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Court of Appeals No. 71526-7-I

BEFORE THE WASHINGTON STATE COURT OF APPEALS
DIVISION ONE

DENNIS WILLHITE,
Appellant

vs.

FARMERS INSURANCE (FARMERS NEW WORLD LIFE
INSURANCE COMPANY),
Respondent

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STATE COURT OF APPEALS
DIVISION ONE
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On Appeal from the King County Superior Court
KCSC Case No. 12-2-23827-8SEA

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

I. INTRODUCTION	1
II. ASSIGNMENTS OF ERROR	3
III. STATEMENT OF THE CASE	5
A. Willhite's Early Career	5
B. Onset of Depression.....	5
C. Willhite Is Put on Disability Leave.....	7
D. Farmer's Terminates Willhite Upon His Return.....	9
E. Human Right's Commission Investigation	10
F. Civil Suit.....	12
IV. ARGUMENT	13
A. The Trial Court Did Not Liberally Construe The WLAD.....	13
1. <i>Farmers Had Notice of Disability as a Matter of Law</i>	15
2. <i>Imputed Knowledge Under Agency Law</i>	16
B. Farmers Policy Serves to Establish Notice.....	21
1. <i>Knowledge is Not a Separate Element of Proof</i>	22
2. <i>Discrimination Inferred From a Termination Decision Based Upon Performance Deficits Related to the Disability</i>	33
3. <i>Discrimination Inferred From Questionable Explanation</i>	36
4. <i>Discrimination Inferred From Circumstances</i>	38
C. The Verdict On The WFLA Should Be Vacated.....	39
D. Willhite Is Entitled To Judgment As A Matter Of Law On Liability Under The WLAD And WFLA	40

E. Order Of Summary Judgment Should Be Reversed And Vacated.....	43
F. The Court’s Rulings On Damage Instructions And Evidence Were Error	45
<i>1. Exclusion of Pension Damages.....</i>	45
<i>2. Exclusion of Bonus and Profit Sharing.....</i>	46
G. Willhite Respectfully Requests An Award Of Costs And Attorneys’ Fees Puruant To Rap 18.1.....	47
V. CONCLUSION.....	48

TABLE OF AUTHORITIES

CASES

American Fidelity & Cas. Co., Inc. v. Backstrom, 47 Wn.2d 77, 82 (1955)
..... 16, 17

Bachelder v. American West Airlines, Inc., 259 F.3d 112, 1130 (2001) .. 26

Callahan v. Walla Walla Housing Authority, 126 Wn.App. 812, 820
(2005)..... 27

Dean v. Municipality of Metropolitan Seattle-Metro, 104 Wn.2d 627, 632
(1985)..... 30

Easley v. Sea-Land Service, Inc., 99 Wn.App. 459, 469 (2000)..... 27

Erickson v. Fisher Communications, Inc., 150 Wn.App. 1003 (2009)25, 26

Evans v. Metropolitan Life Ins. Co., 26 Wn.2d 594, 633 (1946)..... 36

Fahn v. Civil Service Commission of Cowlitz County, 95 Wn.2d 679, 685
(1981)..... 47

Flower v. TRA Industries, 127 Wn.App. 13, 34 (2005)..... 45

Franacom v. Costco Wholesale Corp., 98 Wn.App. 845, 861 (2000)..... 22

Fusato v. Washington Interscholastic Activities Ass'n, 93 Wn.App. 762,
780 (1999)..... 36

Gambini v. Total Renal Care, Inc., 486 F.3d 1087, 1093-95 (2007).. 33, 45

Gammon v. Clark Equipment Co., 38 Wn.App. 274, 284 (1984)..... 34

Goodman v. Boeing Co., 75 Wn.App. 60, 85 (1994)..... 3, 17-19, 21, 23

Haley v. Kinko's Inc., 111 Wn.App. 1037 (2002) 25

Hill v. BCTI, Income Fund-I, 144 Wn.2d 172 (2001)..... 15, 36

Holland v. Boeing, 90 Wn.2d 384, 388-89 (1978)..... 30, 47

<i>Hurlbert v. Gordon</i> , 64 Wn.App. 386, 396 (1992).....	16
<i>In re Dependency of A.S. v. Safouane</i> , 101 Wn.App. 60, 72 (2000).....	40
<i>Jaramillo v. Morris</i> , 50 Wn.App. 822, 833 (1988).....	40
<i>Johnson v. Chevron U.S.A, Inc.</i> , 159 Wn.App. 18, 33 (2010).....	23
<i>Kammerer v. Western Gear Corp.</i> , 27 Wn.App. 512, 526 (1980).....	46
<i>Kimbrow v. Atlantic Richfield Co</i> , 889 F.2d 869 (9 th Cir. 1989).....	19, 38, 41
<i>Kolstad v. American Dental Ass'n</i> , 527 U.S. 526, 541-42 (1999)	19
<i>Kumar v. Gate Gourmet Inc.</i> , 180 Wn.2d 481, 491 (2014).....	14
<i>Lobdell v. Sugar 'N Spice, Inc.</i> , 33 Wn.App. 881, 893 (1983).....	40
<i>Lodis v. Corbis Holdings, Inc.</i> , 172 Wn.App. 835, 850 (2013).....	14
<i>Mackay v. Acorn Custom Cabinetry, Inc.</i> , 127 Wn.2d 302, 309 (1995)..	13, 14, 22, 24
<i>Marquis v. City of Spokane</i> , 130 Wn.2d 97, 109 (1996)	14
<i>Martini v. Boeing</i> , 88 Wn.App. 442, 461 (1997).....	30
<i>McInnis & Co. v. Western Tractor & Equip. Co.</i> , 67 Wn.2d 965, 968-69 (1966).....	46
<i>Meredith v. Hanson</i> , 40 Wn.App. 170, 173-74 (1985).....	34
<i>Owens v. Farmers Insurance Exchange</i> , 94 Wn.App. 1045 (1999).....	32
<i>Riehl v. Foodmaker, Inc.</i> , 152 Wn.2d 138, 145 (2004)	14, 33, 37
<i>Sellsted v. Washington Mutual Savings Bank</i> , 69 Wn.App. 852, 861-64 (1993).....	37
<i>Smith v. Orthopedics Intern., Ltd., P.S.</i> , 170 Wn.2d 659, 668 (2010)..	4, 35
<i>Sommer v. Department of Social and Health Services</i> , 104 Wn.App. 160, 173 (2001).....	26, 41

<i>Svendgard v. State</i> , 122 Wn.App.670 (2004)	24
<i>Tiegs v. Watts</i> , 135 Wn.2d 1, 18 (1998)(.....	47
<i>Townsend v. Quadrant Corp.</i> , 153 Wn.App. 870,883-84 (2009)	45
<i>Wilmot v. Kaiser Aluminum & Chem. Corp.</i> , 118 Wn.2d 46, 69 (1991)..	38
<i>Woods v. Goodson</i> , 55 Wn.2d 687, 689-90 (1960).....	34
<i>Xin Liu v. Amway</i> , 347 F.3d 1125, 1134 (2003)	26, 38
<i>Young v. Department L&I</i> , 81 Wn.App. 123, 128-29 (1996)	35
<i>Young v. Young</i> , 164 Wn.2d 477, 484 (2008).....	44

STATUTES

RCW 49.60.010	13
RCW 49.60.030(2).....	47
RCW 49.60.180(2).....	14
WAC 162-16-200(1).....	13

OTHER AUTHORITIES

WPI 330.32	22
WPI 330.33	26

RULES

ER 201(b)(2)	36
RAP 18.1	47

TREATISES

Restatement (Second) of Agency §272 (1958).....	16
Restatement (Third) of Agency §5.03 (2006).....	16, 17

I. INTRODUCTION

This is a disability discrimination action arising of the Farmers New World Life's ("Farmers") termination of Dennis Willhite ("Willhite") thirteen weeks after his return from disability leave, for treatment of acute anxiety and depression. The termination decision was based on a subjective assessment of Willhite's skills in areas such as "initiative," "teamwork," and "communication."

Prior to his depression, Willhite regularly "exceeded expectations" in all areas tested. In fact, his personnel file contains 31 years of favorable reviews, promotions and raises and is devoid of a single disciplinary or derogatory remark. Yet upon return from medical leave, Willhite received the lowest skills assessment score in the company – with the average score of all others assessed being almost four times higher. As a result of this score, Willhite was terminated. At the time of his termination, Willhite was fifteen months shy of eligibility for early retirement at the highest level of pension benefits. This suit for disability discrimination followed.

At trial, Willhite offered the report of Dr. Laura Don, a consulting psychiatric physician hired by Liberty Mutual, Farmers' disability claims administrator. The report found that Willhite suffered from a "significant psychiatric impairment" manifesting in tangential thought processing, an inability to focus or concentrate, a blunted affect, agitation and suicidal thoughts. Liberty Mutual also determined that Willhite's condition was

aggravated by his work environment. Dr. Don placed two conditions on Willhite's release to return to work: 1) that Willhite remain on his medication; and 2) that Willhite not be placed in a hostile work environment. Farmers claimed that it never received the report of Dr. Don. In fact, Farmers argued that it had no idea that Willhite was suffering from any kind of disability. The trial court granted Farmers' request to exclude the Don report. Farmers then offered testimony that there were no restrictions placed on Willhite's return to work.

Farmers "plausible deniability" defense centers on its contention that Liberty Mutual handles its employee disability claims "top to bottom" and that Farmers is provided no information whatsoever regarding the nature or status of an employee's claim. Although it was copied on letters from Liberty Mutual referencing Willhite's "serious health condition," the head of Farmers HR dismissed the information as "stock language" with no import. No one at Farmers inquired about a potential connection between Willhite's leave and the dramatic decline in his performance, as they consider it to be a "privacy issue."

In addition to the foregoing, the trial court granted Farmers' extraordinary request to add an additional element of proof to the pattern instruction for disability discrimination requiring Willhite to prove, by a preponderance of the evidence, that Farmers had actual knowledge of Willhite's disability. The court denied Willhite's request for an order that

Farmers' had imputed knowledge of facts known to Liberty Mutual and refused to give Willhite's proposed instructions on circumstantial evidence from which discrimination could be inferred.

Given these rulings, the jury found that Willhite failed to prove that Farmers knew of Willhite's disability. Because this was a threshold question on the verdict form, the jury found in favor of Farmers without ever addressing the seminal question of whether Willhite's disability was a "substantial factor" in the termination decision.

II. ASSIGNMENTS OF ERROR

Willhite appeals the judgment entered in favor of Farmers on the grounds that the trial court committed the following errors:

1) Refused to find that Farmers had imputed knowledge of facts known to Liberty Mutual under fundamental agency principles and *Goodman v. Boeing Co.*, 75 Wn.App. 60, 85 (1994).

2) Erroneously instructed the jury that Willhite was required to prove that Farmers had actual knowledge of his disability in violation of RCW 49.60.020 and the governing case authority which provides that such knowledge is inferred.

3) Failed instruct on constructive notice relevant to accommodation cases, notwithstanding the court's adoption of the notice element from the accommodation burden of proof.

4) Failed to give proposed jury instructions 14, 15 and 16 regarding the circumstances from which discrimination can be inferred, thereby depriving Willhite of the ability to argue his theory of liability.

5) Precluded testimony from Dr. Kihichak, Willhite's treating provider, regarding the symptoms of depression and how they affected Willhite's performance of the skills measured by Farmers, on the grounds that she was not a retained expert contrary to *Smith v. Orthopedics Intern., Ltd.*, P.S., 170 Wn.2d 659, 668 (2010).

6) Excluded the National Institute of Health publication on the common signs and symptoms of depression, contrary to ER 201 (b)(2).

7) Excluded the letter of Angie Bechtel containing Farmers' post termination explanation for its termination decision contrary to *Hill v. BCTI, Income Fund-I*, 144 Wn.2d 172, 185 (2001), which provides that a jury can infer discrimination from an explanation that is "unworthy of credence."

8) Granted summary judgment in favor of Famers for unjust enrichment based upon the payment of a severance that was an earned benefit for which Willhite gave value through length of service.

9) Excluded Willhite's testimony on lost pension and bonus/profit sharing income on the grounds that expert testimony was required, contrary to *Kammerer v. Western Gear Corp.*, 27 Wn.App. 512, 526 (1980).

III. STATEMENT OF THE CASE

A. WILLHITE'S EARLY CAREER

Willhite started at Farmers on July 11, 1978, as a Premium Accounting Clerk. RP (Dec. 11 Willhite) 110: 3-10. He was regularly promoted over the years and in 2000, he moved into the marketing department where he reported directly to the VP of Marketing, Mike Keller ("Keller"). He excelled in marketing and received consistently good reviews. Ex. 17. In March 2007, Keller promoted Willhite to the position of Senior Marketing Consultant. RP (Dec. 11 Willhite) 113:23-117:5, 119:18-123:1. In early 2008, Farmers initiated a two year pilot referred to as Independent Agents Simple Term ("IAST"). Keller asked Willhite to join the IAST team to handle the marketing aspects of the pilot. Willhite reported to Michelle Douvia ("Douvia") during the pilot. RP (Dec. 11 Willhite) 117:6-119:17.

B. ONSET OF DEPRESSION

In or about January 2009, Willhite began to experience symptoms of depression and anxiety.¹ By mid-2009, Douvia expressed disappointment in Willhite's work product and attitude, which she

¹ There is no definitive date for the onset of Willhite's depression. His medical records indicate that the symptoms began in about November 2008. App. "C," p. LM48. By November 2009, the symptoms were significantly affecting Willhite's day to day functioning. App. "V," ¶ 13. Farmers elicited testimony from Willhite that he began experiencing symptoms in November or December 2009. RP (Dec. 12 Willhite) 137:17-20. However, that testimony followed a line of questioning regarding Willhite's December 2009 meeting with HR at which time Willhite advised that he would be seeing a doctor. RP (Dec. 12 Willhite) 124:14-128:12.

considered to be out of character. RP (Dec. 12 Willhite) 166:16-24, 240:7-24, (Dec. 16 Douvia) 182:15-25. However, Douvia felt that Willhite was still meeting expectations with respect to his marketing duties at that time. Ex. 173; RP (Dec.16 Douvia) 166:10-167:16. The IAST pilot came to an end and, in the fall of 2009, Willhite began reporting to Brian Fitzpatrick (“Fitzpatrick”), the newly appointed Director of Sales. RP (Dec. 16 Douvia) 137:11-18. By that time, Willhite’s depression and anxiety had a foothold on his life. Douvia testified that, by the time he started working for Fitzpatrick, Willhite was a completely different person and no longer the fun-loving boisterous guy that she once knew. RP (Dec 16 Douvia) 136:23-138:9.

Willhite had no experience in sales and was concerned that he would be expected to perform at the level he demonstrated over the years in marketing. RP (Dec. 17 Fitzpatrick) 22:1-17, (Dec. 11 Willhite) 157:2-24, (Dec. 12 Willhite) 224:10-20. On November 23, 2009, Willhite met with Brian Hogan (“Hogan”), an HR business manager, regarding his fear that he was being set up for termination. RP (Dec. 11 Willhite) 158:20-159:7; Ex. 49.² On December 11, 2009, Willhite emailed Fitzpatrick and Hogan and again expressed his concerns about the placement in sales. Ex.

² Exhibits 49 and 52 are the handwritten notes of Brian Hogan. RP (Dec. 10 Crook) 61:20-62:14. Willhite had several meetings with HR between August 2009 and his disability leave in May 2010 regarding his concern about his ability to perform in sales. RP (Dec. 11 Willhite) 153:24-154:2, 157:10-21, (Dec. 12 Willhite) 105:4-8, 166:14-24, 249:8-19.

179; RP (Dec. 11 Willhite) 164:19-165:20. On December 16, 2009, Willhite met in person with Hogan and Fitzpatrick and advised that his emotional state was akin to how he felt when his best friend died in 2005. He further advised that he would be seeing his doctor regarding his emotional state. Ex. 52; RP (Dec. 11 Willhite) 159:11- 161:22. In the months following this meeting, Willhite's anxiety and depression grew acute.

C. WILLHITE IS PUT ON DISABILITY LEAVE

At a meeting in early May 2010, Fitzpatrick noted that Willhite jumped from topic to topic without saying anything, stating that "it was kind of a ramble. . ." RP (Dec. 17) 136:8-22. On the morning of May 17, 2010, Willhite met with Matthew Crook ("Crook"), the head of HR and advised that he was on the verge of a breakdown. RP (Dec. 5 Crook) 139:21-140:8, (Dec. 9 Crook) 30:24-3; App. "V," ¶ 17. In the days that followed, Willhite's anxiety morphed into nausea and he felt sick to his stomach. On May 19, 2010, Willhite emailed Fitzpatrick stating that he would be home sick that day, believing that he had a stomach bug. Ex. 58. Willhite went to see his regular physician Dr. Luba Kihichak. Dr. Kihichak diagnosed Willhite with acute anxiety and depression, aggravated by his work environment. She prescribed and Zanax, Citalopram and referred Willhite to clinical psychologist, Dr. Richard Wemhoff for counseling. She further recommended that Willhite take a

medical leave of absence. RP (Dec. 11 Willhite) 166:19-167:22; App. "C," pp. LM 33-34, 48-51. After the appointment, Willhite emailed Fitzpatrick and advised that his medical condition was more serious than previously thought and that he would be requesting medical leave. App. "L."

Unbeknownst to Willhite, Fitzpatrick had contacted HR days prior about commencing a disciplinary proceeding against Willhite for poor performance. Upon receipt of Willhite's email regarding medical leave, Fitzpatrick emailed HR and asked how the leave would affect his proposed disciplinary action. App. "L."³

On May 20, 2010, Liberty Mutual wrote Willhite acknowledging his request for short term disability leave under the federal Family and Medical Leave Act ("FMLA") and Washington State Family Leave Act ("FLA"). Douvia was copied on the letter. App. "C," pp. LM 3-4. Liberty Mutual gathered Willhite's medical records and on May 27, 2010, sent Willhite a written approval of his disability leave based upon his "serious health condition." Leave was effective May 18, 2010. Fitzpatrick was copied on Liberty Mutual's leave approval letter. App. "C," p. LM 8-9. On July 20, 2010, Liberty Mutual asked its consulting psychiatric physician, Dr. Laura Don, to review the file and determine whether the psychiatric impairment was supported and to determine a reasonable

³ None of the communication surrounding Fitzpatrick's request to commence the disciplinary proceeding was in the copy of Willhite's personnel file produced prior to litigation. Ex. 86; RP (Dec. 10 Hillinger) 86:12-88:11.

return to work date. App "C," p. LM 75. Dr. Don confirmed the psychiatric impairment and the resulting cognitive deficits. App. "A." Based upon the records of Drs. Wemhoff and Kihichak, Dr. Don concluded that Willhite could return to work after a three month leave, provided that he remains on medication and "as long as it is not in a hostile environment." App. "C," p. LM 83-84. Willhite returned to work on August 12, 2010. Ex. 59. He did not tell anyone of his diagnosis or the nature of the treatment he received while on leave.

D. FARMER'S TERMINATES WILLHITE UPON HIS RETURN

Weeks later, in September 2010, Farmers advised its managers of its decision to lay off 84 employees. RP (Dec. 17 Fitzpatrick) 64:8-23. Selected employees would be the ones with the lowest Matrix score out of a group of peers. The Matrix had two components: 1) the performance ratings for the prior three years (60%); and 2) an assessment of current skills (40%). The skills assessment test required employees to be ranked, 1-10, on 6 skills: 1) initiative, 2) managing priorities, 3) decision making, 4) project work, 5) teamwork, and 6) communication. App. "F;" RP (Dec. 9 Crook) 22:3-21.

Willhite's peer group had 15 members and Fitzpatrick was charged with conducting the skills assessment for all 15. The assessment was based entirely upon the prior 12 month period, including the three months during which Willhite was on disability leave. No performance prior to that

period was considered. RP (Dec. 9 Crook) 24:20-25, (Dec. 17 Fitzpatrick) 75:19-25, 142:8-22. Eight weeks after Willhite's return from disability leave, Fitzpatrick prepared his assessment scores. RP (Dec. 17 Fitzpatrick) 70:25-71:22, (Dec. 9 Crook) 25:4-7. While giving all other employees an average rating of "8," Fitzpatrick gave Willhite scores ranging from 1-3. This resulted in a total skills ranking score of 12 compared to a 47 average score given to the 14 peers. App. "F."

Willhite's scores were so low, that they caught the attention of human resources resulting in an investigation. RP (Dec. 9 Crook) 35:16-38:22, (Dec. 17 Fitzpatrick) 127:18-128:20, (Dec. 18 Hillinger) 48:7-25. However, the investigation was not documented and Crook, the head of HR, has no memory of what it revealed. RP (Dec. 9 Crook) 38:2-21. Despite this investigation, Farmers took no steps to determine if Willhite's skills assessment scores could be related to the medical leave eight weeks prior. RP (Dec. 17 Fitzpatrick) 72:9-13, (Dec. 9 Crook) 47:12-15. Having received the lowest assessment score of anyone in the company, Willhite's performance review ratings were irrelevant and on November 10, 2010, Willhite was terminated. RP (Dec. 9 Crook) 64: 7-10.

E. HUMAN RIGHT'S COMMISSION INVESTIGATION

At the time of his termination, Willhite had no knowledge of the skills assessment that resulted in his selection for termination. RP (Dec. 11 Willhite) 146:9-147:4. Believing that his termination may have been age

related, Willhite filed a claim with the Equal Opportunity Commission, which was transferred to the Washington State Human Rights Commission (“HRC”), for investigation. Angie Bechtel, the Farmers’ Human Resources Consultant that assisted with the layoff, was charged with responding to the HRC investigation. RP (Dec. 9 Crook) 65:6-18. In a letter dated May 6, 2011, Bechtel advised the HRC that that Farmers had conducted an internal investigation regarding Willhite’s termination and determined that Famers had complied with all state and federal laws against discrimination. App. “B.” However, neither Douvia nor Fitzpatrick were ever contacted in connection with any investigation. In fact, prior to this litigation, neither were aware that any investigation had taken place. App. “J.”

Bechtel further advised the HRC that Willhite was selected for termination due to his poor performance. However, Willhite’s personnel file does not contain any indication of any performance deficits. Ex. 86; RP (Dec. 10 Hillinger) 86:12-88:11. His first and only negative performance review in 32 years of employment was in 2009 at which time he was rated as “partially meets expectations.” RP (Dec. 11 Willhite) 136:12-137:22, 146:9-148:17; App. “N,” pp. 185-94. This review rating was issued four months prior to Willhite’s disability leave and approximately one year after the onset of his depression. RP (Dec. 11 Willhite) 135: 4-10, (Dec. 9 Crook) 32:11-18.

F. CIVIL SUIT

Willhite filed suit in King County Superior Court on July 13, 2012, for age and disability discrimination in violation of the Washington Law Against Discrimination (“WLAD”), violation of the Washington Family Leave Act (“WFLA”), breach of contract and violation of public policy. Farmers removed to matter to federal court on September 5, 2012, claiming that Willhite’s claims arose out of an ERISA employee plan. On March 29, 2013, Willhite filed a first amended complaint in which he removed the allegation that Willhite’s termination was motivated in part by Farmers’ desire to reduce its pension obligation. App. “K.” On April 18, 2013, the case was remanded to the King County Superior Court. On November 25, 2013, Judge Jean Rietschel granted Farmers’ motion for summary judgment with respect to Willhite’s claims based upon age discrimination and violation of public policy. CP 790-791.

On December 4, 2013, Willhite’s remaining claims for: 1) disability discrimination in violation of the WLAD; 2) violation of the WFLA; and 3) breach of contract were tried to a 12 person jury before Judge Kenneth Schubert.

The jury returned its verdict on December 19, 2013. Although it found that Willhite was disabled, it found that Farmers did not have knowledge of the disability. Because knowledge was a threshold question on the verdict form, the jury never addressed the question of whether the

disability was a substantial factor in the termination decision. App. “E.” The answer to the knowledge question also served to defeat the claim for violation of the WFLA.⁴ On February 3, 2014, judgment was entered in favor of Farmers in the amount of \$84,795.35 based upon the November 25, 2013 order granting summary judgment on Farmers’ counterclaim for unjust enrichment. CP 1785-1788. Willhite filed his notice of appeal on February 4, 2014. CP 1789-1808.

IV. ARGUMENT

A. THE TRIAL COURT DID NOT LIBERALLY CONSTRUE THE WLAD

The WLAD is a reflection of our state’s “disdain” for discrimination and our commitment to ensure its complete eradication. RCW 49.60.010; WAC 162-16-200(1); *Mackay v. Acorn Custom Cabinetry, Inc.*, 127 Wn.2d 302, 309 (1995). This commitment is based upon a belief that discrimination, in all forms, is a threat to the rights and privileges of individuals and a menace to the institutions of a free democratic state. RCW 49.60.010. In order to ensure that the protections afforded by the statute are not enforced in name only, the legislature included a provision that mandates a liberal construction:

The provisions of this chapter **shall be construed liberally** for the accomplishment of the purposes thereof (emphasis added). RCW 49.60.020.

⁴ The jury also found in favor of Farmers on the contract claim, which is not on appeal.

Consistent with the foregoing, interpretations of the law that reduce its protections to mere rhetoric are to be rejected. *Mackay*, 127 Wn.2d at 310 (1985); *Marquis v. City of Spokane*, 130 Wn.2d 97, 109 (1996).

RCW 49.60.180 prohibits disability discrimination in the workplace and gives rise to two theories of liability: 1) disparate treatment arising out of a wrongful termination, and 2) failure to accommodate. RCW 49.60.180(2); *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 145 (2004). Because of the mandate requiring liberal construction, the protections afforded under the WLAD are broader than the federal laws against discrimination. *Kumar v. Gate Gourmet Inc.*, 180 Wn.2d 481, 491 (2014); *Lodis v. Corbis Holdings, Inc.*, 172 Wn.App. 835, 850 (2013). As such, while courts look to federal law as guidance when there is no state law on a given subject, such authority can never serve to narrow the protections under the state law. *Lodis*, 172 Wn.App. at 849.

In order to establish liability for wrongful termination (disparate treatment) based upon a disability, an employee must prove that his or her disability was a “substantial factor” in the termination decision. WPI 330.32. The substantial factor element is almost always established by circumstantial evidence as there is rarely direct evidence of an employer’s discriminatory motives. As explained by the Washington Supreme Court in *Hill v. BCTI, Income Fund-I*, 144 Wn.2d 172 (2001):

Direct, smoking gun evidence of discriminatory animus is rare, since there will seldom be eyewitness testimony as to the employer's mental processes and employers infrequently announce their bad motives orally or in writing. . . . Courts have thus repeatedly stressed that circumstantial, indirect and inferential evidence will suffice to discharge the plaintiff's burden. Indeed, in discrimination cases it will seldom be otherwise. *Hill*, 144 Wn.2d at 179-80 (internal citations and quotations omitted).

Farmers' principal defense throughout trial was that it had no knowledge of Willhite's disability. However, "knowledge" of the disability is not a separate element of proof as it is inherent in the substantial factor question and subject to inference from the circumstantial evidence. Nonetheless, Farmers argued that, without direct evidence of Farmers' knowledge, Willhite he could not prove that his disability was a substantial factor the termination decision. Contrary to all authority, and over vehement objection, the court agreed and added "knowledge" as an additional element of proof to the pattern jury instruction. This ruling constitutes reversible error.

1. Farmers Had Notice of Disability as a Matter of Law

As will be established below, Willhite did not have the burden of proving that Farmers had actual knowledge of his disability. However, the record establishes that Farmers had imputed knowledge under fundamental agency principles. Since lack of notice was Farmers' primary defense at the time of trial, and since knowledge is established as a matter of law, this issue is addressed first here, prior to a substantive

discussion of the law of discrimination.

2. Imputed Knowledge Under Agency Law

Pursuant to its contract with Farmers, Liberty Mutual administered Willhite's short term disability claim. In so doing, Liberty Mutual's knew that: 1) Willhite suffered from a "significant psychiatric impairment;" 2) Willhite's symptoms included significant cognitive deficits; 3) Willhite's condition was aggravated by a hostile work environment; and 4) that Willhite could return to work provided that he is not in a hostile environment. App. "C," pp. LM 32-33, 75, 79-81. The foregoing information was contained in the August 10, 2010 Don report. App. "A." Willhite offered the Don report and asked that the court find that Farmers had imputed knowledge of all facts known to Liberty Mutual. The court excluded the letter and refused to find imputed knowledge. RP (Dec. 5) 65:25-72:19, (Dec. 16) 69:17-76:16. Both rulings constitute reversible error.

Knowledge of an agent is imputed to the principal if the knowledge is material to the agent's duties to the principal. *American Fidelity & Cas. Co., Inc. v. Backstrom*, 47 Wn.2d 77, 82 (1955); *Hurlbert v. Gordon*, 64 Wn.App. 386, 396 (1992); Restatement (Third) of Agency §5.03 (2006); Restatement (Second) of Agency §272 (1958). This rule is designed to prevent a principal from isolating itself from facts that it would prefer not to know. Restatement (Third) of Agency §5.03 cmt. b

(2006):

By charging a principal with notice of material facts that an agent knows or has reason to know, imputation reduces incentives to deal through agents ***as a way to avoid the legal consequences of facts that a principal might prefer not to know*** (emphasis added). Restatement (Third) of Agency §5.03 cmt. b (2006). App. “P,” pp. 5

A principal is charged with the knowledge of its agent, irrespective of whether the agent took any steps to communicate the information.

American, 47 Wn.2d at 83. Similarly, a company’s internal structure that serves to compartmentalize information does not circumvent the rule imputing knowledge of the agent to the organization, as a whole.

Restatement (Third) of Agency §5.03 cmt. c (2006). App. “P,” p. 6.

These fundamental rules of agency are as applicable and binding in the employment setting as they are in any other context. As such, when an employer hires an outside firm to administer its disability claims, an agency relationship arises and the employer is charged with all knowledge that the agent gathers in connection with those claims. *Goodman v. Boeing Co.*, 75 Wn.App. 60 (1994). In *Goodman*, the court held that Axia, a third party firm hired by Boeing to administer employee worker’s compensation claims, was Boeing’s agent and therefore Axia’s knowledge regarding employee claims was imputed to Boeing.

In that case, plaintiff Goodman worked in microfilming, which required repetitive use of her arms and hands. After suffering an injury at

work, Goodman's private physician, Dr. Cancro, determined that Goodman's work duties were aggravating preexisting conditions in her arm and hand. Dr. Cancro sent several notes to Axia, recommending modifications to Goodman's duties and work schedule. Goodman's supervisor denied receiving copies of the notes and no accommodations were provided. Goodman went on medical leave and thereafter filed suit for disability discrimination arising out of a failure to accommodate.

At trial, Boeing denied having any knowledge of Goodman's condition or requested accommodation. However, the jury was not asked to determine if Goodman's supervisor received the notes. Rather, the court instructed the jury that Boeing had imputed knowledge of all information that Dr. Cancro provided to Axia. Boeing challenged the instruction on appeal, arguing that in order for knowledge to be imputed, it must be shown that Axia was affirmatively required to communicate the information provided by Dr. Cancro. The court rejected the argument and upheld the instruction, holding that knowledge is imputed to the principal if the agent has authority to: 1) receive the information, or 2) take action upon the information, irrespective of any affirmative obligation to communicate the information. *Goodman*, 75 Wn.App. at 85-86.

The same agency principles were applied in *Kimbrow v. Atlantic Richfield Co.*, 889 F.2d 869 (9th Cir. 1989), when the 9th Circuit was asked to determine if Atlantic Richfield had notice of Kimbro's disability under

the WLAD. In that case, the Kimbro was terminated for excessive absenteeism resulting from cluster migraines. While Kimbro's supervisor knew of the migraines, the individuals who made the termination decision did not. Atlantic Richfield argued that since the individuals that made termination decision did not know of the disability, it could not be shown that the disability was a substantial factor in the termination decision. The court rejected argument finding that Atlantic Richfield had imputed knowledge of the facts known to Kimbro's supervisor under agency principles. *Kimbro*, 889 F.2d at 876-77.⁵

Just as Boeing contracted with Axia in *Goodman*, Farmers contracted with Liberty Mutual to administer employee disability claims. Hogan testified to the nature and scope of Farmers contract with Liberty Mutual:

A. Liberty Mutual manages the time off, so if somebody wants to request some time off, we don't handle it, it is basically out-sourced. We don't handle it locally, we let Liberty Mutual handle it.

Q. Let's go to that. When you say you let Liberty Mutual handle it, is it because -- is that their job, that you rely on them?

A. That's correct, that's correct, yes.

⁵ These agency principles are uniformly applied in federal discrimination cases as well. In *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 541-42 (1999), the Supreme Court held that agency law not only applied to discrimination claims under Title VII, but that it could give rise to imputed liability for punitive damages. In *Bustillo v. Southwest*, 33 BRBS 15 (1999) the US Dept of Labor Benefits Review Board held the knowledge of the employer's claims administrator was imputed to the employer with respect to claims under the Longshore and Harbor Workers' Compensation Act.

Q. And does that include all medical disability claims? Do they administer those?

A. Disability claims. They administer, like, time off for FMLA, or under state law, and then they will go to the doctor and ask them for documentation to support the leave. And then, if it is supported, they will approve it, and then they can -- yeah, they can take the time off.

Q. And Liberty Mutual does that at the request of Farmers?

A. Yes, yeah, we contract with them to manage that aspect of leaves of absence, yes.

Q. And do you rely on them to handle all that, then?

A. From top to bottom, yes, they are a resource to employees. RP (Dec. 16 Hogan) 46:6-47:4.

Matt Crook also testified to Liberty Mutual's duties:

[A]ll of our leaves are handled by a company called Liberty Mutual, they are an insurance company that handles all this stuff. . . . Liberty Mutual handles it, where you ask the employee or the manager to tell the employee to contact Liberty Mutual to begin the process, we are contracted from [sic] Liberty Mutual. RP (Dec. 9 Crook) 84:20-85:4

The court denied Willhite's request for an order that Farmers had imputed knowledge of facts known to Liberty Mutual. RP (Dec. 5) 65:25-72:19, (Dec. 16) 69:17-76:16. Since the outcome of the case turned on Farmers' knowledge of Willhite's disability, the ruling was prejudicial.

In addition to the foregoing, the court granted Farmers' motion to exclude the Don report on the grounds that it is: 1) irrelevant; 2) hearsay; and 3) prejudicial. CP 866-867; RP (Dec. 5) 62:20-72:24. The exclusion of the Don report constitutes reversible error. Errors concerning the exclusion

of evidence are review for abuse of discretion. *Goodman*, 75 Wn.App. at 80.

First, as set forth above, information known to Liberty Mutual is imputed to Farmers as a matter of law. As such, the Don report is admissible as evidence of the facts subject to imputation. Second, this is a case of disability discrimination. It is hard to imagine a piece of evidence more relevant than a medical report from a board certified psychiatrist confirming the diagnosis and the conditions for a return to work. Third, both Willhite and Farmers listed the Liberty Mutual file, in its entirety (including the Dr. Don report) on their trial exhibit lists and it was ultimately designated as exhibit 18. Farmers conceded this point, but argued that the report was included solely for the purpose of cross examining Dr. Don at trial. CP 867, fnt. 2.

The prejudice to Willhite was not limited to the court's failure to find imputed knowledge. Rather, Farmers affirmatively testified that *there were no conditions* placed on Willhite's return. RP (Dec. 10 Crook) 29:17-23, (Dec. 17 Fitzpatrick) 120:3-6. Farmers' counsel reiterated this falsehood in closing. RP (Dec. 18 Bowman), 145:18-20, 148:1-2. Because the court excluded the report of Dr. Don and refused to find that Farmers had imputed knowledge of the contents of the Liberty Mutual file, Willhite was unable to undermine this testimony.

B. FARMERS POLICY SERVES TO ESTABLISH NOTICE

When an employer establishes a procedure by which employees are to report claims, it cannot claim notice provided pursuant to that procedure is ineffective. *Franacom v. Costco Wholesale Corp.*, 98 Wn.App. 845, 861 (2000). Crook testified that employees requesting medical leave are instructed to contact Liberty Mutual, directly. RP (Dec. 9 Crook) 84:20-85:4. Willhite followed this procedure and submitted request for leave to Liberty Mutual. Because Farmers created this procedure, it should be precluded from claiming that notice given pursuant to the procedure is ineffective.

1. Knowledge is Not a Separate Element of Proof

RCW 49.60.180 makes it unlawful to terminate an employee “because of” a disability. This standard is met upon a showing that the disability was a “substantial factor” in the termination decision. *Mackay*, 127 Wn.2d at 310-11. This burden of proof is set forth in pattern instruction WPI 330.32. The employer’s knowledge regarding the disability *is not a separate element of proof*. This is because such notice is inherent in the substantial factor question and, like most issues in discrimination cases, established by circumstantial evidence.

a. Final Instruction 18 Misstated The Law

On November 25, 2013, the parties filed their proposed cited jury instructions. App. “D” (Farmers) and App. “G” (Willhite).⁶ Jury

⁶ Willhite’s instructions are found at CP 1151-195 (docket number 89) and are

instructions were vigorously debated throughout the trial. The issue regarding proof of Farmers' knowledge of Willhite's disability was the subject of significant argument. RP (Dec. 10) 31:15-37:15, (Dec. 13) 56:18- 98:17, (Dec. 16) 9:4-7, (Dec. 17) 13:8-15:16. Farmers argued that that the pattern instruction for disparate treatment is "faulty," and "plaintiff-friendly" and that it needs modification so as to include notice as a separate element. RP (Dec. 13) 56:18-57:13, 76:12-16, 77:14-22, 90:17-20, 96:12-23, (Dec. 16) 9:4-7. The court agreed and instructed the jury as follows:

Final Instruction 18: . . . Where an employer did not know or had no notice of an employee's disability, the employee's disability cannot have been a substantial factor in the employment decision (emphasis added). App. "H," (CP 1739).

Errors in connection with jury instructions are reviewed for an abuse of discretion. *Goodman*, 75 Wn.App. at 68. Parties are entitled to have jury instructions that accurately state the law. *Id.* An instruction that serves to create an additional burden of proof in a discrimination case constitutes reversible error. *Johnson v. Chevron U.S.A, Inc.*, 159 Wn.App. 18, 33 (2010). *Johnson* arises out of a claim for race and disability discrimination. At trial, the jury was instructed that the plaintiff was required to prove that he was treated differently than other employees, in addition to proving that his race and disability were a substantial factor in

designated "court's instructions to the jury" without reference to Willhite as the submitting party.

the defendant's employment decisions. The jury found in favor of the defendant and the plaintiff appealed. The court of appeal reversed, holding:

Johnson was required to prove only that his race or disability was a substantial factor in Chevron's decisions. Proof of difference treatment by way of comparator evidence is relevant and admissible but not required, and in many cases is not obtainable. . . . This is not the law, and the error was not harmless. *Johnson*, 159 Wn.App. at 33.

In *Mackay v. Acorn Custom Cabinetry*, the court held that it was reversible error to instruct the jury that the plaintiff was required to prove that discrimination was a "determining" factor as opposed to a "substantial" factor in the termination decision. *Mackay*, 127 Wn.2d at 310-12. In *Svendgard v. State*, 122 Wn.App.670 (2004), the court held that it was reversible error to instruct the jury that the plaintiff was required to prove that he qualified for a commercial driver's license in addition to proving that the defendant failed to accommodate his disability. *Svendgard*, 122 Wn.App. at 675-76. When the jury is instructed on a wrongful proposition of law, the verdict must be vacated. *Mackay*, 127 Wn.2d at 311 (holding that when an error in an instruction is given on behalf of the party in whose favor the verdict was returned, the error is presumed to have been prejudicial and grounds for reversal, unless it affirmatively appears that it in no way affected the final outcome of the case).

The notice language in final instruction 18 was based solely upon two unpublished opinions and the pattern instruction for a claim arising out of a failure to accommodate.⁷ Farmers conceded that it was unable to identify any published authority in support of the modification. RP (Dec. 13) 96:12-13. Moreover, both of the unpublished opinions cited by Farmers in support the instruction are distinguishable on the facts.

In *Erickson v. Fisher Communications, Inc.*, 150 Wn.App. 1003 (2009), the plaintiff suffered from Dysthymic Disorder, a type of depression. No evidence, direct or circumstantial, was presented that the employer had any reason to suspect that the plaintiff had any kind of health problems. Based thereon, the court held that the plaintiff failed to show that his employer “knew or should have had known” of his disability. *Erickson*, 150 Wn.App. at 5. In *Haley v. Kinko’s Inc.*, 111 Wn.App. 1037 (2002), the plaintiff was terminated for poor performance after a year of warnings and a performance improvement plan. *After he was terminated*, the plaintiff provided his employer with a note from his doctor recommending a leave of absence. *Haley*, 111 Wn.App. at 7; App. “R.”

Here, it is undisputed that Willhite had a disability. It is also undisputed that Farmers knew that Willhite was suffering from a “serious health condition” and that such condition resulted in a three month

⁷ The notice provision of instruction 18 was derived from Farmers original proposed instruction 16. App. “D,” CP 1123.

medical leave of absence.

b. Court Should Have Instructed the Jury on Constructive Notice

Farmers also relied on WPI 330.33, the failure to accommodate pattern instruction, as authority supporting modification of the disparate treatment burden of proof. WPI 330.33 provides that a plaintiff alleging a failure to accommodate must prove that the employer had notice of the disability, thereby triggering the duty to engage in the accommodation process. Notice for accommodation purposes is established upon a showing that the employer was aware of the employee's "serious health condition." *Sommer v. Department of Social and Health Services*, 104 Wn.App. 160, 173 (2001); *Bachelder v. American West Airlines, Inc.*, 259 F.3d 112, 1130 (2001); *Xin Liu v. Amway*, 347 F.3d 1125, 1134 (2003). Ironically, *Erickson v. Fisher Communications*, the unpublished opinion on which Farmers relies recites this rule and goes so far as to state that it applies equally in disparate treatment cases. *Erickson*, 150 Wn.App 1003 at p. 5. Willhite requested that the court instruct on constructive notice pursuant to this authority. Farmers argued that constructive notice is inapplicable in disparate treatment case. The court agreed with Farmers and refused to instruct the jury on constructive notice. RP (Dec. 13) 98:18-102:2, (Dec. 16) 75:2-22. The court further denied Willhite's request that the jury be instructed that it can find discrimination irrespective of a

request for an accommodation. RP (Dec. 5) 129:17-132:21, (Dec. 13) 97:8-102:10.

These rulings constitutes reversible error. First, Farmers relied on the accommodation instruction at WPI 330.33 when arguing for the inclusion of a notice element in this case. Given that the notice element in final instruction 18 was based upon the failure to accommodate burden of proof, it stands to reason that the case authority deciding what constitutes notice in those cases should be applied here. Second, courts do not distinguish between claims based on disparate treatment from those alleging failure to accommodate when defining disability. *Callahan v. Walla Walla Housing Authority*, 126 Wn.App. 812, 820 (2005). Third, Farmers raised the accommodation issue at trial and offered testimony that Willhite never requested an accommodation. RP (Dec. 10 Crook) 38:3-7, (Dec. 12 Willhite) 71:22-24, 134:2-4, (Dec 16 Hogan) 108:11-13, (Dec. 16 Douvia) 213:19-21, (Dec. 17 Fitzpatrick) 130:6-11, (Dec. 17 Keller) 230:20-22, (Dec. 18 Bowman) 147:24-25. Given that Farmers raised the accommodation issue, it was all the more important that the jury was properly instructed on what constitutes notice of such a request. *Easley v. Sea-Land Service, Inc.*, 99 Wn.App. 459, 469 (2000) (holding that because evidence was presented that an accommodation would have been an undue hardship, the plaintiff was entitled to an instruction on the issue even though the defendant had not formally raised undue hardship as a

defense).

c. Erroneous Instruction Resulted in Defense Verdict

The error in giving final instruction 18 was not harmless.

Throughout the course of the trial, the jury was inundated with testimony that Farmers had no idea that Willhite had a disability. A review of the trial transcript reveals 32 separate instances in which Farmers elicited witness testimony regarding Farmers' claimed lack of knowledge regarding Willhite's disability. App. "I."

Crook testified that he did not have an "inkling" that Willhite was suffering from anxiety and depression. RP (Dec.9 Crook) 39:1-7. Hogan testified that he had no idea that Willhite's leave was even medically related. RP (Dec. 16 Hogan) 117:5-12. Douvia was on maternity leave at the time Liberty Mutual copied her on its disability letter and she testified that it is possible that no one opened the letter in her absence. RP (Dec.16 Douvia) 230:6-213:17. Fitzpatrick testified "I never learned anything of the reason or the cause of his absence." RP (Dec. 17 Fitzpatrick) 128:24-25.

The jury was swayed by this evidence. In a written question to Crook, juror number 7 asked: "For clarification was there any knowledge of the plaintiff's disability before the termination?" CP 1713. Crook responded: "We knew he was on leave for that time frame, yeah. We didn't know why, "we" being the HR team, nor the manager, only that he

was on leave.” RP (Dec.10 Crook) 72:19-73:14.

During closing, Farmers made eight separate references to its lack of knowledge and pointed to the “unanimous testimony that no one was told of Mr. Willhite’s depression or his anxiety.” RP (Dec. 18 Bowman Closing) 146:23-25. With the modified instruction adding notice as an element, Farmers told the jury that the testimony regarding Farmers lack of knowledge mandated a defense verdict:

Instruction number 18 says that when an employer neither knows of or -- I'm probably paraphrasing, but basically, it is this: When an employer neither knows of or has any notice of an employee's disability, the disability cannot have been a substantial motivating factor in the employer's decision to lay off the employee. It cannot, they didn't know. RP (Dec. 18 Bowman Closing) 148:2-13 . . .

No one, as I have said repeatedly, no one at Farmers Life knew he had depression. It could not have been a significant motivating factor in Farmers Life's decision to lay him off when no one knew. RP (Dec. 18 Bowman Closing) 155:6-10.

After hearing this argument, and a jury instruction consistent therewith, the jury was presented with a verdict form in which the question of Farmers’ knowledge was threshold. Given the erroneous instruction and a record replete with Farmers’ denials, the jury found that Farmers’ did not have knowledge of Willhite’s disability. Pursuant to the instructions on the verdict form, the jury then skipped the substantial factor question. App. “E.” As such, Willhite’s discrimination claim was defeated without the jury ever addressing the elements of proof established

by law. This alone mandates a reversal of the verdict. *Easley*, 99 Wn.App. at 472 (a verdict must be vacated if it is possible that it was the result of an erroneous application of the parties' burden of proof); *Davis v. Microsoft*, 149 Wn.2d 521, 539 (2003)(a verdict must be vacated if it is possible that it is based upon an erroneous legal theory).

d. Addition of Notice Element Violated the Legislative Mandate for a Liberal Construction of WLAD

While the misstatement of law in final instruction 18 would be reversible in any civil case, the error is all the more egregious here given the policy purpose behind the WLAD. The legislative mandate for liberal construction mandates an interpretation that furthers the goal of eliminating discrimination. *Dean v. Municipality of Metropolitan Seattle-Metro*, 104 Wn.2d 627, 632 (1985); *Holland v. Boeing*, 90 Wn.2d 384, 388-89 (1978). For these reasons, exceptions to clear legislative mandate are to be narrowly confined. *Martini v. Boeing*, 88 Wn.App. 442, 461 (1997).

Courts will not read into the WLAD additional elements of proof that would serve to narrow the protections afforded by the act. *Lodis*, 172 Wn.App. at 848-49 (refusing to adopt federal "step outside" requirement to claim asserted under the WLAD as it would narrow the protections contrary to the mandate for liberal construction). Here, the trial court's ruling that adds an additional burden of proof to WPI 330.32 is not a

liberal construction of the WLAD nor does it apply exceptions narrowly. To the contrary, the ruling created an exception so wide that it served to swallow whole the protections that the statute was created to provide. Indeed, the ruling erected a fortress of protection around Farmers' defense of plausible deniability. Such is an affront to the letter and spirit of the WLAD.

While Farmers argues that it is logically incongruous to not have notice determined prior to the substantial factor question, the law rejects this simplistic approach in recognition that it would only serve to carve out a safe harbor for discriminatory practices. If the legislature wanted notice to be a separate element of a disparate treatment claim, it would have taken action in response to decades of authority that provides that notice is inferred. If the courts had interpreted the statute to mandate a separate finding of notice, Farmers would not have cited to two unpublished opinions in support of the creation of a separate notice element.

e. Farmers' Lack of Knowledge Argument Was Previously Rejected by This Court

Farmers does not deny that it had knowledge of Willhite's "serious health condition." Rather, Farmers claims that these words are merely "stock language" of no consequence. RP (Dec. 9 Crook) 29:2-16-23 and 39:8-15. Crook who, as head of HR, is arguably chargeable with Farmers' duties under the WFLA, testified that the words simply mean that leave

was approved “under some specific law.” RP (Dec. 16) 117:13-21.

Farmers knows this to be baseless, as its prior attempts to advance the argument have been rejected by this court, as was the case in *Owens v. Farmers Insurance Exchange*, 94 Wn.App. 1045 (1999) (“*Owens One*”) and 107 Wn.App 1039 (2001) (“*Owens Two*”). App. “R.” *Owens* involves a plaintiff who was diagnosed with depression and advised her supervisor that she was seeking mental health counseling. Thereafter, the plaintiff called in to say that she would be seeking a medical leave of absence as she was “not of any sound mind.” Farmers fired the plaintiff days later for failing to comply with the company call-in policy. The plaintiff sued for disability discrimination. Farmers argued that it did not have notice of the plaintiff’s disability in that it never received a note from the plaintiff doctor. The trial court entered summary judgment in favor of Farmers and the plaintiff appealed. This court reversed and remanded, holding that Farmers’ knowledge that the plaintiff was receiving mental health treatment and her intention to seek medical leave due to her “unsound mind” was sufficient notice of a disability under the WLAD. *Owens One*, 94 Wn.App. 1045 at 4-5.

Owens went to trial and a verdict was entered in favor of the plaintiff. Farmers appealed again and reiterated the argument that it did not have notice of the disability. The court again rejected the argument on the grounds set forth in *Owens One* and on the grounds that jury could infer a

substantial factor if it concluded that that the alleged violation of the call-in policy was pretext. *Owens Two*, 107 Wn.App. 1039 at 2.

2. Discrimination Inferred From a Termination Decision Based Upon Performance Deficits Related to the Disability

If a termination decision is based upon performance deficits related to depression, the jury is entitled to conclude, *based upon this evidence alone*, that the disability was a substantial factor in the termination decision. *Gambini v. Total Renal Care, Inc.*, 486 F.3d 1087, 1093-95 (2007). If evidence is presented on this issue, *it is reversible error* to not instruct the jury that it may find discrimination based upon solely upon such a finding. *Gambini*, 486 F.3d at 1093-95

In *Riehl v. Foodmaker*, the court held that comments about changes in the plaintiff's personality, suggesting that he was not the same as the "old Mark" or that he was becoming more like the "old Mark" were sufficient to give rise to liability for a termination decision based upon the symptoms of depression. *Riehl*, 152 Wn.2d at 152.

a. Willhite Was Entitled to Specific Instruction on Disability Related Performance Deficits and Personality Changes

Based upon the foregoing, Willhite requested that the court instruct the jury as follows:

Proposed Instruction 14: [Y]ou may conclude that

Willhite's disability was a "substantial factor" in Farmers' termination decision, if you find that the decision was based in part upon performance deficits, personality changes or other symptoms that were a result of Willhite's depression. App. "G" (CP 1167).

The court refused to give the proposed instruction. RP (Dec. 10) 31:15-37:15. This ruling constitutes reversible error. A party is entitled to have its theory of the case presented to the jury with a specific instruction on the factual circumstances supporting the theory of liability, even if a general instruction is provided on the subject. *Woods v. Goodson*, 55 Wn.2d 687, 689-90 (1960); *Meredith v. Hanson*, 40 Wn.App. 170, 173-74 (1985); *Gammon v. Clark Equipment Co.*, 38 Wn.App. 274, 284 (1984).

Willhite presented evidence that Farmers' termination decision was based upon performance deficits and personality changes related to his anxiety and depression. As such, Willhite was entitled to have the jury instructed on the specific facts supporting his theory of liability.

b. Limitation on Kihichak Testimony Was Reversible Error

In his primary witness disclosure, Willhite identified Dr. Kihichak as Willhite's treating physician who treated his depression and anxiety. CP 1295. Farmers deposed Dr. Kihichak. CP 873, ¶ 2. Farmers moved the court in limine for an order precluding Dr. Kihichak from testifying to anything other than her diagnosis and the symptoms that she witnessed in Willhite, on the grounds that Dr. Kihichak was not designated as a

retained expert. CP 849-855. Willhite opposed the motion. CP 1280-1297. The court granted the motion and limited the testimony. RP (Dec. 5) 3:10-20:12, (Dec. 12) 13:25-16:10. This ruling was error.

A treating physician may testify as to both facts and medical opinions so long as the testimony is limited to the medical judgments and opinions which were derived from the treatment. *Smith v. Orthopedics Intern., Ltd., P.S.*, 170 Wn.2d 659, 668 (2010). In fact, the opinion of an attending physician is often given greater weight than that of a retained expert. *Young v. Department L&I*, 81 Wn.App. 123, 128-29 (1996). Here, Dr. Kihichak was prepared to testify that the skills measured by the Matrix were compromised by Willhite's depression and anxiety. Such testimony is within the scope allowed by treating physicians and the court's order precluding such testimony was error.

c. Exclusion of NIH Publication Was Reversible Error

Willhite offered the National Institute of Health ("NIH") publication entitled "Depression" and requested that it be admitted via judicial notice pursuant to ER 201. CP 982-1008. The court granted Farmers' motion to exclude the publication. In support of its ruling, the court stated "I'm not taking judicial notice of things, this is a jury trial." RP (Dec. 5) 62:7-9; CP 863-66. This ruling was reversible error.

ER 201 (b)(2) provides that judicial notice may be taken of "facts capable of immediate and accurate demonstration by resort to easily

accessible sources of indisputable accuracy and verifiable certainty.”

Fusato v. Washington Interscholastic Activities Ass’n, 93 Wn.App. 762, 780 (1999). Government studies and reports are regularly admitted under ER 201(b)(2). *Evans v. Metropolitan Life Ins. Co.*, 26 Wn.2d 594, 633 (1946). The failure to give proposed instruction 14, the limitation on the Kihichak testimony and the refusal to admit the NIH publication were not harmless. Farmers elicited testimony from Douvia and Keller that they had no training on how to recognize the signs and symptoms of depression. RP (Dec. 16 Douvia) 213:25-214:5, (Dec. 17 Keller) 230:23-231:3. In closing, Farmers argued that, while witnesses noted that Willhite had become withdrawn and less engaged, “that cannot be attributed to depression.” RP (Dec. 18 Bowman) 139:5-8.

3. Discrimination Inferred From Questionable Explanation

A plaintiff can prove discrimination based solely on evidence that the employer’s offered explanation for the termination is “unworthy of believe.” This is based upon the notion that the trier of fact can reasonably infer from the falsity of the explanation that the employer is attempting to cover up a discrimination motive. *Hill*, 144 Wn.2d at 184-85; *Sellsted v. Washington Mutual Savings Bank*, 69 Wn.App. 852, 861-64 (1993); *Riehl*, 152 Wn.2d at 151-53.

a. Willhite Was Entitled to Instruction That Jury Could Infer Discrimination From Bechtel Letter

Willhite offered the Bechtel letter as evidence and requested that the jury be instructed as follows:

Proposed Instruction 16: When determining whether disability was a substantial factor in the termination decision, you may also consider whether Farmers' offered explanations for the termination decision are: 1) inconsistent; 2) unworthy of belief; 3) unsupported by facts; or 4) affirmatively false. If you disbelieve any of Farmers' offered explanation for Willhite's termination, you are entitled to infer discrimination from this evidence alone, and conclude that Willhite's disability was a substantial factor in Farmers' termination decision. CP 1169

The court refused to give proposed instruction 16 and excluded the Bechtel letter. RP (Dec. 5) 43:3-56:8, (Dec 13) 103:19- 106:12. Both orders constitute reversible error.

Proposed instruction 16 is based upon well-established authority regarding proof of discrimination. As set forth above, Willhite was entitled to have the jury specifically instructed on the factual circumstances supporting his theory of liability. This includes an instruction on the facts from which discrimination can be inferred. *Pannel v. Food Services of America*, 61 Wn.App. 418, 431-32 and 436 (1991).

b. Order Excluding Bechtel Letter Was Error

Willhite offered the May 6, 2011 Bechtel letter as evidence of Farmers' questionable explanation for its termination decision.⁸ The court

⁸ Willhite identified the Bechtel letter in his ER 904 and listed it as a trial exhibit on the Joint Statement of Evidence. CP 788 (#15) and CP 1432 (#15). Farmers did not object to

granted Farmers' motion to exclude the Bechtel letter on the grounds that it is irrelevant. CP 860-62.⁹ Because the letter is admissible pursuant to the authority cited above and because the jury could have found in Willhite's favor on his discrimination claim based solely upon this letter, the order excluding the letter was an abuse of discretion constituting reversible error.

4. Discrimination Inferred From Circumstances

A jury is entitled to infer discrimination from the proximity between the disability-related conduct and the termination or a dramatic drop in performance just prior to termination. *Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wn.2d 46, 69 (1991); *Kimbro*, 889 F.2d at 875; *Xin Liu*; 347 F.3d at 1137.¹⁰ Discrimination can also be inferred when the termination decision is based upon subjective performance evaluations such as those measuring "dedication," or "enthusiasm." *Xin Liu*, 347 F.3d at 1136-37.

Based upon the foregoing, Willhite requested that the jury be instructed as follows:

Proposed Instruction 15: You may also consider the

the letter. In fact, Farmers also identified the entirety of the Human Rights Commission file (which includes the Bechtel letter) and as Exhibit 5 in its ER 904. App. "T."
9 Farmers further argued that the letter was protected work product and that Bechtel prepared the letter at the direction of legal counsel in anticipation of litigation. RP Dec. 5, pp.49:20-50:13. Bechtel is not an attorney. 44:9-12.
10 Federal court decisions interpreting the Civil Rights Act of 1964 are persuasive authority in Washington. *Xieng v. Peoples Bank of Washington*, 120 Wn.2d 512, 518 (1993).

following when determining whether Willhite's disability was a substantial factor in Farmers' termination decision:

- 1) The proximity of time between the disability leave and the termination, as well as the years of employment prior to termination.
- 2) A prior history of satisfactory work performance.
- 3) Whether the performance evaluations upon which the termination decision was based contain subjective opinions, such as those assessing an employee's "dedication," or "enthusiasm."
- 4) Whether there was a drop in performance evaluation scores after the onset of the disability.

The court refused to give proposed instruction 15 on the same grounds as its refusal to give proposed instruction 16. RP (Dec. 13) 103:19-106:2. This ruling constitutes reversible error as it prevented Willhite from arguing his theory of the case, specifically, that the totality of the circumstances warrant an inference of discrimination.

Willhite presented evidence that he was terminated 13 weeks after his return from disability and after 32 years of employment. The skills assessment that resulted in the termination was based entirely upon Fitzpatrick's subjective opinions. Moreover, Willhite's Matrix scores were a dramatic departure from his history of exemplary performance as documented in his personnel file.

C. THE VERDICT ON THE WFLA SHOULD BE VACATED

Willhite's WFLA claim was based upon the premise that his wrongful termination constituted a failure to restore Willhite to his prior

position in violation of RCW 49.78.280. Because the jury found that the termination was not wrongful, it was unable to find in favor of Willhite on the claim for violation of the WFLA. As such, the verdict with respect to the WFLA claim should be reversed on the same grounds as set forth above.

D. WILLHITE IS ENTITLED TO JUDGMENT AS A MATTER OF LAW ON LIABILITY UNDER THE WLAD AND WFLA

Willhite did not move the court for judgment as a matter of law at the time of the verdict. However, this court has authority pursuant to RAP 12.2 to take any action as to the merits of the case which the interest of justice may require, including entry of judgment for the non-prevailing party if a retrial on the issue of liability would be a “useless act and a waste of judicial resources.” *Jaramillo v. Morris*, 50 Wn.App. 822, 833 (1988); *Lobdell v. Sugar ‘N Spice, Inc.*, 33 Wn.App. 881, 893 (1983); *In re Dependency of A.S. v. Safouane*, 101 Wn.App. 60, 72 (2000).

When the undisputed facts reveal discrimination, as a matter of law, the court has authority to order that judgment be entered in favor of the plaintiff, without a retrial on the issue of liability. That is exactly the relief ordered in *Kimbro v. Atlantic Richfield* on facts analogous to those presented here. After finding that the defendant had imputed knowledge of the plaintiff’s migraine condition, the court found that the defendant’s conduct was a violation of the WLAD as a matter of law in that: 1) it

failed to engage in the accommodation process, and 2) terminated the plaintiff based upon migraine related absences. *Kimbro*, 889 F.2d at 875 and 882. The same relief was granted in *Sommer v. Department of Social and Health Services*. In that case, the defendant/employer's sole defense at trial was that it did not have sufficient notice of the plaintiff's disability. The jury found in favor of the employer and the court of appeal reversed. Holding that the defendant had sufficient notice to give rise to a duty to commence the accommodation process, the court vacated the verdict and, finding liability in favor of the plaintiff, ordered a new trial on damages only. *Sommer*, 104 Wn.App. at 163 and 175.

Here, the Matrix was the sole determining factor in the selection of employees for termination. RP (Dec. 9 Crook) 21:6-24: 19. The skills assessment was limited to performance displayed in the prior 12 months. RP (Dec. 9 Crook) 24:20-25, (Dec. 17 Fitzpatrick) 75:19-25, 142:8-22. It is uncontroverted that: 1) Willhite's was suffering from depression during the assessment period; 2) Willhite was on disability leave for three of the twelve months included in the assessment period; 3) the skills assessment was conducted eight weeks after Willhite's return from disability leave; 4) Willhite's depression manifested in cognitive deficits; and 5) Willhite was still receiving treatment at the time of the assessment.¹¹

¹¹ Farmers moved the court for an order establishing that Willhite's disability commenced on the first day of his leave. CP 862-63. The motion was denied. RP (Dec. 5) 56:9-61:16. Willhite remained on medication until mid-2013. RP (Dec. 11 Willhite)

It is also beyond reasonable debate that Willhite's depression compromised the skills measured by the Matrix. First, his cognitive deficits are documented in his medical records. Second, Douvia testified to her eye witness account of Willhite's descent into depression and described a "before and after" picture of man that was a shadow of his former self.¹² Douvia testified that Willhite used to be a fun, outgoing, boisterous guy. RP (Dec. 16 Douvia) 135:17-137:10, 186:9-12. With respect to the skills measured by the Matrix, Douvia had nothing but praise. She described Willhite as "an active leader" who regularly took the initiative. RP (Dec 16 Douvia) 179:11-180:11. She testified that communication was one of Willhite's particular strengths and that he had a great rapport with agents. RP (Dec 16 Douvia) 174:5-9, 222:25-223:8. She highly regarded his creativity, writing skills and overall work product. RP (Dec 16 Douvia) 173:18-174:2, 182: 15-25. Douvia's description of the "old Willhite" is consistent a history of exemplary performance reviews in which Willhite regularly "exceeded expectations" in virtually every category tested. RP (Dec. 12 Willhite) 230:3-232:19. App. "O."¹³

189:24-190:5.

¹² Douvia worked with Willhite before and after his depression. From 2004 to 2007, Willhite and Douvia were peers each holding the title of "life marketing manager." RP (Dec. 16 Douvia) 125:3-8128:11-23, 172:20-24. In 2007, both were promoted and Willhite began reporting directly to Douvia in 2008. RP (Dec. 16 Douvia) 133:22-24. Willhite continued to work for Douvia until he was transferred to work under Fitzpatrick in the fall of 2009. RP (Dec. 16 Douvia) 162:17-22.

¹³ The reviews excerpts in Appendix "O" are from reviews in the ten year period between 1995 and 2005. This is because reviews thereafter do not contain written comments regarding any skill set. However, the reviews between 2006 and 2008 were

Over time, Douvia saw all of these skills and character traits fade away. RP (Dec 16 Douvia) 135:25-138:9. By the time he reported to Fitzpatrick in the fall of 2009, Willhite was withdrawn, unengaged and had “shut himself off.” It appeared to Douvia that Willhite “just didn’t care anymore.” RP (Dec 16 Douvia) 136:23-138:9, 181:20-21. Fitzpatrick testified that, based upon the short amount of time that they worked together, he considered it a mystery how Willhite had remained at Farmers for 32 years. RP (Dec. 17 Fitzpatrick) 140:5-17.

Farmers does not dispute that the termination decision was based upon the Matrix. Rather, it relied on the lack of knowledge argument as a defense to the claim that the Matrix measured disability-related deficits. Because the lack of notice defense fails as a matter of law, and because the same evidence of discrimination would be presented on remand, a retrial on the issue of liability would be a waste of judicial resources.

E. ORDER OF SUMMARY JUDGMENT SHOULD BE REVERSED AND VACATED

In 2009, Farmers added a severance benefit to the Total Rewards

favorable. While Willhite did not receive a written review for 2006, he received a pay raise effective January 2007, based upon his 2006 performance. Ex. 80, p. 44. In March 2007, Willhite was promoted to Senior Marketing Consultant, resulting in 13% salary increase from his base salary in 2006. Exs. 160 and 80, pp. 44-45. Because the promotion was mid-year, Willhite did not receive a performance rating in 2007. Ex. 17, p. 179. However, he received a pay raise effective January 2008, based upon his 2007 performance. Ex. 80, p. 46. In 2008, Willhite received a “meets expectations” performance rating and performance based salary raise. Ex. 80, p. 47. There are no supervisor comments on Willhite’s 2008 review. As set forth herein, 2009 was the only year in which Willhite received a less than favorable review rating. No comments are included in the review regarding the basis for the rating.

employee benefit plan. In a memo to employees dated January 1, 2009, Farmers stated: “this new plan *ensures that affected Farmers employees are rewarded for the length of the services.*” CP 804. On the day that the layoffs were to be announced, the managers received a “talking points” memo that reiterated the foregoing benefit and stated that *all* departing employees would receive a severance package. Ex. 93.

At the time of his termination, Willhite was advised that, in order to receive his severance, he would have to release Farmers of all liability. Although Willhite refused to sign the release, Farmers paid the severance anyway. Three months later, Farmers contacted Willhite and asked for the return of the severance. CP 169-70. Willhite did not return the money. Farmers asserted a counterclaim for unjust enrichment. CP 410-11. On November 25, 2011, Judge Jean Rietschel granted Farmers’ motion for partial summary judgment on the unjust enrichment claim and ordered judgment entered in the amount of \$63,282.76. The court erred in granting the motion.

In order to establish a cause of action for unjust enrichment, it must be shown that the person allegedly enriched did not provide value for the benefit at issue. *Young v. Young*, 164 Wn.2d 477, 484 (2008). Here, the severance was, pursuant to Farmers own description, *an employee benefit*. Benefits are not “gifts,” but rather compensation under the law. *Flower v. TRA Industries*, 127 Wn.App. 13, 34 (2005); WPI 330.81. When

Farmers conditioned receipt upon signing a release, it did not lay the frame work for unjust enrichment but, rather, an adhesion contract. *Townsend v. Quadrant Corp.*, 153 Wn.App. 870,883-84 (2009). As such, the order of November 25, 2011 should be reversed and the principle amount of the severance should be deducted from any back pay awarded to Willhite on retrial.

F. THE COURT'S RULINGS ON DAMAGE INSTRUCTIONS AND EVIDENCE WERE ERROR

Because Willhite is requesting an order vacating the jury verdict and a retrial on damages, Willhite respectfully requests that this court address additional errors in connection with orders on damage evidence and jury instructions. *Gambini*, 486 F.3d at 1093.

1. Exclusion of Pension Damages

The court granted Farmers' mid-trial motion to preclude Willhite's testimony regarding his lost pension income on the grounds that Willhite was not qualified to testify to its calculation. This ruling constitutes reversible error.

An owner is qualified to testify as to the value of his own property, without qualifying as an expert. *Kammerer v. Western Gear Corp.*, 27 Wn.App. 512, 526 (1980)(owner entitled to testify to value of patents); *McInnis & Co. v. Western Tractor & Equip. Co.*, 67 Wn.2d 965, 968-69 (1966)(president of corporation can testify to value of tractor).

Farmers Pension Plan provides a basic “final average earnings” benefit. An employee can easily determine his or projected benefits under the plan with a simple calculation that is based upon the average salary in the last five years of employment, times years of service multiplied by a “break point amount” fixed annually by the plan administrator. The calculation does not depend on any market variables or economic forecasting. The plan booklet provides an illustration by which an employee can readily calculate his or her benefit. “U,” p. 6.

Moreover, even if special skills were required to calculate the benefit, Willhite’s experience renders him qualified. Willhite has a degree in accounting and is a chartered financial consultant. RP (Dec. 11 Willhite) 12:21-23, 14:15-166:1. He testified that he regularly used his accounting skills as part of his job. RP (Dec. 11 Willhite) 13:22-14:3, 15:7-11, 23:2-9. He further testified that he calculated his pension benefit many times over the years in connection with retirement planning. RP (Dec. 11 Willhite) 24:11-25:4.

2. Exclusion of Bonus and Profit Sharing

The court excluded testimony regarding lost bonuses/profit sharing on the grounds that Willhite did not have the requisite expertise. RP (Dec. 11 Willhite) 84:21- 91:17. This was error. Historical data on past bonuses supports projections for future payment of bonuses at the same historical rate of increase. *Tiegs v. Watts*, 135 Wn.2d 1, 18 (1998)(holding that lost

profits are generally established with profit history).

G. WILLHITE RESPECTFULLY REQUESTS AN AWARD OF COSTS AND ATTORNEYS' FEES PURUANT TO RAP 18.1

Should this court vacate the judgment and order judgment in favor of Willhite, Willhite is entitled to an award of costs and attorneys' fees pursuant to RCW 49.60.030(2) and RAP 18.1. *Fahn v. Civil Service Commission of Cowlitz County*, 95 Wn.2d 679, 685 (1981); *Carle*, 65 Wn.App. at 111 (awarding attorneys' fees and cost to plaintiff based upon determination that she "substantially" prevailed on appeal). The legislative mandate for a liberal construction of the WLAD extends to the attorneys' fees provision of the statute as it serves to further the purpose of eliminating discrimination through litigation of claims of aggrieved workers. *Holland*, 90 Wn.2d 393.

As set forth above, the case for attorneys' fees here is all the stronger given our state's policy to take all steps necessary to eradicate discrimination. Farmers' actions suggest that it need not heed that policy as it continues to search for loop holes and through which it can escape liability for conduct that this court has previously deemed to be illegal. For these reasons, all notions of justice mandate an attorney fee award through appeal.

V. CONCLUSION

Willhite respectfully requests the following relief:

- 1) An order vacating the verdict with respect to the claims for violation of the WLAD and WFLA and:
 - a) Entry of judgment in favor of Willhite;
- OR
- b) Remand for trial on the issue of liability with an order that the trial court instruct the jury with Willhite's proposed instructions 14, 15 and 16 and precluding the addition of a notice instruction;
- 2) Remand for trial on the issue of damages;
- 3) Reversal of the order of summary judgment; and
- 4) An award of attorneys' fees and costs pursuant to RAP 18.1 and RCW 49.60.030(2).

Dated: September 4, 2014

CREER LEGAL
LAW OFFICES OF BRIAN H. KRIKORIAN



By: ERICA A. KRIKORIAN, WSBA#28793
4100 - 194th Street SW, Suite 215
Lynnwood, WA 98036

Attorneys for Appellant Dennis Willhite

DECLARATION OF SERVICE

On September 5, 2014, I caused to be delivered via e-mail, per an existing agreement for e-mail service, a true and accurate copy of the attached document, to the following:

Jill D. Bowman
STOEL RIVES LLP
600 University Street, Suite 3600
Seattle, WA 98101-4109
Counsel for Respondent

The original of this document was also sent via legal messenger to be filed in the Court of Appeals.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

CREER LEGAL



Leona M. Phelan, Paralegal

APPENDIX

- A. Laura Don Report (CP 1011-12)
- B. Angie Bechtel Letter (CP 953-55)
- C. Liberty Mutual File excerpts (Ex. 18)
- D. Farmers Proposed Instructions (CP 1105-1140)
- E. Verdict (CP 1752-1760)
- F. Matrix Scores (Ex. 116)
- G. Plaintiff's proposed instructions (CP 1151-1195)
- H. Final Instructions (CP 1719-1751)
- I. Citations to Farmers' trial testimony regarding lack of knowledge
- J. Douvia and Fitzpatrick Deposition Excerpts (CP 972 and 976)
- K. Willhite First Amended Complaint filed in US District Court on March 29, 2013.
- L. Hogan/Fitzpatrick email of May 20, 2010 (Ex. 58)
- M. Reserved
- N. Performance reviews from 1995 to 2009 (Ex. 17)
- O. Excerpts of reviews from 1995 to 2005
- P. Restatement (Third) of Agency § 5.03 (2006)
- Q. Restatement (Second) of Agency § 272 (1958)
- R. *Erickson v. Fisher Communications, Inc.*, 150 Wn.App. 1003 (2009); and *Haley v. Kinko's Inc.*, 111 Wn.App. 1037 (2002)
- S. *Owens v. Farmers Insurance Exchange*, 94 Wn.App. 1045 (1999) ("*Owens One*") and 107 Wn.App 1039 (2001) ("*Owens Two*").
- T. Farmers ER 904 (Docket no. 59, supplemental designation pending)
- U. Pension Plan (Ex. 135)

- V. Willhite Declaration (Ex. 132)
- W. *Bustillo v. Southwest*, 33 BRBS 15 (1999)

Addendum to Memorandum of July 23, 2010

From: Laura Don, M.D. **Date:** August 10, 2010
To: Julie Giachetti, DCM
Re: Claimant: Dennis Willhite
Claim#: 2797583
DOB: Redacted
DOD: 5/18/10

Recommendations / Conclusions:

- The record review continues to support a diagnosis of Adjustment Disorder with Mixed Depression and Anxiety.
- It is my medical opinion that the information supports a finding of significant psychiatric impairment from 5/18/10-8/7/10, with symptoms that precluded the capacity to perform his usual life activities, including work-related activities.
- By 8/8/10, his condition was sufficiently stabilized as to no longer preclude his capacity to perform his usual range of life activities.

