere fact that plaintiff is unemployed at the time of trial does not automatically prove that he will be unable to obtain equivalent employment for the remainder of his or her work life expectancy.

New State Rule of Evidence 1001

DEFINITIONS:

For purposes of this article, the following definitions are applicable:

(1) **Writings and Recordings**. "Writings" and "recordings" consist of letters, words, sounds or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.

(2) **Photographs.** "Photographs" includes still photographs, X-ray films, videotapes, motion pictures or other similar methods of recording information.

(3) **Original.** An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any print out or other output readable by sight, shown to reflect the data accurately, is an "original."

New State Rule of Civil Procedure 33

INTERROGATORIES TO PARTIES

(a) **Availability; Procedures for Use.** Any party may serve upon any other party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections signed by the attorney making them. The party upon whom the interrogatories have been served shall serve a copy of the answers, and objection if any, within 30 days after the service of the interrogatories, except that a defendant may serve answers or objections within 45 days after service of the Summons and Complaint upon that defendant. The court may allow a shorter or longer time. The party submitting the interrogatories may move for an order under Rule 37 (a) with respect to any objection to or other failure to answer an interrogatory.

(b) **Standard Interrogatories.** In all cases, the following standard interrogatories may be served by one party or the other unless otherwise ordered by the court for good cause shown. The interrogatories shall be deemed to continue from the time of service until the time of trial of the action so that information sought, which comes to the knowledge of a party, or his representative or attorney, after original answers to interrogatories have been submitted, shall be promptly transmitted to the other party.

(1) Give the names and addresses of persons known to you or your attorney to be witnesses concerning the facts of the case and indicate whether or not written or recorded statements have been taken from the witnesses and indicate who has possession of such statements.

(2) Set forth a list of photographs, plats, sketches or other prepared documents in your possession or your attorney's possession that relate to your claim in this case.

(3) Set forth the names and addresses of all physicians who have treated you and all hospitals to which you have been committed in connection with your injuries and also set forth a statement of all medical costs involved.

(4) Set forth the names and addresses of all insurance companies which have liability insurance coverage relating to the claim and set forth the number or numbers of the policies involved and the amount or amounts of liability coverage provided in each policy.

(5) Set forth an itemized statement of all damages, exclusive of pain and suffering, claimed to have been sustained by the party.

(6) List the names and addresses of any expert witnesses whom you propose to use as witnesses at the trial of this case.

(7) For each person known to the parties or counsel to be a witness concerning the facts of the case, set forth either a summary sufficient to inform the other party of the important facts known to or observed by such witness, or provide a copy of any written or recorded statements taken from such witness.

New State Rule of Civil Procedure 26(b)(5)

RULE 26. GENERAL PROVISIONS GOVERNING DISCOVERY

. . .

(b) **Scope of Discovery**.

. . .

(5) **Claims of Privilege or Protection of Trial Preparation Materials.** When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications or things not produced or disclosed in a manner that, without revealing the information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

New State Rules of Professional Conduct

RULES 3.4, FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not:

(d) in pretrial procedure, make a frivolous discovery request or fail to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

Rose Marie SAMPLES, Appellant,

v.

Vincent Louis MITCHELL, Respondent.

No. 2747

Supreme Court of New State

Submitted Oct. 8, YR-2.

Decided Nov. 3, YR-2.

Motorist who was struck from behind in rear-end collision sued following motorist, who admitted liability. After refusing to exclude from evidence defendant's surveillance videotape of plaintiff engaging in physical activity, which defendant had failed to disclose during discovery, the Circuit Court, entered judgment on jury verdict for defendant. Plaintiff appealed, and the Supreme Court held that: (1) videotape was relevant and discoverable, and (2) trial court's sanction of refusing to allow defendant's investigator to comment on videotape was inadequate and warranted new trial.

Reversed and remanded.

[1] APPEAL AND ERROR 30k205
Making motion in limine to exclude evidence at beginning of trial does not preserve issue for review, because motion in limine is not a formal determination, and moving party must therefore make contemporaneous objection when evidence is introduced.

[2] APPEAL AND ERROR 30k205
Motion to exclude videotape from evidence was sufficient to preserve issue of videotape's admissibility for review, even though trial court termed motion, which it denied, as motion in limine, where ruling was made on motion during trial and immediately prior to introduction of videotape, and no opportunity existed for court to change its ruling.

[3] PRETRIAL PROCEDURE 307Ak383

Surveillance videotape of personal injury plaintiff engaging in physical activities which had been made by defendant was relevant and discoverable in action, in which liability was admitted but damages were contested; even if applicable, work product rule would not bar discovery, since rules require that nature of evidence be disclosed prior to any claim of privilege, so that applicability of privilege can be assessed. Rules Civ. Proc., Rule 26.

[4] PRETRIAL PROCEDURE 307Ak27.1
Scope of discovery is very broad, and objection on relevance grounds is likely to limit only the most excessive discovery request.

[4] PRETRIAL PROCEDURE 307Ak31
Scope of discovery is very broad, and objection on relevance grounds is likely to limit only the most excessive discovery request.

[5] PRETRIAL PROCEDURE 307Ak309
In deciding what sanction to impose for failure to disclose evidence during discovery process, trial court should weigh nature of interrogatories, discovery posture of case, willfulness, and degree of prejudice.

[6] PRETRIAL PROCEDURE 307Ak434
Trial court's sanction for discovery violation by defendant in personal injury action, who had failed to disclose existence of surveillance videotape of plaintiff engaging in physical activities when responding to

standard interrogatories, of refusing to allow defendant's investigator to interpret videotape, was not meaningful enough to protect discovery rights, and thus was an abuse of discretion warranting new trial. Rules Civ. Proc., Rule 26.

[7] COURTS 106k26
Failure to exercise discretion amounts to an abuse of that discretion.

[8] PRETRIAL PROCEDURE 307Ak15
Entire thrust of discovery rules involves full and fair disclosure to prevent a trial from becoming guessing game or one surprise for either party. Rules Civ. Proc., Rule 26.

[9] PRETRIAL PROCEDURE 307Ak16
Essentially, rights of discovery provided by rules give trial lawyer means to prepare for trial, and when rights are not accorded, prejudice must be presumed. Rules Civ. Proc., Rule 26.

[10] APPEAL AND ERROR 30kl043(6)
Unless party who has failed to submit to discovery can show lack of prejudice, reversal is required. Rules Civ. Proc., Rule 26.

[11] PRETRIAL PROCEDURE 307Ak44.1
Even though imposition of sanctions for discovery violation is usually left to sound discretion of trial judge, whatever sanction judge imposes should serve to protect the rights of discovery provided by Rules of Civil Procedure. Rules Civ. Proc., Rule 26.

[12] PRETRIAL PROCEDURE 307Ak44.1
Overly lenient sanctions for discovery violations are to be avoided where they result in inadequate protection of discovery. Rules Civ. Proc., Rule 26.

CONNOR, Judge:

Rose Marie Samples moved for a new trial after she received an unfavorable verdict. The trial court denied her motion. She appeals. We reverse and remand for a new trial.

FACTS

Vincent Louis Mitchell rear-ended Samples in April YR-12. Mitchell admitted negligence, but contested proximate cause and damages. On April 12 and 15, YR-9, Mitchell's investigator filmed a video which showed Samples removing laundry from a clothesline, watching a ball game, and using her left hand to open a gate.

Two months later, on June 10, YR-9, Samples served Mitchell with standard interrogatories. Mitchell's attorney first answered the interrogatories on July 13, YR-9, and subsequently sent a second set of answers on November 17, YR-9. In neither did she disclose the existence of the video tape nor the name of the investigator as a potential witness.

On October 24, YR-7, a week before trial, Mitchell's lawyer deposed Samples' mother, June Marie Moser, de bene esse, because she would not be available at trial. Mitchell's attorney specifically questioned Moser about Samples' ability to hang clothes, to attend her children's sporting events, and to use the left side of her body. Immediately after the deposition, Mitchell's lawyer told Samples' lawyer about the video. That afternoon she sent him a copy.

At trial, Samples' lawyer offered Moser's deposition into evidence. Subsequently, Mitchell's attorney offered the video tape,

and Samples' attorney objected. The trial judge allowed the video tape over Samples' objection, but refused to allow the investigator to interpret it.

ANALYSIS

Mitchell argues in a footnote that Samples failed to preserve her argument concerning the video because her counsel failed to object immediately prior to the introduction of the video tape.

[1] Making a motion in limine to exclude evidence at the beginning of trial does not preserve an issue for review because a motion in limine is not a final determination. The moving party, therefore, must make a contemporaneous objection when the evidence is introduced.

[2] Despite the fact the judge in this case called the motion one in limine, he ruled on it during the trial, immediately prior to the introduction of the evidence in question.

Our court has held: Because no evidence was presented between the ruling and [the] testimony, there was no basis for the trial court to change its ruling. Thus, . . .[the] motion was not a motion in limine. The trial court's ruling in this instance was in no way preliminary, but to the contrary, was a final ruling. Accordingly, [the defendant] was not required to renew her objection to the admission of the testimony in order to preserve the issue for appeal. [FNI]

FNI. We also note the trial judge's statement that "the evidence will come in over the objection of the plaintiff," as further indication the proceedings are more accurately characterized as a contemporaneous objection and ruling, not a motion in limine. Here no opportunity existed for the court to change its ruling. Therefore, the issue was properly preserved for review.

[3] We next inquire whether or not the surveillance video was discoverable evidence. Mitchell first claims the video was not discoverable because the standard interrogatory asked for photographs, not video tapes. The New State Rules of Evidence clearly define photographs in evidentiary matters to include video tapes. Rule 1001(2), NSRE ("'Photographs' include still photographs, X-ray films, video tapes, motion pictures or other similar methods of recording information."). These rules became effective September 3, YR-7. Rule 1103(b), NSRE. Therefore, they were clearly in effect when this case was tried on October 30-31, YR-7. [FN2]

FN2. The court is aware the definition applies to Article X of the Rules of Evidence. We point to the rule, however, as persuasive authority the terms "video tape" and "photograph" are understood to be synonymous in the trial arena.

[4] Mitchell's lawyer further alleges she did not have to disclose the tape because she did not believe it related to Mitchell's defense. If the tape is related to the claim, Mitchell had a duty to at least disclose the existence of it. Rule 26 (b)(1), NSRCP. In New State the scope of discovery is very broad and an objection on relevance grounds is likely to limit only the most excessive discovery request.

Although the specific question of the discovery of surveillance videos has never been raised in New State, it has been dealt with elsewhere. Professor Moore comments: This question seems to arise most often when the defendant in a personal

injury case has videotaped or collected some other visual evidence of the plaintiff on the extent of his or her injuries. Discovery of the evidence is generally permitted. 6 James Wm. Moore et al., Moore's Federal Practice, § 26.41 [4] [b] (3d ed. YR-5).

Many states that have wrestled with the question have held at least the existence of the video tape must be revealed in response to discovery requests. Florida has held "upon request a party must reveal the existence of any surveillance information he possesses whether or not it is intended to be presented at trial." *Dodson v. Persell*, 390 So.2d 704 (Fla.YR-22). Similarly, the Supreme Court of Appeals of West Virginia reasoned, "[knowledge of the mere existence of this tape would have substantially contributed to the quality of the plaintiffs' trial strategy and their specific preparation of their star witness….. *McDougal v. McCammon*, 193 W.Va. 229, 455 S.E.2d 788. 796 n. 9 (YR-7).

Given the broad interpretation of relevance by our courts, a defendant's surveillance video of the plaintiff was clearly relevant to a personal injury claim in which negligence was admitted and damages were contested. A review of the record makes it clear that Mitchell's counsel found the video useful in drafting her questions to Moser, yet she denied this benefit to Samples' counsel. Furthermore, in this case, Mitchell failed to disclose even the existence of the video tape, thereby providing an inaccurate response to Samples' interrogatories. [FN3]

FN3. Cf. Rule 26(g), NSRCP ("The signature of the attorney or party constitutes a certification in accordance with Rule 11"); Rule 11, SCRCP ("If a pleading, motion, or other paper is signed in violation of this Rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction.

Some states have discussed whether or not surveillance tapes, which will not be introduced at trial, constitute work product. 6 James Wm. Moore et. al., Moore's Federal Practice, § 26.41 [4] [b] (3d Ed. YR-5). The tape in this case, however, was admitted into evidence, and Mitchell has never claimed protection under the work product rule.