Historical:

Dennis Willhite is a 53-year-old male. He last worked in his capacity as a Senior Marketing Consultant with Farmers' Group, Inc. on 5/17/10.

Analysis:

The medical information reviewed for the report of 7/23/10 suggested anxiety and depression secondary to job stress. These records indicated that he did not have a suicidal plan or intent, cognitive impairment, panic attacks, agoraphobia (fear of leaving the home), excessive weight loss, or other symptoms typically associated with a severe mood or anxiety disorder. Behavioral health records were also not provided for review. There was no indication that his symptoms precluded his capacity to perform his usual range of life activities.

Since that time, additional medical records were provided, including a letter from the PCP, Dr. Kihichak and a FMSE from the psychologist, Dr. Wemhoff. In this form, dated 7/27/10, Dr. Wemhoff noted that the claimant has had two visits for anxiety and depression triggered by job stress and a "hostile" work environment. During these visits, the claimant exhibited symptoms associated with a significant mood and anxiety disorder including tangential thought processes (the inability to stay focused on the question asked), agitation, and suicidal thoughts. The presence of these symptoms suggests that his

LM 000083

Dennis Willhite
August 10, 2010
Page 2

capacity to focus, concentrate, and control his emotions was impaired, and these symptoms would be expected to preclude his capacity to perform his usual range of life activities. By 7/27/10, when this form was completed by Dr. Wemhoff, the claimant was noted to be able to "probably perform the basic requirements of his job description as long as he continues on medication" and work "as long as it is not in a hostile environment." This opinion is consistent with Dr. Kihichak's, which states that he was considerably stabilized by the visit of 8/8/10.

It is therefore my opinion that the additional clinical information suggests a more severe psychiatric disorder than previously suggested by the medical records initially provided. By 8/8/10, there was no indication of psychiatric symptoms that precluded his capacity to perform his usual range of life activities, including work-related activities.

Supporting Documentation:

1. Functional Mental Status Evaluation, Richard Wemhoff, PhD, 7/27/10

In weekly therapy for Generalized Anxiety Disorder. Return to work plan is unknown as he has only been seen twice recently, although he has been off work for 2 months. Presents as "quite anxious/depressed." Affect is constricted, blunted. He has experienced "extreme stress and burnout in a hostile (work) environment." Thought processes are tangential; motor activity is agitated. Suicidal thoughts without plan. He is unable to focus and concentrate. Ruminates about work situation. "He can probably perform the basic requirements of his job description as long as he continues on medication." Can perform his work related duties, "as long as it is not in a hostile environment."

2. Letter, Luba Kihichak, MD, PCP

The claimant was unable to return to work until 8/12/10, as his condition only improved by the last office visit of 8/8/10.

Electronically Signed

Laura Don, M.D.
Board Certified in Psychiatry,
American Board of Psychiatry and Neurology
Consulting Physician, Liberty Mutual

LM 000084



FARMERS

Farmers Insurance Exchange
2245 Sequoia Drive
Aurora, IL 60506

May 6, 2011

Washington State Human Rights Commission
Olympia Office
711 S Capitol Way, Ste. 402
Olympia, WA 98504-2409

RECEIVED

MAY 06 2011

Human Rights Commission

RE: Dennis Willhite v. Farmers New World Life Insurance Company
HRC Charge No: 17EA-0832-10-1

Dear Mr. Granbois:

This will serve as the response of Farmers New World Life Insurance Company (FNWL) to the Washington State Human Rights Commission charge filed by Dennis Willhite.

In his charge, Mr. Willhite alleges that he was discriminated against based on his age. FNWL has an enforced and well published policy that no one is to be unlawfully discriminated against for any reason, including age. (See Exhibit A) We have investigated Mr. Willhite's allegations and conclude that FIE has not violated the complainant's rights under the provisions of Title VII of the Civil Rights Act (Title VII), The Age Discrimination in Employment Act (ADEA), the Washington State Law Against Discrimination, or any other law. Rather, Mr. Willhite's job was eliminated as a result of an organizational restructure.

Summary of Relevant Facts

Mr. Willhite was hired as a Premium Accounting Clerk on July 11, 1978. After holding several other positions of varying responsibility with this employer, Mr. Willhite was promoted to the position of Senior Marketing Consultant on March 16, 2007. This was a career path promotion within the FNWL Marketing operation from his previous position of Life Marketing Manager. As a Senior Marketing Consultant, Mr. Willhite was responsible for directing and leading complex or high level projects from start to finish. The Senior Marketing Consultant is the senior most member of any project team and is expected to use their expertise to develop results-oriented solutions and complete project assignments to assist the organization achieve its growth, retention and profitability objectives.

In late 2010, the growth and retention trends at FNWL had become stagnant and were impacting the Company's profitability. The Company's top line growth, made up of new business sales and net investment income, was struggling due to the down economy, a declining customer base, and increased expenses. These factors, and their impact on the financial strength of the organization, brought about the need to restructure and eliminate a number of positions. The restructure plan called for the reduction of 84 positions throughout the FNWL organization. With the exception of those employees whose departments or positions were eliminated altogether, individuals were selected for reduction based on their business unit or function, position and a comparative evaluation of skills.

No. 8673 P. 2

000047
May 6, 2011 4:46PM

At FNWL, a key component in workforce restructures is a comparative evaluation of skills, utilizing the Selection Criteria Matrix ("matrix"). The matrix is an internal tool used by management for the selection of personnel for promotions, laterals, and reductions in workforce. In reduction in workforce situations, the matrix system determines from a pool of current employees who are best qualified for placement into remaining positions based on current skills and past performance. Managers and supervisors are required to use the matrix, as it is an unbiased method of identifying the most qualified individual based on objective, measurable criteria. Using the reduction in workforce matrix results, the management team compares all affected employees, and ranks them to one another. Additionally, under the matrix process, seniority and time on job are not factors considered. Selections are not made unilaterally. Rather, recommendations are reviewed and approved by the department head(s) and Human Resources.

In the Marketing business unit in which Mr. Willhite worked, six different positions were identified for reduction, including one position at the manager level. Mr. Willhite's position of Senior Marketing Consultant was one of the manager level positions considered for reduction, along with others. A matrix was used to determine which manager would be reduced based on a comparative evaluation of skills of all of the managers within each function and discipline throughout the Marketing business unit.

The matrix for the manager position evaluated each individual on the competencies most crucial for a manager level position, requiring expertise and skill in managing projects, business operations and people. The results of the matrix revealed that Mr. Willhite was the lowest ranked manager in the Marketing business unit, falling well below the others in the skills analysis.

Whereas most other managers were managing multiple projects at one time, Mr. Willhite was only able to work on one at a time and exhibited little initiative or drive to complete his projects. While it appeared that Mr. Willhite was moving his projects toward completion, he often missed critical timelines and milestones and ultimately some projects were not completed at all. Brian Fitzpatrick, Mr. Willhite's manager, determined that he was unable to assign Mr. Willhite the higher level projects he should have been able to handle based on his experience because Mr. Willhite had not produced the necessary results.

Therefore, based on the results of the matrix and the business need to reduce one manager level position, on November 10, 2010 Mr. Willhite was advised that his position was being eliminated. (See Exhibit B) His last work day was November 10, 2010 although he continued to be paid his regular salary through the end of the notice period which was January 10, 2011. Additionally, in accordance with Company's Severance Plan, Mr. Willhite was eligible for 26 weeks of severance pay and three months of outplacement service.

Conclusion

At no time was Mr. Willhite's age considered in any employment decisions made by FNWL. Rather, Mr. Willhite's employment with FNWL terminated because of a restructure which resulted in his position being eliminated.

FNWL submits that Mr. Willhite's speculation is not a sufficient basis on which to rest a discrimination case, and that the law provides that a company's business judgment should be respected absent substantially more proof of wrongdoing. We respectfully request dismissal of this charge without cause.

If you have any questions, please do not hesitate to contact me at (630) 907-3221.

Very truly yours,

Angie Bechtel

Angie Bechtel
Human Resources Consultant

3

No. 8673 P.

App. B-3

May 6. 2011 4:47PM 000048



Liberty Life Assurance of Boston
Leave Service Department
P.O. Box 8700
Dover, NH 03821-8700

5/20/2010

DENNIS WILLHITE
20348 NE 34TH CT
SAMMAMISH, WA 98074-0000

RE: Farmers Group, Inc. – Leave Acknowledgment with Short Term Disability
LEAVE ID#: 2797585

Dear Mr. WILLHITE,

We received your request for Short Term Disability (STD) on 5/20/2010, and will also be processing your leave due to your own health condition included in the Family & Medical Leave Act (FMLA). You have indicated that your STD, FMLA and/or State leave will begin on 5/18/2010.

You are eligible for leave under the FMLA and/or State leave program. You may be entitled to State leave which will count concurrently with your FMLA leave entitlement when appropriate, and both, if applicable, will run concurrent with your Short Term Disability claim.

Please provide any medical information that may have been requested from you as soon as possible to ensure a prompt decision regarding your Short Term Disability, FMLA and/or State specific leave. We will monitor the Short Term Disability claim for a determination. If there is no progress on your Short Term Disability claim within a reasonable timeframe, or you do not meet the certification requirements of your Short Term Disability claim, you will still have the opportunity to certify your FMLA absence. We will provide you with alternative forms to be completed for your FMLA and/or State specific leave.

Our records show, as of the date of this letter, prior to your leave begin date, you have a right under the Family & Medical Leave Act for up to 480.00 hours of unpaid leave in a rolling forward, 365 day period for your leave. Also, your health benefits must be maintained during any period of unpaid leave under the same conditions as if you continued to work and you must be reinstated to the same or an equivalent job with the same pay, benefits, term, and conditions of employment on your return from leave.

If you do not return to work following FMLA leave for a reason other than: (1) the continuation, recurrence or onset of a serious health condition which would entitle you to FMLA leave; or (2) other circumstances beyond your control, you may be required to reimburse your employer for the share of health insurance premiums paid on your behalf during your FMLA leave.

During the leave, you may elect to retain your Options Plus benefits provided that you continue to pay your portion of the premiums. If sick pay, vacation or personal day benefits are paid to you during the leave, premiums will continue to be withheld from your paycheck as long as

these benefits are available. If the leave is unpaid, the premium for the entire leave period may be withheld from the last paycheck before the leave begins or the premium must be paid during the length of leave on at least a monthly basis. Payments should be made payable to Farmers and mailed to the human resources department by the first of each month. Failure to make such payments may result in the cancellation of benefit(s).

Your employment state may offer a more generous job protection plan. For the state of WA, our records indicate that you qualify for 480.00 hours for your leave type. (0 hours indicates either State leave is not applicable or, if applicable, you have exhausted State leave entitlement.)

Enclosed you will find a copy of your Rights under the Family & Medical Leave Act.

Liberty will provide you with periodic updates on the status of your FMLA and/or State leave. Please follow all instructions to ensure timely administration of your leave.

Your employer has elected not to invoke the federal provision to exclude key employees from FMLA entitlements.

Information regarding health insurance and other benefit continuation while on FMLA and/or State leave will need to be discussed with your employer.

If the circumstances of your FMLA and/or State leave change, and you are able to return to work earlier than the date you may be approved for, you will be required to notify the Leave Services Team and your employer at least two business days prior to the date you intend to report to work. If you have any questions regarding your leave, please contact the Leave Services Team at 800-283-0823, or e-mail us at LEADSAdmin@libertymutual.com.

Sincerely,

Your Leave Services Team
Phone: 800-283-0823
Fax: 800-694-6312

COM01

Forms Attached:
FMLA Rights
Employee Responsibilities for STD

CC:
MICHELLE DOUVIA

Your Rights and Responsibilities Under the FAMILY AND MEDICAL LEAVE ACT

Basic Leave Entitlement

FMLA requires covered employers to provide up to 12 Weeks of unpaid, job protected leave to "eligible" employees for the following reasons:

- For incapacity due to pregnancy, prenatal medical care or child birth;
- To care for the employee's child after birth, or placement for adoption or foster care;
- To care for the employee's spouse, son or daughter, or parent, who has a serious health condition; or
- For a serious health condition that makes the employee unable to perform the employee's job

Military Family Leave Entitlement

Eligible employees with a spouse, son, daughter, or parent on active duty or call to active duty status in the National Guard or Reserves in support of a contingency operation may use their 12-week leave entitlement to address certain qualifying exigencies. Qualifying exigencies may include attending certain military events, arranging for alternative childcare, addressing certain financial and legal arrangements, attending certain counseling sessions, and attending post-deployment reintegration briefings.

FMLA also includes a special leave entitlement that permits eligible employees to take up to 26 weeks of leave to care for a covered servicemember during a single 12 month period. A covered servicemember is a current member of the Armed Forces, including a member of the National Guard or Reserves, who has a serious injury or illness incurred in the line of duty on active duty that may render the servicemember medically unfit to perform his or her duties for which the servicemember is undergoing medical treatment, recuperation, or therapy; or is in outpatient status; or is on the temporary disability retired list.

Job Benefits and Protection:

During FMLA leave, the employer must maintain the employee's health coverage under any "group health plan" on the same terms as if the employee had continued to work. Upon return from FMLA leave, most employees must be restored to their original or equivalent positions with equivalent pay, benefits, and other employment terms. Use of FMLA leave cannot result in the loss of any employment benefit that accrued prior to the start of an employee's leave.

Eligibility Requirements

Employees are eligible if they have worked for a covered employer for at least one year, for 1250 hours over the previous 12 months, and if at least 50 employees are employed by the employer within 75 miles.

Definition of Serious Health Condition

A serious health condition is an illness, injury, impairment, or physical or mental condition that involves either an overnight stay in a medical care facility, or continuing treatment by a health care provider for a condition that either prevents the employee from performing the functions of the employee's job, or prevents the qualified family member from participating in school or other daily activities.

Subject to certain conditions, the continuing treatment requirements may be met by a period of incapacity of more than 3 consecutive calendar days combined with at least two visits to a health care provider or one visit and a regimen of continuing treatment, or incapacity due to pregnancy, or incapacity due to a chronic condition. Other conditions may meet the definition of continuing treatment.

Use of Leave

An employee does not need to use this leave entitlement in one block. Leave can be taken intermittently or on a reduced leave schedule when medically necessary. Employees must make reasonable efforts to schedule leave for planned medical treatments so as not to unduly disrupt the employer's operations. Leave due to qualifying exigencies may also be taken on an intermittent basis.

Substitution of Paid leave for Unpaid Leave

Employees may choose or employers may require use of accrued paid leave while taking FMLA leave. In order to use paid leave for FMLA leave, employees must comply with the employer's normal paid leave policies.

Employee Responsibilities

Employees must provide 30 days advance notice of the need to take FMLA leave when the need is foreseeable. When 30 days notice is not possible, the employee must provide notice as soon as practicable and generally must comply with an employer's normal call-in procedures.

Employees must provide sufficient information for the employer to determine if the leave may qualify for FMLA protection and the anticipated timing and duration of the leave. Sufficient information may include that the employee is unable to perform job functions; the family member is unable to perform daily activities, the need for hospitalization or continuing treatment by a health care provider, or circumstances supporting the need for military family leave. Employees also must inform the employer if the requested leave is for a reason for which FMLA leave was previously taken or certified. Employees also may be required to provide a certification and periodic recertification supporting the need for leave.

Employer Responsibilities

Covered employers must inform employees requesting leave whether they are eligible under FMLA. If they are, the notice must specify any additional information required as well as the employee's rights and responsibilities. If they are not eligible, the employer must provide a reason for the ineligibility. Covered employers must inform employees if leave will be designated as FMLA-protected and the amount of leave counted against the employee's leave entitlement. If the employer determines that the leave is not FMLA-protected, the employer must notify the employee.

Unlawful Acts by Employers

FMLA makes it unlawful for any employer to:

- Interfere with, restrain, or deny the exercise of any right provided under FMLA;
- Discharge or discriminate against any person for opposing any practice made unlawful by FMLA or for involvement in any proceeding under or relating to FMLA.

Enforcement

An employee may file a complaint with the U.S. Department of Labor or may bring a private lawsuit against an employer. FMLA does not affect any Federal or State law prohibiting discrimination, or supersede any State or local law or collective bargaining agreement which provides greater family or medical leave rights.

For additional information:

1-866-4US-WAGE (1-866-487-9243) TTY: 1-877-889-5627
WWW.WAGEHOUR.DOL.GOV

WH Publication 1420 Revised 2009

Employee Responsibilities for Short Term Disability (STD) and FMLA

6/2009

The following provides instructions, guidelines and important information you need to know if you are applying for Short Term Disability (STD) or an FMLA absence. Please keep this document to refer to. If you have question you may contact your manager or local HR group.

Event	Action
<p>Qualifying Event Occurs</p> <ul style="list-style-type: none"> • Due to injury or illness you will be disabled for more than 7 continuous calendar days. • Employees own medical condition, less than 5 days • To care for a child, parent or spouse who has a serious health condition • The birth of a child for the adoption of a minor child • The placement of a foster care child in your home. 	<ul style="list-style-type: none"> • Notify your manager of Absence. • Supervisor to complete Requesting Leave of Absence form, SRN#27-0234 and fax to 913-227-8929 • Call Liberty Mutual directly at 1-800-793-2797 or go to the website at www.MyLibertyClaim.com. The Claimant Services ID is: Farmers. • Leave a signed authorization card with your treating physician. • STD will be paid if approved by Liberty Mutual. • Receive FMLA package from Liberty Mutual and return the information in the time frame (15-day deadline for forms to be received by Liberty Mutual). • Provide periodic updates to your manager on your return to work status.
<p>California Employees Only</p>	<ul style="list-style-type: none"> • File for CA State Disability Insurance (SDI). • Contact EDD at 1-800-480-3287 or online at www.edd.ca.gov • STD is offset by SDI and will be withheld from your pay.
<p>Paid Time Off (PTO)</p> <ul style="list-style-type: none"> • 5 PTO days will be used for the first week of disability. • PTO will be used for any unpaid absence, including FMLA and bonding, except a reserve of 5 PTO days. 	<ul style="list-style-type: none"> • Payroll will deduct 5 PTO days from your pool of days. • PTOPal will be updated to reflect the deduction. • Unpaid absence, including FMLA and bonding, employee may request the final 5 PTO days if desired.
<p>Return to work</p>	<ul style="list-style-type: none"> • Advise manager a week in advance. • If you have questions about your return to work contact your Human Resources group.
<p>Your position has been filled during your absence and there is not a similar position available when you are released to return to work.</p> <ul style="list-style-type: none"> • If your job has been filled you will be placed on a 30—day unpaid personal leave of absence. 	<ul style="list-style-type: none"> • In accordance with FMLA, and if business necessitates, the Company has the right to fill your position. • Contact your Human Resources group to determine if there are any open positions for which you qualify. • Employment ends if no position is found during the 30 day period.
<p>If absence exceeds beyond 26 weeks</p>	<ul style="list-style-type: none"> • You will be contacted by Liberty Mutual regarding eligibility for Long Term Disability benefits. • Provide requested information.



Liberty Life Assurance of Boston
Leave Service Department
P.O. Box 8700
Dover, NH 03821-8700

5/27/2010

DENNIS WILLHITE
20348 NE 34TH CT
SAMMAMISH, WA 98074-0000

RE: Farmers Group, Inc. Leave Approval with Short Term Disability
LEAVE ID#: 2797585

Dear Mr. WILLHITE,

We received your request for leave included in your Family & Medical Leave Act (FMLA) on 5/20/2010. We have approved your continuous leave due to your own serious health condition, to begin on 5/18/2010.

The Family & Medical Leave Act provides you 12 weeks of job-protection for an unpaid absence in a 12-month period. Prior to your leave begin date shown above, you have 480.00 hours available for leave in the current rolling forward, 365 day period for your leave.

Your employment state may offer a more generous job protection plan. For the state of WA, our records indicate that you qualify for 480.00 hours for your leave type. (0 hours indicates either State leave is not applicable or, if applicable, you have exhausted State leave entitlement.)

Your FMLA and/or State leave will count concurrently with your Short Term Disability claim. We will continue to monitor your Short Term Disability claim for the ongoing status, and will update your FMLA leave accordingly.

Liberty will periodically update you on the status of your FMLA and/or State leave. Please follow all instructions as indicated in the acknowledgement letter sent to you earlier, to ensure timely administration of your FMLA and/or State leave.

Please contact your employer within two business days prior to your leave end date to schedule your return to work and ensure compliance with your employer's return to work policy. Failure to return to work on the date indicated may be considered voluntary resignation of your employment.

If the circumstances of your FMLA and/or State leave change:

1. If you are able to return to work earlier than anticipated, you will be required to notify the Leave Services Team and your employer at least two business days prior to the date you intend to report to work.
2. If you have need for additional leave, you will need to contact the Leave Services Team and your employer to make arrangements for an extension of your leave.

3. If your leave is for your own serious health condition relating to the birth of your child and you wish to extend the leave for newborn bonding, please contact the Leave Services Team. If you decide to return to work immediately following the childbirth recovery and would like to later take available leave for newborn bonding (within 12 months of the date of birth), please contact the Leave Services Team.

If you have any questions regarding your leave, please contact the Leave Services Team at 800-283-0823, or e-mail us at LEADSAdmin@libertymutual.com.

Sincerely,

Your Leave Services Team
Phone: 800-283-0823
Fax: 800-694-6312

COM13

CC:
BRIAN FITZPATRICK



Liberty Life Assurance of Boston
Leave Service Department
P.O. Box 8700
Dover, NH 03821-8700

8/10/2010

DENNIS WILLHITE
20348 NE 34TH COURT
SAMMAMISH, WA 98074-0000

RE: Farmers Group, Inc. Short Term Disability Closed Leave
LEAVE ID#: 2797585

Dear Mr. WILLHITE,

We have been advised that your Short Term Disability claim has been closed due to your return to work.

As indicated in our earlier letter to you, your FMLA and/or State Leave runs concurrent with your Short Term Disability claim.

Your FMLA and/or State Leave began on 5/18/2010 and was approved through 8/8/2010. Your leave was closed because your Disability claim indicates you returned to work.

As of 8/8/2010, our records show you have 8.00 hours of FMLA time remaining.

Your employment state may offer a more generous job protection plan. For the state of WA, our records indicate that you qualify for 8.00 hours for your leave type. (0 hours indicates either State leave is not applicable or, if applicable, you have exhausted State leave entitlement.)

If you have any questions please contact the Leave Services Team at 800-283-0823, or e-mail us at LEADSAdmin@libertymutual.com. If you would like us to reconsider this closure decision, please send in a request no later than 15 days from the date of this letter. This request should include the appropriate documentation or additional information to support your FMLA and/or State leave. You can fax this information to us at (800) 694-6312, or mail to us at the address listed above.

Sincerely,

Your Leave Services Team
Phone: 800-283-0823
Fax: 800-694-6312

COM15

CC:
BRIAN FITZPATRICK
Allyson Vaughn

LM 000011

Employee Detail

Find Clear Save New Delete Last Modified Print Help Change Customer Chg Sub Loc

Add Claim Add Leave Admin Notes Assign Benefits Claim Class Contact Info Dependents Direct Deposit Document Eligibility Emp History Fed Tax Opt Leave Life Claim Live Correspondence Product Refund Tests Tax YTD

Customer Name FARMERS GROUP INC ID 06 004094 Sub Name PARTNERSHIP SERVICES-FNWL Sub Code 00P5 Loc Name PARTNERSHIP SERVICES-FNWL Loc Code 00NOSTAT

SSN XXX-XX-3073 Last Name WILLHITE First Name DENNIS Middle Initial H Suffix Employee Job Information/Work Location

Employee Information

Employee Status Approved Use Legal Guardian For Payments Date of Birth 02/16/1957 Gender Male Date of Death Marital Status Married Spouse DOB # of Child Dependents 0 Direct Deposit Status

Employee Contact Information

Address 20348 NE 34TH COURT Phone (425) 738-3068 Type Primary City SAMMAMISH State/Prov WA Zip 98074-0000 Domicile State WA Leave Correspondence Distribution Type Mail Country UNITED STATES Fax #

E-Mail

Claim Correspondence

Primary Recipient Claimant CC Recipients Claimant Alternate (Self) Alternate (Not Self) Language Type English Distribution Type Mail Legal Guardian Attorney Additional

Leave Detail

Find Clear Save New Delete Last Modified Print Help Amend Extend Convert Chg Sub Loc
 Add Note Associated Leaves Contact Info Coord Claim Note Document Eligibility Lve Adtl Info Lve Correspondence Lve Entitlement Lve History Lve Program Lve Time Lve Work Sched Note Note Rpt Tasks

Employee
 First Name DENNIS MI H
 Last Name WILLHITE
 SSN XXX-XX-3073 DOB 02/18/1957
Customer
 Name FARMERS GROUP INC ID 06 004094
 Sub Name PARTNERSHIP SERVICES-FNWL Sub Code 00P5
 Loc Name PARTNERSHIP SERVICES-FNWL Loc Code 00NOSTAT

Leave ID 2797585 Previous Leave ID 0 Submitted Via INTR Leave Sub Code 00P5 Leave Loc Code 00NOSTAT Enable Save

Leave Details
 Status Closed System Task ACK
 Status Reason Return To Regular Work Schedule
 Leave Type Own Disability Leave Reason Absence Plus Treatment
 Leave Category Continuous Int Freq Amt 0.0 Mode Period
 Coordinated? Y Claim Synch with Claim 2797583
 Takeover? N Prior Carrier ID
 Hospitalized? N WC Ctn Num 0
 Assign To: COLEMAN LORI

Related Dates
 Begin Date 05/18/2010 End Date 08/08/2010
 Request From Date 05/18/2010 Request Thru Date 08/08/2010
 Overridden
 Certified From Date 05/18/2010 Certified Thru Date 08/08/2010
 Received Date 05/20/2010 Determination Date 05/27/2010
 Ext Requested Date
 Last Worked Date 05/17/2010 Actual RTW Date
 Closed Date 08/10/2010 Expected RTW Date

Program Entitlement

State	Code	Begin Date	End Date
US	USFMLA	05/18/2010	08/06/2010
WA	WAWFL	05/18/2010	08/06/2010

Leave Entitlement Report

Find Clear Save New Delete Last Modified Print Help Time Applied

Add Note Document Employee Leave Lve Addtl Info Lve Correspondence Lve Program Lve Time Lve Work Sched Note

SSN XXX-XX-3073 Employee Name WILLHITE, DENNIS
 Leave ID 2797585 Customer ID 06 004094 Name FARMERS GROUP INC.

Leave Information
 Type Own Disability Reason Absence Plus Treatment Category Continuous Begin Date 05/18/2010 End Date 08/08/2010
 Takeover? N

Entitlement Calculation
 Entitlement As Of 08/08/2010 Calculate Entitlement Reported On 07/15/2013 10:52 AM Print Report Options
 Print Directly Save to Disk

Program Entitlement:

Leave Program Code	Leave Hours Used	Leave Hours Remaining	Calculation Type	Tracking From	Tracking Thru	Benefit Remaining
USFMLA	472.00	08.00	Rolling Forward	05/18/2010	05/17/2011	0.20 Weeks
WAWFLL	472.00	08.00	Rolling Forward	05/18/2010	05/17/2011	0.20 Weeks

n0167872

From: Messner, Lynda
Sent: Friday, May 21, 2010 3:37:26 PM
To: Garrett, Lindsey
Subject: FW: FW: [SEND SECURE]New Disability Claim 2797583

Lynda Messner
Liberty Life Assurance Company of Boston
Insurance Assistant Disability Claims-Phoenix

-----Original Message-----

From: mary_mcgee@farmersinsurance.com [mailto:mary_mcgee@farmersinsurance.com]
Sent: Friday, May 21, 2010 12:17 PM
To: Messner, Lynda
Subject: RE: FW: [SEND SECURE]New Disability Claim 2797583

Lynda - yes May 17, 2010 was the last day Dennis Willhite worked in our office.

Mary McGee
Sr. Ex. Assistant
Life Marketing

-----Original Message:

FROM: Lynda.Messner@LibertyMutual.com
TO: "mary_mcgee@farmersinsurance.com"
<mary_mcgee@farmersinsurance.com>
CC: "Garrett, Lindsey"
<Lindsey.Garrett@LibertyMutual.com>
DATE: May 20, 2010 6:45:41 PM EDT
SUBJECT: FW: [SEND SECURE]New Disability Claim 2797583

From: Messner, Lynda
Sent: Thursday, May 20, 2010 2:40 PM
To: 'michelle.douvia@farmersinsurance.com'
Cc: Garrett, Lindsey
Subject: [SEND SECURE]New Disability Claim 2797583

Hello;

Could you please confirm the date last worked for the
employee listed
below?

05/25/2010 16:54 FAX 425 898 8825

EVERGREEN SAMMAMISH

001/002

LMG

5/24/2010 6:02:43 PM PAGE 4/005 FAX SERVER

FAX SERVER



Liberty Mutual.

ATTENDING PHYSICIAN'S STATEMENT

This form is to be completed without expense to Liberty Mutual and returned along with your original claim for benefits or by the date requested by the Liberty Mutual Claims Dept.

Group Market Disability Claims
Liberty Life Assurance Company of Boston
P.O. Box 7209
London, KY 40742-7209
Phone No.: (800) 320-7585
Secure Fax No.: (603) 422-0119

Return To Lindsey Garrett

EMPLOYEE/CLAIMANT NAME: DENNIS WILLHITE

CLAIM NO: 2797583

S.S. NO: _____

EMPLOYER/SPONSOR: FARMERS GROUP INC.

DATE OF BIRTH: 2/16/1957

AUTHORIZATION TO OBTAIN AND RELEASE INFORMATION

I authorize any licensed physician, medical provider, hospital, medical facility, HMO, pharmacy, government agency, including the Social Security Administration and Veterans Administration, insurance or reinsurance company, credit or consumer reporting agency, financial/institutional institutions and any current or former employer to release any and all medical information with respect to my physical or mental condition and/or treatment of me, including confidential information regarding AIDS/HIV infection, communicable diseases, alcohol and substance abuse, mental health and any non-medical information to the particular Company in the Liberty Mutual Group of companies to which I am submitting a claim, or to its legal representative, or to the Plan Sponsor (if Self Insured Plan), or to persons or other organizations providing claims management services.

I understand the Company or Plan Sponsor will use the information obtained under this Authorization or directly from me to determine eligibility for insurance benefits, which may include assessing ongoing treatment. Any information obtained will not be released to any person or organizations EXCEPT to the Plan Sponsor, reinsuring companies, other companies in the Liberty Mutual Group of companies to which I am submitting a claim, Employee Assistance Programs (EAP) or other disease management or assistance programs providing services to the Plan Sponsor and/or to the Company, persons or other organizations providing claims management and claim advisory services to the Plan Sponsor and/or to the Company, the Group Policyholder or its agents/vendors for purposes of auditing the Company's administration of claims under the policy and/or assessing statistical claim data related to its benefit programs, and persons or organizations providing medical treatment or services in connection with my claim, or as may be otherwise permitted or required by law.

If I receive a disability benefit greater than that which I should have been paid, I understand that the Company has the right to recover such overpayment from me, including the right to reduce future disability benefits, if any.

I understand that any person who knowingly, and with intent to injure, defraud, or deceive the Company and/or Plan Sponsor, files a statement or claim containing any false, incomplete, or misleading information may be guilty of a criminal act punishable under law.

I know that I may request a copy of this Authorization. I agree that a photographic copy of this Authorization shall be as valid as the original. This Authorization shall become effective on the date appearing next to my signature below. I understand that this Authorization shall be valid for two years from the date appearing below with my signature and that I have the right to revoke this Authorization at any time by written notification to the Company in the Liberty Mutual group of companies to which I submit a claim and/or the Plan Sponsor.

5/25/10
Date

[Signature]
Claimant's Signature (or Authorized Representative)

PHYSICIAN'S INSTRUCTIONS

PLEASE NOTE: IF ANY PORTION OF THIS FORM IS NOT COMPLETED, WE WILL BE REQUIRED TO REQUEST THE INFORMATION WHICH WILL RESULT IN A DELAY IN DETERMINATION OF YOUR PATIENT'S DISABILITY BENEFITS.

THE CLINICAL INFORMATION, IN COMBINATION WITH THE PHYSICAL FACTORS OF YOUR PATIENT'S JOB AND THE CONTRACTUAL PROVISIONS UNDER WHICH HIS/HE IS COVERED, WILL BE USED TO ESTABLISH THE MOST APPROPRIATE WORK ABSENCE DURATION.

1. DIAGNOSIS
 Primary: Depression ICD9 _____
 Secondary: Anxiety disorder ICD9 _____
 ICD9 _____
 Has patient ever had the same or a similar condition? Yes yes No _____
 If "Yes", state when and describe. 2005 -> 2006 - with complete recovery

What is your prognosis? fair to good

For Pregnancy:
 EDC _____ Date of Delivery _____ Type _____

2. DATES OF TREATMENT
 (a) Date of First Visit 5/19/10 (mo/day/yr)
 (b) Date of Last Visit 5/19/10 (mo/day/yr)
 (c) Frequency of Visits Weekly Monthly _____ Other (Specify) _____
 (d) Date of First Treatment _____ (mo/day/yr)
 (e) Date Symptoms First Appeared / Accident Occurred _____ (mo/day/yr)
 (f) Date Patient Advised to Cease Work 5/25/10
 (g) Estimated Return to Work Date 7/6/10

05/25/2010 16:56 FAX 425 898 8825
LMG

EVERGREEN SAMMAMISH

002/002

5/24/2010 6:02:43 PM PAGE 6/005 Fax Server

3. Please describe in detail your PROPOSED TREATMENT PLAN. Please list all medications the patient is taking for this condition. Include your prognosis as a result of this treatment plan. IDENTIFY ANY RESTRICTIONS you have imposed on your patient at this time.

1) - Medication
2) - Counseling therapy

4. PHYSICAL IMPAIRMENT

Class 1 - No limitation of functional capacity; capable of heavy work. No physical impairment
 Class 2 - Medium manual activity.
 Class 3 - Slight limitation of functional capacity; capable of light work.
 Class 4 - Moderate limitation of functional capacity; capable of clerical/administrative activity.
 Class 5 - Severe limitation of functional capacity; incapable of minimum activity.

REMARKS:
- Patient, -

5. MENTAL/NERVOUS IMPAIRMENT

Class 1 - Patient is able to function under stress and engage in interpersonal relations (no limitations).
 Class 2 - Patient is able to function in most stressful situations and engage in most interpersonal relations (slight limitations).
 Class 3 - Patient is able to engage in only limited stressful situations or engage in interpersonal relations (marked limitations).
 Class 4 - Patient is unable to engage in stressful situations or engage interpersonal relations (marked limitations).
 Class 5 - Patient has significant loss of psychological, physiological, personal, and social adjustment (severe limitations).

REMARKS:
Patient suffers from acute anxiety and depression due to stress and adjustment, reaction

6. CARDIAC IMPAIRMENT (if applicable) None Secondarily to work conditions

Functional Capacity: Class 1: No Limitation Class 2: Slight Limitation
 (per American Heart Assn) Class 3: Marked Limitation Class 4: Complete Limitation

Blood Pressure (last visit): _____
 (systolic/diastolic)

7. Date of Next Scheduled Visit

Are you still treating the patient? Yes No
 If patient has been referred to another physician, please indicate the name of physician, address, telephone number, and reason for referral.

Was patient referred to you by another physician? Yes No

8. Has patient been hospital confined? Yes No

Dates of Confinement: From _____ to _____
 Was surgery performed? Yes No If "Yes", please list the procedure(s) performed:
 CPT Code: _____ Date Performed: _____
 Name and Address of Hospital: _____

9. After you have completed this form, please attach copies of the following materials:

- Office notes for the period of treatment or for the last two years
- Test Results showing medical evidence
- Hospital discharge summary (if applicable)
- Consulting physician's reports (if applicable)

10. REMARKS: I am recommending a medical leave of absence due to acute anxiety + depression as a result of stressful work environment.

Luba Kihichak, MD

22850 NE 8th St, Suite 103
 Sammamish, WA 98074
 425 898 0305 TAX ID #91-0844563

Degree/Specialty _____ SS No. or Tax ID No. _____
 Telephone No. _____ Fax No. _____
 Signature _____ Date _____

Luba Kihichak, MD
 DP 402 Rev. 22850 NE 8th St., Suite 103
 Sammamish, WA 98074
 425 898 0305 TAX ID #91-0844563

Patient Chart

WILLHITE, DENNIS

86021

Sex: M

Age: 53

DOB: 02/16/1957

Date Printed: 07/12/10

Progress Notes

05/19/10 : 02:09pm

Depression anxiety

Providers: lk

Luba Kihichak, MD - EMG Sammamish

Chief Complaint(s): Discuss stress.

Weight: 200 lbs lbs

Health Maintenance:Weight X

Blood Pressure: 110 / 72

Health Maintenance:Blood Pressure X

Pulse: 68

Temperature: 98 F °F

Respiration Rate: 12

Current Medications:

Allergies:

NKDA

Pain Assessment: the patient reports no current pain.

Patient Ambulatory: yes

Mask worn by patient: not applicable

Mask worn by staff: not applicable

Intake done by: - EMG Sammamish

*****End MA Intake Section*****

History of Present Illness

DENNIS WILLHITE is a 53 yr old male , who presents for evaluation of the following:

Problem 1: S-Anxiety:and Depression.

History of present illness:

Duration of anxiety: 18 month(s)

Frequency of anxiety: constant

Anxiety situational?: yes

Panic attacks?: no

Flashbacks or nightmares?: no

Obsessive thoughts (persistent and unwanted)?: yes

Compulsive behaviors (cx. hand washing, lock checking)?: no

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07/12/2010 15:25 FAX 425 898 8825

EVERGREEN SAMMAMISH

016/032

Patient Chart

WILLHITE, DENNIS

86021 Sex: M Age: 53 DOB: 02/16/1957
Date Printed: 07/12/10

Depression?: yes

Medications tried for anxiety: no

Review of systems:

Chest pain/tightness?: yes
Dyspnea (shortness of breath)?: no
Heart palpitations?: no
Diaphoresis (sweating)?: no

Major Problems

TOBACCO USE (NO) No current tobacco use

Current Medications

Allergies

NKDA

Past Medical Problems: none

Past Surgery: none

Current Medications (include nutritional/herbal supplements): none

Medication Reactions/Allergies/Intolerances: none

Immunizations: last Td probably over 10 years

Past Infections: Yes

Chickenpox: yes
Tuberculosis: no
Rheumatic fever: no
Hepatitis: no
Pneumonia: no
Pelvic Infection: no
Other: measles in his childhood

Past Exams: Yes

Eye Exam (last): 2007, wears glasses
PSA (last): no
Cardiac Stress Test (last): no
Stool for blood (last): yes
Sigmoidoscopy/Colonoscopy (last): no
Other: sees dentist regularly

Marital Status: Married.

Lives with: family

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Patient Chart

WILLHITE, DENNIS

86021

Sex: M

Age: 53

DOB: 02/16/1957

Date Printed: 07/12/10

Children: sons, age(s) 18 , daughters, age(s) 21, 15

Alcohol: yes, has About 2 a week

Smoking: non-smoker

Caffeine intake: two or less caffeinated beverages per day

Illicit drugs: no

Occupation: employed full-time manager

Occupational exposure to respiratory irritants: no

Exercise: regular (4 x a week or more) aerobic activity

Nutrition: moderate sugar, sodium, saturated fat, and cholesterol intake, trying to limit calories to achieve or maintain ideal body weight

Sexual history: satisfied with sexual function

Contraception: wife on OCPs

Pets: no

Review of Systems

Constitutional: as above

Cardiovascular: negative

Respiratory: negative

Gastrointestinal: negative

Psychiatric: as above

Objective

Bp: 110/72, Pulse: 68

Temperature: 98 F, Weight: 200 lbs

Respirations: 12

Body Mass Index: 28.41 kg/m2

Height: 6'1" on 06/20/2008 (Date at left also applies to BMI above)

General: Well appearing, nourished in no distress.

Heart: regular rate and rhythm, no murmur or gallop

Lungs: Clear to auscultation. No wheezes, rales, or rhonchi

Abdomen: abdomen soft, nondistended with bowel sounds nl, no organomegaly or masses, no tenderness or hernia

Oriented to: person place time situation

Speech: normal

Recent memory: intact

Remote memory: intact

Affect: anxious depressed

Intellectual functioning: appropriate

Current Suicidal or Homicidal Ideation: no

Associations: congruent

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07/12/2010 15:25 FAX 425 898 8825

EVERGREEN SAMMAMISH

018/032

Patient Chart

WILLHITE, DENNIS

86021

Sex: M

Age: 53

Date Printed: 07/12/10

DOB: 02/16/1957

Diagnostic Testing Results

Assessment

DIAGNOSIS:
anxiety depression.

Plan

zanax citalopram referral to Emmaus counseling

Orders Made:

Contact clinic ASAP if discomfort increases
Go to Emergency Room for severe symptoms or after hours

Visit time/counseling/coordination of care: Total face to face visit time = 30 minutes out of which 30 minutes were spent in counseling and coordination of care

Rx: XANAX 0.25MG 1 TAB three times daily for 10 days, 30TAB, Ref: 0
Rx: CITALOPRAM HYDROBROMIDE 20MG 1 TAB QD for 30 days, 30TAB, Ref: 3

SIGNED BY LUBA KIHICHAK, MD (LK) 05/23/2010 09:50PM

Liberty Mutual Consulting Physician Referral Consults - Claim

Consulting Physician: Don, Laura		
Office: 0913		Claim #: 2797583
Claimant Name: DENNIS H WILLHITE		Document Locations <input checked="" type="checkbox"/> Document List <input type="checkbox"/> Correspondence <input type="checkbox"/> Paper File
Date of Birth: 2/16/1957		
Date of Disability: 5/18/2010	Claim Status: AP	Date Sent: 7/20/2010
Claimant SSN: ***-**-3073	Date Benefits Began: 5/25/2010	
Product Type: STD	Paid Through: 7/5/2010	
Disability Level: Own Occupation		
Policyholder/Self-Insured Plan Holder: FARMERS GROUP INC.		
Referred By: GIACHETTI, JULIE 913 8*734-1461		
Assigned Nurse Case Manager:		
Diagnosis: 296.2 DEPRESSION, MAJOR, 293.84 ANXIETY DISORDER IN CONDI		

Questions or Issues for Physician: (Note - If a physician has viewed this claim in the past please detail the physician and the outcome)

Claim's first consult. Claim approved thru 7/5/10 based on ee's hx of depression w/anxiety which is currently aggravated by work stress, to allow time for new meds to take effect, R&Ls to avoid stressful situations, ERTW 7/6/10, MDA guidelines show 14/28/56. EE tx plan is counseling 4 sessions, one per week, first session on 7/19/10. Updated meds show EE is improving, ERTW 8/12/2010 Is continued psychiatric impairment supported? If so, what is a reasonable duration?

JUL 19 2010 12:18 PM FR LIBERTY MUTUAL 502 906 8824 TO 14238878300

FUNCTIONAL MENTAL STATUS EVALUATION



Liberty Mutual.

Group Market Disability Claims
Liberty Life Assurance Company of Boston
P.O. Box 7209
London, KY 40742-7209
Phone No.: (800) 320-7585
Secure Fax No.: (603) 422-0119

Return To: Julie Giachetti

page 1 of 3

EMPLOYEE/CLAIMANT NAME: <u>DENNIS WILLHITE</u>	S.S. NO: _____
CLAIM NO: <u>2797583</u>	DATE OF BIRTH: <u>2/16/1957</u>
EMPLOYER/SPONSOR: <u>FARMERS GROUP INC.</u>	

TO BE COMPLETED BY PHYSICIAN:

Please provide a complete description of your patient's current Mental Status Exam in the following areas. Also, if your patient will be out of work, and is expected to be significantly impaired for longer than 4 weeks, please attach a copy of your clinical progress notes and a copy of the treatment plan that is sent to the medical insurance company.

GENERAL APPEARANCE: (physical characteristics/grooming, etc.)

Well groomed.

EMOTIONAL STATE: (mood and affect)

Presents himself as quite anxious/depressed. Affect is constricted, blunted.

EXPERIENCES: (describe hallucinations/delusions)

No hallucinations/delusions. Has experienced extreme stress + burnout in a hostile environment at his place of work.

SENSORIUM: (level of alertness, patient's orientation)

Thought processes are tangential; motor activity is agitated.

MEMORY: (Define status and what testing determines impairment)

Immediate: _____

Short Term: _____

Long Term: _____

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Functional Mental Status Evaluation
page 3 of 3

How is work readiness being measured? How will you include return to work in the short term goals of the treatment plan?

Have only seen this client 2x's recently, d/tto her's been off work for 2 months - so, unknown.

Goal: _____ Success Indicator: _____ Timeline: _____

Diagnosis (DSM IV)

Axis I 300.02
Axis II _____
Axis III _____
Axis IV Occupational
Axis V 50

Current GAF 50 Past Year GAF ?

If psychotherapy is indicated, what is the modality, frequency, name of provider and phone number?

1x/week Richard Wemhoff - rational/emotive
425-869-2644

List all current Medications:

Alprazolam Dosage: .25 Frequency: _____
Citalopram Dosage: 20 Frequency: _____
Dosage: _____ Frequency: _____
Dosage: _____ Frequency: _____

Comments:

Examiner's Name (Please print)	Title/Specialty	Tax ID#	Telephone No.	Fax No.
Richard Wemhoff	Psychology		425-869-2644	425-867-0930
Signature required:	Richard Wemhoff		Date:	7/27/10

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Functional Mental Status Evaluation
page 2 of 3

COGNITION: (Define status and what testing determines impairment)

Thought processes are intact.

JUDGMENT AND INSIGHT: (What evidence supports impairment?)

Intact.

RISK BEHAVIORS:

Suicidal thoughts, plans, actions

Has had suicidal thoughts, no plan.

Homicidal thoughts, plans, actions

None

SUBSTANCE ABUSE: (abuse, dependency)

None

In what way do the above symptoms interfere with the person's ability to function in a work setting?

Unable to focus + concentrate - continues to ruminate re: his work situation.

What functional abilities are still retained?

Memory is intact.

What job tasks can this person perform?

He can probably perform the basic requirements of his job description as long as he continues on medication.

What kind of work settings can the patient perform in, at this time, despite the limitations above?

His job description, as long as it is not a hostile environment.



Group Market Disability Claims
Liberty Life Assurance Company of Boston
P.O. Box 7209
London, KY 40742-7209
Phone No.: (800) 320-7585
Secure Fax No.: (603) 422-0119

May 24, 2010

Dr. Luba Kihichak
22850 Ne 8th Street Suite 103
Sammamish, WA 98074

RE: Short Term Disability Benefits
Patient: Dennis Willhite
DOB: February 16, 1957
Claim Number: 2797583

Dear Dr. Kihichak:

We are the disability benefits carrier for your patient, Dennis Willhite, and are requesting specific medical information in order to approve Mr. Willhite's disability benefits. Please provide the following:

- A completed Attending Physician's Statement (attached)
- All treatment notes, diagnostic test results and procedure reports from May 2010 to the present.

Please fax the information back to my attention at 603-422-0119 as soon as possible but no later than June 7, 2010.

Although HIPAA does not apply to disability insurance carriers, we understand your responsibilities under HIPAA as a health care provider, and our associated responsibility of ensuring this information is protected against deliberate or inadvertent misuse or disclosure.

As the insurance carrier providing employer sponsored Short Term Disability Benefits coverage to your patient, Mr. Willhite has provided your office with a HIPAA compliant authorization signed by him allowing the release of information to our company. This authorization specifically allows you to release medical information to us and is valid for two years from the date of Mr. Willhite's signature. If you have any questions, please contact me directly.

Sincerely,

Lindsey Garrett
Disability Claims Case Manager
Phone No.: (800) 320-7585 Ext. 41680
Secure Fax No.: (603) 422-0119



Liberty Mutual

ATTENDING PHYSICIAN'S STATEMENT

This form is to be completed without expense to Liberty Mutual and returned along with your original claim for benefits or by the date requested by the Liberty Mutual Claims Dept.

Group Market Disability Claims
Liberty Life Assurance Company of Boston
P.O. Box 7209
London, KY 40742-7209
Phone No.: (800) 320-7585
Secure Fax No.: (603) 422-0119

Return To Lindsey Garrett

PART A TO BE COMPLETED BY EMPLOYEE

EMPLOYEE/CLAIMANT NAME: DENNIS WILLHITE
CLAIM NO: 2797583 S.S. NO: _____
EMPLOYER/SPONSOR: FARMERS GROUP INC. DATE OF BIRTH: 2/16/1957

AUTHORIZATION TO OBTAIN AND RELEASE INFORMATION

I authorize any licensed physician, medical provider, hospital, medical facility, HMO, pharmacy, government agency, including the Social Security Administration and Veterans Administration, insurance or reinsurance company, credit or consumer reporting agency, financial/educational institutions and any current or former employer to release any and all medical information with respect to my physical or mental condition and/or treatment of me, including confidential information regarding AIDS/HIV infection, communicable diseases, alcohol and substance abuse, mental health and any non-medical information to the particular Company in the Liberty Mutual Group of companies to which I am submitting a claim, or to its legal representative, or to the Plan Sponsor (if Self Insured Plan), or to persons or other organizations providing claims management services.

I understand the Company or Plan Sponsor will use the information obtained under this Authorization or directly from me to determine eligibility for insurance benefits, which may include assessing ongoing treatment. Any information obtained will not be released to any person or organizations EXCEPT to the Plan Sponsor, reinsuring companies, other companies in the Liberty Mutual Group of companies to which I am submitting a claim, Employee Assistance Programs (EAP) or other disease management or assistance programs providing services to the Plan Sponsor and/or to the Company, persons or other organizations providing claims management and claim advisory services to the Plan Sponsor and/or to the Company, the Group Policyholder or its agents/vendors for purposes of auditing the Company's administration of claims under the policy and/or assessing statistical claim data related to its benefit programs, and persons or organizations providing medical treatment or services in connection with my claim, or as may be otherwise permitted or required by law.

If I receive a disability benefit greater than that which I should have been paid, I understand that the Company has the right to recover such overpayment from me, including the right to reduce future disability benefits, if any.

I understand that any person who knowingly, and with intent to injure, defraud, or deceive the Company and/or Plan Sponsor, files a statement or claim containing any false, incomplete, or misleading information may be guilty of a criminal act punishable under law.

I know that I may request a copy of this Authorization. I agree that a photographic copy of this Authorization shall be as valid as the original. This Authorization shall become effective on the date appearing next to my signature below. I understand that this Authorization shall be valid for two years from the date appearing below with my signature and that I have the right to revoke this Authorization at any time by written notification to the Company in the Liberty Mutual group of companies to which I submit a claim and/or the Plan Sponsor.

Date

Claimant's Signature (or Authorized Representative)

PHYSICIAN'S INSTRUCTIONS

PLEASE NOTE: IF ANY PORTION OF THIS FORM IS NOT COMPLETED, WE WILL BE REQUIRED TO REQUEST THE INFORMATION WHICH WILL RESULT IN A DELAY IN DETERMINATION OF YOUR PATIENT'S DISABILITY BENEFITS.

THE CLINICAL INFORMATION, IN COMBINATION WITH THE PHYSICAL FACTORS OF YOUR PATIENT'S JOB AND THE CONTRACTUAL PROVISIONS UNDER WHICH HE/SHE IS COVERED, WILL BE USED TO ESTABLISH THE MOST APPROPRIATE WORK ABSENCE DURATION.

PART B TO BE COMPLETED BY ATTENDING PHYSICIAN

1. DIAGNOSIS
 Primary _____ ICD9 _____
 Secondary _____ ICD9 _____
 _____ ICD9 _____
 Has patient ever had the same or a similar condition? Yes _____ No _____
 If "Yes", state when and describe.

What is your prognosis?

For Pregnancy:
 EDC _____ Date of Delivery _____ Type _____

2. DATES OF TREATMENT
 (a) Date of First Visit _____ (mo/day/yr)
 (b) Date of Last Visit _____ (mo/day/yr)
 (c) Frequency of Visits _____ Weekly _____ Monthly _____ Other (Specify)
 (d) Date of First Treatment _____ (mo/day/yr)
 (e) Date Symptoms First Appeared / Accident Occurred _____ (mo/day/yr)
 (f) Date Patient Advised to Cease Work _____
 (g) Estimated Return to Work Date _____



Group Market Disability Claims
Liberty Life Assurance Company of Boston
P.O. Box 7209
London, KY 40742-7209
Phone No.: (800) 320-7585
Secure Fax No.: (603) 422-0119

May 24, 2010

Dennis Willhite
20348 Ne 34th Ct
Sammamish, WA 98074

RE: Farmers Group Inc.
Short Term Disability Benefits
Claim #: 2797583

Dear Mr. Willhite:

We are writing with regard to your claim for Short Term Disability Benefits (STD) under the Farmers Group Inc. STD Plan. In order to consider your claim for disability benefits, we are requesting you provide us with medical information.

On May 24, 2010, we contacted Dr. Luba Kihichak requesting a completed Attending Physician's Statement, all treatment notes, diagnostic test results and procedure reports from May 2010 to the present in order to support your claim for disability benefits. Please contact Dr. Kihichak and request that this information be sent to us within the timeframe specified below.

The Farmers Group Inc. STD Plan requires that, in order to receive benefits, you provide proof of disability within a required timeframe. Your cooperation in providing the requested information is essential to our claims investigation. We ask that you provide us with this information no later than July 7, 2010 (45 days) as required under the terms of your Plan.

Although you have until July 7, 2010, under the terms of your Plan to submit this information, as well as any other documentation supporting your claim for disability benefits, we ask that you submit this information as well as all other supporting documentation as soon as possible.

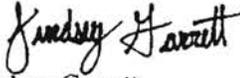
Please be advised until we have proof of disability and all required forms, we will not be able to make a claim determination. No benefits will be issued during this investigation period.

If there are any other attending physicians or specialists, including physical therapy providers, please have them forward all of your medical records pertinent to this period of disability within the timeframe stated above.

In the absence of this information, we will make a claim determination based on the information in our file.

If you have any questions about your disability benefits, please contact me.

Sincerely,



Lindsey Garrett
Disability Claims Case Manager
Phone No.: (800) 320-7585 Ext. 41680
Secure Fax No.: (603) 422-0119



Liberty Life Assurance Company of Boston
Disability Claims
P.O. Box 7209
London, KY 40742-7209
Phone: (800) 320-7585
Secure Fax No.: (603) 422-0119

May 28, 2010

DENNIS WILLHITE
20348 NE 34TH CT
SAMMAMISH, WA 98074-0000

RE: FARMERS GROUP INC.
Short Term Disability Benefits
Claim #: 2797583

MR. WILLHITE

We are pleased to advise you that your claim for Short Term Disability (STD) benefits has been approved based upon your inability to perform your occupation. Benefits have been approved through 6/4/2010 based upon the medically supported disability date of 5/18/2010.

We will be contacting you by phone to provide further details regarding the approval and to advise of the next steps in the administration of your claim.

If you have any questions regarding this information, please contact our office at (800) 320-7585, Monday through Friday, 8:00am – 5:00pm EST. We will be happy to assist you.

Sincerely,

LINDSEY GARRETT
Disability Case Manager
Phone: (800) 320-7585
Secure Fax No.: (603) 422-0119



Group Market Disability Claims
Liberty Life Assurance Company of Boston
P.O. Box 7209
London, KY 40742-7209
Phone No.: (800) 320-7585
Secure Fax No.: (603) 422-0119

July 6, 2010

Dennis Willhite
20348 Ne 34th Court
Sammamish, WA 98074

RE: Short Term Disability Benefits
Farmers Group Inc.
Claim #: 2797583

Dear Mr. Willhite:

We are writing with regard to your claim for Short Term Disability Benefits (STD) under the Farmers Group Inc. Group Disability Plan.

In our continued efforts to serve you promptly and courteously, we have adjusted our caseload assignments. As a result, I have been assigned as your dedicated Disability Case Manager.

If you have any questions regarding the above, please contact me.

Sincerely,

Julie Giachetti
STD Case Manager
Phone No.: (800) 320-7585 Ext. 41461
Secure Fax No.: (603) 422-0119



Group Market Disability Claims
Liberty Life Assurance Company of Boston
P.O. Box 7209
London, KY 40742-7209
Phone No.: (800) 320-7585
Secure Fax No.: (603) 422-0119

July 7, 2010

Dennis Willhite
20348 Ne 34th Court
Sammamish, WA 98074

RE: Farmers Group Inc.
Short Term Disability Benefits
Claim #: 2797583

Dear Mr. Willhite:

We are writing with regard to your claim for Short Term Disability Benefits (STD) under the Farmers Group Inc. Group STD Plan. Your disability claim is currently approved through July 05, 2010. In order to consider continued disability benefits beyond this date, we are in need of additional medical information.

On July 2, 2010, we contacted Dr. Luba Kihichak requesting all treatment notes and diagnostic test results from May 19, 2010 to the present, and a treatment plan and an estimated return to work date in order to support your claim for ongoing disability benefits. Please contact Dr. Kihichak and request this information be sent to us within the timeframe specified below.

The Farmers Group Inc. STD Plan requires that, in order to receive ongoing benefits, you provide proof of disability within a required timeframe. Your cooperation in providing the requested information is essential to our claims investigation. We ask that you provide us with this information no later than 45 days from the date of this letter, by August 20, 2010, as required under the terms of your Plan.

If there are any other attending physicians or specialists, including a counselor or therapist, please have them forward all of your medical records pertinent to this period of disability within the timeframe stated above.

In the absence of this information, we will make a claim determination based on the information in our file.

If you have any questions about your disability benefits, please feel free to contact me.

Sincerely,

Julie Giachetti
STD Case Manager
Phone No.: (800) 320-7585 Ext. 41461
Secure Fax No.: (603) 422-0119



Group Market Disability Claims
Liberty Life Assurance Company of Boston
P.O. Box 7209
London, KY 40742-7209
Phone No.: (800) 320-7585
Secure Fax No.: (603) 422-0119

July 12, 2010

Dr. Luba Kihichak
22850 Ne 8th Street Suite 103
Sammamish, WA 98074

RE: Short Term Disability Benefits
Patient: Dennis Willhite
DOB: February 16, 1957
Claim Number: 2797583

Dear Dr. Kihichak:

We are the disability benefits carrier for your patient, Dennis Willhite, and are requesting specific medical information in order to extend Mr. Willhite's disability benefits. Please provide the following:

- All treatment notes, diagnostic test results and procedure reports from May 19, 2010 to the present.
- Your treatment plan and an estimated return to work date.

Please fax the information back to my attention at 1-603-422-0119 or mail to the above address by July 25, 2010.

Although HIPAA does not apply to disability insurance carriers, we understand your responsibilities under HIPAA as a health care provider, and our associated responsibility of ensuring this information is protected against deliberate or inadvertent misuse or disclosure.

As the insurance carrier providing employer sponsored Short Term Disability Benefits coverage to your patient, we have provided your office with a HIPAA compliant authorization signed by your patient allowing the release of information to our company. This authorization specifically allows you to release medical information to us and is valid for two years from the date of Mr. Willhite's signature. If you have any questions, please contact me directly.

Sincerely,

Julie Giachetti
STD Case Manager
Phone No.: (800) 320-7585 Ext. 41461
Secure Fax No.: (603) 422-0119



Group Market Disability Claims
Liberty Life Assurance Company of Boston
P.O. Box 7209
London, KY 40742-7209
Phone No.: (800) 320-7585
Secure Fax No.: (603) 422-0119

July 19, 2010

Dr. Richard Wemhoff
8290 165th Ave Ne
Redmond, WA 98052-3948

RE: Short Term Disability Benefits
Patient: Dennis Willhite
DOB: February 16, 1957
Claim Number: 2797583

Dear Dr. Wemhoff:

We are the disability benefits carrier for your patient, Dennis Willhite, and are requesting specific medical information in order to extend Mr. Willhite's disability benefits. Please provide the following:

- Functional Status Evaluation
- All treatment notes, diagnostic test results and procedure reports from July 2010 to the present.
- Your treatment plan and an estimated return to work date.

Please fax the information back to my attention at 1-603-422-0119 or mail to the above address by July 25, 2010.

Although HIPAA does not apply to disability insurance carriers, we understand your responsibilities under HIPAA as a health care provider, and our associated responsibility of ensuring this information is protected against deliberate or inadvertent misuse or disclosure.

As the insurance carrier providing employer sponsored Short Term Disability Benefits coverage to your patient, we have provided your office with a HIPAA compliant authorization signed by your patient allowing the release of information to our company. This authorization specifically allows you to release medical information to us and is valid for two years from the date of Mr. Willhite's signature. If you have any questions, please contact me directly.

Sincerely,

Julie Giachetti
STD Case Manager
Phone No.: (800) 320-7585 Ext. 41461
Secure Fax No.: (603) 422-0119

FILED

13 NOV 25 PM 4:19

KING COUNTY
SUPERIOR COURT CLERK
E-FILED

CASE NUMBER: 12-2-23827-8 SEA
The Honorable Jean Rietschel
Trial Date: December 2, 2013

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

DENNIS WILLHITE,

Plaintiff,

v.

FARMERS INSURANCE GROUP, d/b/a
FARMERS NEW WORLD LIFE
INSURANCE COMPANY, a Washington
corporation, ZURICH AMERICAN
INSURANCE CO., a corporation,

Defendants.

No. 12-2-23827-8 SEA

DEFENDANT FARMERS NEW WORLD
LIFE INSURANCE COMPANY'S JURY
INSTRUCTIONS

Defendant Farmers New World Life Insurance Company respectfully submits the following proposed jury instructions.

DATED: November 25, 2013.

STOEL RIVES LLP

s/ Jill D. Bowman

Jill D. Bowman, WSBA No. 11754
Molly Daily, WSBA No. 28360
Attorneys for Defendant Farmers Insurance New
World Life Insurance Co.

DEFENDANT'S PROPOSED JURY INSTRUCTIONS - 1

1 **PROPOSED JURY INSTRUCTION NO. 1**

2 **(Introductory Instruction)**

3 It is your duty to decide the facts in this case based upon the evidence presented to you
4 during this trial. It is also your duty to accept the law as I explain it to you, regardless of what
5 you personally believe the law is or what you personally think it should be. You must apply the
6 law from my instructions to the facts that you decide have been proved, and in this way decide
7 the case.

8 The evidence that you are to consider during your deliberations consists of the testimony
9 that you have heard from witnesses, and the exhibits that I have admitted, during the trial. If
10 evidence was not admitted or was stricken from the record, then you are not to consider it in
11 reaching your verdict.

12 Exhibits may have been marked by the court clerk and given a number, but they do not
13 go with you to the jury room during your deliberations unless they have been admitted into
14 evidence. The exhibits that have been admitted will be available to you in the jury room.

15 In order to decide whether any party's claim has been proved, you must consider all of
16 the evidence that I have admitted that relates to that claim. Each party is entitled to the benefit of
17 all of the evidence, whether or not that party introduced it.

18 You are the sole judges of the credibility of the witness. You are also the sole judges of
19 the value or weight to be given to the testimony of each witness. In considering a witness's
20 testimony, you may consider these things: the opportunity of the witness to observe or know the
21 things they testify about; the ability of the witness to observe accurately; the quality of a
22 witness's memory while testifying; the manner of the witness while testifying; any personal
23 interest that the witness might have in the outcome or the issues; any bias or prejudice that the
24 witness may have shown; the reasonableness of the witness's statements in the context of all of
25 the other evidence; and any other factors that affect your evaluation or believe of a witness or
26 your evaluation of his or her testimony.

DEFENDANT'S PROPOSED JURY INSTRUCTIONS - 2

1 One of my duties has been to rule on the admissibility of evidence. Do not be concerned
2 during your deliberations about the reasons for my rulings on the evidence. If I have ruled that
3 any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not
4 discuss that evidence during your deliberations or consider it in reaching your verdict.

5 The law does not permit me to comment on the evidence in any way. I would be
6 commenting on the evidence if I indicated my personal opinion about the value of testimony or
7 other evidence. Although I have not intentionally done so; if it appears to you that I have
8 indicated my personal opinion, either during trial or in giving these instructions, you must
9 disregard it entirely.

10 As to the comments of the lawyers during this trial, they are intended to help you
11 understand the evidence and apply the law. However, it is important for you to remember that
12 the lawyers' remarks, statements, and arguments are not evidence. You should disregard any
13 remark, statement, or argument that is not supported by the evidence of the law as I have
14 explained it to you.

15 You may have heard objections made by the lawyers during trial. Each party has the
16 right to object to questions asked by another lawyer, and may have a duty to do so. These
17 objections should not influence you. Do not make any assumptions or draw any conclusions
18 based on a lawyer's objections.

19 As jurors, you have a duty to consult with one another and to deliberate with the intention
20 of reaching a verdict. Each of you must decide the case for yourself, but only after an impartial
21 consideration of all of the evidence with your fellow jurors. Listen to one another carefully. In
22 the course of your deliberations, you should not hesitate to re-examine your own views and to
23 change your opinion based upon the evidence. You should not surrender your honest
24 convictions about the value or significance of evidence solely because of the opinions of your
25 fellow jurors. Nor should you change your mind just for the purpose of obtaining enough votes
26 for a verdict.

DEFENDANT'S PROPOSED JURY INSTRUCTIONS - 3

App. D-3

1 As jurors, you are officers of this court. You must not let your emotions overcome your
2 rational thought process. You must reach your decision based on the facts proved to you and on
3 the law given to you, not on sympathy, bias, or personal preference. To assure that all parties
4 receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

5 Finally, the order of these instructions has no significance as to their relative importance.
6 They are all equally important. In closing arguments, the lawyers may properly discuss specific
7 instructions, but you must not attach any special significance to a particular instruction that they
8 may discuss. During your deliberations, you must consider the instructions as a whole.

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10 **SOURCE:** WPI 1.02

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1 **PROPOSED JURY INSTRUCTION NO. 2**

2 **(Summary of Claims)**

3 The following is merely a summary of the claims of the parties. You are not to consider
4 the summary as proof of the matters claimed; and you are to consider only those matters that are
5 established by the evidence. These claims have been outlined solely to aid you in understanding
6 the issues.

7 Dennis Willhite is a former employee of Farmers Life. Farmers Life terminated Mr.
8 Willhite's employment as part of a reduction-in-force. Mr. Willhite claims that his termination
9 (1) breached a promise by Farmers Life that he would not be terminated for poor performance
10 without notice and an opportunity to improve and (2) was unlawful discrimination on the basis of
11 disability. He also alleges that Farmers Life violated the Washington Family Leave Act.

12 Farmers Life denies Mr. Willhite's claims in their entirety.

13 **SOURCE:** WPI 20.05
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1 **PROPOSED JURY INSTRUCTION NO. 3**

2 **(Direct and Circumstantial Evidence)**

3 The evidence that has been presented to you may be either direct or circumstantial. The
4 term “direct evidence” refers to evidence that is given by a witness who has directly perceived
5 something at issue in this case. The term “circumstantial evidence” refers to evidence from
6 which, based on your common sense and experience, you may reasonably infer something that is
7 at issue in this case.

8 The law does not distinguish between direct and circumstantial evidence in terms of their
9 weight or value in finding the facts in this case. One is not necessarily more or less valuable than
10 the other.

11 **SOURCE:** WPI 1.03
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1 **PROPOSED JURY INSTRUCTION NO. 4**

2 **(Corporations and Similar Parties)**

3 The law treats all parties equally whether they are corporations, partnerships, or
4 individuals. This means that corporations, partnerships, and individuals are to be treated in the
5 same fair and unprejudiced manner.

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7 **SOURCE:** WPI 1.07
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1 **PROPOSED JURY INSTRUCTION NO. 8**

2 **(Employment At-Will)**

3 In Washington, the general rule is that employment is at-will. “At-will employment”
4 means both the employer and the employee may terminate the employment relationship at any
5 time, for any reason, or for no reason, so long as the reason is not prohibited by law.

6 **SOURCE:** *Bakotich v. Swanson*, 91 Wash. App. 311, 314 (1998). Generally, an employment
7 contract indefinite in duration is terminable at-will by either the employee or the
8 employer. *Id.* (citing *Roberts v. Atlantic Richfield Co.*, 88 Wn.2d 887, 894
9 (1977)). The rule governing termination of at-will employees is generally that
10 “employers [can] discharge employees for no cause, good cause or even cause
11 morally wrong without fear of liability.” *Id.* (citing *Thompson v. St. Regis Paper*
12 *Co.*, 102 Wn.2d 219, 225-26 (1984) (emphasis added)).
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1 **PROPOSED INSTRUCTION NO. 11**

2 **(Disclaimers)**

3 An employer can disclaim what might otherwise appear to be enforceable promises in
4 handbooks or manuals. The disclaimer must state in a conspicuous manner that nothing
5 contained in the handbook, manual, or similar document is intended to be part of the
6 employment relationship and that such statements are instead simply general statements of
7 company policy. A disclaimer must be effectively communicated to the employee in order to be
8 effective.

9
10 **SOURCE:** *Swanson v. Liquid Air Corp.*, 118 Wn.2d 512, 526-, 826 P.2d 664 (1992) (citing
Thompson v. St. Regis Paper Co., 102 Wn.2d 219, 230, 685 P.2d 1081 (1984)).

1 **PROPOSED JURY INSTRUCTION NO. 14**

2 **(Interference Under the FLA)**

3 In general, the Washington Family Leave Act (“FLA”) requires employers to provide
4 eligible employees with up to 12 weeks per year of unpaid leave for certain reasons, including to
5 attend to a serious health condition. At the end of the leave, the employee is entitled to either
6 return to the position of employment he had previously held, or, alternatively, be placed in an
7 equivalent position. The FLA makes it unlawful for any employer to interfere with, restrain, or
8 deny the exercise of or attempt to exercise, any right it provides.

9 Upon his return from FLA leave, Dennis Willhite was entitled to be restored to the
10 position of employment he held when his leave commenced or to an equivalent position. Mr.
11 Willhite has alleged that Farmers Life interfered with, restrained, or denied him the exercise of
12 that right. In order to prevail on this claim, Dennis Willhite must prove:

13 (1) He took leave under the FLA; and

14 (2) Upon his return from FLA leave, Farmers Life failed to reinstate him to his former
15 position or an equivalent position.

16 If you find that Dennis Willhite has proved each of the above propositions by a
17 preponderance of the evidence, then your verdict should be for Dennis Willhite on this claim.
18 On the other hand, if you find that either of the above propositions has not been proved, then
19 your verdict should be for Farmers Life.

20
21 **SOURCE:** Model Jury Instructions, Employment Litigation (2nd), 8.01 (modified); 8.09
22 (modified); 8.12 (modified).
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PROPOSED JURY INSTRUCTION NO. 15

(FLA--Right to Reinstatement)

An employee has no greater rights to continued employment or other benefits and conditions of employment than any of his fellow employees by virtue of the fact that he exercised rights to FLA leave.

SOURCE: Model Jury Instructions, Employment Litigation (2nd), 8.09 (modified).

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PROPOSED JURY INSTRUCTION NO. 17

(Disability Discrimination--Definition of Disability--Disparate Treatment Cases)

A disability is a sensory, mental, or physical impairment that:

1. Is medically recognized or diagnosable; or
2. Exists as a record or history.

SOURCE: WPI 330.31

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PROPOSED JURY INSTRUCTION NO. 18

(Disability Discrimination—Definition of Impairment)

An impairment includes but is not limited to: a physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculo-skeletal, special sense organs, respiratory, including speech organs, cardio-vascular, reproductive, digestive, genitor-urinary, hemic and lymphatic, skin, and endocrine; or any mental, developmental, traumatic, or psychological disorder including but not limited to cognitive limitation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

SOURCE: WPI 330.31.01

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PROPOSED JURY INSTRUCTION NO. 19

(Notice to Employer)

It is the employee's burden to notify the employer of a disability.

SOURCE: *Goodman v. Boeing Co.*, 127 Wn.2d 401, 408, 899 P.2d 1265 (1995) (employee bears the burden).

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PROPOSED JURY INSTRUCTION NO: 28

(Damages--Employment Discrimination--Future Lost Earnings (Front Pay))

In calculating damages for future wage loss you should determine the present cash value of salary, pension, and other fringe benefits from today until the time that Dennis Willhite may reasonably be expected to fully recover from the continuing effects of the discrimination, decreased by any projected future earnings.

SOURCE: WPI 330.82; Lords v. Northern Automotive Corp., 75 Wn. App. 589, 605, 881 P.d 256 (1994), overruled on other grounds in Mackay v. Acorn Custom Cabinetry, Inc., 127 Wn.2d 302, 898 P.2d 284 (1995) (other than in age cases, the determination of future lost earnings, including the number of years, is generally left to the jury to determine); Blaney v. Int'l Ass'n of Machinists & Aerospace Workers, 151 Wn.2d 203, 87 P.3d 757 (2004) (same).

1 **PROPOSED JURY INSTRUCTION NO. 30**

2 **(Damages--mitigation)**

3 A person discriminated against should only recover damages for the period of time he
4 would have worked but for the discrimination; he should not recover damages for the time after
5 which his employment would have ended for a non-discriminatory reason.

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7 **SOURCE:** *Hayes v. Trulock*, 51 Wn. App. 795 (1988); *Bartek v. Urban Redevelopment Auth.*
8 *of Pittsburgh*, 882 F.2d 739, 747 (3d Cir. 1989); *Ramirez v. Chase Manhattan*
9 *Bank*, 109 F. Supp. 2d 62, 65 (D.P.R. 2000); *Davis v. Los Angeles Unified Sch.*
10 *Dist. Personnel Comm'n*, 152 Cal. App. 4th 1122, 1134, 62 Cal. Rptr. 3d 69, 77
11 (Cal. Ct. App. 2007).

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PROPOSED JURY INSTRUCTION NO. 31

(Concluding Instruction—For Special Verdict Form)

When you begin to deliberate, your first duty is to select a presiding juror. The presiding juror’s responsibility is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

You will be given the exhibits admitted in evidence and these instructions. You will also be given a special verdict form that consists of several questions for you to answer. You must answer the questions in the order in which they are written, and according to the directions on the form. It is important that you read all the questions before you begin answering, and that you follow the directions exactly. Your answer to some questions will determine whether you are to answer all, some, or none of the remaining questions.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. [For this purpose, use the form provided in the jury room.] In your question, do not state how the jury has voted, or in any other way indicate how your deliberations are proceeding. The presiding juror should sign and date the question and give it to the bailiff. I will confer with the lawyers to determine what response, if any, can be given.