Furthermore, the work product rule would not excuse the failure to disclose the existence of the video tape here. If Mitchell's attorney believed Samples had no right to this evidence, either because of relevancy or because of the work product rule, she should have either objected to the interrogatory or disclosed the existence, but not the content, of the evidence and moved for a protective order. [FN4] Rule 33 (a), NSRCP; Rule 26(c), NSRCP. [FN5]

FN4. Mitchell argues admitting the video into evidence was necessary to avoid allowing the statements of Moser to go uncontradicted. According to Mitchell, this promoted discovery's goal of reaching the truth. At the heart of this argument is the question of whether or not the contents of a surveillance video should be protected from discovery until the witness has been deposed in order to safeguard the defendant's ability to impeach the witness on cross-examination. That question is not properly before us. Because Mitchell's attorney failed to disclose the video's existence and move for a protective order covering its contents under this theory, the trial judge was never afforded an opportunity to rule on this issue.

FN5. The New State Rules of Civil Procedure were amended in YR-6 to expressly require the disclosure of the nature

of evidence prior to any claim of privilege so other parties may assess the applicability of the privilege or protection. Rule 26(b)(5), NSRCP. This rule was not in effect at the time of this trial. However, reading rules 26, 33 and 11 together as they were at the time of the trial, this court is convinced the rules never permitted an attorney to deny the existence of evidence deemed privileged.

Having determined Mitchell's conduct was sanctionable, we must now decide if the trial judge abused his discretion in choosing a sanction.

[5] In deciding what sanction to impose for failure to disclose evidence during the discovery process, the trial court should weigh the nature of the interrogatories, the discovery posture of the case, willfulness, and the degree of prejudice.

[6][7] Although the trial judge in this case correctly framed the issue as discovery abuse, he did not weigh the required factors. A failure to exercise discretion amounts to an abuse of that discretion. When the trial judge is vested with discretion, but his ruling reveals no discretion was, in fact, exercised, an error of law has occurred. It is an equal abuse of discretion to refuse to exercise discretionary authority when it is warranted as it is to exercise the discretion improperly.

Mitchell argues that trial judge's decision to limit the testimony of the investigator evidences discretion. This decision in and of itself does not show the judge exercised discretion, especially where the Supreme Court has articulated the legal analysis which should be utilized. The mere recital of the discretionary decision is not sufficient to bring into operation a determination that discretion was exercised. It should be stated on what basis that discretion was exercised. A more meaningful sanction was required in this case.

Samples' attorney served standard interrogatories, not a complex series of questions making compliance difficult. At a minimum, the existence of the tape should have been disclosed in the original answers to Samples' interrogatories, as the tape obviously related to Samples' personal injury claim. Instead, Mitchell's lawyer knew about the video tape when the interrogatories were received, yet willfully failed to reveal it to Samples or the court for some two and a half years. At the least, Mitchell's lawyer should have known the video was relevant when Moser was added as a witness and should have disclosed the video's existence to Samples' attorney prior to Moser's deposition.

[8][9][10] The entire thrust of the discovery rules involves full and fair disclosure, to prevent a trial from becoming a guessing game or one of surprise for either party. Essentially, the rights of discovery provided by the rules give the trial lawyer the means to prepare for trial, and when these rights are not accorded, prejudice must be presumed. Unless the party who has failed to submit to discovery can show lack of prejudice, reversal is required.

[11][12] Even though the imposition of sanctions is usually left to the sound discretion of the trial judge, whatever sanction the judge imposes should serve to protect the rights of discovery provided by the Rules. Overly lenient sanctions are to be avoided where they result in inadequate protection of discovery.

Few litigants would reveal the existence of video surveillance evidence if the alternative were simply having the testimony of the

investigator who filmed the video limited at trial.

In summary, in failing to exercise discretion, the trial judge abused that discretion. Furthermore, the sanction he imposed was not meaningful enough to protect the rights of discovery provided by the Rules.

Samples also appeals the trial court's refusal to grant a new trial based on the inflammatory closing argument of Mitchell. We need not reach this issue.

REVERSED AND REMANDED

New State Hospital and Medical Service, Appellant,

v.

Diana SMITH, Respondent

Former employee, a licensed certified public accountant (CPA), sued former employer for wrongful termination of employment. The District Court entered judgment for employer on all claims. Employee appealed. The Court of Appeals, affirmed in part, but reversed and remanded with respect to accountant's claim of wrongful discharge in violation of public policy. Certiorari was granted. The Supreme Court held that: (1) non-legislative sources, including State Board of Accountancy Rules of Professional Conduct, may constitute public policy for purposes of wrongful discharge claim; (2) "integrity and objectivity" provision of accountants' professional conduct rules was sufficiently clear mandate of public policy to sustain wrongful discharge claim; and (3) employee established prima facie case of wrongful discharge for her claim that she was fired for refusing to falsify accounting information in connection with proposed merger between employer and other health insurance providers.
Affirmed and remanded with directions.

The Opinion of the Court.
We granted certiorari to review the court of appeals opinion, reversing the trial court's grant of a directed verdict against the plaintiff, Diana Smith, on her tort claim against her former employer, New State Hospital and Medical Service (NSHMS), for wrongful discharge in violation of public policy. The court of appeals held that the New State Board of Accountancy Rules of Professional Conduct, specifically Rule 7.3, could establish public policy for purposes of a wrongful discharge claim. The court of appeals further held that Smith had produced sufficient evidence during her trial to establish that NSHMS fired her for refusing to violate this public policy. We affirm.

I.

Since this case was resolved on a directed verdict, the facts regarding Smith's retaliatory discharge claim must be viewed in the light most favorable to Smith. [FN1]

FN1. See *infra* part III. A, p.19.

Diana Smith is a licensed certified public accountant. In November of YR-15, NSHMS hired her as an at-will employee as manager of general accounting for their human resources department. In that position, Smith had financial reporting responsibilities for the company. According to Smith, those responsibilities included reporting all transactions involving the company's payroll expenses, premiums, revenues, and claims expense. In April of YR-12, NSHMS reassigned Smith to the position of manager of special projects. In this new position, Smith did not have any financial reporting responsibilities, but did have a general oversight role. Smith remained an at-will employee of NSHMS until her termination in February of YR-11.

At trial, Smith testified that during her employment with NSHMS she discovered and complained to her supervisors about questionable accounting practices. Her concerns included her observation that reimbursed expenses, such as moving

expenses, were not properly noted on some of the IRS reports that NSHMS submitted. Smith reported these concerns to her supervisor, Samuel Joseph. [FN2]

> FN2. Smith's direct supervisor for both her positions and throughout most of her employment with NSHMS was Samuel Joseph.

She further complained to her supervisor [FN3] that NSHMS had reduced its fees for management services and office space charged to New State Life Insurance Company in order to make New State Life appear profitable and to preserve its B plus solvency rating. Smith told her supervisor that the adjustment violated generally accepted accounting principles because the reports then misrepresented the financial status of New State Life. Her supervisor responded that the adjustment was a business decision.

> FN3. For a brief period applicable to this assertion, Smith's supervisor was Joe Hartley.

When she became manager of special projects Smith continued to object to NSHMS's accounting practices. Smith worked on two documents discussing the benefits of a proposed merger between NSHMS and Second State Blue Cross and Blue Shield and Third State Blue Cross and Blue Shield. The documents were to be submitted to the Board of Directors of NSHMS and ultimately to the New State Division of Insurance. [FN4] Smith's supervisor, Joseph, told her that she should identify and describe benefits of the merger in the documents. Smith informed Joseph that she was having difficulty uncovering any benefits of the merger. In response, Smith asserts that Joseph told her she would be fired if she was unable to quantify ***522** concrete benefits of the merger. Smith attempted to uncover some benefits, although she was ultimately unsuccessful. [FN5]

> FN4. Ultimately, the documents were not submitted to the Division of Insurance and were used only for internal reference by NSHMS.

> FN5. Smith testified that the reason she could not find any benefits for the proposed merger was that both Second State Blue Cross and Blue Shield and Third State Blue Cross and Blue Shield were insolvent. Thus, there would be no financial benefit for NSHMS to merge with these other companies.

Smith further testified that she objected to some of the representations that her supervisors made about the benefits of the merger within the documents. Smith explained that her supervisors deleted information she had included in the merger documents and substituted their own. Smith further stated that she believed that her supervisors had made what she considered to be inappropriate omissions and misrepresentations in the merger documents.

Smith testified that one of her duties was to compile a staffing analysis of Second State Blue Cross and Blue Shield. While compiling the analysis, Smith discovered that NSHMS had purchased a $3.5 million computer for Second State Blue Cross and Blue Shield. Smith objected to this purchase because it was recorded as an asset on the books of Second State Blue Cross and Blue Shield. As an accountant, Smith considered

it improper for an asset purchased by one entity to be recorded on the books of another separate entity. Smith further objected to NSHMS not recording as liabilities certain discounts that NSHMS owed to other companies. She claimed that the omission misled NSHMS subscribers into believing that NSHMS had more funds in reserve to pay claims than it actually had.

As a result of reviewing the Third State Blue Cross and Blue Shield account, Smith learned that Third State had $1.5 million of duplicate claim liability. Smith explained that between YR-15 and YR-12, Third State had collected $1.5 million in overpayments but had not refunded the money. Smith brought this to the attention of Joseph, her supervisor, who declined to take any action to remedy the situation. Lastly, while reviewing Third State Blue Cross and Blue Shield's premium taxes, Smith discovered that the entity was improperly taking a home office tax credit. Smith reported to Joseph that Third State Blue Cross and Blue Shield was not entitled to that credit. Joseph told Smith that Third State Blue Cross and Blue Shield would take the credit anyway. Joseph ordered Smith to turn the work papers over to someone else.

Smith also complained about NSHMS's treatment of non-admitted assets on its financial statement. A non-admitted asset is a receivable that is outstanding for more than ninety days. In YR-14, NSHMS had loaned Second State Blue Cross and Blue Shield $13.5 million through a surplus note. This note was not indicated on the NSHMS financial statement as a non-admitted asset. She objected to Joseph about this practice. Joseph told her that he believed it was proper not to list the note as a non-admitted asset.

On February 19, YR-11, NSHMS fired Smith. NSHMS told Smith that her job was being eliminated because of a restructuring within the finance department. Smith testified that her dismissal was the direct result of her objections to NSHMS's irregular accounting practices. On June 11, YR-11, Smith filed suit against NSHMS and Joseph. She asserted five claims for relief: (1) breach of contract for wrongful discharge; (2) breach of implied contract and promissory estoppel for wrongful discharge; (3) retaliatory discharge in violation of the public policy exception to employment at-will; (4) tortious interference with contract by Samuel Joseph; and (5) outrageous conduct against Joseph. At the close of Smith's case, NSHMS and Joseph made a Motion for a Directed Verdict. The district court directed a verdict against Smith as to the breach of implied and express contract causes of action and the tortious interference with contract cause of action. The district court reserved judgment on Smith's promissory estoppel claim until the end of the trial and ruled that the outrageous conduct cause of action against Joseph should be submitted to the jury. In addition, the district court directed a verdict against Smith on her claim of retaliatory discharge in violation of public policy. ***523** Relying on *Martin Marietta v. Lorenz*, 823 P.2d 100, (New State YR-10), the trial court ruled that in order to establish a prima facie case of wrongful discharge in violation of public policy, Smith must allege that NSHMS had asked her to violate a specific public policy. In her complaint, Smith relied on the following sources of public policy to make her claim: 18 U.S.C. § 1001 (YR-14) which prohibits the making of false statements to federal agencies; section 24-34-402, 10A New State Statutes (YR-7 Supp.), which provides a cause of action and remedies for discriminatory and unfair employment practices; section 10- 16-102, 4A New State Statutes (YR-8), which provides statutory

definitions for the New State Health Care Coverage Act; and the New State Board of Accountancy Rules of Professional Conduct. The trial court considered each of these sources of public policy and held that none of them could support Smith's claim for wrongful discharge in violation of public policy. After trial, the jury found for NSHMS and Joseph on Smith's outrageous conduct claim. The trial court ruled that Smith had failed to prove her claim of promissory estoppel and entered final judgment for NSHMS and Joseph on all counts.

Smith appealed the dismissal of her claims to the court of appeals. The court of appeals upheld the trial court's ruling regarding Smith's implied contract and promissory estoppel claims. The court of appeals reversed the directed verdict for NSHMS on Smith's claim that she had been wrongfully discharged in violation of public policy. The court of appeals held that the New State Board of Accountancy Rules of Professional Conduct, specifically Rule 7.3, was sufficient to establish public policy for purposes of a wrongful discharge claim. The court of appeals further held that Smith presented sufficient evidence to establish that she was fired for refusing NSHMS's requests to violate this rule. The court of appeals thus reversed the part of the trial court's ruling dismissing Smith's wrongful discharge claim in violation of public policy and remanded the case for a new trial.

NSHMS petitioned this court for certiorari review. We granted certiorari to determine the following:

> 1) Whether the first element of a public policy wrongful discharge claim can be satisfied based on an allegation that the employer required the employee to engage in conduct which allegedly violates the New State Board of Accountancy Rules and Regulations.
>
> 2) Whether an employee must prove that she refused to perform the act allegedly against public policy in order to establish the second and third elements of a public policy wrongful discharge claim.

We hold that the New State Board of Accountancy Rules and Regulations may constitute public policy for purposes of establishing a wrongful discharge claim in violation of public policy. We further hold that the plaintiff established a prima facie case of wrongful discharge under *Martin Marietta v. Lorenz*, 823 P.2d 100, 109 (New State YR-10). We therefore affirm the court of appeals and remand with directions to order a new trial on Smith's wrongful discharge claim.

II.

[1] In general, employment contracts are at-will and either the employer or the employee may terminate the relationship at any time. In *Martin Marietta v. Lorenz*, 823 P.2d 100, 109 (New State YR-10), we recognized an exception to this general rule in situations where the employer terminated the employment contract in violation of public policy. The rational underlying this exception was the long-standing rule that a contract violative of public policy is unenforceable. It is the manifest public policy of this state that an employee whether at will or otherwise, should not be put to the choice of either obeying an employer's order to violate the law or losing his or her job.

[2] The essence of the public policy exception is that an employee will have a cognizable claim for wrongful discharge if the ***524** discharge of the employee contravenes a clear mandate of public policy. Smith claims that NSHMS terminated her for refusing to violate the New State Board of Accountancy Rules of Professional Conduct. In particular, Smith relies on Professional Rule 7.3 which prohibits a certificate holder from knowingly misrepresenting facts or subordinating their judgment to others. [FN6] At issue in this appeal is whether the New State Board of Accountancy Rules of Professional Conduct and in particular Rule 7.3 may constitute a clear mandate of public policy for the purpose of a wrongful discharge cause of action.

> FN6. Rule 7.3 states:
>
> *Integrity and Objectivity.*
>
> A certificate holder shall not in the performance of professional services knowingly misrepresent facts, nor subordinate his judgment to others. In tax practice, however, a certificate holder may resolve doubt in favor of his client as long as there is reasonable support for his position.
>
> Rule 7.3, 3 New State Regulations 705-1 (YR-11).

A.

[3] NSHMS argues that we should limit the sources of public policy for a wrongful discharge claim to constitutional or statutory provisions. NSHMS claims that ethical codes, such as the one upon which Smith relies, are too variable and ill-defined to provide employers and employees with fair notice as to what comprises public policy. We disagree.

We have never conclusively defined the sources of public policy for purposes of the public policy exception to employment at-will. In *Martin Marietta v. Lorenz*, 823 P.2d 100, 109 (New State YR-10), we stated that in order to establish a prima facie case for wrongful discharge in violation of public policy, the employee must prove that " ... the action directed by the employer would violate a *specific statute* relating to the public health, safety, or welfare, or would undermine a *clearly expressed public policy* relating to the employee's basic responsibility as a citizen or the employee's rights as a worker...." (Emphasis added.) Although we suggested that public policy would generally be limited to specific statutory mandates, we left open the question of whether clearly expressed public policy might be manifested elsewhere.

Jurisdictions are split as to whether to recognize non-legislative sources of public policy. Some jurisdictions limit the sources of public policy to statutory or constitutional sources. [FN7] This limitation stems from concerns that an expansive definition of public policy would be both unwieldy and unpredictable leaving employers and employees alike without direction as to the contours of the public policy exception. However, even courts that limit the public policy exception to statutory and constitutional sources cannot escape that concern. The identification of the statutory or constitutional provisions that qualify as clear expressions of public policy is a matter for judicial determination. *See* *Brockmeyer v. Dun & Bradstreet*, 113 Wis.2d 561, 335 N.W.2d 834, 841 (YR-19) (stating: "The determination of whether the public policy asserted is a well-defined and fundamental

one is an issue of law and is to be made by the trial court.").

> FN7. *See, e.g.*, *Gantt v. Sentry Ins.*, 1 Cal.4th 1083, 4 Cal.Rptr.2d 874, 881, 824 P.2d 680, 687 (YR-10) (holding that the courts may not declare public policy without a basis in either the constitution or statutory provisions); *Firestone Textile Co. Div. v. Meadows*, 666 S.W.2d 730, 733 (Ky.YR-19)(indicating that public policy must be limited to a constitutionally protected right or statute); *Brockmeyer v. Dun & Bradstreet*, 113 Wis.2d 561, 335 N.W.2d 834, 840 (YR-19) (holding that public policy must be evidenced by constitutional or statutory provisions).

Other jurisdictions have recognized that non-legislative sources, including professional ethical codes, may provide the basis for a public policy claim. [FN8] Courts that have recognized ***525** ethical codes as a potential source of public policy have noted that employees who are professionals have a duty to abide not only by federal and state law but also by the recognized codes of ethics of their professions. *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58, 417 A.2d 505, 512 (YR-22); *see generally* Lawrence E. Blades, *Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 Colum.L.Rev. 1404 (YR-35). As these ethical codes are central to a professional employee's activities, there may be a conflict at times between the demands of an employer and the employee's professional ethics.

> FN8. *See, e.g.*, *Boyle v. Vista Eyewear, Inc.*, 700 S.W.2d 859, 871 (Mo.Ct.App.YR-17) (holding that public policy may be found in letter or purpose of constitutional, statutory, or regulatory provisions; in judicial decisions of state; and, in certain instances, in professional codes of ethics); *Cloutier v. Great Atlantic & Pacific Tea Co.*, 121 N.H. 915, 436 A.2d 1140, 1144 (YR-21) (holding that public policy exception is not limited to legislative directives); *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58, 417 A.2d 505, 512 (YR-22) (holding that sources of public policy include legislation, administrative rules, regulations or decisions, and judicial decisions and in certain instances a professional code of ethics); *Payne v. Rozendaal*, 147 Vt. 488, 520 A.2d 586, 588 (YR-16) (holding that absence of statutory directive is not dispositive of whether there is a public policy against the directive).

A professional employee forced to choose between violating his or her ethical obligations or being terminated is placed in an intolerable position. *See General Dynamics v. Superior Ct.*, 7 Cal.4th 1164, 32 Cal.Rptr.2d 1, 15, 876 P.2d 487, 501 (YR-8). It is just such a situation that the public policy exception was meant to prevent. As we stated in *Lorenz*, "an employee should not be put to the choice of either obeying an employer's order to violate the law or losing

his or her job." 823 New State at 109. As is clear from the above discussion, the term public policy is not subject to precise definition. *Petermann v. International Bhd. of Teamsters*, 174 Cal.App.2d 184, 344 P.2d 25, 27 (YR-43). A common requirement in cases discussing the issue is that public policy must concern behavior that truly impacts the public in order to justify interference into an employer's business decisions. In addition, public policy must be clearly mandated such that the acceptable behavior is concrete and discernible as opposed to a broad hortatory statement of policy that gives little direction as to the bounds of proper behavior. [FN9]

> FN9. *Compare* *Cronk v. Intermountain Rural Elec. Ass'n*, 765 P.2d 619 (New State Court of Appeals YR-14) (statutes prohibiting employee from lying before Public Utility Commission and awarding preferences to developers constituted public policy) *with* *Lampe v. Presbyterian Medical Ctr.*, 590 P.2d 513 (New State Court of Appeals YR-24) (statute allowing State Board of Nursing the power to revoke a nursing license if the nurse has negligently or willfully acted in a manner inconsistent with the health or safety of persons under his or her care did not constitute public policy).

Statutes by their nature are the most reasonable and common sources for defining public policy. In limited circumstances, however, we agree with the jurisdictions that hold there may be other sources of public policy such as administrative regulations and professional ethical codes. However, we quickly note that even those courts that have adopted ethical codes as a source of public policy have not done so without limitation. *See* *Pierce*, 417 A.2d at 512. In particular, in order to qualify as public policy, the ethical provision must be designed to serve the interests of the public rather than the interests of the profession. The provision may not concern merely technical matters or administrative regulations. In addition, the provision must provide a clear mandate to act or not to act in a particular way. Finally, the viability of ethical codes as a source of public policy must depend on a balancing between the public interest served by the professional code and the need of an employer to make legitimate business decisions. We also adopt these limitations as a prudent check on the public policy exception to employment at-will.

Thus, we hold that professional ethical codes may in certain circumstances be a source of public policy. However, we emphasize that any public policy must serve the public interest and be sufficiently concrete to notify employers and employees of the behavior it requires. We now turn to the issue of whether Rule 7.3 of the New State Board of Accountancy Rules of Professional Conduct is of sufficient clarity and public value to qualify as an expression of public policy.

B.

[4] NSHMS argues that the New State Board of Accountancy Rules of Professional Conduct are not clear mandates of public ***526** policy but rather broad aspirational statements that cannot support a public policy claim. We disagree.

The New State Board of Accountancy is established pursuant to section 12-2-103, 5A New State Statutes (YR-11). The Board has

responsibility for making appropriate rules of professional conduct, in order to establish and maintain a high standard of integrity in the profession of public accounting. § 12-2-104, 5A New State Statutes (YR-11). These rules of professional conduct govern every person practicing as a certified public accountant. *Id.* Failure to abide by these rules may result in professional discipline. § 12-2-123, 5A New State Statutes (YR-11).

The rules of professional conduct for accountants have an important public purpose. They ensure the accurate reporting of financial information to the public. They allow the public and the business community to rely with confidence on financial reporting. Rule 7.1, 3 New State Regulations 705-1 (YR-11). In addition, they ensure that financial information will be reported consistently across many businesses. The legislature has endorsed these goals in section 12-2-101, 5A New State Statutes (YR-11), which includes the legislative declaration for establishing the Board of Accountancy. Section 12-2-101 states in pertinent part:

> It is declared to be in the interest of the citizens of the state of New State and a proper exercise of the police power of the state of New State to provide for the licensing and registration of certified public accountants, ... to provide for the maintenance of high standards of professional conduct by those so licensed and registered as certified public accountants.

Given this legislative declaration and the purposes of the rules of professional conduct for accountants, we hold that the rules have a sufficient public purpose to constitute public policy.

[5] Further, we conclude that Rule 7.3 [FN10] of the New State Board of Accountancy Rules of Professional Conduct is a sufficiently clear mandate of public policy to sustain a wrongful discharge cause of action. Rule 7.3 is entitled "Integrity and Objectivity" and states:

> FN10. Smith also offered Rules 7.8 and 7.11 as sources of public policy; however, her principal argument before both the court of appeals and this court focused on Rule 7.3 only and we confine ourselves to that Rule here.

A certificate holder shall not in the performance of professional services knowingly misrepresent facts, nor subordinate his judgment to others. In tax practice, however, a certificate holder may resolve doubt in favor of his client as long as there is reasonable support for his position. Rule 7.3, 3 New State Regulations 705-1 (YR-11). This rule mandates accuracy in financial reporting and furthers the laudable goal of establishing public confidence in financial reporting. The rule specifically directs an accountant to refrain from knowingly misrepresenting facts. The clear purpose of this rule is to prohibit accountants from falsifying information when completing tasks. The rule also directs accountants not to subordinate their judgment to others, such that an accountant may not succumb to pressure from his or her employer to misrepresent facts or deviate from generally accepted accounting principles. Both of these proscriptions provide clear direction to an accountant as to the scope of duty, and clear notice to an employer that accountants have a duty to report financial information fairly and accurately.

Thus, we hold that Rule 7.3 represents a clear mandate of public policy for purposes of establishing a claim for wrongful discharge in violation of public policy. Smith was entitled to rely on this rule for purposes of her suit against NSHMS. We affirm the court of appeals in its holding that the New State Board of Accountancy Rules of Professional Conduct and Rule 7.3 in particular can be an adequate source of public policy for a wrongful discharge claim.

III.

A.

[6] [7] Having resolved the public policy question, we must now address the factual posture of Smith's case before the trial court on motion for directed verdict. Preliminarily, we note that directed verdicts are not favored. When a plaintiff makes out a prima ***527** facie case, even though the facts are in dispute, it is for the jury, and not the judge, to resolve the conflict.

[8] A reviewing court must consider all of the facts in the light most favorable to the nonmoving party, and determine whether a reasonable jury could have found in favor of the nonmoving party. This court described the second component of that analysis in *McGlasson v. Barger:*

> A motion for directed verdict can only be granted where the evidence, when so considered, compels the conclusion that the minds of reasonable men could not be in disagreement and that no evidence, or legitimate inference arising therefrom, has been presented upon which a jury's verdict against the moving party could be sustained. 163 New State 438, 442, 431 P.2d 778, 779 (YR-35). [FN11]
>
> FN11. In a recent Supreme Court opinion, Justice Scalia indicated that in order to establish a prima facie case of age discrimination, the plaintiff need only present enough evidence to "create an inference" that the employment decision was based on discriminatory criteria. *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 878, ----, 116 S.Ct. 1307, 1310, 134 L.Ed.2d 433 (YR-6).