1 In order to answer any question on the special verdict form, ten jurors must agree upon
2 the answer. It is not necessary that the jurors who agree on the answer be the same jurors who
3 agreed on the answer to any other question, so long as ten jurors agree to each answer.

4 When you have finished answering the questions according to the directions on the
5 special verdict form, the presiding juror will sign the verdict form. The presiding juror must sign
6 the verdict whether or not the presiding juror agrees with the verdict. The presiding juror will
7 then tell the bailiff that you have reached a verdict. The bailiff will bring you back into court
8 where your verdict will be announced.

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10 **SOURCE:** WPI 1.11 (modified)

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1 **CERTIFICATE OF SERVICE**

2 I certify that on November 25, 2013, I caused a copy of the foregoing document to be
3 served via email to:

4 Brian H. Krikorian, WSBA 27861 5 LAW OFFICES OF BRIAN H. KRIKORIAN 6 4100 194th Street SW, Suite 215 7 Lynnwood, WA 98036 8 Telephone: (206) 547-1942 9 Facsimile: (425) 732-0115 10 Email: bhkrik@bhklaw.com 11 12 Counsel for Plaintiff	13 Erica Krikorian, WSBA 28793 14 CAREER LEGAL 15 22722 - 29th Drive SE, Suite 100 16 Bothell, WA 98021 17 Telephone: (425) 424-9555 18 Facsimile: (800) 546-7155 19 Email: erica@creerlegal.com 20 Email: nicole@creerlegal.com 21 22 Counsel for Plaintiff
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s/Debbie Dern
Debbie Dern, Practice Assistant
Stoel Rives

FILED
KING COUNTY WASHINGTON

DEC 19 2013

SUPERIOR COURT CLERK
BY Susan Bone
DEPUTY

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

Willhite

Plaintiff/Petitioner,

vs.

Farmer's Ins. Group et al

NO. *12-2-23827-8*

SEA
 KNT

Defendant/Respondent.

Verdict form

is attached.

BREACH OF PROMISE OF SPECIFIC TREATMENT IN SPECIFIC SITUATIONS –

LIABILITY

QUESTION NO. 1:

Has Dennis Willhite proved by a preponderance of the evidence that statements in a policy manual or handbook amounted to a promise by Farmers Life that he would not be terminated for poor performance without prior notice and an opportunity to improve?

Answer "yes" or "no" if any ten jurors agree.

ANSWER: NO

Instruction: If you answered "no" to Question No. 1, skip to Question No. 4. If you answered "yes" to Question No. 1, then proceed to Question No. 2.

QUESTION NO. 2:

Has Dennis Willhite proved by a preponderance of the evidence that he justifiably relied upon the promise?

Answer "yes" or "no" if any ten jurors agree.

ANSWER: _____

Instruction: If you answered "no" to Question No. 2, skip to Question No. 4. If you answered "yes" to Question No. 2, then proceed to Question No. 3.

QUESTION NO. 3:

Has Dennis Willhite proved by a preponderance of the evidence that Farmers Life breached the promise?

Answer "yes" or "no" if any ten jurors agree.

ANSWER: _____

Instruction: Proceed to Question No. 4.

**INTERFERENCE UNDER THE WASHINGTON FAMILY LEAVE ACT (FLA) –
LIABILITY**

QUESTION NO. 4:

Has Dennis Willhite proved by a preponderance of the evidence that he took leave under the Washington Family Leave Act?

Answer "yes" or "no" if any ten jurors agree.

ANSWER: YES

Instruction: If you answered "no" to Question No. 4, skip to Question No. 6. If you answered "yes" to Question No. 4, then proceed to Question No. 5.

QUESTION NO. 5:

Has Dennis Willhite proved by a preponderance of the evidence that upon his return from FLA leave, Farmers Life failed to reinstate him to his former position or an equivalent position?

Answer "yes" or "no" if any ten jurors agree.

ANSWER: NO

Instruction: Proceed to Question No. 6.

DISABILITY DISCRIMINATION – LIABILITY

QUESTION NO. 6:

Has Dennis Willhite proved by a preponderance of the evidence that he had a disability?

Answer "yes" or "no" if any ten jurors agree.

ANSWER: YES

Instruction: If you answered "no" to Question No. 6, skip to Question No. 10. If you answered "yes" to Question No. 6, then proceed to Question No. 7.

QUESTION NO. 7:

Has Dennis Willhite proved by a preponderance of the evidence that Farmers Life had notice of his disability?

Answer "yes" or "no" if any ten jurors agree.

ANSWER: NO

Instruction: If you answered "no" to Question No. 7, skip to Question No. 10. If you answered "yes" to Question No. 7, then proceed to Question No. 8.

QUESTION NO. 8:

Has Dennis Willhite proved by a preponderance of the evidence that he was able to perform the essential functions of the job in question?

Answer "yes" or "no" if any ten jurors agree.

ANSWER: _____

Instruction: If you answered "no" to Question No. 8, skip to Question No. 10. If you answered "yes" to Question No. 8, then proceed to Question No. 9.

QUESTION NO. 9:

Has Dennis Willhite proved by a preponderance of the evidence that his disability was a substantial factor in Farmers Life's decision to lay him off?

Answer "yes" or "no" if any ten jurors agree.

ANSWER: _____

Instruction: Proceed to Question No. 10.

DISABILITY DISCRIMINATION - DAMAGES

QUESTION NO. 10:

Instruction: If you answered "no" or did not reach a verdict as to any of Question Nos. 6-9, SKIP THIS QUESTION and proceed to Question No. 11. If you answered "yes" to all of Question Nos. 6-9, then answer this Question.

You must determine the reasonable value of Dennis Willhite's damages, if any, that were proximately caused by disability discrimination. Please state the amount of damages Dennis Willhite is entitled to for each of the following categories. If you find that Dennis Willhite is not entitled to damages for a category or categories, write "0" in that category or those categories.

- a. Lost past salary \$ _____
- b. Lost future salary \$ _____
- c. Damages for emotional harm \$ _____ Total: \$ _____

Instruction: Proceed to Question 11.

FAMILY LEAVE ACT VIOLATION – DAMAGES

QUESTION NO. 11:

Instruction: If you answered “no” or did not reach a verdict as to any of Question Nos. 4-5, SKIP THIS QUESTION and proceed to Question No. 12. If you answered “yes” to all of Question Nos. 4-5, then answer this Question.

What is the reasonable value of the actual lost past salary damages, if any, that Dennis Willhite suffered by reason of Farmers Life’s violation of the Washington Family Leave Act? If you find that Dennis Willhite did not suffer resulting damages, write “0.”

ANSWER: \$ _____ *

** Instruction:* If you awarded lost past earnings in response to Question No. 10 above, do not duplicate those amounts in your response to Question No. 11.

Instruction: Proceed to Question 12.

BREACH OF PROMISE – DAMAGES

QUESTION NO. 12:

Instruction: If you answered “no” or did not reach a verdict as to any of Question Nos. 1-3, date and sign this verdict form and notify the bailiff. If you answered “yes” to all of Question Nos. 1-3, then answer this Question.

What is the reasonable value of the actual damages suffered by Dennis Willhite, if any, for losses of salary that were reasonably foreseeable at the time the promise that he would not be terminated for poor performance without prior notice and an opportunity to improve was made, as a probable result of breach of that promise?

ANSWER: \$ _____ *

** Instructions: If you awarded lost past salary in response to Question No. 10 or Question No. 11 above, do not include such losses in your damages award here. If you awarded future lost salary under Question No. 10 above, do not include such losses in your damages award here.*

Instructions: Date and sign this verdict form and notify the bailiff.

SIGNATURE OF PRESIDING JUROR

I verify the accuracy of these responses.

A handwritten signature in black ink, appearing to be "B. Smith", written over a horizontal line.

Presiding Juror

19 December 2013

Date

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Staff Selection Criteria

Skills Ranking Chart

Ranking	Initiative & Drive	Time Management / Managing Multiple Priorities	Judgment & Decision Making	Project Work	Teamwork / Leadership	Communication
10	Always takes charge in the absence of detailed instructions, demonstrates self-reliance & develops resourceful solutions, approaches challenges with enthusiasm	Always places a high value on time effectiveness, respects the time of others; avoids becoming involved in endless details	Always assembles all available facts before making decisions, excels in suggesting optional solutions	Always Work product is of top quality, accuracy and keen attention to detail is top priority.	Always volunteers for extra work & projects; makes a valuable contribution to team objectives, excels in developing team momentum, enthusiasm, & pride	All verbal & written communications are very effective, clear & concise
9	Consistently takes charge in the absence of detailed instructions, demonstrates self-reliance & develops resourceful solutions, approaches challenges with enthusiasm	Consistently places a high value on time effectiveness, respects the time of others; avoids becoming involved in endless details	Consistently assembles all available facts before making decisions, good at suggesting optional solutions	Consistently Work product is of top quality, accuracy and keen attention to detail is top priority.	Consistently volunteers for extra work & projects, makes a valuable contribution to team objectives, excels in developing team momentum, enthusiasm, & pride	All verbal & written communications are effective, clear & concise
8	Usually takes charge in the absence of detailed instructions; demonstrates self-reliance & develops resourceful solutions, approaches challenges with enthusiasm	Usually places a high value on time effectiveness, respects the time of others; avoids becoming involved in endless details	Occasionally assembles all available facts before making decisions, good at suggesting optional solutions	Usually work product is of top quality, accuracy and keen attention to detail is top priority.	Usually volunteers for extra work & projects; makes a valuable contribution to team objectives, excels in developing team momentum, enthusiasm, & pride	Communications are consistently very effective, clear & concise
7	Occasionally takes charge in the absence of detailed instructions, demonstrates self-reliance & develops resourceful solutions, approaches challenges with enthusiasm	Occasionally places a high value on time effectiveness, respects the time of others; avoids becoming involved in endless details	Occasionally seeks supervisor or staff for assistance in obtaining a solution	Occasionally Work product is of top quality, accuracy and keen attention to detail is top priority	Occasionally volunteers for extra work & projects, makes a valuable contribution to team objectives, excels in developing team momentum, enthusiasm, & pride.	Communications are consistently effective, clear & concise
6	Demonstrates a satisfactory use of resources, requires minimal direction in obtaining resources	Demonstrates satisfactory allocation of time resources	Consistently seeks supervisor or staff for assistance in obtaining a solution	Consistently Work quality is good, attention to detail is a priority	Always demonstrates commitment to organizational goals, promotes cooperative behavior & team effort	Communications are generally very effective, clear & concise
5	Occasionally requires direction in obtaining & utilizing resources	Consistently demonstrates satisfactory allocation of time resources	Usually seeks supervisor or staff for assistance in obtaining a solution	Occasionally Work quality is good, attention to detail is a priority	Consistently demonstrates commitment to organizational goals, promotes cooperative behavior & team effort	Communications are generally effective, clear & concise
4	Usually requires direction in obtaining & utilizing resources	Usually demonstrates satisfactory allocation of time resources	Usually able to make sound decisions in the absence of detailed instructions	Usually work quality is good, attention to detail is a priority	Usually demonstrates commitment to organizational goals, promotes cooperative behavior & team effort	Communications are usually very effective, clear & concise
3	Consistently requires direction in obtaining & utilizing resources	Occasionally demonstrates satisfactory allocation of time resources	Occasionally requires detailed instructions to make sound decisions	At times work quality is good, attention to detail is a priority	Occasionally demonstrates commitment to organizational goals, promotes cooperative behavior & team effort	Communications are usually effective, clear & concise
2	Seldom initiates solutions	Inefficient use of time	Consistently requires detailed instructions to make sound decisions	Work quality is not good	Needs strong encouragement to assist the team	Communications are seldom very effective, clear & concise
1	Does not initiate solutions	Inefficient use of time, minimum awareness of impact on others time	Always requires detailed instructions to make sound decisions	Quality of work is substandard	Not a team player, only willing to do their own work	Communications are seldom effective, clear & concise

Staff Selection Criteria

Name	Score by Category, on a scale of 1 thru 10						Weighted Score	
	Initiative & Drive	Time Management / Managing Multiple Priorities	Judgment & Decision Making	Project Work	Teamwork / Leadership	Communication	Total	40.0%
Wayne Daniels	8	8	8	7	7	7	45.0	18.0
Bret Fredricksen	8	8	8	8	8	7	47.0	18.8
Dennis Willhite	1	2	2	2	3	2	12.0	4.8
Barb Kuch	8	9	7	8	8	7	47.0	18.8
Fran Chew	9	9	7	8	8	7	48.0	19.2
Fenina Fink	8	7	7	7	7	7	43.0	17.2
Dan Krueger	8	8	9	7	8	7	47.0	18.8
John Hanley	8	6	7	6	6	6	39.0	15.6
Mike Pickett	9	8	9	8	9	7	50.0	20.0
Lynn Wilson	9	8	8	8	8	7	48.0	19.2
Laura Blaylock	8	8	8	8	7	7	46.0	18.4
Erinn Lawson-knoll	9	9	9	9	9	9	54.0	21.6
Richard Winmill	9	9	9	9	9	8	53.0	21.2
Joshua Putnam	9	8	9	9	8	9	52.0	20.8
Patty Eastwood	8	8	7	8	8	7	46.0	18.4

Staff Selection Criteria

Name (automatically entered from Skills Ranking)	Eval Method (1-4)	Last Eval	1st Prior Eval	2nd Prior Eval	Eval Total	Eval Total (60%)	Score From Matrix (40%)	Stacking Result (60% 40%)
Wayne Daniels	1.0	10.0	10.0	15.0	35.0	21.0	18.0	39.0
Bret Fredricksen	1.0	10.0	5.0	10.0	25.0	15.0	18.8	33.8
Dennis Willhite	1.0	5.0	10.0	10.0	25.0	15.0	4.8	19.8
Barb Kuch	1.0	15.0	15.0	15.0	45.0	27.0	18.8	45.8
Fran Chew	1.0	20.0	15.0	15.0	50.0	30.0	19.2	49.2
Fenina Fink	1.0	10.0	10.0	15.0	35.0	21.0	17.2	38.2
Dan Krueger	1.0	10.0	10.0	20.0	40.0	24.0	18.8	42.8
John Hanley	1.0	10.0	15.0	15.0	40.0	24.0	15.6	39.6
Mike Pickett	1.0	10.0	10.0	20.0	40.0	24.0	20.0	44.0
Lynn Wilson	1.0	15.0	15.0	15.0	45.0	27.0	19.2	46.2
Laura Blaylock	1.0	15.0	15.0	15.0	45.0	27.0	18.4	45.4
Erinn Lawson-Knoll	1.0	20.0	20.0	20.0	60.0	36.0	21.6	57.6
Richard Winmill	1.0	15.0	15.0	15.0	45.0	27.0	21.2	48.2
Joshua Putnam	2.0	15.0	10.0	12.5	37.5	22.5	20.8	43.3
Patty Eastwood	1.0	10.0	10.0	10.0	30.0	18.0	18.4	36.4

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Staff Selection Criteria

Skills Ranking Chart

Ranking	Initiative & Drive	Time Management / Managing Multiple Priorities	Judgment & Decision Making	Project Work	Teamwork / Leadership	Communication
10	Always takes charge in the absence of detailed instructions, demonstrates self-reliance & develops resourceful solutions, approaches challenges with enthusiasm	Always places a high value on time effectiveness, respects the time of others, avoids becoming involved in endless details	Always assembles all available facts before making decisions; excels in suggesting optional solutions	Always Work product is of top quality, accuracy and keen attention to detail is top priority	Always volunteers for extra work & projects; makes a valuable contribution to team objectives; excels in developing team momentum, enthusiasm, & pride	All verbal & written communications are very effective, clear & concise
9	Consistently takes charge in the absence of detailed instructions, demonstrates self-reliance & develops resourceful solutions, approaches challenges with enthusiasm	Consistently places a high value on time effectiveness, respects the time of others, avoids becoming involved in endless details	Consistently assembles all available facts before making decisions; good at suggesting optional solutions	Consistently Work product is of top quality, accuracy and keen attention to detail is top priority	Consistently volunteers for extra work & projects; makes a valuable contribution to team objectives; excels in developing team momentum, enthusiasm, & pride	All verbal & written communications are effective, clear & concise
8	Usually takes charge in the absence of detailed instructions, demonstrates self-reliance & develops resourceful solutions, approaches challenges with enthusiasm	Usually places a high value on time effectiveness, respects the time of others, avoids becoming involved in endless details	Occasionally assembles all available facts before making decisions; good at suggesting optional solutions	Usually work product is of top quality, accuracy and keen attention to detail is top priority	Usually volunteers for extra work & projects; makes a valuable contribution to team objectives; excels in developing team momentum, enthusiasm, & pride	Communications are consistently very effective, clear & concise
7	Occasionally takes charge in the absence of detailed instructions, demonstrates self-reliance & develops resourceful solutions, approaches challenges with enthusiasm	Occasionally places a high value on time effectiveness, respects the time of others, avoids becoming involved in endless details	Occasionally seeks supervisor or staff for assistance in obtaining a solution	Occasionally Work product is of top quality, accuracy and keen attention to detail is top priority	Occasionally volunteers for extra work & projects; makes a valuable contribution to team objectives; excels in developing team momentum, enthusiasm, & pride	Communications are consistently effective, clear & concise
6	Demonstrates a satisfactory use of resources, requires minimal direction in obtaining resources	Demonstrates satisfactory allocation of time resources	Consistently seeks supervisor or staff for assistance in obtaining a solution	Consistently Work quality is good, attention to detail is a priority	Always demonstrates commitment to organizational goals; promotes cooperative behavior & team effort	Communications are generally very effective, clear & concise
5	Occasionally requires direction in obtaining & utilizing resources	Consistently demonstrates satisfactory allocation of time resources	Usually seeks supervisor or staff for assistance in obtaining a solution	Occasionally Work quality is good; attention to detail is a priority	Consistently demonstrates commitment to organizational goals; promotes cooperative behavior & team effort	Communications are generally effective, clear & concise
4	Usually requires direction in obtaining & utilizing resources	Usually demonstrates satisfactory allocation of time resources	Usually able to make sound decisions in the absence of detailed instructions	Usually work quality is good; attention to detail is a priority	Usually demonstrates commitment to organizational goals; promotes cooperative behavior & team effort	Communications are usually very effective, clear & concise
3	Consistently requires direction in obtaining & utilizing resources	Occasionally demonstrates satisfactory allocation of time resources	Occasionally requires detailed instructions to make sound decisions	At times work quality is good; attention to detail is a priority	Occasionally demonstrates commitment to organizational goals; promotes cooperative behavior & team effort	Communications are usually effective, clear & concise
2	Seldom initiates solutions	Inefficient use of time	Consistently requires detailed instructions to make sound decisions	Work quality is not good	Needs strong encouragement to assist the team	Communications are seldom very effective, clear & concise
1	Does not initiate solutions	Inefficient use of time, minimum awareness of impact on other's time	Always requires detailed instructions to make sound decisions	Quality of work is substandard	Not a team player; only willing to do their own work	Communications are seldom effective, clear & concise

Staff Selection Criteria

Name	Score by Category, on a scale of 1 thru 10						Weighted Score	
	Initiative & Drive	Time Management / Managing Multiple Priorities	Judgment & Decision Making	Project Work	Teamwork / Leadership	Communication	Total	40.0%
Stacey Watson	7	5	7	7	6	5	37.0	14.8
Kathy McDowell	3	3	7	3	2	3	21.0	8.4
Espie Washington							51.0	20.4
Brian Reeder	7						49.0	19.6
Rachael Rondestvedt	7	6	6			6	42.0	16.8
Karen Lane							48.0	19.2
Jason Robinson	7	7	7		7		44.0	17.6
Denise Allison		7	7	7			45.0	18.0
Danielle Smalley	7	6	7	7		7	42.0	16.8
Briana Anderson	7	6	7	7		7	42.0	16.8

Staff Selection Criteria

Name (automatically entered from Skills Ranking)	Eval Method (1-4)	Last Eval	1st Prior Eval	2nd Prior Eval	Eval Total	Eval Total (60%)	Score From Matrix (40%)	Stacking Result (60% 40%)
Stacey Watson	0.0				30.0	18.0	14.8	32.8
Kathy McDowell	0.0				20.0	12.0	8.4	20.4
Espie Washington	0.0	10.0	15.0	10.0	35.0	21.0	20.4	41.4
Brian Reeder	0.0	10.0	10.0	10.0	30.0	18.0	19.6	37.6
Rachael Rondestvedt	0.0	15.0	10.0	20.0	45.0	27.0	16.8	43.8
Karen Lane	0.0	15.0	10.0	10.0	35.0	21.0	19.2	40.2
Jason Robinson	0.0	10.0	10.0	20.0	40.0	24.0	17.6	41.6
Denise Allison	0.0	10.0	10.0	10.0	30.0	18.0	18.0	36.0
Danielle Smalley	0.0	15.0	15.0	15.0	45.0	27.0	16.8	43.8
Briana Anderson	0.0	20.0	15.0	20.0	55.0	33.0	16.8	49.8

Staff Selection Criteria

Ranking	Initiative & Drive	Time Management / Managing Multiple Priorities	Judgment & Decision Making	Project Work	Teamwork / Leadership	Communication
10	Always takes charge in the absence of detailed instructions, demonstrates self-reliance & develops resourceful solutions, approaches challenges with enthusiasm	Always places a high value on time effectiveness, respects the time of others, avoids becoming involved in endless details	Always assembles all available facts before making decisions, excels in suggesting optional solutions	Always: Work product is of top quality, accuracy and keen attention to detail is top priority.	Always volunteers for extra work & projects, makes a valuable contribution to team objectives, excels in developing team momentum, enthusiasm, & pride	All verbal & written communications are very effective, clear & concise
9	Consistently takes charge in the absence of detailed instructions, demonstrates self-reliance & develops resourceful solutions, approaches challenges with enthusiasm	Consistently places a high value on time effectiveness, respects the time of others, avoids becoming involved in endless details	Consistently assembles all available facts before making decisions, good at suggesting optional solutions	Consistently: Work product is of top quality, accuracy and keen attention to detail is top priority.	Consistently volunteers for extra work & projects, makes a valuable contribution to team objectives, excels in developing team momentum, enthusiasm, & pride	All verbal & written communications are effective, clear & concise
8	Usually takes charge in the absence of detailed instructions, demonstrates self-reliance & develops resourceful solutions, approaches challenges with enthusiasm	Usually places a high value on time effectiveness, respects the time of others, avoids becoming involved in endless details	Occasionally assembles all available facts before making decisions, good at suggesting optional solutions	Usually work product is of top quality, accuracy and keen attention to detail is top priority.	Usually volunteers for extra work & projects, makes a valuable contribution to team objectives, excels in developing team momentum, enthusiasm, & pride	Communications are consistently very effective, clear & concise
7	Occasionally takes charge in the absence of detailed instructions, demonstrates self-reliance & develops resourceful solutions, approaches challenges with enthusiasm	Occasionally places a high value on time effectiveness, respects the time of others, avoids becoming involved in endless details	Occasionally seeks supervisor or staff for assistance in obtaining a solution	Occasionally: Work product is of top quality, accuracy and keen attention to detail is top priority.	Occasionally volunteers for extra work & projects, makes a valuable contribution to team objectives, excels in developing team momentum, enthusiasm, & pride	Communications are consistently effective, clear & concise
6	Demonstrates a satisfactory use of resources, requires minimal direction in obtaining resources	Demonstrates satisfactory allocation of time resources	Consistently seeks supervisor or staff for assistance in obtaining a solution	Consistently: Work quality is good, attention to detail is a priority.	Always demonstrates commitment to organizational goals, promotes cooperative behavior & team effort	Communications are generally very effective, clear & concise
5	Occasionally requires direction in obtaining & utilizing resources	Consistently demonstrates satisfactory allocation of time resources	Usually seeks supervisor or staff for assistance in obtaining a solution	Occasionally: Work quality is good, attention to detail is a priority.	Consistently demonstrates commitment to organizational goals, promotes cooperative behavior & team effort	Communications are generally effective, clear & concise
4	Usually requires direction in obtaining & utilizing resources	Usually demonstrates satisfactory allocation of time resources	Usually able to make sound decisions in the absence of detailed instructions	Usually: work quality is good, attention to detail is a priority.	Usually demonstrates commitment to organizational goals, promotes cooperative behavior & team effort	Communications are usually very effective, clear & concise
3	Consistently requires direction in obtaining & utilizing resources	Occasionally demonstrates satisfactory allocation of time resources	Occasionally requires detailed instructions to make sound decisions	At times work quality is good, attention to detail is a priority.	Occasionally demonstrates commitment to organizational goals, promotes cooperative behavior & team effort	Communications are usually effective, clear & concise
2	Seldom initiates solutions	Inefficient use of time	Consistently requires detailed instructions to make sound decisions	Work quality is not good	Needs strong encouragement to assist the team	Communications are seldom very effective, clear & concise
1	Does not initiate solutions	Inefficient use of time, minimum awareness of impact on other's time	Always requires detailed instructions to make sound decisions	Quality of work is substandard	Not a team player, only willing to do their own work	Communications are seldom effective, clear & concise

Confidential

Staff Selection Criteria

Skills Ranking

Name	Score by Category, on a scale of 1 thru 10						Weighted Score	
	Initiative & Drive	Time Management / Managing Multiple Priorities	Judgment & Decision Making	Project Work	Teamwork / Leadership	Communication	Total	40.0%
Steve Ladd	6	6		6	6	6	38.0	15.2
Alan Glickman	6	4	5	6	2		30.0	12.0
Mike Varney							51.0	20.4
Roy Tadlock							51.0	20.4
Craig Trojahn	5	4		6	2	5	29.0	11.6

Staff Selection Criteria

Ranking	Initiative & Drive	Time Management / Managing Multiple Priorities	Judgment & Decision Making	Project Work	Teamwork / Leadership	Communication
10	Always takes charge in the absence of detailed instructions, demonstrates self-reliance & develops resourceful solutions, approaches challenges with enthusiasm	Always places a high value on time effectiveness, respects the time of others, avoids becoming involved in endless details	Always assembles all available facts before making decisions, excels in suggesting optional solutions	Always Work product is of top quality, accuracy and keen attention to detail is top priority	Always volunteers for extra work & projects, makes a valuable contribution to team objectives, excels in developing team momentum, enthusiasm, & pride	All verbal & written communications are very effective, clear & concise
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Staff Selection Criteria

Name	Score by Category, on a scale of 1 thru 10						Weighted Score	
	Initiative & Drive	Time Management / Managing Multiple Priorities	Judgment & Decision Making	Project Work	Teamwork / Leadership	Communication	Total	40.0%
Elaine Woo	8	8	8		7	8	48.0	19.2
Diana Sullivan	6	7	7	8	6	7	41.0	16.4
Gerald Cornel		7	8	8	8	8	48.0	19.2
Amy Blankenship	7	7	7	7	6	7	41.0	16.4
Jorge Bermudez	8	7	7	8	7	8	45.0	18.0
Jeffry Parker			8			8	52.0	20.8
Laurie Hinman	7	7	7	8	7	8	44.0	17.6
Kaycee Rush		8.0	8.0		8.0	8.0	50.0	20.0
Kevin Gray	8.0	8.0	8.0		7.0	8.0	48.0	19.2
	0	0	0	0	0	0	0.0	0.0
	0	0	0	0	0	0	0.0	0.0
	0	0	0	0	0	0	0.0	0.0
	0	0	0	0	0	0	0.0	0.0
	0	0	0	0	0	0	0.0	0.0
	0	0	0	0	0	0	0.0	0.0
	0	0	0	0	0	0	0.0	0.0
	0	0	0	0	0	0	0.0	0.0
	0	0	0	0	0	0	0.0	0.0

Staff Selection Criteria

Name (automatically entered from Skills Ranking)	Eval Method (1-4)	Last Eval	1st Prior Eval	2nd Prior Eval	Eval Total	Eval Total (60%)	Score From Matrix (40%)	Stacking Result (60% 40%)
Elaine Woo	0.0				35.0	21.0	19.2	40.2
Diana Sullivan	0.0				30.0	18.0	16.4	34.4
Gerald Cornel	0.0	10.0	10.0	15.0	35.0	21.0	19.2	40.2
Amy Blankenship	0.0	15.0	15.0	15.0	45.0	27.0	16.4	43.4
Jorge Bermudez	0.0	10.0	10.0	5.0	25.0	15.0	18.0	33.0
Jeffry Parker	0.0	15.0	15.0	15.0	45.0	27.0	20.8	47.8
Laurie Hinman	0.0	10.0	10.0	15.0	35.0	21.0	17.6	38.6
Kaycee Rush	0.0	15.0	15.0	10.0	40.0	24.0	20.0	44.0
Kevin Gray	0.0	10.0	10.0	10.0	30.0	18.0	19.2	37.2
					0.0	0.0	0.0	0.0
					0.0	0.0	0.0	0.0
					0.0	0.0	0.0	0.0
					0.0	0.0	0.0	0.0
					0.0	0.0	0.0	0.0
					0.0	0.0	0.0	0.0
					0.0	0.0	0.0	0.0

Staff Selection Criteria

Ranking	Initiative & Drive	Time Management / Managing Multiple Priorities	Judgment & Decision Making	Project Work	Teamwork / Leadership	Communication
10	Always takes charge in the absence of detailed instructions, demonstrates self-reliance & develops resourceful solutions; approaches challenges with enthusiasm	Always places a high value on time effectiveness; respects the time of others; avoids becoming involved in endless details	Always assembles all available facts before making decisions, excels in suggesting optional solutions	Always Work product is of top quality, accuracy and keen attention to detail is top priority.	Always volunteers for extra work & projects, makes a valuable contribution to team objectives, excels in developing team momentum, enthusiasm, & pride	All verbal & written communications are very effective, clear & concise
9	Consistently takes charge in the absence of detailed instructions, demonstrates self-reliance & develops resourceful solutions; approaches challenges with enthusiasm	Consistently places a high value on time effectiveness; respects the time of others; avoids becoming involved in endless details	Consistently assembles all available facts before making decisions, good at suggesting optional solutions	Consistently Work product is of top quality, accuracy and keen attention to detail is top priority.	Consistently volunteers for extra work & projects, makes a valuable contribution to team objectives, excels in developing team momentum, enthusiasm, & pride	All verbal & written communications are effective, clear & concise
8	Usually takes charge in the absence of detailed instructions, demonstrates self-reliance & develops resourceful solutions; approaches challenges with enthusiasm	Usually places a high value on time effectiveness; respects the time of others; avoids becoming involved in endless details	Occasionally assembles all available facts before making decisions, good at suggesting optional solutions	Usually work product is of top quality, accuracy and keen attention to detail is top priority	Usually volunteers for extra work & projects, makes a valuable contribution to team objectives, excels in developing team momentum, enthusiasm, & pride	Communications are consistently very effective, clear & concise
7	Occasionally takes charge in the absence of detailed instructions; demonstrates self-reliance & develops resourceful solutions; approaches challenges with enthusiasm	Occasionally places a high value on time effectiveness; respects the time of others; avoids becoming involved in endless details	Occasionally seeks supervisor or staff for assistance in obtaining a solution	Occasionally Work product is of top quality, accuracy and keen attention to detail is top priority.	Occasionally volunteers for extra work & projects, makes a valuable contribution to team objectives, excels in developing team momentum, enthusiasm, & pride	Communications are consistently effective, clear & concise
6	Demonstrates a satisfactory use of resources, requires minimal direction in obtaining resources	Demonstrates satisfactory allocation of time resources	Consistently seeks supervisor or staff for assistance in obtaining a solution	Consistently Work quality is good; attention to detail is a priority	Always demonstrates commitment to organizational goals, promotes cooperative behavior & team effort	Communications are generally very effective, clear & concise
5	Occasionally requires direction in obtaining & utilizing resources	Consistently demonstrates satisfactory allocation of time resources	Usually seeks supervisor or staff for assistance in obtaining a solution	Occasionally Work quality is good; attention to detail is a priority	Consistently demonstrates commitment to organizational goals; promotes cooperative behavior & team effort	Communications are generally effective, clear & concise
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1	Does not initiate solutions	Inefficient use of time; minimum awareness of impact on other's time	Always requires detailed instructions to make sound decisions	Quality of work is substandard	Not a team player, only willing to do their own work	Communications are seldom effective, clear & concise

Staff Selection Criteria

Name	Score by Category, on a scale of 1 thru 10						Weighted Score	
	Initiative & Drive	Time Management / Managing Multiple Priorities	Judgment & Decision Making	Project Work	Teamwork / Leadership	Communication	Total	40.0%
Garry Chapman	6					6	44.0	17.6
Weiling Hua	5	5		6	3	3	29.0	11.6
Bryon Reynolds					6	6	45.0	18.0
	0	0	0	0	0	0	0.0	0.0
	0	0	0	0	0	0	0.0	0.0
	0	0	0	0	0	0	0.0	0.0
	0	0	0	0	0	0	0.0	0.0
	0	0	0	0	0	0	0.0	0.0
	0	0	0	0	0	0	0.0	0.0
	0	0	0	0	0	0	0.0	0.0
	0	0	0	0	0	0	0.0	0.0
	0	0	0	0	0	0	0.0	0.0
	0	0	0	0	0	0	0.0	0.0
	0	0	0	0	0	0	0.0	0.0
	0	0	0	0	0	0	0.0	0.0
	0	0	0	0	0	0	0.0	0.0
	0	0	0	0	0	0	0.0	0.0
	0	0	0	0	0	0	0.0	0.0
	0	0	0	0	0	0	0.0	0.0
	0	0	0	0	0	0	0.0	0.0

Staff Selection Criteria

Name (automatically entered from Skills Ranking)	Eval Method (1-4)	Last Eval	1st Prior Eval	2nd Prior Eval	Eval Total	Eval Total (60%)	Score From Matrix (40%)	Stacking Result (60% 40%)
Elaine Woo	0.0				35.0	21.0	19.2	40.2
Diana Sullivan	0.0				30.0	18.0	16.4	34.4
Gerald Cornel	0.0	10.0	10.0	15.0	35.0	21.0	19.2	40.2
Amy Blankenship	0.0	15.0	15.0	15.0	45.0	27.0	16.4	43.4
Jorge Bermudez	0.0	10.0	10.0	5.0	25.0	15.0	18.0	33.0
Jeffry Parker	0.0	15.0	15.0	15.0	45.0	27.0	20.8	47.8
Laurie Hinman	0.0	10.0	10.0	15.0	35.0	21.0	17.6	38.6
Kaycee Rush	0.0	15.0	15.0	10.0	40.0	24.0	20.0	44.0
Kevin Gray	0.0	10.0	10.0	10.0	30.0	18.0	19.2	37.2
					0.0	0.0	0.0	0.0
					0.0	0.0	0.0	0.0
					0.0	0.0	0.0	0.0
					0.0	0.0	0.0	0.0
					0.0	0.0	0.0	0.0
					0.0	0.0	0.0	0.0
					0.0	0.0	0.0	0.0
					0.0	0.0	0.0	0.0

Staff Selection Criteria

Ranking	Initiative & Drive	Time Management / Managing Multiple Priorities	Judgment & Decision Making	Project Work	Teamwork / Leadership	Communication
10	Always takes charge in the absence of detailed instructions, demonstrates self-reliance & develops resourceful solutions, approaches challenges with enthusiasm	Always places a high value on time effectiveness, respects the time of others, avoids becoming involved in endless details	Always assembles all available facts before making decisions, excels in suggesting optional solutions	Always Work product is of top quality, accuracy and keen attention to detail is top priority.	Always volunteers for extra work & projects, makes a valuable contribution to team objectives, excels in developing team momentum, enthusiasm, & pride	All verbal & written communications are very effective, clear & concise
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Staff Selection Criteria

Name	Score by Category, on a scale of 1 thru 10						Weighted Score	
	Initiative & Drive	Time Management / Managing Multiple Priorities	Judgment & Decision Making	Project Work	Teamwork / Leadership	Communication	Total	40.0%
Anthony Williams	7.0	6.0	7.0	8.0	7.0	8.0	43.0	17.2
Danny A. Brooke	7	6	7	7	6	7	40.0	16.0
Faustino M. Ligot	7	6	6	6	6	6	37.0	14.8
First Last Name 4	0	0	0	0	0	0	0.0	0.0
First Last Name 5	0	0	0	0	0	0	0.0	0.0
First Last Name 6	0	0	0	0	0	0	0.0	0.0
First Last Name 7	0	0	0	0	0	0	0.0	0.0
First Last Name 8	0	0	0	0	0	0	0.0	0.0
First Last Name 9	0	0	0	0	0	0	0.0	0.0
First Last Name 10	0	0	0	0	0	0	0.0	0.0
First Last Name 11	0	0	0	0	0	0	0.0	0.0
First Last Name 12	0	0	0	0	0	0	0.0	0.0
First Last Name 13	0	0	0	0	0	0	0.0	0.0
First Last Name 14	0	0	0	0	0	0	0.0	0.0
First Last Name 15	0	0	0	0	0	0	0.0	0.0
First Last Name 16	0	0	0	0	0	0	0.0	0.0
First Last Name 17	0	0	0	0	0	0	0.0	0.0
First Last Name 18	0	0	0	0	0	0	0.0	0.0
First Last Name 19	0	0	0	0	0	0	0.0	0.0
First Last Name 20	0	0	0	0	0	0	0.0	7.0

Staff Selection Criteria

Name (automatically entered from Skills Ranking)	Eval Method (1-4)	Last Eval	1st Prior Eval	2nd Prior Eval	Eval Total	Eval Total (60%)	Score From Matrix (40%)	Stacking Result (60% 40%)
Anthony Williams	1.0				30.0	18.0	17.2	35.2
Danny A. Brooke	1.0				30.0	18.0	16.0	34.0
Faustino M. Ligot	1.0	10.0	10.0	10.0	30.0	18.0	14.8	32.8
					0.0	0.0	0.0	0.0
					0.0	0.0	0.0	0.0
					0.0	0.0	0.0	0.0
					0.0	0.0	0.0	0.0
					0.0	0.0	0.0	0.0
					0.0	0.0	0.0	0.0
					0.0	0.0	0.0	0.0
					0.0	0.0	0.0	0.0
					0.0	0.0	0.0	0.0
					0.0	0.0	0.0	0.0
					0.0	0.0	0.0	0.0
					0.0	0.0	0.0	0.0
					0.0	0.0	0.0	0.0
					0.0	0.0	7.0	7.0

FILED

13 NOV 25 PM 12:59

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

KING COUNTY
SUPERIOR COURT CLERK
E-FILED

CASE NUMBER: 12-2-23827-8 SEA

DENNIS WILLHITE,

Plaintiff,

v.

FARMERS INSURANCE GROUP, d/b/a
FARMERS NEW WORLD LIFE INSURANCE
COMPANY, a Washington corporation,
ZURICH AMERICAN INSURANCE CO, a
corporation,

Defendants.

CASE NO. 12-2-23827-8SEA

COURT'S INSTRUCTIONS TO THE JURY

JEAN RIETSCHER, JUDGE

PLAINTIFF'S PROPOSED INSTRUCTION NO. 1

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law as I explain it to you, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses and the exhibits that I have admitted, during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

In order to decide whether any party's claim has been proved, you must consider all of the evidence that I have admitted that relates to that claim. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of the witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things they testify about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict.

The law does not permit me to comment on the evidence in any way. I would be commenting on the evidence if I indicated my personal opinion about the value of testimony or other evidence. Although I have not intentionally done so, if it appears to you that I have indicated my personal opinion, either during trial or in giving these instructions, you must disregard it entirely.

As to the comments of the lawyers during this trial, they are intended to help you understand the evidence and apply the law.

However, it is important for you to remember that the lawyers' remarks, statements, and arguments are not evidence. You should disregard any remark, statement, or argument that is not supported by the evidence or the law as I have explained it to you. You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

As jurors, you have a duty to consult with one another and to deliberate with the intention of reaching a verdict. Each of you must decide the case for yourself, but only after an impartial consideration of all of the evidence with your fellow jurors. Listen to one another carefully. In the course of your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon the evidence. You should not surrender your honest convictions about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of obtaining enough votes for a verdict.¹¹

¹¹ WPI 1.02

PLAINTIFF'S PROPOSED INSTRUCTION NO. 2

When it is said that a party has the burden of proof on any proposition, or that any proposition must be proved by a preponderance of the evidence, or the expression “if you find” is used, it means that you must be persuaded, considering all the evidence in the case, that the proposition on which that party has the burden of proof is more probably true than not true.²

The plaintiff has the burden of proving each of the following propositions:

The defendant has the burden of proving both of the following propositions:

² WPI 21.01; WPI 21.03

PLAINTIFF'S PROPOSED INSTRUCTION NO. 3

The evidence that has been presented to you may be either direct or circumstantial. The term "direct evidence" refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term "circumstantial evidence" refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.

The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.³

³ WPI 1.03

PLAINTIFF'S PROPOSED INSTRUCTION NO. 4

Evidence of discrimination is almost always circumstantial – as there is rarely an eyewitness to an employer's motives.⁴ As such, a plaintiff is not required to produce direct evidence or a "smoking gun" in order to meet his or her burden.⁵

⁴ *Hill v. BCTI*, 144 Wn.2d 172 (2001); *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99 (2003) (holding that in employment cases, circumstantial evidence is not only sufficient, "but may also be more certain, satisfying and persuasive than direct evidence").

⁵ *Chen v. State*, 86 Wn.App. 183, 190 (1997); *Hill v. BCTI Income Fund*, 144 Wn.2d 172, 179-80 (2001).

PLAINTIFF'S PROPOSED INSTRUCTION NO. 5

If an employer chooses to create an atmosphere in which the employee perceives the personnel policies and practices as fair and consistent, thus securing the benefit of a compliant and loyal workforce, the employer creates a situation 'instinct with an obligation' and cannot treat its promises as illusory."⁶

⁶ *Rowe v. Vaagen Bros. Lumber, Inc.*, 100 Wn.App. 268, 276 (2000), quoted verbatim from case, citing to *Thompson v. St.Regis Paper Co.*, 102 Wn.2d 219,229-30.

PLAINTIFF'S PROPOSED INSTRUCTION NO. 6

In order to prevail on his breach of contract claim, Willhite must prove:

- 1) Statements in Farmers' policy manuals and handbooks amount to promises of specific treatment in specific situations,
- 2) Willhite knew of the policies and believed that they would be enforced,⁷ and
- 3) Farmers breached those promises.

If you find that the Willhite has proved each of the above propositions by a preponderance of the evidence then your verdict should be for the Willhite. If you find that Willhite has failed to prove any of the above propositions, then your verdict should be for Farmers.⁸

⁷ *Carlson v. Lake Chelan Community Hosp.*, 116 Wn.App. 718, 736 (2003); *Bulman v. Safeway, Inc.*, 144 Wn.2d 335, 341-43(2001); *Duncan v. Alaska USA Federal Credit Union, Inc.*, 148 Wn.App. 52, 67-68 (2008)(see cited evidence in footnote 49); *Korlund v. Dyncorp Tri-Cities Services Inc.*, 156 Wn.2d 168, 190-91 (2005); *Clark v. Sears Roebuck & Co.*, 110 Wn.App. 825, 830, n.3 (2002) (holding that failure to read the manual is not dispositive). Also, evidence that employee looked into employment elsewhere does not defeat reliance. In *Stewart v. Chevron Chemical Co.*, 111 Wn.2d 609 (1988), the plaintiff was offered a job elsewhere but turned it down as it did not offer the same job security. *Id.* at 620. The court in *Carlson v. Lake Chelan Community Hospital*, 116 Wn.App. 718 (2003) further held: “[Defendant] also suggests that [plaintiff] must also demonstrate or show some evidence indicating that the provisions of the Handbook induced him to stay on the job. This argument reads too much into *Bulman* (emphasis original).” *Id.* at 733.

⁸ *Bulman v. Safeway, Inc.*, 144 Wn.2d 335, 344-45 (2001). Instruction taken from the *Bulman* opinion with expanded explanation of reliance element as discussed in the cases in footnote 4, above); *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 229-30 (1984).

PLAINTIFF'S PROPOSED INSTRUCTION NO. 7

Terms such as “shall,” “will,” and “must” in policy manuals give rise to a promise of specific treatment.⁹

⁹ *Duncan v. Alaska USA Federal Credit Union, Inc.*, 148 Wn.App. 52, 62-64 (2008); *Korshund v. DynCorp, Inc.*, 156 Wn.2d 168, 190 (2005); *Swanson v. Liquid Air Corp.*, 118 Sn.2d 512, 523-24 (1992).

PLAINTIFF'S PROPOSED INSTRUCTION NO. 8

If it is shown that promises of specific treatment in specific situations were made, Farmers cannot avoid the obligation of complying with those promises on the grounds that the policy manuals also contain non-binding promises described with discretionary language such as “may,” “should” or “guidelines.”¹⁰

¹⁰ *Carlson v. Lake Chelan Community Hosp.*, 116 Wn.App. 718, 731-33 (2003); *Duncan v. Alaska USA Federal Credit Union, Inc.*, 148 Wn.App. 52, 65-66 (2008)

PLAINTIFF'S PROPOSED INSTRUCTION NO. 9

If it is shown that promises of specific treatment in specific situations were made, Farmers cannot avoid the obligation of complying with those promises on the grounds that the policy manuals also state that employees are "at-will."¹¹

¹¹ *Swanson v. Liquid Air Corp.*, 118 Wn.2d 512, 532 (1992)(holding: "We reject the premise that this disclaimer can, as a matter of law, effectively serve as an eternal escape hatch for an employer who may then make whatever unenforceable promises of working conditions it is to its benefit to make"); *Carlson v. Lake Chelan Community Hosp.*, 116 Wn.App. 718, 730-33 (2003); *Duncan v. Alaska USA Federal Credit Union, Inc.*, 148 Wn.App. 52, 70-71 (2008); *Clark v. Sears Roebuck & Co.*, 110 Wn.App. 825, 827 (2002).

PLAINTIFF'S PROPOSED INSTRUCTION NO. 10

If it is shown that promises of specific treatment in specific situations were made, Farmers cannot avoid the obligation of complying with those promises on the grounds that Willhite signed a separate document indicating that his employment was "at-will."¹²

¹² *Korslund v. DynCorp Inc.*, 156 Wn.2d 168, 187-88 (2005); *Clark v. Sears Roebuck & Co.*, 110 Wn.App. 825, 829 (2002); *Brown v. Scott Paper Worldwide, Co.*, 143 Wn.2d 349, 362 (2001).

PLAINTIFF'S PROPOSED INSTRUCTION NO. 11

It is not a defense to any of the claims asserted in this action that Willhite was laid-off, as opposed to being fired.¹³

¹³ WPI 330.32 (providing for a "lay off" in brackets as a mode of termination); *Xieng v. Peoples Nat. Bank of Wash.*, 120 Wn.2d 512, 531-32 (1993) (holding that a reduction in force is not a defense to a claim for front pay). In addition, all of the following cases involve termination pursuant to a lay-off, reduction in force or elimination of position: *Schechener v. KPIX-TV*, 686 F.3d 1018 (2012); *Cluff v. CMX Corp. Inc.*, 84 Wn.App. 634 (1997); *Palmer v. US*, 794 F.2d 534 (1986); *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138 (2004); *Sellsted v. Washington Mutual Savings Bank*, 69 Wn.App. 852 (1993); *Stewart v. Chevron Chemical Co.*, 111 Wn.2d 609 (1988).); *Xin Liu v. Amway Corp.*, 347 F.3d 1125 (2003).

PLAINTIFF'S PROPOSED INSTRUCTION NO. 12

Depression is a recognized disability and those suffering from depression are entitled to the protections of the Law Against Discrimination.¹⁴

The cause of an employee's disability is irrelevant to the determination as to whether an employer engaged in discriminatory conduct.

Here, it is undisputed that Willhite suffered from a temporary disability from acute depression and anxiety. It is undisputed that Willhite could perform the essential functions of his job, with reasonable accommodation.

¹⁴ WAC 162-22-020; RCW 49.60.120(3) grants the Human Rights Commission the power to adopt rules to carry out the provisions of the chapter. The Commission's definition is given great weight. *Phillips v. City of Seattle*, 111 Wn.2d 903, 908 (1989).

PLAINTIFF'S PROPOSED INSTRUCTION NO. 13

Discrimination in employment on the basis of disability is prohibited.

To establish his claim of discrimination on the basis of disability, Willhite has the burden of proving each of the following propositions:

- (1) That Willhite had a disability, specifically depression (this is undisputed);
- (2) That Willhite was able to perform the essential functions of his job with reasonable accommodation (this is also undisputed); and
- (3) That Willhite's disability was a substantial factor in Farmers decision to lay him off.

Willhite does not have to prove that his disability was the only factor or the main factor in the decision.

Nor does Willhite have to prove that he would not have been termination but for his disability.

If you find from your consideration of all of the evidence that each of these propositions has been proved, then your verdict should be for Willhite on the disability discrimination claim. On the other hand, if any of these propositions has not been proved, your verdict should be for Farmers on the disability discrimination claim.¹⁵

¹⁵ WPI 330.32 **Modified**; *Anica v. Wal-Mart Stores, Inc.*, 120 Wn.App. 481, 491 (2004).

PLAINTIFF'S PROPOSED INSTRUCTION NO. 14

The law makes no distinction between conduct caused by a disability and the disability itself. As such, you may conclude that Willhite's disability was a "substantial factor" in Famers' termination decision, if you find that the decision was based in part upon performance deficits, personality changes or other symptoms that were a result of Willhite's depression.¹⁶

¹⁶ *Gambini v. Total Renal Care, Inc.*, 486 F.3d 1087, 1093-95 (2007) (holding: "[I]f the law fails to protect the manifestations of [the plaintiff's] disability, there is no real protection in the law because it would protect the disabled in name only." Court further held that "a jury **must** be instructed that it may find that the employee was terminated on the impermissible basis of her disability" if evidence is presented of a causal link between the disability-produced conduct and the termination." Court held it was reversible error to not provide the following proposed instruction: "Conduct resulting from a disability is part of the disability and not a separate basis for termination."

Riehl v. Foodmaker, Inc., 152 Wn.2d 138, 152 (2004) (holding that personality changes could be a symptom of depression and therefore impermissible grounds for termination).

Callahan v. Walla Walla Housing Authority, 126 Wn.App. 812, 821 (2005) (holding that there can be disability discrimination even without a diagnosed condition).

Humphrey v. Memorial Hospitals Assn., 239 F.3d 1128, 1139-40 (2001) (holding that under the ADA, conduct resulting from the disability is considered to be part of the disability).

PLAINTIFF'S PROPOSED INSTRUCTION NO. 15

You may also consider the following when determining whether Willhite's disability was a substantial factor in Farmers' termination decision:

- 1) The proximity of time between the disability leave and the termination, as well as the years of employment prior to termination;¹⁷
- 2) A prior history of satisfactory work performance.¹⁸
- 3) Whether the performance evaluations upon which the termination decision was based contain subjective opinions, such as those assessing an employee's "dedication," or "enthusiasm."¹⁹
- 4) Whether there was a drop in performance evaluation scores after the onset of the disability.²⁰

¹⁷ *Anica v. Wal-Mart Stores, Inc.*, 120 Wn.App. 481, 491 (2004); *Xin Liu v. Amway Corp.*, 347 F.3d 1125, 1137 (2003); *Matthews v. Alhambra School Dist.*, 39 NDLR P 224 (unpublished but cited by Farmers in MSJ proceedings); *Murray v. JEN-WELD Inc.*, 922 F.Supp.2d 497, 514 (USDC MD Pennsylvania 2013)(cited by Farmers in MSJ proceedings); *Presta v. West Customer Management Group LLC*, 2011 WL 6370355 (2011)

¹⁸ *Anica v. Wal-Mart Stores, Inc.*, 120 Wn.App. 481, 491 (2004); *Phillips v. City of Seattle*, 111 Wn.2d 903, 909 (1989) (holding that whether a condition was the reason for a dismissal "depends upon the documentation of the employer, testimony regarding the dismissal and other relevant facts.")

¹⁹ *Xin Liu v. Amway Corp.*, 347 F.3d 1125, 1136-37 (2003).

²⁰ *Xin Liu v. Amway Corp.*, 347 F.3d 1125, 1137 (2003).

PLAINTIFF'S PROPOSED INSTRUCTION NO. 16

When determining whether disability was a substantial factor in the termination decision, you may also consider whether Farmers' offered explanations for the termination decision are: 1) inconsistent; 2) unworthy of belief; 3) unsupported by facts; or 4) affirmatively false.²¹

If you disbelieve any of Farmers' offered explanation for Willhite's termination, you are entitled to infer discrimination from this evidence alone, and conclude that Willhite's disability was a substantial factor in Farmers' termination decision.²²

²¹ *Sellsted v. Washington Mutual Savings Bank*, 69 Wn.App. 852, 861 (1993); *Chen v. State*, 86 Wn.App. 183, 190 (1997); *Reeves v. Sanderson Plumbing, Inc.*, 530 U.S. 133, 134 (2000)

²² *Reeves v. Sanderson Plumbing Inc.*, 530 U.S. 133, 147-48 (2000); *Hill v. BCTI Income Fund*, 144 Wn.2d 172, 185 (2001); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993); *Cluff v. CMX Corp., Inc.*, 84 Wn.App. 634, 639 (1997) (holding: "Pretext can be showed indirectly by establishing the employer's explanation for the termination is false.")

PLAINTIFF'S PROPOSED INSTRUCTION NO. 17

It is not a defense to a claim for discrimination that the employer did not know that its conduct was a violation of the law against discrimination.²³

²³ *Xin Liu v. Amway Corp.*, 347 F.3d 1125, 1134-35 (2003)(holding that it is the employer's responsibility to inquire as to the specific facts supporting the request for leave).

PLAINTIFF'S PROPOSED INSTRUCTION NO. 18

It is not a defense to a claim for discrimination that the employer did not know the nature or extent of the employee's disability.²⁴

²⁴ *Goodman v. Boeing*, 127 Wn.2d 401, 408 (1995). To the contrary, once an employer is on notice, it is the employer's responsibility to determine the nature of the condition. *Bachelder v. America West Airlines, Inc.*, 259 F.3d 1112, 1130 (9th Cir.2001). In addition, fundamental rules of agency preclude Farmers from claiming ignorance of facts held by its disability carrier, Liberty Mutual, as it was the agent charged with discovering those very facts. *Kimbrow v. Atlantic Richfield Co. Eyeglasses*, 889 F.2d 869, 876 (1989) (holding that supervisor's knowledge of disability is imputed to employer).

PLAINTIFF'S PROPOSED INSTRUCTION NO. 19

The laws prohibiting discrimination are to be liberally construed and exceptions are narrowly confined.²⁵

²⁵ *Phillips v. City of Seattle*, 111 Wn.2d 903, 908 (1989)

PLAINTIFF'S PROPOSED INSTRUCTION NO. 20

The Washington Family Leave Act entitles employees to 12 weeks of medical leave due to a serious health condition. An employee who takes medical leave under the Act is entitled to be restored to the position of employment held prior to the leave. It is unlawful for an employer to interfere with an employee's rights provided under the Family Leave Act.²⁶

²⁶ RCW 49.78.220, 49.78.280 and 49.78.300

PLAINTIFF'S PROPOSED INSTRUCTION NO. 21

Damages in a wrongful termination case are to be calculated in a way that puts the plaintiff in the position he would have been, but for the wrongful termination.²⁷

²⁷ *Albermarle Paper Co. v. Moody*, 422 US 405, 418-19 (1975)

PLAINTIFF'S PROPOSED INSTRUCTION NO. 22

It is the duty of the court to instruct you as to the measure of damages. By instructing you on damages, the court does not mean to suggest for which party your verdict should be rendered.

If your verdict is for Willhite you must determine the amount of money that will reasonably and fairly compensate him for such damages as you find were proximately caused by the acts of Farmers.

If you find for Willhite, you should consider the following elements:

- (1) The reasonable value of lost past earnings and fringe benefits, from the date of the wrongful conduct to the date of trial;
- (2) The reasonable value of lost future earnings and fringe benefits; and
- (3) The emotional harm to the plaintiff caused by Farmers' wrongful conduct, including emotional distress, loss of enjoyment of life, humiliation, personal indignity, embarrassment, fear, anxiety, and/or anguish. Willhite is entitled to compensation for such harm experienced to date and, with reasonable probability, to be experienced in the future.

The burden of proving damages rests with the party claiming them, and it is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence.

Any award of damages must be based upon evidence and not upon speculation, guess, or conjecture. The law has not furnished us with any fixed standards by which to

measure emotional distress, loss of enjoyment of life, humiliation, personal indignity, embarrassment, fear, anxiety, and/or anguish. With reference to these matters, you must be governed by your own judgment, by the evidence in the case, and by these instructions.²⁸

²⁸ WPI 330.81 *Modified*

PLAINTIFF'S PROPOSED INSTRUCTION NO. 23

“Wages” are broadly defined to include to include any compensation due by reason of employment, including benefits and bonuses.²⁹

²⁹ *Flower v. TRA Industries*, 127 Wn.App. 13, 34 (2005).

PLAINTIFF'S PROPOSED INSTRUCTION NO. 24

Back pay is the total dollar amount of wages (including salary, bonus and benefits) that Willhite would have earned from November 10, 2010 to the date of this verdict.³⁰

³⁰ *Brundridge v. Fluor Federal Services, Inc.*, 164 Wn.2d 432, 456 (2008); *Xieng v. Peoples Nat'l Bank of Wash.*, 120 Wn.2d 512, 531 (1993).

PLAINTIFF'S PROPOSED INSTRUCTION NO. 25

If you find that Farmer's discriminated against Willhite, any doubts concerning back pay are to be resolved in favor of Willhite and against Farmers.³¹

³¹ *Henningsen v. Worldcom, Inc.* 102 Wn.App. 828, 846 (2000).

PLAINTIFF'S PROPOSED INSTRUCTION NO. 26

“Willful” failure to pay back pay means that the failure to pay was an intentional act, as opposed to mere carelessness. An employee need not show that the employer’s conduct was mean-spirited or with ill-intent in order to show that it was “willful.”³²

³² *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 159-60 and 165 (1998); *Durand v. HIMC*, 151 Wn.App. 818, 833 (2009)

PLAINTIFF'S PROPOSED INSTRUCTION NO. 27

In calculating damages for future wage loss you should determine the salary, and benefits from today until the time the plaintiff may reasonably be expected to retire, decreased by any projected future earnings from another employer.³³

In calculating lost pension benefits, you are to determine the pension benefits that Willhite would have been received, through the life of Colleen Willhite, had he remained at Farmers through retirement at the age of 65.

³³ WPI 330.82, Modified.

PLAINTIFF'S PROPOSED INSTRUCTION NO. 28

It is not a defense to a claim for future wage loss, that the plaintiff's position was eliminated in connection with a reduction in force.³⁴

³⁴ *Xieng v. Peoples Nat. Bank of Wash.*, 120 Wn.2d 512, 531-32 (1993).

PLAINTIFF'S PROPOSED INSTRUCTION NO. 29

Willhite, has a duty to use reasonable efforts to mitigate damages. To mitigate means to avoid or reduce damages.

To establish a failure to mitigate, Farmers, has the burden of proving:

- (1) There were openings in comparable positions available for Willhite elsewhere after Farmers laid him off;
- (2) Willhite failed to use reasonable care and diligence in seeking those openings;
and
- (3) The amount by which damages would have been reduced if Willhite had used reasonable care and diligence in seeking those openings.

You should take into account the characteristics of the Willhite and the job market in evaluating the reasonableness of Willhite's efforts to mitigate damages.

If you find that Farmers has proved all of the above, you should reduce your award of damages for wage loss accordingly.³⁵

³⁵ WPI 330.83, *Modified*.

PLAINTIFF'S PROPOSED INSTRUCTION NO. 30

Willhite need not show that he was successful at finding comparable employment in order to establish that he mitigated his damages. He mitigated his damages if he exercised reasonable diligence in finding comparable employment."³⁶

³⁶ *Burnside v. Simpson Paper Co.*, 66 Wn.App. at 530; *Sutton v. Shufelberger*, 31 Wn.App. 579, 581, 643 P.2d 920 (1982) (holding that because the duty to mitigate only requires one to take reasonable steps, it is error to instruct jury the duty requires one to obtain another job).

PLAINTIFF'S PROPOSED INSTRUCTION NO. 31

If Farmers does not prove by a preponderance of the evidence that Willhite failed to use reasonable care in finding comparable positions, you are to presume that Willhite would have remained employed at Farmers until February 2022, at which time he would have retired at the age of 65.³⁷

³⁷ *Brundridge v. Fluor Federal Services, Inc.*, 164 Wn.2d 432, 456 (2008); *Xieng v. Peoples Nat'l Bank of Wash.*, 120 Wn.2d 512, 531 (1993)

PLAINTIFF'S PROPOSED INSTRUCTION NO. 32

Any doubts regarding the accuracy regarding the total amount of back pay and front pay should be resolved in favor of Willhite.³⁸

³⁸ *Henningsen v. Worldcom, Inc.* 102 Wn.App. 828, 846 (2000); *Salinas v. Roadway Exp., Inc.*, 735 F.2d 1574 (5th Cir. 1984)

PLAINTIFF'S PROPOSED INSTRUCTION NO. 33

Willhite need not prove that Farmers intended to cause him emotional distress in order to recover emotional distress damages. Rather, Willhite need only prove that he suffered such harm as a result of Farmers' discriminatory conduct.³⁹

³⁹ *Dean v. Municipality of Metropolitan Seattle-Metro*, 104 Wn.2d 627, 641 (1985).

PLAINTIFF'S PROPOSED INSTRUCTION NO. 34

Noneconomic damages are not susceptible of precise measurement, and evidence that assigns an actual dollar value to the injury or that fixes the amount of damages with mathematical certainty is not required.⁴⁰

⁴⁰ *Rasor v. Retail Credit Co.*, 87 Wn.2d 516, 554 P.2d 1041 (1976); *Wagner v. Monteilh*, 43 Wn.App. 908, 720 P.2d 847 (1986).

PLAINTIFF'S PROPOSED INSTRUCTION NO. 35

If you find that Farmers discriminated against Willhite based upon his disability for depression and if you find that:

- (1) Willhite was suffering from anxiety and depression prior to such discrimination, and
- (2) That Farmers' conduct aggravated the pre-existing anxiety or depression, then you should consider the degree to which the condition or the pain or disability was aggravated by this occurrence.

However, you should not consider any anxiety or depression that may have existed prior to Farmers' conduct, or from which Willhite may now be suffering, that was not caused or contributed to by Farmers' conduct.⁴¹

⁴¹ WPI 30.17, *Modified*.

PLAINTIFF'S PROPOSED INSTRUCTION NO. 36

When you begin to deliberate, your first duty is to select a presiding juror. The presiding juror's responsibility is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

You will be given the exhibits admitted in evidence and these instructions. You will also be given a special verdict form that consists of several questions for you to answer. You must answer the questions in the order in which they are written, and according to the directions on the form. It is important that you read all the questions before you begin answering, and that you follow the directions exactly. Your answer to some questions will determine whether you are to answer all, some, or none of the remaining questions.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. [For this purpose, use the form provided in the jury room.] In your question, do not state how the jury has voted, or in any other way indicate

how your deliberations are proceeding. The presiding juror should sign and date the question and give it to the bailiff. I will confer with the lawyers to determine what response, if any, can be given.

In order to answer any question on the special verdict form, ten jurors must agree upon the answer. It is not necessary that the jurors who agree on the answer be the same jurors who agreed on the answer to any other question, so long as ten jurors agree to each answer.

When you have finished answering the questions according to the directions on the special verdict form, the presiding juror will sign the verdict form. The presiding juror must sign the verdict whether or not the presiding juror agrees with the verdict. The presiding juror will then tell the bailiff that you have reached a verdict. The bailiff will bring you back into court where your verdict will be announced.⁴²

⁴² WPI 1.11

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

DENNIS WILLHITE,

Plaintiff,

v.

FARMERS INSURANCE GROUP, d/b/a
FARMERS NEW WORLD LIFE INSURANCE
COMPANY, a Washington corporation,
ZURICH AMERICAN INSURANCE CO, a
corporation,

Defendants.

CASE NO. 12-2-23827-8SEA

SPECIAL VERDICT FORM

JUDGE JEAN RIETSCHER

First Cause Of Action - Breach Of Contract

1) Did language in Farmers' policy manuals and handbooks contain promises of specific treatment in specific situations?

Answer: Yes ___ or No ___

*If your answer to question number 1 is "yes," please continue on to question number 2.
If your answer is "no," skip to question number 4.*

2) Was Willhite aware, prior to his termination, of the policy language that contained promises of specific treatment and did he reasonably expect those policies to be enforced?

Answer: Yes ___ or No ___

*If your answer to question number 2 is "yes," please continue on to question number 3.
If your answer is "no," skip to question number 4.*

3) Did Farmers breach those promises?

Answer: Yes ___ or No ___

Second Cause of Action - Violation of Washington Family Leave Act

4) Did Farmers termination of Willhite 13 weeks after his return from medical leave constitute a violation of the Washington Family Leave Act?

Answer: Yes ___ or No ___

Fourth Cause of Action - Disability Discrimination

5) Was Willhite's disability a "substantial factor" in Farmers' decision to lay him off?

Answer: Yes ___ or No ___

If you answered "yes" to question numbers 3, 4 or 5, or any combination of those questions, please continue on to question 6. If you did not answer "yes" to any one of those questions, please date and sign this verdict and deliver it to the bailiff.

DAMAGES

6) Please state the dollar amount of wages (including salary, bonus and benefits) that Willhite would have earned between November 10, 2010 and today's date, had he not been terminated:

\$ _____

7) Was Farmers' failure to pay Willhite the amount identified in response to question 6 an intentional act?

Answer: Yes ___ or No ___

8) Please state the dollar amount of wages (including salary, bonus and benefits), that Willhite would have earned at Farmers between the date of this verdict and February, 2022, had he not been terminated:

\$ _____

9) Please state the dollar amount that is the difference between the pension benefits that Willhite is currently entitled to receive (through the life of his spouse Colleen Willhite) and the amount Willhite would have been entitled to receive (through the life of his spouse Colleen Willhite) had he not been terminated:

\$ _____

If you answered "yes" to question number 4 or question number 5 (or both), please answer questions 10 and 11. If you did not answer "yes" to either question 4 or question 5, skip questions 10 and 11 and move on to question 12.

10) Did Willhite suffer emotional distress, loss of enjoyment of life, humiliation, personal indignity, embarrassment, fear, anxiety, and/or anguish as a result of Farmers' conduct?

Answer: Yes ___ or No ___

If your answer to question number 10 is "yes," please answer question number 11. If your answer is "no," skip to question 12.

11) What dollar amount constitutes a "fair value trade" for the emotional distress, loss of enjoyment of life, humiliation, personal indignity, embarrassment, fear, anxiety, and/or anguish Willhite suffered as a result of Farmers' conduct?

\$ _____

12) Did Willhite use reasonable efforts to find comparable employment?

Answer: Yes ___ or No ___

If your answer to question number 12 is "yes," date and sign this verdict and notify the bailiff.

If your answer to question number 12 is "no," please answer question numbers 13, 14, and 15.

13) State the dollar amount of wages (including salary, bonus and benefits) Willhite would have earned between November 10, 2010 and the present, had he used reasonable efforts to find comparable employment:

\$ _____

14) State the dollar amount of wages (including salary, bonus and benefits) Willhite could reasonably be expected to earn from today's date to February 2020, with reasonable efforts to find comparable employment:

\$ _____

SIGN THIS VERDICT FORM AND NOTIFY THE BAILIFF.

DATED this ____ day of December, 2013.

Presiding Juror

FILED
KING COUNTY WASHINGTON

DEC 19 2013

SUPERIOR COURT CLERK
BY Susan Bone
DEPUTY

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

Dennis Willhite,

Plaintiff,

vs.

Farmers Insurance et ano,

Defendant.

No: 12-2-23827-8 SEA

COURT'S INSTRUCTIONS TO THE JURY

Dated this 18th day of December, 2013



Honorable Ken Schubert

ORIGINAL

JURY INSTRUCTION NO. 1

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It is also your duty to accept the law as I explain it to you, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, and the exhibits that I have admitted, during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

In order to decide whether any party's claim has been proved, you must consider all of the evidence that I have admitted that relates to that claim. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of the witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things they testify about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or believe of a witness or

your evaluation of his or her testimony.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict.

The law does not permit me to comment on the evidence in any way. I would be commenting on the evidence if I indicated my personal opinion about the value of testimony or other evidence. Although I have not intentionally done so, if it appears to you that I have indicated my personal opinion, either during trial or in giving these instructions, you must disregard it entirely.

As to the comments of the lawyers during this trial, they are intended to help you understand the evidence and apply the law. However, it is important for you to remember that the lawyers' remarks, statements, and arguments are not evidence. You should disregard any remark, statement, or argument that is not supported by the evidence of the law as I have explained it to you.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

As jurors, you have a duty to consult with one another and to deliberate with the intention of reaching a verdict. Each of you must decide the case for yourself, but only after an impartial consideration of all of the evidence with your fellow jurors. Listen to one another carefully. In the course of your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon the evidence. You should not surrender your honest

convictions about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of obtaining enough votes for a verdict.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, bias, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

Finally, the order of these instructions has no significance as to their relative importance. They are all equally important. In closing arguments, the lawyers may properly discuss specific instructions, but you must not attach any special significance to a particular instruction that they may discuss. During your deliberations, you must consider the instructions as a whole.

JURY INSTRUCTION NO. 2

The following is merely a summary of the claims of the parties. You are not to consider the summary as proof of the matters claimed; and you are to consider only those matters that are established by the evidence. These claims have been outlined solely to aid you in understanding the issues.

Dennis Willhite is a former employee of Farmers Life. Farmers Life terminated Mr. Willhite's employment as part of a reduction-in-force. Mr. Willhite claims that his termination (1) breached a promise by Farmers Life that he would not be terminated for poor performance without notice and an opportunity to improve and (2) was unlawful discrimination on the basis of disability. He also alleges that Farmers Life violated the Washington Family Leave Act.

Farmers Life denies Mr. Willhite's claims.

JURY INSTRUCTION NO. 3

When it is said that a party has the burden of proof on any proposition, or that any proposition must be proved by a preponderance of the evidence, or the expression "if you find" is used, it means that you must be persuaded, considering all the evidence in the case, that the proposition on which that party has the burden of proof is more probably true than not true.

JURY INSTRUCTION NO. 4

The evidence that has been presented to you may be either direct or circumstantial. The term "direct evidence" refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term "circumstantial evidence" refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.

The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

JURY INSTRUCTION NO. 5

The law treats all parties equally whether they are corporations, partnerships, or individuals. This means that corporations, partnerships, and individuals are to be treated in the same fair and unprejudiced manner.

JURY INSTRUCTION NO. 6

In Washington, employment for an indefinite duration generally is at-will. "At-will employment" means both the employer and the employee may terminate the employment relationship at any time, for any reason, or for no reason, so long as the reason is not prohibited by law.

JURY INSTRUCTION NO. 7

If an employer creates an atmosphere of job security and fair treatment with promises of specific treatment in specific situations, and the employee is induced by those promises to remain on the job and not actively seek other employment, those promises are enforceable components of the employment relationship and modify the "at will" nature of the employment.

Dennis Willhite has alleged that Farmers Life made a promise to him that he would not be terminated for poor performance without prior notice and an opportunity to improve. In order to prevail on this claim, Dennis Willhite must prove:

- (1) That statements in a policy manual or handbook amounted to a specific promise by Farmers Life that he would not be terminated for poor performance without prior notice and an opportunity to improve; and
- (2) That he justifiably relied upon such promise; and
- (3) That Farmers Life breached the promise of specific treatment.

If you find that Dennis Willhite has proved each of the above propositions by a preponderance of the evidence, then your verdict should be for Dennis Willhite on this claim. On the other hand, if you find that any of the above propositions has not been proved, then your verdict should be for Farmers Life.

JURY INSTRUCTION NO. 8

Only those statements in employment handbooks, manuals, or similar documents that constitute promises of specific treatment in specific situations are binding. A promise is an expression that justifies the person to whom it is made in reasonably believing that a commitment has been made that something specific will happen or not happen in the future.

General statements of company policy do not constitute promises of specific treatment in a specific situation.

An illusory promise is a purported promise that actually promises nothing because it leaves to the speaker the choice of performance or nonperformance. An alleged promise may be illusory if it is so indefinite it cannot be enforced, or if its performance is optional or discretionary on the part of the promisor. An illusory promise is unenforceable.

Terms such as "shall," "will," and "must" in policy manuals may give rise to a promise of specific treatment. On the other hand, terms such as "should," "may," "might," and "normally" are illusory and do not give rise to a promise of specific treatment.

JURY INSTRUCTION NO. 9

An employer can disclaim what might otherwise appear to be enforceable promises in handbooks or manuals. The disclaimer must state in a conspicuous manner that nothing contained in the handbook, manual, or similar document is intended to be part of the employment relationship and that such statements are instead simply general statements of company policy. A disclaimer must be effectively communicated to the employee in order to be effective. An employer's inconsistent representations can negate the effects of a disclaimer.

JURY INSTRUCTION NO. 10

To establish justifiable reliance, an employee must have actual knowledge of the promise that was allegedly breached. General reliance on an "atmosphere" of job security is not sufficient. The employee must rely on an employer's specific promise.

In order for Dennis Willhite to prove that he justifiably relied on a promise that he would not be terminated for poor performance without prior notice and an opportunity to improve, he must prove that:

1. He was induced by the promise to remain on the job, and
2. He was induced by the promise to not actively seek other employment.

JURY INSTRUCTION NO. 11

A breach of promise is defined as a failure to perform a duty or obligation contained in the promise.

JURY INSTRUCTION NO. 12

In general, the Washington Family Leave Act ("FLA") requires employers to provide eligible employees with up to 12 weeks per year of unpaid leave for certain reasons, including to attend to a serious health condition. At the end of the leave, the employee is entitled to either return to the position of employment he had previously held, or, alternatively, be placed in an equivalent position. The FLA makes it unlawful for any employer to interfere with, restrain, or deny the exercise of or attempt to exercise, any right it provides.