B.

[9] [10] The issue before the trial court on directed verdict was whether Smith had presented a prima facie case for wrongful discharge. Based on today's discussion, the elements of a wrongful discharge claim can be summarized as follows: (1) the employer directed the employee to perform an act that would violate a statute or clearly expressed public policy; (2) the employee was terminated as a result of refusing to perform the act; and (3) the employer was aware or should have been aware that the employee's refusal was based upon the employee's reasonable belief that the act was either illegal or against public policy.

The trial court granted NSHMS's motion for directed verdict solely on the grounds that Smith failed to present evidence that the actions directed by her employer would violate a statute or clearly expressed public policy. We now conclude that Rule 7.3 is an expression of public policy, thereby overturning the trial court on that basis. We also briefly consider whether Smith has presented sufficient evidence to establish a prima facie case of wrongful discharge in violation of public policy. NSHMS argues that Smith failed to show that her supervisors directed her to perform an act against public

policy and that she refused to do so. We disagree.

[11] [12] Smith presented evidence from which a reasonable jury could have concluded that NSHMS dismissed her for her refusal to falsify accounting information. For instance, while she was working on the proposed merger between NSHMS, Second State Blue Cross and Blue Shield and Third State Blue Cross and Blue Shield, Smith's supervisor told her to identify benefits of the proposal. When she told her supervisor that she had tried to find benefits of the merger but was unable to do so, she testified that she was informed that she should not be working at NSHMS. Taken in the light most favorable to Smith, that evidence would indicate that she was directed to identify benefits of the merger plan or face job termination. She refused [FN12] to agree to what she perceived to ***528** be false benefits that would contravene the rules of professional conduct for accountants; she was unable to identify any other benefits, and she was later terminated. [FN13] Such evidence satisfies the elements for purposes of our limited consideration on appeal of a directed verdict.

> FN12. NSHMS argues that Smith objected to various accounting practices, but did not outright refuse to undertake them. First, we note that "refuse" is defined as: 1. to avoid or shun; 2. to decline to accept; and 3. to show or express a positive unwillingness to do or comply with. Websters Third New International Dictionary 1910 (YR-41). Clearly, if Smith objected to the accounting practices and did not participate in them or by inaction declined to undertake them, she satisfied the refusal component. Refusal is not limited to the verbal expression of refusal, but can consist of inaction as well. The objections Smith voiced about the practices to her supervisors similarly satisfied the requirement that the employer was aware or should have been aware of the reason for the refusal.
>
> FN13. Since Smith presented sufficient evidence to establish that she actually refused her employer's directives to violate public policy, we decline to decide whether mere objection without other manifestation of refusal would alone satisfy the second and third elements.

IV.

In conclusion, we hold that professional codes may be a source of public policy for purposes of a claim of wrongful discharge in violation of public policy. Smith properly relied on Rule 7.3 of the New State Board of Accountancy Rules of Professional Conduct as a source of public policy. She further presented evidence sufficient to satisfy the prima facie requirements. On the evidence Smith adduced at trial, reasonable jurors could differ as to whether she was wrongfully discharged by NSHMS. Therefore, jurors--not judges--must be allowed to make that ultimate determination. We affirm the court of appeals and remand with directions to order a new trial on Smith's wrongful discharge claim.

DEPOSITION OF HARVEY GORMAN TAKEN MAY 1, YR-1

(The witness was sworn by a certified shorthand reporter. All objections except those as to form were reserved for the time of trial. The witness was given standard instructions concerning deposition testimony.)

Q: Mr. Gorman, please state your name and address for the record.

A: Harvey Gorman, 100 Tulip Street, Rocky Mount, Home State.

Q: How old are you?

A: Thirty-two years old.

Q: Are you married?

A: Yes, but my wife and I are separated.

Q: The address you gave before, is that your address or your wife's address?

A: That is my address. My wife lives with our two children at 220 Sycamore Drive in Rocky Mount.

Q: Do you share your residence on Tulip Street with anyone?

A: Just the kids when they come over to stay.

Q: You stated before that you have two children. What are their names and dates of birth?

A: Norman, who was born in July YR-5, and Vicki, who was born in YR-7.

Q: How is your health Mr. Gorman?

A: Overall, I would say good.

Q: You say "overall." Do you have any health problems whatsoever or are you suffering from any medical ailments?

A: Oh, it's just that many years ago I tore my rotator cuff, and it acts up now and again. Nothing serious, sometimes it limits the range of motion of my arm.

Q: How did you injure yourself?

A: Just an old injury from the Peace Corps.

Q: Mr. Gorman, can you provide us with a brief history of your educational background from high school onward?

A: I graduated from Rocky Mount High School in YR-15. Although I was accepted to Dartmouth College, financial pressures at home resulted in my attending college at the University of Home State in Centerville, where I graduated in YR-11. I spent two years in the Peace Corps serving in the Philippines. After completing my two-year service I returned to the States, I entered the University of Home State Law School, where I graduated in YR-6.

Q: Mr. Gorman, would you describe any work history or employment you have had?

A: While in high school, I did various farm-related jobs for both my father and for other farmers in the Rocky Mountain community. During my first two years of college, I waited tables at the dining hall. After college, I went to the Philippines for two years, where I worked in the Peace Corps. After my first year of law school, I clerked law with the law offices of William Dalehite in Rocky Mount. After my second summer, I clerked with Sterling & Morgan in Metropol, New State. After law school, I accepted an associate's position with Sterling & Morgan where I worked until I was terminated in December YR-2.

Q. Is Exhibit 1 a copy of your curriculum vitae?

A. As of the time I worked for Sterling & Morgan, yes.

Q: Mr. Gorman, have you ever been terminated from any job before?

A: No.

Q: Have you ever been convicted of a crime?

[Brief off-the-record conference between Mr. Gorman and his counsel].

By Mr. Acevedo: Let me state an objection that I do not believe that this line of inquiry is relevant and/or admissible. And, I would move to strike any questions or answers along this line. However, expressly subject to our objection, I will permit him to answer.

A: I was charged with possession of marijuana while I lived in the Philippines.

Q: How was the matter resolved?

A: By entering into an agreement with the prosecutor's office.

Q: What was your agreement?

A: I pleaded “no contest” to simple possession and my sentence was limited to the time served waiting for the matter to come to trial.

Q: How long were you in jail in the Philippines?

A: Approximately 2-1/2 months.

Q: How long did you continue to live in the Philippines after you were released from jail?

A: My wife and I left almost immediately.

Q: Was that a condition of the arrangement you had with the Philippine authorities?

A: Yes.

Q: Have you been charged with any other crimes?

A: No.

Q: Mr. Gorman, did you have any ties or other affiliations with New State prior to coming to work with Sterling & Morgan?

A: No.

Q: Why did you decide to work in Metropol?

A: Metropol is the largest city in this part of the country. While in law school, I decided that I wanted to work for a large firm, both because of the complexity of the cases and the quality of work that would be involved.

Q: Would you describe your work history with Sterling & Morgan?

A: When I first began at Sterling & Morgan, I was placed in the general litigation group. For the first eighteen months, my work involved primarily conducting discovery on larger cases for partners who had primary responsibility for those cases. Some time after my first year, I began receiving the assignment of my own files which I handled to conclusion. In my fourth year with the firm, I was assigned to the medical products defense team headed by Bill Sterling. I remained on that team until I was fired.

Q. Did you like working at the firm?

A. I loved working for the firm. I would have been happy to spend my whole career there.

Q: How would you describe your relationship with Bill Sterling?

A: Bill is a hard person to work with. He is very demanding and prefers to communicate by memorandum rather than to sit down and talk about our cases. However, I felt that he was pleased with the work that I did.

Q: Prior to your termination, had you had any involvement representing CyLab, Inc.?

A: Yes, I had worked on four cases for CyLab prior to receipt of the Malaguer file.

Q: What was your involvement in those cases?

A: Each of those cases was fairly large and either involved very serious injuries or death. As a result, my role consisted primarily of preparing the discovery and assisting Bill Sterling in the trial of the cases.

Q: What was the result in those cases?

A: We tried all four of those cases and received either a defense verdict or a nominal damages award in each.

Q: Did you work for Michael Evans on those files?

A: I had no direct involvement with Mr. Evans in handling any of those files. Although he was responsible for assigning each of those files to the firm, other members of his in-house counsel team served as our liaison during the discovery and trial of those cases.

Q: How would you describe CyLab's approach to the defense of its cases?

A: CyLab was extremely aggressive in the defense of all of its cases. We all understood that it would be very unusual if CyLab were to engage in meaningful settlement negotiations.

Q: Were you aware of any particular instructions from CyLab with regard to either obtaining or granting extensions of time in the handling of its cases?

A: Yes, I was.

Q: What were the instructions?

A: CyLab preferred that we not obtain extensions of time to answer the complaints or respond to discovery. It also preferred that we not grant such extensions.

Q: You have used the word "preferred." Isn't it true that CyLab had very explicit instructions directing its counsel not to either ask for or grant extensions of time?

A: I never saw anything in writing to that effect.

Q: Didn't Bill Sterling advise you explicitly that you were under no circumstances allowed to grant or obtain extensions of time in handling discovery on the CyLab's cases?

A: Yes, I think that Bill Sterling may have mentioned something to that effect.

Q: Would you describe what happened leading up to your termination?

A: On Friday, December 2, YR-2, I received a memo from Bill Sterling with a draft of Answers to Interrogatories. The memo requested that I finalize the discovery responses and then serve them by the due date, which was December 20, YR-2. The following Monday, December 5, I received a research memo from Mr. Sterling that he said was urgent and instructed me to complete before he left for his vacation. The memo had to do with preemption raised issues that I had never researched before. The project took me longer than I anticipated. When I completed the research memo I began working on the CyLab matter. I reviewed the file and saw that it contained a surveillance tape of the plaintiff engaging in yard work as well as bowling. The draft answers that Bill Sterling had prepared did not disclose the existence of the tape. I remembered that a case had recently come down from our Supreme Court on this issue. I researched the matter and concluded that it was necessary that we disclose the existence of the tape. I tried to reach Bill Sterling, who had left the office on a European skiing vacation. I decided that the matter was sufficiently serious that Bill Sterling should make the call on how we should respond. Later in the afternoon on the 19th I received a call from Mr. Evans who wanted to know about the status of the discovery responses. I told him that I had some questions with the draft that Mr. Sterling had to me and that I needed to reach him on his vacation. Mr. Evans instructed that I send him a draft which I did through e-mail. The next day Mr. Evans called me back and said that he was comfortable with the answers and that I should file them. I felt it was best not to argue with him but I really did not feel that I was in a position to file the answers because of the research that I had conducted. I tried again to reach Mr. Sterling by leaving him a voicemail message on his cell phone and by leaving him an e-mail but I did not hear back from him that day. Because the interrogatories had to be filed the next day I felt it was best for the client's interest to get an extension from opposing counsel. I called opposing counsel and was successful in convincing him to give me an extension of time until January 5 to respond to the discovery, which was several days after Bill was due to return. On December 20, I received a call from Michael Evans asking me whether I had served the discovery responses. When I told him the problem with the surveillance tape, he got very angry and hung up the phone. The next thing I knew, I was called in to Lawrence Morgan's office, and I was fired.

Q: What else was said between you and Mr. Evans?

A: That was it. The conversation was very short.

Q: Would you please describe in detail what you and Mr. Morgan said to each other?

A: Mr. Morgan started out telling me he had received a call from Michael Evans complaining that I had deliberately violated an extremely important and well-articulated policy with respect to the handling of CyLab's files. He asked me if I was aware of the importance of CyLab's work to the firm and I told him that I was. He asked if I was aware of CyLab's requirement that no extensions of time be granted or requested by members of this firm and I told him that I was aware of that. He asked if I had received the work assignment in sufficient time to complete it before the answers were due**.** I told him that when I received the file on December 2 I felt that I had plenty of time to complete the review before the following deadline on December 20th. However, at the time I did not know that Mr. Sterling was going to give me another urgent matter on December 5.

Q: With the receipt of that second memo, would it be within sufficient time to do both projects?

A: I had existing plans to take off the following weekend to go out of town. I felt even taking a long weekend I had enough time to complete the research project and to review the answers in advance of the following deadline. I told Mr. Morgan when he asked me if I had enough time that I had. I didn't tell him about taking off the weekend and I did not go into great detail about the second research project. He told me that one of the most important and necessary attributes of lawyers at Sterling & Morgan was to provide the very best service for its clients. He told me that if an attorney was conducting himself in a fashion that caused one of the firm's major clients to consider withdrawing its work from the firm, that the attorney could not expect to continue working with Sterling & Morgan. He told me that he wished me the very best but, under the circumstances, was compelled to terminate my employment with the firm as of that afternoon. I told Mr. Morgan that for me to have filed the discovery responses in the form left by Bill Sterling would have been a violation of my ethical responsibilities and that obtaining the extension of time created no prejudice to the client. Mr. Morgan asked me if Mr. Sterling had left a memo directing that the discovery responses be filed in the form in which he had dictated them, and I told him that he had. He said something about my having waited to the eleventh hour and some nonsense about acting without having talked with a partner. He told me that partners in the firm had to be able to rely on associates to carry out their requests and that he did not feel any further discussion would be helpful.

Q: Mr. Gorman, you stated that you received the memo from Mr. Sterling in early mid-December. Is Exhibit 2 a copy of the memo?

A: Yes.

Q: It bears a date of December 2, YR-2. Did you receive it on or about that date?

A: Probably.

Q: When did Bill Sterling leave to go on his vacation?

A: I believe it was December 17th.

Q: Why didn't you confer with Mr. Sterling about this issue before he left?

A: I did not begin working on the file until December 18th, and Bill Sterling had already left for his vacation and was not reachable.

Q: Why didn't you attend to the matter before Mr. Sterling left on his vacation?

A: I just explained Mr. Sterling gave me another urgent research memo that he was very clear needed to be completed before he left on the 17th.

Q: Did Mr. Sterling ask you if you would have enough time to get everything done with the second research project?

A: He did, and I told him that I expected to be able to get both things done. I didn't tell him that I had plans to take off the following weekend. I did not anticipate at the time that the preemption issue was going to take me as long as it did. The matter was unusually complex.

Q: Did you confer with any other lawyer or with anyone at CyLab before you obtained the extension?

A: No.

Q: Why not?

A: I felt the way I handled it was the best way to do it.

Q: Do you have any more information concerning the circumstances of your termination?

A: No, it was real short, but not very sweet.

Q: Please describe the benefits provided to you as part of your compensation package with Sterling & Morgan.

A: I got life insurance and major medical coverage. The death benefit under the life insurance policy was three times my annual salary. My health benefits covered me and my entire family, and I didn't have to make any contribution to the premiums.

Q: Were the benefits you just described part of your compensation package since the time you first started with Sterling & Morgan until your termination in December YR-2?

A: Yes. And I got year-end bonuses almost every year.

Q: How much were each of the bonuses you received while employed by Sterling & Morgan, beginning with YR-5 and every year thereafter until your termination?

A: The first two years, you know all the associates got the same bonus – maybe $15,000. But in YR-3, I finally started to be recognized for the great work I was doing for Sterling & Morgan and the bonuses began to get much bigger. In YR-5 and YR-4, I received a $15,000 bonus each year. In YR-3, I received a $25,000 bonus. I did not receive a bonus in YR-2.

Q: Can you please describe in general your work experience and work environment at Sterling & Morgan?

A: I like working at Sterling & Morgan. While I missed my family and friends, I felt I had security at Sterling & Morgan. They promised it. I got along well with the clients and other lawyers.

Q: How and when did anyone promise you job security?

A: Sterling & Morgan always touted the fact that it hired each associate expecting them to be a partner.

Q: How many associates were in your class?

A: Eight.

Q: Have any of them been fired?

A: Well, that's not exactly how it works. If an associate is on thin ice he will figure that out and move on.

Q: How many from your class have "moved on"?

A: Five.

Q: Were you ever promised anything specifically?

A: Yes, at my three-year evaluation I was told I was doing a great job and that if I continued to develop at the same rate, I would be a partner "in no time**."** Another time a young partner told me I should hold off applying to the U. S. Attorney's Office until after I had made partner so that I could take a leave, work there, and then return to the firm and make what he called "big money."

Q: Were you ever told anything else about job security?

A: Not specifically.

Q: Mr. Gorman, do you remember any specific occasion when you received an award or honor of any type from Sterling & Morgan?

A: Other than my annual bonus, which was definitely performance based, and the regular pat on the back and "you're doing a great job," I don't recall specifically.

Q: Were you ever reprimanded while employed at Sterling & Morgan?

A: No. I was always told what a good job I was doing.

Q: Did you ever have any problems with your clients?

A: I really don't recall any problems with clients.

Q: Mr. Gorman, did you do work for the Standard Insurance Company?

A: Yes.

Q: Do you recall the case of *Hansen v. Bi-Rite Department Stores?*

A: Was that a slip and fall case in Forsacken County?

Q: I am not sure of that, but do you recall the case?

A: I think so.

Q: Let me show you a document that I will have marked as Exhibit 3A to your deposition and ask if you recall seeing this?

A: Not specifically.

Q: I will represent to you that this letter was contained in the *Hansen v. Bi-Rite* file maintained at Sterling & Morgan.

A: Yes, I think I probably do recall having seen this.

Q: What was your reaction upon receiving it?

A: I don't recall specifically, but I am sure I would have been concerned.

Q: And would you have taken prompt action to attend to this matter?

A: Certainly.

Q: Let me show you what we will mark as Exhibit 3B to your deposition and ask if you recall receiving these.

A: Again, I don't have a specific memory of this particular letter, but I do have a general recollection of this file.

Q: Do you recall why it was necessary for the client to have to write you twice to obtain a status report in this file?

A: I'm sure it was probably related to the fact that I was so involved in other cases and this was not a front burner type of matter. By the end of my third year with Sterling & Morgan, I was carrying quite a caseload. At any one time, I had between 35 to 60 active cases. Occasionally, if there were no activity on a file for some time, I might not send a letter out to the client. Some of the files were managed by adjusters who had the cases diaried for periodic reporting, 30, 60 days, whatever. There were occasions when I might not send a status report out and the adjuster's diary system would prompt them to write a letter requesting a report. Basically, the clients were very satisfied with the work I did for them.

Q: Do you recall any other problems that you had with any clients while you were at Sterling & Morgan?

A: No.

Q: Mr. Gorman, you told us that you clerked in Rocky Mount after your first year of law school. Is that right?

A: Right.

Q: You also told us that you missed your family and friends during the years that you worked at Sterling & Morgan.

A: What's your question?

Q: Did you ever consider moving back to Home State at any time prior to YR-1?

A: Well, if you mean thought about it, sure. I suppose everybody thinks about what it would be like practicing where they grew up. But at the time I was terminated, I had no plans to leave Sterling & Morgan.

Q: Is your father still active in the farming business?

A: Yes, but he's cutting back because of his age.

Q: Isn't it true that your father owns a substantial farm operation in Rocky Mount?

A: I don't know what you mean by substantial, but it's a nice farm.

Q: Who will help your father manage the farm now that he plans to cut back?

A: Well, he has some pretty good managers working for him and, to the extent that I can be of assistance on the business side, I may help, as well.

Q: Exactly how many acres does your father farm, Mr. Gorman?

A: Well, that depends on the rotation.

Q: How many acres does he own?

A: Just under 26,000.

Q: Isn't it true that your father is the largest landowner in the four counties surrounding Rocky Mount?

A: Yes, I think that's true.

Q: Mr. Gorman, what was your gross annual compensation at the time you were terminated?

A: $161,504, plus the benefits and bonuses I told you about before. But it would have gone up a lot.

Q: Are you presently employed?

A: I am about to be self-employed. I plan to open up my own practice in Rocky Mount.

Q: What efforts have you made to find employment?

A: Since I was fired in December YR-2, I applied to six other firms in Metropol.

Q: Were you offered a position at any of the firms to which you applied?

A: No, they said there were no openings for me.

Q: To which firms did you apply?

A: The six largest defense firms in Metropol.

Q: Did you apply to any other firms?

A: No.

Q: You made no effort to apply for a position at any firm beyond those six?

A: Right.

Q: Did you seek the assistance of a professional employment agency or what is known as a "head hunter" in your job search?

A: Nope.

Q: Why did you not apply to more than those six?

A: I got the definite impression that Sterling & Morgan had put the word out on the street.

Q: Do you have any specific information that someone from the Sterling & Morgan had done so?

A. A friend of mine heard that someone in his firm's litigation department was told by a partner at Sterling & Morgan that I was not dependable and had almost cost them a big client.

Q. Do you know who purportedly said that, either the person at your friend's firm or the partner at Sterling & Morgan.

A: No, but it was pretty obvious that the firm was not supporting my efforts to find a job. Lawrence Morgan could get Bin Laden a job with those firms if he wanted to.

Q: What do you expect to earn when you start you practice?

A: I'm not really sure. It depends on what clients I can attract.

Q: Have you made any estimates of the cost of setting up your office?

A: Yes. With the cost of furnishings, a part-time secretary, the necessary computer and equipment, the lease and everything, I estimate I will need approximately $64,000 to cover overhead for the first six months.

Q: Does this include your living expenses?

A: Oh no! My living expenses and those for my wife and kids are all in addition to the $64,000 figure I just gave you.

Q: Mr. Gorman, I believe you are seeking to recover in this law suit your relocation expenses to Rocky Mount.

A: Yes, right. Since Sterling & Morgan so damaged my reputation and made it impossible for me to find work in the Metropol area, Sterling & Morgan is responsible for all my relocation expenses.

Q: Do you have an estimate as to what those expenses total?

A: Yes, at least $54,000.

Q: What is included within this $54,000 figure?

A: A number of items. I don't know the exact figure for each category, but the $54,000 figure includes (1) closing fees and costs on the sale of our home in Metropol; (2) closing fees and costs on our new home in Rocky Mount; (3) airfare for me and my family; (4) movers and transportation expenses; (5) loss on the sale of the Metropol house; (6) personal property and furnishings damaged in the move; and (7) renovations and redecorating of the Rocky Mount home.

Q: Is there anything else included within the $54,000 figure?

A: Not that I can recall at this time.

Q: Mr. Gorman, with respect to the personal property and furnishings damaged during the move, did you have insurance to cover such damage?

A: I think there was some insurance, but I don't believe it covered all the damages. I don't really remember.

Q: With respect to the loss on the sale of the Metropol home, please describe what you mean by that?

A: Well, the real estate market in Metropol was very bad at the time we sold our house, and we had to sell in a hurry, so we were forced to take less for it than what it was worth.

Q: For how much did you sell your house?

A: $350,000, but it was worth at least $365,000.

Q: Do you have any real estate appraisal or any other document which shows that your house was worth $365,000 at the time it was sold for $350,000?

A: Not yet.

Q: As to the renovations and redecorating of the Rocky Mount house, please describe for me what that entails.

A: Well, we had to buy a house in Rocky Mount very quickly because of the move and everything. We really didn't have time to find exactly what we wanted, so we had to make renovations to make our new home comparable to the one which we had in Metropol. Also, my wife is very allergic to cats, and the people who lived in the Rocky Mount home before us had several cats. We had to replace all the wall-to-wall carpeting in the house.

Q: Did you first try to clean the carpeting to see if that would solve your wife's allergy problems?

A: No, we didn't. I know my wife's allergies, and it wouldn't have helped. Also, my wife has asthma. To expose her to that would have been dangerous.

Q: Mr. Gorman, you stated before that you and your wife separated around New Year's Day of YR-1?

A: Yeah, thanks to Sterling & Morgan.

Q: Have you or your wife started any divorce proceedings?

A: Not yet.

Q: Do you attribute in any way the breakup of your marriage to your termination from Sterling & Morgan?

A: I certainly do. The dumping I got from Sterling & Morgan, my difficulties in finding a new job and being forced to start a new professional life in my early 30s caused me a lot of strain and stress which led directly to problems in my home life and caused the breakup with my wife.

Q: Have you sought any treatment by a counselor, psychologist, psychiatrist, or other mental health professional for this "strain and stress" which you are referring to?

A: No, not yet.

Q: Thank you Mr. Gorman, I have no further questions.

Gorman Deposition Exhibit 1

HARVEY GORMAN
176 LINDER AVENUE
METROPOL, NEW STATE

PERSONAL:

Date of Birth: November 25, YR-33 in Rocky Mount, Home State

Marital Status: Married, two children

Interests: Biking and Spanish

EDUCATION:

YR-15 Rocky Mount High School

National Merit Semifinalist
Honor Society
President 4-H Club
Drama Club
Varsity Soccer
JV Basketball

YR-11 University of Home State

B.S. Business Administration
Outreach volunteer – Junior and Senior Years
Vice President – AgClub

YR-6 University of Home State School of Law

J.D.

PROFESSIONAL EXPERIENCE:

YR-11- YR-9 Peace Corps, Philippines

YR-6 –YR-2 Sterling & Morgan, P.A.

Gorman Deposition Exhibit 2

Sterling & Morgan

MEMORANDUM

To: **Harvey Gorman**
From: **WTS, Jr.**
Re: **Malaguer v. CyLab, Inc.**
Date: **December 2, YR-2**

Please review the attached draft discovery responses, put them in final form as required and obtain necessary executed verifications from the client. The responses are due 12/20/YR-2. Also please notice the plaintiff's deposition for the first week of January. As usual, CyLab wants to get a jump on this guy. I will be out of the country during the last two weeks of December, so this is yours to handle.