Upon his return from FLA leave, Dennis Willhite was entitled to be restored to the position of employment he held when his leave commenced or to an equivalent position. Mr. Willhite has alleged that Farmers Life interfered with, restrained, or denied him the exercise of that right. In order to prevail on this claim, Mr. Willhite must prove:

(1) He took leave under the FLA; and

(2) Upon his return from FLA leave, Farmers Life failed to reinstate him to his former position or an equivalent position.

If you find that Dennis Willhite has proved each of the above propositions by a preponderance of the evidence, then your verdict should be for Dennis Willhite on this claim. On the other hand, if you find that either of the above propositions has not been proved, then your verdict should be for Farmers Life.

JURY INSTRUCTION NO. 13

An employee has no greater rights to continued employment or other benefits and conditions of employment than any of his fellow employees by virtue of the fact that he exercised rights to FLA leave.

JURY INSTRUCTION NO. 14

Discrimination in employment on the basis of disability is prohibited.

To establish his claim of discrimination on the basis of disability, Dennis Willhite has the burden of proving each of the following propositions:

- (1) That he had a disability;
- (2) That he was able to perform the essential functions of his job; and
- (3) That his disability was a substantial factor in Farmers Life's decision to lay him off.

"Substantial factor" means a significant motivating factor in bringing about the employer's decision. Dennis Willhite does not have to prove that his disability was the only factor or the main factor in the decision. Nor does he have to prove that he would not have been terminated but for his disability.

If you find from your consideration of all of the evidence that each of these propositions has been proved, then your verdict should be for Dennis Willhite. On the other hand, if any of these propositions has not been proved, your verdict should be for Farmers Life on this claim.

JURY INSTRUCTION NO. 15

A disability is a sensory, mental, or physical impairment that:

1. Is medically recognized or diagnosable; or
2. Exists as a record or history.

JURY INSTRUCTION NO. 16

An impairment includes but is not limited to: a physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculo-skeletal, special sense organs, respiratory, including speech organs, cardio-vascular, reproductive, digestive, genitor-urinary, hemic and lymphatic, skin, and endocrine; or any mental, developmental, traumatic, or psychological disorder including but not limited to cognitive limitation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

JURY INSTRUCTION NO. 17

An essential function is a job duty that is fundamental, basic, necessary and indispensable to filling a particular position, as opposed to a marginal duty divorced from the essence or substance of the job.

In determining whether a function is essential to a position, you may consider, among others, the following factors:

- (1) whether the reasons the position exists include performing that function;
- (2) the employer's judgment as to which functions are essential;
- (3) the judgment of those who have experience working in and around the position in question;
- (4) any written job descriptions such as those used to advertise the position; and
- (5) the amount of time spent on the job performing the particular function.

JURY INSTRUCTION NO. 18

Dennis Willhite alleges that Farmers Life based its decision to terminate him on conduct resulting from his disability. Conduct resulting from the disability is part of the disability and not a separate basis for termination. To establish that Farmers Life terminated him based on conduct resulting from his disability, Dennis Willhite must prove:

- (1) That the conduct on which Farmers Life relied resulted from his disability, and
- (2) That there was a causal link between the disability-produced conduct and the termination.

Where an employer did not know or had no notice of an employee's disability, the employee's disability cannot have been a substantial factor in the employment decision.

JURY INSTRUCTION NO. 19

You heard evidence in this lawsuit that Dennis Willhite asserted a claim of age discrimination and a claim that Farmers Life was motivated to choose him for the layoff in order to lower its pension benefits obligation to him. Both of those claims have been dismissed. You are not to consider those dismissed claims in deciding any of the remaining claims in this case.

JURY INSTRUCTION NO. 20

It is the duty of the court to instruct you as to the measure of damages. By instructing you on damages, the court does not mean to suggest for which party your verdict should be rendered.

The burden of proving damages rests with the party who is claiming them and it is for you to determine, based upon the evidence, whether any particular element of damages has been proved by a preponderance of the evidence. You must be governed by your own judgment, by the evidence in the case, and by these instructions, rather than by speculation, guess, or conjecture.

You may not award damages as a punishment, and damages cannot be imposed or increased to penalize Farmers Life. You may not award damages for to compensate Dennis Willhite for court costs or attorney fees.

JURY INSTRUCTION NO. 21

If your verdict is for Dennis Willhite on his claim for breach of promise of specific treatment in specific situations and if you find that Dennis Willhite has proved that he incurred actual damages related to lost past and future salary and the amount of those actual damages, then you shall award actual damages to him.

Actual damages are those losses of past and future salary that were reasonably foreseeable, at the time the promise was made, as a probable result of a breach. A loss may be foreseeable as a probable result of breach because it follows from breach of the promise either

(a) in the ordinary course of events, or

(b) as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know.

In calculating Dennis Willhite's actual damages for lost past and future salary, you should determine the sum of money that will put him in as good a position as he would have been in if both Dennis Willhite and Farmers Life had performed their promises.

JURY INSTRUCTION NO. 22

A party who sustains damage as a result of another party's breach of a promise has a duty to minimize his loss. An injured party is not entitled to recover for any part of the loss that he could have avoided with reasonable efforts. The party who caused the damages has the burden to prove that the injured party failed to use reasonable efforts to minimize his loss, and the amount of damages that could have been minimized or avoided.

JURY INSTRUCTION NO. 23

If your verdict is for Dennis Willhite on his claim for disability discrimination you must determine the amount of money that will reasonably and fairly compensate him for such damages as you find were proximately caused by the acts of Farmers Life.

If you find for Dennis Willhite on his claim for disability discrimination, you should consider the following elements:

- (1) The reasonable value of lost past salary, from January 11, 2011 to the date of trial;
- (2) The reasonable value of lost future salary; and
- (3) The emotional harm to Dennis Willhite caused by Farmers Life's wrongful conduct, including emotional distress, loss of enjoyment of life, humiliation, personal indignity, embarrassment, fear, anxiety, and/or anguish, experienced by Dennis Willhite and with reasonable probability to be experienced by him in the future.

Any award of damages must be based upon evidence and not upon speculation, guess, or conjecture. The law has not furnished us with any fixed standards by which to measure emotional distress, loss of enjoyment of life, humiliation, personal indignity, embarrassment, fear, anxiety, and/or anguish. With reference to these matters, you must be governed by your own judgment, by the evidence in the case, and by these instructions.

JURY INSTRUCTION NO. 24

If you find that Farmers Life violated the Washington Family Leave Act, then you must determine the amount of damages Dennis Willhite suffered.

If you find that Dennis Willhite has suffered loss of past salary relating to his employment by reason of Farmers Life's violation of the Family Leave Act, you must determine and award the amount of such lost past salary.

JURY INSTRUCTION NO. 25

In calculating damages for lost future salary you should determine the present cash value of Dennis Willhite's salary from today until the time that Dennis Willhite may reasonably be expected to retire or fully recover from the continuing effects of the discrimination, decreased by any projected future earnings.

JURY INSTRUCTION NO. 26

Any award for future economic damages must be for the present cash value of those damages. Noneconomic damages are not reduced to present cash value.

“Present cash value” means the sum of money needed now which, if invested at a reasonable rate of return, would equal the amount of loss at the time in the future when the earnings would have been received.

The rate of interest to be applied in determining present cash value should be that rate which in your judgment is reasonable under all circumstances. In this regard, you should take into consideration the prevailing rates of interest in the area that can reasonably be expected from safe investments that a person of ordinary prudence, but without particular financial experience or skill, can make in this locality.

JURY INSTRUCTION NO. 27

In order to prevail on his claim for disability discrimination, Dennis Willhite must prove that Farmers Life intended to discriminate against him. He need not prove, however, that Farmers Life intended to cause him emotional distress in order to recover emotional distress damages. Rather, he need only prove that he suffered such harm as a result of Farmers Life's discriminatory conduct.

JURY INSTRUCTION NO. 28

The plaintiff, Dennis Willhite, has a duty to use reasonable efforts to mitigate damages. To mitigate means to avoid or reduce damages.

To establish a failure to mitigate damages proximately caused by disability discrimination, Farmers Life has the burden of proving:

(1) There were openings in comparable positions available for Dennis Willhite elsewhere after Farmers Life laid him off;

(2) Dennis Willhite failed to use reasonable care and diligence in seeking those openings; and

(3) the amount by which damages would have been reduced if Dennis Willhite had used reasonable care and diligence in seeking those openings.

Dennis Willhite need not show that he was successful at finding comparable employment in order to establish that he mitigated his damages. He mitigated his damages if he exercised reasonable diligence in finding comparable employment.

You should take into account the characteristics of Dennis Willhite and the job market in evaluating the reasonableness of his efforts to mitigate damages.

If you find that Farmers Life has proved all of the above, you should reduce your award of damages for wage loss accordingly.

JURY INSTRUCTION NO. 29

When you begin to deliberate, your first duty is to select a presiding juror. The presiding juror's responsibility is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

You will be given the exhibits admitted in evidence and these instructions. You will also be given a special verdict form that consists of several questions for you to answer. You must answer the questions in the order in which they are written, and according to the directions on the form. It is important that you read all the questions before you begin answering, and that you follow the directions exactly. Your answer to some questions will determine whether you are to answer all, some, or none of the remaining questions.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. [For this purpose, use the form provided in the jury room.] In your question, do not state how the jury has voted, or in any other way indicate how your deliberations are proceeding. The presiding juror should sign and date the question and give it to the bailiff. I will confer with the lawyers to determine what response, if any, can be given.

In order to answer any question on the special verdict form, ten jurors must agree upon

the answer. It is not necessary that the jurors who agree on the answer be the same jurors who agreed on the answer to any other question, so long as ten jurors agree to each answer.

When you have finished answering the questions according to the directions on the special verdict form, the presiding juror will sign the verdict form. The presiding juror must sign the verdict whether or not the presiding juror agrees with the verdict. The presiding juror will then tell the bailiff that you have reached a verdict. The bailiff will bring you back into court where your verdict will be announced.

TESTIMONY REGARDING LACK OF KNOWLEDGE

Opening Statement

RP (Dec. 5) 122:17-20 (Willhite never mentioned disability)
RP (Dec. 5) 124: 7-9 (Willhite never mentioned disability)
RP (Dec. 5) 124: 25-125:4 (Willhite never mentioned disability)
RP (Dec. 5) 127: 20-128:1 (Willhite never mentioned disability)
RP (Dec. 5) 128:10-11 (Willhite never mentioned disability)

Matt Crook

RP (Dec. 9) 39:1-7 (didn't have an inkling about disability)
RP (Dec. 10) 28:5 – 29:4 (Willhite did not discuss his leave with Crook and Crook did not learn anything from Liberty Mutual, other than "serious medical condition")
RP (Dec. 10) 29:24-30:23 ("what, if anything, did Willhite tell you")
RP (Dec. 10) 38:3-7 (Willhite never made an accommodation request)
RP (Dec. 10) 38:8-39:1("what if anything" did Willhite tell "HR")
RP (Dec. 10) 73:1-14 (knew he was on leave, but didn't know why)
RP (Dec. 10) 74:19-23 (not restrictions upon his return)

Dennis Willhite

RP (Dec. 12) 71:10-72:6 (did not mention depression or need for accommodation in his notes)
RP (Dec. 12) 123:13-124:4 (did not tell Fitzpatrick or anyone at Farmers that leave was due to depression or anxiety).
RP (Dec. 12) 133:15-134:1 (never told anyone at Farmers about disability)
RP (Dec. 12) 134:2-4 (never sought an accommodation)
RP (Dec. 12) 176:22-178:5 (letter from attorney did not mention depression, anxiety or disability)
RP (Dec. 12) 179:20-180:25 (did not check "disability" box on EEOC claim form)

Brian Hogan

RP (Dec. 16) 82:1-83:13 (no knowledge of restrictions on return to work status - does not question anything if employee returns to work)
RP (Dec. 16) 107:4-11 (never learned anything from Liberty Mutual)
RP (Dec 16) 107:12-108:10 ("what if anything" did Willhite tell you)
RP (Dec 16) 108:11-13 (never made a request for an accommodation)
RP (Dec 16) 116:11-13 (knew nothing about Willhite's medical condition)
RP (Dec 16) 117:5-12 (didn't even know it was a disability – he could have been caring for a child)

Michelle Douvia

RP (Dec. 16) 213:10-18 (Willhite did not tell her anything)
RP (Dec. 16) 213:19-21 (Willhite did not ask for an accommodation)
RP (Dec. 16) 213:25-214:5 (no training on how to spot symptoms of depression or anxiety).

Brian Fitzpatrick

RP (Dec. 17) 119:19-22 (Willhite never told why he was on leave)

RP (Dec. 17) 120:3-6 (Willhite never said there were restrictions on his return to work)

RP (Dec. 17) 128:21-129:2 (never learned anything from Liberty Mutual - felt it was a privacy issue)

RP (Dec. 17) 129:3-10 (never had any concern about Willhite's emotional or mental health and no one at Farmers expressed concern)

RP (Dec. 17) 129:11 – 130:5 (“what if anything” did Willhite tell you)

RP (Dec. 17) 130:6-11 (never asked for an accommodation)

RP (Dec. 17) 131:5-12 (does not know of Willhite telling anyone at Farmers)

Mike Keller

RP (Dec. 17) 230:6-19 (Willhite never told him about anxiety or depression)

RP (Dec. 17) 230:20-22 (never asked for an accommodation)

RP (Dec. 17) 230:23-231:3 (no training in how to spot anxiety or depression)

Closing Argument

RP (Dec. 18) 136:3-5 (never told anyone he was disabled)

RP (Dec. 18) 138:13-16 (Willhite has not shown that anyone at Farmers knew)

RP (Dec. 18) 139:16-18 (“at no time, did he ever tell anyone at Farmers Life that he was depressed or disabled”)

RP (Dec. 18) 146:15-17. (he never told anyone)

RP (Dec. 18) 146:23-147:2 (“You heard unanimous testimony that no one was told of Mr. Willhite's depression or his anxiety. You heard unanimous testimony that no one knew of or suspected mental or emotional health problems”)

RP (Dec. 18) 147:24-25 (no request for accommodation)

RP (Dec. 18) 148:2-13 (paraphrasing instruction 18 – you have to prove knowledge).

RP (Dec. 18) 155:6-10 (as I have said. . . no one knew)

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

DENNIS WILLHITE,)
)
Plaintiff,)
)
vs.)
)
FARMERS INSURANCE GROUP, d/b/a)
FARMERS NEW WORLD LIFE)
INSURANCE COMPANY, a Washington)
corporation; ZURICH AMERICAN)
INSURANCE CO., a corporation,)
)
Defendants.)

Case No. 12-2-23827-8 SEA

DEPOSITION UPON ORAL EXAMINATION OF

BRIAN J. FITZPATRICK

September 26, 2013

9:00 a.m.

600 University Street

Seattle, Washington

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REPORTED BY: SANDRA L. BARRON, CSR #2552

FILE NO. A70A371

1 Q Can I assume, then, you've never spoken to her?
2 A Not that I recall. The name does not sound familiar
3 to me.
4 MS. KRIKORIAN: I'd like to mark Exhibit 72.
5 (Exhibit No. 72 marked for
6 identification.)
7 Q Exhibit 72 I'll represent to you is a letter dated May
8 6, 2011, apparently authored by Angie Bechtel, whose
9 title on here is Human Resources Consultant, and this
10 letter was included in the EEOC file of Dennis
11 Willhite. Do you think you've ever seen this letter
12 before?
13 A No, I haven't.
14 Q Okay.
15 A No, I have not.
16 Q And again, the name isn't familiar to you, correct?
17 A Correct.
18 Q Okay. Have you ever been to the Aurora, Illinois,
19 office of Farmers?
20 A Yes, I have.
21 Q Okay. Is that where Human Resources is located?
22 A That I do not know.

23 Q Okay. In this letter, and let's just assume that
24 Angie Bechtel did write it, she states in the second
25 paragraph, we have investigated Mr. Willhite's

1 allegations and conclude that FIE has not violated the
2 complainant's rights under the provisions of Title
3 VII.
4 What do you know about that investigation, if
5 anything?
6 A I don't know anything about this investigation.
7 Q Okay. Did anybody contact you from Farmers ever about
8 Dennis's termination and the grounds for his
9 termination?
10 A No.
11 Q When did you learn that Dennis was asserting any kind
12 of a wrongful termination claim, either with the State
13 Human Rights Commission or in this lawsuit?
14 MS. BOWMAN: Object to the form, and object
15 only to the extent instruct the witness -- caution the
16 witness not to answer in any way that would disclose
17 attorney/client communications.
18 Q Right. Don't tell me anything that you -- discussions
19 you had with your attorney, although I'm not going to
20 necessarily concede that it's privileged, but I'm not
21 going to push it because I'm not sure. I haven't done
22 that analysis on the control group and that whole
23 thing, but all I want to know is when you learned that
24 Dennis was asserting that there was something wrongful
25 about his termination, irrespective of who told you or

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SUPERIOR COURT OF WASHINGTON, KING COUNTY

DENNIS WILLHITE,)
)
 Plaintiff(s),)
)
 vs.) 12-2-23827-8 SEA
)
 FARMERS INSURANCE GROUP, d/b/a)
 FARMERS NEW WORLD LIFE)
 INSURANCE COMPANY, a)
 Washington corporation, ZURICH)
 AMERICAN INSURANCE CO, a)
 corporation,)
)
 Defendant(s).)

DEPOSITION UPON ORAL EXAMINATION OF
 MICHELLE DOUVIA

11:01 A.M.

OCTOBER 10, 2013

600 UNIVERSITY STREET, SUITE 3600

SEATTLE, WASHINGTON

REPORTED BY: SALLY J. HANDS, CCR 2191

1 Have you ever heard that name before?

2 A. No.

3 Q. Okay. Can I assume from that answer, then,
4 you've never spoken to somebody named Angie Bechtel?

5 A. I don't think so.

6 Q. Okay.

7 A. Not that I recall.

8 Q. Do you recall, at any point after Dennis was
9 terminated, anyone coming to you -- did anybody from
10 Farmers come to you and ask you questions about his
11 employment?

12 MS. DAILY: And I'm going to object to
13 the extent that it would solicit information protected
14 by the attorney-client privilege.

15 So outside of conversations that you had with
16 the legal department or outside counsel, you can
17 answer.

18 A. Okay. Can you repeat.

19 Q. (BY MS. KRİKORIAN) Actually, let me give you
20 another question.

21 In the middle of the second paragraph here,
22 Angie Bechtel states, We have investigated
23 Mr. Willhite's allegations.

24 Do you see that?

25 A. Yes.

1 Q. Do you know anything about that investigation?

2 A. No.

3 Q. Did anybody other than your attorney -- and
4 actually, on that, I'm not necessarily conceding that
5 there's a privilege with her. But be that as it may,
6 did anybody other than an attorney come to you and ask
7 you anything about facts and circumstances surrounding
8 Dennis's employment?

9 A. No.

10 Q. Have you ever seen this letter before?

11 A. Not that I recall.

12 Q. What did you, if anything -- did you review
13 any documents in preparation for this?

14 A. Yeah. I did see this -- that e-mail that
15 this -- the one where he asks what he should be working
16 on next. And I responded, and then he responded in
17 blue --

18 Q. Okay.

19 A. -- that. I was shown the performance review
20 forms, and I was shown tips on depositions they gave
21 me. But I think in terms of what I've seen -- that's
22 all -- let's see. Was there anything else?

23 (Witness reviewing document.)

24 These are the only other e-mails that I've
25 seen.

1 REPORTER'S CERTIFICATE

2

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6

I, SALLY J. HANDS, the undersigned Certified Court Reporter, pursuant to RCW 5.28.010 authorized to administer oaths and affirmations in and for the State of Washington, do hereby certify:

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That the sworn testimony and/or proceedings, a transcript of which is attached, was given before me at the time and place stated therein; that any and/or all witness(es) were duly sworn to testify to the truth; that the sworn testimony and/or proceedings were by me stenographically recorded and transcribed under my supervision, to the best of my ability; that the foregoing transcript contains a full, true, and accurate record of all the sworn testimony and/or proceedings given and occurring at the time and place stated in the transcript; that I am in no way related to any party to the matter, nor to any counsel, nor do I have any financial interest in the event of the cause.

WITNESS MY HAND AND DIGITAL SIGNATURE this 16th day of October, 2013

SALLY J. HANDS
Washington State Certified Court Reporter, CCR 2191
shands@yomreporting.com

HON. RICHARD A. JONES

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON—AT SEATTLE

DENNIS WILLHITE,

Plaintiff,

v.

FARMERS INSURANCE GROUP, d/b/a
FARMERS NEW WORLD LIFE INSURANCE
COMPANY, a Washington corporation,
ZURICH AMERICAN INSURANCE CO, a
corporation,

Defendants.

CASE NO. 12-cv-01509 RAJ

**FIRST AMENDED COMPLAINT
FOR DAMAGES BASED UPON:
(1) BREACH OF IMPLIED
CONTRACT;
(2) VIOLATION OF THE
WASHINGTON STATE FAMILY
LEAVE ACT;
(3) AGE DISCRIMINATION;
(4) DISABILITY DISCRIMINATION;
(5) WRONGFUL DISCHARGE
AGAINST PUBLIC POLICY**

Comes now, plaintiff Dennis Willhite (“Willhite”), and alleges as follows:

General Allegations

1. Plaintiff is an individual and resident of the State of Washington.
2. Plaintiff is informed and believes and thereon alleges that Farmers New World Life Insurance Company is wholly owned by Farmers Insurance Group, and is authorized to do business, and is doing business in the State of Washington, with its principal place of business

1 located at 3003 77th Ave SE, Mercer Island, WA 98040. Plaintiff is informed that Farmers New
2 World Life Insurance Company is a Washington corporation. Farmers Insurance Group is an
3 insurance company that provides insurance and financial services and products, including life
4 insurance, throughout various regions of the United States of America including Washington.

5
6 3. In or about 1998, Zurich Financial Services (“Zurich”) acquired Farmers
7 Insurance Group through its acquisition of British American Financial Services. Zurich is a
8 leading commercial property-casualty insurance provider serving the global corporate, large
9 corporate, middle market, specialties and programs sectors, with its principal place of business as
10 1400 American Lane, Schaumburg, Illinois 60196. In addition, Zurich also offers life insurance
11 products and services. Farmers and Zurich are hereinafter referred to collectively as
12 (“Farmers”).

13
14 4. Plaintiff is informed and believes and thereon alleges that each defendant named
15 in this Complaint was at all times herein mentioned and now is the agent, servant and employee
16 of the other defendants herein, and was at all such times was acting within the course and scope
17 of said agency and employment and with the consent and permission of each of the other co-
18 defendants, and each of the defendants herein ratified each of the acts of each of the other co-
19 defendants, and each of them.

20
21 5. Venue is proper in King County in that the causes of action alleged herein arose
22 in King County, and/or one or more of the defendants named herein is domiciled or has its
23 principal place of business in the King County. The United States District Court, Western
24 District of Washington has supplemental jurisdiction over the subject matter of this action
25 pursuant to 28 USC §1367(a).
26

1
2 **BACKGROUND FACTS**

3 **Plaintiff's Career At Farmers**

4 6. Willhite began his employment at Farmers on July 11, 1978, when he was hired
5 as a Premium Accounting Clerk. Willhite was regularly promoted over the following years and,
6 on March 16, 2007, he was promoted to the position of Senior Marketing Consultant.
7

8 7. In or around late 2007, Willhite was asked to work on an Independent Agent
9 Initiative ("IAI") pilot project in the sales department. Willhite was advised that he could return
10 to his prior position in the marketing department upon the conclusion of the project. Willhite
11 agreed and the pilot project was launched several months later. However, Willhite was then
12 transferred to the sales department. Willhite had no training, expertise or experience in sales or
13 sales management.
14

15 8. Willhite made numerous requests for training on his new job duties. Farmers
16 denied Willhite's requests, and did not provide any sales training.

17 9. Willhite made numerous requests for a formal review so that issues regarding his
18 performance in the new sales position could be discussed. Farmer's denied Willhite's request
19 and did not provide a formal review.

20 10. The stress of being forced to perform in a position in which Willhite had no
21 background, experience, expertise or training—after decades of success in the marketing
22 department created a hostile work environment and took a toll on Willhite's health.
23

24 11. On or about May 18, 2010, Willhite went on an approved medical leave as a
25 result of the foregoing. Willhite returned from medical leave on or about August 12, 2010. On
26 November 10, 2010, approximately three months after returning from medical leave, and after 32

1 years of service, Farmers terminated Willhite's employment. Willhite was 53 years old at the
2 time of the termination.

3 **Farmers' Formal Review Process**

4 12. Farmers has a highly structured employee review process which is set forth in the
5 Zurich Group Performance Management Handbook and the Farmers Human Resources Policy
6 and Procedure Manual (hereinafter referred to collectively as the "Handbook."). The Handbook
7 describes in detail each step of the review process and the required documentation. Each year,
8 Farmers' employees, including Willhite, are required to acknowledge that they have reviewed
9 these and other company policies and that they are bound by them. Employees are also required
10 to acknowledge that the failure to abide by company policies is grounds for termination.
11

12 13. The review process as set forth in the Handbook involves three phases: 1) the
13 creation of an Individual Development Plan (IDP); 2) a Mid-Year Review; and 3) a Year-End
14 Assessment. According to the Handbook, the review process achieves three key goals: (i)
15 "Ensures that there are no surprises;" (ii) "Creates a climate of trust" between employees and
16 supervisors; and, (iii) Creates a "globally consistent" and "fair" approach to evaluating
17 employees. This process is hereinafter referred to as a "Review."
18

19 14. In order to prevent what it terms as employee "surprise," the process emphasizes
20 the identification of performance problems early so that an under-performing employee can be
21 given the resources, tools and/or training need to improve and so that barriers to performance can
22 be removed.
23

24 15. The Group Learning & Development Handbook ("GLD Handbook") outlines the
25 required contents and development of the IDP. The GLD states that purpose of an IDP is to
26 improve an employee's skills, competencies and knowledge required for their current position.

1 The GLD provides that employees are to meet with their managers at least once a quarter to
2 discuss what additional training, education or support is required to perform in the existing
3 position. Such is then incorporated into the IDP. Consistent therewith, the Handbook states that
4 an important goal of the Mid-Year Review is to provide a “continuous, open and frank
5 discussion of performance.” The Handbook emphasizes constant and open communication
6 between employees and their supervising managers so that performance problems can be
7 addressed and quickly resolved.
8

9 16. In connection with the third goal of the three part review process, (achievement of
10 a globally consistent reviews), Farmers implemented what it refers to as a calibration matrix
11 (hereinafter “Matrix”). The Matrix serves to compare employees to their peers resulting in a
12 calibration rating or curve. The Handbook provides that all employees are to be advised of their
13 calibration rating and given feedback that can be incorporated into their IDPs. The Handbook
14 further provides that a Matrix rating is “always reinforced by comments to make absolutely clear
15 why a particular rating has been given.”
16

17 17. The Handbook further provides that all reviews are to be in writing so as to create
18 “documentation when and if it is necessary to take disciplinary or remedial action so both the
19 employee and the company is protected.” Consistent therewith, an entire section of the
20 Handbook is dedicated to writing an assessment. Once the review is documented in writing,
21 managers are further required to enter their findings in an internal software program called
22 “GPMS”. With respect to under-performing employees, the Handbook states that the narrative
23 section of the review is “critical” and that the “rater has the ethical responsibility to tell the
24 truth.”
25
26

1 18. According to the Handbook, managers and supervisors are required to use the
2 Matrix when making decisions regarding promotions and terminations, as it is designed to be an
3 unbiased method of evaluating skills based upon objective criteria.

4 19. Despite the mandates set forth in the Handbook, Willhite did not undergo a formal
5 review in the year prior to his termination. Farmers failed to conduct such reviews even upon
6 Willhite's request for such a review.

7 20. Subsequent to his termination, Farmers stated that it selected Willhite for
8 termination based upon the Matrix and its determination that Willhite "exhibited little initiative,"
9 "missed critical timelines and milestones" and failed to complete projects. Willhite was never
10 provided these criticisms through an interim or formal review. In addition, and contrary to the
11 provisions of the Handbook, training necessary to address the deficits was never incorporated
12 into his IDP.
13

14
15 **FIRST CAUSE OF ACTION**
16 **(Breach Of Implied Contract)**

17 21. Plaintiff repeats, realleges and incorporates herein by reference the allegations of
18 paragraphs 1 through 20, inclusive, as though set forth at length.

19 22. The Handbook provides that all employees will be reviewed at least twice
20 annually, that such review will be reduced to writing and that under-performing employees will
21 be given the tools and training needed to improve performance as recorded in the IDP. The
22 review process is described in great detail, over hundreds of pages of policy manuals.

23 23. Each year, employees are required to attest that they have "read, understand and
24 will comply" with these polices. The Zurich Basics Code of Conduct ("Code of Conduct")
25
26

1 further provides that noncompliance with internal procedures is grounds for termination and that
2 such provision will be “vigorously enforced.”

3 24. The Handbook, the Code of Conduct and the GLD Handbook state that the
4 provisions regarding the review process are mandatory. These provisions, along with the goal
5 of avoiding employee surprise, the required written warning of poor performance and the policy
6 of providing needed training created an atmosphere of job security and fair treatment with
7 promises of specific treatment in specific situations. Such gave rise to an implied contract that
8 no employee would be terminated for poor performance or as a result of an unfavorable Matrix
9 score without prior notice in the form of a formal documented review and the opportunity for
10 improvement. The Handbook further gives rise to a reasonable belief that employees transferred
11 to positions in which they have no background or experience will be given the training necessary
12 to carry out the required job duties.
13

14 25. Willhite reasonably relied upon the promises set forth in the Handbook, Code of
15 Conduct and the GLD Handbook and continued in his employment at Farmers without looking
16 for employment elsewhere. He planned to continue working at Farmer until he reached 65, at
17 which time he would have been entitled to his full pension benefits at the highest available level.
18

19 26. Farmers breached its implied contract with Willhite in one or more of the
20 following particulars:
21

- 22 a) In failing to provide Willhite with a formal review twice annually as required by the
23 Handbook, Code of Conduct and GLD Handbook;
- 24 b) In failing to formally document the review process as required by the Handbook,
25 Code of Conduct and GLD Handbook;
26

- 1 c) In failing to follow its own written procedures as set forth in the Handbook, Code of
2 Conduct and GLD Handbook;
- 3 d) In failing to comply with its own policies despite mandates that its employees comply
4 with said policies;
- 5 e) In failing to provide written warnings regarding poor performance;
- 6 f) In failing to provide training relevant to sales position and job duties;
- 7 g) In failing to provide training to create an atmosphere of job security;
- 8 h) In failing to give proper notice of termination without a documented review and the
9 opportunity for improvement;
- 10 i) In transferring Willhite to a position for which he had no training or background
11 necessary to carry out the required job duties;
- 12 j) In failing to document the performance issues on which Farmers relied in its
13 termination decision;
- 14 k) In failing to provide Willhite with written notice of the performance issues on which
15 Farmers relied in its termination decision;
- 16 l) In failing to incorporate into Willhite's IDP potential solutions to the performance
17 issues, including training;
- 18 m) In failing to give Willhite the opportunity to improve his performance;
- 19 n) In failing to provide Willhite with notice of his Matrix score or make "absolutely
20 clear" the reason for the score given; and,
- 21 o) In failing to take steps to avoid employee surprise provide written notice of the
22 performance issues that were putting his employment at risk.
- 23
24
25
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1 27. As a result of Farmer's breach, Willhite has suffered economic damages including
2 but not limited to front and back pay, benefits and all remuneration to which he would have been
3 entitled had he remained employed at Farmers until the age of 65.

4 28. As a result of Farmer's breach, Willhite is entitled to double the forgoing damages
5 pursuant to RCW 49.52.050(2) and attorneys' fees and cost of suit pursuant to RCW 49.48.030.
6

7 **SECOND CAUSE OF ACTION**
8 **(Violation of the Washington State Family Leave Act RCW 49.78.300)**

9 29. Plaintiff repeats, realleges and incorporates herein by reference the allegations of
10 paragraphs 1 through 24, and 26 through 32 inclusive, as though set forth at length.

11 30. Willhite took approved medical leave under the Washington State Family Leave
12 Act from May 18, 2010 to August 12, 2010. Willhite was terminated upon his return from leave,
13 in violation of RCW 49.78.280.

14 31. As a result of Farmer's wrongful termination of Willhite's employment in
15 violation of RCW 49.78, Willhite has suffered special and general damages, including lost
16 income and emotional distress in an amount to be proven at the time of trial. Willhite is entitled
17 to recover double damages, interest, attorneys' fees, expert witness fees and costs, pursuant to
18 RCW 49.78.300.
19

20 **THIRD CAUSE OF ACTION**
21 **(Age Discrimination in Violation of RCW 49.44.090 and RCW 49.60.180)**

22 32. Plaintiff repeats, realleges and incorporates herein by reference the allegations of
23 paragraphs 1 through 24, 26 through 32 and 34 through 35 inclusive, as though set forth at
24 length.
25
26

FIFTH CAUSE OF ACTION
(Wrongful Discharge based Upon Public Policy)

1
2
3 38. Plaintiff repeats, realleges and incorporates herein by reference the allegations of
4 paragraphs 1 through 24, 26 through 32, 34 through 35, 37 through 38, 40 through 41 and 43
5 through 46 inclusive, as though set forth at length.

6 39. After the conclusion of the IAI pilot project, Farmers placed Willhite in a position
7 for which he had no training, expertise or experience. Willhite made numerous requests for
8 training and for a formal review so as to maximize his performance. Farmers denied all of
9 Willhite's requests.

10
11 40. The stress created by the situation forced Willhite to seek medical and
12 psychological treatment and, ultimately, medical leave. Farmers' decision to terminate
13 Willhite's employment was based in part upon Willhite's conduct in availing himself of the right
14 to take medical leave under the Washington State Family Leave Act.

15 41. Public policy, including but not limited to that set forth in the Family Medical
16 Leave Act ("FMLA") and the Washington Family Leave Act ("WFLA") supports the right of
17 employees suffering from a physical or mental condition to go on medical leave without fear of
18 losing their job or accrued benefits. This policy would be jeopardized if employees felt that
19 their employment could be terminated as a result of exercising the right to take such leave.

20
21 42. Willhite worked for Farmers for 32 years. He was terminated 13 weeks after
22 returning from medical leave. Farmers used Willhite's medical leave as a negative factor in its
23 decision to terminate Willhite's employment.



Brian
Hogan/HO/Farmers/USA/Zurich
05/20/2010 08:24 AM

To Brian J Fitzpatrick/HO/Farmers/USA/Zurich@ZURICH
cc David Pierce/HO/Farmers/USA/Zurich@ZURICH, "Crook, Matthew" <matthew.crook@farmersinsurance.com>
bcc
Subject Re: Fw: Sick Today

Hi Brian,

Assuming he is approved for a leave under FMLA, we will have to wait until he returns to move forward. When he does return, we can have the conversation, provide the Formal Warning letter and proceed through the progressive discipline process as needed.

Brian Hogan, PHR
Human Resources Business Partner
Farmers New World Life
206-236-6540

Brian J Fitzpatrick/HO/Farmers/USA/Zurich

Brian J
Fitzpatrick/HO/Farmers/USA/
Zurich
05/20/2010 07:52 AM

To Brian Hogan/HO/Farmers/USA/Zurich@ZURICH, "Crook, Matthew" <matthew.crook@farmersinsurance.com>
cc David Pierce/HO/Farmers/USA/Zurich@ZURICH
Subject Fw: Sick Today

Brian and Matt,

How should I proceed on this?

Brian Fitzpatrick
Vice President, Life Sales
317-319-2368 (cell)

Sent from my Blackberry
Dennis Willhite

----- Original Message -----
From: Dennis Willhite
Sent: 05/20/2010 07:48 AM PDT
To: Brian Fitzpatrick
Subject: Fw: Sick Today

Brian, my medical condition is more serious than first thought. I will be out more than 7 calendar days and will request medical leave.

Dennis Willhite

----- Original Message -----
From: Dennis Willhite

RESERVED



Farmers Insurance Group of Companies Performance Planning and Review

Employee	<u>Dennis H. Willhite</u>		Employment Date	<u>7-11-78</u>
	First Name	M.I.	Last Name	Soc. Sec. No. <u>535-64-3073</u>
Office	<u>FNWL - WZO</u>	<u>56</u>	Department/BCO	Disbursement Services <u>256</u>
	Name	Number	Name	Number
Job Title	<u>Disbursement Serv Supervisor</u>	Number <u>32/AD15</u>	Date Assigned to this position	<u>7-1-90</u>

Definition of Factor Weighting Scale (Performance Planning Section)

Critical	A "must do" element of the performance plan.
Important	A priority element of the performance plan.
Expected	A day-to-day element that needs to be accomplished.
Risk Opportunity	A result with a high degree of stretch that may not be attainable (to be used with expected results only).

Performance Planning Approvals

<i>Dennis H. Willhite</i>	<u>2-1-95</u>	<i>Mary Burns</i>	<u>6-1-95</u>	<i>Michael J. Kiser</i>	<u>6-13-95</u>
Employee	Date	Supervisor	Date	Next Level Manager	Date

Interim Reviews

1) <u> / / </u>	Employee <u> </u>	Supervisor <u> </u>	3) <u> / / </u>	Employee <u> </u>	Supervisor <u> </u>
Date	Employee	Supervisor	Date	Employee	Supervisor
2) <u> / / </u>	Employee <u> </u>	Supervisor <u> </u>	4) <u> / / </u>	Employee <u> </u>	Supervisor <u> </u>
Date	Employee	Supervisor	Date	Employee	Supervisor

Definition of Performance Rating Scale (Performance Review Section)

Exceeds Expectations	Performance surpasses expectations for the performance factor or expected result. Individual takes initiative to clearly exceed requirements. Actions contribute to improved department results and innovative work practices.
Meets Expectations	Performance meets expectations for the performance factor or expected result. Actions contribute to department results.
Below Expectations	Performance is below expectations for the performance factor or expected result. Improvement is necessary in order to contribute to department results.

Performance Review Approvals

<i>Dennis H. Willhite</i>	<u>2-11-96</u>	<i>Mary Burns</i>	<u>2-11-96</u>	<i>Michael J. Kiser</i>	<u>2-15-96</u>
Employee	Date	Supervisor	Date	Next Level Manager	Date

PERFORMANCE FACTORS	COMMENTS AND RATING
<p>CUSTOMER SATISFACTION:</p> <ul style="list-style-type: none"> - Identifies and anticipates needs of internal and external customers. - Understands how work impacts other departments within Farmers. - Listens to and defines customers needs. - Suggests approaches to meet customer needs. - Adapts priorities, as appropriate, to meet customer requirements. - Others: - Continue Agency Contact Program. - Participate in district manager and agent meetings at FNWL. - Communicate with regional marketing staff. - Periodic D.M. and agent visits/meetings. <p><input checked="" type="checkbox"/>Critical <input type="checkbox"/>Important <input type="checkbox"/>Expected</p>	<p>During 1995 you have participated in several training presentations with district managers, agents and Life Marketing representatives and also participated in a Life Performance dinner. You continue to communicate with regional marketing staff relating to life policy administration, commissions and bonus. During second quarter, 1995, Disbursements recognized agents/district managers with anniversaries and birthdays. This was in support of the agency contact program. In addition, Congratulatory Greetings were mailed to Life Performance Bonus earners during the year.</p> <p>To conserve business, you implemented an agent contact program for cancellations on FFUL contracts. As a result of the program, 188 or 31.2% decided to continue coverage. This program will be implemented company wide in 1996. You have continued a customer service contact program during the year. Policyholders and agents provided comments relating to the service Disbursements provided. Overall comments were positive with very few complaints about FNWL or Disbursements.</p> <p><input checked="" type="checkbox"/>Exceeds Expectations <input type="checkbox"/>Meets Expectations <input type="checkbox"/>Below Expectations</p>
<p>TEAMWORK:</p> <ul style="list-style-type: none"> - Builds and maintains positive relations with others. - Appropriately balances individual and team interests, recognizing membership on multiple teams. - Shows initiative and team support by accepting and fulfilling team obligations. - Promotes mutual ownership of ideas and actions. - Communicates with other teams and contributes to environment where teams can work together. - Shares knowledge and ideas with others. - Contributes to team effectiveness by being prepared and available for work in order to fulfill all job responsibilities. - Others: <p><input checked="" type="checkbox"/>Critical <input type="checkbox"/>Important <input type="checkbox"/>Expected</p>	<p>During 1995 you continued your involvement as a vice chair budget committee member and chair of the Walk America activities. You also completed the task of reviewing the commission system which included the lead position in reviewing the OSL/IGL commission system.</p> <p>You continue to share employees throughout the year. In particular, 3 employees provided ongoing support during December to Underwriting/Issue.</p> <p><input type="checkbox"/>Exceeds Expectations <input checked="" type="checkbox"/>Meets Expectations <input type="checkbox"/>Below Expectations</p>

PERFORMANCE FACTORS	COMMENTS AND RATING
<p>COMMUNICATION:</p> <ul style="list-style-type: none"> - Effectively communicates with customers and others throughout Farmers. - Asks questions and listens carefully to understand the message. - Presents written and oral information in a clear and organized way. - Considers and respects others' points of view. - Seeks and listens to input from others and incorporates their ideas appropriately. - Others: <p><input type="checkbox"/> Critical <input checked="" type="checkbox"/> Important <input type="checkbox"/> Expected</p>	<p>You do a very good job of interacting effectively with your subordinates, peers, upper management and agency force. Your written and oral communication has been consistently clear and concise. You are well prepared for training sessions or visits from agents and district managers.</p> <p><input type="checkbox"/> Exceeds Expectations <input checked="" type="checkbox"/> Meets Expectations <input type="checkbox"/> Below Expectations</p>
<p>CREATIVITY/INNOVATION</p> <ul style="list-style-type: none"> - Stays current with new technology and uses it effectively. - Seeks ways to continually improve work processes and methods. - Generates effective, original ideas and concepts. - Appropriately applies new ideas in inventive or imaginative ways. - Adds value to the ideas of others. - Others: <p><input type="checkbox"/> Critical <input checked="" type="checkbox"/> Important <input type="checkbox"/> Expected</p>	<p>You continue to look for ways to improve work processes and methods. This includes:</p> <ol style="list-style-type: none"> 1. Implementing a bank draft verify clear procedure with Premium Billing to reduce the number of uncollectible write offs. This program has resulted in a significant reduction of uncollectible cases. 2. Rearranging mail responsibilities within the department. Result of 1.0 reduction in staff. 3. Processing auto reinstatements and registering of assignments for 1035 exchanges rather than referring to Policy Changes. Result in time service improvement of 2.3 days. <p><input checked="" type="checkbox"/> Exceeds Expectations <input type="checkbox"/> Meets Expectations <input type="checkbox"/> Below Expectations</p>
<p>ANALYSIS/DECISION MAKING</p> <ul style="list-style-type: none"> - Gathers and evaluates appropriate information. - Analyzes alternative solutions. - Balances analysis with decision making to develop timely solutions. - Balances logic, analysis, and intuition to take appropriate risks. - Develops practical/workable solutions that can be implemented and used by others. - Others: <p><input type="checkbox"/> Critical <input type="checkbox"/> Important <input checked="" type="checkbox"/> Expected</p>	<p>You have done a very good job of evaluating information, presenting solutions and making decisions in a timely manner. Consideration is given to those involved.</p> <p><input type="checkbox"/> Exceeds Expectations <input checked="" type="checkbox"/> Meets Expectations <input type="checkbox"/> Below Expectations</p>

Dennis Willhite

EXPECTED RESULTS	COMMENTS AND RATING
<p>Continue assessment programs to monitor service to agents and policyholders.</p> <p><input type="checkbox"/>Critical <input type="checkbox"/>Important <input checked="" type="checkbox"/>Expected <input type="checkbox"/>Risk</p>	<p>As stated under "Customer Satisfaction", you have continued a customer service contact program to agents and policyholders.</p> <p><input type="checkbox"/>Exceeds Expectations <input checked="" type="checkbox"/>Meets Expectations <input type="checkbox"/>Below Expectations</p>
<p>1995 service objective:</p> <ul style="list-style-type: none"> - Quality control 97.5% or better. - LOMA time service results meet goal in all major Disbursement functions. <p><input type="checkbox"/>Critical <input checked="" type="checkbox"/>Important <input type="checkbox"/>Expected <input type="checkbox"/>Risk</p>	<p>Disbursements' quality control averaged 98% in 1995.</p> <p>LOMA time service results exceeded goal in all related categories.</p> <p><input checked="" type="checkbox"/>Exceeds Expectations <input type="checkbox"/>Meets Expectations <input type="checkbox"/>Below Expectations</p>
<p>Special projects assigned or those you initiate that are considered extra work above and beyond normal job duties.</p> <p><input type="checkbox"/>Critical <input type="checkbox"/>Important <input type="checkbox"/>Expected <input checked="" type="checkbox"/>Risk</p>	<p>In June, 1995 you developed a training program for agents' continuing education credit. This included functions handled by Policy Service and Annuity Services. As a result, Washington and Oregon approved the program for 3 credit hours.</p> <p>In August, 1995 Melissa Hart assisted you in preparing the 1996 Disbursements' budget. This included reviewing the budget manual, company philosophy on the budget process, forms, schedules and final product.</p> <p><input type="checkbox"/>Exceeds Expectations <input checked="" type="checkbox"/>Meets Expectations <input type="checkbox"/>Below Expectations</p>
<p><input type="checkbox"/>Critical <input type="checkbox"/>Important <input type="checkbox"/>Expected <input type="checkbox"/>Risk</p>	<p><input type="checkbox"/>Exceeds Expectations <input type="checkbox"/>Meets Expectations <input type="checkbox"/>Below Expectations</p>
<p><input type="checkbox"/>Critical <input type="checkbox"/>Important <input type="checkbox"/>Expected <input type="checkbox"/>Risk</p>	<p><input type="checkbox"/>Exceeds Expectations <input type="checkbox"/>Meets Expectations <input type="checkbox"/>Below Expectations</p>

ANNUAL REVIEW (SUPERVISOR COMMENTS)

Dennis, you exceed expectations in areas of Customer Satisfaction, Creativity/Innovation, Financial and Performance Management. You have met expectations in all other areas of performance. You and your employees continue to develop innovative ideas and seek ways to improve time service and production goals. Underwriting/Policy Issue are very complimentary of the assistance you and your employees provided during 1995. I encourage you to continue the open communication with your employees through department and individual meetings.

DEVELOPMENT PLAN

PLANS FOR DEVELOPMENT ON THE CURRENT JOB:

1. Continue your involvement or knowledge in all Policy Service departmental changes allowing for assistance and crosstraining.
2. Plans will be established for you to complete a crosstraining program in Underwriting/Policy Issue, to be completed by February, 1997.
3. Involvement or participation in work groups or committees.
4. Special projects as assigned or you initiate.
5. Complete AALU exam 1 during 1996.

PLANS FOR LONGER-TERM DEVELOPMENT:

Continue educational pursuits and committee involvement.

POTENTIAL FOR PROMOTION:

Overall, your potential for promotion is good. You limited your potential for promotion by turning down an opportunity to be considered as one of the candidates for a promotional position in Arizona, as a Life Marketing Representative.

ANNUAL REVIEW (EMPLOYEE COMMENTS)

FOR THE PAST 2-3 YEARS THE FARMERS ORGANIZATION (WIS) HAVE BEEN PROCLAIMING THAT WE CANT CONTINUE THE STATUS QVO. HOWEVER, AT FNWL WE ARE CONTINUING THE STATUS QVO AND THERE HAS BEEN VERY LITTLE CHANGE OF MOVEMENT. THE FRUSTRATING THING IS THAT WE HAVE THE PEOPLE TO MAKE GREAT IMPROVEMENTS AND CHANGES TO BETTER OURSELVES, BUT THESE PEOPLE ARE STIFLED WHILE OTHERS BLOCK PROGRESS.

I TOTALLY DISAGREE THAT I HAVE LIMITED MY POTENTIAL FOR PROMOTION BECAUSE I DIDNT WANT TO BE CONSIDERED AS ONE OF THE CANDIDATES FOR THE LIFE REP POSITION IN PHOENIX. THIS POSITION IS IN MANY WAYS A DEAD END POSITION. MY INTERESTS ARE AT FNWL, WHICH NEEDS NEW TALENT PUSHING US TO GO HIGHER HEIGHTS.

FOR THE PAST 4-5 YEARS, NOT ONE INDIVIDUAL HAS ASKED ME FOR MY CAREER GOALS OR ASPIRATIONS. BEING SHUT OUT IS NOT A GOOD FEELING. IF THIS CHANGES SOON *Dennis Willhite*



**Farmers Insurance Group of Companies
Performance Planning and Review
Supplement For Non-Clerical Employees**

EMPLOYEE NAME <i>(First, M.I., Last)</i> Dennis H. Willhite	SOCIAL SECURITY NO. 535-64-3073
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The following are additional Performance Factors for non-clerical employees.

The Professional Responsibility factor that appears below applies to all non-clerical employees, including Managers and Supervisors.

The Financial Management, Participative Management, and Performance Management factors on the next page apply to Managers and Supervisors only.

PERFORMANCE PLANNING	PERFORMANCE REVIEW
PERFORMANCE FACTOR	COMMENTS AND RATING
PROFESSIONAL RESPONSIBILITY: <ul style="list-style-type: none"> - Takes personal responsibility for self-development and staying current in professional field. - Plans and completes work independently. - Understands the insurance industry and how Farmers competes within the industry - Contributes to Farmers overall strategy and operations. - Consistently works to support Farmers positive public image. - Additional responsibilities related to this specific job. 	<p>Your personal attendance record is an excellent example for your subordinates. The absence rate for Disbursements for 1995 was 1.5%. This is well below the company goal of 2.3%.</p> <p>Employees in Disbursements continue to be very active in PIP activities, continuing education and the agency contact programs. Your personal PIP activities include chairing March of Dimes "Walk America".</p>
<input type="checkbox"/> Critical <input checked="" type="checkbox"/> Important <input type="checkbox"/> Expected	<input type="checkbox"/> Exceeds Expectations <input checked="" type="checkbox"/> Meets Expectations <input type="checkbox"/> Below Expectations

The three factors on the next page should be completed for all Managers and Supervisors.

PERFORMANCE FACTORS	COMMENTS AND RATING
<p>FINANCIAL MANAGEMENT:</p> <ul style="list-style-type: none"> - Manages in accordance with Farmers' strategic plan. - Develops objectives to support the strategic plan. - Communicates financial performance of Company and department. - Accurately forecasts budget requirements and manages within established budgets. - Controls expenses while maintaining quality. - Communicates to department how work impacts company revenue and expenses. - Others: - 1995 profit objective: - PIF per employee 22,800 - Cost per policy inforce \$1.30 (Based on 341,876 PIF as of 12-31-95) <p><input checked="" type="checkbox"/> Critical <input type="checkbox"/> Important <input type="checkbox"/> Expected</p>	<p>Objectives, plans, and results are completed in support of Company's goals.</p> <ul style="list-style-type: none"> - 1995 overall expenses \$40,242 or 9.1% below the budgeted total of \$442,582. - 1995 salary expenses 9.3% below the budgeted total of \$441,834. - PIFPE in 1995 was 24,333; 6.7% above the goal of 22,800. - Cost per policy inforce was \$1.18, 9.2% above the goal of \$1.30. - Budget employee complement 15.0; actual 14.0. - 12-31-95 policies in force for WZO totaled 340,667. Comparing expenses between 1994 and 1995, the results continue to show a reduction in expenses. Salary expenses in 1995 are 4.8% below 1994, overall 1995 expenses are 5.0% below 1994. <p><input checked="" type="checkbox"/> Exceeds Expectations <input type="checkbox"/> Meets Expectations <input type="checkbox"/> Below Expectations</p>
<p>PARTICIPATIVE LEADERSHIP:</p> <ul style="list-style-type: none"> - Plans and organizes activities to achieve goals and improve operations. - Communicates knowledge and provides guidance to accomplish team and individual goals. - Delegates work and follows up appropriately. - Regularly solicits input to improve department results. - Provides opportunities for development and innovation. - Others: - Budget Committee member - Commissions Task Force member - Develop programs to maximize work quality and minimize time service. <p><input type="checkbox"/> Critical <input checked="" type="checkbox"/> Important <input type="checkbox"/> Expected</p>	<p>Departmental meetings are held regularly and open for employee input. As outlined under "Creativity/Innovation", you have provided opportunities for employees to submit ideas to improve department results or reduce expenses.</p> <p>During the year you continued your involvement as vice chair of the expense budget committee and was active on the commissions task force.</p> <p><input type="checkbox"/> Exceeds Expectations <input checked="" type="checkbox"/> Meets Expectations <input type="checkbox"/> Below Expectations</p>

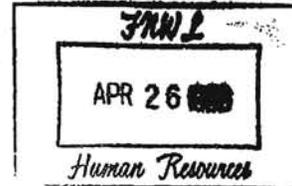
PERFORMANCE FACTORS	COMMENTS AND RATING
<p>PERFORMANCE MANAGEMENT:</p> <ul style="list-style-type: none"> - Develops effective performance plans on a timely basis. - Coaches employees to improve performance, develop skills, and prepare for career growth. - Conducts interim reviews discussing development needs and career potential. - Manages employee compensation to meet budgets and reinforce performance. - Others: - Cross train employees to prepare for promotional opportunities and enhance overall understanding of the operation. - 1995 salary compensation to average 3.26% and contribution level is in-line with company results. 	<p>Crosstraining programs are ongoing and have prepared employees for promotional opportunities or career enhancements. Michelle Meade earned a well deserved promotion to Annuities and Cynthia LoRe transferred to Policy Changes to enhance her understanding of the operation.</p> <p>During 4th quarter 1995, 6 employees successfully completed LOMA exams, 9 employees are in the process or have completed 13 in-house classes, one employee is attending the University of Washington to earn an undergraduate degree.</p> <p>Your 1995 average salary compensation increase was 2.65%. This compares to a goal of 3.26%. This is reasonable based on your employee mix and that several are at or close to the maximum amount. The contribution level for your employees is in line with FNWL and company wide totals.</p>
<p><input type="checkbox"/> Critical <input checked="" type="checkbox"/> Important <input type="checkbox"/> Expected <input checked="" type="checkbox"/> Exceeds Expectations <input type="checkbox"/> Meets Expectations <input type="checkbox"/> Below Expectations</p>	



Interoffice Correspondence

THE
Farmers Insurance Group
OF COMPANIES

DATE: April 25, 1996
TO: DENNIS WILLHITE, CLU, ChFC, FLMI
FROM: MARY BURNS
SUBJECT: PERFORMANCE REVIEW



Dennis,

As requested, this memo is in response to your performance review completed February 16, 1996 regarding "exceeding expectations" versus "meeting expectations".

When completing a performance review I extract results and data from your Monthly Operations Report and the quarterly objective results since your last review as well as overall observation.

Also taken into consideration is the definition of each performance rating as outlined in the performance management program. Exceeds expectations is defined as follows:
"Performance surpasses expectations for the performance factor or expected result. Individual takes initiative to clearly exceed requirements. Actions contribute to improved department results and innovative work practices."

You met expectations in the performance factors of teamwork, communication, analysis/decision making, professional responsibility, and participative leadership.

To receive an "exceeds expectations" rating, consider the following suggestions or comments in addition to the need of taking initiative to identify actions that would contribute to improved department results and innovative work practices.

Teamwork

1. Initiate the sharing of ideas and knowledge with counterparts at MZO/PZO and communicate results with me.
2. Volunteer support when other departments require phone coverage during department functions or when building tour guides are required for planned functions.

Company - Earning the Reputation of Being the Best

FNWL 000127

Dennis Willhite, CLU, ChFC, FLMI
Page 2
April 25, 1996

Communication

1. Further enhance interpersonal skills by dealing with conflicts in department directly. You should determine the solutions before bringing the problem to me.
2. Consistently demonstrate an approachable "I care" attitude.
3. Respect and support manager's authority.
4. At times you come across as already having all the answers and are unwilling to look at alternative ways to problem solving.

Analysis/Decision Making

1. Handling of special projects as assigned or you initiate.

Professional Responsibility

1. Additional participation in community outreach programs.
2. Communicate your career goals or aspirations to me and take personal responsibility for completing the requirements to achieve your goals.

Participative Leadership

1. Additional involvement in task forces or committees.
2. Take the initiative to communicate your knowledge/ideas that would provide guidance to other policy service departments in accomplishing goals.

Dennis, I can't always provide you with exact steps and plans to exceed expectations. The above suggestions are guidelines to help you determine ways to improve your performance. Let me know if you have any questions.



Mary Burns, FLMI
Policy Service Manager
Western Zone Office

MB:te

cc: Mike Kaiser, FLMI - Director of Operations

Farmers - Earning the Reputation of Being the Best

FNWL 000128



Farmers Insurance Group of Companies Performance Planning and Review

Employee	<u>Dennis</u>	<u>Willhite</u>	Employment Date	<u>7-11-78</u>
	First Name	M.I.	Soc. Sec. No.	<u>535-64-3073</u>
		Last Name		
Office	<u>FNWL - WZO</u>	<u>56</u>	Department/BCO	Disbursement Services
	Name	Number	Name	Number
Job Title	<u>Disbursement Services Supervisor</u>		Date Assigned	<u>7-1-90</u>
		Number	to this position	
		<u>32/AD15</u>		

Definition of Factor Weighting Scale (Performance Planning Section)

Critical	A "must do" element of the performance plan.
Important	A priority element of the performance plan.
Expected	A day-to-day element that needs to be accomplished.
Risk Opportunity	A result with a high degree of stretch that may not be attainable (to be used with expected results only).

Performance Planning Approvals

<i>Dennis Willhite</i>	<u>7/22/90</u>	<i>Mary Burns</i>	<u>3/27/96</u>	<i>Michael J. Hain</i>	<u>3/27/96</u>
Employee	Date	Supervisor	Date	Next Level Manager	Date

Interim Reviews

1) <u> </u> / <u> </u> / <u> </u> <u> </u> / <u> </u> / <u> </u>	3) <u> </u> / <u> </u> / <u> </u> <u> </u> / <u> </u> / <u> </u>
Date Employee Supervisor	Date Employee Supervisor
2) <u> </u> / <u> </u> / <u> </u> <u> </u> / <u> </u> / <u> </u>	4) <u> </u> / <u> </u> / <u> </u> <u> </u> / <u> </u> / <u> </u>
Date Employee Supervisor	Date Employee Supervisor

Definition of Performance Rating Scale (Performance Review Section)

Exceeds Expectations	Performance surpasses expectations for the performance factor or expected result. Individual takes initiative to clearly exceed requirements. Actions contribute to improved department results and innovative work practices.
Meets Expectations	Performance meets expectations for the performance factor or expected result. Actions contribute to department results.
Below Expectations	Performance is below expectations for the performance factor or expected result. Improvement is necessary in order to contribute to department results.

Performance Review Approvals

<i>Dennis Willhite</i>	<u>8/13/97</u>	<i>Mary Burns</i>	<u>6/19/97</u>	<i>Michael J. Hain</i>	<u>6/19/97</u>
Employee	Date	Supervisor	Date	Next Level Manager	Date

PERFORMANCE FACTORS	COMMENTS AND RATING
<p>CUSTOMER SATISFACTION:</p> <ul style="list-style-type: none"> - Identifies and anticipates needs of internal and external customers. - Understands how work impacts other departments within Farmers. - Listens to and defines customers needs. - Suggests approaches to meet customer needs. - Adapts priorities, as appropriate, to meet customer requirements. - Others: - Continue agency contact program for policy cancellations and letters of recognition. - Continue direct communication with regional marketing staff. - Participate in DM/Agent meetings or office visits. <p><input checked="" type="checkbox"/>Critical <input type="checkbox"/>Important <input type="checkbox"/>Expected</p>	<p>Congratulatory letters sent to agents and district managers who earned a Life Performance Bonus each quarter.</p> <p>Agent continuing education program; Tim Nihoul and Gary Blake with 22 agents, Kevin Hauglie and John Hight with 20 agents; Life Module Training with Fenina Fink and Vancouver agents.</p> <p>Organized district visit and meeting at FNWL with DM, Les Forman and 10 life leaders; Howard Leiber, Fred Lehrer, Darrel Maasjo and John Peters.</p> <p>Continued the agent contact program through January 1997 for cancellations on FFUL contracts. Since implementation, April 1995, 919 agent calls - 319 retraction letters, a 35% favorable response rate. Modifications to this program were made for all three zones April 1997.</p> <p>Continued a customer service contact program each month. Overall comments are positive.</p> <p>Implemented a program of contacting policyholders who recently cancelled their policies and asked why they decided to surrender their coverage. Reasons vary; coverage through employer, financial reasons, etc.</p> <p><input checked="" type="checkbox"/>Exceeds Expectations <input type="checkbox"/>Meets Expectations <input type="checkbox"/>Below Expectations</p>
<p>TEAMWORK:</p> <ul style="list-style-type: none"> - Builds and maintains positive relations with others. - Appropriately balances individual and team interests, recognizing membership on multiple teams. - Shows initiative and team support by accepting and fulfilling team obligations. - Promotes mutual ownership of ideas and actions. - Communicates with other teams and contributes to environment where teams can work together. - Shares knowledge and ideas with others. - Contributes to team effectiveness by being prepared and available for work in order to fulfill all job responsibilities. - Others: <p><input checked="" type="checkbox"/>Critical <input type="checkbox"/>Important <input type="checkbox"/>Expected</p>	<p>You continue to support WZO and company promotions relating to attendance, agency contact programs, building tours and PIP activities.</p> <p>Employees were loaned to the Underwriting/Issue area during quarter cutoffs, supported the Tele-Underwriting unit for several months and two employees were assigned to support the Life-Comm Upgrade.</p> <p><input type="checkbox"/>Exceeds Expectations <input checked="" type="checkbox"/>Meets Expectations <input type="checkbox"/>Below Expectations</p>

PERFORMANCE FACTORS	COMMENTS AND RATING
<p>COMMUNICATION:</p> <ul style="list-style-type: none"> - Effectively communicates with customers and others throughout Farmers. - Asks questions and listens carefully to understand the message. - Presents written and oral information in a clear and organized way. - Considers and respects others' points of view. - Seeks and listens to input from others and incorporates their ideas appropriately. - Others: <p><input type="checkbox"/>Critical <input checked="" type="checkbox"/>Important <input type="checkbox"/>Expected</p>	<p>You continue to interact effectively with your subordinates, peers, upper management and agency force. You are well prepared for training sessions or visits from agents and district managers.</p> <p><input type="checkbox"/>Exceeds Expectations <input checked="" type="checkbox"/>Meets Expectations <input type="checkbox"/>Below Expectations</p>
<p>CREATIVITY/INNOVATION</p> <ul style="list-style-type: none"> - Stays current with new technology and uses it effectively. - Seeks ways to continually improve work processes and methods. - Generates effective, original ideas and concepts. - Appropriately applies new ideas in inventive or imaginative ways. - Adds value to the ideas of others. - Others: - Encourage employee to participate in the Process Innovation program to develop and implement new ideas to improve efficiency. <p><input type="checkbox"/>Critical <input checked="" type="checkbox"/>Important <input type="checkbox"/>Expected</p>	<p>You seek ideas to improve the way work is done; putting emphasis on quality. Typing additional information on system generated letters and eliminating the transaction accounting statement (525) saves approximately 21 hours per month. This was implemented during second quarter 1996. Your department had strong participation in the Operation Breakthrough promotion. Twelve entries with a monthly time savings of 33 hours.</p> <p>You maintain a strong understanding of new processes, techniques and products as introduced.</p> <p><input checked="" type="checkbox"/>Exceeds Expectations <input type="checkbox"/>Meets Expectations <input type="checkbox"/>Below Expectations</p>

PERFORMANCE FACTORS	COMMENTS AND RATING
<p>ANALYSIS/DECISION MAKING</p> <ul style="list-style-type: none"> - Gathers and evaluates appropriate information. - Analyzes alternative solutions. - Balances analysis with decision making to develop timely solutions. - Balances logic, analysis, and intuition to take appropriate risks. - Develops practical/workable solutions that can be implemented and used by others. - Others: 	<p>Decisions are based on thorough analysis and use of appropriate information. Consideration is given to those involved. Casework as a result of agent compensation, surrender penalties on policy cancellations and timeliness of refunding money can be very sensitive to the customer. You do a very good job of balancing logic, developing practical/workable solutions and making decisions when appropriate.</p>
<p><input type="checkbox"/> Critical <input type="checkbox"/> Important <input checked="" type="checkbox"/> Expected</p>	<p><input checked="" type="checkbox"/> Exceeds Expectations <input type="checkbox"/> Meets Expectations <input type="checkbox"/> Below Expectations</p>

Dennis Willhite

EXPECTED RESULTS	COMMENTS AND RATING
<p>Implement strategies to exceed Profit Objectives as follows:</p> <p>1996 PIFPE 26,380 1996 cost per PIF \$1.13</p> <p><input type="checkbox"/>Critical <input type="checkbox"/>Important <input type="checkbox"/>Expected <input checked="" type="checkbox"/>Risk</p>	<p>PIFPE as of 12-31-96 = 27,876 based on actual PIF of 362,399. PIFPE based on mean PIF 351,533 = 27,041. (13 available employees)</p> <p>PIFPE as of 5-30-97 based on mean PIF 364,476 = 26,034 (14 available employees)</p> <p>1996 results are 5.6% better than budget.</p> <p>Cost per PIF = \$1.12/budget \$1.13.</p> <p><input checked="" type="checkbox"/>Exceeds Expectations <input type="checkbox"/>Meets Expectations <input type="checkbox"/>Below Expectations</p>
<p>Special projects assigned or those you initiate that are considered extra work above and beyond normal job duties.</p> <p><input type="checkbox"/>Critical <input type="checkbox"/>Important <input type="checkbox"/>Expected <input checked="" type="checkbox"/>Risk</p>	<p>You completed a project relating to commission application advances; what percentage of abandoned applications receive written advances.</p> <p>Co-chaired, developed, and implemented Operation Breakthrough (employee productivity promotion).</p> <p><input type="checkbox"/>Exceeds Expectations <input checked="" type="checkbox"/>Meets Expectations <input type="checkbox"/>Below Expectations</p>
<p>Complete AALU exam 1 during 1996.</p> <p><input type="checkbox"/>Critical <input type="checkbox"/>Important <input type="checkbox"/>Expected <input checked="" type="checkbox"/>Risk</p>	<p>It was completed successfully in April 1996.</p> <p><input type="checkbox"/>Exceeds Expectations <input checked="" type="checkbox"/>Meets Expectations <input type="checkbox"/>Below Expectations</p>
<p>Complete a crosstraining program in Underwriting/Policy Issue by February 1997.</p> <p><input type="checkbox"/>Critical <input type="checkbox"/>Important <input type="checkbox"/>Expected <input checked="" type="checkbox"/>Risk</p>	<p>Due to timing and other activities, the crosstraining program in Underwriting/Policy Issue was not completed.</p> <p><input type="checkbox"/>Exceeds Expectations <input type="checkbox"/>Meets Expectations <input type="checkbox"/>Below Expectations</p>
<p><input type="checkbox"/>Critical <input type="checkbox"/>Important <input type="checkbox"/>Expected <input type="checkbox"/>Risk</p>	<p><input type="checkbox"/>Exceeds Expectations <input type="checkbox"/>Meets Expectations <input type="checkbox"/>Below Expectations</p>

Dennis Willhite

ANNUAL REVIEW (SUPERVISOR COMMENTS)

Dennis, since your last review, Disbursement Services has been challenged due to staffing changes, absences, and several extended LOA's. Through the efforts of you and your employees, time service and production goals were achieved without additional support or overtime hours. You have contributed to the performance results of Policy Service and WZO by continuing to review work practices and encouraging employees to participate in company promotions. I wish you continued success in your new position as Office Services Manager.

DEVELOPMENT PLAN

PLANS FOR DEVELOPMENT ON THE CURRENT JOB:

Plans will be established by Jeff Blackburn.

PLANS FOR LONGER-TERM DEVELOPMENT:

Plans will be established by Jeff Blackburn.

POTENTIAL FOR PROMOTION:

Dennis was promoted to Office Service Manager June 16, 1997.

ANNUAL REVIEW (EMPLOYEE COMMENTS)

This Review is fair and accurate
D. Willhite



**Farmers Insurance Group of Companies
Performance Planning and Review
Supplement For Non-Clerical Employees**

EMPLOYEE NAME (First, M.I., Last) Dennis Willhite	SOCIAL SECURITY NO. 535-64-3073
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The following are additional Performance Factors for non-clerical employees.

The Professional Responsibility factor that appears below applies to all non-clerical employees, including Managers and Supervisors.

The Financial Management, Participative Management, and Performance Management factors on the next page apply to Managers and Supervisors only.

PERFORMANCE PLANNING	PERFORMANCE REVIEW
PERFORMANCE FACTOR	COMMENTS AND RATING
PROFESSIONAL RESPONSIBILITY: <ul style="list-style-type: none"> - Takes personal responsibility for self-development and staying current in professional field. - Plans and completes work independently. - Understands the insurance industry and how Farmers competes within the industry - Contributes to Farmers overall strategy and operations. - Consistently works to support Farmers positive public image. - Additional responsibilities related to this specific job. 	<p>You are a member of the Seattle Chapter and National Organization of the American Society of CLU and ChFC.</p> <p>You stay current in reviewing routed reading materials and publications pertinent to our industry and FNWL.</p> <p>You and the employees in Disbursements continue to participate in PIP activities (Baby Clothing/Food Drive, Back to School Drive, United Way, WalkAmerica) continuing education and agency contact programs.</p>
<input type="checkbox"/> Critical <input type="checkbox"/> Important <input checked="" type="checkbox"/> Expected	<input type="checkbox"/> Exceeds Expectations <input checked="" type="checkbox"/> Meets Expectations <input type="checkbox"/> Below Expectations

The three factors on the next page should be completed for all Managers and Supervisors.

PERFORMANCE FACTORS	COMMENTS AND RATING
<p>FINANCIAL MANAGEMENT:</p> <ul style="list-style-type: none"> - Manages in accordance with Farmers' strategic plan. - Develops objectives to support the strategic plan. - Communicates financial performance of Company and department. - Accurately forecasts budget requirements and manages within established budgets. - Controls expenses while maintaining quality. - Communicates to department how work impacts company revenue and expenses. - Others: <p><u>Cost Control</u></p> <p>1996 DS cost per PIF \$1.19 based on 1996 budget \$416,829 and mean PIF as of 12/31/96 - \$351,729.</p> <p><u>Productivity</u></p> <p>1996 PIF per DS employee 25,124 based on 14 employees/351,729 PIF.</p> <p><input checked="" type="checkbox"/>Critical <input type="checkbox"/>Important <input type="checkbox"/>Expected</p>	<p>Objectives, plans and results are completed in support of company's goals. As of 12-31-96 results are:</p> <ul style="list-style-type: none"> - Overall expenses are \$28,787 or 6.7% below the budgeted total of \$432,429. - Salary expenses 6.7% below the budgeted total of \$431,882. - Cost per policy in force as of 12-31-96 \$1.12. - Budget employee complement 14.0. During 1996 Disbursement Services averaged 13.3 employees. Time service and production goals were met each month. <p><input checked="" type="checkbox"/>Exceeds Expectations <input type="checkbox"/>Meets Expectations <input type="checkbox"/>Below Expectations</p>
<p>PARTICIPATIVE LEADERSHIP:</p> <ul style="list-style-type: none"> - Plans and organizes activities to achieve goals and improve operations. - Communicates knowledge and provides guidance to accomplish team and individual goals. - Delegates work and follows up appropriately. - Regularly solicits input to improve department results. - Provides opportunities for development and innovation. - Others: <p><input type="checkbox"/>Critical <input type="checkbox"/>Important <input checked="" type="checkbox"/>Expected</p>	<p>Meetings with employees are held frequently and open for employee input. Due to employee turnover and absences, through planning, organizing and delegating, work production and time service goals were achieved.</p> <p>Attending the two seminars on launching or managing teams (9-96 & 3-97) provided the knowledge or basis for analyzing the team concept for Policy Service or implementing new programs involving ideas generated during the seminar.</p> <p><input type="checkbox"/>Exceeds Expectations <input checked="" type="checkbox"/>Meets Expectations <input type="checkbox"/>Below Expectations</p>

PERFORMANCE FACTORS	COMMENTS AND RATING
<p>PERFORMANCE MANAGEMENT:</p> <ul style="list-style-type: none"> - Develops effective performance plans on a timely basis. - Coaches employees to improve performance, develop skills, and prepare for career growth. - Conducts interim reviews discussing development needs and career potential. - Manages employee compensation to meet budgets and reinforce performance. - Others: <p><input type="checkbox"/> Critical <input checked="" type="checkbox"/> Important <input type="checkbox"/> Expected</p>	<p>Crosstraining programs are ongoing in addition to training new employees. All training programs prepare employees for promotional opportunities and an opportunity to improve performance and develop skills. Examples include Libby Johnson - promoted to Customer Service Clerk and Michele Clements - lateral transfer to Policy Changes to enhance her understanding of the operation.</p> <p>The 1996 and 1997 salary contribution levels are in line with FNWL and company wide totals.</p> <p><input type="checkbox"/> Exceeds Expectation <input checked="" type="checkbox"/> Meets Expectations <input type="checkbox"/> Below Expectations</p>



Farmers Insurance Group of Companies Salary Review Resume

Employee Dennis H. Willhite Soc. Sec. No.: 535-64-3073
 First Name M.I. Last Name
 Office FNWL - WZO 56 Department/BCO Disbursement Services 256
 Name Number Name Number
 Job Title Policy Service Supervisor Number AD29

You are scheduled for a salary review. Following is a summary of your performance contribution since your last salary review.

Customer Satisfaction - You participate in Agency Contact programs, policy deliveries, district manager/agent Continuing Education programs and visits from the agency force throughout the year. You have also organized and set up agent visits and training. Customer Service contact programs regarding cancellations and service feedback continue with positive results.

Teamwork - You and your staff continue to deliver quality service to our customers. We received numerous thank you letters from the field that support this assessment. You have shared employees with other departments and zones that promote a positive working relationship.