Gorman Deposition Exhibit 3A

STANDARD INSURANCE COMPANY

1550 Parkway South
Hartford, CT

June 10, YR-5

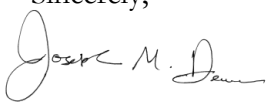
Harvey Gorman, Esquire
Sterling & Morgan
Top of the Park Plaza
Metropol, New State 04045-0400

RE: Hansen v. Bi-Rite Department Stores
Our Insured: Bi-Rite Department Stores
DOA: April 7, YR-7

Dear Harvey:

Would you please send me a status report on this file.

Sincerely,



Joseph M. Dewees
Assistant Claims Adjuster

JMD/car

Gorman Deposition Exhibit 3B

STANDARD INSURANCE COMPANY

1550 Parkway South
Hartford, CT

August 10, YR-5

Harvey Gorman, Esquire
Sterling & Morgan
Top of the Park Plaza
Metropol, New State 04045-0400

RE: Hansen v. Bi-Rite Department Stores
Our Insured: Bi-Rite Department Stores
DOA: April 7, YR-7

Dear Mr. Gorman:

Enclosed is a copy of my letter of June 10, YR-5 to which I have received no response. Would you kindly favor me with a status report on this file?

Sincerely,

Joseph M. Dewees
Assistant Claims Adjuster

JMD/car

STATE OF NEW STATE	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF METROPOL	)	CIVIL ACTION NO. YR-2-CP-10-4796
	)	
ALBERT MALAGUER,	)	
	)	
Plaintiff	)	**DRAFT**
	)	
v.	)	**DEFENDANT'S ANSWERS TO PLAINTIFF'S INTERROGATORIES**
	)	
CYLAB, INC.,	)	
	)	
Defendant.	)	
_____	)	

The Defendant CyLab, Inc. hereby responds to the Interrogatories propounded by Plaintiff as follows:

1. Give the names and addresses of persons known to Defendant or counsel to be witnesses concerning the facts of the case and indicate whether or not written or recorded statements have been taken from the witnesses and indicate who has possession of such statements.

ANSWER:

a. Albert Malaguer
2727 Lenwood Boulevard
Pralog, New State

b. Betty Lou Malaguer
2727 Lenwood Boulevard
Pralog, New State

c. Dr. James J. Hinchey
2914 Rivers Avenue
Pralog, New State

2. Set forth a list of photographs, videos, plats, sketches or other prepared documents in possession of the Defendant that relate to the claim or defense in this case.

ANSWER: The Defendant objects to this Interrogatory as seeking materials beyond the scope of discovery under Rule 26. The objection notwithstanding, there are no such documents or materials in the defendant's possession, custody or control other than those protected by attorney work product.

3. Set forth the names and addresses of all insurance companies which have liability insurance coverage relating to the claim and set forth the number or numbers of the policies involved and the amount or amounts of liability coverage provided in each policy, including all underinsured policies which may be applicable.

ANSWER: Not applicable.

4. List the names and addresses of any expert witnesses whom the Defendant proposes to use as a witness at the trial of the case.

ANSWER: The Defendant has not made a determination at this time as to whether it will use any expert witnesses at the trial of the case. However, it reserves the right to designate such experts at the time that the determination is made.

5. For each person known to the Defendant or counsel to be a witness concerning the facts of the case, set forth either a summary sufficient to inform the Plaintiff of

the important facts known to or observed by such witness, or provide a copy of any written or recorded statements taken from such witnesses.

ANSWER: Mr. and Mrs. Malaguer have information concerning their purchase of Defendant's product and its use. Dr. Hinchey is the Plaintiff's primary treating physician and has information concerning the Plaintiff's medical condition.

_____

William Tildreth Sterling, Jr
Harvey Gorman
Sterling & Morgan
Top of the Park Plaza
Metropol, New State 04045-04000

December _____, YR-2

STATE OF NEW STATE	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF METROPOL	)	CIVIL ACTION NO. YR-2-CP-10-4796
	)	
ALBERT MALAGUER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**VERIFICATION**
	)	
CYLAB, INC.,	)	
	)	
Defendant	)	
_____	)	

I have read the foregoing Answers to Interrogatories and certify that they are, to the best of my knowledge, true and correct.

CyLab, Inc.

_____

Sworn before me this

_____of December YR-2.

_____
Notary Public for the state of New State
My commission expires_____.

STATE OF NEW STATE	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF METROPOL	)	CIVIL ACTION NO. YR-2-CP-10-4796
	)	
ALBERT MALAGUER,	)	
	)	
Plaintiff	)	
	)	
v.	)	**DEFENDANT'S ANSWERS TO**
	)	**PLAINTIFF'S INTERROGATORIES**
CYLAB, INC.,	)	
	)	
Defendant.	)	
_____	)	

The Defendant CyLab, Inc. hereby responds to the Interrogatories propounded by Plaintiff as follows:

1. Give the names and addresses of persons known to Defendant or counsel to be witnesses concerning the facts of the case and indicate whether or not written or recorded statements have been taken from the witnesses and indicate who has possession of such statements.

ANSWER:

a. Albert Malaguer
2727 Lenwood Boulevard
Pralog, New State

d. Betty Lou Malaguer
2727 Lenwood Boulevard
Pralog, New State

e. Dr. James J. Hinchey
2914 Rivers Avenue
Pralog, New State

2. Set forth a list of photographs, videos, plats, sketches or other prepared documents in possession of the Defendant that relate to the claim or defense in this case.

ANSWER: The Defendant objects to this Interrogatory as calling for attorney product and material that is the subject of the attorney-client privilege.

Privileged, confidential or otherwise protected material or attorney work product: surveillance videotape of Plaintiff Malaguer.

3. Set forth the names and addresses of all insurance companies which have liability insurance coverage relating to the claim and set forth the number or numbers of the policies involved and the amount or amounts of liability coverage provided in each policy, including all underinsured policies which may be applicable.

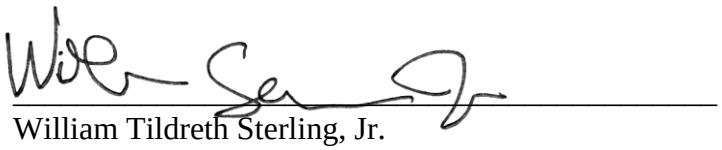
ANSWER: Not applicable.

4. List the names and addresses of any expert witnesses whom the Defendant proposes to use as a witness at the trial of the case.

ANSWER: The Defendant has not made a determination at this time as to whether it will use any expert witnesses at the trial of the case. However, it reserves the right to designate such experts at the time that the determination is made.

5. For each person known to the Defendant or counsel to be a witness concerning the facts of the case, set forth either a summary sufficient to inform the Plaintiff of the important facts known to or observed by such witness, or provide a copy of any written or recorded statements taken from such witnesses.

ANSWER: Mr. and Mrs. Malaguer have information concerning their purchase of Defendant's product and its use. Dr. Hinchey is the Plaintiff's primary treating physician and has information concerning the Plaintiff's medical condition.



William Tildreth Sterling, Jr.
Harvey Gorman
Sterling & Morgan
Top of the Park Plaza
Metropol, New State 04045-04000

January 5, YR-1

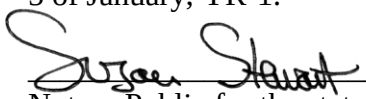
STATE OF NEW STATE	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF METROPOL	)	CIVIL ACTION NO. YR-2-CP-10-4796
	)	
ALBERT MALAGUER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**VERIFICATION**
	)	
CYLAB, INC.,	)	
	)	
Defendant	)	
_____	)	

I have read the foregoing Answers to Interrogatories and certify that they are, to the best of my knowledge, true and correct.

CyLab, Inc.

Sworn before me this

5 of January, YR-1.



Notary Public for the state of New State
My commission expires December 6, YR-4

Sterling & Morgan

MEMORANDUM

TO: File

FROM: Personnel

RE: Harvey Gorman

DATE: January 3, YR-1

Below is the history of Mr. Gorman's salary and bonuses from the firm.

Harvey Gorman, Associate

Salary History	(Yr. End)Bonuses	Base Salary
YR-6		$100,000.00 (Annual Rate)
YR-5	$ 15,000.00	$111,000.00
YR-4	$ 15,000.00	$123,210.00
YR-3	$ 25,000.00	$139,227.00
YR-2		$161,504.00

DEPOSITION OF LUISA L. MONET TAKEN MAY 15, YR-0

Q: State your full name, please.

A: Luisa Lotte Monet.

Q: Where do you reside?

A: At 123 Green Street, Maryville, New State

Q: And what is your current occupation?

A: I am an Assistant Professor of Economics at New State University.

Q: How long have you held that position?

A: From YR-23 to present.

Q: You have been an Assistant Professor for 23 years?

A: Yes.

Q: Have you been considered for full professorship?

A: Well, I believe I have.

Q: You know that this is a matter that is decided by the faculty?

A: I do not have anything to do with that decision.

Q: Typically, how long does one serve as an Assistant Professor in the Economics Department at New State University before being considered or promoted to a full professorship?

A: I don't know that there is a typical time that I could give you.

Q: Are you eligible for being promoted to full professor?

A: I believe that I am, yes.

Q: Are you aware that the department has specifically decided on previous occasions not to promote you to full professor?

A: I am not aware of that.

Q: Other than teaching as an Assistant Professor of Economics at New State University, do you have any other occupation or employment?

A: On occasion, I am consulted as an expert in economic matters involving litigation.

Q: On how many occasions have you been retained on litigation matters?

A: I really don't know.

Q: How long have you been accepting employment in litigation matters?

A: Probably for 15 or 20 years.

Q: For as long as you have taught economics at New State University?

A: Yes.

Q: When you are retained in litigation matters, what are you requested to do?

A: Typically to make an evaluation of the economic loss suffered by the person who has been injured.

Q: Has most of your work involved testifying in personal injury cases?

A: Yes, and in some cases it involves death, and I am doing an economic analysis of the loss to the estate.

Q: Is it fair to say that the majority of your work is performed for the plaintiff?

A: Well, I do work for plaintiffs and defendants.

Q: What percentage of your work is done for plaintiffs?

A: It would be difficult to say.

Q: For how many cases have you done an evaluation of economic loss?

A: I would say probably in the vicinity of 20 to 30 a year on the average.

Q: 20 to 30 a year on the average over a period of 15 to 20 years.

A: Yes.

Q: Of that 20 to 30 evaluations that you do each year, how many of those typically or on the average have been done for the plaintiff?

A: Probably the majority.

Q: Can you name one defendant that you testified for last year, that is in YR-1?

A: Well a lot of times, I do not testify after I do an evaluation. The cases seem to settle after they get my report.

Q: Out of the 20 to 30 evaluations that you do a year, how many times do you testify in court on the average?

A: Probably 3 or 4 times a year.

Q: Last year, how many times did you testify for the defendant?

A: Last year?

Q: Yes.

A: None

Q: How many times have you testified for the defendant in the past five years concerning your evaluation of economic loss?

A: Right off hand I can't recall any although I am sure that I have.

Q: Do you advertise your services?

A: Not really.

Q: Do you consider putting an ad in the American Trial Lawyers Association magazine advertising?

A: Well, yes, I guess one could say that that is advertising.

Q: You have advertised in the magazine, correct?

A: Oh, I think once I put an ad in when they requested me to help support the magazine.

Q: When you do an evaluation of economic loss, what are your charges?

A: I charge $5,000 for a basic evaluation.

Q: What did you charge in this case?

A: $5,000.

Q: If you testify in court about that evaluation, do you charge more?

A: Yes. And I also charge for the deposition like we are on today. My charge is $450.00 per hour. I understand that you will be paying that.

Q: When were you contacted in this case?

A: I believe that Mr. Gorman's attorney originally contacted me about May of last year.

Q: And when he contacted you, what did he tell you?

A: That he represented Harvey Gorman. That Mr. Gorman had been wrongfully discharged from his firm at Sterling & Morgan. That Mr. Gorman had been unable to obtain employment at a comparable firm in New State and that as a consequence, Mr. Gorman and his wife and children decided to return to Home State where he plans to take the bar examination and open his own office. Mr. Gorman's counsel asked me to review the pertinent information which he would provide to me and to do an evaluation of Mr. Gorman's economic loss over his remaining career.

Q: And what did you review to do the economic evaluation?

A: Well, I reviewed the materials and information that Mr. Gorman's counsel provided to me. I also talked to Mr. Gorman by telephone and I gathered certain government documents and materials to assist me in making the analysis and calculations.

Q: And what government materials did you obtain?

A: Well, I obtained general and specific economic data concerning interest rates, inflation, wage growth, labor force participation, employment probabilities, employee benefit levels, retirement and pension information and other things.

Q: Did you bring those materials with you?

A: Well I have some of them with me. They are attached to my report dated May 15, YR-1. For example, I obtained information from the Home State Bar Association that was put together by the Committee on Law Office Economics. It shows what an attorney in Home State would make in the cities of various populations depending on firm size. I also obtained information on Mr. Gorman's employment history which I assume was provided by his employer, Sterling & Morgan. And then of course, I looked at current interest rates, that is the discount rate, and inflation.

Q: Did you have any other information available to you when you made your evaluation of economic loss?

A: I believe that was most of the material that I had.

Q: Describe how you went about doing your evaluation.

A: Well, first, I needed to calculate back pay losses for YR-1. After I did that, I then calculated future wages as an attorney in the Sterling and Morgan firm through retirement in YR+35. I then calculated the amount of money that Mr. Gorman likely will earn as a sole practitioner in Home State because that amount has to be deducted from the amount that he would earn at Sterling and Morgan. Next I calculated the fringe benefits that Mr.

Gorman would have earned at Sterling and Morgan and then I netted those amounts to find present value.

Q: Is that information summarized in your report?

A: Yes.

Q: Take a look at page 76 of your report. That's the document entitled "Mr. Harvey Gorman Front Pay Losses."

A: Yes, I've got that.

Q: Did you prepare this document?

A: Yes.

Q: Let's look at that document.

A: OK.

Q: What is signified by the very first column on the left side of the page which is numbered 1 through 37?

A: That signifies the total number of years that Mr. Gorman will most likely work before retirement starting in the year YR-0.

Q: The next column is age. You are making your calculations from age 32 through age 68, correct?

A: Yes.

Q: In other words, you are assuming that Mr. Gorman will work until age 68?

A: Yes.

Q: Where did you arrive at age 68 for retirement?

A: Well, I look at two things. Mr. Gorman's statistical work life as published by the U.S. Department of Labor, Bureau of Labor Statistics, Bulletin 2254, is to age 64. But, because of Mr. Gorman's excellent health and his desire to practice law, Mr. Gorman believes that he will probably work to age 70 and perhaps beyond. As a consequence, I thought using age 68 for retirement was an appropriate number. It is a matter of judgment, but in Mr. Gorman's case, it appears that he would probably work at least until that age, so I think that my number is conservative.

Q: The third column of course is the year, correct?

A: Yes, from YR-0 through YR+36.

Q: The fourth column is what?

A: That is the salary that Mr. Gorman would earn had he remained as associate and then become a partner in Sterling and Morgan Law Firm.

Q: How did you arrive at the numbers in column four?

A: Well, I looked at the historical number for lawyers in Sterling and Morgan. For example, in Mr. Gorman's case, he was receiving an increase in salary of 16% a year during the time he was an associate in the Sterling and Morgan firm. It would be reasonable to assume that he would receive almost the same increase through his most productive years. Therefore, concluded that up to age 45, he would receive increases of 10% a year. At age 45, however, based upon the trends of lawyers' earnings, I reduced that annual increase in income to 5.0%. Again, I think that is very conservative number. Calculating the 5.0% increase from age 45 through retirement at age 68, it is easy to determine what Mr. Gorman's base salary with Sterling and Morgan would be at retirement at age 68.

Q: Are there any government statistics that suggest that attorneys earn 16% increases in income each year?

A: Well, in that regard I am using Mr. Gorman's own personal experiences in the law firm. In addition, that is born out by the salary increases of other associates in Mr. Gorman's position. Therefore, I believe that that is an appropriate and valid number.

Q: My question, however is, are there any government statistics which support using a 16% increase each year?

A: I don't have any government documents that suggest that. It is more important to use actual experience such as Mr. Gorman's and other associates to make that determination.

Q: Take a look at Exhibit 1 on page 74 attached to your report. Do you have that?

A: Yes.

Q: That is a document from New State Department of Labor. Correct?

A: Yes.

Q: You did not utilize the wage increase trends from the New State Department of Labor, did you?

A: No, I used the actual experience of Mr. Gorman and other associates in Sterling and Morgan.

Q: The New State Department of Labor document, Exhibit 1, shows that the wage increase trends in New State for YR-11 through YR-6 in the total economy was 5.7%, correct?

A: That's what it shows.

Q: And the retail/services area, the wage increase trends in New State from YR-11 through YR-6 was 4.6%, correct.

A: That is correct.

Q: But you did not use this information, correct?

A: I did not think it as valid as the actual experience of associates in Sterling and Morgan.

Q: Let's go back to the Front Pay Losses document on page 76. Take a look at the ninth column, the one that is entitled "Medical Coverage."

A: OK.

Q: What do those numbers represent?

A: That column represents the value in dollars of the medical coverage that Sterling and Morgan would provide Mr. Gorman each year.

Q: And how did you arrive at those numbers?

A: I took the projected costs in YR-1 and calculated the cost each year after YR-1 considering inflationary increases.

Q: So in the year YR+36, when Mr. Gorman is 68 years old, you calculate the value of medical coverage to be $186,253, correct?

A: Yes.

Q: Then in the column entitled "12.5%, Benefits," what are you showing there?

A: Those are the fringe benefits that Mr. Gorman would receive as a member of Sterling and Morgan through his career to the year YR+36.

Q: And the next column shows the net present value of those benefits?

A: Yes.

Q: At what point in time do you assume that Mr. Gorman would have become a partner in the firm?

A: Based upon the information I have been provided and my discussion with Mr. Gorman, I would assume that he would become a partner in the year YR+1 when he turned age 34.

Q: As a partner in the law firm, did you determine whether medical coverage and fringe benefits were paid for by Mr. Gorman himself because he is a partner?

A: I do not know, but I am assuming that the firm would continue to provide that coverage and those benefits.

Q: Based upon your calculation, the net present value of salary, medical coverage and fringe benefits through age 68 would be $10,668,824, correct?

A: Correct.

Q: And you conclude that Mr. Gorman will earn through age 68 the amount of $2,711,634 as a sole practitioner in Home State, correct?

A: Yes.

Q: And what do you calculate to be the difference in net present value between what Mr. Gorman will likely earn under your scenario and what he likely would have earned had he remained at Sterling and Morgan?

A: The cumulative net present value is $7,957,190.

Q: Did you make any other calculations?

A: Yes, I calculated that the educational licensing and relocation costs for Mr. Gorman's wrongful termination amounts of $121,500. That calculation is shown on page 77.

Q: How did you obtain that information?

A: This was provided to me by Mr. Gorman.

Q: Did you verify any of these numbers yourself?

A: No.

Q: Looking again at page 76. What discount rate did you use to calculate present value?

A: Well, of course, any award given must be equal in value to the projected future loss. To calculate this present day value, an economist must discount the future loss by the interest which can be earned from the date of the award until the time the projected future loss would actually occur. I made my calculations here assuming that the award will be invested in U.S. Treasury securities which insures the lowest degree of risk and provides adequate liquidity. I do not have that rate with me, but I can certainly check and let you know what it was when I made these calculations.

Q: Do you intend to do any additional work before you testify at trial?

A: That will be up to Mr. Gorman's counsel. If I am asked to do some additional work, I certainly will do it.

Q: Do you have in mind any additional work that you would like to do?

A: At this point in time, I believe my analysis is complete.

(END OF DEPOSITION)

EVALUATION OF ECONOMIC LOSS:

TERMINATION OF
HARVEY GORMAN

PREPARED FOR:

TRIAL ASSOCIATES, P.C.
ATTORNEYS AT LAW

PREPARED BY:

L.L. MONET, M.A.
123 GREEN STREET
MERRYVILLE, NEW JERSEY 01234

May 15, YR-1

Summary of Findings

Due to his termination from Sterling & Morgan, Mr. Harvey Gorman, born November 25, YR-33, is no longer employable within the legal community of Metropol. I have learned that as a result, Mr. Gorman decided to return to Home State to practice law after and passing the bar examination. If successful, he will be admitted in December YR-1. Therefore, Mr. Gorman will have no earnings in YR-1. The back pay earnings (wages and benefits in YR-1) loss amounts to $190,549. The front pay loss arising from the difference between Mr. Gorman's earnings (wages and benefits) as an associate (and later a partner) with Sterling & Morgan, P.A. and Mr. Gorman's anticipated earnings as a sole practitioner in Rocky Mount (assuming, of course, that he passes the Bar exam) has a net present value of $7,957,190. This differential is likely understated as it assumes that Mr. Gorman will not incur losses during the first few years of his new practice when building up clientele, but will earn the average of what other sole practitioners earn immediately. The total earnings (back and front pay) loss is accordingly $8,147,739. This $8,147,739 represents the full amount of monies needed to be provided to Mr. Gorman to compensate him for his lost after-tax stream of earnings. In addition, the cost to establish Mr. Gorman's new practice, cover his bar exam fees and the expenses of relocation and equipping his new office has a value of $121,500. Therefore, the total loss to Mr. Gorman amounts to $8,269,239. If the legal criteria requires that this lump sum be taxed, then this award must be increased to $11,742,319 in order to net Mr. Gorman with the full after-tax losses of $8,269,239.

The analysis, assumptions, and calculations underlying my conclusion are found in subsequent sections of the report. The elements of loss are:

Earnings Loss

A:	Back pay losses for YR-1 (includes wages and benefits) 1/1/YR-1 – 12/31/YR-1	$ 190,549
B:	Future pre-termination net wages as Metropol attorney in YR-1 dollars 1/1/YR-0 – 12/31/YR+35	8,446,723
C.	Allowance for anticipated net wages as a sole practitioner in YR-1 dollars 1/1/YR-0 – 12/31/YR+35	<2,711,634>
D.	Fringe benefits at Sterling & Morgan $900 per month for medical coverage for family 5.5% average percentage for social security and medicare 5.0% pension/retirement plan 2% for misc. benefit	2,222,100
E.	Fringe Benefits as a sole practitioner None considered as he will be a sole practitioner and will have to pay for all of his own benefits	0
Net Earnings Loss (Back and Front Pay)		**$8,147,739**

Educational, Licensing and Relocation Costs

Bar Review Course	$ 3,500
Expenses to establish law office	64,000
Relocation expenses	54,000
Total	**$121,500**

Documents Reviewed

I have reviewed case information forwarded to me by your office including Statement of the Case, the deposition of Harvey Gorman taken May 1, YR-1 and general and specific economic data concerning interest rates, inflation, wage growth, labor force participation, employment probabilities, employee benefit levels, retirement and pension information, etc. I have also conducted a telephone interview with Mr. Gorman.

Personal Status

Harvey Gorman was born on November 25, YR-33 and stopped working on December 20, YR-2 due to his termination from Sterling & Morgan. At that time he was 31 years old. He has been unable to find employment as an attorney in Metropol. Although Mr. Gorman's statistical work-life is to age 64 (U.S. Department if Labor, Bureau of Labor Statistics, Bulletin 2254), I have been advised that Mr. Gorman intends to work at least to age 65, and probably to age 70. My calculations reasonably anticipate retirement at age 68.

Employment and Earnings

Mr. Gorman had worked as an associate for Sterling & Morgan from YR-6 until his discharge in YR-2. At the time of his termination, Mr. Gorman's annual salary was $161,504. Mr. Gorman received a raise in YR-2 of 16% over his YR-3 base salary. This is well within the range of raises provided to other Sterling & Morgan associates in YR-3. Therefore, I have calculated Mr. Gorman's total lost wages and benefits in YR-1 to be $190,549 net of taxes which includes the loss of $25,000, his expected YR-2 year end bonus. On this basis the loss to the present is:

Net Wages:	$148,641
Benefits:	
$900 per month for medical coverage	$ 10,800
5% for pension/retirement plan	$ 10,617
7.65% for social security	$ 16,244
2% for misc. (life insurance, disability insurance, etc.)	$ 4,247
Back Pay Loss:	$ 190,549

The projection of Mr. Gorman's front pay wage loss anticipates a continued increase in his current earnings level at the rate of 10% per year until age 45 after which increases are decreased to 5.0% per year as the double-digit wage increases typically experienced by partners in a law firm tend to taper off in the later years of their work life. The calculated earnings loss is reduced by 30.0 percent to reflect federal and state income tax liability.

As part of his compensation with Sterling & Morgan, Mr. Gorman was covered by Blue Cross-Blue Shield and Major Medical Insurance. These benefits are valued at $900 per month for the value of medical coverage to the Gorman family. Also, it is necessary to recognize the employer's mandatory payments to social security and medicare, as without these contributions Mr. Gorman will not qualify for the same level of social security retirement. The typical employer contribution is 7.65% of gross pay up until a certain earnings level. Once Mr. Gorman's earnings reach a certain level, contributions for social security are not required on the amount above that level. Therefore, social security and medicare contributions are included at an average of 5.5% on all pre-termination wages over the front pay period. Miscellaneous benefits such as life and disability insurance have been valued at two percent of gross pay.