Communication - You continue to interact effectively with your subordinates, peers, management, and the agency force.

Creativity/Innovation - You maintain a strong understanding of new processes, techniques and products as introduced. You seek ideas to improve the way work is done; putting emphasis on quality and production.

Analysis/Decision Making - You do a very good job of balancing logic, developing practical, workable solutions and making decisions when appropriate.

Professional responsibility - Member of Seattle Chapter and National Organization of the American Society of CLU and ChFC.

Financial Management - PIFPE and Cost Per Policy In Force exceeds year end goal and an improvement over the previous year.

Participative Management - You take action to foster teamwork and keep employees motivated to achieve goals.

Performance Management - Performance plans and reviews are completed on schedule. 1996 salary contribution levels for Disbursement Services are in line with FNWL and company wide totals. Developing employees for promotional opportunities is ongoing through cross training programs and continuing education.

Dennis H. Willhite 10/24/96 Mary Burns 10/24/96 Michael D. Hain 10/24/96
 Employee Date Supervisor Date Next Level Manager Date



Farmers Insurance Group of Companies Performance Planning and Review

Employee	Dennis	H.	Willhite	Employment Date	7-11-78
	First Name	M.I.	Last Name	Soc. Sec. No.	535-64-3073
Office	FNWL-MI	54	Department/BCO	Office Services	260
	Name	Number		Name	Number
Job Title	Office Services Manager		Number OS76	Date Assigned to this position	6-16-97

Definition of Factor Weighting Scale (Performance Planning Section)

Critical	A "must do" element of the performance plan.
Important	A priority element of the performance plan.
Expected	A day-to-day element that needs to be accomplished.
Risk Opportunity	A result with a high degree of stretch that may not be attainable (to be used with expected results only).

Performance Planning Approvals

	9/22/97		9/22/97		
Employee	Date	Supervisor	Date	Next Level Manager	Date

Interim Reviews

1) / / /	/ / /	3) / / /
Date	Employee	Supervisor
2) / / /	/ / /	4) / / /
Date	Employee	Supervisor

Definition of Performance Rating Scale (Performance Review Section)

Exceeds Expectations	Performance surpasses expectations for the performance factor or expected result. Individual takes initiative to clearly exceed requirements. Actions contribute to improved department results and innovative work practices.
Meets Expectations	Performance meets expectations for the performance factor or expected result. Actions contribute to department results.
Below Expectations	Performance is below expectations for the performance factor or expected result. Improvement is necessary in order to contribute to department results.

Performance Review Approvals

	11/21/97		11/22/97		12/1/97
Employee	Date	Supervisor	Date	Next Level Manager	Date

PERFORMANCE PLAN '88

PERFORMANCE REVIEW

PERFORMANCE FACTORS	COMMENTS AND RATING
<p>CUSTOMER SATISFACTION:</p> <ul style="list-style-type: none"> - Identifies and anticipates needs of internal and external customers. - Understands how work impacts other departments within Farmers. - Listens to and defines customers needs. - Suggests approaches to meet customer needs. - Adapts priorities, as appropriate, to meet customer requirements. - Others: <p><input checked="" type="checkbox"/>Critical <input type="checkbox"/>Important <input type="checkbox"/>Expected</p>	<p>The Office Services function has been very accommodating to all customers in meeting their needs over the past 5 months.</p> <ul style="list-style-type: none"> - All requests for purchase have been completed in a very timely manner. - Department moves, LUS training room and all support work for building renovations have been handled very efficiently. - Updated employee emergency procedures. - Completed redesign of lobby and painting of front area. - Building Services has completed 83 projects since June 1997. - Completed building office space for State Director. - Modified security procedures to enhance access to building by employees. And, reduced security expense by one security guard. <p><input type="checkbox"/>Exceeds Expectations <input checked="" type="checkbox"/>Meets Expectations <input type="checkbox"/>Below Expectations</p>
<p>TEAMWORK:</p> <ul style="list-style-type: none"> - Builds and maintains positive relations with others. - Appropriately balances individual and team interests, recognizing membership on multiple teams. - Shows initiative and team support by accepting and fulfilling team obligations. - Promotes mutual ownership of ideas and actions. - Communicates with other teams and contributes to environment where teams can work together. - Shares knowledge and ideas with others. - Contributes to team effectiveness by being prepared and available for work in order to fulfill all job responsibilities. - Others: <p><input type="checkbox"/>Critical <input checked="" type="checkbox"/>Important <input type="checkbox"/>Expected</p>	<ul style="list-style-type: none"> - Personally involved in development, implementation and completion of operation breakthrough campaign. - Working closely with management from the beginning in the reorganization and merger of Zone Operations, including floor plans and physical moves by 3/31/98. - Fully supported United Way activities through Bulletin printings and distribution, facilities rearrangement and providing a representative. - Emergency Control Group coordinator. - Safety Promotion Committee coordinator. - Always in touch with department heads regarding condition of facilities, needs of departments and working together to find a solution. <p><input type="checkbox"/>Exceeds Expectations <input checked="" type="checkbox"/>Meets Expectations <input type="checkbox"/>Below Expectations</p>
<p>COMMUNICATION:</p> <ul style="list-style-type: none"> - Effectively communicates with customers and others throughout Farmers. - Asks questions and listens carefully to understand the message. - Presents written and oral information in a clear and organized way. - Considers and respects others' points of view. - Seeks and listens to input from others and incorporates their ideas appropriately. - Others: <p><input type="checkbox"/>Critical <input checked="" type="checkbox"/>Important <input type="checkbox"/>Expected</p>	<ul style="list-style-type: none"> - Maintains open communication with all Office Services employees, department heads, LAHO Marketing, State Directors office and regional staff. - Communicates with all vendors, in writing and by phone to ensure services and products received are appropriate. - Seeks feedback from others for proposed changes to procedures, facilities and department configurations, to ensure that information is accurate and changes are handled correctly and efficiently. - Keeps supervisor informed of major activities, events impacting the company or facilities. - Stays current with trade publications and is prepared for discussions when attending meetings. - Written communication is clear, understandable and concise. - Articulate and organized with oral information. <p><input type="checkbox"/>Exceeds Expectations <input checked="" type="checkbox"/>Meets Expectations <input type="checkbox"/>Below Expectations</p>
<p>CREATIVITY/INNOVATION</p> <ul style="list-style-type: none"> - Stays current with new technology and uses it effectively. - Seeks ways to continually improve work processes and methods. - Generates effective, original ideas and concepts. - Appropriately applies new ideas in inventive or imaginative ways. - Adds value to the ideas of others. - Others: <p><input type="checkbox"/>Critical <input checked="" type="checkbox"/>Important <input type="checkbox"/>Expected</p>	<ul style="list-style-type: none"> - Reorganized Office Services and mail center OCC positions and responsibilities to enhance productivity and accountability for operations. - Reorganized supply and mail inserter operations to broaden scope of responsibilities and eliminate need to replace employee. - Redesign of automated attendant and PBX operator position to streamline incoming calls by circumventing need to speak with operator. First phase of redesign and relocation of PBX operator. - Created facility, communications coordinator position to handle cafeteria, phone system and facility use by outside groups. This eliminated the need for a supervisor level position, and freed up Cash Receipts supervisor to handle primary tasks and forego adding to staff. - Submitted request to remove "address correction requested" from FNWL envelopes. This will save us hundreds of dollars in corrections from USPS without impacting mail delivery. <p><input checked="" type="checkbox"/>Exceeds Expectations <input type="checkbox"/>Meets Expectations <input type="checkbox"/>Below Expectations</p>
<p>ANALYSIS/DECISION MAKING</p> <ul style="list-style-type: none"> - Gathers and evaluates appropriate information. - Analyzes alternative solutions. - Balances analysis with decision making to develop timely solutions. - Balances logic, analysis, and intuition to take appropriate risks. - Develops practical/workable solutions that can be implemented and used by others. - Others: <p><input type="checkbox"/>Critical <input checked="" type="checkbox"/>Important <input type="checkbox"/>Expected</p>	<p>Strong analytical skills. Reviews/analyzes a broad spectrum of information to ensure decisions are informed and the most practical to the company. Willing to assume risk in decision making to improve operating efficiencies. Ability to identify problems/challenges, and more importantly, come up with solutions.</p> <p><input type="checkbox"/>Exceeds Expectations <input checked="" type="checkbox"/>Meets Expectations <input type="checkbox"/>Below Expectations</p>

EXPECTED RESULTS	COMMENTS AND RATING
<p>Continue reorganization of Office Services. Evaluate current structure, specifically:</p> <ul style="list-style-type: none"> - PBX operator (4/98 as part of Zone realignment). - Print Shop/Copy Center (initial review and proposal 6/98). - All job descriptions (completion year end 1997). - Security changes (1/98). - Propose changes to meet productivity/efficiency goals. <p><input checked="" type="checkbox"/>Critical <input type="checkbox"/>Important <input type="checkbox"/>Expected <input type="checkbox"/>Risk</p>	<p>Reevaluations of job descriptions and job duties completed. Upgraded mail center OCC position and broadened scope of duties. Combined supply clerk and mail inserter operator duties to provide backup and broaden job responsibilities. Upgraded one mail clerk position to mail and supply clerk to broaden scope and provide backup. Changed security agreement to reduce by one guard. Enhanced employee access to building. Total staff reductions at year end 1997 is 2.5 employee equivalents.</p> <p><input type="checkbox"/>Exceeds Expectations <input checked="" type="checkbox"/>Meets Expectations <input type="checkbox"/>Below Expectations</p>
<p>Complete an evaluation of Building Services staffing and submit cost/benefit study to management 5/98.</p> <p><input type="checkbox"/>Critical <input checked="" type="checkbox"/>Important <input type="checkbox"/>Expected <input type="checkbox"/>Risk</p>	<p>Building Services supervisor compiling cost data, services provided by regional building services departments to compare with our operation. Contacted LAHO for information about Home Office structure. On target for proposal to management.</p> <p><input type="checkbox"/>Exceeds Expectations <input checked="" type="checkbox"/>Meets Expectations <input type="checkbox"/>Below Expectations</p>
<p>Improve overall facilities operation:</p> <ul style="list-style-type: none"> - Develop/implement procedure for facility use by outside groups 9/97. - Create facilities, telecommunications coordinator position 8/97. - Handle physical move of Zone Operations realignment 4/98. - Redesign phone system automated attendant for agents and policyholders 10/97 & 4/98. - Analyze every machine in use in mail room/copy center and submit proposal on best use/option for each machine function - begin with inserter 2/98. <p><input type="checkbox"/>Critical <input checked="" type="checkbox"/>Important <input type="checkbox"/>Expected <input type="checkbox"/>Risk</p>	<ul style="list-style-type: none"> - Completed review of requested procedure for facility use, Hired Penny Lytle as FCC, currently formalizing new job description and will submit for approval in 1998. - Began meeting with Zone management on moves, submitted F&E lists to Zones for designing department needs. - Modified phone system for reporting needs and have changed automated attendant menu. We will be more responsive to policyholder calls by not requiring them to contact the operator as a first choice. Improved phone service to agents by adding toll free service to system for advanced life financial services (ALFS) agents. - Evaluated mail inserting equipment to determine if we should replace or use a vendor service. Initiating a pilot program to use a vendor for inserting and mailing a few selected mailings between now and January 1998. - In contact with Vancouver Region regarding rental space for move of Claims Administration to FNWL building. <p><input type="checkbox"/>Exceeds Expectations <input checked="" type="checkbox"/>Meets Expectations <input type="checkbox"/>Below Expectations</p>
<p>Implement "fast forward" mail service to reduce amount and cost of return mail processing by year end 1997.</p> <p><input checked="" type="checkbox"/>Critical <input type="checkbox"/>Important <input type="checkbox"/>Expected <input type="checkbox"/>Risk</p>	<p>We're on schedule to implement fast forward before year end. Immediate impact is improved ratio of mail delivery. Also, address correction fees from postal service will diminish to zero. Down the road, will revisit usefulness of Transunion address tracking and whether this expense can be reduced or eliminated.</p> <p><input type="checkbox"/>Exceeds Expectations <input checked="" type="checkbox"/>Meets Expectations <input type="checkbox"/>Below Expectations</p>
<p>Complete 1996 physical inventory and managements response to audit findings by 9/97.</p> <p><input checked="" type="checkbox"/>Critical <input type="checkbox"/>Important <input type="checkbox"/>Expected <input type="checkbox"/>Risk</p>	<p>1996 physical inventory completed in August 1997, response to audit findings submitted. Also, completed response to housekeeping items. Revised F&E procedures to include all department heads as being responsible for their own F&E inventory. Implemented new process for 1997 F&E.</p> <p><input type="checkbox"/>Exceeds Expectations <input checked="" type="checkbox"/>Meets Expectations <input type="checkbox"/>Below Expectations</p>
<p><input checked="" type="checkbox"/>Critical <input type="checkbox"/>Important <input type="checkbox"/>Expected <input type="checkbox"/>Risk</p>	<p><input type="checkbox"/>Exceeds Expectations <input checked="" type="checkbox"/>Meets Expectations <input type="checkbox"/>Below Expectations</p>

ANNUAL REVIEW (SUPERVISOR COMMENTS)

Dennis, you have done a very good job in your first 5 months as Office Services manager. Your strong management skills and experience have enabled you to quickly organize and regroup a part of Staff Operations that was without sufficient leadership or controls.

I have rated your first 5 months contribution as a level 3, largely based on your limited time on the job and consequently fewer accomplishments compared to your peer group. At your current high level of effort and with successful achievement of your next full years' plans and goals, you have an excellent opportunity for a higher level of contribution.

Thank you for your effort to date - I look forward to working together in the upcoming year.



DEVELOPMENT PLAN

PLANS FOR DEVELOPMENT ON THE CURRENT JOB:

You have outlined a number of initiatives for the next 12 months that will present opportunities to demonstrate ability to handle additional responsibilities and increased contribution.

PLANS FOR LONGER-TERM DEVELOPMENT:

Lead a major project outside Office Services area of responsibility - new product, etc.

POTENTIAL FOR PROMOTION:

Good potential for other management positions in Insurance Operations or Staff Operations.

ANNUAL REVIEW (EMPLOYEE COMMENTS)

O/S MANAGER POSITION IS A GOOD CHALLENGE FOR ME, AND AN OPPORTUNITY TO MAKE SEVERAL POSITIVE CHANGES IN THE NEXT 12 Mths.

*JKH/whh
11/21/97*



**Farmers insurance Group of Companies
Performance Planning and Review
Supplement For Non-Clerical Employees**

EMPLOYEE NAME (First, M.I., Last) Dennis H. Willhite	SOCIAL SECURITY NO. 535-64-3073
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The following are additional Performance Factors for non-clerical employees.

The Professional Responsibility factor that appears below applies to all non-clerical employees, including Managers and Supervisors.

The Financial Management, Participative Management, and Performance Management factors on the next page apply to Managers and Supervisors only.

PERFORMANCE PLANNING	PERFORMANCE REVIEW
PERFORMANCE FACTOR	COMMENTS AND RATING
PROFESSIONAL RESPONSIBILITY: <ul style="list-style-type: none"> - Takes personal responsibility for self-development and staying current in professional field. - Plans and completes work independently. - Understands the insurance industry and how Farmers competes within the industry - Contributes to Farmers overall strategy and operations. - Consistently works to support Farmers positive public image. - Additional responsibilities related to this specific job. 	<p>Very good understanding of the insurance industry and Farmers strategies to be one of the best insurers. Stays current with industry trends through trade publications and various internal memorandum.</p> <p>Member of American Society of CLU & ChFC.</p> <p>Interacts with various company groups and outside organizations in support of community interests and charitable fund raising.</p> <p>Initiated training program to learn Office Services operation. Review and study Company's procedures and operations manuals to ensure operation of Office Services is in accordance with Company guidelines.</p>
<input type="checkbox"/> Critical <input type="checkbox"/> Important <input checked="" type="checkbox"/> Expected	<input type="checkbox"/> Exceeds Expectations <input checked="" type="checkbox"/> Meets Expectations <input type="checkbox"/> Below Expectations

The three factors on the next page should be completed for all Managers and Supervisors.

PERFORMANCE PLANNING	PERFORMANCE REVIEW
PERFORMANCE FACTORS	COMMENTS AND RATING
<p>FINANCIAL MANAGEMENT:</p> <ul style="list-style-type: none"> - Manages in accordance with Farmers' strategic plan. - Develops objectives to support the strategic plan. - Communicates financial performance of Company and department. - Accurately forecasts budget requirements and manages within established budgets. - Controls expenses while maintaining quality. - Communicates to department how work impacts company revenue and expenses. - Others: <p><input type="checkbox"/> Critical <input type="checkbox"/> Important <input checked="" type="checkbox"/> Expected</p>	<p>Objectives, plans and results are completed in support of company strategies.</p> <p>Strong management and budget controls to make certain expenses are in line. Through 9/30/97 actual expenses are below budget.</p> <p>All jobs, assignments and responsibilities are being completed on time and within budget. Department meetings initiated to communicate the importance of Office Services to company and our responsibility to be efficient.</p> <p><input type="checkbox"/> Exceeds Expectations <input checked="" type="checkbox"/> Meets Expectations <input type="checkbox"/> Below Expectations</p>
<p>PARTICIPATIVE LEADERSHIP:</p> <ul style="list-style-type: none"> - Plans and organizes activities to achieve goals and improve operations. - Communicates knowledge and provides guidance to accomplish team and individual goals. - Delegates work and follows up appropriately. - Regularly solicits input to improve department results. - Provides opportunities for development and innovation. - Others: <p><input type="checkbox"/> Critical <input type="checkbox"/> Important <input checked="" type="checkbox"/> Expected</p>	<p>Open communication with all employees through one on one discussions and group meetings. Communicates goals to staff so everyone understands department responsibilities.</p> <p>Initiated in house training for employees to improve skills. Also, encourage specific seminars be attended by selected employees.</p> <p>Clearly indicates job responsibilities to staff.</p> <p><input type="checkbox"/> Exceeds Expectations <input checked="" type="checkbox"/> Meets Expectations <input type="checkbox"/> Below Expectations</p>
<p>PERFORMANCE MANAGEMENT:</p> <ul style="list-style-type: none"> - Develops effective performance plans on a timely basis. - Coaches employees to improve performance, develop skills, and prepare for career growth. - Conducts interim reviews discussing development needs and career potential. - Manages employee compensation to meet budgets and reinforce performance. - Others: <p><input type="checkbox"/> Critical <input type="checkbox"/> Important <input checked="" type="checkbox"/> Expected</p>	<p>Performance plans and reviews are completed on time. Initiate cross training programs to improve performance of staff. Formal and informal reviews with employees completed to ensure a clear understanding of expectations.</p> <p>Salary expenses in line with budgeted goals and increases are given to those demonstrating a high level of performance and contribution.</p> <p><input type="checkbox"/> Exceeds Expectations <input checked="" type="checkbox"/> Meets Expectations <input type="checkbox"/> Below Expectations</p>

PERFORMANCE PLANNING	PERFORMANCE REVIEW
PERFORMANCE FACTORS	COMMENTS AND RATING
<p>FINANCIAL MANAGEMENT:</p> <ul style="list-style-type: none"> - Manages in accordance with Farmers' strategic plan. - Develops objectives to support the strategic plan. - Communicates financial performance of Company and department. - Accurately forecasts budget requirements and manages within established budgets. - Controls expenses while maintaining quality. - Communicates to department how work impacts company revenue and expenses. - Others: <p><input type="checkbox"/> Critical <input type="checkbox"/> Important <input checked="" type="checkbox"/> Expected</p>	<p>Objectives, plans and results are completed in support of company strategies.</p> <p>Strong management and budget controls to make certain expenses are in line. Through 9/30/97 actual expenses are below budget.</p> <p>All jobs, assignments and responsibilities are being completed on time and within budget. Department meetings initiated to communicate the importance of Office Services to company and our responsibility to be efficient.</p> <p><input type="checkbox"/> Exceeds Expectations <input checked="" type="checkbox"/> Meets Expectations <input type="checkbox"/> Below Expectations</p>
<p>PARTICIPATIVE LEADERSHIP:</p> <ul style="list-style-type: none"> - Plans and organizes activities to achieve goals and improve operations. - Communicates knowledge and provides guidance to accomplish team and individual goals. - Delegates work and follows up appropriately. - Regularly solicits input to improve department results. - Provides opportunities for development and innovation. - Others: <p><input type="checkbox"/> Critical <input type="checkbox"/> Important <input checked="" type="checkbox"/> Expected</p>	<p>Open communication with all employees through one on one discussions and group meetings. Communicates goals to staff so everyone understands department responsibilities.</p> <p>Initiated in house training for employees to improve skills. Also, encourage specific seminars be attended by selected employees.</p> <p>Clearly indicates job responsibilities to staff.</p> <p><input type="checkbox"/> Exceeds Expectations <input checked="" type="checkbox"/> Meets Expectations <input type="checkbox"/> Below Expectations</p>
<p>PERFORMANCE MANAGEMENT:</p> <ul style="list-style-type: none"> - Develops effective performance plans on a timely basis. - Coaches employees to improve performance, develop skills, and prepare for career growth. - Conducts interim reviews discussing development needs and career potential. - Manages employee compensation to meet budgets and reinforce performance. - Others: <p><input type="checkbox"/> Critical <input type="checkbox"/> Important <input checked="" type="checkbox"/> Expected</p>	<p>Performance plans and reviews are completed on time. Initiate cross training programs to improve performance of staff. Formal and informal reviews with employees completed to ensure a clear understanding of expectations.</p> <p>Salary expenses in line with budgeted goals and increases are given to those demonstrating a high level of performance and contribution.</p> <p><input type="checkbox"/> Exceeds Expectations <input checked="" type="checkbox"/> Meets Expectations <input type="checkbox"/> Below Expectations</p>



Farmers Insurance Group of Companies
Performance Planning and Review



Employee	<u>DENNIS</u>	<u>WILLHITE</u>	Employment Date	<u>7, 11, 78</u>
First Name	M.I.	Last Name	Soc. Sec. No.	<u>5351 64 13073</u>
Office	<u>FNWL</u>	<u>54</u>	Department/BCO	<u>OFFICE SERVICES</u> <u>260</u>
Name	Number	Name	Number	
Job Title	<u>OFFICE SERVICES MANAGER</u>	Number	<u>0576</u>	Date Assigned to this Position <u>6, 16, 97</u>

Definition of Factor Weighting Scale (Performance Planning Section)

Critical	A "must do" element of the performance plan.
Important	A priority element of the performance plan.
Expected	A day-to-day element that needs to be accomplished.
Risk Opportunity	A result with a high degree of stretch that may not be attainable (to be used with expected results only).

Performance Planning Approvals

<u>Dennis Willhite</u>	<u>1, 27, 98</u>	<u>[Signature]</u>	<u>1, 27, 98</u>	<u>[Signature]</u>	<u>1, 27, 98</u>
Employee	Date	Supervisor	Date	Next Level Manager	Date

Interim Reviews

1) _____	_____	_____	3) _____	_____	_____
Date	Employee	Supervisor	Date	Employee	Supervisor
2) _____	_____	_____	4) _____	_____	_____
Date	Employee	Supervisor	Date	Employee	Supervisor

Definition of Performance Rating Scale (Performance Review Section)

Exceeds Expectations	Performance surpasses expectations for the performance factor or expected result. Individual takes initiative to clearly exceed requirements. Actions contribute to improved department results and innovative work practices.
Meets Expectations	Performance meets expectations for the performance factor or expected result. Actions contribute to department results.
Below Expectations	Performance is below expectations for the performance factor or expected result. Improvement is necessary in order to contribute to department results.

Performance Review Approvals

<u>Dennis Willhite</u>	<u>12, 21, 98</u>	<u>[Signature]</u>	_____	<u>[Signature]</u>	_____
Employee	Date	Supervisor	Date	Next Level Manager	Date

PERFORMANCE PLAN 'G

PERFORMANCE REVIEW

PERFORMANCE FACTORS	COMMENTS AND RATING
<p>CUSTOMER SATISFACTION:</p> <ul style="list-style-type: none"> - Identifies and anticipates needs of internal and external customers. - Understands how work impacts other departments within Farmers. - Listens to and defines customers needs. - Suggests approaches to meet customer needs. - Adapts priorities, as appropriate, to meet customer requirements. - Others: <p><input checked="" type="checkbox"/>Critical <input type="checkbox"/>Important <input type="checkbox"/>Expected</p>	<p>Office Services/Building Services have provided excellent service to internal and external customers. The very significant reorganization of Insurance Operations is one example. A complete rebuild of the 2nd floor "lawyers" space for the PIP office is another. Reorganized PBX operator position and automated attendant to handle customer calls more efficiently with less manual intervention.</p> <p>Enhanced phone system to meet communications needs of customers. Initiated automated address update process to reduce our return mail, improve our mail delivery to policyholders and eliminate most manual address update procedures. Completed 10,000 plus marketing mailings for local area district managers in support of their marketing initiatives. Initiated functional review of Office Services to overhaul the way business with customers is performed.</p> <p><input checked="" type="checkbox"/>Exceeds Expectations <input type="checkbox"/>Meets Expectations <input type="checkbox"/>Below Expectations</p>
<p>TEAMWORK:</p> <ul style="list-style-type: none"> - Builds and maintains positive relations with others. - Appropriately balances individual and team interests, recognizing membership on multiple teams. - Shows initiative and team support by accepting and fulfilling team obligations. - Promotes mutual ownership of ideas and actions. - Communicates with other teams and contributes to environment where teams can work together. - Shares knowledge and ideas with others. - Contributes to team effectiveness by being prepared and available for work in order to fulfill all job responsibilities. - Others: <p><input type="checkbox"/>Critical <input checked="" type="checkbox"/>Important <input type="checkbox"/>Expected</p>	<p>Very good rapport with customers and fellow employees. Works hard to ensure Office Services function is a positive force in meeting company goals. Always accessible to all employees to respond and support their needs. Currently serves as Emergency Control Group coordinator, Safety Promotion Committee coordinator, and member of Business Resumption Committee. Works closely with other departments to ensure support services being provided are satisfactory, and if not, makes changes in services until they are satisfactory. Insurance Operations reorganization is a good example of working closely with several groups to complete a major task. Always available for work to meet job responsibilities.</p> <p><input type="checkbox"/>Exceeds Expectations <input checked="" type="checkbox"/>Meets Expectations <input type="checkbox"/>Below Expectations</p>
<p>COMMUNICATION:</p> <ul style="list-style-type: none"> - Effectively communicates with customers and others throughout Farmers. - Asks questions and listens carefully to understand the message. - Presents written and oral information in a clear and organized way. - Considers and respects others' points of view. - Seeks and listens to input from others and incorporates their ideas appropriately. - Others: <p><input type="checkbox"/>Critical <input checked="" type="checkbox"/>Important <input type="checkbox"/>Expected</p>	<p>Very effective in written communication to customers, vendors and supervisor. Outsource recommendation, proof of concept, is a very good example. Oral communication is very clear, organized and articulate. Maintains open communication with Office Services employees, other departments, vendors, district managers, Life Marketing, Regional staff.</p> <p>Asks questions and looks for feedback to ensure communication is clear and accurate. Keeps supervisor informed of major activities and projects impacting the office. Implementing a redesigned automated phone attendant is a good example of responding to input from others and improving communication between policyholders, agents and FNWL. Participated in Friday management communications meeting and made a presentation to attendees on Office Services operations.</p> <p><input type="checkbox"/>Exceeds Expectations <input checked="" type="checkbox"/>Meets Expectations <input type="checkbox"/>Below Expectations</p>
<p>CREATIVITY/INNOVATION</p> <ul style="list-style-type: none"> - Stays current with new technology and uses it effectively. - Seeks ways to continually improve work processes and methods. - Generates effective, original ideas and concepts. - Appropriately applies new ideas in inventive or imaginative ways. - Adds value to the ideas of others. - Others: <p><input type="checkbox"/>Critical <input checked="" type="checkbox"/>Important <input type="checkbox"/>Expected</p>	<ul style="list-style-type: none"> - Redesigned outgoing mail logs and improved Copy Center job tickets and use of job tickets. - Completed review and initiated project to automate our address update process, reduce return mail and lower related costs. - Works with LAHO Communications to implement 1-800 number for all ALFS. - Reconfigured phone system to boost capacity at a very minimal cost. - Developed proof of concept for outsourcing support services and implemented recommendation. - Submitted recommendation for automating FNWL forms creation and storage. Implementing digital forms generation and archive system. - Completed analysis of forms costs through LAHO Materials Distribution Center and communicated findings to LAHO forms purchasing manager to meet lower costs of outside vendors. - Redesigned F&E inventory processes to improve accuracy of inventory count and strengthen controls. - Reviewed multiple service agreements with Bell & Howell. Worked with vendor to redesign agreement, simplify accounting and save several thousand dollars in maintenance expenses. - Reorganized purchasing clerk duties, upgraded position to specialist, enhanced job duties to maximize efficiencies in work processes. - Redesigned phone call routing service for Insurance Operations communications unit to improve response time in handling customer calls. <p><input type="checkbox"/>Exceeds Expectations <input checked="" type="checkbox"/>Meets Expectations <input type="checkbox"/>Below Expectations</p>

<p>ANALYSIS/DECISION MAKING</p> <ul style="list-style-type: none"> - Gathers and evaluates appropriate information. - Analyzes alternative solutions. - Balances analysis with decision making to develop timely solutions. - Balances logic, analysis, and intuition to take appropriate risks. - Develops practical/workable solutions that can be implemented and used by others. - Others: <p><input type="checkbox"/> Critical <input checked="" type="checkbox"/> Important <input type="checkbox"/> Expected</p>	<p>Information gathering is very thorough. Analysis of multiple issues on many different projects is comprehensive and well thought out. Analytical skills are very strong. Decisions are creative and very sound. Works to develop solutions within the frame work of company goals to get the most out of every idea at the best cost.</p> <p>A willingness to take calculated risks to improve overall performance of Office Services operations and processes affecting the entire organization.</p> <p>Ability to identify potential problems and solve before problem impacts operations. Looks for productivity/efficiency opportunities, analyzes possibilities and implements strategies immediately.</p> <p><input type="checkbox"/> Exceeds Expectations <input checked="" type="checkbox"/> Meets Expectations <input type="checkbox"/> Below Expectations</p>
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EXPECTED RESULTS	COMMENTS AND RATING
<p>Continue Office Services realignment PBX operator to Insurance Operations 2/98 Outsource alternative proposal recommendation for mail center, copy center, shipping & receiving 6/98</p> <p><input checked="" type="checkbox"/>Critical <input type="checkbox"/>Important <input type="checkbox"/>Expected <input type="checkbox"/>Risk</p>	<p>PBX operator was reassigned to Insurance Operations 3/98. All vendors for facilities management proposal have been chosen and their respective proposals have been submitted. Recommendation to management completed 6/98. Proof of concept submitted to executive management and approved 7/98. Transition to facilities management completed 12/98.</p> <p><input checked="" type="checkbox"/>Exceeds Expectations <input type="checkbox"/>Meets Expectations <input type="checkbox"/>Below Expectations</p>
<p>Complete evaluation of Building Services staffing and submit cost/benefit study to management 5/98</p> <p><input type="checkbox"/>Critical <input checked="" type="checkbox"/>Important <input type="checkbox"/>Expected <input type="checkbox"/>Risk</p>	<p>Building Services completed analysis and submitted review to management 5/13/98. Current staff performance to cost ratio is one of the best in Farmers. Building projects performed by in-house staff are greater than in other offices and the cost is average.</p> <p><input type="checkbox"/>Exceeds Expectations <input checked="" type="checkbox"/>Meets Expectations <input type="checkbox"/>Below Expectations</p>
<p>Complete floor plans design for Insurance Operations 4/98 Complete department moves 3/98</p> <p><input type="checkbox"/>Critical <input checked="" type="checkbox"/>Important <input type="checkbox"/>Expected <input type="checkbox"/>Risk</p>	<p>Floor plans for Insurance Operations were completed and approved. Floor moves completed 5/98.</p> <p><input type="checkbox"/>Exceeds Expectations <input checked="" type="checkbox"/>Meets Expectations <input type="checkbox"/>Below Expectations</p>
<p>Redesign phone system and update automated attendant 1/98 & 4/98 to boost customer service contact and response time and support internal customers phone line needs.</p> <p><input type="checkbox"/>Critical <input checked="" type="checkbox"/>Important <input type="checkbox"/>Expected <input type="checkbox"/>Risk</p>	<p>Phone system redesigned to handle more calls without operator assistance. Automated attendant updated. Capacity for additional lines to meet user needs was completed.</p> <p>Continually working with customers to meet phone access needs. Completing analysis of use and recommending changes to customers to improve service.</p> <p><input type="checkbox"/>Exceeds Expectations <input checked="" type="checkbox"/>Meets Expectations <input type="checkbox"/>Below Expectations</p>
<p>Research viability of in-house barcoding for mail processing.</p> <p><input type="checkbox"/>Critical <input type="checkbox"/>Important <input type="checkbox"/>Expected <input type="checkbox"/>Risk</p>	<p>Outsource management company - Archer Management Services - will incorporate barcoding as part of their mail support for Farmers. To be implemented in 1999.</p> <p><input type="checkbox"/>Exceeds Expectations <input checked="" type="checkbox"/>Meets Expectations <input type="checkbox"/>Below Expectations</p>

ANNUAL REVIEW (SUPERVISOR COMMENTS)

This plan outlines the numerous value-added services and initiatives you successfully completed in 1998. This has been your strongest accomplishment year to date - congratulations. Your most significant accomplishment this year was the research and recommendation for outsourcing Office Services functions. This creative solution will provide FNWL with significant improvements in infrastructure, capacity and improved service to operations.

Also notable was your leadership in seeing the address update project to completion. Your discovery of deficiencies in maintaining our address database and subsequent review and initiated solutions have made a significant improvement in the accuracy of the data. This has also allowed FNWL to automate the process, reduced our related expenses by approximately \$40,000 per year and virtually removed the manual update process from Insurance Operations.

DEVELOPMENT PLAN

PLANS FOR DEVELOPMENT ON THE CURRENT JOB:

Continue to involve you in special projects to increase your "resume" of projects delivering business value, increase your exposure to other areas of our business and exposure to top management.

PLANS FOR LONGER-TERM DEVELOPMENT:

N/A

POTENTIAL FOR PROMOTION:

You continue to demonstrate your ability to handle additional responsibilities, i.e., additional special projects and staff work.

ANNUAL REVIEW (EMPLOYEE COMMENTS)

REVIEW IS FAIR AND ACCURATE. WORKING IN OFFICE SERVICES HAS BEEN A VERY GOOD CHALLENGE AND LEARNING EXPERIENCE. JOE HAS BEEN VERY HELPFUL AND IS A GOOD PERSON TO WORK WITH
JAW



**Farmers insurance Group of Companies
Performance Planning and Review
Supplement For Non-Clerical Employees**

EMPLOYEE NAME <i>(First, M.I., Last)</i> Dennis H. Willhite	SOCIAL SECURITY NO. 535-64-3073
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The following are additional Performance Factors for non-clerical employees.

The Professional Responsibility factor that appears below applies to all non-clerical employees, including Managers and Supervisors.

The Financial Management, Participative Management, and Performance Management factors on the next page apply to Managers and Supervisors only.

PERFORMANCE PLANNING	PERFORMANCE REVIEW
PERFORMANCE FACTOR	COMMENTS AND RATING
PROFESSIONAL RESPONSIBILITY: - Takes personal responsibility for self-development and staying current in professional field. - Plans and completes work independently. - Understands the insurance industry and how Farmers competes within the industry. - Contributes to Farmers overall strategy and operations. - Consistently works to support Farmers positive public image. - Additional responsibilities related to this specific job.	Strong background in insurance industry. Very good understanding of company strategies and goals. Stays current with industry trends through trade publications, professional affiliations and membership in Society of CLU & ChFC. Pursues plans that support company goals and creates new opportunities for company success. Supports community involvement programs, e.g., March of Dimes, Mercer Island 1/2 Marathon, United Way and various food and clothing drives. Coordinates use of facilities for worthwhile events like: blood donor program, phone-a-thon. Meeting rooms and cafeteria space are provided to charity groups, school district and senior citizens.
<input type="checkbox"/> Critical <input type="checkbox"/> Important <input checked="" type="checkbox"/> Expected	<input type="checkbox"/> Exceeds Expectations <input checked="" type="checkbox"/> Meets Expectations <input type="checkbox"/> Below Expectations

The three factors on the next page should be completed for all Managers and Supervisors.

PERFORMANCE PLAN/

PERFORMANCE REVIEW

PERFORMANCE FACTORS	COMMENTS AND RATING
<p>FINANCIAL MANAGEMENT:</p> <ul style="list-style-type: none"> - Manages in accordance with Farmers' strategic plan. - Develops objectives to support the strategic plan. - Communicates financial performance of Company and department. - Accurately forecasts budget requirements and manages within established budgets. - Controls expenses while maintaining quality. - Communicates to department how work impacts company revenue and expenses. - Others: <p><input type="checkbox"/>Critical <input checked="" type="checkbox"/>Important <input type="checkbox"/>Expected</p>	<ul style="list-style-type: none"> - Recommendation and MSR submitted for automating address update processing; annual savings \$40,000/year. - Completed renegotiation of paper costs for our high speed printers. Savings expected to be \$15,000/year. - Completed envelope change to reduce return mail expense. Savings \$38,000/year. - Functional budget for 1998 will be on target and under budget. - Worked with Cost Accounting to reorganize major expense lines for better control and budgeting of expenses. Includes stationery & supplies and mailing & shipping. - Completed equipment maintenance cost/benefit analysis. Bell & Howell maintenance costs reduced \$10,000 plus annually. - Completed review of long standing agreement with Air Touch Cellular and made changes to remove any company liability for service billing. - Discontinued maintenance agreement for the Kodak copier and mail inserter as part of AMS outsourcing plans. Annual savings \$20,000. - Completed analysis of cafeteria operations and discussed findings with CFM. Agreement reached to reduce cafeteria costs to meet our 1999 budgeted expense goals. - Reorganized PBX and automated attendant to reduce the need for a full time operator. Annual savings \$21,000. <p><input checked="" type="checkbox"/>Exceeds Expectations <input type="checkbox"/>Meets Expectations <input type="checkbox"/>Below Expectations</p>
<p>PARTICIPATIVE LEADERSHIP:</p> <ul style="list-style-type: none"> - Plans and organizes activities to achieve goals and improve operations. - Communicates knowledge and provides guidance to accomplish team and individual goals. - Delegates work and follows up appropriately. - Regularly solicits input to improve department results. - Provides opportunities for development and innovation. - Others: <p><input type="checkbox"/>Critical <input type="checkbox"/>Important <input checked="" type="checkbox"/>Expected</p>	<p>Very good at developing plans for changes to operations, improvements in productivity and reduction in costs. Communicates ideas to others to ensure plans are implemented and goals are achieved.</p> <p>Appropriately delegates assignments and projects to Office Services staff and follows up to ensure completion. Created many new job opportunities for Office Services staff to enhance job satisfaction and develop new skills to add additional value to position. Continually requests feedback from employees and customers regarding performance and how things can be done better.</p> <p><input type="checkbox"/>Exceeds Expectations <input checked="" type="checkbox"/>Meets Expectations <input type="checkbox"/>Below Expectations</p>
<p>PERFORMANCE MANAGEMENT:</p> <ul style="list-style-type: none"> - Develops effective performance plans on a timely basis. - Coaches employees to improve performance, develop skills, and prepare for career growth. - Conducts interim reviews discussing development needs and career potential. - Manage employee compensation to meet budgets and reinforce performance. - Others: <p><input type="checkbox"/>Critical <input type="checkbox"/>Important <input checked="" type="checkbox"/>Expected</p>	<p>Performance plans developed for all Office Services staff. Coaching, discussion, daily contact and conversation with employees to ensure goals are achieved and performance levels maintained. Performance reviews completed for all employees with appropriate feedback and discussion provided to everyone. Compensation for employees within budget and based on performance.</p> <p><input type="checkbox"/>Exceeds Expectations <input checked="" type="checkbox"/>Meets Expectations <input type="checkbox"/>Below Expectations</p>



Farmers Insurance Group of Companies Salary Review Resume

Employee	Dennis Willhite				Soc. Sec. No.: 535-64-3073
	First Name	M.I.	Last Name		
Office	FNWL	54	Department/BCO	Variable Products	17E
	Name	Number		Name	Number
Job Title	Life Marketing Specialist		Number	MKxx	

You are scheduled for a salary review. Following is a summary of your performance contribution since your last salary review.

This has been a very interesting year. Your specific job responsibilities have shifted several times during most of 1999 (Office Services, Staff Services, Special Assignment, Marketing, etc.). Even though you have been close to the Variable Initiative from early 1999, your full-time assignment to the Initiative was not official until about July 1999.

Your original assignment with the Variable Initiative (Special Assignment) was to review the Chicago Operations area and other call center operations, then recommend a customer and sales support operation for FNWL. You put in a lot of time (and air miles) during early to mid-1999, but the scope and direction on this part of the initiative was not very specific; therefore, deliverables were not really defined.

As we entered the second half of 1999, specific variable product and marketing-related assignments and tasks began to slip as a result of turnover and lack of staff in Life Marketing. You stepped up and have effectively filled many "holes" in this area. Below are some examples:

- ▶ Provided initial variable product content for LifeNet.
- ▶ Created sales material and sales process design for the Arizona test launch (including point of sale material, presentation material, forms, and training material).
- ▶ Assisted with the Internal Wholesaling/Sales Support unit (including facilitating the registration of staff).
- ▶ Worked with Steve Klein on compliance issues (including review of sales material, OSJ procedures, FNWL procedural interfaces, etc.).
- ▶ Created and will continue to finalize sales material and sales process design for the January FNWL product roll-out (including point of sale material, presentation material, forms, and training material).
- ▶ Worked and will continue to finalize product illustration development with LAHO and Field Data (includes design, format, content, and testing, etc.).
- ▶ Served on the Operations team as marketing liaison (including agent procedures, etc.).
- ▶ Assisted and will continue to assist in the development of the "Why Variable" video series.

	2/99		12/21/99		12/31/99
Employee	Date	Supervisor	Date	Next Level Manager	Date

FNWL 000095

Other contributions in 1999 include:

- ▶ Completed proposal for a phone switch upgrade which was approved and funds allocated (NOTE: this will directly impact the effectiveness of the variable product sales support unit).
- ▶ Completed securities exams (Series 6, 63, & 26).
- ▶ Created an initial phone tree for the Sales Support Center.
- ▶ Assisted with the "Why Life?" video series and with the survey reply cards.
- ▶ Assisted with and participated in the Annual Life Rep Conference.
- ▶ Assisted with the creation of the Social Security marketing program.

Again, 1999 was an interesting year. You have been flexible with your job assignments and you have kept a strong service attitude with every task. You are finishing the year with a strong focus on what needs to be done, and you are assisting to position the Variable Products Marketing team to be successful in 2000.

_____ Employee	____/____/____ Date	_____ Supervisor	____/____/____ Date	_____ Next Level Manager	____/____/____ Date
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FNWL 000096



Farmers Insurance Group of Companies Performance Planning and Review

Employee	Dennis H. Willhite	Employment Date	7-11-78
	First Name M.I. Last Name	Soc. Sec. No.	535-64-3073
	Life Marketing Manager	June 1, 2000	
Job Title	Number	Date Assigned to this position	

Definition of Factor Weighting Scale (Performance Planning Section)

Critical	A "must do" element of the performance plan.
Important	A priority element of the performance plan.
Expected	A day-to-day element that needs to be accomplished.
Risk Opportunity	A result with a high degree of stretch that may not be attainable (to be used with expected results only).

Performance Planning Approvals

<i>[Signature]</i>	3/19/00	<i>[Signature]</i>	3/19/2000			
Employee	Date	Supervisor	Date	Next Level Manager	Date	

Interim Reviews

1) / / /	/ / /	3) / / /	/ / /	/ / /	/ / /
Date	Employee	Supervisor	Date	Employee	Supervisor
2) / / /	/ / /	4) / / /	/ / /	/ / /	/ / /
Date	Employee	Supervisor	Date	Employee	Supervisor

Definition of Performance Rating Scale (Performance Review Section)

Exceeds Expectations	Performance surpasses expectations for the performance factor or expected result. Individual takes initiative to clearly exceed requirements. Actions contribute to improved department results and innovative work practices.
Meets Expectations	Performance meets expectations for the performance factor or expected result. Actions contribute to department results.
Below Expectations	Performance is below expectations for the performance factor or expected result. Improvement is necessary in order to contribute to department results.

Performance Review Approvals

<i>[Signature]</i>	12/14/00	<i>[Signature]</i>	12/14/2000			
Employee	Date	Supervisor	Date	Next Level Manager	Date	

PERFORMANCE PLANNING

PERFORMANCE REVIEW

PERFORMANCE FACTORS	COMMENT AND RATING
<p>CUSTOMER SATISFACTION:</p> <ul style="list-style-type: none"> - Identifies and anticipates needs of internal and external customers. - Understands how work impacts other departments within Farmers. - Listens to and defines customers needs. - Suggests approaches to meet customer needs. - Adapts priorities, as appropriate, to meet customer requirements. - Others: <p><input checked="" type="checkbox"/>Critical <input type="checkbox"/>Important <input type="checkbox"/>Expected</p>	<p>A considerable amount of time and energy went into satisfying internal and external customer needs this year. The launch of the Variable Initiative was critical to the ongoing success of the life company, and creating the marketing support, sales support, and product support infrastructure was a very big accomplishment. You made every attempt to understand the needs of the agents, B/D, and other Zurich business units and to provide the tools.</p> <p>Multiple customer priorities change rapidly, and responsiveness was key to keeping all constituents moving forward in a productive manner.</p> <p>In 2001, as you work on the customer experience project, you will need to define our customers and find creative solutions to increase sales and maintain our existing clients</p> <p><input type="checkbox"/>Exceeds Expectations <input checked="" type="checkbox"/>Meets Expectations <input type="checkbox"/>Below Expectations</p>
<p>TEAMWORK:</p> <ul style="list-style-type: none"> - Builds and maintains positive relations with others. - Appropriately balances individual and team interests, recognizing membership on multiple teams. - Shows initiative and team support by accepting and fulfilling team obligations. - Promotes mutual ownership of ideas and actions. - Communicates with other teams and contributes to environment where teams can work together. - Shares knowledge and ideas with others. - Contributes to team effectiveness by being prepared and available for work in order to fulfill all job responsibilities. - Others: <p><input checked="" type="checkbox"/>Critical <input type="checkbox"/>Important <input type="checkbox"/>Expected</p>	<p>You are a team player! With 80% turnover in our department this year, we have all had to play multiple roles and assist each other. You have made yourself a valuable team member. You have an excellent rapport with customers and colleagues, and work hard to ensure Marketing & Sales is positively represented inside and outside the company. Your accessibility to employees and customers shows a genuine interest in helping others be successful. Creating the Sales Support Unit and launching the Variable marketing material are two very good examples of working with many people inside and outside the marketing function to realize a major objective.</p> <p><input checked="" type="checkbox"/>Exceeds Expectations <input type="checkbox"/>Meets Expectations <input type="checkbox"/>Below Expectations</p>
<p>COMMUNICATION:</p> <ul style="list-style-type: none"> - Effectively communicates with customers and others throughout Farmers. - Asks questions and listens carefully to understand the message. - Presents written and oral information in a clear and organized way. - Considers and respects others' points of view. - Seeks and listens to input from others and incorporates their ideas appropriately. - Others: <p><input checked="" type="checkbox"/>Critical <input type="checkbox"/>Important <input type="checkbox"/>Expected</p>	<p>Your written communications are very good. You have the ability to create excellent marketing material and correspond well to customers and agents. Oral communication is clear, organized and articulate. You are very good at keeping me informed of major activities or obstacles that may require escalation to resolve. Actively participates in departmental meetings and company meetings to facilitate open communication throughout the organization.</p> <p><input type="checkbox"/>Exceeds Expectations <input checked="" type="checkbox"/>Meets Expectations <input type="checkbox"/>Below Expectations</p>
<p>CREATIVITY/INNOVATION</p> <ul style="list-style-type: none"> - Stays current with new technology and uses it effectively. - Seeks ways to continually improve work processes and methods. - Generates effective, original ideas and concepts. - Appropriately applies new ideas in inventive or imaginative ways. - Adds value to the ideas of others <p><input type="checkbox"/>Critical <input checked="" type="checkbox"/>Important <input type="checkbox"/>Expected</p>	<p>You use technology to maximize productivity. You have strong PC skills and have magnified the effectiveness of project work and creating new ideas.</p> <p>The creation of the variable marketing material, website material and Friendly Exchange mail campaign are three key examples. Other examples are the redesign of various marketing pieces, organizational structure of the sales support unit, phone tree for agent and policyholder customer service for and variable material.</p> <p><input type="checkbox"/>Exceeds Expectations <input checked="" type="checkbox"/>Meets Expectations <input type="checkbox"/>Below Expectations</p>
<p>ANALYSIS/DECISION MAKING</p> <ul style="list-style-type: none"> - Gathers and evaluates appropriate information. - Analyzes alternative solutions. - Balances analysis with decision making to develop timely solutions. - Balances logic, analysis, and intuition to take appropriate risks. - Develops practical/workable solutions that can be implemented and used by others. - Others: <p><input type="checkbox"/>Critical <input checked="" type="checkbox"/>Important <input type="checkbox"/>Expected</p>	<p>Information gathering is thorough. You have been assigned several projects to manage simultaneously and are organized. You negotiated the contract with COSS Development Corp. for variable sales illustrations to get this off the ground. You are good at seeing the potential for a problem before it becomes a problem, and respond pro-actively with an appropriate decision.</p> <p>You are now ready to take these tools to the next level to ensure you spend more time analyzing the information than just gathering the data. You will also be able to focus more on budget management for the department in 2001 to be sure we are leveraging our budget for the best sales results and provide appropriate recommendations</p> <p><input type="checkbox"/>Exceeds Expectations <input checked="" type="checkbox"/>Meets Expectations <input type="checkbox"/>Below Expectations</p>

EXPECTED RESULTS	COMMENTS AND RATING
<p>Develop Variable Marketing point of sale Material for new Variable UL and Variable Annuity. Facilitate the development of Variable Illustration Software for AS/400 and PC based systems. Develop life product and process content for inclusion in Agents Reference Guide.</p> <p><input checked="" type="checkbox"/>Critical <input type="checkbox"/>Important <input type="checkbox"/>Expected <input type="checkbox"/>Risk</p>	<p>You successfully developed and produced variable product point of sale marketing material for the VUL and VA. You worked with our Strategic partners ZKL, SKI, IBS, and various Farmers home office staff to launch the life company's first variable products to the Farmers agency force. You put created new and updated existing support documentation for the creation of the Farmers Financial Solutions Reference Guide. You provided prototype sales illustrations for the AS/400 agent computer system, and brought in a Third Party Vendor, COSS, to develop the PC based illustration. You facilitated and coordinated the printing of the prospectuses for both products, utilizing another new Third Party Vendor, Bowne Financial Printers, and worked in concert with all strategic partners in the development of the agent training material, including the Customer Profile Worksheet.</p> <p><input checked="" type="checkbox"/>Exceeds Expectations <input type="checkbox"/>Meets Expectations <input type="checkbox"/>Below Expectations</p>
<p>Create and staff the Sales Support/Internal Wholesale Unit. This includes the infrastructure, organizational layout, job descriptions and hiring of staff from inside and outside the company.</p> <p><input checked="" type="checkbox"/>Critical <input type="checkbox"/>Important <input type="checkbox"/>Expected <input type="checkbox"/>Risk</p>	<p>Successfully created the Sales Support/Internal Wholesale Unit to promote and support our variable initiative and LTC. Developed the organizational structure and call tree with toll free numbers for this group as well as the customer service support at McCamish. You hired staff throughout the year as business warranted, and will be at full staff in January 2001. You established job descriptions, with help from ZKL and Farmers staff. I add this was all done while assuming new duties as Special projects Manager for the department.</p> <p><input checked="" type="checkbox"/>Exceeds Expectations <input type="checkbox"/>Meets Expectations <input type="checkbox"/>Below Expectations</p>
<p>Implement Friendly Exchange Mail Campaign for Fall 2000, including business reply card, announcements to the field, tracking of responses, reply feedback to the field for follow-up, and migration of the database to LifeNet for immediate access by the district managers and agents.</p> <p><input type="checkbox"/>Critical <input checked="" type="checkbox"/>Important <input type="checkbox"/>Expected <input type="checkbox"/>Risk</p>	<p>You facilitated and implemented the Friendly Exchange reply mail campaign for 2000. Developed sales kits, mailing schedules, introductory announcements, database on LifeNet for agents to see and follow-up with those clients that have expressed an interest in products and services offered by the life company, and a follow-up notification system through the Life Specialists and District Managers. Nearly 5000 reply cards were received and forwarded out to the agency force to solicit new business. We now need to follow-up with appropriate sales reports and lead the agent back to the client or reassign the leads as necessary.</p> <p><input type="checkbox"/>Exceeds Expectations <input checked="" type="checkbox"/>Meets Expectations <input type="checkbox"/>Below Expectations</p>
<p>Oversee strategic marketing relationships with CNA for long term care and Unum/Provident for disability income. Enhance the relationship and build production from both lines of business.</p> <p><input type="checkbox"/>Critical <input checked="" type="checkbox"/>Important <input type="checkbox"/>Expected <input type="checkbox"/>Risk</p>	<p>You revised LTC marketing material to reduce the number of sales pieces in distribution and reduce the associated cost of producing. Created a new sales support access point for Farmers agents selling LTC. Created a new training relationship with a Third Party Vendor, LTC Consultants, to boost the level of training for this product and provide access to the premier sales education and agent training company for LTC. Dove tailed this new relationship into our LifeNet for easy online access.</p> <p>You are currently negotiating a new contract with Unum/Provident for DI. This contract will provide development for you by requiring additional selling and negotiation skills.</p> <p><input type="checkbox"/>Exceeds Expectations <input checked="" type="checkbox"/>Meets Expectations <input type="checkbox"/>Below Expectations</p>

ANNUAL REVIEW (SUPERVISOR COMMENTS)

Dennis, you are a team player and an asset to the marketing and sales team. You have done an excellent job for your first year in your new managerial role. Your strengths are your teamwork, administration skills and ability to follow-through. With additional development and seasoning, you have the ability for additional promotions

DEVELOPMENT PLAN

PLANS FOR DEVELOPMENT ON THE CURRENT JOB:

- Continue the required continuing education process with your security licenses
- Develop your project management skills in your current assignment

PLANS FOR LONGER-TERM DEVELOPMENT:

- Consider pursuing additional education through outside college programs and business seminars

POTENTIAL FOR PROMOTION:

With additional development and continued performance in your current position, there will be opportunities in marketing as we grow and achieve sales results. With your experience in both sales and operations, you should be considered for positions in Operations. You may also have opportunities with our Broker Dealer as they grow and expand their marketing and sales functions.

ANNUAL REVIEW (EMPLOYEE COMMENTS)

*Very fair review. It's great to have life
Marketing with the life company.
Joe is an excellent supervisor
and a good person to work with
DHW*



Farmers Insurance Group of Companies Performance Planning and Review

2001

Employee	<u>Dennis</u>	<u>H.</u>	<u>Willhite</u>	Employment Date	<u>7/11/78</u>
	First Name	M.I.	Last Name	Soc. Sec. No.	_____
Office	<u>FNWL</u>	Department/BCO		<u>Life Marketing</u>	<u>351</u>
	Name	Number	Name	Number	
	<u>Life Marketing Manager</u>		Date Assigned	<u>June 2000</u>	
Job Title	_____		Number	_____ to this position _____	

Definition of Factor Weighting Scale (Performance Planning Section)

Critical	A "must do" element of the performance plan.
Important	A priority element of the performance plan.
Expected	A day-to-day element that needs to be accomplished.
Risk Opportunity	A result with a high degree of stretch that may not be attainable (to be used with expected results only).

Performance Planning Approvals

Employee	Date	Supervisor	Date	Next Level Manager	Date

Interim Reviews

1) _____ / _____ / _____	3) _____ / _____ / _____
Date Employee Supervisor	Date Employee Supervisor
2) _____ / _____ / _____	4) _____ / _____ / _____
Date Employee Supervisor	Date Employee Supervisor

Definition of Performance Rating Scale (Performance Review Section)

Exceeds Expectations	Performance surpasses expectations for the performance factor or expected result. Individual takes initiative to clearly exceed requirements. Actions contribute to improved department results and innovative work practices.
Meets Expectations	Performance meets expectations for the performance factor or expected result. Actions contribute to department results.
Below Expectations	Performance is below expectations for the performance factor or expected result. Improvement is necessary in order to contribute to department results.

Performance Review Approvals

	<u>12/21/01</u>		<u>12/20/01</u>		
Employee	Date	Supervisor	Date	Next Level Manager	Date

FNWL 00081

PERFORMANCE PLANNING

PERFORMANCE REVIEW

PERFORMANCE FACTORS	COMMENTS AND RATING
<p>CUSTOMER SATISFACTION:</p> <ul style="list-style-type: none"> - Identifies and anticipates needs of internal and external customers. - Understands how work impacts other departments within Farmers. - Listens to and defines customers needs. - Suggests approaches to meet customer needs. - Adapts priorities, as appropriate, to meet customer requirements. - Others: <p><input checked="" type="checkbox"/> Critical <input type="checkbox"/> Important <input type="checkbox"/> Expected</p>	<p>You were responsible for the development and implementation of the first "virtual" sales/marketing kit on LifeNet. This demonstrated your ability to bring support and service to our agents and ultimately to annuity applicants in a form that is readily available and easily accessed. You work well with other functions within the company to ensure products and marketing materials provided to our customers can be supported by our Underwriting, MIS and Service units. Our LTC products, DI products through Unum, are very good examples of coordination.</p> <p>You listen to our sales management team and respond to their suggestions to make our offerings more user friendly to the agents and appealing to our customers. The total revision of the variable marketing material illustrates that commitment to providing what our customers need and want to successfully sell our products. Also, the fact that this was a major priority shift for you late in the process, clearly demonstrates your willingness and ability to do what it takes to make it happen.</p> <p><input checked="" type="checkbox"/> Exceeds Expectations <input type="checkbox"/> Meets Expectations <input type="checkbox"/> Below Expectations</p>
<p>TEAMWORK:</p> <ul style="list-style-type: none"> - Builds and maintains positive relations with others. - Appropriately balances individual and team interests, recognizing membership on multiple teams. - Shows initiative and team support by accepting and fulfilling team obligations. - Promotes mutual ownership of ideas and actions. - Communicates with other teams and contributes to environment where teams can work together. - Shares knowledge and ideas with others. - Contributes to team effectiveness by being prepared and available for work in order to fulfill all job responsibilities. - Others: <p><input checked="" type="checkbox"/> Critical <input type="checkbox"/> Important <input type="checkbox"/> Expected</p>	<p>Proactive teamwork is a critical ingredient of a successful team. You demonstrate such teamwork on a daily basis. You interact very positively with agents, DM's, Life Reps and others within the Farmers organization. And, you spend a considerable amount of time helping others to be effective team players. You freely share your thoughts and ideas with team members and work jointly to create solutions to our sales, marketing, service and customer challenges.</p> <p><input checked="" type="checkbox"/> Exceeds Expectations <input type="checkbox"/> Meets Expectations <input type="checkbox"/> Below Expectations</p>
<p>COMMUNICATION:</p> <ul style="list-style-type: none"> - Effectively communicates with customers and others throughout Farmers. - Asks questions and listens carefully to understand the message. - Presents written and oral information in a clear and organized way. - Considers and respects others' points of view. - Seeks and listens to input from others and incorporates their ideas appropriately. - Others: <p><input checked="" type="checkbox"/> Critical <input type="checkbox"/> Important <input type="checkbox"/> Expected</p>	<p>You have effective written communication to customers, strategic partners and supervisor. You can write a plan of execution and implement it. You are very good at keeping up to speed with information flow to ensure that the marketing function is in the know and takes appropriate action to meet obligations. Oral communication is clear, organized and articulate. Maintains open communication with marketing staff, other departments, strategic partners, and other Farmers offices and Zurich business units. You are very good at asking questions to clarify the message so that there is no confusion or wasted effort.</p> <p>Very good at keeping supervisor informed of major activities or obstacles that may require escalation to resolve. You actively participates in departmental meetings and company meetings to facilitate open communication throughout the organization.</p> <p><input type="checkbox"/> Exceeds Expectations <input checked="" type="checkbox"/> Meets Expectations <input type="checkbox"/> Below Expectations</p>
<p>CREATIVITY/INNOVATION</p> <ul style="list-style-type: none"> - Stays current with new technology and uses it effectively. - Seeks ways to continually improve work processes and methods. - Generates effective, original ideas and concepts. - Appropriately applies new ideas in inventive or imaginative ways. - Adds value to the ideas of others. - Others: <p><input type="checkbox"/> Critical <input checked="" type="checkbox"/> Important <input type="checkbox"/> Expected</p>	<p>You have very good PC skills. You use these tools to create new marketing support material in an effective and efficient manner. This has helped with the new budget process which is now on SAP and many other administrative duties.</p> <p>The virtual annuity sales kit is an excellent example of utilizing technology to it's fullest in support of our marketing initiatives. Also, the development of the business insurance kits for Debt Reduction, Keyperson, Tele-Xpress process, WM Blueprint for Farmers agents, and the Architecting your Financial Future material for use with our alternative distribution initiatives. These all clearly illustrate your inventive use of technology to improve and increase life sales activity now and in the future. And, though some of these concepts were not your original ideas, you embraced them and developed them into workable marketing solutions. Now, it is time to take this to the next level. You will have this opportunity in 2002 with the roll-out of the tele-app, and short form app.</p> <p><input type="checkbox"/> Exceeds Expectations <input checked="" type="checkbox"/> Meets Expectations <input type="checkbox"/> Below Expectations</p>
<p>ANALYSIS/DECISION MAKING</p> <ul style="list-style-type: none"> - Gathers and evaluates appropriate information. - Analyzes alternative solutions. - Balances analysis with decision making to develop timely solutions. - Balances logic, analysis, and intuition to take appropriate risks. - Develops practical/workable solutions that can be implemented and used by others. - Others: <p><input type="checkbox"/> Critical <input checked="" type="checkbox"/> Important <input type="checkbox"/> Expected</p>	<p>Your information gathering is very thorough. Analysis of many issues on multiple projects is comprehensive and well organized. Contract negotiations with Unum for Disability Income, LTC Administration alternative using Producers America and your Worksite Marketing project with Farmers East Coast are all excellent examples of thorough analysis and decision making. You are very flexible and creative when coming up with a solution for a given challenge. You are willing to take calculated risks to complete a project or solve a problem.</p> <p>You improved the budget management process for marketing by actively managing the major expense categories and providing information to all marketing team members.</p> <p><input type="checkbox"/> Exceeds Expectations <input checked="" type="checkbox"/> Meets Expectations <input type="checkbox"/> Below Expectations</p>

EXPECTED RESULTS	COMMENTS AND RATING
<p>Complete total rewrite/development of all variable marketing material and update the VA and VUL prospectuses with 22 new sub-accounts in time to meet that annual filing May 1st.</p> <p><input type="checkbox"/>Critical <input type="checkbox"/>Important <input type="checkbox"/>Expected <input type="checkbox"/>Risk</p>	<p>You took charge mid-stream of a major re-creation of our variable marketing material to include the 22 new sub-accounts. Not only was this mid-stream, but at a point of near disaster from the previous project manager, and up against an established deadline by the NASD. This was a great effort on your part considering you weren't expected to be involved in this process this year.</p> <p><input checked="" type="checkbox"/>Exceeds Expectations <input type="checkbox"/>Meets Expectations <input type="checkbox"/>Below Expectations</p>
<p>Launch Farmers Friendly Exchange Direct Mail campaign for 2001.</p> <p><input type="checkbox"/>Critical <input type="checkbox"/>Important <input type="checkbox"/>Expected <input type="checkbox"/>Risk</p>	<p>You and your team designed the term mailer and Friendly Exchange reply card for leads to our agents. The field bulletin, fillers, LifeNet leads, and procedures were developed and implemented timely. Responses are coming into the office at this time, and sales results are not available yet.</p> <p><input type="checkbox"/>Exceeds Expectations <input checked="" type="checkbox"/>Meets Expectations <input type="checkbox"/>Below Expectations</p>
<p>Create business insurance kits for Farmers Commercial agents and alternative distribution.</p> <p><input type="checkbox"/>Critical <input type="checkbox"/>Important <input type="checkbox"/>Expected <input type="checkbox"/>Risk</p>	<p>The business kit was developed in both paper and virtual formats to assist our agents to sell life insurance to our small business clients. The kit was designed for limited use to affected agents and to maintain costs consistent with production levels. Next, we need to attempt to measure sales results from these efforts.</p> <p><input type="checkbox"/>Exceeds Expectations <input checked="" type="checkbox"/>Meets Expectations <input type="checkbox"/>Below Expectations</p>
<p>Complete analysis of LTC relationship with CNA and submit a proposal on improving the bottom line income to FLI.</p> <p><input type="checkbox"/>Critical <input type="checkbox"/>Important <input type="checkbox"/>Expected <input type="checkbox"/>Risk</p>	<p>You researched various alternatives to recommend a solution for FLI to lower its cost to process LTC business. This is consistent with our objective to focus on selling and issuing life policies. You also worked with the director to propose an alternative distribution source of LTC business at a level to produce profit, without reducing the focus on life. This proposal was not pursued by executive decision on timing, but not due to the system proposed.</p> <p><input checked="" type="checkbox"/>Exceeds Expectations <input type="checkbox"/>Meets Expectations <input type="checkbox"/>Below Expectations</p>
<p><input type="checkbox"/>Critical <input type="checkbox"/>Important <input type="checkbox"/>Expected <input type="checkbox"/>Risk</p>	<p><input type="checkbox"/>Exceeds Expectations <input type="checkbox"/>Meets Expectations <input type="checkbox"/>Below Expectations</p>

ANNUAL REVIEW (SUPERVISOR COMMENTS)

Dennis, you are an excellent team mate and contribute to our departmental and company success. You are well respected by your peers and provide a positive example for your employees. In 2002, I need your support to help us reach our sales goals and tie each person's performance plans to the sales goals. If it doesn't help to get us to the 217,600, we can't do it. I appreciate your support and know I can count on you as I have been able to in the past. I believe you have made great strides this year. You are developing well in your current assignment. Thanks for all you do!

DEVELOPMENT PLAN

PLANS FOR DEVELOPMENT ON THE CURRENT JOB:

1. Continue to take the required continuing education required to maintain your security licenses
2. Look for any opportunity to tie your projects to the sales goals, measure results and promote the contributions.

PLANS FOR LONGER-TERM DEVELOPMENT:

1. Continue pursuing industry education to stay current
2. Continue expanding your horizons by pursuing outside education
3. Work with the director to build development plans or two positions of promotional interest

POTENTIAL FOR PROMOTION:

You prospects for promotion are good with continued development in your current assignment and through finding meaningful ways to distinguish your self from the crowd.

ANNUAL REVIEW (EMPLOYEE COMMENTS)

Working with Joe and the entire marketing team has been very rewarding. I'm looking forward to the significant challenges and opportunities next year.

[Signature]



Farmers Insurance Group of Companies Performance Planning and Review Supplement For Non-Clerical Employees



The following are additional Performance Factors for non-clerical employees.

The Professional Responsibility factor that appears below applies to all non-clerical employees, including Managers and Supervisors.

The Financial Management, Participative Management, and Performance Management factors on the next page apply to Managers and Supervisors only.

PERFORMANCE PLANNING	PERFORMANCE REVIEW
PERFORMANCE FACTOR	COMMENTS AND RATING
<p>PROFESSIONAL RESPONSIBILITY:</p> <ul style="list-style-type: none"> - Takes personal responsibility for self-development and staying current in professional field. - Plans and completes work independently. - Understands the Insurance Industry and how Farmers competes within the industry - Contributes to Farmers overall strategy and operations. - Consistently works to support Farmers positive public image. - Additional responsibilities related to this specific job. 	<p>You are active in improving your professional skills through continuing education. Specifically, Attendance and participation in IMS professional seminars and Regulatory Element Continuing Education for NASD Registered Principal License.</p> <p>You participate in online training and seminars conducted by FFS and various Mutual Fund Companies. And, you subscribe and stay current with several industry and business related publications such as: HBR, Life Insurance Selling, Financial Planning, National Underwriter, Journal of Financial Service Professionals and NAVA.</p> <p>You do an excellent job of handling various projects and assignments with very little initial direction. You are self motivated and work on your own to complete those projects and assignments.</p> <p>You have a very good understanding of company objectives and goals and you work hard to do your part to achieve the global goals. Your work well with professionals from other functions of Farmers and outside companies to ensure our overall operational and marketing objectives are met.</p>
<input type="checkbox"/> Critical <input type="checkbox"/> Important <input type="checkbox"/> Expected	<input type="checkbox"/> Exceeds Expectations <input checked="" type="checkbox"/> Meets Expectations <input type="checkbox"/> Below Expectations

The three factors on the next page should be completed for all Managers and Supervisors.

PERFORMANCE PLAN

PERFORMANCE REVIEW

PERFORMANCE FACTORS	COMMENTS AND RATING
<p>FINANCIAL MANAGEMENT:</p> <ul style="list-style-type: none"> - Manages in accordance with Farmers' strategic plan. - Develops objectives to support the strategic plan. - Communicates financial performance of Company and department. - Accurately forecasts budget requirements and manages within established budgets. - Controls expenses while maintaining quality. - Communicates to department how work impacts company revenue and expenses. - Others: <p><input type="checkbox"/> Critical <input type="checkbox"/> Important <input type="checkbox"/> Expected</p>	<p>You continue to build your budget expertise for the marketing functional general expense budget. You worked with the managers and staff to create the 2002 annual budget for the 3 marketing departments. And, you continue to oversee the 2001 current year budget and actual expenses. This has been especially challenging with the many new and ever changing priorities and initiatives. You have done a good job of communicating the budget numbers and major expenses items as we move through the year, enlisting the support of everyone in the marketing area to be prudent when deciding to spend money on behalf of our marketing goals. We must continually update the actual results against budget and manage so we do not exceed our budget unless the payback is worth the extra sales.</p> <p><input type="checkbox"/> Exceeds Expectations <input checked="" type="checkbox"/> Meets Expectations <input type="checkbox"/> Below Expectations</p>
<p>PARTICIPATIVE LEADERSHIP:</p> <ul style="list-style-type: none"> - Plans and organizes activities to achieve goals and improve operations. - Communicates knowledge and provides guidance to accomplish team and individual goals. - Delegates work and follows up appropriately. - Regularly solicits input to improve department results. - Provides opportunities for development and innovation. - Others: <p><input type="checkbox"/> Critical <input type="checkbox"/> Important <input type="checkbox"/> Expected</p>	<p>You actively participate in department decisions and communicating priorities to other marketing team members. You are willing to help others to improve their professional experience and complete projects impacting marketing and the company. You've done a good job of communicating Farmers goals and philosophy to the newer members of the organization and helping them achieve what is expected of them for all of us to be successful. You worked with various marketing team members to broaden their skill base and assume additional responsibilities. Continuing your efforts to delegate work to free up time for strategic planning and implementation will improve your leadership skills and allow you to assume new responsibilities.</p> <p><input type="checkbox"/> Exceeds Expectations <input checked="" type="checkbox"/> Meets Expectations <input type="checkbox"/> Below Expectations</p>
<p>PERFORMANCE MANAGEMENT:</p> <ul style="list-style-type: none"> - Develops effective performance plans on a timely basis. - Coaches employees to improve performance, develop skills, and prepare for career growth. - Conducts interim reviews discussing development needs and career potential. - Manages employee compensation to meet budgets and reinforce performance. - Others: <p><input type="checkbox"/> Critical <input type="checkbox"/> Important <input type="checkbox"/> Expected</p>	<p>Those employees reporting directly to you have been very effective and productive this past year. You have provided positive guidance to improve their skills and direct them to attain results most desired by the department and company. Performance plans were communicated in a timely fashion and were well laid out, providing a challenge with stretch. You have great rapport with your direct reports and all marketing staff and you don't mind assisting them to be more productive and self sufficient. You've worked well with fellow managers to ensure fair and honest performance measurements and compensation in line with company guidelines and within budget. In 2002, we must tie everyone's performance to the sales goals.</p> <p><input type="checkbox"/> Exceeds Expectations <input checked="" type="checkbox"/> Meets Expectations <input type="checkbox"/> Below Expectations</p>



FARMERS



Review Period: 01/01/2002 – 12/31/2002

Farmers Insurance Group
PERFORMANCE AND DEVELOPMENT PLAN AND REVIEW

I. Identification and Signatures

This form is intended to guide and document discussions. It is not an end in itself. The discussion is what's important. Both parties should take time to prepare properly and talk candidly. We owe this to *our people*. All shaded sections are to be completed at the end of the review period.

If you are filling in this form on line, the boxed-in areas will automatically expand to accommodate your text.

Employee Name:	<u>Dennis Willhite</u>	Social Security No:	<u>535-64-3073</u>
Employment Date:	<u>7-11-78</u>	Date Assigned Position:	<u>6-1-2000</u>
Division:	<u>PNWL</u>	Department:	<u>Life Marketing</u>
Job Title:	<u>Life Marketing Manager</u>	Salary Grade:	<u>SG37</u>

Performance Plan Agreement

Employee Signature _____ Date _____

Manager Signature _____ Date _____

Next level Manager Signature _____ Date _____

Interim Reviews (Minimum of one per review period)

Manager Initials _____ Employee Initials _____ Date _____

Manager Initials _____ Employee Initials _____ Date _____

Manager Initials _____ Employee Initials _____ Date _____

Final Performance Review Agreement

Employee Signature _____ Date _____

Manager Signature _____ Date _____

Next level Manager Signature _____ Date _____

Instructions: Based on the Company goals below, each organizational unit has established key goals for the review period. List your unit's goals in the space provided. These should be specific to the department and identify the main objectives for your work group. The Strategic Initiatives and your unit's goals are supplemental to the Overall Company Goals. Using the most applicable of these goals as a basis (you can pick from any of these groups), establish individual performance plans under Section III, Individual Performance Plan.

***Goals specific to Farmers Life**

A. Overall Company Goals	
Goal Description	Measures
1) Exchange Profitability a. Surplus ratio goal b. Combined ratio goal c. Achieving Farmers Life earnings goal reduces strain on Management fee*	33% 103% \$184 million*
2) Agency Development a. Appoint career agents b. Achieve a net gain	3 per district 1 per district
3) Life and Assets Under Management a. Increase Life Issued and Paid Policies b. Increase Assets Under Management	Minimum of 17 per full time agent* Increase by at least \$523 million
4) Product Density a. Product density per household	Increase by 15%
5) Management Company Earnings a. Manage our growth by better managing and leveraging our expenses and business investments	Achieve earnings of \$538.8 million Achieve FLI earnings of \$184 million*

B. Strategic Initiatives

1) Distribution	7) People
2) #1 Specialty Company-Foremost	8) Tele-apps*
3) Marketing Management	9) E-app*
4) Experience driven by technology	10) Auto/Life Discount*
5) Customer Experience/Retention	11) Alternative Distribution*
6) Trusted Advisor	

C. Unit Goals (Unit= work group to which the employee most directly contributes)

Goal Description	Measures
Issued & Paid Life Policies Goal	217,600-139,346
Issued & Paid Life Volume Goal	38.4 Billion in Face Amount (\$ 24.5)
Life Annual Premium Goal	\$133.5 million
Annuity Contracts Issued Goal	14,551
Annuity Deposits Goal	\$261.8 million
Variable Universal Life Issued Policies Goal	12,958
Variable Annuity Issued Contracts Goal	6,400

III. Individual Performance Plan:

Dennis Willhite

name

Instructions: At the beginning of the review period, determine the individual goals as they relate to the organizational goals on Page 2. To complete this portion, refer to the *What's Important Now* personal planning form completed in conjunction with the Strategic Management Conference. In the left # column, indicate which Company Goal, Strategic Initiative, or Unit Goal (from Page 2) the individual goal supports, e.g., A1, B3, C2. Establish performance measures, both quantitative and qualitative, and target dates for completion.

Instructions: At the end of the review period, describe the actual accomplishments and evaluate each goal using the following rating scale:

- Exceeds expectations
- Meets expectations
- Below expectations

#	Key Individual Goals (list in priority order)	Measures/Action Plan	Target Dates	Actual Accomplishments (describe and rate)
1	1. Auto/ADB direct mail campaign for accidental life	Communicate and coordinate the mailing of 1 million offers 3x in 2002. Sales goal is to issue 40,000-75,000 new policies.	April 02 June 02 August 02	Rating: Not Achieved Only 5,339 issues have been recorded. However, there were many problems with the database and mailings which were outside of your control
	2. VUL SS – registered agent training and marketing program to promote the sale of VUL. Additional VUL sales goal is 6,000 I&P for a total issues of 12,958	Create a powerpoint based program with marketing tools. Distribute to the Life Reps for agent training. Conduct follow-up review of materials and revise where needed to enhance.	3/15/02 4/15/02 6/30/02	Rating: Not Achieved At year end we issued 9,083 I&P versus 11,387 which is 80% of original goal. However, we did manage to increase VUL sales by 21% over the previous year in a down market. A very good result considering a negative economic environment.
	3. Enhance current VUL marketing material and develop new material for 2nd generation product for use with alternative distribution and Farmers Registered Reps.	Revisions to existing VUL material needed to meet NASD annual update requirements. Develop new marketing material for 2 nd generation VUL product.	5/1/02 10/01/02	Rating: In process at this time due the delay of the second VUL. However, an additional plan to reduce expenses by over \$500,000 has been put in place. You have been instrumental in executing a plan to place prospectus and material on CD versus paper
	4. Tele-Xpress Application (FELIX) marketing development and introduction to agents.	Pilot introduction in NV and WA Final version of FELIX Ticket introduction to all states as approvals received.	1/1/02-2/6/02 State introductions begin 4/1/02	Rating: Meets The tele-applications projects have produced an increase of business by 1.5 policies per FTA in those districts using. This project has been a shared project within the department

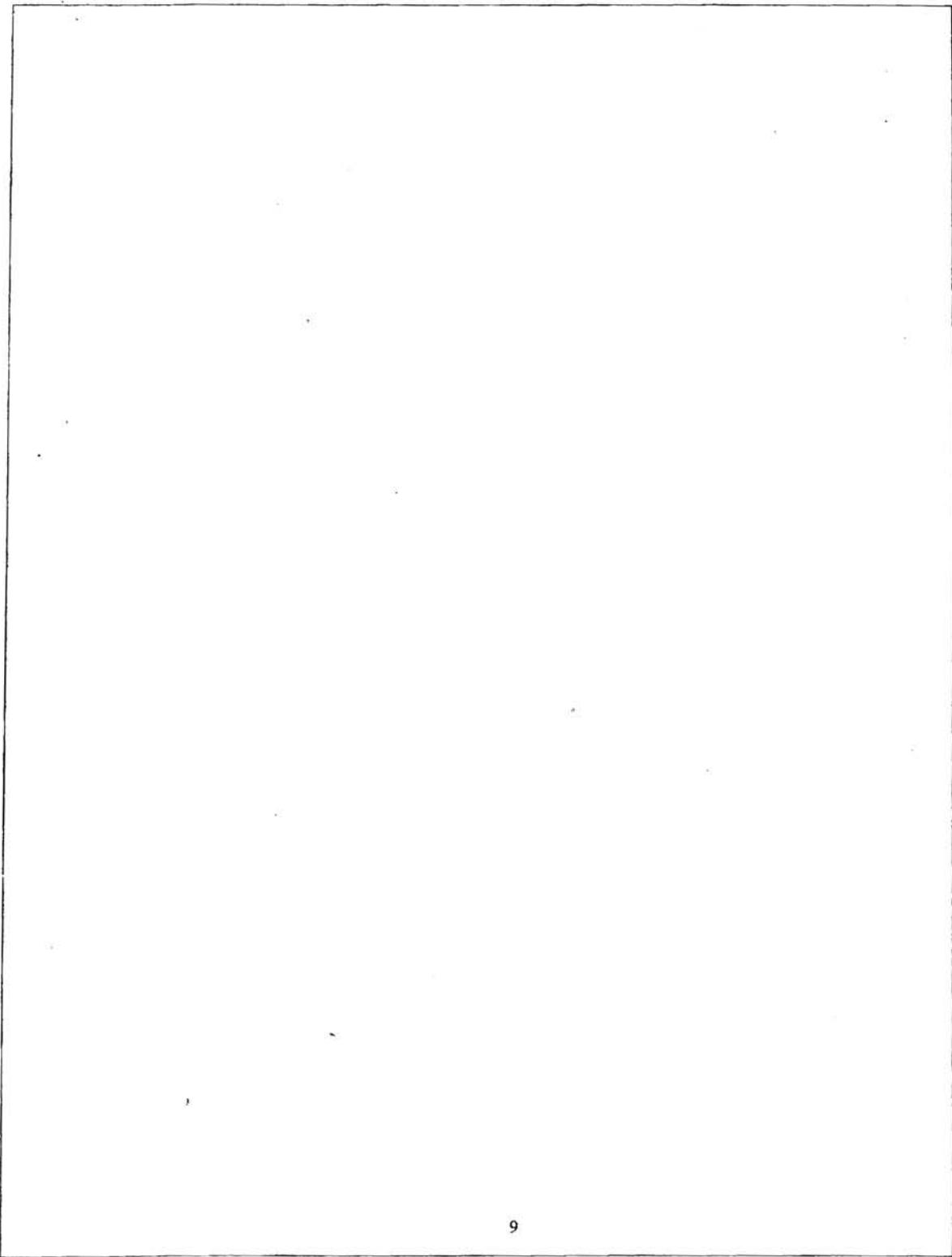
#	Key Individual Goals (list in priority order)	Measures/Action Plan	Target Dates	Actual Accomplishments (describe and rate)
	5. Friendly Exchange mail campaign Summer/Fall issue.	Sales lead BRC for life insurance solicitation	6/1/02 or 9/1/02	Rating: Meets Although it is too early to measure sales results, both plans have been designed and initially implemented. The next step is to refine both programs to reach the desired and needed sales results.
	6. Develop and introduce Financial Blueprint marketing/sales program for traditional products and a version for variable products.	Create marketing kit designed to help the agents use LifeNet to create custom financial blueprints for their customers, to assist them in the purchase of life insurance. Complete design and get compliance approval for variable version and implement	12/31/02	Worked with VP Marketing and LifeNet Team to complete development of interactive sales presentation tool on LifeNet. Designed, developed and introduced blueprint marketing, display and support materials. Developed state introduction plans and worked with state sales management teams to introduce. Completed and implemented variable version of blueprint. Blueprint is one of the top ten most visited sites on LifeNet.
	8. Develop and implement plan to move LTC admin to TPA to reduce costs and improve agent support	Find TPA experienced to handle LTC administration. Complete due diligence Submit proposal, complete agreement and implement change	5/02	Developed proposal and received approval to implement. Completed agreement negotiations with Producers America. Implemented plan moving LTC admin from Farmers to TPA Realized significant decrease in costs and improved agent support

#	Key Individual Goals (list in priority order)	Measures/Action Plan	Target Dates	Actual Accomplishments (describe and rate)
	9. Develop, present to the budget committee and manage Life Marketing budgets for all 3 departments	Create annual budget for 2003 Manage budget and expenses Complete quarterly budget explanations	8/02	Developed and presented 2003 annual budget and received approval from budget committee. Managed travel and other high use accounts monthly to maintain control and stay within budget. Completed quarterly budgets on time and managed expenses for 2002 to less than budgeted for the year (excluding extraordinary item for Auto/ADB).
	10. Develop and submit LTC business model proposal to change from private label to co-branding to improve product offering, reduce costs and maintain up to date product portfolio	Complete analysis of business under both models Create proposal to move to co-branding and submit to executive management Implement change once approved	1/02 – 12/02 1/02, 4/02, 7/02, 10/02	Completed analysis and submitted proposal to executive management for approval. Updated proposal and made changes to profit and loss assumptions, received review and approval of assumptions from Actuarial. Resubmitted proposal, waiting for approval.

#	Key Individual Goals (list in priority order)	Measures/Action Plan	Target Dates	Actual Accomplishments (describe and rate)
	11. Various projects, programs and administrative responsibilities	- Review and propose change to Advanced Underwriting outside consultant to improve agent support. Implement once approved.	12/02	Completed analysis of current agreement and services. Proposed change to executive management, waiting for approval. Rating:
	11. Continued	- Coordinate and facilitate publication of third party publications for Farmers Life, Best Report, Standard Growth chart, LTC Consultants review	6/02 – 12/02	Completed updates, had reviewed and approved by Finance and submitted to LAHO coordinator with distribution requirements for the field.
		- Business Resumption Manual and Gap Analysis coordination, development and implementation for Marketing Function	3/02 9/02	Developed and completed marketing section of the business resumption manual and completed gap analysis process for marketing function
		- Propose and implement Deposit Fund letter mailing campaign to encourage sell of life and annuity products	9/02	Developed and implemented a contact plan to solicit new life and annuity policies from customers who have deposit funds with Farmers.
		- Develop business insurance marketing kits for use with Commercial agents to sell life	4/02 6/02	Developed 2 business insurance marketing kits for use by commercial agents.
		- Annuity Sales Kit update on LifeNet	4/02	Completed sales kit update with current forms and IRS limits.
		- Participate, complete and manage LIMRA surveys and research projects	Various studies, ongoing	Completed surveys on: Conservation, Life Specialist, Wholesalers, Cross Selling and Compensation
		- Participate in 2002 Profit Sharing Program	3/02	Participated in profit sharing all employee program
		- Continuing Education for registered principals and complete national exams	12/02	Completed 3 national exams required by NASD to retain Registered Principal status.

#	Key Individual Goals (list in priority order)	Measures/Action Plan	Target Dates	Actual Accomplishments (describe and rate)
11. Continued		- Develop and implement "Product Type" sales tool for LifeNet	6/02	Created interactive life product decision tool for LifeNet to help agents with life sales decisions.
		- Complete Financial Printer review and due diligence for variable prospectuses	4/02	Worked with Legal Counsel on financial printer review, due diligence and proposal
		- Implement new Unum agreement and disability product portfolio	1/1/02-2/6/02	Completed new DI agreement with Unum and introduced in January 02 to Farmers agents. Enhanced compensation and expanded product offering.
		- Develop and implement project to discover agent needs and effectiveness of marketing materials	Ongoing	Completed discovery phase which included agent interviews. Received conclusions and suggestions from consultant and working on revamp of marketing material and positioning.
		- Coordinate and manage product illustration agent needs and vendor relationships (Coss, Field Data, ACS)	Ongoing	Continuous management and coordination of illustration software updates, changes and improvements.
		- Coordinate and develop 2002 SMC marketing presentation	11/02	Developed and coordinated completion of Marketing presentation to SMC Execs.
		- Coordinate and manage advertising review and compliance review for marketing and sales materials	Ongoing	Marketing representative for coordinating review and update of marketing/sales material to meet compliance requirements.
		- Update and improve OFT Kit packets to encourage higher % of agent use to reduce acquisition costs	7/02 Ongoing	Completed Rewrite and update of OFT kit materials. Working with Medical director on testing simplification and ease of use by agents to increase overall usage and reduce underwriting related costs.

#	Key Individual Goals (list in priority order)	Measures/Action Plan	Target Dates	Actual Accomplishments (describe and rate)
	11. Continued	<ul style="list-style-type: none"> - Complete annual E-map study for Marketing - Edit and Proof read press releases, bulletins and articles 	<p>4/02</p> <p>Ongoing</p>	<p>Completed E-map study input for marketing/sales function and submitted to Cost Accounting.</p> <p>Daily process of reviewing, editing, writing and approving written communications from life marketing for distribution to agents, vendors, public, etc.....</p>



IV. Competency Review

Dennis Willhite

name

Instructions: Using the listing of competencies below, choose 3-5 that would positively support the individual goals to be accomplished during the review period. Prepare a development plan to build these skills. This plan should include specific assignments and actions that describe what is to be accomplished. You may wish to refer to the VCU (link) for additional job specific competencies. At the end of the review period, provide comments regarding the accomplishments in the specified competencies.

Business		Strategic Thinking & Acting		Interpersonal Skills		Leadership	
Business Knowledge	<input type="checkbox"/>	Capabilities & Innovation	<input type="checkbox"/>	Communication	<input type="checkbox"/>	Attracting & Developing Talent	<input type="checkbox"/>
Customer Service	<input type="checkbox"/>	Results Orientation	<input type="checkbox"/>	Building & Cultivating Relationships	<input type="checkbox"/>	Performance Management	<input type="checkbox"/>
Financial Acumen	<input type="checkbox"/>	Analysis/Decision Making	<input type="checkbox"/>	Professionalism	<input type="checkbox"/>	Planning & Resource Mgmt	<input type="checkbox"/>
Quality Focus	<input type="checkbox"/>	Meeting Deadlines	<input checked="" type="checkbox"/>	Ability to Influence	<input type="checkbox"/>	Teamwork/Team Building	<input type="checkbox"/>
Technical Competence	<input type="checkbox"/>	Shaping Strategy	<input checked="" type="checkbox"/>	Willingness to Collaborate	<input type="checkbox"/>	Flexibility and Managing Change	<input type="checkbox"/>
Global Perspective	<input type="checkbox"/>	Driving Execution	<input checked="" type="checkbox"/>	Negotiating	<input type="checkbox"/>	Inspiring Trust	<input type="checkbox"/>
Other:							

Development Plan & Comments

Your projects are strategic in nature. The plans have to be designed well for execution by you as project manager, and the distribution managers responsible for sales results. These assignments are critical as we have to be ready with back-up plans to achieve the expected sales results in a different manner, or with an additional plan if they do not produce the expected results.

Instructions: To be completed at the end of the review process. Employee and supervisor should each rate the employee by checking the rating that most closely matches the employee's performance on that factor. This section is designed to provide an overall picture of the employee beyond his or her contributions as defined by the individual goals. The ratings are as follows: (O) Outstanding; (S) Satisfactory; and (NI) Needs Improvement.

For all employees:

Performance Factors	Employee Rating			Manager Rating		
	O	S	NI	O	S	NI
Personal Development		X			X	
Quality of Work	X				X	
Decision Making		X			X	
Initiative	X			X		
Time Management	X			X		
Gathering and Analyzing Information	X			X		
Technical Job Knowledge	X				X	
Oral Expression	X			X		
Keeping Supervisor Informed	X			X		
Written Expression	X				X	
Quantity of Work	X				X	
Adaptable to Change		X			X	
Observing Rules	X			X		
Identification of Strengths and Weaknesses		X			X	
Identification of Root Causes		X			X	
Development of Objectives		X			X	
Planning to Meet Objectives		X			X	
Achievement of Objectives		X			X	
Handling Special Assignments	X				X	

For Managers and Supervisors only:

Managerial functions	Employee rating			Manager rating		
	O	S	NI	O	S	NI
Planning		X			X	
Organizing		X			X	
Controlling		X			X	
Directing		X			X	
Staffing		X			X	

Instructions: To be completed at the end of the review process. This summary should include accomplishments and disappointments for the year. In addition, qualitative as well as quantitative evaluations should be used to stimulate discussion with the employee.

Annual Review Summary – Supervisor Comments

We got off to a slow start with the field focused on profit and agency development in a year we budgeted and strived for a 75% increase in sales. We have been successful in outpacing the industry with our marketing and sales results for a third year in a row. Your contributions through support of the auto/life discount programs, initial launch of Blue Print, support with the initial phases of tele-application, and variable product support have assisted the team to realize these results. You keep me well informed, and are well respected by your peers. You do a nice job of following through on projects. In 2003, we need to continue to focus on ensuring each activity and project gets the needed sales results or we abandon the project with a successful plan.

Annual Review Summary – Employee Comments

[This section is heavily redacted with a dense pattern of black dots, obscuring the text.]



FARMERS



Farmers Insurance Group
2003 PERFORMANCE AND DEVELOPMENT PLAN AND REVIEW

I. Identification and Signatures

This form is intended to guide and document performance and development discussions. It is not an end in itself. The discussion is what's important. Both parties should take time to prepare properly and talk candidly. We owe this to *our people*. All shaded sections are to be completed at the end of the review period. If you are filling in this form on line, the boxed-in areas will automatically expand to accommodate your text.

Employee Name: <u>Dennis Willhite</u>	Social Security No: <u>535-64-3073</u>
Employment Date: <u>July 11, 1978</u>	Date Assigned Position: <u>June 1, 2000</u>
Division: <u>Farmers Life Insurance Co.</u>	Department: <u>Life Marketing</u>
Job Title: <u>Marketing Manager</u>	Salary Grade: <u>SG37</u>

Performance Plan Agreement

<u>[Signature]</u>	_____
Employee Signature	Date
<u>[Signature]</u>	_____
Manager Signature	Date
<u>[Signature]</u>	_____
Next Level Manager Signature	Date

Interim Reviews (Minimum of one per review period)

_____	_____	_____
Manager Initials	Employee Initials	Date
_____	_____	_____
Manager Initials	Employee Initials	Date
_____	_____	_____
Manager Initials	Employee Initials	Date

Final Performance Review Agreement

<u>[Signature]</u>	<u>4/5/04</u>
Employee Signature	Date
<u>[Signature]</u>	<u>4/4/04</u>
Manager Signature	Date
<u>[Signature]</u>	<u>4/5/04</u>
Next level Manager Signature	Date

II. Organizational Goals - 2003

_____ name

Instructions: Based on the Company Focus Goals below, each organizational unit has established key goals for the review period. List your unit's goals in the space provided. These should be specific to the department and identify the main objectives for your work group. Your unit's goals are supplemental to the Overall Company Goals. Using the most applicable of these goals as a basis (you can pick from any of these groups), establish individual performance plans under Section III, Individual Goals.

*Because our overall goal in Claims handling is to pay what we owe-no more, no less, Farmers Insurance Exchange employees should not establish an individual goal in support of Overall Company Goal #1.

**Goals specific to Farmers Life*

A. Overall Company Goals	
Goal Description	Measures
1. Exchange Profitability* a. Surplus ratio goal b. Combined ratio goal c. <i>Achieving Farmers Life Business Operating Profits (BOP) goal reduces strain on Management Fee*</i>	32% 99% \$230 million*
2. Customer Experience	Local Benchmark Surveys
3. Agency Development a. Appoint career agents b. Achieve a net gain	3 per district 1 per district
4. Life and Assets Under Management a. <i>Increase Life Issued and Paid Policies and/or variable products*</i>	<i>Minimum of 17 per full time agent* I&P of \$29.9 Billion*</i>
5. Operational Efficiency a. Net Operating Earnings b. Profit improvement	\$740 million \$ 45 million
6. Auto Growth	\$400 million growth
7. E-Agent a. Daily dashboard usage b. Auto/Home transactions	90% 70%

B. Unit Goals (Unit=work group to which the employee most directly contributes)	
Goal Description	Measures

III. Individual Goals 2003:

Dennis Wilhite
name

Instructions: At the beginning of the review period, determine Individual Goals as they relate to the Organizational Goals on Page 2. In the far left column indicate, by #, which Company or Unit Goal (from Page 2) the Individual Goal supports (e.g. A1, B3). Establish performance measures, both quantitative and qualitative, and target dates for completion.

Everyone is required to have a Customer Experience goal.

Instructions: At the end of the review period, describe the actual accomplishments and evaluate each goal using the following rating scale:

- Exceeds expectations
- Meets expectations
- Below expectations

Key Individual Goals (list in priority order)	Measures/Action Plan	Target Dates	Actual Accomplishments (describe and rate)
Variable Marketing/Sales Development and Management	Develop and update variable marketing materials for SEC annual review Promote variable products to registered agents through sales management teams Support sales activities to meet annual sales goal	5/1/03 Ongoing 12/31/03	Created new marketing and sales materials for our second generation variable life product which was launched in May. Revised marketing materials for our V1 product to meet our the annual May 1 st update requirements of the NASD. Managed the development of two sales promotions to boost sales of variable life. Marketing activities helped to increase overall variable sales by 23% over the prior year. Variable issues were 10,489 Rating <i>Exceeds</i>
Vendor Relationship Coordination and Management: -Unum Provident, DI -CNA, Long Term Care -COSS, Product Illus.	Actively manage the sales relationship with multiple vendors Keep Farmers agents up to date with changes to product and service offerings Develop new illustration/sales presentation tools through COSS	Ongoing	Developed exit strategy to discontinue private label LTC offering with CNA. Created new business proposal to search and find a new company to offer their product. However, current economic environment resulted in discontinuing LTC offering in any form. Worked directly with UnumProvident National Sales Team on offering DI to Farmers Agents. Expanded the product offering and kept the relationship on a strong and positive footing. Completed vendor search and proposal to expand the sales illustration and presentation capabilities through our outside partner - COSS. Rating <i>Meets</i>

Key Individual Goals (list in priority order)	Measures/Action Plan	Target Dates	Actual Accomplishments (describe and rate)
Financial Blueprint Development and Management	Continue to enhance and improve the Blueprint. Add new profiles and develop new display and support materials	Ongoing	Created and published Agent office display materials to assist in the agent in providing blueprints to their clients. Developed a new Single Adult profile to enhance the blueprint offering. Redesigned the Blueprint menu page on LifeNet to improve access. Updated the sales materials and added new support materials to help increase the use of Blueprint. This sales tool continues to be one of the top ten sights visited by agents who access LifeNet Rating <i>Exceeds</i>
Marketing - Annual Budget/Quarterly Budget Preparation and Administration	Develop annual budget for all Life Marketing departments Manage expenses to stay within budget Complete quarterly budget explanations	7/03 Quarterly	Developed and presented the Life Marketing Annual Budget to the FLI Budget Committee. It was approved with virtually no changes. Completed the year within budget for the Life Marketing Function. Managed major expenses, like traveling, on a monthly basis and completed quarterly explanations for the Budget Committee as required. Rating <i>Meets</i>
Develop Implement new Controlled Business Rule for liberalizing advance commissions	Re-define the commission advance rule to allow advances on controlled business Work with MIS and Operations to implement Introduce to Field	9/30/03	Developed a new commission advance rule for controlled business and received approval to implement. Worked with our MIS team to create the new system rules for commissions and re-confirmed with Operations to ensure a successful launch. Implemented and announced to the field during 4 th quarter Rating <i>Meets</i>
Create and manage introduction of new Top Life Producer Awards and recognition program	Create Top Producer Awards for Life Implement program to field	6/30/03	Worked with marketing staff to develop the criteria and award categories for top life producers. Implemented program and announced to the field. Added to LifeNet for tracking and recognition Rating <i>Exceeds</i>

Key Individual Goals (list in priority order)	Measures/Action Plan	Target Dates	Actual Accomplishments (describe and rate)
Develop and implement new conversion and replacement rules for commission chargebacks	Analyze current conversion and replacement rules Compare with industry Provide recommendation to Executive Staff for approval Implement approved changes	12/31/03	Reviewed our current conversion/replacement rules and compared to peer companies and LIMRA studies to determine what action is needed to bring our rules in line and encourage additional life sales. Completed the review and submitted recommendations to the SST. Variations we considered and 3 ideas submitted to the Life President for approval. 2 ideas were accepted and will be implemented in January 04 Rating <i>Mets</i>
Develop new proposal for DM performance bonus to enhance life sales	Review current DM bonus criteria Work with Actuarial to suggest new program Develop recommendation and present to SST for approval Implement new program in 04	12/31/03	Completed review of current rules for DM's to earn a bonus. Within the financial constraints of the current payout for this bonus, worked with actuarial to develop alternatives solutions that would reward more DM's for consistent Life Sales throughout the year. Submitted recommendations to SST for consideration Rating <i>Mets</i>
Manage and coordinate participation in various LIMRA surveys	Complete LIMRA surveys related to Life Sales, Agent Compensation, Wholesaler profile	Ongoing	Managed, coordinated and completed surveys on: Buyer Study, Compensation, Wholesalers, Conservation Rating
Develop Achievement Club conference workshops for PC, Championship, Toppers	Develop workshops as needed for moderators to use Provide display and meeting materials for workshops	Ongoing	Created Workshop programs for Presidents Council, Championship and Leadership Conference. All programs were well received and well attended Rating <i>Mets</i>
Develop, revise, update and implement new marketing support materials, programs and brochures	Develop new materials as needed Review existing printed materials and update	Ongoing	Updated and published revised FFUL marketing materials Reviewed many outdated publications, forms and brochures. Updated some and obsoleted many others Rating <i>Exceeds</i>

Key Individual Goals (list in priority order)	Measures/Action Plan	Target Dates	Actual Accomplishments (describe and rate)
Manage Miscellaneous: Breaking News Bulletins Product updates Compliance issues OFT kit revisions	Write new BNB's as needed Ensure materials meet compliance requirements Update OFT kit	Ongoing Ongoing 6/03	Created, revised and changed multiple BNB's throughout the year. Worked closely with Staff Services and others to meet compliance requirements Created new OFT kit package to improve the customer experience between Farmers and applicants/clients Rating <i>Meets</i>
Develop, update and implement new Sales kits for LifeNet	Create FFUL Selling Strategies online kit Update Annuity Sales kit Create Small Business Selling System	8/03 Ongoing 2/04	Created and implemented new FFUL Selling Strategies online kit for LifeNet. Updated the Annuity Sales Kit to keep current with changing tax rules, product changes and annuity experience. Mid way through the development of a new kit designed for small business owners and Farmers Commercial agents Rating <i>Meets</i>
Complete SEC Firm Element and Registered Principal continuing educations requirements	Complete course requirements: Interviewing, hiring, firing RR Tax free exchanges The USA Patriot Act	10/31/03	Successfully completed three continuing education courses to retain SEC registration and stay up to date on securities related issues Rating <i>Exceeds</i>

V. Performance factors 2003: Dennis Lillbit
name

Instructions: To be completed at the end of the review process. Employee and supervisor may wish to discuss initially to determine a baseline or starting point. Employee and supervisor should each rate the employee by checking the rating that most closely matches the employee's performance on that factor. This section is designed to provide an overall picture of the employee beyond his or her contributions as defined by the individual goals. It is also intended to generate an active discussion between the employee and supervisor. The ratings are as follows: (O) Outstanding; (S) Satisfactory; and (NI) Needs Improvement.

For all employees:

Performance Factors	Employee Rating			Manager Rating		
	O	S	NI	O	S	NI
Adaptable to Change		X		✓		
Awareness of Strengths and Weaknesses		X			✓	
Decision Making	X			✓		
Gathering and Analyzing Information	X			✓		
Goals: Development		X			✓	
Planning		X			✓	
Achievement/Implementation/Follow Through		X			✓	
Handling Special Assignments	X			✓		
Initiative	X			✓		
Keeping Supervisor Informed	X			✓		
Observing Policies		X			✓	
Oral Expression	X			✓		
Personal Development		X			✓	
Quality of Work		X			✓	
Quantity of Work/Productivity/Efficiency	X			✓		
Technical Job Knowledge		X		✓		
Time Management		X			✓	
Written Expression	X			✓		

For Managers and Supervisors only:

Managerial functions	Employee rating			Manager rating		
	O	S	NI	O	S	NI
Directing Projects and Staff		X			✓	
Managing Resources	X			✓		
Organizing		X			✓	
Planning		X			✓	
Staffing		X			✓	

VI. Final Overall Summary:

Dennis Wilkots
name

Instructions: To be completed at the end of the review process. This summary should include accomplishments and disappointments for the year. In addition, qualitative as well as quantitative evaluations should be used to stimulate discussion with the employee.

Annual Review Summary - Supervisor Comments

Dennis - 2003 was a great sales and earnings year for FLT. Your contributions supporting our team enabled us to accomplish 97% of our T.P. goal, our 100% of written goal, and achieve our "17" focus goal. Your personal contributions kept us compliant with all our variable material, within department budget, and on-time. You worked with several outside vendors to produce various marketing pieces and banners allowing us to continually improve our professionalism. Thanks for being a valuable member of the team!

Annual Review Summary - Employee Comments

I agree - we had an excellent year at the life company.
The Marketing Team worked well together and are looking to begin and better results in 2004.
[Signature]



FARMERS

Carpe Diem!

Farmers Insurance Group
PERFORMANCE AND DEVELOPMENT PLAN AND REVIEW
2004 Performance Year

I. Identification and Signatures

This form is intended to guide and document performance and development discussions. It is not an end in itself. The discussion is what's important. Both parties should take time to prepare properly and talk candidly. We owe this to *our people*. All shaded sections are to be completed at the end of the review period. If you are filling in this form on line, the boxed-in areas will automatically expand to accommodate your text.

Employee Name:	<u>Dennis Willhite</u>	Social Security No:	<u>535-64-3073</u>
Employment Date:	<u>7/11/1978</u>	Date Assigned Position:	<u>6/1/2000</u>
Division:	<u>Farmers Life - 54</u>	Department:	<u>Life Marketing & Sales - 351</u>
Job Title:	<u>Life Marketing Manager</u>	Salary Grade:	<u>37</u>

Performance Plan Agreement	
<u><i>Dennis Willhite</i></u> Employee Signature	<u>2/1/05</u> Date
<u><i>[Signature]</i></u> Manager Signature	<u>2/4/05</u> Date
_____ Next level Manager Signature	_____ Date

Interim Reviews (Minimum of one per review period)		
_____ Manager Initials	_____ Employee Initials	_____ Date
_____ Manager Initials	_____ Employee Initials	_____ Date
_____ Manager Initials	_____ Employee Initials	_____ Date

Final Performance Review Agreement	
<u><i>Dennis Willhite</i></u> Employee Signature	<u>2/1/05</u> Date
<u><i>[Signature]</i></u> Manager Signature	<u>2/4/05</u> Date
_____ Next level Manager Signature	_____ Date

Instructions: Based on the Company Focus Goals below, each organizational unit has established key goals for the review period. List your unit's goals in the space provided. These should be specific to the department and identify the main objectives for your work group. Your unit's goals are supplemental to the Overall Company Goals. Using the most applicable of these goals as a basis (you can pick from any of these groups), establish individual performance plans under Section III, Individual Goals.

*Because our overall goal in Claims handling is to pay what we owe-no more, no less, Farmers Insurance Exchange employees should not establish an individual goal in support of Overall Company Goal #1.

***Focus Goals specific to Farmers Life**

A. Overall Company Goals	
Goal Description	Measures
1. Profitable Growth* a. Surplus ratio goal b. Combined ratio goal c. <i>FLI Business Operating Profit*</i>	1a. Increase organically by 2%. 1b. Achieve 99% or better. 1c. <i>\$232.7 million*</i> <i>(FGI goal: \$1.36 billion business operating profit.)</i>
2. Agents of the Future a. Agency appointments	2a. Appoint a minimum of 3 agents per district with a career success ratio of 75%.
3. Life a. Issued and Paid policies b. New life insurance protection c. <i>Issued and Paid*</i> d. <i>Issued and Paid policies per FTA*</i>	3a. Minimum of 19 per full time agent. 3b. Achieve \$31.2 billion. 3c. <i>192,191 policies*</i> 3d. <i>19.0 policies*</i>
4. Customer Retention	4. Improve all lines customer retention by 5 points.
5. Auto Growth	5. Minimum 10% increase in new business in all markets.
6. Business Success a. <i>Written Apps per Risk Mgmt Employee*</i> b. <i>PIF per Employee*</i> c. <i>Reengineer processes which will facilitate growth of life insurance in-force, while improving productivity and reducing expenses.*</i>	6. Achieve \$1.36 billion business operating profit. 6a. <i>\$1,097 apps*</i> 6b. <i>\$6,710 policies*</i>
7. People a. <i>Accelerate our ability to identify and prepare the next generation of leaders through a focused development effort within each function.*</i>	7. Achieve a focused development effort in each function.
8. Customer Experience	8. Exceed common industry benchmarks: - Achieve a target customer experience rating of 85% for our servicing operations and 80% of claims.
B. Unit Goals (Unit=work group to which the employee most directly contributes)	
Goal Description	Measures

III. Individual Goals 2004:

Dennis Willhite

Name

Instructions: At the beginning of the review period, determine Individual Goals as they relate to the Organizational Goals on Page 2. In the far left column indicate, by #, which Company or Unit Goal (from Page 2) the Individual Goal supports (e.g. A1, B3). Establish performance measures, both quantitative and qualitative, and target dates for completion.

Everyone is required to have a Customer Experience goal.

Instructions: At the end of the review period, describe the actual accomplishments and evaluate each goal using the following rating scale:

- Exceeds expectations
- Meets expectations
- Below expectations

Key Individual Goals (list in priority order)	Measures/Action Plan	Target Dates	Actual Accomplishments (describe and rate)
1. Manage the process for all variable materials to be in compliance by the appropriate dates and within budget	VUL redesign and update VA redesign and update WM Accumulator & VUL 2 update	5/1/2004 12/31/2004	Worked directly with Eric, Legal and FFS on updating our variable marketing materials, giving them a fresh look and meeting our 5/1 deadline. Rating:meets
2. Manage the development of new marketing/sales initiatives, products and programs	Develop and design product, implementation and launch for: -Simple Term -ROP -Small Business Selling System -Multi-line Discount Calculator -Financial Blueprint updates	Ongoing	Working directly with Marketing, Actuarial, LifeNet Team, Staff Services and Operations project teams to develop new product and marketing support initiatives. Including design of product specs, product launch plans and implementation plans to ensure we can support such initiatives internally with our systems and administration processes. Simple Term concept has been finalized and focus groups conducted with sales team. Small Biz Selling System is scheduled for launch in February. Multi-line calculator is scheduled to launch end of January. ROP plans specs being finalized and positioning strategy being finalized. Revise and update Financial blueprint materials and developed new display materials for greater acceptance and usage by the field. Rating:meets

Key Individual Goals (list in priority order)	Measures/Action Plan	Target Dates	Actual Accomplishments (describe and rate)
3. Manage the monthly/qtr. Budget review. Develop the annual budget for Life Marketing to present to the Budget Committee	Review functional expenses monthly and quarterly. Manage expenses to ensure costs remain reasonable relative to marketing initiatives. Complete Annual Budget presentation	Monthly Quarterly July 04	Developed and presented the Life Marketing Annual Budget to the FLI Budget Committee. Managed major expenses, like traveling and promotions on a monthly basis and completed quarterly explanations for the Budget Committee as required. Collaborated with Finance to set up new project cost/benefit tracking metrics for major marketing initiatives. Rating: meets
4. Manage and coordinate FLI participation in 1 st annual Industry program, Life Insurance Awareness Month	Design and distribute specific communication template and marketing strategies for agents to use with their customers during event	July - September	Managed and coordinated Farmers Life participation in the first ever Life Insurance Awareness Month. Industry wide program to generate awareness of the importance of life to the public. The marketing campaign included sales/marketing materials for the field, National Ad campaign through USA Today and press release to the industry and public. Very successful program that helped drive sales during the months of September and October Rating: exceeds

Key Individual Goals (list in priority order)	Measures/Action Plan	Target Dates	Actual Accomplishments (describe and rate)
<p>Develop and Manage various communications strategies for internal customers, state sales management teams, customers</p>	<p>Create point of sale customer material Design Product & marketing/sales materials Create and publish press releases and other information for the public Create and publish communication to agents. Presentations for Executive Staff, Employees and Sales team.</p>	<p>Ongoing</p>	<p>Developed and worked on new materials for variable products, financial blueprint, Small Biz Selling System, Multi-line discount calculator design. Created presentation materials for life masters and Toppers club workshops Worked with Corp Communications on life communication initiatives to ensure Life didn't get lost behind other Farmers Group programs. Directly involved in writing and reviewing life field announcements and BNB's. Developed product and marketing initiatives presentations for executive staff: Simple Term, ROP, Small Biz. Developed various press releases and ads for public consumption touting Farmers Life and leader in the insurance industry. Conducted many agent, district and field management meetings, focus groups and phone conferences to get the word out on what we're doing to make Farmers the premier life company in the industry.</p> <p>Rating:exceeds</p>

IV. Skills Development 2004:

Deanis Willhite

Name

Instructions: This section is designed to help individuals develop skills that enhance performance. Using the list of skills below, circle 3-5 that would positively support the individual goals to be accomplished during the review period. Prepare a development plan to build these skills. You may wish to refer to the VCU for additional job-specific skills.

We strongly encourage all employees to focus on continuing insurance education. This aspect of the plan should include specific goals and actions, describing what is to be accomplished. Depending on the individual's job, goals could range from reading insurance-related articles on the Employee Dashboard and in periodicals, to participating in self-study courses like Insurance Essentials or classroom courses like CPCU.

Completion of the development plan may or may not affect results on the job, but can provide additional tools to assist in meeting expectations. At the end of the review period, no ratings are required but comments regarding the accomplishments in the specified skills should be provided.

Business	Strategic Thinking & Acting	Interpersonal Skills	Leadership
Business Knowledge <input type="checkbox"/>	Capabilities & Innovation <input type="checkbox"/>	Communication <input type="checkbox"/>	Attracting & Developing Talent <input type="checkbox"/>
Customer Service <input type="checkbox"/>	Results Orientation <input type="checkbox"/>	Building & Cultivating Relationships <input type="checkbox"/>	Performance Management <input type="checkbox"/>
Financial Acumen <input type="checkbox"/>	Analysis/Decision Making <input type="checkbox"/>	Professionalism <input type="checkbox"/>	Planning & Resource Mgmt <input type="checkbox"/>
Quality Focus <input type="checkbox"/>	Meeting Deadlines <input type="checkbox"/>	Ability to Influence <input type="checkbox"/>	Teamwork/Team Building <input type="checkbox"/>
Technical Proficiency <input checked="" type="checkbox"/>	Shaping Strategy <input type="checkbox"/>	Willingness to Collaborate <input type="checkbox"/>	Flexibility and Managing Change <input type="checkbox"/>
Global Perspective <input checked="" type="checkbox"/>	Driving Execution <input checked="" type="checkbox"/>	Negotiating <input type="checkbox"/>	Inspiring Trust <input type="checkbox"/>
Insurance Education: <input type="checkbox"/>	Safety Awareness: <input type="checkbox"/>	Other:	

Development Plan

1. Technical Proficiency – To research, analyze, and recommend a new insurance related product, or develop a new and creative approach for an existing line of business to expand knowledge and abilities.
2. Global Perspective – Assist the VP Marketing who has been assigned to a Zurich Committee for assignments related to global issues.
3. Driving Execution – In the interim, while the Director position is open, prepare weekly and monthly emails, reports, and presentations of results which can be communicated by the VP to management and the field. Also, "roll-up" any execution plans and gaps for presentation by the team for communication to the VP

Comments:

V. Performance factors 2004:

Dennis Willhite

Name

Instructions: To be completed at the end of the review process. Employee and supervisor may wish to discuss initially to determine a baseline or starting point. Employee and supervisor should each rate the employee by checking the rating that most closely matches the employee's performance on that factor. This section is designed to provide an overall picture of the employee beyond his or her contributions as defined by the individual goals. It is also intended to generate an active discussion between the employee and supervisor. The ratings are as follows: (O) Outstanding; (S) Satisfactory; and (NI) Needs Improvement.

For all employees:

Performance Factors	Employee Rating			Manager Rating		
	O	S	NI	O	S	NI
Adaptable to Change	X				x	
Awareness of Strengths and Weaknesses		X			x	
Decision Making		X			x	
Gathering and Analyzing Information		X			x	
Goals: Development		X			x	
Planning		X			x	
Achievement/Implementation/Follow Through		X			x	
Handling Special Assignments	X			x		
Initiative	X			x		
Keeping Supervisor Informed		X		x		
Observing Policies		X			x	
Oral Expression		X			x	
Personal Development		X			x	
Quality of Work		X			x	
Quantity of Work/Productivity/Efficiency	X			x		
Technical Job Knowledge		X			x	
Time Management		X			x	
Written Expression		X			x	

For Managers and Supervisors only:

Managerial functions	Employee rating			Manager rating		
	O	S	NI	O	S	NI
Directing Projects and Staff		X			x	
Managing Resources	X			x		
Organizing		X			x	
Planning		X			x	
Staffing		X			x	

VI. 2004 Final Overall Summary:

Dennis Willhite

Name

Instructions: To be completed at the end of the review process. This summary should include accomplishments and disappointments for the year. In addition, qualitative as well as quantitative evaluations should be used to stimulate discussion with the employee.

Annual Review Summary – Supervisor Comments

Annual Review Summary – Employee Comments

We had a tremendous year in 04. Great sales success and excellent collaboration between Auto, Home and Life. Strong support from the State Sales Management Teams and internal support from Insurance Operations made all the difference. I'm looking forward to another challenging and rewarding year in 05. Life Marketing team is a strong group that works well together to get the job done. Great group of people to work with!

I have enjoyed working directly with Mike Keller on many different strategies and initiatives. Mike is a very positive and creative individual who brings many new and innovative ideas to the team.

Dennis Willhite- Jan 06 development discussion key point

Existing Building Blocks

- Initiative and ideas- CSR and SB
- Field presentation- CI as an example
- Better team participation

Development Items and Areas

- Team building and management- getting others to do what you want- your resources and other- don't be constrained, be creative and resourceful in getting to your goal
- Implementation- work on planning, execution and follow-up
- Build key relationships- here and in LA, e.g. Paul Evanoff and Jim Vannice, Zone and LAHO Marketing

Year-End Assessment (2007)

Personnel Data

Employee Name:	Willhite, Dennis H	Organizational Unit:	No data
GEMS ID:	70047725	Position Title:	No data
Local Employee Number:	USWDSW02	Line Manager:	Douvia, Michelle L
Business Segment:		Matrix Manager 1:	Groves, Rion S
Business Division:		Matrix Manager 2:	No data
Function:	Marketing	Country:	
Sub-function:	BU / Country / Region Marketing	Entry Date:	11 Jul. 1978
		Start Date of Current Position:	16 Mar. 2007

Objectives

Objectives	Objective Measurement Criteria	Weighting
Expand our product offering and introduce a new, innovative program to simplify the Life insurance sales, application, underwriting and issue process. Significantly reduce the time it takes to submit a life application, approve and issue a policy. Create a processthat more closely resembles e-Auto and e-Home, integrating online submission, online underwriting approval, binding the coverage, and automatically issuing the policy with no manual intervention. Respond to ongoing agent demands for a much simpler and quicker life application process. Create a Life product and process that will make it easier and encourage Farmers agents who currently don#t write Life to become engaged and contribute to our Life sales growth strategy.	A)Develop and Implement full launch/communication plan for Simple Term fast start in January B)Develop and launch Simple Term fast start Promotion for 1st Quarter 07 C)Establish a process thru Farmers procurment on Agency Dashboard for agents to purchase eSignature Pads. D)Promote use of eSignature with ePads for all agents to maximize the benefits to the agent and customer when selling and purchasingSimple Term. D)Review success and agent feedback of Simple Term E)Develop plans to enhance and expand product reach within the agency force E)Integrate Simple Term into eAuto, eHome and eCMS F)Develop and implement Simple Term solutions that target each or the major	35%

Willhite, Dennis H	Douvia, Michelle L	Groves, Rion S
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<Please Select>

<Please Select>

<Please Select>

Objectives	Objective Measurement Criteria	Weighting
Updating our products to the 2001 CSO mortality table, while challenging, presents us with an opportunity to do a number of product changes and enhancements to the life insurance product offerings, and provide an opportunity to integrate more closely with PersonalLines and Commercial. Key to the integration is ease of submission by the agent, development of life discounts for customers and enhanced product benefits for both agents and customers. The new Farmers EssentialLife series of products have been created and begins with the launch of Farmers EssentialLife Universal Life (FEUL).	A) Design and develop a product that fits our market # Traditional Middle America, Asian and Hispanic markets. B) Design new benefits for agents and customers C) Develop and Implement full launch/communication plan for FEUL intro in September D) Develop marketing and sales tools which allow agents to integrate FEUL into mainstream agent sales process D) Integrate UL into multi-line discount programs E) Integrate UL into eAuto, eHome and eCMS quoting and management programs with letters, postcards, ePrint, etc... F) Develop fast start promotion for agents and sales management teams G) Review success and agent feedback of FEUL H) Develop plans to enhance and expand product reach within the agency force	25%

Willhite, Dennis H	Douvia, Michelle L	Groves, Rion S
<Please Select>	<Please Select>	<Please Select>

Objectives	Objective Measurement Criteria	Weighting
Develop a program that provides the resources, support and incentives needed for our State Sales Management Teams (State Exec, DMM, Life Zone Managers, Life Sales Specialists, DM#s) to support and assist Farmers agents in becoming MDRT qualifiers and MDRT members in 2007 and beyond. Agent benefits include; increased Life sales, professional recognition, increased financial rewards (commissions & bonus) and personal achievement and satisfaction. Membership in the Million Dollar Round Table is one of the ultimate achievements for the Life Insurance Sales Elite. Elevating the significance of MDRT, membership benefits, and the recognition associated with this achievement within the Farmers organization is an important element of our overall Life growth strategy to meet our 2010 Destination Greatness goals and be recognized as an industry leader.	A) Create MDRT Home Page (with supporting links) on Life Net created to provide resources and support to State Executive, DMM, LSS, Life Zone Manager, DM#s and agents B) Create MDRT Requirements highlighting what is needed to become an MDRT qualifier. C) Track Your MDRT Progress - Agents view personal sales success to ensure meeting MDRT requirements. D) Create MDRT On Schedule tracker # Highlights agents who are currently at 80% achievement. E) Create MDRT Success Tracker #	20%

Objectives	Objective/Measurement Criteria	Weighting
	Tracks the sales results of those agents specifically identified by the LSS for mentoring. F) Create MDRT Rewards # Profiles new company award and achievement details for Achievement Clubs G) Create MDRT Promotions - Details and incentives about MDRT promotions. H) Create MDRT Mentoring Program that can be scaled and used by any DM to enhance Life within the district I) Create MDRT incentives program for State Sales Management Teams J) Create and test pilot program for MDRT Coaching of agents by professional coach	

Willhite, Dennis H	Douvia, Michelle L	Groves, Rion S
<Please Select>	<Please Select>	<Please Select>

Objectives	Objective/Measurement Criteria	Weighting
Develop and enhance Agent Life Training programs. Agents are drifting into transactional selling with minimal needs selling. We need to improve agent Life training and develop tools to emphasize needs selling. This will improve customer retention and ensure appropriate coverage is being provided to our customers for all the right reasons.	A) Work with Director of life Sales to revitalize Life Training in University of Farmers, Post University Life Modules and LUTC B) Work jointly with HO Sales on introducing and supporting the VIP Program with Life Specialists C) Develop and implement Real Life Needs Analysis Tool to complement Blueprint and provide a more comprehensive needs tool for our agents D) Work with UofF to develop Small Business training programs for DM's and Agents to enhance the cross-sell effort between Life and Commercial E) Develop and implement the Business Blueprint assessment tool to lead agents thru a simple analysis of a business and determine risks that should be covered by Life insurance, Annuities and FFS products	20%

Willhite, Dennis H	Douvia, Michelle L	Groves, Rion S
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Willhite, Dennis H	Douvia, Michelle L	Groves, Rion S
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Year-End Assessment Comments on the Competency Framework

	Willhite, Dennis H	Douvia, Michelle L	Groves, Rion S
Change Operates effectively in change situations			
Results Gets things done, using appropriate techniques in a timely & effective manner, to budgetary and other financial standards			
Collaboration Works and communicates constructively with others, placing collective success above individual gain			
Customers Delivers a high level of service internally and externally			
People Realizes full potential in self and others and pursues formal and informal development opportunities			
Interpersonal Develops and maintains trust-based relationships			
Strategy			

Actively contributes to the achievement of the organization's strategy			
Innovation Generates innovative solutions through creative, daring, and original thinking			
Integrity and Compliance Takes personal responsibility for acting with integrity and ensuring compliance in everything that they do			

Year-End Assessment Overall Comments

Willhite, Dennis H	Douvia, Michelle L	Groves, Rion S

Overall Rating Not Applicable or No Basis

Year-End Assessment Meeting Confirmation

Willhite, Dennis H
8 May 2008

Douvia, Michelle L

Groves, Rion S
8 May 2008

Year-End Assessment (2008)

Personnel Data

Employee Name:	Willhite, Dennis H	Organizational Unit:	No data
GEMS ID:	70047725	Position Title:	No data
Local Employee Number:	USWDSW02	Line Manager:	Douvia, Michelle L
Business Segment:		Matrix Manager 1:	No data
Business Division:		Matrix Manager 2:	No data
Function:	Marketing	Country:	
Sub-function:	BU / Country / Region Marketing	Entry Date:	11 Jul. 1978
		Start Date of Current Position:	16 Mar. 2007

Objectives

Objective	Objective Measurement Criteria	Weighting
Develop a Foremost branded Simple Term product offering for the IA channel, and pilot a marketing/sales campaign in GA to attract independent agents to become licensed/appointed with Farmers Life and sell Foremost/Farmers innovative new life product - Simple Term Life.	1) Appoint 40-50% of IA's contacted by end of 6 mo pilot 2) 40-50% of appointed agents writing STL 3) Achieve multiple sales per agent during pilot, 4-8 policies	80%

Willhite, Dennis H	Douvia, Michelle L
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<Please Select>

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Objective	Objective Measurement Criteria	Weighting
Miscellaneous projects: - Research Bank Insurance channel and develop marketing strategy to enter channel - piloting with small regional bank and offering Simple Term Life. - Review Life training needs of new state agent program in Wisconsin. - MDRT presentation at LSS Conference - Assisted with Business Blueprint development and design		10%

Willhite, Dennis H	Douvia, Michelle L
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Willhite, Dennis H	Douvia, Michelle L
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<Please Select>

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Objectives	Objective Measurement Criteria	Weighting
Develop and present Life program at 08 CA Agent Conference		10%

Willhite, Dennis H	Douvia, Michelle L
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<Please Select>

<Please Select>

Year-End Assessment Comments on the Competency Framework

Willhite, Dennis H

Douvia, Michelle L

<p>Change</p> <p>Operates effectively in change situations</p>		
<p>Results</p> <p>Gets things done, using appropriate techniques in a timely & effective manner, to budgetary and other financial standards</p>		
<p>Collaboration</p> <p>Works and communicates constructively with others, placing collective success above individual gain</p>		
<p>Customers</p> <p>Delivers a high level of service internally and externally</p>		
<p>People</p> <p>Realizes full potential in self and others and pursues formal and informal development opportunities</p>		
<p>Interpersonal</p> <p>Develops and maintains trust-based relationships</p>		
<p>Strategy</p>		

Actively contributes to the achievement of the organization's strategy		
Innovation Generates innovative solutions through creative, daring, and original thinking		
Integrity and Compliance Takes personal responsibility for acting with integrity and ensuring compliance in everything that they do		

Year-End Assessment Overall Comments

Willhite, Dennis H

Douvia, Michelle L

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Overall Rating Meets Expectations (3)

Year-End Assessment Meeting Confirmation

Willhite, Dennis H

Douvia, Michelle L

4 May, 2009

Year-End Assessment (2009)

Personnel Data

Employee Name:	Willhite, Dennis H	Organizational Unit:	No data
GEMS ID:	70047725	Position Title:	No data
Local Employee Number:	USWDSW02	Line Manager:	Douvia, Michelle L
Business Segment:		Matrix Manager 1:	Fitzpatrick, Brian J
Business Division:		Matrix Manager 2:	No data
Function:	Marketing	Country:	
Sub-function:	BU / Country / Region Marketing	Entry Date:	11 Jul. 1978
		Start Date of Current Position:	16 Mar. 2007

Objectives

Objectives	Objective Measurement Criteria	Weighting
Design, develop and implement multiple marketing strategies as part of a pilot initiative to determine the most effective way to introduce Farmers Life into a new distribution channel - Independent Agents (Georgia is first test state), successfully appointing IA's and realizing sales of Life products (beginning with Simple Term Life).	1) Create 3 Test marketing campaigns (Direct Mail, Sales Call and Meetings). 2) Develop base metrics for success; 20-30% response rate, 10-20% agents appointed, 25-35% agents writing Life. 3) Launch a 3 test pilot in March 4) Analyze results and determine most effective method of marketing during six month pilot. 5) Finalize results of pilot and submit to senior staff for discussion and decision on how best to expand into new IA channel	30%

Willhite, Dennis H	Douvia, Michelle L	Fitzpatrick, Brian J
The 3 test strategy included: Test #1 # Direct Mail * Agents will receive direct mail marketing 1st direct mail offer with Personal-URL (PURL) 2nd & 3rd direct mail offers if no response Sales support call if direct mail fails Test #2 # Sales Support * Agents will NOT receive direct mail		

Willhite, Dennis H	Douva, Michelle L	Fitzpatrick, Brian J
<p>marketing First contact will be sales support call Establish if personal contact initially is the most effective approach Test #3 # Town Hall Meeting * Agents will receive invitation to Town Hall style meeting First contact will be invitation to the event Follow-up with sales support call Planned for Atlanta metro area 2-6 meetings 20-100 agents per mtg Giveaways Coordinated by Foremost Agency Sales Support Determine if face-to-face contact is the most effective approach Direct mail was the preferred method and from a business perspective was the most effecient and cost effective based on response rates. The pilot group in GA was just under 1,000 agents. More than 260 agents responded and 150+ agents/agencies submitted paperwork to get appointed with FLI and over 100 agents/agencies appointed. Production from appointed agents was below our projections. Several mitigating circumstances came into play: -Over price term product in an IA environment could not be overcome by ease of doing business alone. -IA's are multi-line and expected multi-line discounts and more life products to offer. -The very poor economy negatively impacted opportunities. After management discussions, it was decided to discontinue the pilot for now and look for future window to expand. The overall objective of how best to engage IA's was a success and the direct mail with online support and access value proposition was a very good learning result.</p>		

Meets Expectations (3)

<Please Select>

<Please Select>

Objectives	Objective Measurement Criteria	Weighting
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Objectives	Objective/Measure/Target/Criteria	Weighting
Design and develop marketing collateral and product support materials for Independent Agent Channel, including Foremost affiliation on all materials.	1) 3 direct mail pieces 2) Fast Start Kit for agents 3) STL product guide 4) Communication materials 5) Website style & look 6) STL customer materials 7) Meeting materials	30%

Willhite, Dennis H	Douvia, Michelle L	Fitzpatrick, Brian J
<p>A very innovative, comprehensive and appealing marketing program was developed and put into action consisting of:</p> <p>Marketing/Sales Materials</p> <ul style="list-style-type: none"> #Invitations/Reminders # email, print, postcard #PURL # Personalized Landing Page for all targeted IA#s #Postcard follow-up #PPT Template for presentations #New Design Theme for STL materials #Congratulatory messaging #Customer Letter sample #Fast Start Kit #Welcome greeting #Agent # What's In It For Me (WIIFM) highlight piece #Quick Look Product Summary #Agent/Product Guide # Full version #Customer Brochures - 2 #eSignature Pad #Quick Start guide for ePad install #Sales Support highlights and toll free number (e-mail also) #Customer Service highlights and toll free number (e-mail also) #Agent appointment incentive #1st Application Incentive #Production level incentives (5 issued, 10 issued, etc#) <p>One-to-One Marketing & Personal URLs</p> <p>Personalized postcard provides content and information tailored to each individual agent based on key drivers.</p> <p>Personalized postcard features a PURL which directs the agent to a personal landing page.</p>		

Willhite, Dennis H	Dolvia, Michelle L	Fitzpatrick, Brian J
Truly a unique and innovative way to develop and introduce very effective marketing materials and support.		

Meets Expectations (3)

<Please Select>

<Please Select>

Objectives	Objective Measurement Criteria	Weighting
Design and implement an online introduction to Farmers Life offering for agent prospects that provides real-time feedback, analytics, and reporting for agent appointment activity.	1) Create a website for online communication, product demonstration and personal agent information capture. 2) Create personalized URL's for agent prospects 3) Create online reporting to capture all agent prospect visits 4) create online agent appointment contract access	10%

Willhite, Dennis H	Dolvia, Michelle L	Fitzpatrick, Brian J
Personalized online landing pages, support and access offers the agent relevant content and incentives based on desired actions. Personalized direct mail piece with personal URL is sent to the agent # 3 mailings planned over 2 weeks. When the agent visits the personal landing page, a #visitor# email alert will be automatically sent to the email address of the assigned Sales Support representative The landing page will be personalized for each agent with pre-populated contact information. Additional online support and content included: New IA version of LifeNet with: #New Business/Get It Issued #Commission #Simple Term Product/Marketing Materials #Simple Term Quick Rater #Policy Service - Customer Service, Policyholder Info, Phone and e-mail contact info #Sales Support contact Info		

Willhite, Dennis H	Douvia, Michelle L	Fitzpatrick, Brian J
<p>#Underwriting Rules and Tracker #LifeNet links as identified #Special Welcome Home Page #Image/photo of Sales Support/Customer Service person - warm & fuzzy #About Our Company/Financial Strength info for FLI # Letter and Home page #call-out# #Simple Term Playground for online application. All online access and activity including licensing and production were made available with complete monitoring and feedback for the agents and farmers support team. It was the first time we had created such a robust feedback loop regarding 1st touch contact with prospective agents, thru licensing, appointment and production.</p>		
Exceeds Expectations (4)	<Please Select>	<Please Select>

Objective: 4	Objective Measurement/Scale	Weighting
Attain Agent appointment goal of approximately 25% of independent agents contacted, and producing approximately 4-6 policies per agent per year.	1) 350 agents appointed 2) 400-600 policies written 3) 4-6 million in volume	30%

Willhite, Dennis H	Douvia, Michelle L	Fitzpatrick, Brian J
<p>Though we had much success with the pilot and testing of contact programs, marketing support and engagement - Due to many unforeseen issues beyond our immediate control we did not meet our production goals: -The pilot was originally based on 2000+ agents in two states. This was reduced to less than 1000 agents in one state. - The pricing challenge of simple term in the IA channel was more important than we anticipated. Though very convenient with our automated process, the rate at 3 times more than underwritten term products was just too much of a gap. - Not having multi-line discounts and more</p>		

Willhite, Dennis H	Dotvia, Michelle L	Fitzpatrick, Brian J
<p>than one life product offering was also a big negative in the eyes of the IA's.</p> <p>- The severe economic decline at the beginning of the test had a tremendous negative impact on the willingness of IA's to expand and grow with new products from new carriers.</p> <p>The process is sound and with a few improvements based on lessons learned during the pilot, we could test again in the future with better sales results</p>		

Partially Meets Expectations (2)

<Please Select>

<Please Select>

Year-End Assessment Comments on the Competency Framework

Willhite, Dennis H

Douvia, Michelle L

Fitzpatrick, Brian J

<p>Change</p> <p>Operates effectively in change situations</p>	<p>Taking on a new test initiative from "scratch" - designing a process on how best to approach a new distribution channel and then implementing and managing it to deliver greater understanding of that channel - demonstrates my abilities to effectively change as needed. Creating a scalable, successful solution where none existed previously.</p>		
<p>Results</p> <p>Gets things done, using appropriate techniques in a timely & effective manner, to budgetary and other financial standards</p>	<p>Being able to conceptualize a new way of doing business within a new distribution channel, creating processes and techniques unique to this new challenge, engaging new agents to do business with us with very limited resources and products. Keeping within budget for marketing and sales.</p>		
<p>Collaboration</p> <p>Works and communicates constructively with others, placing collective success above individual gain</p>	<p>Working with many others from several disciplines and companies within the greater Farmers organization was a very big challenge. In the end, we launched an innovative program and process that was successful in many aspects and it could be expanded and scaled to handle our entire operating territory.</p>		
<p>Customers</p> <p>Delivers a high level of service internally and externally</p>	<p>At the end of the test initiative, we were able to bring a solution to our customers that was unique, innovative, and effective for all. The customer experience for IA's in a new distribution channel for Farmers was very good. Feedback from our customers demonstrated a</p>		

	high level of satisfaction and excitement in what we, as an organization, were offering.		
<p>People</p> <p>Realizes full potential in self and others and pursues formal and informal development opportunities</p>	Continue striving to learn more about just how far I can go in becoming more creative and effective in delivering solutions that grow the business and help our customers. Taking on new initiatives that haven't been explored before at Farmers is one way to grow. Working with others and those with less experience and helping them to learn and grow is key to the development of myself and those that I work with and the organization as a whole.		
<p>Interpersonal</p> <p>Develops and maintains trust-based relationships</p>	Developing and maintaining relationships based on trust has been the most challenging for me this past year. There have been many personnel changes, including executive changes, over the past few years, and this has made it difficult to build relationships. For the most part, I would say the interpersonal and trust based part of relationships within our function has diminished.		
<p>Strategy</p> <p>Actively contributes to the achievement of the organization's strategy</p>	The strategy to expand our marketing and sales efforts in a new distribution channel was very exciting. Being the lead marketing person to create and implement an effective solution from the ground up was a big challenge. I believe we did a very good job of testing the channel and finding solutions that work. Hopefully, we will have the opportunity to move to the next level in the future.		
<p>Innovation</p>	Exploring the possibilities of how best to approach a new		

<p>Generates innovative solutions through creative, daring, and original thinking</p>	<p>distribution channel was very exciting and allowed us to try new and innovative things that we would/could not try elsewhere. The personalized direct mail campaign with personalized URL's was the creative and innovative way for us to enter a competitive channel with the "wow" factor. We introduced an innovative new product/process and added an online appointment and licensing marketing program that we could monitor and get agent feedback online and automatically. This entire approach had not been done within Farmers nor the industry at large. It was an unknown and we weren't sure about many things as we created and built out the program. A real challenge but, also very exciting and fun to be involved with</p>		
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<p>Integrity and Compliance Takes personal responsibility for acting with integrity and ensuring compliance in everything that they do</p>	<p>With so many new and unknown aspects to the initiative, there was tremendous oversight from many groups within the Farmers organization. Communication with and following requirements of our compliance rules and processes allowed all interested parties to be in the loop and provide feedback to ensure we were compliant. Many suggestions were made from compliance, legal and operations to help build a workable process and deliver a program that would succeed at all levels. The online tracking tool was very helpful in meeting those requirements and suggestions.</p>		
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Year-End Assessment Overall Comments

Willhite, Dennis H	Douvia, Michelle L	Fitzpatrick, Brian J

Overall Rating Partially Meets Expectations (2)

Year-End Assessment Meeting Confirmation

Willhite, Dennis H
4 May 2010

Douvia, Michelle L

Fitzpatrick, Brian J
4 May 2010

PERFORMANCE REVIEW EXCERPTS
(Exhibit 17)

Initiative and Drive

“[Y]ou implemented an agent contact program for cancellations on FFUL contracts. As a result of the program, 188 or 31.2% decided to continue with coverage. This program will be implemented company wide in 1996.” Ex. 17, p. 99.

“You continue to look for ways to improve work processes and methods. This includes: Implementing a bank draft verify clear procedure with Premium Billing to reduce the number of uncollectible write offs. This program has resulted in a significant reduction of uncollectible cases.” Ex. 17, p. 100.

“You seek ideas to improve the way work is done; putting emphasis on quality.” Ex. 17, p. 110.

“You were responsible for the development and implementation of the first ‘virtual’ sales/marketing kit on LifeNet.” Ex. 17, p. 139.

“Your discovery of deficiencies in maintaining our address database and subsequent review and initiated solutions have made a significant improvement in the accuracy of the data. This has also allowed FNWL to automate the process, reduced our related expenses by approximately \$40,000 per year and virtually removed the manual update process from Insurance Operations.” Ex. 17, p. 129.

“You took charge mid-stream of a major re-creation of our variable marketing material to include the 22 new sub-accounts. . . This was a great effort on your part considering you weren’t expected to be involved in this process this year.” Ex. 17, p. 140.

Additional references to initiative and drive: Ex. 17, pp. 119,129, 132, 142, 154, 162 and 170.

Communication

“Your written and oral communication has been consistently clear and concise.” Ex. 17, p. 100.

“Very effective in written communication to customers, vendors and supervisor. . . Oral communication is very clear, organized and articulate.” Ex. 17, p. 126.

“Written communications are very good. You have the ability to create excellent marking materials and correspond well to customers and agents.” Ex. 17, p. 135.

“You have effective written communication to customers, strategic partners and supervisor.” Ex. 17, p. 139.

Willhite’s oral expression was rated as “outstanding” in 2002 and 2003. Ex. 17, p. 154 and 162.

Teamwork and Leadership

“You take action to foster teamwork and keep employees motivated to achieve goals.” Ex. 17, p. 117.

“Your strong management skills and experience have enabled you to quickly organize and regroup a part of Staff Operations that was without sufficient leadership or controls.” Ex. 17, p. 121.

“You are a team player! . . . You have an excellent rapport with customers and colleagues, and work hard to ensure Marketing & Sales is positively represented inside and outside the company. Your accessibility to employees and customers shows a genuine interest in helping others be successful.” Ex. 17, p. 135.

“You are a team player and an asset to the marketing and sales team.” Ex. 17, p. 137.

“Proactive teamwork is a critical ingredient of a successful team. You demonstrate such teamwork on a dialed basis.” Ex. 17, p. 139.

“Dennis, you are an excellent team mate and contribute to our departmental and company success. You are well respected by your peers and provide a positive example for your employees.” Ex. 17, p. 141.

Restatement (Third) Of Agency § 5.03 (2006)

Restatement of the Law - Agency

Database updated March 2014
Restatement (Third) of Agency

Chapter 5. Notifications and Notice

§ 5.03 Imputation of Notice of Fact to Principal

Comment:

Reporter's Notes

Case Citations - by Jurisdiction

For purposes of determining a principal's legal relations with a third party, notice of a fact that an agent knows or has reason to know is imputed to the principal if knowledge of the fact is material to the agent's duties to the principal, unless the agent

(a) acts adversely to the principal as stated in § 5.04, or

(b) is subject to a duty to another not to disclose the fact to the principal.

Comment:

a. Scope and cross-references. This section states the general principle that a principal is charged with notice of facts that an agent knows or has reason to know. Comment *b* examines the bases on which imputation is justified and the circumstances under which imputation is not relevant to or determinative of legal consequences. Comment *c* discusses imputation in the context of principals that are organizations. Comment *d* explores the range of situations in which imputation of notice to a principal affects the principal's legal relations. Comment *e* deals with the circumstances under which an agent may acquire knowledge of a fact or reason to know a fact. Comment *f* discusses when notice is imputed to a principal. Comment *g* explains that there is no "downward imputation" to an agent of notice of facts that a principal knows or has reason to know.

A notification given or received by an agent is effective as a notification given or received by a principal as stated in § 5.02. Section 1.04(4) defines "notice."

b. Justifications for imputation; limitations on relevance of imputation. A principal's agents link the principal to the external world for purposes of taking action, including the acquisition of facts material to their work for the principal. An agent undertakes to act on behalf of a principal; at the time the agent determines how to act, facts known to the agent at the time should guide the agent's determination of what action to take, if any. For further discussion, see § 1.01, Comment *e*; § 2.02, Comments *c* and *e*; and § 3.06, Comment *b*. An agent also has a duty, unless otherwise agreed, to use reasonable effort to transmit material facts to the principal or to coagents designated by the principal. See § 8.11. A principal's right to control an agent enables the principal to consider whether and how best to monitor agents to ensure compliance with these duties. A principal may not rebut the imputation of an agent's notice of a fact by establishing that the agent kept silent.

Imputation creates incentives for a principal to choose agents carefully and to use care in delegating functions to them.

§ 5.03 Imputation of Notice of Fact to Principal, Restatement (Third) Of Agency § 5.03...

Additionally, imputation encourages a principal to develop effective procedures for the transmission of material facts, while discouraging practices that isolate the principal or coagents from facts known to an agent. Notice is not imputed for purposes of determining rights and liabilities as between principal and agent. Thus, imputation does not furnish a basis on which an agent may defend against a claim by the principal.

Knowledge, including imputed knowledge, is not always determinative of, and sometimes is not even relevant to, certain claims and defenses. It is a matter of underlying substantive law, not agency law, whether knowledge, including imputed knowledge, forecloses a claim for relief or a defense against liability.

The nature of a principal's relationship or transaction with a third party may require performance by the third party under terms that provide no defense to the third party that is derived from imputation of an agent's knowledge. For example, if a principal makes a claim under a fidelity bond covering an employee's dishonesty, the issuer of the bond may not decline to pay on the basis that the employee's knowledge of the employee's own wrongdoing is imputed to the principal.

Imputation may provide the basis for a defense that may be asserted by third parties when sued by or on behalf of a principal. Defenses such as *in pari delicto* may bar a plaintiff from recovering from a defendant whose conduct was also seriously culpable. If a principal's agents fail to disclose or misstate material information to a third party who provides services to the principal, the agents' conduct may result in flawed work by the service provider. The agents' conduct may provide a defense to the service provider, if sued by or on behalf of the principal, on the basis that the agents' knowledge, imputed to the principal, defeats a claim that the principal relied on the accuracy of work done by the service provider. Subject to § 5.04, the agents' knowledge is imputed to the principal as a matter of basic agency law.

A principal may retain a service provider on terms or for tasks that make imputation of agents' knowledge irrelevant to subsequent claims that the principal may assert against the service provider. For example, a principal may retain a service provider to assess the accuracy of its financial reporting or the adequacy of its internal financial controls or other internal processes, such as its processes for reporting and investigating complaints of harassment in the workplace. If the service provider fails to detect or report deficiencies, the principal's claim against the service provider should not be defeated by imputing to the principal its agents' knowledge of deficiencies in the processes under scrutiny.

Imputation charges a principal with the legal consequences of having notice of a material fact, whether or not such fact would be useful and welcome. If an agent has actual knowledge of a fact, the principal is charged with the legal consequences of having actual knowledge of the fact. If the agent has reason to know a fact, the principal is charged with the legal consequences of having reason to know the fact. A principal may not rebut the imputation of a material fact that an agent knows or has reason to know by establishing that the principal instructed the agent not to communicate such a fact to the principal. Imputation thus reduces the risk that a principal may deploy agents as a shield against the legal consequences of facts the principal would prefer not to know.

Illustration:

Illustration:

1. P wants to sell goods to the government of country X but is concerned that payoffs may be necessary to effect such a sale. P employs A in country X and advises A that P does not wish to know of any commissions or other payments A may need to pay to effect the sale of P's goods. P may nonetheless be subject to liability for violations of anti-bribery laws. Notice may be imputed to P of A's knowledge of payments made by A.

Imputation is a doctrine that may carry severe consequences for a principal. For example, in situations comparable to Illustration 1, P may not defeat the imputation of A's knowledge by showing that P directed A to disclose to P any risk that payoffs might be made or by showing that A knew or suspected their occurrence but did not tell P. However, certain legal consequences may require a greater showing of culpability on the part of the principal, such as the knowledgeable involvement of higher-level agents. Additionally, an agent's knowledge of the agent's own conduct is not imputed to the principal when the conduct contravenes an unequivocal instruction furnished by the principal. Thus, if in Illustration 1 P directs A in unmistakable terms to make no illegal payments, A's knowledge of payments made is not imputed to P.

§ 5.03 Imputation of Notice of Fact to Principal, Restatement (Third) Of Agency § 5.03...

Imputation serves distinctive functions when an agent engages in transactions on behalf of a principal. In transactional settings, facts that agents know or have reason to know may be material to how the parties determine the price and terms on which they are willing to transact. If a principal may use an agent as a shield by claiming ignorance of facts known to the agent that are relevant to the terms of a transaction with a third party, the terms of the transaction to which the principal and the third party agree may differ from the terms to which they would have agreed were the principal not shielded from the agent's knowledge. By treating the principal as knowing material facts known to the agent, imputation encourages dealings that more fully reflect material facts. Imputation may also encourage a principal to direct its agent to reveal material facts to it because knowledge of these facts enables the principal to make an informed decision how to proceed. The principal may, for example, decide to abandon a transaction that has not yet been consummated, or to bargain for a lower price or for other terms that reflect the economic significance of the facts.

Pragmatic considerations also justify charging a principal with notice of facts that an agent knows or has reason to know. Most agents most of the time fulfill their duties, including the duty to disclose material facts to the principal or to coagents designated by the principal. See § 8.11. If both agent and principal deny that an agent transmitted knowledge of a particular fact, a third party may confront difficulties in proving otherwise. A similar pragmatic rationale underlies the doctrine of apparent authority, see § 2.03, Comment *c*.