Wage Increase Trends and Comparative Wages

The YR-2 average compensation for attorneys in Home State working in established firms with one to three lawyers is considered to be $67,000 based on the data set forth in Exhibit 2. Over the last ten years, this figure has grown at the rate of 7% annually. Using this annual rate, the average attorney compensation is $76,708 in YR-1 dollars. Mr. Gorman's future earnings losses commence January 1, YR-0 when he anticipates opening his new firm. Based on relevant wage data, future wages at Sterling & Morgan are expected to increase at an average of 10% per year decreasing to 5.0% per year after age 45, while compensation for sole practitioners in Home State is projected to grow at the annual rate of 7%.

Present Value Calculation

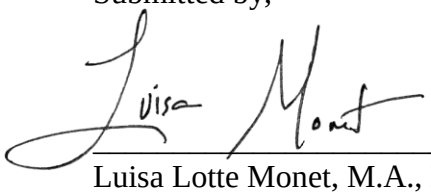
Any award which is given should be equal in value to the projected future loss. To obtain this present-day value one must discount the future loss by the interest which can be earned from the date of the award until the time that the projected future loss would actually occur. The discounted value of the future loss is called the "present value" of the loss.

Interest rates which can be earned on various investments will vary greatly, due to differences in risk and liquidity. The calculations herein assume that the award will be invested in U.S. Treasury securities to ensure the lowest degree of risk and provide adequate liquidity. However interest income on U.S. Treasury securities is subject to federal income tax. Future interest rates may, of course, change. However, a future rise in interest rates will most probably be associated with rising inflationary expectations and rising wages. Therefore, the impact of a higher interest rate on investment income will be greatly diminished by the likely accompanying increase in wages.

Educational, Licensing and Relocation Costs

I have been advised that the tuition for the Home State bar review course is $3,500. Estimated expenses for books, equipment and other set-up costs for Mr. Gorman's law office in Rocky Mount are $64,000. Relocation expenses, which include transportation of belongings, air fare for Mr. and Mrs. Gorman and their children, closing costs arising from the sale of the Gorman home in Metropol, and closing costs arising from the purchase of a new home in Rocky Mount, total $54,000 (based upon information obtained from discussions with Mr. Gorman), but I have not yet received any other verification of the costs. I would like to reserve my right to review these documents and make adjustments, if necessary.

Submitted by,



Luisa Lotte Monet, M.A., Economist and
Certified Actuary

Exhibit 1

WAGE INCREASE TRENDS

New State

	YR-16-YR-6	YR-11-YR-6
Total Economy	6.0%	5.7%
Manufacturing	6.8	6.6
Construction	6.4	5.9
Retail/Services	4.8	4.6

Source: ***New State Department of Labor***

Exhibit 2

Home State Bar Association
Committee on Law Office Economics

The following is a summary of the YR-2 poll results of the Committee of Law Office Economics Annual Survey of law firms.

	City Population				
Law Firm Size	0 – 10,000	10,000 – 25,000	25,000 – 50,000	50,000 – 100,000	Over 100,000
1 – 3	$51,300	$67,000	$78,300	$84,600	$81,900
4 – 10	$85,500	$84,600	$88,200	$92,700	$96,300
11 – 20	N/A	$118,800	$140,400	$145,800	$153,900
21 – 50	N/A	N/A	N/A	$166,500	$161,100
Over 50	N/A	N/A	N/A	$176,400	$189,000

Net Income Exclusive of Benefits

MR. HARVEY GORMAN
Front Pay Losses

			Pre-termination										*Prost-termination*					
	Age	Year	1.10 1.05 Salary	Bonus	Gross Sal. And Bonus	30.0% Net Sal. and Bonus	1.05 NPV of Net sal/bonus	1.08 Medical Coverage	1.05 Med. Cov. NPV	12.50% Benefits	1.05 Benefits NPV	Total NPV	1.07 Wages	30.0% Net Wages	1.05 Net Wages NPV	Total NPV	Diff NPV	Cum NPV
1	32	YR-0	$ 206,080	$ 10,000	$ 216,080	$ 151,256	$ 144,053	$ 11,664	$ 11,109	$ 27,010	$ 25,724	$ 180,886	$ 76,708	$ 53,696	$ 51,139	$ 51,139	$ 129,747	$ 129,747
2	33	YR+1	226,688	10,000	236,688	165,682	150,278	12,597	11,426	29,586	26,835	188,539	82,078	57,455	52,113	52,113	136,426	266,173
3	34	YR+2	249,357		249,357	174,550	150,783	13,605	11,752	31,170	26,925	189,461	87,823	61,476	53,106	53,106	136,355	402,528
4	35	YR+3	274,293		274,293	192,005	157,963	14,693	12,088	34,287	28,208	198,259	93,971	65,780	54,117	54,117	144,142	546,670
5	36	YR+4	301,722		301,722	211,205	165,485	15,869	12,434	37,715	29,551	207,469	100,549	70,384	55,148	55,148	152,322	698,992
6	37	YR+5	331,894		331,894	232,326	173,365	17,138	12,789	41,487	30,958	217,112	107,587	75,311	56,198	56,198	160,914	859,905
7	38	YR+6	365,084		365,084	255,559	181,621	18,509	13,154	45,635	32,432	227,207	115,118	80,583	57,269	57,269	169,938	1,029,844
8	39	YR+7	401,592		401,592	281,114	190,269	19,990	13,530	50,199	33,977	237,776	123,177	86,224	58,360	58,360	179,416	1,209,260
9	40	YR+8	441,751		441,751	309,226	199,330	21,589	13,917	55,219	35,595	248,841	131,799	92,259	59,471	59,471	189,370	1,398,630
10	41	YR+9	485,926		485,926	340,148	208,821	23,316	14,314	60,741	37,290	260,425	141,025	98,718	60,604	60,604	199,821	1,598,451
11	42	YR+10	534,519		534,519	374,163	218,766	25,182	14,723	66,815	39,065	272,554	150,897	105,628	61,758	61,758	210,796	1,809,247
12	43	YR+11	587,971		587,971	411,580	229,183	27,196	15,144	73,496	40,926	285,252	161,460	113,022	62,935	62,935	222,318	2,031,564
13	44	YR+12	646,768		646,768	452,738	240,096	29,372	15,577	80,846	42,874	298,547	172,762	120,933	64,133	64,133	234,414	2,265,978
14	45	YR+13	711,445		711,445	498,011	251,530	31,722	16,022	88,931	44,916	312,467	184,855	129,399	65,355	65,355	247,112	2,513,090
15	46	YR+14	747,017		747,017	522,912	251,530	34,259	16,479	93,377	44,916	312,925	197,795	138,456	66,600	66,600	246,325	2,759,415
16	47	YR+15	784,368		784,368	549,058	251,530	37,000	16,950	98,046	44,916	313,396	211,641	148,148	67,869	67,869	245,527	3,004,943
17	48	YR+16	823,586		823,586	576,510	251,530	39,960	17,435	102,948	44,916	313,880	226,455	158,519	69,161	69,161	244,719	3,249,661
18	49	YR+17	864,766		864,766	605,336	251,530	43,157	17,933	108,096	44,916	314,378	242,307	169,615	70,479	70,479	243,900	3,493,561
19	50	YR+18	908,004		908,004	635,603	251,530	46,610	18,445	113,500	44,916	314,891	259,269	181,488	71,821	71,821	243,070	3,736,631
20	51	YR+19	953,404		953,404	667,383	251,530	50,338	18,972	119,176	44,916	315,418	277,418	194,192	73,189	73,189	242,228	3,978,859
21	52	YR+20	1,001,074		1,001,074	700,752	251,530	54,365	19,514	125,134	44,916	315,960	296,837	207,786	74,583	74,583	241,376	4,220,236
22	53	YR+21	1,051,128		1,051,128	735,790	251,530	58,715	20,072	131,391	44,916	316,517	317,616	222,331	76,004	76,004	240,513	4,460,749
23	54	YR+22	1,103,684		1,103,684	772,579	251,530	63,412	20,645	137,961	44,916	317,091	339,849	237,894	77,451	77,451	239,639	4,700,388
24	55	YR+23	1,158,869		1,158,869	811,208	251,530	68,485	21,235	144,859	44,916	317,680	363,638	254,547	78,927	78,927	238,754	4,939,142
25	56	YR+24	1,216,812		1,216,812	851,768	251,530	73,964	21,842	152,102	44,916	318,287	389,093	272,365	80,430	80,430	237,857	5,176,999
26	57	YR+25	1,277,653		1,277,653	894,357	251,530	79,881	22,466	159,707	44,916	318,911	416,329	291,430	81,962	81,962	236,949	5,413,948
27	58	YR+26	1,341,535		1,341,535	939,075	251,530	86,271	23,108	167,692	44,916	319,553	445,472	311,831	83,523	83,523	236,030	5,649,978
28	59	YR+27	1,408,612		1,408,612	986,028	251,530	93,173	23,768	176,077	44,916	320,213	476,655	333,659	85,114	85,114	235,099	5,885,077
29	60	YR+28	1,479,043		1,479,043	1,035,330	251,530	100,627	24,447	184,880	44,916	320,892	510,021	357,015	86,735	86,735	234,157	6,119,234
30	61	YR+29	1,552,995		1,552,995	1,087,096	251,530	108,677	25,145	194,124	44,916	321,591	545,723	382,006	88,388	88,388	233,203	6,352,438
31	62	YR+30	1,630,644		1,630,644	1,141,451	251,530	117,371	25,864	203,831	44,916	322,309	583,923	408,746	90,071	90,071	232,238	6,584,676
32	63	YR+31	1,712,177		1,712,177	1,198,524	251,530	126,760	26,603	214,022	44,916	323,048	624,798	437,358	91,787	91,787	231,262	6,815,937
33	64	YR+32	1,797,786		1,797,786	1,258,450	251,530	136,901	27,363	224,723	44,916	323,808	668,534	467,974	93,535	93,535	230,273	7,046,211
34	65	YR+33	1,887,675		1,887,675	1,321,372	251,530	147,853	28,145	235,959	44,916	324,590	715,331	500,732	95,317	95,317	229,274	7,275,484
35	66	YR+34	1,982,059		1,982,059	1,387,441	251,530	159,682	28,949	247,757	44,916	325,394	765,404	535,783	97,132	97,132	228,262	7,503,746
36	67	YR+35	2,081,161		2,081,161	1,456,813	251,530	172,456	29,776	260,145	44,916	326,221	818,982	573,288	98,982	98,982	227,239	7,730,985
37	68	YR+36	2,185,220		2,185,220	1,529,654	251,530	186,253	30,627	273,152	44,916	327,072	876,311	613,418	100,868	100,868	226,204	7,957,190
			$36,714,360	$ 20,000	$ 36,734,360	$25,714,052	$ 8,446,723	$ 2,368,612	$ 713,757	$ 4,591,795	$ 1,508,343	$10,668,824	$12,299,210	$ 8,609,447	$ 2,711,634	$ 2,711,634	$ 7,957,190	

Mr. Harvey Gorman
Back Pay Losses

Earnings:

$187,345	YR-4 Salary
$25,000	Bonus
$212,345	
($63,704)	Taxes @ 30%
$148,641	
$10,800	medical @ $900 per month
$10,617	pension @ 5%
$11,679	social security and medicare @5.5
$4,247	misc. @ 2%
$185,985	

Other Expenses:

$54,000	Cost of relocating to Rocky Mount
$64,000	Cost of setting up a new law office
$3,500	Cost of bar review course
$121,500	

LUISA LOTTE MONET, M.A.

Economist
123 Green Street
Merryville, New State 01234

Position:

Assistant Professor of Economics, New State University
YR-22 – Present

Education:

B.S., Mathematics, University of Miami (Florida), YR-40
M.A., Temple University (Economics), YR-37
Courses in Actuarial Science (various)

Articles:

Hedonic Damages, *Trial Magazine* (YR-13)
How Much Is a Mother Really Worth?, *Southern Economic Journal* (YR-12)
The Hypothetical Question, (chapter), *Advocacy* (YR-12)

Publications in Economics and Finance:

The Review of Economics and Statistics
The Southern Economic Journal
Financial Review
Journal of Finance
Research in Finance
Association of Trial Lawyers Newsletter
The Denver Post (Op-Ed)

Professional Affiliations:

American Economic Association
American Association of Forensic Economists (Treasurer New State Chapter, YR-12)

Consulting Experience:

- Prepared reports concerning the appraisal of economic loss. (Have testified in court on such matters)
- Conducted cost of capital studies for New State Transit Authority
- Analyzed rates of return for New State Public Utility Ombudsman, Matter of Application of Continental Divide Power Company (YR-16)