In most cases in which imputation is an issue, the fact in question is one that a principal might well prefer not to know because knowing the fact will carry negative consequences for the principal in legal relations with third parties. A principal may, as in Illustration 1, explicitly encourage its agents to be reticent when they learn of such facts. A principal may also implicitly encourage reticence through the incentives it provides to agents and other mechanisms of control that the principal deploys. Imputation makes it unnecessary for a third party to establish collusion between principal and agent when an agent knows or has reason to know a material fact of which the principal claims ignorance.

It is a mixed question of fact and law whether an agent knows or has reason to know a particular fact. An agent knows a fact if the agent has actual knowledge of it. An agent has reason to know a fact when a reasonable person in the agent's position would infer the existence of the fact, in light of facts that the agent does know. Facts that an agent knows often affect how the agent understands what is observed.

Illustrations:

Illustrations:

2. P owns a residential property, Blackacre, and lists it for sale with A. A resides in the same neighborhood and knows that high winds periodically damage structures. P, who has never visited Blackacre, does not know this. On behalf of P, A enters into a contract to sell Blackacre to T, who does not know of the wind conditions. Applicable law requires that P disclose the existence of such conditions to T if they are known to P. Notice of the high-wind conditions, known to A, is imputed to P.
3. Same facts as Illustration 2, except that A denies knowing anything about wind conditions specific to Blackacre. A's knowledge of wind conditions in the neighborhood gives A reason to know that Blackacre may face comparable peril. Notice of the peril to Blackacre, which A has reason to know, is imputed to P.

Notice of a fact is not imputed to a principal unless the agent knows the fact or has reason to know it. This is so although the agent's failure to know the fact is the consequence of the agent's breach of a duty owed to the principal or to a third party. The agent's failure to know the fact, however, may cause the principal to breach a duty that the principal owes to a third party.

Illustration:

Illustration:

4. P lists a residential property, Whiteacre, for sale with A, directing A to handle all aspects of selling the property. A enters into a contract on P's behalf to sell Whiteacre to T. Unknown to P and A, Whiteacre is infested by wood-destroying insects. An applicable statute requires a seller of residential property to have it inspected to determine whether it is infested by wood-destroying insects. A does not inspect Whiteacre or cause it to be inspected by another. A does not know or have reason to know of the infestation. Therefore, knowledge of the

§ 5.03 Imputation of Notice of Fact to Principal, Restatement (Third) Of Agency § 5.03...

infestation is not imputed to P. However, as a result of A's failure, P has not complied with P's statutory duty to T. P is subject to liability to T. A may be subject to liability to P, see § 8.08, and to T, see § 7.01.

As discussed more fully in Comment *e*, regardless of the circumstances under which an agent acquires knowledge of a fact or reason to know it, notice of the fact is imputed to the principal if material to the agent's duties, unless the agent owes a duty to another not to disclose the fact to the principal. In many instances, a principal benefits when an agent brings to bear all material facts then known to the agent, as indeed an agent has a duty to do. See §§ 8.08 and 8.11. Imputation charges a principal with the legal burdens of taking action through another person with the benefit of what each then knows or has reason to know. The scope of an agent's duties delimits the content of knowledge that is imputed to the principal. When an agent's obligations to others prevent disclosure to the principal of material facts known to the agent that are material to the agent's duties to the principal, the agent may be obliged to terminate the agency relationship.

Illustrations:

Illustrations:

5. P Corporation manufactures construction supplies, using numerous chemicals in its manufacturing processes. Governmental regulations applicable to P Corporation require that it dispose of chemicals used in manufacturing in a manner that does not degrade the natural environment and that it promptly investigate and rectify environmentally damaging spills of chemicals. P Corporation employs A, an environmental engineer, whose duties include monitoring P Corporation's facilities for compliance with applicable environmental regulations and reporting the results of A's findings to S, a superior agent within P Corporation. While touring the exterior of P Corporation's plant, A inspects a pipe that drains used chemicals into storage vats. A observes that a chemical is leaking from a pipe into the ground in close proximity to a stream. A does not tell S or any other agent of P Corporation about the leaky pipe. Notice of the fact that the pipe leaks, known to A, is imputed to P Corporation.
6. Same facts as Illustration 5, except that P Corporation permits its employees to use certain of its grounds for leisure-time activities, such as hiking. A observes the leaky pipe while hiking P Corporation's grounds during a vacation from work. Notice of the fact that the pipe leaks, known to A, is imputed to P Corporation because it is material to A's duties to P Corporation, regardless of the circumstances under which A gained the knowledge.
7. Same facts as Illustration 6, except that the leaky pipe is observed by B, a clerk in P Corporation's accounts-payable department. B's duties do not include monitoring P Corporation's compliance with environmental regulations. Notice of the fact that the pipe leaks, known to B, is not imputed to P Corporation.

Not all that an agent knows constitutes a "fact" for purposes of this doctrine. An agent's knowledge that the agent has acted or intends to act in a manner unauthorized by the principal is not imputed to the principal. However, notice of an agent's knowledge of the agent's own intention may be imputed to the principal as, for example, when an agent makes a promise to a third party on behalf of the principal that the agent does not intend to fulfill. If an agent deals with a principal as an adverse party on the agent's own account, the principal is not charged with notice of facts known to the agent because the agent is not acting as the principal's agent in the transaction.

Agents who are individuals may forget what they once knew or learned under circumstances in which an agent's memory does not retain the information for long. If an agent learns a material fact when a relationship of agency exists with a particular principal, the principal is charged with notice of the fact although the agent forgets the fact or claims to have forgotten it at a later time when knowledge of the fact is material to the principal's legal relations. For example, in Illustration 6, notice of the fact of the leaky pipe is imputed to P Corporation even if A claimed to have forgotten about it. Moreover, an agent may continue to have reason to know a fact although the agent may no longer remember it. If the agent relays the fact to the principal, who forgets it, the principal is charged with knowledge of the fact.

In contrast, if an agent learns a material fact prior to the existence of a relationship of agency with a particular principal, the agent may not be subject to a duty to remember the fact. It is a question of fact whether an agent knows or has reason to know a fact at a subsequent time when the agent takes action and when the fact, if known at that time, would be material to legal consequences for the principal. The nature of the fact and the circumstances under which an agent learned it are relevant to whether the agent may plausibly claim to have forgotten the fact.

§ 5.03 Imputation of Notice of Fact to Principal, Restatement (Third) Of Agency § 5.03...

Just as it may be difficult for a third party to show that an agent duly transmitted information to a principal, it may be difficult for a third party to show that an agent remembered information when the agent claims to have forgotten it. Some cases address this problem through a presumption that an agent continues to know recently acquired information when the agent acts on behalf of the principal. Others allocate to the third party the burden of showing that the agent remembered the information at the time of taking action. It is preferable to allocate the burden to the principal to show that knowledge, once acquired by an agent, had been forgotten by the time of taking action. The third party should not bear the burden of establishing the agent's knowledge because principal and agent are more likely to know facts relevant to proving that the agent has forgotten what the agent once knew.

Illustration:

Illustration:

8. P retains A to act as closing agent on P's behalf in P's purchase of Blackacre from T. A also acts in like capacity for many others. Some years before, A acted as closing agent on behalf of S in S's sale of Blackacre to T. In reviewing the closing documents at that time, A learned that Blackacre was subject to an unrecorded equitable lien in favor of L. By the time A conducts P's closing, A has forgotten about the unrecorded lien. L seeks to enforce the lien. Notice of L's interest is imputed to P unless P carries the burden of proving that A had forgotten about the lien.

Earlier academic accounts of agency and cases justified imputation as a consequence of deeming an agent and a principal to share the same legal identity. This approach does not adequately reflect the fact that principal and agent retain separate legal personalities. See § 1.01, Comment *c*. It also fails to explain why notice of less than all of an agent's knowledge is imputed to a principal; why notice of facts may be imputed to a principal when an agent learned them prior to the relationship of agency or in extramural circumstances, see Comment *e*; and why notice of facts known to a principal is not imputed downward to an agent, see Comment *g*.

Most contemporary cases tie imputation doctrine to an agent's duties, often stressing that an agent has a duty to transmit material facts to the principal. An agent's duties to a principal may limit the scope of what is imputed but do not constitute a comprehensive reason for imputation itself. As noted above, a principal may not defeat the imputation of notice of a material fact known to an agent on the basis that the agent breached the agent's duty to communicate the fact to the principal. Moreover, notice of material facts that an agent knows or has reason to know is imputed to the principal although the agent has reason to believe that the principal would prefer not to know such facts. For example, in Illustration 8, P may not defeat imputation of notice of L's unrecorded lien on Blackacre on the basis that P instructed A to close the transaction and purchase Blackacre from S without telling P about any such circumstances.

A more comprehensive justification for imputation focuses on its impact on behavior. Imputation creates strong incentives for principals to design and implement effective systems through which agents handle and report information. By charging a principal with notice of material facts that an agent knows or has reason to know, imputation reduces incentives to deal through agents as a way to avoid the legal consequences of facts that a principal might prefer not to know.

c. Imputation within organizational principals. Imputation doctrines, like common-law agency in general, treat a juridical person that is an organization as one legal person. Organizations generally function by subdividing work or activities into specific functions that are assigned to different people. See § 1.03, Comment *c*. Within an organization, the work done by some agents consists of obtaining information on the basis of which coagents take action. Imputation recognizes that an organization constitutes one legal person and that its link to the external world is through its agents, including those whose assigned function is to receive, collect, report, or record information for organizational purposes. For example, in Illustrations 5 and 6, A's assigned function is to monitor circumstances relevant to P Corporation's compliance with environmental regulations and report A's findings to S. P Corporation may assign responsibility to others to ensure that apparent violations are investigated and that required reports are made to governmental officials.

The nature and scope of the duties assigned to an agent are key to imputation within an organization. In Illustration 7, in contrast to Illustrations 5 and 6, the duties assigned to B do not encompass acquiring or reporting information relevant to P Corporation's compliance with environmental regulations. Thus, P Corporation is not charged with the legal consequences of

§ 5.03 Imputation of Notice of Fact to Principal, Restatement (Third) Of Agency § 5.03...

B's knowledge of a fact that lies outside the scope of B's duties to P Corporation.

An organization's large size does not in itself defeat imputation, nor does the fact that an organization has structured itself internally into separate departments or divisions. Organizations are treated as possessing the collective knowledge of their employees and other agents, when that knowledge is material to the agents' duties, however the organization may have configured itself or its internal practices for transmission of information.

Illustration:

Illustration:

9. T Corporation issues debentures containing a covenant that restricts T Corporation's right to borrow additional funds. A, who is employed by the credit department of P Bank to monitor the financial reports of issuers of securities, learns of the restrictive covenant in the debentures issued by T Corporation. A does not communicate this fact to the loan department of P Bank, which lends additional money to T Corporation on terms that violate the restrictive covenant in the debentures. A's knowledge will be imputed to P Bank.

If an agent has learned a fact under circumstances that impose a duty on the agent not to reveal it to a principal, notice of that fact is not imputed to that principal. Thus, notice of a fact that an agent learns in confidence from one principal is not imputed to another principal. For further discussion, see Comment *e*.

An organization may put in place internal restrictions on how information is handled and transmitted to assist in fulfilling duties of confidentiality owed to its clients. Such restrictions are common in multifunction financial-services firms.

Illustration:

Illustration:

10. P Corporation is a multifunction financial-services firm. Its commercial-lending department enters into a loan agreement with T, which provides that T will supply nonpublic financial information about itself, that the information will be used within the loan department to form credit judgments about T, and that P Corporation will not otherwise use or reveal the information. P Corporation's trust department gives investment advice to customers, including whether to buy or sell securities. P Corporation restricts access to nonpublic information provided by T and other loan customers like T to personnel in its commercial-lending department who need to know it to service a customer's account and to supervisory personnel who monitor compliance with the prohibition. P Corporation also has a policy that otherwise prohibits communication of such information, including communication to personnel in other departments. Personnel in P Corporation's commercial-lending department comply with these restrictions and prohibitions in handling the information supplied by T. Information about T learned by personnel in P Corporation's commercial-lending department is not imputed to P Corporation in connection with the activities of its trust department.

If information is communicated within an organization contrary to a prohibition imposed by an internal barrier on communication, the firm is charged with notice of the information. Thus, in Illustration 10, if personnel in P Corporation's commercial-lending department transmit to personnel in the trust department the information that T supplied to the commercial-lending department, notice of the information is imputed to P Corporation, affecting its legal relations with customers of its trust department. Whether such communication has occurred is a question of fact. Prior communications that contravene an organization's internal barrier call the barrier's general effectiveness into question. A barrier is not likely to be effective or to appear credible when personnel who possess nonpublic information work on shared projects with personnel whose job functions involve trading or other activity that would be aided by access to nonpublic information. Indicia of commitment to the barrier at an organization's highest levels enhance its credibility, as does consistent imposition of sanctions when violations are known to have occurred. A barrier's credibility will also be enhanced by regular review of its efficacy by a suitable organ of internal governance, such as an internal audit or regulatory department or an independent audit or other committee of a board of directors.

Barriers on intra-organization transmission of nonpublic information may also be strongly encouraged or required by law or regulation, which evolves as circumstances require. For example, the SEC's Rule 14e-3(b), promulgated under § 14(e) of the

§ 5.03 Imputation of Notice of Fact to Principal, Restatement (Third) Of Agency § 5.03...

Securities Exchange Act, provides that a person (other than a natural person) will not be subject to liability for trading on the basis of nonpublic information about an impending tender offer if the person has established reasonable policies to ensure that individuals who make decisions to trade in securities of the target corporation do not receive information about the bid possessed by other individuals within the same firm. Such barriers may also be required by law. For example, the Insider Trading and Securities Fraud Enforcement Act of 1988 requires broker-dealers and investment advisers to establish and maintain written procedures to prevent misuse of inside information. See 15 U.S.C. § 78o(f). National banks are required by the Office of the Comptroller of the Currency to use internal barriers to prevent bank trust departments from unlawfully obtaining nonpublic information from other bank departments. See 12 C.F.R. § 9.5.

An internal barrier on communication of nonpublic information does not provide a defense to the legal consequences of a failure to take action in light of information that is otherwise freely available. Thus, in Illustration 10, the fact that P Corporation prohibits the transmission of nonpublic information provided by T from the commercial-lending department does not relieve its trust department of duties to take action on the basis of information about T that is otherwise freely available.

d. Significance to principal's legal relations of imputing notice of facts. Although imputation is often characterized as a doctrine relevant to a principal's liability, it operates more generally. Imputation may affect a principal's legal relations in diverse contexts.

(1). Legal consequences—contracts and other transactions. A party's rights and duties created by a contract may be affected by the party's knowledge of facts. For example, facts known to a contracting party may be relevant to interpreting terms in the contract, may establish defenses to duties of performance, and may provide grounds on which the contract may be rescinded. If an agent enters into a contract on behalf of a principal, notice is imputed to the principal of material facts that the agent knows or has reason to know.

Illustrations:

Illustrations:

11. As agent for P, A enters into a written contract with T knowing that T does not understand the writing and also knowing that the writing does not correspond in a material respect to the agreement to which T believes T has consented. Notice of the facts about T's understanding and the writing known to A is imputed to P. P may not enforce the contract against T. A's knowledge of T's mistake is imputed to P. See Restatement Second, Contracts § 153(b).
12. A, the Executive Vice President of P Corporation, purchases a liability-insurance policy on P Corporation's behalf issued by T Corporation. The policy application completed by A states that the applicant, P Corporation, knows of no present condition that would give rise to a claim under the policy. A knows of such a condition. Notice of the condition known by A is imputed to P Corporation. Under the substantive law of insurance, T Corporation may avoid the policy.
13. Same facts as Illustration 12, except that A does not know of a present condition that would give rise to a claim under the policy. B, an upper-level employee of P Corporation, knows of such a condition but, contrary to B's duty to P Corporation, tells no one. Notice of the condition known by B is imputed to P Corporation. Although B did not complete the policy application, B's knowledge is material to B's duties to P Corporation and material to the accuracy of representations made by P Corporation in its application for insurance. T Corporation may avoid the policy.
14. P Corporation, which operates a chain of fast-food restaurants, employs A, a food broker, to purchase supplies on its behalf. On behalf of P Corporation, A enters into negotiations with S, the Vice-President of T Corporation, a poultry producer. T Corporation's sales manager drafts a contract calling for T Corporation to sell a large quantity of "chicken" to P Corporation at prices and on terms stated in the contract. Prior to executing the contract, A asks S what T Corporation intends the term "chicken" to mean. S replies that by "chicken," T Corporation means "broilers or fryers." A executes the contract on P Corporation's behalf. T Corporation tenders delivery of a quantity of stewing chicken to P Corporation. The contract does not contain an integration clause and the parol-evidence rule does not exclude proof of the interchange between A and S about the meaning of "chicken." P Corporation may reject the shipment as nonconforming under its contract with T Corporation. Notice of the fact of T Corporation's

§ 5.03 Imputation of Notice of Fact to Principal, Restatement (Third) Of Agency § 5.03...

interpretation of “chicken,” known to A, is imputed to P Corporation. Notice is imputed to T Corporation of the fact, known to S, that A and, through A, P Corporation, believe that T Corporation understands “chicken” to mean “broilers or fryers.”

(2). *Legal consequences—tort liability.* If an agent’s action interferes with the legally protected interests of other persons, the action may constitute a tort. An actor’s knowledge and intention often determine whether an act is tortious. In this context, imputing notice to the principal of facts that an agent knows or has reason to know underlies the principal’s vicarious liability for action by the agent that constitutes a tort.

Illustration:

Illustration:

15. A is retained by P, a dealer in industrial equipment, as a sales representative. On behalf of P, A sells a machine owned by P to T, representing that the machine has been used only for demonstration purposes by its manufacturer. This statement is false, as A knows. Notice is imputed to P of the fact, known to A, that the equipment has been used other than for demonstration purposes.

Particular legal consequences may depend on a combination of knowledge or reason to know a fact, plus a specific intention. For example, a claim of fraud may require that a person who misstated a material fact have made the misstatement intending to defraud the person to whom the statement was made. If so, a principal may not be subject to liability for fraud if one agent makes a statement, believing it to be true, while another agent knows facts that falsify the other agent’s statement. Although notice is imputed to the principal of the facts known by the knowledgeable agent, the agent who made the false statement did not do so intending to defraud the person to whom the statement was made. The person to whom the statement was made may nonetheless have remedies available against the principal, such as rescission of any transaction induced by the false statement. If the agent who made the false statement did so negligently, the principal may be subject to liability for negligent misrepresentation. See Restatement Second, Torts § 552.

In contrast, in Illustration 15, A knowingly makes a false representation to T. A’s knowledge of the falsity is imputed to P. P is subject to liability to T for the loss caused to T. See Restatement Second, Torts § 525. Rescission is available to T as a remedy alternative to recovery of damages. See *id.* § 549, Comment *e*.

Particular legal consequences may also depend on whether action was taken reasonably. Material facts known to an agent may establish that action was taken reasonably when the law requires reasonable action, if notice of those facts is imputed to the principal.

Illustrations:

Illustrations:

16. A, a security guard employed by P Bank, overhears two patrons waiting in line at a teller window discuss plans to rob the bank. A thereupon detains them. Notice of the fact of the conversation, known to A, is imputed to P Bank and is a defense to a claim for false imprisonment asserted by the detained patrons.

17. P Corporation retains A, a loan broker, to obtain a loan on its behalf and to handle the requisite paperwork. Applicable law requires a lender to make itemized disclosure of all fees it charges for a loan and provides remedies to the borrower against the lender if such disclosure is not made. A arranges a loan to P Corporation to be made by T Corporation. T Corporation provides A with a written and itemized disclosure of fees it will charge in connection with the loan to P Corporation that complies with applicable law. The loan agreement given to P Corporation does not itemize the fees that T Corporation is charging. A does not give T Corporation’s written fee disclosure to any officer or employee of P Corporation. Notice is imputed to P Corporation of the fees charged by T Corporation.

(3). *Legal consequences—acquisition of property.* An agent who acquires property for a principal may know or have reason to know material facts about the property, including facts relevant to other persons’ interests and claims. Notice of such facts is generally imputed to the principal.

Illustrations:

Illustrations:

18. P retains A to purchase Blackacre for P from S. A knows that T has an unrecorded equitable interest in Blackacre. A does not tell P and purchases Blackacre for P. P takes Blackacre subject to T's interest but may have an action against A. See § 8.11, which states an agent's duty to furnish material information to the principal.
19. P retains A to purchase Blackacre for P from S. A learns that neighboring structures obstruct the scenic view from portions of Blackacre. Based on statements previously made to P by S, P believes that Blackacre enjoys unobstructed scenic views. A does not tell P what A has learned and purchases Blackacre for P. P seeks to rescind the purchase on the basis that P believed Blackacre's scenic view to be unobstructed. Notice of the fact of the obstruction, known to A, is imputed to P. P may have a claim against A. See § 8.11.

(4). *Legal consequences—acquisition of information.* An agent who does not represent a principal in transactions may be authorized to acquire information on the principal's behalf, as in Illustrations 5 and 6. As discussed in Comment *b*, it is not unusual for organizations to assign duties to gather information to agents who do not otherwise interact with third parties on the principal's behalf. If an agent fails to discover a fact that the agent should know in light of the agent's duties and prior knowledge, notice of the fact is not imputed to the principal. However, as in Illustration 4, a principal may be subject to liability to a third party when, as a result of an agent's failure to discover a fact, the principal breaches a duty owed by the principal to the third party. The principal's liability is not a consequence of imputing notice to the principal of facts not known by the agent but a consequence of the principal's breach of a duty, itself the consequence of a breach of duty by the agent.

(5). *Legal consequences—timeliness of action.* Knowledge of a fact or reason to know it may determine whether a person has asserted a claim in timely fashion by bringing suit because knowing the fact or having reason to know it determines when the applicable statute of limitations begins to run. Likewise, knowledge of a fact or reason to know it may determine whether a claim has been made or notice has been given in a timely fashion under an insurance policy or other contract stating how one party may assert a claim against another. Facts that an agent knows or has reason to know may thus determine whether the principal has acted in timely fashion.

Illustrations:

Illustrations:

20. P Corporation carries a policy of liability insurance, written by T Corporation, that requires P Corporation to give prompt notice to T Corporation of the occurrence of events that may give rise to claims under the policy. A, the manager of P Corporation's Risk Management department, learns that such an event has occurred. Notice is imputed to P Corporation of the fact, known to A, that an event has occurred that may give rise to claims under the policy.
21. Same facts as Illustration 20, except that A learns of the event 10 days after it happens. P Corporation gives notice to T Corporation the next day after A learns of the event. P Corporation's notice is timely because P Corporation is not charged with notice of the fact known to A until A has the knowledge.

(6). *Legal consequences—ratification.* If notice is imputed to a principal of a fact that an agent knows or has reason to know, the principal may be held to have ratified an act for which an agent lacked actual or apparent authority if the principal manifests assent to the act or otherwise consents to it. See § 4.01(2). On the knowledge requisite for ratification, see § 4.06.

Illustration:

Illustration:

22. A, the sales manager for P Corporation, enters into a contract to sell a large quantity of poultry to T Corporation. A does not have actual or apparent authority to enter into the contract. B, the President of P Corporation, learns of the terms of the contract and tells A that P Corporation will perform the contract. Notice is imputed to P Corporation of the facts about the contract known to B. B has also manifested assent on behalf of P Corporation. P Corporation has ratified A's act in entering into the contract with T Corporation.

(7). *Legal consequences—requirement of personal knowledge.* In some circumstances, the law may condition a particular result on whether an individual person had personal knowledge of a fact. For example, personal knowledge may be required

§ 5.03 Imputation of Notice of Fact to Principal, Restatement (Third) Of Agency § 5.03...

for some forms of criminal liability or other penal consequences, for the imposition of penalties within certain licensing regimes, and when a statute requires personal knowledge for a particular legal consequence. In a corporate context, as when a statute imposes criminal liability on a corporation itself, the relevant personal knowledge is that of the individual who took the action that the statute criminalizes, or, in appropriate circumstances, the personal knowledge of the individual who directed or ratified the action taken. See also Comment *d*(2) for discussion of tort liability.

e. Circumstances under which agent acquires knowledge of or reason to know facts. If an agent knows a fact or has reason to know it, notice of the fact is imputed to the principal if the fact is material to the agent's duties unless the agent is subject to a duty not to disclose the fact to the principal or unless the agent acts with an adverse interest as stated in § 5.04. This is so regardless of how the agent came to know the fact or to have reason to know it. When an agent is aware of a fact at the time of taking authorized action on behalf of a principal and the fact is material to the agent's duties to the principal, notice of the fact is imputed to the principal although the agent learned the fact prior to the agent's relationship with the principal, whether through formal education, prior work, or otherwise. Likewise, notice is imputed to the principal of material facts that an agent learns casually or through experiences in the agent's life separate from work.

However, as stated in subsection (b), when an agent is subject to a duty to another not to disclose a fact to the principal, the agent's knowledge is not imputed to the principal. Information that an agent learns in confidence from one principal is not imputed to another principal. See, e.g., Restatement Third, The Law Governing Lawyers § 28(1). An agent who owes a duty of confidentiality to one principal may not be able to fulfill duties that the agent will owe to another principal who also retains the agent. See §§ 8.01, 8.03, and 8.11.

The breadth of notice imputed to a principal of facts that an agent knows or has reason to know mirrors the agent's duty to the principal, as discussed in Comment *b*. When an agent is an individual, the breadth of imputation also reflects the fact that an individual agent's mind "cannot be divided into compartments...." Restatement Second, Agency § 276, Comment *a*. An agent brings the totality of relevant information that the agent then knows to the relationship with a particular principal. This often works to the benefit of a principal who retains an agent. Most cases that consider the question adopt the rule as stated. Many cases state in passing that an agent's knowledge is imputed to the principal if the agent acquired it "within the course" of the agency relationship but do not consider whether the circumstances under which the agent acquires knowledge of a fact should matter. The better rule is the broader rule that charges a principal with the totality of an agent's knowledge of material facts and disregards the provenance of how the agent learned them.

f. Time when notice is imputed to principal. Notice of a fact that an agent knows or has reason to know is not imputed to a principal unless it is material to legal consequences for the principal as a consequence of action taken, or a failure to act, on the part of the knowledgeable agent, another agent, or the principal. For example, in Illustration 2, A's reason to know the wind conditions that afflict Blackacre is not material to P's legal relations until some action is taken, such as entering into a contract to sell Blackacre to T when applicable law requires disclosure of such conditions to a purchaser.

Notice of a fact that an agent learns following the termination of the agent's actual authority is not imputed to the principal. See § 8.05 on post-termination duties owed by agents concerning property and confidential information of the principal. However, if an agent acts with apparent authority in dealing with a third party, notice is imputed to the principal of material facts that the agent knows or has reason to know when knowledge of those facts is material to the principal's legal relations with the third party.

g. Downward imputation. Notice of facts that a principal knows or has reason to know is not imputed downward to an agent. A principal does not owe a duty of disclosure to an agent that is a full counterpart of the duty owed by an agent to relay material facts, as discussed in Comment *b*. For the principal's duties of disclosure, see § 8.15.

As a consequence, an agent who deals with third parties on the principal's behalf is not treated as knowing facts known by the principal that the agent does not know or have reason to know. This protects the agent from the legal consequences of facts that only the principal knows or has reason to know. A principal may be subject to liability to a third party if the principal withholds relevant information from an agent, knowing that the agent will materially misstate facts to a third party as a result.

§ 5.03 Imputation of Notice of Fact to Principal, Restatement (Third) Of Agency § 5.03...

Illustration:

Illustration:

23. A represents P, a prospective purchaser of businesses. A negotiates the terms of a contract under which P will buy a business from T, its owner, with T to provide financing. A does not know and has no reason to know the relevant facts concerning P's finances, which make it likely that P will default on the debt owed to T. After P defaults on the debt P owes T, T sues A, alleging that A fraudulently failed to disclose the true facts of P's finances. Notice of the facts about P's finances is not imputed to A. P may be subject to liability to T if P had a duty to disclose these facts to T. On A's rights to be indemnified by P for the costs of A's defense, see § 8.14.

In contrast with the rule stated in this section, most codifications of agency law state that principal and agent are each deemed to have notice of all of which the other has notice. However, these provisions also state that such deeming shall be operative only "as against the principal."

In contexts defined by a regulatory statute, some courts have imputed notice of facts known by a principal downward from principal to agent when the principal has a duty to transmit all material facts to the agent and the statute's regulatory objectives would be undermined were principals to limit disclosure of material facts to their agents.

Reporter's Notes

a. Comparison with Restatement Second, Agency. This section consolidates treatment of topics covered by Restatement Second, Agency §§ 272 to 281. Substantive changes are noted below.

b. Justifications for imputation; limitations on relevance of imputation. On an agent's duty as the basis for the doctrine, see *Apollo Fuel Oil v. United States*, 195 F.3d 74, 76 (2d Cir.1999) ("[i]n general, when an agent is employed to perform certain duties for his principal and acquires knowledge material to those duties, the agent's knowledge is imputed to the principal"); *Cromer Fin. Ltd. v. Berger*, 245 F.Supp.2d 552, 560 (S.D.N.Y.2003) ("[t]he law presumes that it is fair to find that that which the agent knows, the principal knows as well, because it is also presumed that in the normal course of their relationship, the agent will have a duty to disclose information acquired in the course of the agency"); *Triple A Mgmt. Co. v. Frisone*, 81 Cal.Rptr.2d 669, 678-679 (Cal.App.1999) (basis for imputing agent's knowledge to principal "is that the agent has a legal duty to disclose information obtained in the course of the agency and material to the subject matter of the agency, and the agent will be presumed to have fulfilled this duty"; escrow agent's knowledge of collateral nature of assignment is imputed to lender who retained agent; knowledge obtained by agent in separate but simultaneous transaction is not imputed because scope of escrow agent's duty to disclose is narrow and limited to specific transaction and instructions given to agent); *Southport Little League v. Vaughan*, 734 N.E.2d 261, 275 (Ind.App.2000) (imputation rests on "the legal principle that it is the duty of the agent to disclose to his principal all material facts coming to his knowledge, and upon the presumption that he has discharged that duty.").

On identification between agent and principal as the basis for imputation, see *Stump v. Indiana Equip. Co.*, 601 N.E.2d 398, 403 (Ind.App.1992) ("[i]mputed knowledge is a tenet of agency law, and is based on an underlying legal fiction of agency—the identity of agent and principal when the agent is engaged in the principal's business.").

The best-known assertion that identification between agent and principal underlies agency doctrine is Oliver Wendell Holmes, *Agency*, 1, 4 Harv. L. Rev. 345, 350 (1891). The rationale of fictitious identification may have declined in appeal because it is no longer necessary. If it is understood that imputation charges the principal with notice of what is known by the agent on the basis of the duties the agent owes the principal, interjecting a claim of fictitious identification becomes superfluous. On why fictions die in explanatory force, see Lon L. Fuller, *Legal Fictions* 19 (1967) ("[t]he death of a fiction

§ 5.03 Imputation of Notice of Fact to Principal, Restatement (Third) Of Agency § 5.03...

may indeed be characterized as a result of the operation of the law of economy of effort in the field of mental processes"; originally maxim "qui facit per alium facit per se" was likely a fiction because it invited the reader to believe that the act in question had in fact been done personally by the principal, but as statement came to convey correct meaning that principal legally was bound by acts of agent "the pretense that formerly intervened between the statement and this meaning has been dropped out as a superfluous and wasteful intellectual operation.").

For the point that it is a question of fact whether an agent has knowledge of a fact at the relevant time, see *Williams v. State Med. Oxygen & Supply, Inc.*, 874 P.2d 1225, 1229 (Mont.1994); *Bourgois v. Montana-Dakota Utilities Co.*, 466 N.W.2d 813, 816-817 (N.D.1991) (architect's plans given to corporate employee showed presence of buried concrete on building site 10 years before corporation contracted with demolition contractor, who sought to rescind contract on basis of fraud; court holds that determinative question is "the mind of the agent at the time of the transaction in regard to which notice or knowledge is sought to be imputed to the corporation" and finds summary judgment on behalf of corporation appropriate).

Illustration 2 is based on *Carter v. Gugliuzzi*, 716 A.2d 17 (Vt.1998).

Notice of facts that a person knows is not imputed to another person in the absence of an agency relationship or other relationship that results in imputation. See *Ratliff v. Safeway Ins. Co.*, 628 N.E.2d 937, 942 (Ill.App.1993) (knowledge of insurance broker that insured's son regularly drove automobile not imputed to insurer when broker did not act as insurer's agent); *Celotex Corp. v. Gracy Meadow Owners Ass'n*, 847 S.W.2d 384 (Tex.App.1993) (knowledge of owner of individual condominium unit that roof shingles were not as represented by manufacturer not imputed to incorporated condominium association when no evidence unit owner was an officer or director of association).

On notice of facts that an agent has reason to know, see, e.g., *Southport Little League*, 734 N.E.2d at 275 ("a principal is charged with the knowledge of that which his agent by ordinary care could have known where the agent has received sufficient information to awaken inquiry.").

The discussion of how a principal's legal relations may be affected by an agent's failure to know a fact that the agent should know, when the principal as a result breaches a duty owed to a third party, differs from the formulation in Restatement Second, Agency § 277, Comment *b*, which states that "[t]he principal is affected by information which the agent should have acquired if the principal has a contractual or other duty to third persons with respect to a matter entrusted to the agent. In such cases the principal is subject to liability for failing to act in the light of information which he should have acquired if he himself had done the work." Comment *b* to Restatement Second, Agency § 272 states that "[i]f an agent has reason to know or should know a particular fact, the principal is affected as if the circumstances were such that the principal would have reason to know or should know the fact, subject to the rules stated in Sections 274-282." The black letter of Restatement Second, Agency § 277 states that "[t]he principal is not affected by the knowledge which an agent should have acquired in the performance of the agent's duties to the principal or to others, except where the principal or master has a duty to others that care shall be exercised in obtaining information." The discussion in this Restatement makes it explicit that a principal's liability does not turn on imputing notice to the principal of facts that the agent does not know and does not have reason to know.

Imputing an agent's knowledge is not the sole route to relief when an agent makes a misstatement to a third party in a transaction on behalf of a principal. See *Equitable Life Assurance Soc'y v. New Horizons, Inc.*, 146 A.2d 466, 470 (N.J.1958) (holding that innocent material misrepresentations support rescission of insurance contract when general manager made material misrepresentations about his medical condition on application for life insurance taken out for benefit of employer; court does not impute employee's knowledge of condition of his health to employer but finds employee acted as agent in procuring policy).

Notice of a fact is not imputed to a principal when to learn the fact would require action by an agent beyond the scope of the agent's duties. See *Evanston Bank v. Conticommodity Servs., Inc.*, 623 F.Supp. 1014, 1035 (N.D.Ill.1985) (bank cashier who recorded daily reports of commodities trades had duty to record data in corporate books; no showing duty extended to analysis of information in reports); *Southwest Bank v. Hughes*, 883 S.W.2d 518, 525 (Mo.App.1994) (issues of fact present as to scope of duty of bank officer who notarized deeds in 2 transactions conducted the same day; nothing in record to show

§ 5.03 Imputation of Notice of Fact to Principal, Restatement (Third) Of Agency § 5.03...

that officer's duties extended beyond ministerial recording of information contained on face of records). The scope of an agent's duties limits imputation in *Kruse, Inc. v. United States*, 213 F.Supp.2d 939, 942 (N.D.Ind.2002) (although vice president for operations of automobile-auction business may have been aware of requirement that business file informational returns concerning large cash transactions, "it does not follow perforce that the ... corporation would be imputed with that knowledge"; vice-president had no accounting or tax functions, was in charge of purchasing and maintaining property, and was only responsible for carrying out instructions given by corporation's ultimate decisionmakers). See also *Sulik v. Central Valley Farms, Inc.*, 521 P.2d 144, 146 (Idaho 1974) (question for jury whether employee-tenant who received notice that only temporary repairs had been made to defective utility pole acted as agent for farm owner).

Notice of facts known by an agent is not imputed to the principal unless the agent has a duty to furnish them to the principal. See *Seward Park Housing Corp. v. Cohen*, 734 N.Y.S.2d 42, 50-51 (App.Div.2001) (knowledge that tenant kept pet dog in apartment, obtained through direct observation of dog by building's maintenance and security personnel, imputed to landlord; personnel were landlord's agents for purposes of obtaining information under New York City Admin. Code § 27-2009.1, which makes no-pet clauses in leases waivable upon pet's open and notorious presence); *Estate of Sawyer v. Crowell*, 559 A.2d 687, 691 (Vt.1989) (information relayed to lawyer's secretary about how client's funds were invested not imputed to lawyer when lawyer authorized secretary only to inquire about mechanism for continuing investment or withdrawing funds and secretary had no reason to know of importance of information). On the scope of an agent's duty to furnish information to the principal, see § 8.11.

Imputation reduces incentives that agents and principals may otherwise have to ignore or turn a blind eye to facts that the principal would prefer not to know. English cases articulate a doctrine termed "blind-eye knowledge" to encompass situations in which an insured under a policy of maritime insurance suspects the existence of facts that mean that a ship is unseaworthy but consciously refrains from further inquiry. See *The Eurysthenes*, [1976] 2 Lloyd's Rep. 171, 179 (per Denning, L.J.). To turn a blind eye to a situation does not always imply conduct through which an actor intends to deceive another. At the Battle of Copenhagen in 1801, Lord Nelson's superiors hoisted signal flags directing him to retreat. However, "Nelson ... made a deliberate decision to place the telescope to his blind eye in order to avoid seeing what he knew he would see if he placed it to his good eye." *Manifest Shipping Co. v. Uni-Polaris Ins. Co.*, [2001] 1 Lloyd's Rep. 389, 413 (H.L.) (per Scott, L.J.). However, by turning his blind eye to his telescope, Nelson took the risk that, had the battle of Copenhagen been other than a brilliant success, he would have been court-martialed for disobeying his superiors' orders.

On facts an agent acquires prior to the relationship with a particular principal, see *Chicagoland Vending, Inc. v. Parkside Ctr., Ltd.*, 454 S.E.2d 456, 458 (Ga.1995) (agent's previously acquired knowledge imputed to subsequent principal only when agent has it in mind in dealing for subsequent principal or acquired knowledge so recently as to warrant assumption that agent's mind still retained it). See also *Pee Dee State Bank v. Prosser*, 367 S.E.2d 708, 714 (S.C.App.1988), overruled on other grounds, 446 S.E.2d 415 (S.C.1994) (principal charged with knowledge agent acquired before relationship only when it "can be reasonably said to have been in the mind of the agent when acting for the principal or where he acquired it so recently as to raise the presumption he still retained it in his mind."). In contrast, the burden of showing that the agent retains the knowledge is explicitly allocated to the third party in *First Palmetto Sav. Bank, F.S.B. v. Patel*, 543 S.E.2d 241, 244 (S.C.App.2001) (knowledge that lawyer who served as closing agent acquired in transaction 8 years earlier imputed to principal only if it is "clearly shown that the information was in [his] mind while he served" as agent in present transaction; agent testified he remembered little of earlier transaction, did not remember that assignment in prior transaction was collateral as opposed to absolute, and closing documents for present transaction gave no indication of collateral nature of prior assignment). See also *Constant v. University of Rochester*, 19 N.E. 631, 634 (N.Y.1889) (principal charged with knowledge agent earlier acquired in another transaction for another principal only "upon clear proof" information "was present to his mind at the very time of the transaction in question").

c. Imputation within organizational principals. On the imputed collective knowledge of an organization, see *Gutter v. E.I. DuPont de Nemours*, 124 F.Supp.2d 1291, 1309 (S.D.Fla.2000) (underlying basis for collective-knowledge doctrine is "to avoid the injustice that would result if the principal could have an agent conduct business for him and at the same time shield himself from the consequences that would ensue from knowledge of conditions or notice of the rights and interests of others had the principal transacted his own business in person"; absent collective-knowledge doctrine, corporations could avoid adverse consequences by restricting intracorporate flow of information); *CPC Int'l, Inc. v. Aerojet-General Corp.*, 825

§ 5.03 Imputation of Notice of Fact to Principal, Restatement (Third) Of Agency § 5.03...

F.Supp. 795, 812 (E.D.Mich.1993) (corporation “considered to have the collective knowledge of its employees and is held responsible for their failure to act appropriately”; on basis of knowledge of numerous individual employees, corporation should have known of substantial probability of loss caused by groundwater contamination already in progress before effective dates of insurance policies in issue, making loss uninsurable); *Fleming v. U-Haul Co.*, 541 S.E.2d 75, 77 (Ga.App.2000) (jury could infer malice and find negligent or reckless failure by corporation to ascertain true facts in seeking arrest warrant for conversion of vehicle by lessee when lessee called lessor’s designated 1-800 number and told operator of vehicle’s breakdown and its location near rental outlet); *Bates v. Design of the Times, Inc.*, 610 N.W.2d 41, 45 (Neb.App.2000), rev’d on other grounds, 622 N.W.2d 684 (Neb.2001) (actual knowledge of owner of salon of dangerous practice imputed to corporation, which had duty to instruct employees about risk; irrelevant to corporation’s liability to injured customer that salon employee who dealt directly with customer had no personal knowledge of danger); *Green Tree Acceptance, Inc. v. Holmes*, 803 S.W.2d 458, 460 (Tex.App.1991) (corporate seller of motor home bound by knowledge of employee that odometer at time of sale reflected materially lower mileage number than mileage certificate signed by its credit manager 3 years earlier; not necessary for buyer to prove that seller’s employees communicated information internally or that they actually understood significance of odometer discrepancy).

Directors generally do not act as shareholders’ agents. See § 1.01, Comment *f*(2). However, when a relationship of agency as defined in § 1.01 is present between a director and a shareholder, facts that the director comes to know through service as a director may be imputed to the shareholder-principal. See *Mercy Med. Ctr., Inc. v. United Healthcare, Inc.*, 815 A.2d 886, 904-905 (Md.App.2003), cert. denied, 824 A.2d 59 (Md.2003) (officers of hospital whom hospital trustees chose to serve as members of board of physicians’ network created by hospital acted as hospital’s agents in service on board of network; officers’ knowledge of amendments to agreement, considered by board of network, imputed to hospital).

Illustration 9 is based on *Kelly v. Central Hanover Bank & Trust Co.*, 11 F.Supp. 497 (S.D.N.Y.1935), remanded, 85 F.2d 61 (2d Cir.1936). For discussion of the imputation point in *Kelly*, see Note, *Restrictive Covenants in Debentures: The Insull Case*, 49 Harv. L. Rev. 620, 629 (1936) (“[i]t was claimed by the defendants in the *Kelly* case that the knowledge of a credit department, a trust department, or a security affiliate, could not *per se* be imputed to a loan department. To the extent that this argument depends upon the excuse of bigness, it would seem that a corporation should not be able, by departmentalization, to avoid the responsibilities which would result were the corporate mind not so segregated.”). See also *Browning v. Fidelity Trust Co.*, 250 F. 321, 324 (3d Cir.1918) (knowledge of teller in banking department that issuer of bonds has defaulted in payment of interest coupons is imputed to trust department as trustee under mortgage that secured bonds; “the trustee cannot thus divide itself into units or parts and cannot escape liability, when based upon knowledge, because one of its parts was without it while another possessed it.”).

Internal barriers to communication are common phenomena within financial-services institutions. See generally Thomas Lee Hazen, *Law of Securities Regulation* § 14.12 (4th ed. 2002). On communication barriers within banks, see David L. Abney & Mark A. Nadeau, *National Banks, the Impassable “Chinese Wall,” and Breach of Trust: Shaping a Solution*, 107 *Bank. L.J.* 251 (May-June 1990). For discussion of barriers to communication within institutional investors that serve on creditors’ committees in bankruptcy proceedings, see Robert C. Pozen & Judy K. Mencher, *Chinese Walls for Creditors’ Committees*, 48 *Bus. Law.* 747 (1993).

For the point that an internal prohibition on transmission of nonpublic information does not provide a defense to action that a trust department has a duty to take on the basis of legally available information, see *Batsakis v. FDIC*, 670 F. Supp. 749, 753 (W.D.Mich.1987). For applications of this doctrine in the context of duties owed by ERISA fiduciaries, see *Fischer v. Philadelphia Elec. Co.*, 994 F.2d 130, 135 (3d Cir.1993) (employer, acting as ERISA plan administrator, had duty to answer participants’ questions about early retirement in forthright manner; duty may not be circumvented by isolating employees on whom plan participants rely for information and guidance from information about employer’s plans); *Mullins v. Pfizer, Inc.*, 147 F.Supp.2d 95, 109 (D.Conn.2001) (same; “[a] fiduciary cannot leave its front-line benefits counselors in the dark, or instruct them to give noncommittal and nonfactual responses to inquiries regarding potential benefit changes, if the information that is withheld is material to beneficiaries.”).

The result given for Illustration 11 reflects common industry understanding, reflected in references in a relatively small number of recent cases. See *Ershick v. United Missouri Bank*, 1990 WL 126929 (D.Kan.1990), aff’d, 948 F.2d 660 (10th

§ 5.03 Imputation of Notice of Fact to Principal, Restatement (Third) Of Agency § 5.03...

Cir.1991) (bank did not violate its duties under ERISA as directed trustee of ESOP by retaining stock of plan's sponsoring employer in ESOP although bank's commercial-loan personnel had information about employer's financial problems based on their knowledge of employer's performance on loans made by bank to employer; bank followed directives of Comptroller of Currency and Federal Reserve System in preventing flow of information to trust department from commercial-loan department and no information was in fact communicated); *Master Consol. Corp. v. BancOhio Nat'l Bank*, 1990 WL 65666 (Ohio App.1990), *aff'd*, 575 N.E.2d 817 (Ohio 1991) (bank did not breach duties owed as trustee in disbursing proceeds of industrial-revenue bonds; information that might have called propriety of disbursement into question was known by member of lending department, who, consistent with bank's policy, did not communicate it to member of trust department who acted as trustee).

For the point that a barrier to internal communication of information does not provide a defense when, in fact, personnel in one department transmit information across departmental boundaries, see *ADT Operations, Inc. v. Chase Manhattan Bank, N.A.*, 662 N.Y.S.2d 190 (Sup.1997) (complaint states claim that bank breached duty assumed under confidentiality agreement with customer that became target of other customer's acquisition attempt when bank used confidential information itself to determine whether to finance acquisition attempt and when bank disseminated confidential information to customer interested in making acquisition).

Some earlier cases reflect different eras in practice and regulation. In *Hazzard v. Chase Nat'l Bank*, 287 N.Y.S. 541 (Sup.1936), *aff'd*, 14 N.Y.S.2d 147 (App.Div.1939), *aff'd*, 26 N.E.2d 801 (N.Y. 1940), an action brought by holders of debentures against the bank that served as indenture trustee, the court treated the bank as one single entity, although the trust department was fully segregated in operations from the rest of the bank and operated from a separate location. An officer outside the trust department knew that the issuer of debentures was insolvent, but the facts in *Hazzard* do not suggest that the officer was under any duty to treat this information as confidential. The court nonetheless exculpated the bank on the basis of a clause in the indenture that provided that the trustee would not be subject to liability in the absence of gross negligence. Under the Trust Indenture Act of 1939, as amended, an exculpatory clause is not effective to relieve an indenture trustee from liability for its own negligence except under very narrow circumstances, not applicable to the facts in *Hazzard*. See 15 U.S.C. § 7700o(d).

The SEC has often recognized the efficacy of an internal barrier as a defense when a securities firm has maintained strict restrictions on transmission of information between the firm's research department or its trading department, and its investment-banking department. See, e.g., *Koppers Co. v. American Express Co.*, 689 F.Supp. 1413, 1416-1417 (W.D.Pa.1988) (response of SEC to inquiries from court; firm's significant equity position in tender offer did not create conflicts of interest beyond remediation "through the effective implementation" of internal barriers to transmission of information and other proper procedures); J.P. Morgan Secs. Ltd., SEC No-Action Letter, [2000-2001 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶78,250 (Feb. 27, 2002) (firm granted exemption under Rule 14e-5 to act as market maker at time it was acting as dealer manager so long as it observed "Ethical Wall" required by London Panel on Take-overs and Mergers); *Diageo plc.*, SEC No-Action Letter, [1998 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶77,430 (Feb. 26, 1998) (broker dealer exempt from Rule 10b-13 during tender offer to act as market maker at same time acting as dealer manager if barrier maintained); *United Mexican States*, SEC No-Action Letter, [1996-1997 Transfer Binder] Fed. Sec. L. Rep. ¶77,245 (Apr. 30, 1996) (exemption from stabilization rules under Rule 10b-6 in offer inviting holders of Brady bonds to exchange them for new Mexican securities if trading desk and dealer activities are separated by barrier to transmission of information). See also *Broker-Dealer Internal Control Procedures for High Yield Securities: Report by SEC Division of Market Regulation*, [1993 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶85,251 (Oct. 1993).

A provision in the proposed Federal Securities Code states that, in determining whether to impute knowledge, scienter, or action to a principal or company when insider trading is at issue, the SEC or a court "shall consider whether the principal or company operated under established procedures reasonably designed (I) to prevent transmission of those facts to persons other than those who have responsibility for administering those procedures or who act in furtherance of a purpose for which access to those facts was given by the issuer or another person, or (II) to prevent transactions in and recommendations concerning securities of the issuer." Federal Securities Code § 202(86)(C)(ii) (1980). At the 1978 Annual Meeting, an amendment was defeated that would have deleted "shall consider whether," and substituted, "shall not, in the absence of unusual circumstances, make an imputation where the principal or company operated under" established procedures. See 55

§ 5.03 Imputation of Notice of Fact to Principal, Restatement (Third) Of Agency § 5.03...

A.L.I. Proc. 337-339 (1978). For a fuller account, see Larry L. Varn, *The Multi-Service Securities Firm and the Chinese Wall: A New Look in Light of the Federal Securities Code*, 63 Neb. L. Rev. 197 (1984).

English law does not recognize the efficacy of an internal barrier created on an ad hoc basis to maintain the confidentiality of former clients' information. See *Prince Jefri Bolkiah v. KPMG*, [1999] 2 A.C. 222. For further discussion, see Harry McVea, "Ad Hoc" Chinese Walls, 2 J. Corp. L. Stud. 24 (2002).

d. Significance to principal's legal relations of imputing notice of facts. Illustration 11 comes from Restatement Second, Agency § 272, Illustration 1. See also *Sumitomo Marine & Fire Ins. Co. v. Southern Guar. Ins. Co.*, 337 F.Supp.2d 1339, 1354 (N.D.Ga.2004) (insurers, through agent, had notice of issuance of certificates of insurance adding party as additional insured); *Fidelity & Guar. Ins. Co. v. Global Techs., Ltd.*, 117 F.Supp.2d 911, 916-917 (D.Minn.2000) (court orders reformation of insurance policy to exclude coverage for products liability when insurance broker who acted as insured's agent in obtaining policy and was given unrestricted power to negotiate insurance contract intended to buy umbrella insurance without products-liability coverage).

For the principle underlying Illustration 12, see *Affiliated FM Ins. Co. v. Kushner Cos.*, 627 A.2d 710, 715 (N.J.Super.L.Div.1993) (partner's knowledge of a loss imputed to partnership although another partner applied for insurance; knowledgeable partner had duty to disclose known loss to partnership, when loss occurred while application for insurance was pending).

Partnership legislation states principles that govern imputation. Under Uniform Partnership Act (1914) § 12, a partnership is charged with "the knowledge of the partner acting in the particular matter, acquired while a partner or then present to his mind, and the knowledge of any other partner who reasonably could and should have communicated it to the acting partner ... except in the case of a fraud on the partnership committed by or with the consent of that partner." Under Uniform Partnership Act (1997) § 102(f), "[a] partner's knowledge ... is effective immediately as knowledge by ... the partnership, except in the case of a fraud on the partnership committed by or with the consent of that partner."

An example of legislation with implications for imputation is the Marine Insurance Act 1906, 6 Edw. 6. ch. 41, which requires an assured to disclose to a prospective underwriter every material circumstance about the risk known to the assured, who is "deemed to know every circumstance which, in the ordinary course of business, ought to be known by him." In *Berger & Light Diffusers Pty. Ltd. v. Pollock*, [1973] 2 Lloyd's Rep. 442, 461 (Q.B.), the court held that these statutory terms cause the knowledge of an assured's agent to be imputed to his principal.

On the relevance of imputation in contractual contexts, see *New York Marine & Gen. Ins. Co. v. Tradeline (L.L.C.)*, 266 F.3d 112, 122-123 (2d Cir.2001) (agent of marine insurer received fax from insured referring to weather forecast of impending rain; court imputes agent's knowledge to insurer, which precludes applicability of doctrine of *uberrimae fides* to insured's claim when cyclone-driven rains damage insured cargo); *Thyphin Steel Co. v. Certain Bills of Lading*, 2002 WL 31465791 (S.D.N.Y.2002), *aff'd* in part and vacated in part on other grounds, 82 Fed. Appx. 738 (2d Cir.2003) (endorsee of bill of lading charged with its consignee's knowledge of third party's interest in cargo; endorsee did not act in good faith in acquiring bill); *Essex Ins. Co. v. Hoffman*, 168 F.Supp.2d 547, 553 (D.Md.2001) (denying insurer's motion for summary judgment in claim made by manufacturer under products-liability policy; court finds triable issue of fact on whether materials provided to insurer's agent misrepresented nature of product that purportedly enhanced user's immune system); *Dreiling v. Maciuszek*, 780 F.Supp. 535, 541 (N.D.Ill.1991) (insurance broker's knowledge of restrictions on coverage in insurance policy imputed to insured; broker's knowledge that insured wanted broader coverage not imputed to insurer); *Pearson v. Black King Shipping Co.*, 769 F.Supp. 940, 946 (E.D.Va.1991), *aff'd*, 953 F.2d 638 (4th Cir.1992) (freight forwarder acted as shipper's agent; freight forwarder's knowledge of contents of shipping documents imputed to shipper); *Peterson v. Modern Woodmen of America*, 220 P. 809, 811 (Wash.1923), *aff'd*, 226 P. 1119 (Wash.1924) (knowledge of collecting officer of local branch that insured used alcohol is imputed to mutual insurer and estops it from denying liability under policy when collecting officer collected subsequent dues and assessments and forwarded them to home office, which retained them).

Illustration 14 is based on a variation on the facts of *Frigalment Importing Co. v. B.N.S. Int'l Sales Corp.*, 190 F.Supp. 116 (S.D.N.Y.1960).

§ 5.03 Imputation of Notice of Fact to Principal, Restatement (Third) Of Agency § 5.03...

For an example of circumstances in which a principal's liability did not require action by an agent with knowledge of a fact, see *Wardley Better Homes & Gardens v. Cannon*, 61 P.3d 1009, 1016-1017 (Utah 2002) (knowledge of agent imputed to real-estate brokerage firm for purpose of determining whether brokerage firm brought action against vendors and another brokerage firm in bad faith; agent knew that vendors had been fraudulently induced to sign listing agreements because agent assured them agreement would be effective for only one day and then inserted longer duration into blank spaces in agreements).

Illustration 17 is based on a variation on *Stone v. Mellon Mortgage Co.*, 771 So. 2d 451, 457 (Ala.2000) (knowledge of fax fee contained in payoff statement given to mortgagor's agent is imputed to mortgagor).

On imputation in the context of transactions in property, see *Gregg v. Cloney*, 110 Cal.Rptr.2d 615, 623 (Cal.App.2001) (agent's knowledge of specific material information "that could have a substantial adverse effect on the principal" will be imputed to principal when material to agent's duty; agent's knowledge of vendor's use of alternate names imputed to purchaser of property).

On an employer's reasonableness in denying a worker's-compensation claim, see *Tri-Met, Inc. v. Odighizuwa*, 828 P.2d 468, 470-471 (Or.App.1992) (knowledge of agent imputed to principal as to matters within scope of agent's authority, including knowledge of facts of incident to underlying claim).

On imputation when fraud and related claims are based on an agent's knowledge, see, e.g., *S Dev. Co. v. Pima Capital Mgmt. Co.*, 31 P.3d 123, 133-134 (Ariz.App.2001) (in action alleging fraudulent nondisclosure, vendor charged with knowledge of plumbing defect in apartment complex known to its agents); *Dyke v. Peck*, 719 N.Y.S.2d 391, 394 (App.Div.2001) (although material misrepresentation made by seller's agent to buyer of real estate imputed to seller, buyer's reliance was not justifiable under the circumstances); *Carter v. Gugliuzzi*, 716 A.2d 17, 23 (Vt. 1998) (agent's knowledge of high-wind conditions afflicting property imputed to brokerage corporation with which property was listed). On other intentional torts, see, e.g., *Fleming v. U-Haul Co.*, 541 S.E.2d 75, 77-78 (Ga.App.2000) (in action asserting claims of false arrest and malicious prosecution, knowledge of principal's employees and agents imputed for purposes of determining whether actions were taken with malice or recklessly); *Oklahoma ex rel. Hettel v. Security Nat'l Bank & Trust Co.*, 922 P.2d 600, 607, 609 (Okla.1996) (in *qui tam* action challenging legality of bond issuance, fact issues present on whether knowledge of officers of banks that participated in lending syndicate of circumstances may be imputed to banks). See also *Hughes v. Lillian Goldman Family, LLC*, 153 F.Supp.2d 435, 450-451 (S.D.N.Y.2001) (court finds factual issue for trial whether agency relationship existed between rental management company and real-estate broker; if agency relationship present, broker's knowledge of plaintiff's race may be imputed to management company).

For the proposition that a principal may be deceived through a statement made to an agent, see *Vannest v. Sage, Ruttly & Co.*, 991 F.Supp. 155, 160 (W.D.N.Y.1997) (investor may bring federal action alleging securities fraud on basis of deceptive statements made to agent who purchased securities on investor's behalf).

For imputed knowledge as a defense to fraud, see *Jay Group, Ltd. v. Glasgow*, 534 S.E.2d 233, 237 (N.C.App.), rev. den., 546 S.E.2d 100 (N.C.2000) (knowledge of officers of corporate acquiror that trademarks owned by acquired corporation could not be registered imputed to acquiring corporation, defeating its claim of fraud based on failure of acquired corporation and its lawyer to disclose status of trademarks); *Horrocks v. Westfalia Systemat*, 892 P.2d 14, 17 (Utah App.1995) (notice imputed to seller of dairy equipment of facts known to agent who told purchaser of equipment that, if he executed certificate stating that all equipment had been delivered, remainder of order would be delivered; imputation defeats seller's claim of fraud against purchaser, who reasonably believed statements made to him by agent who apparently fled vicinity with undelivered equipment).

Imputed knowledge creates a defense against a claim that a warning was inadequate in *Crook v. Kaneb Pipe Line Operating P'ship, L.P.*, 231 F.3d 1098, 1101-1102 (8th Cir.2000) (when managerial employees of purchaser of propane gas knew of its dangers, seller and shipper of propane not liable on basis that warning actually provided was insufficient).

§ 5.03 Imputation of Notice of Fact to Principal, Restatement (Third) Of Agency § 5.03...

For the point that imputed knowledge may establish ratification, see *EUA Congenex Corp. v. North Rockland Cent. School Dist.*, 124 F.Supp.2d 861, 870 (S.D.N.Y.2000) (school district had reason to know of actions of agent in signing energy-savings contract when it acted on contract by making payments for 4 years and did not repudiate contract).

On the impact of imputed knowledge on the operation of statutes of limitations, see *Veal v. Geraci*, 23 F.3d 722, 725 (2d Cir.1994) (lawyer's knowledge of tainted lineup imputed to client; client thus had reason to know of conduct giving rise to claim under 42 U.S.C. § 1983); *Mason v. Tucker & Assocs.*, 871 P.2d 846, 851 (Idaho App.1994) (statute of limitations applicable to inmate's claim against court reporter based on errors in preparation of trial transcript tolled only until inmate or his lawyer acquired knowledge of facts from which either could detect deficiencies in transcript; knowledge of lawyer gained while preparing appeal imputed to client); *Kaeding v. W.R. Grace & Co.*, 961 P.2d 1256 (Mont.1998) (knowledge of medical opinions communicated in letter to lawyer imputed to client to determine accrual of latent-disease claim); *Agency of Natural Res. v. Towns*, 724 A.2d 1022, 1024-1025 (Vt.1998) (remanded for findings on factual issues; notice sufficient to trigger statute of limitations may be imputed to state on basis of inquiry made to person in state attorney general's office, depending on identity of person and nature and content of information conveyed).

On requirements of actual knowledge, see *Roberts Real Estate, Inc. v. New York State Dept. of State, Div. of Licensing Servs.*, 603 N.E.2d 242, 245 (N.Y.1992) (holding that broker's license may not be suspended on basis of imputed knowledge of employee salespersons when statute requires "actual knowledge" for revocation or suspension of license; court notes that third parties injured by employee misconduct have common-law remedies against licensed employer but that "the principles of responsibility in the distinct spheres of liability and license regulation ought not be merged.").

In civil-forfeiture actions under 21 U.S.C. § 881(a)(7), courts have required a showing of actual knowledge that property was being used to facilitate drug violations, even when the property was owned by a corporation and the drug violator was the corporation's senior officer. See *United States v. One Parcel of Land*, 965 F.2d 311 (7th Cir.1992); *United States v. One Parcel of Real Estate*, 852 F.Supp. 1013 (S.D.Fla.1994). These cases give otherwise-innocent shareholders the benefit of a statutory defense available to an "innocent owner," see 21 U.S.C. § 881(a)(7), despite the fact that the corporation itself owns the property.

There is conflicting authority whether knowledge of an agent's fraud is imputed to a bankrupt principal for purposes of discharging a debt under 11 U.S.C. § 523(a)(2)(B). Compare *In re Cohn*, 54 F.3d 1108, 1119 (3d Cir.1995) (dictum that "common principles of agency law would probably dictate the imputation of an agent's fraud to a principal") with *In re Walker*, 726 F.2d 452, 454 (8th Cir.1984) (construing 11 U.S.C. § 523(a)(2)(A), court holds that "more than the mere existence of an agent-principal relationship is required to charge the agent's fraud to the principal.... If the principal either knew or should have known of the agent's fraud, the agent's fraud will be imputed to the debtor-principal.").

For the point that imputation is inapplicable to claims under fidelity bonds, when the fact in issue is an employee's knowledge of the employee's own wrongdoing, see *Miami Nat'l Bank v. Pennsylvania Ins. Co.*, 314 F.Supp. 858 (S.D.Fla.1970).

e. Circumstances under which agent acquires knowledge of or reason to know facts. For a spirited defense of the rule as stated, surveying the cases applying the rule, see Daniel S. Kleinberger, *Guilty Knowledge*, 22 Wm. Mitchell L. Rev. 953 (1996).

For statements of the rule, see, e.g., *O'Riordan v. Federal Kemper Life Assurance Co.*, 114 P.3d 753, 757 (Cal.2005) (knowledge of prospective insured's smoking learned by life insurer's agent while representing prospective insured in replying to insurer's medical questionnaire is imputed to insurer; agent became insurer's agent when insurer granted his request to be so appointed, submitted with prospective insured's application, and once insurer's agent, agent had duty to disclose "any material information he had pertaining to" application); *Bryant v. Livigni*, 619 N.E.2d 550, 556 (Ill.App.1993) (information reported to coworker who is not in a superior position imputed to principal if it concerns matter within scope of authority, even though coworkers had friendly relationship; store manager told fellow employees in friendly conversation about prior battery he committed, and court finds that reasonable jury could conclude that information was within scope of coworkers' authority to act upon); *Carter v. Gugliuzzi*, 716 A.2d 17, 23 (Vt.1998) (in action against listing broker whose

§ 5.03 Imputation of Notice of Fact to Principal, Restatement (Third) Of Agency § 5.03...

agent failed to disclose high-wind conditions to purchaser of property, court states it is “immaterial whether [agent’s] information was derived from his residence in the area, his listing and sale of other properties in the area, or his experience as the town’s zoning officer” because broker’s statutory duty of disclosure to purchaser encompasses material facts about property, regardless of their provenance).

For the point that an agent’s knowledge is not imputed to the principal when the agent owes a duty to another not to disclose the information, see *Imperial Fin. Corp. v. Finance Factors, Ltd.*, 490 P.2d 662 (Haw.1971) (officer of finance corporation sought and received agreement of insurer’s agent not to reveal existence of attachment bond to defendant; finance corporation estopped from asserting that knowledge of attachment bond should be imputed to defendant, which breached no duty in obtaining mortgage lien on same property with priority over attachment bond); *Reininger v. Prestige Fabricators, Inc.*, 523 S.E.2d 720, 725 (N.C.App.1999) (company physician who treats employee following accident has ethical obligation to withhold confidential communications of patients; knowledge of company physician based on confidential communications from employee-patient not imputed to employer for purposes of inferring that improper ex parte communication occurred between employer and physician).

Defining an agent’s duty narrowly will limit the scope of imputation. See, e.g., *Triple A Mgmt. Co. v. Frisone*, 81 Cal.Rptr.2d 669, 678-679 (Cal.App.1999) (duty of escrow agent to make disclosure to principal does not extend to matters beyond scope of particular agency relationship; escrow agent’s knowledge of collateral assignment contained in escrow instructions imputed to principal).

Opinions may state that knowledge is imputed if it is “obtained in the course of the agency” when the context does not require the court to consider the implications. See, e.g., *Triple A Mgmt. Co.*, 81 Cal.Rptr. at 679.

Cases applying a narrower rule include *R.B.Z. v. Warwick Dev. Co.*, 725 So. 2d 261, 264 (Ala.1998) (knowledge gained by agent outside scope of agency and prior to it not imputed to principal; property manager of apartment complex, formerly married to defendant who raped tenant, knew of his prior rape conviction); *Engen v. Mitch’s Bar & Grill*, 1995 WL 387738 (Minn.App.1995) (party seeking to impute agent’s knowledge to principal must establish relevance of knowledge to subject of agency and that agent learned knowledge while acting within the course and scope of employment; court does not impute bartenders’ knowledge of violent propensities of patron to bar); cf. *Christopher S. v. Douglaston Club*, 713 N.Y.S.2d 542 (App.Div.2000) (knowledge of agent not imputed to principal when agent has abandoned principal’s interests and is acting entirely for own or another’s purposes; knowledge of 2 members of club’s board of improper sexual behavior of member’s son not imputed to club because not learned while acting within scope of duties as club’s agents but as fathers of boys involved in incident; board members testified they intentionally withheld information about incident from club to save embarrassment for all families involved).

f. Time when notice is imputed to principal. For applications of the basic point, see *Schuff Steel Co. v. Industrial Comm’n*, 891 P.2d 902, 913 (Ariz.App.1994) (in dispute whether disability compensation should be apportioned between worker’s former employers, knowledge of examining physician’s diagnosis not imputed to prior employer to satisfy requirement of written record because, absent direct request from prior employer, insurance carrier at later time of industrial injury had no duty to communicate content of physician’s report to prior employer).

g. Downward imputation. Illustration 23 is based on *Ago v. Begg, Inc.*, 705 F. Supp. 613, 617-618 (D.D.C.1988), *aff’d*, 911 F.2d 819 (D.C.Cir.1990). See also *Grove Holding Corp. v. First Wisconsin Nat’l Bank*, 12 F.Supp.2d 885, 895-896 (E.D.Wis.1998) (knowledge of facts in corporation’s files not imputed to its officers, directors, and shareholders; question of fact whether these individuals had knowledge of facts); *Garren v. First Realty, Ltd.*, 481 N.W.2d 335, 338 (Iowa 1992) (trial court correctly directed verdict for seller’s agent when no proof that agent knew of or should have known that seller’s property was in flood zone, which seller knew).

For an early recognition of a related point, see *Cornfoote v. Fowke*, 6 M & W 358 (1840) (agent retained to lease house owned by principal does not share principal’s knowledge of existence of adjacent brothel and innocently tells lessee that house has no objectionable features; lessee may not assert principal’s knowledge as defense against principal in action brought by principal on agreement for lease). Commenting on this case, Professor Seavey observed, “[t]hough we may agree

§ 5.03 Imputation of Notice of Fact to Principal, Restatement (Third) Of Agency § 5.03...

that the other party should have the right to withdraw from the agreement upon learning the facts, the court's reasoning that there was not fraud of any sort, in the absence of a conscious concealment on the part of the principal, is sound." Warren A. Seavey, *Notice Through an Agent*, 65 U. Pa. L. Rev. 1, 36 (1916).

For the related point that a principal's intention or liability is not imputed downward to an agent, see *Browning-Ferris Indus., Inc. v. Ter Maat*, 195 F.3d 953, 956 (7th Cir.1999) (noting absence of doctrine of " 'superiors' liability' " as counterpart to respondeat superior; a corporate officer is not automatically liable for acts of a corporation); *Brownlee v. Lear Siegler Mgmt. Servs. Corp.*, 15 F.3d 976, 978 (10th Cir.1994) (principal's discriminatory intention is not imputed to an agent).

For the point that a principal is subject to liability if the principal withholds facts from an agent, knowing that the agent will as a result make material misstatements to third parties, see *Essex v. Getty Oil Co.*, 661 S.W.2d 544, 550-551 (Mo.App.1983). This theory of liability is inapplicable when the principal did not intend or direct that the agent make the misstatement. See *Li v. Metropolitan Life Ins. Co.*, 998 S.W.2d 828 (Mo.App.1999).

For a rare case holding that notice of a fact known only by a principal may be imputed downward to an agent, see *Roland v. Cooper*, 768 So. 2d 400, 404-405 (Ala.Civ.App.2000) (son of owner of company that owned used truck sold truck to plaintiff; son deemed to have owner's knowledge of odometer discrepancy; court holds that lower court erred in granting summary judgment on seller's fraud claims against son). The basis for the court's holding on imputation is Ala. Code § 8-2-8. However, the statute provides that "[a]s against a principal, both principal and agent are deemed to have notice of whatever either has notice of and ought in good faith and the exercise of ordinary care and diligence to communicate to the other." See Ala. Code § 8-2-8 (2002 & Supp. 2004). The court's paraphrase of the statute, see 768 So. 2d at 404, omits the initial phrase, "[a]s against a principal...." Given its inclusion of the initial phrase, the statute is not a basis for downward imputation.

On downward imputation in the context of a regulatory statute, cases decided under the federal Fair Debt Collection Practices Act, 15 U.S.C. § 1692, are instructive. Section 1692c(a)(2) provides that a debt collector may not communicate with a consumer if it knows that the consumer is represented by a lawyer and knows or can readily ascertain the lawyer's name and address. The court does not impute the creditor's knowledge that the consumer had retained counsel to the debt collector in *Schmitt v. FMA Alliance*, 398 F.3d 995, 998 (8th Cir.2005) ("no textual basis within the statute to suggest that an exception to such a well-settled rule was intended") and *Hubbard v. National Bond & Collection Assocs., Inc.*, 126 B.R. 422 (D.Del.1991), *aff'd*, 947 F.2d 935 (3d Cir.1991). In *Jones v. Weiss, Neuren & Neuren*, 95 F.Supp.2d 105 (N.D.N.Y.2000), the court does not impute the creditor's knowledge to the law firm that represented it as collection agent. The court imputes such knowledge, however, in *Powers v. Professional Credit Servs., Inc.*, 107 F.Supp.2d 166, 169 (N.D.N.Y.2000), on the basis that, if a creditor has actual knowledge that a consumer has retained a lawyer but fails "to disclose that fact to its debt collector ... [this] would utterly eviscerate the protections afforded debtors by the FDCPA." The *Powers* court also states that a creditor has a duty "when turning over a file to his debt collector to convey all of the material information regarding the claim." *Id.*

In applying the doctrine of judicial estoppel, a court may impose a form of downward imputation. See, e.g., *Alternative Sys. Concepts, Inc. v. Synopsys, Inc.*, 374 F.3d 23, 35-36 (1st Cir.2004) (notice of litigation position taken by corporation imputed to its chief executive officer; deposition testimony of chief executive officer recalling contract negotiations with defendant does not constitute information that was neither known to nor readily available to plaintiff at time initial position taken in litigation).

Case Citations - by Jurisdiction

§ 5.03 Imputation of Notice of Fact to Principal, Restatement (Third) Of Agency § 5.03...

C.A.2
C.A.3.
C.A.3
C.A.7
C.A.11
C.A.D.C.
Ct.Fed.Cl.
N.D.Ala.Bkrty.Ct.
D.Hawai
N.D.Ill.
E.D.Ky.
D.Mass.
D.Nev.
E.D.N.Y.
S.D.N.Y.
S.D. Ohio
M.D.Pa.
D.P.R.
E.D.Tex.Bkrty.Ct.
S.D.Tex.
N.D.W.Va.
Alaska
Conn.App.
Del.Ch.
Ill.
Miss.
N.J.
N.Y.
N.Y.Sup.Ct.
Pa.
Pa.Super.
Tex.App.
Vi.
Wash.App

C.A.2

C.A.2, 2012. Sec. and coms. (b), (c), and (e) cit. in sup. Spain sued ship-classification society and its subsidiaries, alleging that defendants were reckless in classifying as structurally sound an oil tanker that sank and released large quantities of oil that washed up on the Spanish coastline. Affirming the district court's grant of summary judgment for defendants, this court, *inter alia*, rejected plaintiff's argument that society was reckless in disregarding a fax allegedly sent to its subsidiary prior to the tanker's sinking by the vessel's then-master, reporting mechanical and structural problems aboard the tanker; even if subsidiary was society's agent for certain purposes, there was no evidence that either the owner or operator of the tanker was ever a client of subsidiary such that a fax from the vessel's crew would come within the scope of subsidiary's duties on behalf of society, or that the information in the fax should be imputed to society. *Reino de Espaa v. American Bureau of Shipping, Inc.*, 691 F.3d 461, 474.

C.A.3,

§ 5.03 Imputation of Notice of Fact to Principal, Restatement (Third) Of Agency § 5.03...

C.A.3, 2013. Com. (b) quot. in sup. Investors brought, inter alia, securities-fraud claims under the Securities Exchange Act against a firm that did business as a registered investment adviser, seeking to recover money that they had lost in a Ponzi scheme that one of firm's senior executives had operated through a hedge fund that he controlled and managed outside of the scope of his responsibilities with firm. Vacating the district court's grant of summary judgment for defendant on these claims and remanding, this court held that imputation to defendant of executive's fraud might be appropriate in this case, if plaintiffs could prove that the manner in which executive marketed the hedge fund to plaintiffs while he was working for defendant, and the apparent benefit to defendant, made it appear that he marketed the hedge fund within the scope of his authority as a senior executive of defendant. The court noted that the imputation doctrine advanced public-policy goals in that it created incentives for a principal who selected and delegated responsibility to its agents to do so carefully and responsibly. *Belmont v. MB Inv. Partners, Inc.*, 708 F.3d 470, 495.

C.A.3

C.A.3, 2009. Quot. in sup., coms. (b), (c), and (e) and illus. 5 and 7 quot. in sup. Former employee of paper plant sued former employer for sexual harassment and retaliation, alleging that defendant knew or should have known of harassment at the plant through two supervising technicians who had been informed of the harassment, but that it failed to take prompt and appropriate remedial action. The district court granted summary judgment for employer. Affirming, this court held, inter alia, that the two supervising technicians were not management-level employees for purposes of imputing to employer their knowledge of potential co-worker harassment, because they did not have authority to affect the employment status of their teammates and because they were not employed to discover or act upon knowledge or rumors of sexual harassment but, rather, to keep machines at the plant working. *Huston v. Procter & Gamble Paper Products Corp.*, 568 F.3d 100, 106, 107.

C.A.7

C.A.7, 2010. Cit. in sup. (T.D. No. 6, 2005). Steel-mill corporation brought a fraud claim against mill-development firm, alleging that defendant's false statements to plaintiff's board and principal investors that plaintiff's mill had costly design flaws caused the mill to close for five years when investors withdrew their support. The district court entered judgment for defendant. Affirming, this court held that the fraud claim was untimely because plaintiff's CEO's knowledge that defendant's statements were wrong was imputed to plaintiff, and thus plaintiff's claim accrued at the time of injury. The court noted that only two exceptions existed to the proposition that an employee's knowledge of a matter within the scope of his duties was imputed to the employer: One was that the employee was acting adversely to the employer's interests, and the other was that the employee was subject to a duty to a third party not to disclose the information to the principal: no exception existed for an employee, like plaintiff's CEO in this case, who had lost the board's confidence and was soon to be discharged. *Prime Eagle Group Ltd. v. Steel Dynamics, Inc.*, 614 F.3d 375, 379.

C.A.11

C.A.11, 2011. Sec. and com. (b) cit. in sup. Mexican farm workers hired as guest workers through the Department of Labor's H-2A visa program brought suit under the Fair Labor Standards Act against Georgia onion grower that employed them, alleging that they were entitled to reimbursement from defendant for the fees that employment agencies had charged them. The district court granted summary judgment for defendant. Affirming in part, this court held, inter alia, that, under principles of agency law, defendant was not liable for the fees, because plaintiffs failed to present substantial evidence that defendant provided employment agencies with the authority to collect those fees. The court rejected plaintiffs' argument that defendant was liable for the fees because contractor employed by defendant to facilitate plaintiffs' hiring was aware of the fees and this knowledge was imputed to defendant; this argument failed because the collection of the fees was outside the scope of authority granted by defendant. *Ramos-Barrientos v. Bland*, 661 F.3d 587, 602.

C.A.D.C.

C.A.D.C.2009. Cit. in sup., com. (g) quot. in sup. United States sought civil forfeiture of almost \$7 million on the ground that the money was involved in a scheme to launder money earned through an unlawful offshore Internet gambling enterprise. The district court invoked the fugitive-disentitlement statute to grant summary judgment to government against a claim to the money filed by a British Virgin Islands corporation. Reversing, this court held that a genuine issue of fact existed as to whether the statute applied to corporation's majority shareholder, and thus whether corporation's claim could be dismissed under the statute, since government failed to satisfy its burden to show that shareholder remained outside the United States to avoid pending criminal charges. The court concluded that, while shareholder's knowledge of one of the criminal warrants against him satisfied the statute's requirement of notice, the mere fact that he was a majority shareholder was not sufficient to impute corporation's knowledge of outstanding warrants to him; no evidence was presented to show that corporation was acting as an agent of shareholder. *U.S. v. \$6,976,934.65, Plus Interest Deposited into Royal Bank of Scotland Intern. Account No. 2029-56141070, Held in Name of Soulbury Ltd.*, 554 F.3d 123, 129.

Ct.Fed.Cl.

Ct.Fed.Cl.2010. Quot. in sup. Partnerships sued the United States, challenging certain accuracy-related penalties that the Internal Revenue Service assessed against them due to their participation in a tax sham. After a bench trial, this court granted judgment in favor of the government, holding, among other things, that, under fundamental agency principles, partnerships' principals were imputed to have the same knowledge of and involvement in the sham transactions as their authorized agent on the transactions. The court noted that agent was an employee and consigliere to principals and their family members, and that he was so intimately involved in the transactions that his knowledge, experience, and sophistication had to be imputed to principals. *Murfam Farms, LLC ex rel. Murphy v. U.S.*, 94 Fed.Cl. 235, 246.

N.D.Ala.Bkrcty.Ct.

N.D.Ala.Bkrcty.Ct.2009. Quot. in fn. Liquidating trustee of bankrupt company brought an adversary proceeding against company's officers and directors, counsel for company, and investment banking firm hired by company in connection with its acquisition of another corporation, alleging that the acquisition caused company's financial demise. Granting investment banking firm's motion to dismiss, this court held, inter alia, that all of trustee's claims against firm were barred by the doctrine of in pari delicto, an equitable principle providing that a plaintiff who had participated in wrongdoing could not recover damages resulting from the wrongdoing, because the knowledge and conduct of company's officers and directors was fully imputable to company. *In re Verilink Corp.*, 405 B.R. 356, 364.

D.Hawaii

D.Hawaii, 2007. Cit. in case quot. in sup. Trademark licensor sued licensees for breach of licenses and fraud, and licensees counterclaimed, alleging, among other things, that, because their disclosed agent was acting as licensor's undisclosed double agent, they were entitled to rescind the licenses, making them void and unenforceable. Denying defendants' motion for summary judgment, this court held, inter alia, that genuine issues of material fact remained as to whether agent engaged in services on plaintiff's behalf in a transaction connected with his agency relationship with defendants. The court noted that defendants could not be liable for the alleged breach of licenses if defendants' disclosed agent was also plaintiff's undisclosed agent, because agent's knowledge with regard to the breach would be imputed to plaintiff. *Television Events & Marketing, Inc. v. Amcon Distributing Co.*, 526 F.Supp.2d 1118, 1128.

N.D.Ill.

N.D.Ill.2009. Com. (b) cit. in sup, com. (e) quot. in sup. Group of employee benefit funds and other organizations that represented plastering company's employees brought suit under ERISA and the Labor Management Relations Act against purchaser of company's assets, seeking to collect, under a successor-liability theory, allegedly delinquent employee-benefit-fund contributions, union dues, and other amounts owed by company. Granting summary judgment for defendant, this court held, inter alia, that the knowledge of plaintiffs' claims against company could not be imputed to defendant through company's attorney, who represented defendant for the limited purpose of acquiring company's assets; while the fact that attorney learned of plaintiffs' claims before representing defendant did not by itself make imputation inappropriate, the limited scope of his authority negated imputation to defendant of his knowledge of company's potential liability to plaintiffs. *Trustees of Chicago Plastering Institute Pension Trust v. Elite Plastering Co., Inc.*, 603 F.Supp.2d 1143, 1150.

E.D.Ky.

E.D.Ky.2011. Quot. in disc. Insurer sued insured bank, seeking a declaration that losses bank sustained as a result of embezzlement by its president/CEO's were not covered under a financial institution bond and extended professional liability policy. Denying in part insurer's motion for summary judgment, this court held that, while president/CEO made a false statement in bank's application to renew its bond and insurance, her knowledge was not imputed to bank, and therefore the bond and policy were not rescinded and remained in effect; while a principal was generally charged with notice of facts that an agent knew or had reason to know, the "adverse interest" exception applied here, because president/CEO was acting adversely to bank's interests when she lied on the renewal application. *BancInsure, Inc. v. U.K. Bancorporation Inc./United Kentucky Bank of Pendleton County, Inc.*, 830 F.Supp.2d 294, 302.

D.Mass.

D.Mass.2008. Cit. and quot. in sup. Consumers and third-party payors brought proposed nationwide class action against pharmaceutical manufacturers under the unfair and deceptive trade practices acts (UDTPAs) of 39 jurisdictions, alleging that manufacturers caused them to overpay for certain prescription drugs by misstating the average wholesale prices of the drugs in industry publications. This court, inter alia, declined to certify plaintiffs' proposed non-Medicare class under the laws of states that required reliance on an alleged misrepresentation in order to establish liability under their UDTPAs. The court noted that certain third-party payors had continued to overpay for the drugs even after learning the truth about the prices, and concluded that the knowledge of those third-party payors could be imputed to proposed class member consumers who were beneficiaries of third-party payor plans. *In re Pharmaceutical Industry Average Wholesale Price Litigation*, 252 F.R.D. 83, 97.

D.Nev.

D.Nev.2011. Cit. in sup. Liquidating trust sued Chapter 11 debtor's former outside auditor, contending that, if auditor had not issued certain unqualified audit opinions, debtor's insiders could not have engaged in two allegedly fraudulent schemes that ultimately resulted in millions of dollars of losses to debtor. This court granted summary judgment for defendant on all claims, holding that insiders' conduct was imputed to debtor, and thus, under the doctrine of in pari delicto, plaintiff could not sue defendant for failing to stop debtor from engaging in its own fraudulent conduct. The court reasoned that, because debtor granted the insiders unfettered control over every aspect of its business, it could not disavow those agents' knowledge

§ 5.03 Imputation of Notice of Fact to Principal, Restatement (Third) Of Agency § 5.03...

and conduct committed in the course and scope of their employment; even if a reasonable jury could find under Nevada law that insiders acted adversely to debtor as their principal, imputation would still apply, since insiders were debtor's sole relevant actors. *USACM Liquidating Trust v. Deloitte & Touche LLP*, 764 F.Supp.2d 1210, 1217.

E.D.N.Y.

E.D.N.Y.2012. Quot. in sup. Insurers sued medical service corporation and related entities and individuals, alleging that defendants engaged in a fraudulent scheme to improperly collect payment from insurers for medical services provided to injured motorists. Denying defendants' motion for summary judgment based on the statute of limitations, this court held that genuine issues of material fact existed as to when insurers were on inquiry notice of the fraud, whether insurers were misled by defendants' affirmative efforts to conceal the scheme such that equitable tolling was appropriate, and when the suspicions of an investigator for one insurer could be imputed to insurers as knowledge. The court noted that, while organizations were generally treated as possessing the collective knowledge of their employees and other agents, it was sometimes desirable in cases involving fraud to depart from a rule of automatic imputation of knowledge. *Liberty Mut. Ins. Co. v. Excel Imaging, P.C.*, 879 F.Supp.2d 243, 271.

S.D.N.Y.

S.D.N.Y.2011. Com. (b) quot. in ftn. Investors brought a putative class action against equity fund's investment managers, among others, for breach of fiduciary duty, inter alia, alleging that managers failed to conduct adequate diligence before investing 100% of investors' funds in a Ponzi scheme. This court dismissed plaintiffs' claims, holding that plaintiffs lacked standing to pursue the claims directly, and knowingly waived their right to pursue them derivatively. The court rejected plaintiffs' argument that assertion of derivative claims against defendants on behalf of the fund would have been subject to an unclean hands defense, and, therefore, New York's Wagoner Rule—which allowed claims against third parties for defrauding a corporation with the cooperation of management to accrue to creditors—should have been applied to allow the claims to proceed directly. The court explained that the Wagoner rule operated to *bar* shareholder derivative claims, because in such cases plaintiffs stood in the shoes of the corporation whose "unclean hands" barred *it* from bringing suit, and policy reasons dictated imputation of responsibility in order to create incentives for principals to choose agents carefully and use care in delegating functions to them. *In re Optimal U.S. Litigation*, 813 F.Supp.2d 383, 397.

S.D.N.Y.2009. Quot. in sup. Music publisher that was represented by mechanical licensing agency brought copyright-infringement action against record company, alleging that record company failed to acquire mechanical licenses for four songs owned by music publisher that record company included on compilation albums. Granting in part and denying in part the parties' cross-motions for summary judgment, this court held, inter alia, that, while defendant acquired valid mechanical licenses as to three of the songs at issue, those licenses were later terminated. The court noted that defendant's statutory notice of intent to obtain a license, which was communicated to agency, was effective as to plaintiff, because agency acted as plaintiff's licensing agent at all relevant times. *EMI Entertainment World, Inc. v. Karen Records, Inc.*, 603 F.Supp.2d 759, 767.

S.D.N.Y.2009. Com. (b) cit. in ftn. Extraordinary commissioner of collapsed Italian dairy conglomerate, along with conglomerate's wholly owned subsidiary, brought suit for damages against accountants, banks, and others that allegedly assisted conglomerate's insiders in perpetrating a massive fraud involving the understatement of conglomerate's debt and the overstatement of its net assets. Granting summary judgment for defendants, this court held that plaintiffs' claims were barred by the doctrine of *in pari delicto*, which foreclosed recovery by a claimant that was a participant in the alleged wrong; because conglomerate's corrupt insiders were acting within the scope of their employment when they worked with defendants to defraud conglomerate, their actions and knowledge could be imputed to plaintiffs. The court further held that

§ 5.03 Imputation of Notice of Fact to Principal, Restatement (Third) Of Agency § 5.03...

the adverse-interest exception to the imputation rule did not apply here, because the insiders did not totally abandon corporate interests when they engaged in their fraudulent activities. In re Parmalat Securities Litigation, 659 F.Supp.2d 504, 519.

S.D.N.Y.2004. Com. (b) quot. in disc. (T.D. No. 3, 2002). Disbursing agent for bankruptcy debtor brought adversary proceeding as assignee of debtor's claims against prebankruptcy auditor, seeking damages for expenditures made in reliance, in part, on auditor's alleged fraud. The bankruptcy court entered judgment for plaintiff, awarded damages, and expunged auditor's proof of claim in the underlying bankruptcy proceeding. Affirming in part and reversing in part, this court declined to resolve whether agent had standing to sue auditor for fraud on behalf of debtor under "adverse interest" exception to rule that would bar standing by imputing debtor's management's misconduct to debtor. The court, however, declined to adopt and "innocent insider" exception to the imputation rule. In re CBI Holding Co., Inc., 311 B.R. 350, 372, on rehearing 318 B.R. 761 (S.D.N.Y.2004).

S.D. Ohio

S.D. Ohio, 2011. Com. (b) cit. in disc. and cit. in case cit. in fn. Trust created in bankruptcy court to pursue legal causes of action belonging to debtor and debtor's subsidiaries sued financial company for, inter alia, breach of fiduciary duty and fraud, alleging that company assisted debtor's principals in looting billions of dollars of funds from debtor's subsidiaries. This court granted defendant's motion for summary judgment, holding that plaintiff's claims were barred by the in pari delicto defense. The court rejected plaintiff's proposed co-conspirator equitable exception to the in pari delicto defense, holding that in a situation of corporate wrongdoing where, as here, the officers and directors were the alter egos of the debtor corporations, applying the co-conspirator exception would swallow the in pari delicto rule by protecting primary wrongdoers at the expense of an alleged co-conspirator who was plainly less at fault. In re National Century Financial Enterprises, Inc., 783 F.Supp.2d 1003, 1024, 1025.

M.D. Pa.

M.D. Pa.2009. Quot. in sup. Towing company and its owner sued state police officers, state police commissioner, and others, alleging that defendants retaliated against them in violation of their constitutional rights by removing company from state police towing-referral lists. Denying summary judgment for commissioner, this court held, inter alia, that, while commissioner played no role in removing company from the lists, questions of fact remained as to whether he was liable for failing to take corrective action after learning that his subordinates had allegedly violated plaintiffs' constitutional rights. The court rejected commissioner's argument that he could not be liable because he never himself read the letter sent him by plaintiffs complaining of the allegedly unconstitutional conduct; commissioner, as principal, was charged with the legal consequences of having actual knowledge of the conduct, because his attorneys, as his agents, read the letter and had such actual knowledge, which was imputed to him. Schlier v. Rice, 630 F.Supp.2d 458, 470.

D.P.R.

D.P.R.2008. Cit. in sup., cit. in fn. Plaintiff sued the United States for return of two vehicles seized as part of a criminal investigation, alleging inadequate notice of forfeiture. Granting summary judgment, sua sponte, against plaintiff, this court held that no genuine issue of material fact existed as to plaintiff's reasonable notification of forfeiture. The court concluded that, pursuant to agency principles of the Civil Code of Puerto Rico, plaintiff's criminal deputies, who were in possession of the vehicles at the time of seizure, were plaintiff's agents for purposes of maintaining and operating the vehicles; notice sent to plaintiff's agents of impending forfeiture proceedings was therefore imputed to plaintiff. The court noted that, while the Civil Code sufficed to dispose of this case, the court's decision was in accord with Restatement Third of Agency § 5.03.

§ 5.03 Imputation of Notice of Fact to Principal, Restatement (Third) Of Agency § 5.03...

Gonzalez-Gonzalez v. U.S., 581 F.Supp.2d 272, 280.

E.D.Tex.Bkrcty.Ct.

E.D.Tex.Bkrcty.Ct.2007. Com. (b) quot. in disc. Securities Investor Protection Corporation (SIPC) and trustee for the liquidation of debtor securities-brokerage firm brought an adversary proceeding alleging professional negligence and negligent misrepresentation against accounting firm that, while performing annual audits of debtor's financial statements, failed to discover fraud committed by debtor's CEO and CFO. Entering judgment that trustee was entitled to an award of damages, and that the SIPC was to take nothing, this court held that the adverse-interest exception to the imputation rule barred the imputation of officers' fraud to debtor, or to trustee, as debtor's successor-in-interest, and thus trustee was not precluded from maintaining his negligence action against defendant; the evidence showed that the two officers acted entirely for their own self-interests in misappropriating customer assets, and against debtor's interests. In re Sunpoint Securities, Inc., 377 B.R. 513, 562, 563.

S.D.Tex.

S.D.Tex.2011. Sec. and com. (b) quot. in sup. Oil company sued refining business, alleging that a spent catalyst distributor installed in business's refinery infringed upon company's patents. This court denied defendant's motion for summary judgment on the basis of laches, holding that defendant had not met its burden in establishing that the laches period began at the date it asserted, and thus the court could not analyze whether the delay resulted in material prejudice to defendant. The court reasoned that, although plaintiff's employee was provided with sufficient information such that he should have inquired into the nature of defendant's allegedly infringing activities, the court could not conclude at this stage in the proceedings whether that knowledge should have been imputed to plaintiff, because questions of material fact existed as to whether, among other things, that employee possessed a duty to familiarize himself with plaintiff's patents. Shell Global Solutions (US) Inc. v. RMS Engineering, Inc., 782 F.Supp.2d 317, 330.

N.D.W.Va.

N.D.W.Va.2008. Com. (g) quot. in sup. Chapter 13 debtor and his trustee brought adversary proceeding against lender and its debt collector, alleging that defendants engaged in illegal debt-collection practices in violation of the Fair Debt Collection Practices Act and corresponding state law. This court granted debt collector's motion to dismiss certain of those claims, unless plaintiffs, within 30 days, filed an amended complaint alleging that debt collector had knowledge, separate from lender, that debtor was represented by an attorney when it communicated with debtor in an attempt to collect a debt, and knowledge of debtor's request that all further debt collection contacts be made through his attorney. The court noted that, in general, notice of facts that a principal knew or had reason to know was not imputed downward to an agent. In re Carroll, 400 B.R. 497, 502.

Alaska

Alaska, 2011. Quot. in sup., cit. in fn. Subcontractor sued general contractor for damages, alleging that its inadvertent error in underbidding on a concrete foundation construction project was due to a discrepancy between the bid schedule and the project drawings sent to it by defendant. The trial court granted partial summary judgment for defendant. Affirming, this court held that plaintiff committed a unilateral mistake for which it bore the risk, as a result of its general manager's failure to give its bid preparer the contents of an e-mail that accompanied and clarified the bid schedule. The court further held that the trial court did not err by imputing knowledge of the e-mail to plaintiff's bid preparer; plaintiff's bid preparer could

§ 5.03 Imputation of Notice of Fact to Principal, Restatement (Third) Of Agency § 5.03...

reasonably have been expected to know the facts material to estimating plaintiff's bid, the contents of the e-mail included. *Handle Const. Co., Inc. v. Norcon, Inc.*, 264 P.3d 367, 373.

Conn.App.

Conn.App.2009. Quot. in sup. Prospective sellers of real property sued limited-liability company and principal of company who sought to acquire the property for a proposed auto raceway, after defendants were unable to obtain the necessary zoning approvals and the sale did not take place. After a bench trial, the trial court rendered judgment for defendants. Affirming, this court held, inter alia, that defendants did not accept certain unilateral changes made by plaintiffs to the contractual closing date by congratulating plaintiffs after they signed the contract. The court concluded that, while the changes were communicated to a licensed real-estate agent who was acting as the parties' dual agent for the sale, agent did not have actual, implied, or apparent authority to enter into a contract on behalf of defendants, and thus agent's knowledge of the added terms was not imputed to principal. *LeBlanc v. New England Raceway, LLC*, 116 Conn.App. 267, 283, 976 A.2d 750, 762.

Del.Ch.

Del.Ch.2009. Com. (b) cit. in ftn. Shareholders of corporation that allegedly engaged in certain illegal conspiracies brought derivative action against, among others, corporation's alleged coconspirators. Granting defendants' motion to dismiss, this court held, inter alia, that plaintiffs' action against defendants was barred by the doctrine of in pari delicto. The court rejected plaintiffs' argument that one of the conspiracies did not involve the very seniormost of corporation's executives but only well-compensated managers with the authority to make critical decisions, reasoning that the acts of those managers would still be imputed to corporation; when a corporation empowered managers with the discretion to handle certain matters and to deal with third parties, the corporation was charged with the knowledge of those managers when the corporation was sued by innocent parties. *In re American Intern. Group, Inc.. Consol. Derivative Litigation*, 976 A.2d 872, 887.

Ill.

Ill.2011. Com. (b) quot. in spec. conc. op. After a court-ordered termination of father's parental rights, father filed a postjudgment motion for relief, alleging that the state failed to perform a diligent inquiry to ascertain his location when it served him notice by publication, and thus service was ineffective to confer personal jurisdiction on the court. The trial court denied the petition; the court of appeals affirmed. Reversing and remanding, this court held that the state failed to perform the diligent inquiry required when it relied on a computerized database search of father's name while ignoring other potentially useful information, including father's continuous payment of social security income to his children. A special concurrence would have held that, because an employee of the state's attorney's office was able to contact father at his current address with regard to a separate child support matter, actual knowledge of father's whereabouts could be imputed to the state's attorney's office through the rules of agency law. *In re Dar. C.*, 2011 IL 111083, 957 N.E.2d 898, 921.

Miss.

Miss.2007. Illus. 5-7 cit. in ftn. Fourteen-year-old youth-sports-program participant sued university that hosted the program, after she was raped by two 15-year-old participants soon after program's bus driver dropped the three off at the wrong building on campus, leaving them unattended and unsupervised. The trial court granted summary judgment to defendant. Reversing and remanding, this court held, inter alia, that a reasonable jury could find that plaintiff's injuries were a foreseeable consequence of defendant's negligence in failing to provide adequate supervision and security on its premises, given that defendant had imputed knowledge of the attackers' violent history and tendencies through bus driver as its

§ 5.03 Imputation of Notice of Fact to Principal, Restatement (Third) Of Agency § 5.03...

employee/agent and knew that 63 crimes were reported to have occurred on the campus during the three months prior to the rape. *Glover ex rel. Glover v. Jackson State University*, 968 So.2d 1267, 1276.

N.J.

N.J.2006. Quot. but dist., com. (b) quot. in disc. (T.D. No. 6, 2005). Litigation trust, acting as successor-in-interest to bankrupt corporation and representing corporation's shareholders, sued independent auditor for negligence after auditor failed to detect intentional misrepresentations made by corporation's officers. The trial court granted auditor's motion to dismiss based on the imputation doctrine, ruling that officers' fraud could be imputed to litigation trust. The court of appeals reversed. Affirming as modified, this court held that the imputation doctrine did not bar corporate shareholders from recovering through a litigation trust against an auditor who was negligent within the scope of its engagement by failing to uncover or report the fraud of corporate officers; auditor did not have to have actively participated in the fraud to be barred from raising the imputation defense. *NCP Litigation Trust v. KPMG LLP*, 187 N.J. 353, 366, 901 A.2d 871, 879.

N.Y.

N.Y.2010. Com. (b) quot. in sup. Chapter 11 debtor's litigation trustee brought fraud, breach-of-fiduciary-duty, and malpractice claims in federal court against debtor's insiders, among others. The district court dismissed the claims; the court of appeals certified questions to this court. Answering the questions, this court held that the adverse-interest exception to the imputation of corporate insiders' acts to the corporation was not satisfied by showing that the insiders intended to benefit themselves by their misconduct, and the exception was available only where the insiders' misconduct had harmed the corporation. The court noted that the presumption of imputation reflected the recognition that principals, rather than third parties, were best-suited to police their chosen agents and to make sure that they did not take actions that ultimately did more harm than good. *Kirschner v. KPMG LLP*, 15 N.Y.3d 446, 468, 912 N.Y.S.2d 508, 938 N.E.2d 941, 953.

N.Y.Sup.Ct.

N.Y.Sup.Ct.2008. Com. (b) quot. in sup. Joint official liquidators of hedge fund brought suit on behalf of fund against auditor for negligently failing to detect and report to fund's directors that fund's investment managers had fraudulently valued fund's securities. Granting summary judgment for auditor, this court held, inter alia, that liquidators were barred from asserting their claim against auditor, because managers' conduct could be imputed to the fund. The court concluded that the innocent-insider exception did not apply to rebut the presumption of imputation, since liquidators failed to raise a triable issue that directors were innocent decisionmakers who could have stopped managers' wrongdoing had they been alerted to it by auditor; the record showed that directors ceded control of the fund to managers, permitted them to operate the fund with impunity until they were removed by the SEC, and failed to review fund's financial statements, despite attesting to their accuracy. *Bullmore v. Ernst & Young Cayman Islands*, 20 Misc.3d 667, 675, 861 N.Y.S.2d 578, 585.

Pa.

Pa.2010. Com. (b) quot. in sup. and cit. in ftn. Committee of creditors established for corporate debtor brought adversary proceeding against corporation's auditor and auditor's successor, alleging that defendants colluded with debtor's officers to fraudulently misstate debtor's finances. After the district court granted summary judgment for defendants on grounds that officers' fraud was imputed to debtor, because they provided auditor with false financial statements in the first place, the court of appeals certified to this court for review questions of first impression centering on the availability of an imputation-based in pari delicto defense in an auditor-liability scenario. Answering the questions, this court held, inter alia,

§ 5.03 Imputation of Notice of Fact to Principal, Restatement (Third) Of Agency § 5.03...

that, in factual circumstances entailing secretive, collusive conduct of an agent and an auditor, Pennsylvania law rendered imputation unavailable, as the auditor had not proceeded in material good faith. Official Committee of Unsecured Creditors of Allegheny Health Educ. and Research Foundation v. PriceWaterhouseCoopers, LLP, 605 Pa. 269, 989 A.2d 313, 319, 321, 323, 324, 333.

Pa.Super.

Pa.Super.2012. Cit. in sup. After ten-year-old child was bitten and injured by a pit bull dog owned by landlord's tenants, child's mother sued landlord, alleging that landlord negligently permitted tenants to keep a vicious dog on the premises and failed to warn others of the danger. The trial court granted summary judgment for landlord. Affirming, this court held that there was no evidence from which one could reasonably infer that landlord had actual knowledge of the dog's alleged dangerous propensities such that a duty of care could be imposed on landlord. The court rejected mother's argument that landlord's knowledge could be inferred from the knowledge of a worker who did odd jobs for landlord, reasoning that worker's awareness, acquired while performing a maintenance chore on tenants' property, that the dog had a tic that caused her to clench her teeth in a biting motion was not material to his duties for landlord; thus, worker, who was arguably an independent contractor, and whose agency was limited in scope, had no duty to report the tic. *Rosenberry v. Evans*, 48 A.3d 1255, 1261.

Pa.Super.2009. Cit. and quot. in disc. Steelworker who was injured in a steam explosion at a steel plant, along with estate of another steelworker who was killed in the accident, sued the plant's former owner, alleging that defendant removed the access drawbridge that permitted workers to escape the effects of an accidental steam explosion and sold the plant to the new owner in the same condition without disclosing the dangerous condition. The district court entered summary judgment for defendant. Affirming, this court held that defendant had no reason to believe that the new owner would not become aware of the dangerous condition that caused the accident, since defendant's management and employees remained working at the mill after the sale, and defendant would certainly expect that the management and employees would relate all matters relevant to the operation of the mill to the new owner. The court noted that the significance of the fact that defendant's management and employees remained working at the plant after the sale did not relate to whether the new owner was their principal and was therefore charged with their knowledge of the dangerous condition through operation of agency law; instead, the focus was on what defendant had reason to believe would occur in the relationship between the new owner and its new management and employees. *Gresik v. PA Partners, L.P.*, 989 A.2d 344, 353.

Tex.App.

Tex.App.2008. Com. (g) quot. in sup. State, city, and city transit authority sued officers of corporation, seeking to hold them personally liable, as "responsible individuals" under the state tax code, for corporation's unpaid tax liability. After a bench trial, the trial court entered judgment that plaintiffs took nothing by their suit. Affirming, this court held that the evidence was sufficient to establish that defendants did not act with knowledge or reckless disregard of the risk that the taxes were not remitted. Although the court recognized that corporation had executed a limited power of attorney on behalf of an outside certified public accountant who obtained knowledge of the deficiency, it reasoned that, even assuming that accountant's knowledge could be imputed to corporation under agency principles, corporation's knowledge could not be imputed downward to defendants as corporation's officers. *State v. Crawford*, 262 S.W.3d 532, 545.

Vt.

Vt.2009. Com. (d)(7) cit. in disc. Youth campers who had been sexually abused at summertime leadership camp by camp's

§ 5.03 Imputation of Notice of Fact to Principal, Restatement (Third) Of Agency § 5.03...

executive director sued camp; camp's insurer intervened, seeking a declaration that it was not required to indemnify camp for any judgment obtained against camp by plaintiffs. The trial court granted summary judgment for insurer, ruling that director's knowledge of his own misconduct was imputed to camp such that camp could be said to have "personal knowledge" of the abuse, thereby precluding coverage under an exclusion in the insurance policy. Reversing and remanding, this court held that the adverse-interest exception to imputation applied in this case because director's sexual assaults were clearly inconsistent with his duty of loyalty to camp, and fact issues remained as to whether, under the sole-representative doctrine, director, as an adverse agent, controlled and dominated camp such that he was the de facto principal, and camp could again be charged with his knowledge. *Mann v. Adventure Quest, Inc.*, 2009 VT 38, 186 Vt. 14, 974 A.2d 607, 614.

Wash.App.

Wash.App.2011. Com. (e) cit. in sup. Former executive director of nonprofit corporation sued corporation, alleging that he was discharged in retaliation for requesting that defendant's board members provide proof of their legal status, or resign if they were not legally in the United States, in order to avoid compromising corporation's future government funding. After defendant and certain board members refused to respond to plaintiff's requests for discovery regarding the citizenship and immigration status of its board members, the trial court granted plaintiff's motions to compel and, later, to sanction defendant. Although the parties settled and requested dismissal of defendant's interlocutory appeal, rendering the action moot, this court nevertheless held that a corporation could not refuse to respond entirely, as defendant did here, on the basis that relevant facts known to its board members were acquired outside the scope of their official duties and were known to them "personally" rather than "professionally." *Diaz v. Washington State Migrant Council*, 265 P.3d 956, 968.

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Restatement (Second) of Agency § 272 (1958)

Restatement of the Law - Agency

Database updated June 2014
Restatement (Second) of Agency

Chapter 8. Liability of Principal to Third Persons; Notice Through Agent

Topic 2. Knowledge of Agents

§ 272 General Rule

Comment:

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Case Citations - by Jurisdiction

In accordance with and subject to the rules stated in this Topic, the liability of a principal is affected by the knowledge of an agent concerning a matter as to which he acts within his power to bind the principal or upon which it is his duty to give the principal information.

See Reporter's Notes.

Comment:

a. The liability of a principal because of the knowledge of the agent is based upon the existence of a duty on the part of the agent to act in light of the knowledge which he has. The principal is affected by the agent's knowledge whenever the knowledge is of importance in the act which the agent is authorized to perform. The knowledge may be of importance where: an agent makes a contract for the principal or acts in the execution of a contract;

the conduct of an agent or principal interferes with the protected interests of another and thereby may constitute a tort against such other;

an agent acquires property for the principal; or

an agent is employed by the principal to act in relation to a matter and to make reports concerning it to the principal or to other agents of the principal.

b. Where agent has reason to know or should know. In situations in which knowledge of a particular fact is relevant to the legal liability of participants in an event, their liability is often affected by their having knowledge of other facts from which persons of ordinary intelligence and prudence would infer the existence of the fact in question or would be led to make such inquiries as would give them knowledge of it. In such cases they have reason to know the fact in question or they should know of it. The Comment on Section 9 indicates the meaning of these phrases and gives illustrations of situations in which

§ 272 General Rule, Restatement (Second) of Agency § 272 (1958)

knowledge is important in a variety of situations. If an agent has reason to know or should know a particular fact, the principal is affected as if the circumstances were such that the principal would have reason to know or should know the fact, subject to the rules stated in Sections 274- 282.

c. Situations in which knowledge is important. In contracts, knowledge of a contracting party is relevant in determining the interpretation of the contract, in the determination of grounds for reformation or rescission, and in determining the questions relating to performance and breach. Thus, if one party knows that the other party is giving a particular interpretation to the words of an offer, this interpretation, unless prevented by the parol evidence rule, prevails. Likewise, the knowledge of a person dealing with an agent as to the limitations of the agent's authority or the motive with which the agent acts is often of great importance, since an agent acting in violation of a limitation upon his authority or with a motive adverse to his principal does not bind his principal to a person knowing such limitation or purpose. In the performance of a contract the knowledge of a party that the other has not performed or will not perform is of importance in determining the matter of damages and may be of importance in determining the time when the cause of action arises. In all such cases a principal is affected by the knowledge of the agent acting for him as he would be by his own knowledge, within the limitations stated in the following Sections.

In determining tort liability, the knowledge which the actor has or should have is usually of great importance. This is particularly true in cases of negligence and in torts which, like deceit or malicious prosecution, are based upon the fact that the defendant has acted improperly in view of the knowledge which he has.

In the acquisition of property, the knowledge which a person has of the interests of third persons may prevent his acquiring an interest in the subject matter of the property free from the interests of others.

Illustrations:

Illustrations:

1. A, as agent for P, enters into a written contract with T, knowing that T does not understand the instrument and that it does not correspond to the agreement to which T consents. P is bound by A's knowledge and cannot enforce the contract against T.
2. In selling a horse to T, A makes a representation that it is sound. A's principal, P, is affected by A's knowledge that the horse is unsound.
3. A purchases Blackacre from B for P, knowing that T has an equity therein not of record. P is affected by A's knowledge, subject to the limitations stated in Sections 281- 282.
4. A is employed by P to report upon the title to Blackacre and to tell him of any secret equities which he may discover. A discovers that T has an equity in Blackacre, but negligently fails to report this to P, who accordingly buys Blackacre from B. P is affected by A's knowledge.
5. A, general manager for P, learns that a ship owned by P has sunk. Although he knows that P's insurance broker has been instructed to take out insurance upon the ship, "lost or not lost," but has not yet done so, he negligently fails to communicate with the broker and the insurance is effected. The insurance is invalidated by A's knowledge.
6. P employs A to manage rental property. A learns that a stairway used in common by a number of tenants is dangerously weak. P's liability for harm to a tenant, hurt by the fall of the stairway, results from A's knowledge.

Comment:

d. Knowledge of agent beneficial to principal. Just as the principal may be adversely affected because the agent has knowledge of facts, so he may be relieved from a liability which otherwise would exist by the fact that an agent or servant has knowledge. The performance of many acts is privileged only because done for a particular purpose and upon reasonable grounds. As evidence of such purpose or grounds, the knowledge of the agent who acts may be shown. Likewise, a

§ 272 General Rule, Restatement (Second) of Agency § 272 (1958)

contracting party may be excused from performance if he has reason to believe from the conduct of the other party that the other does not intend to perform. The reasonable belief of an agent in charge of performance of the contract that the other party does not intend to perform may be shown to relieve the principal from liability for failure to perform.

Illustrations:

Illustrations:

7. A, a railway conductor, overhears two passengers apparently making plans to rob the mail car. He thereupon imprisons them. His knowledge is a defense to the railroad in an action by the passengers against it for false imprisonment.
8. A overhears T, to whom he is about to deliver goods for P, state that after receiving them he does not intend to pay. A thereupon refuses to make the delivery. Irrespective of T's intent to pay for the goods, P is relieved from liability for failure to deliver them if it is found that A reasonably believed from what T said that T would not pay for them.

Comment:

e. Duration of knowledge. Matters once known may be forgotten when the event occurs to which notice or the lack of it is legally material. In some of such cases, as, for instance when the legal standard is "good faith" in the subjective sense, the forgetting is material; the law does not charge the party with the knowledge that he no longer has. In other situations, forgetting does not help him; the law holds him bound by the notice or knowledge he once had, whether or not he has it now. In neither case is it material whether he originally got the knowledge or notice himself or was charged with it because his agent had it.

f. Knowledge by agent of his breaches of duty. The principal is not affected by the knowledge of the agent that he is or has been violating instructions, although acting for the general purposes of his employer. See § 280.

g. Where agent is unauthorized. A principal may be affected by the knowledge of an agent not authorized to do the act or conduct the transaction in which knowledge is important if the act or transaction is one in which the principal is responsible for his agent's conduct. Thus, a principal, disclosed or undisclosed, is affected by the knowledge of a general agent as to relevant facts in connection with the contract which the agent has power to make. Likewise, a principal may be subject to liability in an action of tort because of the knowledge of an agent in doing an act in which liability depends on the agent's knowledge or lack of knowledge, as where a selling agent knowingly makes a misrepresentation. The principal is not, however, affected by the knowledge of an agent acting only within his apparent authority, except as stated in Section 273.

h. Effect of ratification. If a person does an act capable of ratification and this is ratified by the purported principal, the latter is affected by the knowledge of the purported agent to the same extent as if the act had been originally authorized. See Section 91 as to the knowledge of the principal required for ratification.

REPORTER'S NOTES

The following cases are illustrative of situations in which the master or other principal was held liable or was prevented from maintaining an action because of the knowledge of an agent as to the physical condition of land or other property which caused harm: *Linker v. Container Corp. of America*, 96 F.Supp. 911 (E.D.Pa.1951), knowledge of foreman of defective

§ 272 General Rule, Restatement (Second) of Agency § 272 (1958)

condition of premises; *U.S. v. One 1955 Model Buick Automobile*, 145 F.Supp. 72 (S.D.Ga.1956), knowledge of illegal use; *Arizona Livestock Co. v. Washington*, 52 Ariz. 591, 84 P.2d 588 (1938), knowledge of employees that children were accustomed to play with its more or less dangerous burros; *Barnett v. La Mesa Post No. 282*, 92 P.2d 461 (Cal.App.1939), reversed 15 Cal.2d 191, 99 P.2d 650 (1940), knowledge of vicious propensities of horse in custody of servant; *Dressel v. Parr Cement Co.*, 80 Cal.App.2d 536, 181 P.2d 962 (1947), knowledge of superintendent of dangerous condition of premises; *Fields v. Oakland*, 137 Cal.App.2d 602, 291 P.2d 145 (1955), similar facts; *Deacy v. McDonnell*, 131 Conn. 101, 38 A.2d 181 (1944), knowledge of presence of guest; *Capital View Realty Co. v. Meigs*, 92 A.2d 765 (D.C.Mun.App.1952), knowledge of viciousness of dog; *Dunlea v. R.D.A. Realty Co.*, 301 Mass. 501, 17 N.E.2d 707 (1938), knowledge of janitor of condition of premises; *Van Brock v. First Nat. Bank in St. Louis*, 349 Mo. 425, 161 S.W.2d 258 (1942), same; *Packard Mfg. Co. v. Indiana Lumbermen's Mut. Ins. Co.*, 356 Mo. 687, 203 S.W.2d 415 (1947), knowledge as to amount of gasoline stored in factory; *Cashin v. Northern Pac. Ry. Co.*, 96 Mont. 92, 28 P.2d 862 (1934), citing s 272, knowledge as to effect of previous blasting; *Smith v. Boston & Maine R.R.*, 87 N.H. 246, 177 A. 729 (1933), knowledge of presence of persons near dangerous right of way; *Coronal Realty Corp. v. Smith*, 187 Misc. 401, 63 N.Y.S.2d 684 (1946), knowledge of presence of vermin; *Graham v. N.C. Butane Gas Co.*, 231 N.C. 680, 58 S.E.2d 757, 17 A.L.R.2d 881 (1950), knowledge of escape of gas; *Tidal Oil Co. v. Forcum*, 189 Okl. 268, 116 P.2d 572 (1941), knowledge of viciousness of dog; *Benke v. Stepp*, 199 Okl. 119, 184 P.2d 615 (1947), same; *The Vogue, Inc. v. Cox*, 28 Tenn.App. 344, 190 S.W.2d 307 (1945), knowledge of defect in floor; *Mary Jane Stevens Co. v. First Nat. Bank Bldg. Co.*, 89 Utah 456, 57 P.2d 1099 (1936), knowledge of agent in charge of building as to action of adjoining landowners conducting building operations; *Aronovitch v. Ayres*, 169 Va. 308, 193 S.E. 524 (1937), knowledge of defective brakes.

In the following cases knowledge as to the terms of a contract or other matters with reference to contractual relations was involved: *United States v. One Chrysler Sedan*, 18 F.Supp. 684 (W.D.Pa.1937), knowledge by defendant that automobile to be sold would be used in an illegal manner; *Copeman Laboratories Co. v. General Motors Corp.*, 36 F.Supp. 755 (E.D.Mich.1941), knowledge of circumstances under which contract was made; *Standard Acc. Ins. Co. v. Sonne*, 128 F.Supp. 83 (W.D.Ky.1954), knowledge of manager of accident on insured premises, imputed to owner, so that failure to notify insurer avoided the policy by its terms; *Life & Casualty Ins. Co. of Tennessee v. Crow*, 231 Ala. 144, 164 So. 83 (1935), knowledge by insurance agent that insured had lost a foot; *National Union Fire Ins. Co. v. Morgan*, 231 Ala. 640, 166 So. 24 (1936), knowledge by insurance agent that insured did not have complete ownership; *Columbia Pictures Corp. v. De Toth*, 87 Cal.App.2d 620, 197 P.2d 580 (1948), citing s 272, knowledge by agent as to standard form of contract; *Veal v. Veal*, 50 Ga.App. 445, 178 S.E. 456 (1935), knowledge that married woman was signing note as surety for husband's pre-existing debt; *Barnes v. Gossett Oil Co.*, 58 Ga.App. 102, 197 S.E. 920 (1938), knowledge by transferee's agent that one giving check did not have sufficient funds in bank to pay it; *Scanlon-Thompson Coal Co. v. Lick Branch Coal Co.*, 243 Ky. 100, 47 S.W.2d 1007 (1932), knowledge of inferiority of seller's coal by buyer's receiving agent; *Reeme v. Motors Securities Co.*, 51 So.2d 833 (La.App.1951), knowledge by seller's agent that buyer was a minor; *Somerville Nat. Bank v. Hornblower*, 293 Mass. 363, 199 N.E. 918, 104 A.L.R. 1107 (1946), knowledge by broker's clerk that securities were received on a condition not performed; *Newark Hardware & Plumbing Supply Co. v. Stove Mfrs. Co.*, 136 N.J.L. 401, 56 A.2d 605 (1948), affirmed 137 N.J.L. 612, 61 A.2d 240, knowledge by defendant's receiving clerk that stoves were delivered to defendant by mistake; *Newsom v. Watson*, 198 Okl. 220, 177 P.2d 109 (1947), knowledge by plaintiff's agent on receiving a deed that it contained a clause now claimed by plaintiff to be improper; *Brandtjen & Kluge v. Hughes*, 236 S.W.2d 180 (Tex.Civ.App.1951), knowledge of seller's agent of damages which would be occasioned by delay in delivery; *U.S. Pipe & Foundry Co. v. City of Waco*, 100 S.W.2d 1099 (Tex.Civ.App.1937), affirmed 130 Tex. 126, 108 S.W.2d 432, certiorari denied 302 U.S. 749, 58 S.Ct. 266, 82 L.Ed. 579, knowledge of seller's sales manager as to the use to which property would be put.

The following cases furnish further illustrations of **knowledge imputed** to insurance companies through their agents: *St. Louis Fire & Marine Ins. Co. v. Witney*, 96 F.Supp. 555 (M.D.Pa.1951), citing s 272, knowledge of agent making contract of insurance, as to the agreement; *Sovereign Camp. W.O.W. v. Cole*, 192 Ark. 326, 91 S.W.2d 250 (1936), knowledge of agent as to physical condition of insured; *Hill v. Employers' Liability Assur. Corp.*, 122 Conn. 193, 188 A. 277 (1936), knowledge of agent as to transfer of subject matter; *Beddow v. Hicks*, 303 Ill.App. 247, 25 N.E.2d 93 (1940), knowledge of seller's agent that property insured was not wholly owned by insured; *Fay v. Swicker*, 154 Ohio St. 341, 96 N.E.2d 196 (1950), certiorari denied 342 U.S. 812, 72 S.Ct. 24, 96 L.Ed. 614, **knowledge not imputed** because of terms of the policy; *Globe & Rutgers Fire Ins. Co. v. Roysden*, 208 Okl. 660, 258 P.2d 644 (1953), knowledge by insurer's agent that it was planned to remove the property to another location; *Headley's Express & Storage Co. v. Pennsylvania Indem. Corp.*, 319 Pa. 240, 178

§ 272 General Rule, Restatement (Second) of Agency § 272 (1958)

A. 816 (1945), knowledge by agent issuing liability insurance upon trucks that the insured did not own the trucks; *Adams v. Lasalle Life Ins. Co.*, 99 S.W.2d 386 (Tex.Civ.App.1936), error dismissed, knowledge of insurer's soliciting agent that insured was in poor health.

In the following cases the defendant's agent had knowledge of facts concerning the rights of others in property held by the defendant which made the defendant's conduct improper: *In re Prudence-Bonds Corp.*, 57 F.Supp. 839 (E.D.N.Y.1944), affirmed in part and modified in part; *President and Directors of Manhattan Co. v. Kelby*, 147 F.2d 465 (2 Cir.), certiorari denied 324 U.S. 866, 65 S.Ct. 916, 89 L.Ed. 1422, violation of a trust indenture; *Angelus Securities Corp. v. Ball*, 20 Cal.App.2d 436, 67 P.2d 158 (1937), knowledge of agent that exchange of plaintiff's property for the property of another was unauthorized; *Fidelity & Casualty Co. of N.Y. v. Abraham*, 70 Cal.App.2d 776, 161 P.2d 689 (1945), knowledge of agent of assignee of a judgment of agreement that judgment should not be enforced against one of the judgment debtors; *Klein v. Inman*, 298 Ky. 122, 182 S.W.2d 34 (1944), knowledge of agent of corporation transferring shares of rights of alleged transferor; *Raines v. Moran*, 270 App.Div. 979, 62 N.Y.S.2d 817 (1945), knowledge by agent conducting transaction of equity of third person; *Bonded Royalties v. Jefferson*, 174 Okl. 345, 50 P.2d 281 (1935), same; *Fidelity & Deposit Co. of Maryland v. Hamilton Nat. Bank*, 23 Tenn.App. 20, 126 S.W.2d 359 (1939), knowledge of agent of bank as to ownership of funds on which check was drawn; *Ganchoff v. Bullock*, 234 Wis. 613, 291 N.W. 837 (1940), knowledge of attorney of Home Owners Loan Corp. that second mortgage was being given on the property.

Miscellaneous situations in which **knowledge** was **imputed** to the principal: *Rosenthal v. J. Leo Kolb, Inc.*, 97 A.2d 925 (D.C.Mun.App.1953), knowledge of assignee's agent of terms of lease binding on assignee; *Walker v. State*, 89 Ga.App. 101, 78 S.E.2d 545 (1953), knowledge by servants of violation of rules by other servants; *Rose v. City of Chicago*, 317 Ill.App. 1, 45 N.E.2d 717 (1942), in action by passenger for harm by strikers, knowledge of manager or corporation as to conduct of strikers; *Mayer v. Ford*, 12 So.2d 618 (La.App.1943), knowledge of agent in charge of land that defendant, a neighbor, was undercutting the land; *Frank v. Dodd*, 130 S.W.2d 210 (Mo.App.1939), as respects right to forfeit lease, disclaimer of knowledge of improvements made by lessee was not available to lessor, where lessor's agent had full knowledge of improvements; *Dumas v. Hartford Acc. & Indem. Co.*, 94 N.H. 484, 56 A.2d 57 (1947), in action by insured for negligence in not effecting a settlement, knowledge by agent of insurer that person liable had made an offer of settlement; *Devlin to Use of U.S. Fidelity & Guaranty Co. v. School District of Philadelphia*, 337 Pa. 209, 10 A.2d 408 (1940), knowledge of a foreman of a demolition contractor that a scout troop had the right to enter a partly demolished building.

In the following cases it was held that the principal was not bound by the knowledge of an agent who had no authority to act with reference to the matter involved, in many cases irrespective of the existence of apparent authority: *Hare & Chase v. Nat. Surety Co.*, 49 F.2d 447 (S.D.N.Y.1931), affirmed 60 F.2d 909 (2 Cir.), certiorari denied 287 U.S. 662, 53 S.Ct. 222, 77 L.Ed. 572, citing § 273, knowledge of soliciting agent after execution of contract where no reliance upon appearance of authority; *National Carbon Co. v. Bankers' Mortgage Co.*, 77 F.2d 614 (10th Cir.1935), knowledge by agent to collect rents as to violation of law by tenants; *Duplex Envelope Co. v. Denominational Envelope Co.*, 80 F.2d 179 (4th Cir.1935), knowledge by agent not authorized to contract for the use of corporation's premises as to tortious operation by tenant; *St. Louis Fire & Marine Ins. Co. v. Witney*, 96 F.Supp. 555 (M.D.Pa.1951), stating Pennsylvania rule that **knowledge** is **imputed** only when acquired in course of employment; *Great American Indem. Co. v. First Nat. Bank of Holdenville*, 100 F.2d 763 (10th Cir.1938), citing s 272, knowledge of bank's cashier of improper use of funds by him as executor; *Crumpton v. N.Y. Life Ins. Co.*, 27 Ala.App. 137, 166 So. 730 (1938), knowledge by soliciting agent of insurance company that insured was not in good health; *Hale v. Depaoli*, 33 Cal.2d 228, 201 P.2d 1, 13 A.L.R.2d 183 (1948), citing s 272, **knowledge** of partner not **imputed** to purchaser; *Roadside Rest v. Lamkershim Estate*, 76 Cal.App.2d 525, 173 P.2d 554 (1946), lessor appointing lessee to collect rent from sublessee not bound by attempted modification in terms of sublease; *Oldenburg v. Brody*, 139 Cal.App.2d 543, 293 P.2d 844 (1956), knowledge of broker as to state of title; *Poole v. Newark Trust Co.*, 1 Terry 163, 8 A.2d 10 (Del.1939), knowledge of bank's attorney that depositor was incompetent; *Thompson v. Sun Oil Co.*, 135 Fla. 731, 185 So. 837 (1931), citing s 272, knowledge of salesmen of lessor that lessee was planning to violate lease by transferring the premises to another; *Woulfe v. D'Antoni*, 158 So. 394 (La.App.1935), knowledge of a servant having no control over defendant's dog that dog was vicious; *MacQuinn v. Patterson*, 147 Me. 196, 85 A.2d 183 (1951), citing § 273, knowledge of person employed to clean up premises as to an earth fill improperly made; *Wurn v. Allen Cadillac Co.*, 301 Mass. 413, 17 N.E.2d 305 (1938), knowledge of servant of presence of plaintiff on premises, servant having no duties as to the use of the premises; *Great American Indem. Co. v. Richard*, 90 N.H. 148, 5 A.2d 674 (1939), soliciting agent's

§ 272 General Rule, Restatement (Second) of Agency § 272 (1958)

knowledge as to unauthorized changes in automobile policy; *Akerson v. D.C. Bates & Sons*, 180 Or. 224, 174 P.2d 953 (1946), citing s 272, knowledge of servant as to plaintiff's presence on defendant's land; *Western Union Tel. Co. v. Shaw*, 173 S.W.2d 335 (Tex.Civ.App.1943), rehearing denied 173 S.W.2d 766, reversed 142 Tex. 243, 177 S.W.2d 52, knowledge of relation between sender and recipient of telegram; *Phillips Petroleum Co. v. Daniel Motor Co.*, 149 S.W.2d 979 (Tex.Civ.App.1941), error dismissed, judgment correct, noted in 38 Mich.L.Rev. 1339; 20 N.C.L. 418; 7 Pitts.L.R. 116, citing s 272, knowledge by bookkeeper of buyer's agent that seller's agent had misappropriated the purchase price.

If personal knowledge is required for liability, the rule as to **imputed knowledge** does not apply: *Petition of Liebler*, 19 F.Supp. 829, W.D.N.Y.1937.

Public policy may prevent the normal operation of **imputed knowledge** as to governmental liability: *Re Texas City Disaster Litigation*, 197 F.2d 771 (5th Cir.1952), certiorari denied 344 U.S. 873, 73 S.Ct. 166, 97 L.Ed. 676.

See also article by the Reporter entitled *Notice Through an Agent*, 65 Uni.Pa.L.R. 1 (1916). Also articles by Merrill, *The Anatomy of Notice*, 3 Uni. Chicago L.R. 417 (1936); *Unforgettable Knowledge*, 34 Mich.L.R. 474 (1936).

Case Citations - by Jurisdiction

U.S.
C.A.1
C.A.2
C.A.3
C.A.5
C.A.6
C.A.7
C.A.8
C.A.9
C.A.11
C.A.D.C.
U.S.Ct.Ct.
E.D.Ark.Bktry.Ct.
S.D.Cal.Bktry.Ct.
D.Del.
D.D.C.
D.D.C.Bktry.Ct.
M.D.Fla.
N.D.Iowa
E.D.La.
D.Mass.
E.D.Mich.
I.D.N.Y.
S.D.N.Y.
S.D.N.Y.Bktry.Ct.
N.D.Ohio
S.D.Ohio

§ 272 General Rule, Restatement (Second) of Agency § 272 (1958)

D.Or.
E.D.Pa.
E.D.Pa.Bkrtcy.Ct.
D.P.R.
D.R.I.
D.Vt.
W.D.Wash.
E.D.Wis
Alaska
Alaska App.
Ariz.
Ariz.App.
Cal.App.
Conn.
D.C.App.
Fla.App.
Idaho
Mass.
Mass.App.
Mich.
Minn.
Miss.
N.H.
N.J.
N.J.Super.
N.M.App.
N.Y.
N.Y.Sup.Ct.App.Div.
Ohio
Or.
Pa.
Tex.App.
Tex.Civ.App.
Utah
Utah App.
Vi.
Wash.App.
Wis.

U.S.

U.S.1972. Cit. in sup. This was an appeal of a criminal conviction for passing forged money orders. The only evidence to link defendant to the crime was the testimony of a coconspirator who stated at the trial that he had not been given immunity from prosecution in return for his testimony. After the trial, it was revealed that the government attorney who presented the case to the grand jury had offered the witness immunity, but that the attorney who prosecuted the case had no knowledge of this offer. The Court held that the first attorney's promise of immunity was attributable to the entire prosecution, regardless of whether or not the attorney had the power to make it. *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 766, 31 L.Ed.2d 104.

§ 272 General Rule, Restatement (Second) of Agency § 272 (1958)

C.A.1

C.A.1, 1988. Quot. in case cit. in appendix to diss. op. A Massachusetts district court applied judicial estoppel against the government, striking certain predicate acts from the RICO count of an indictment against six defendants. The government appealed. This court reversed, holding that the Massachusetts federal district court erred in applying judicial estoppel against the government in the RICO prosecution; the government had agreed to dismiss certain counts in an earlier New York district court proceeding that arose out of the same underlying conduct as the stricken predicate acts, but this court said that the benefit flowing to the government in return for the earlier dismissals (relief from the time strictures of the Speedy Trial Act) was merely an incidental reward. The dissent disagreed, contending that the district court correctly estopped the government from alleging the predicate acts. Appended to the dissent was an excerpt from the Massachusetts federal district court opinion, stating, in part, that the prosecutor's office was the spokesman for the government, and that a promise made by one attorney must be attributed to the government. U.S. v. Levasseur, 846 F.2d 786, 799, cert. denied 488 U.S. 894, 109 S.Ct. 232, 102 L.Ed.2d 222 (1988).

C.A.2

C.A.2, 1999. Cit. in sup. Trucking company challenged \$1,000 penalty assessed when the Internal Revenue Service Diesel Compliance Inspector discovered that company was holding or using nontaxable fuel for taxable purposes, in violation of 26 U.S.C. § 6715(a). The district court upheld the assessment. Affirming, this court held that the lower court did not err in determining that company knew or should have known that one of its employees or agents had intentionally introduced red-dyed, purposefully identifiable tax-exempt fuel into its propulsion tank, the tank used for the storage of taxable fuel. Apollo Fuel Oil v. U.S., 195 F.3d 74, 76.

C.A.2, 1997. Com. (a) cit. in disc. Former employee of university dental center sued her boss, his supervisors, and university for violations of Title VII and Title IX, alleging that boss, by his crude and offensive comments, had created a sexually and racially hostile work environment. Employee maintained that university's liability stemmed from its failure to remedy the situation once she made boss's supervisor aware of the problem in two separate letters. After determining that individual liability was precluded, the district court entered summary judgment for boss and supervisors, and later granted university's motion for summary judgment as well. Affirming, this court held, in part, that, even though supervisor's knowledge of the harassment could be imputed to university on the ground that he was a high-level official with a duty to inform university of boss's misconduct, university was not liable for a failure to take immediate action where employee specifically asked supervisor to keep the matter confidential and to refrain from acting until a later date. Torres v. Pisano, 116 F.3d 625, 637, cert. denied ... U.S. ..., 118 S.Ct. 563, 139 L.Ed.2d 404 (1997).

C.A.2, 1994. Cit. in headnotes, cit. in sup. Convicted defendant granted new trial sued officer conducting lineup in which witness identified him under 42 U.S.C.A. § 1983, alleging that defendant arranged to have witness wait in precinct parking lot for arrival of defendant and plaintiff from another precinct, providing opportunity for witness to see plaintiff in custody before lineup. This court affirmed the district court's finding that suit was barred by three-year limitation statute, and held that plaintiff's claim may have accrued as early as date of hearing at which defendant's conduct was disclosed to plaintiff's counsel, prompting counsel to move to suppress lineup identification, but that it certainly accrued no later than date plaintiff was sentenced for crimes of which he was convicted with aid of identification, both dates occurring more than three years before plaintiff brought suit. Veal v. Geraci, 23 F.3d 722, 723, 725.

C.A.2, 1991. Cit. in disc. A wholly owned corporation of the Iranian government brought suit for damages against a tanker and its owners and operators for failure to deliver certain chemicals originally destined for Iran but ultimately discharged at Taiwan after the outbreak of war between Iran and Iraq. On remand, the district court granted summary judgment for the defendants. Affirming, this court held that, since the plaintiff's agent knew that the transaction violated United States law

§ 272 General Rule, Restatement (Second) of Agency § 272 (1958)

imposing an embargo on the sale or transfer of various items to Iran, that knowledge was attributable to the plaintiff as principal; therefore, the plaintiff was in *pari delicto* with those who intentionally violated the trade embargo and was barred from recovery. *National Petrochemical Co. v. M/T Stolt Sheaf*, 930 F.2d 240, 244.

C.A.2, 1983. Cit. in fn. Plaintiffs brought suit for federal securities fraud, common law fraud, and negligent misrepresentation, claiming that defendant misrepresented or failed to disclose to their representative the worthlessness of stock purchased. Dismissal of the complaint was reversed on appeal. On remand, judgment was rendered for defendant, and plaintiffs successfully appealed. Defendant asserted that plaintiffs' representative knew the true condition of the stock, that he was acting as plaintiffs' agent, and that his **knowledge** should be **imputed** to his principals. The court agreed that an agent's **knowledge** was **imputed** to the principal but concluded that plaintiffs' representative was not acting as their agent when the stock deal was made. Judgment affirmed; case remanded for addition of interest. *Mallis v. Bankers Trust Co.*, 717 F.2d 683, 689.

C.A.2, 1978. Cit. in sup. in disc. op. Appeal by shipowner from decision finding him liable for injuries sustained by plaintiff carpenter when he slipped on a patch of grease on defendant's ship and sustained permanent injuries to his knee. The trial court found defendant shipowner liable for damages in the amount of \$65,620.69, after a deduction which included \$8,000 per year for remaining earning ability and 40% contributory negligence. The shipowner appealed, and plaintiff cross-appealed from the reduction in the damage awarded. The court affirmed in part, reversed in part and remanded. The trial court had found that the ship's crew placed cluster lights and their attached electrical wires in the passageway at least one-half hour before plaintiff's accident and that wires and other clutter, which lay on top of the greasy deck, created an "obviously dangerous condition which would have been obvious to any prudent person." The trial court found that plaintiff had actual or constructive notice of this condition, inasmuch as the ship's personnel should have seen the grease on the deck when they put on the cluster lights. Furthermore, the crew should have anticipated that plaintiff would be unable to avoid the dangerous condition. The court affirmed on the issue of liability, reversed on the issue of damages, believing \$8,500 per year deduction for remaining earning capacity to be too high a deduction for the 58-year-old partially disabled plaintiff with a history of heart trouble, and it remanded for redetermination of plaintiff's damages. The dissent argued that there was no substantial basis for finding that the lights aggravated the situation, and that the grease removal was the primary responsibility of the independent contractor and not the shipowner. Furthermore, any knowledge of unknown deckhands about the presence of the grease would be imputable to the shipowner only if they had a duty to inform plaintiff about it, which duty they may not have had unless they were ship's officers, for which there was no proof at all. Moreover, even if such a duty existed, there was no reason to think that the independent contractors, who were primarily responsible for eliminating or warning about it, would not take care of the problem as they were bound to do. *Canizzo v. Farrell Lines, Inc.*, 579 F.2d 682, 690. certiorari denied 439 U.S. 929, 99 S.Ct. 316, 58 L.Ed.2d 322 (1978).

C.A.2, 1974. Quot. in sup. Plaintiff seller, a Barbados company organized and owned by a number of United States citizens, brought an action against a Delaware Corporation, the buyer of its corporate assets for the amount allegedly due as an unpaid balance of the purchase price. The buyer counterclaimed for alleged breach of certain financial representations and warranties. The contract provided that it would be interpreted under and governed by the laws of New York. On closing day, the buyer discovered misrepresentations by the seller in its financial statement; however, instead of repudiating the contract the buyer negotiated an amendment with the seller's president which was in writing and signed by the president. The plaintiff alleged that the amendment was never ratified by its board of directors as required by the board resolution approving the sale, and that the president had no authority to sign it. The District Court entered judgment dismissing the complaint and counterclaim and both parties appealed. Held: Judgment affirmed. The amendment was not invalid under New York law for lack of consideration, notwithstanding the New York statute of frauds requiring that if an agent executes an agreement affecting or relating to real estate, the agent's authorization must be in writing, since there was no evidence that the amendment related to or affected any real property; and further that a president of a corporation is not an agent within the meaning of that statute. Even if the amendment were held to be invalid because the signing by plaintiff's president was unauthorized, plaintiff corporation's failure to repudiate the amendment until several months after the signing estopped it from doing so thereafter. Further plaintiff's president was under a duty to immediately inform plaintiff of the amendment,

§ 272 General Rule, Restatement (Second) of Agency § 272 (1958)

and his failure to do so **imputed** his **knowledge** of the amendment to the corporation. Plaintiff also argued that the provision in the original agreement, stipulating that New York law would govern its interpretation, was not applicable to the amendment, and that a New York court would therefore apply Barbados law which requires a new consideration to accomplish a binding modification of an existing agreement. The court dismissed this argument noting that it ignores the rationale of the principle that “the law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.” *Scientific Holding Co. v. Plessey, Inc.*, 510 F.2d 15, 26.

C.A.2, 1959. Plaintiff, a wholesale distributor of doughnuts and other baked goods under federally registered trade marks was not prevented by laches from enjoining defendant’s use of the trade mark because four years prior to the commencement of the infringement action plaintiff’s New York sales representative, who also represented several other companies besides plaintiff, called on defendant and observed boxes bearing the trade mark on desk of defendant’s bakery manager, where the sales representative’s contacts with defendant were on behalf of companies other than plaintiff, since knowledge of sales representative would not be imputed to plaintiff. *Dawn Donut Co. v. Hart’s Food Stores, Inc.*, 267 F.2d 358, 363.

C.A.3

C.A.3, 2009. Com. (a) quot. in sup. Former employee of paper plant sued former employer for sexual harassment and retaliation, alleging that defendant knew or should have known of harassment at the plant through two supervising technicians who had been informed of the harassment, but that it failed to take prompt and appropriate remedial action. The district court granted summary judgment for employer. Affirming, this court held, inter alia, that the two supervising technicians were not management-level employees for purposes of imputing to employer their knowledge of potential co-worker harassment, because they did not have authority to affect the employment status of their teammates and because they were not employed to discover or act upon knowledge or rumors of sexual harassment but, rather, to keep machines at the plant working. *Huston v. Procter & Gamble Paper Products Corp.*, 568 F.3d 100, 107.

C.A.5

C.A.5, 2001. Cit. in fn. Owner of barge that struck and ruptured natural-gas pipeline filed complaint for exoneration from or limitation of liability, seeking to limit its liability to the value of the barge and its pending freight. Reversing the district court’s denial of limited liability and remanding, this court held that the position of the construction superintendent who supervised one of owner’s company’s construction projects and who had made the decision to leave the barge unmanned was not sufficiently elevated in the corporate hierarchy to **impute** his **knowledge** to the company so as to preclude limitation of owner’s liability. The court said that, although superintendent possessed significant authority over the management of an individual job, he lacked authority to make basic business decisions for the company. *In re Hellenic Inc.*, 252 F.3d 391, 395.

C.A.5, 1982. Cit. in fn. in sup. A ship owner brought an action against stevedores and a charterer for damages to the cargo compartment of its ship allegedly caused when the stevedores unloaded the ship’s cargo with heavy grabs and bulldozers. The defendant stevedoring company argued that the agent appointed by the charterer at the point of discharge was an agent of the ship owner, and that it had the authority to bind the ship owner in its berthing agreement with the stevedoring company. The defendant stevedoring company also alleged that because the berthing agreement between the stevedoring company and the charterer’s agent acknowledged that the agreement was subject to all published tariffs and ordinances, the agent bound the ship owner to a nonmandatory tariff limiting the liability of the stevedores for damages to the ship owner’s vessel during all stevedoring operations. The lower court granted damages to the plaintiff as against the stevedore and dismissed the complaint against the charterer without prejudice. This court affirmed the lower court in part, reversed it in part, and remanded. The court held, inter alia, that because the charterer selected its agent, and the vessel owner exercised no control over the conduct

§ 272 General Rule, Restatement (Second) of Agency § 272 (1958)

of the agent, the agent was acting on the behalf of the charterer in the matter of discharging the cargo. Thus he lacked actual authority to bind the vessel owner in accepting the tariff's limitation of liability for damage to the vessel. The court stated that a principal is considered to know only what its agents discover concerning matters in which the agent has power to bind the principal. The court also found that no apparent authority existed because there was no representation that would lead the stevedoring company to believe that the charterer's agent represented the ship owner. The court remanded to determine whether the stevedore damage required detention of the vessel for repairs before the next scheduled lay up. *Marvirazon Compania, Etc. v. H.J. Baker and Bros., Inc.*, 674 F.2d 364, 367.

C.A.5, 1980. *Cit. in disc.* The United States brought a suit, seeking forfeiture of a sum of currency seized by customs officials. Preliminary to the commencement of this suit, a car, attempting to enter the United States from Mexico, was stopped and searched, revealing a large sum of concealed currency. The driver was arrested and indicted on a count of knowingly and wilfully transporting currency in excess of \$5,000 into the United States without having filed the requisite report. After his arrest, the driver of the car agreed to pay another a retainer if he would represent him in matters relating to the seizure. A formal written document was executed by the parties which purported to be an assignment of \$35,300 of the seized currency. The assignee undertook to serve a copy of the assignment on the United States by attempting to serve a copy of the assignment on a customs supervisor who refused to accept the assignment on behalf of customs. The assignee thereafter sought to intervene in the forfeiture proceeding, but the district court denied the claimant's standing to contest the forfeiture, and this appeal followed. In affirming the lower court's ruling, the court held that the assignee took the right, title, and interest in the currency which the assignor possessed at the time of the assignment, and such right, title, and interest was insufficient to provide standing for the assignee in the forfeiture proceeding. The court identified the decisive issue as whether the assignee perfected his assigned interest in the seized currency by giving notice of the assignment to the United States, the court concluding that the refusal of the customs agent to acknowledge receipt of the assignment was sufficient to appraise the assignee that the agent lacked authority to receive notice on behalf of the United States. *United States v. Currency Totalling \$48,318.08*, 609 F.2d 210, 215, rehearing denied 612 F.2d 579 (1980).

C.A.6

C.A.6, 1993. *Cit. in fn.* Alleged Nazi war criminal was extradited to face capital charges in Israel. After his acquittal, his habeas corpus case, in which he lost in the district court and on appeal, was reopened by this court, which vacated that judgment and held, *inter alia*, that attorneys for the United States government had engaged in prosecutorial misconduct by recklessly disregarding their obligation to disclose to the courts and the detainee exculpatory information that was in their possession, even though they might have acted in good faith. This misconduct was attributable to the government, said the court, as the prosecutor's office was an entity of, and spokesman for, the government. *Demjanjuk v. Petrovsky*, 10 F.3d 338, 353, cert. denied 513 U.S. 914, 115 S.Ct. 295, 130 L.Ed.2d 205 (1994).

C.A.7

C.A.7, 1981. *Cit. in disc.* A taxpayer, as the personal representative of an estate, brought an action to recover the additional estate tax assessed following his failure to timely file the return and pay the tax. The lower court awarded summary judgment in favor of the United States and the taxpayer appealed. The taxpayer argued that he had not known when the return was due because his attorney had given him the wrong information about an extension and, therefore, a refund of the penalty should be allowed. The court stated that the taxpayer had a non-delegable duty to file the return on time and this duty extended to and encompassed the proper and timely filing of an application for an extension and the ascertainment that an extension had been granted. The court found that the attorney had been the taxpayer's agent and that the attorney had been negligent by not filing the application for an extension and by not informing himself and advising the taxpayer as to the provisions of the tax law regarding the filing of an estate tax return and the obtaining of an extension of its due date. The court stated that the taxpayer was charged with the knowledge, or lack of it, of his agent and, accordingly, held that the attorney's negligence

§ 272 General Rule, Restatement (Second) of Agency § 272 (1958)

cannot be transmuted into “reasonable cause” for the late filing of the return. Because the taxpayer’s reliance on the attorney to file the return did not constitute “reasonable cause” for the late filing, the court held that the imposition of the late penalty was proper and affirmed the judgment of the lower court. *Fleming v. United States*, 648 F.2d 1122, 1127.

C.A.8

C.A.8, 2005. Cit. in disc., illus. 6 cit. in disc. Hotel chain brought suit against window manufacturer and general contractor for, in part, negligence and breaches of various contractual duties, after thermal-break shrinkage in hotel windows caused water infiltration. District court granted summary judgment for defendants. Affirming, this court held that plaintiff’s claims were time-barred because plaintiff failed to raise a genuine issue of material fact as to whether, through the exercise of reasonable diligence, it should have known of the defects in the hotel windows more than 10 years before commencing this action. Because hotel employees’ knowledge of repairs made to windows in early 1990s was imputed to their employer as principal, no reasonable jury could find that plaintiff had insufficient inquiry notice of the problem. *John Q. Hammons Hotels, Inc. v. Acom Window Systems, Inc.*, 394 F.3d 607, 611.

C.A.8, 1995. Cit. in headnote, cit. in disc. Renters of post office box sued United States government under Federal Tort Claims Act for, inter alia, conversion, alleging that they were injured by a postal worker’s repeated opening and pilfering of their adult-oriented mail. Plaintiffs argued that defendant was liable for worker’s illegal conduct because post office authorized the behavior by failing to act once it had notice of it. Reversing and remanding the district court’s grant of summary judgment for defendant on the conversion claim but otherwise affirming, this court held that further consideration was needed to determine whether defendant had notice when plaintiffs reported the worker’s conduct to the postal desk clerk or whether the Post Office Code of Conduct required them to notify the principal, the post office, directly. *Tonelli v. U.S.*, 60 F.3d 492, 493, 495.

C.A.8, 1976. Cit. in sup. The United States Attorney charged the defendant bank with making an unlawful political contribution and misapplying bank funds. The bank, in addition to arguing that it had merely lent money to the political organization instead of contributing to it, sought to have the indictment dismissed because of preindictment delay. The Comptroller of the Currency had informed the Department of Justice in Washington of the loan more than two years before the local United States Attorney brought the indictment. The district court dismissed the indictment, finding that the government’s forty-seven month delay in bringing the indictment caused substantial prejudice to the defendant’s claim. The district court **imputed the knowledge** of the Department of Justice to the United States Attorney in considering the defendant’s claim. On appeal, the court affirmed, holding that the district court was not clearly erroneous in finding that the delay caused substantial prejudice to the defendant and was an unreasonable violation of his right to due process. The appellate court also stated that the Justice Department’s **knowledge** was properly **imputed** to the local federal prosecutor, holding that one office within a single federal agency must know what another office of the same agency is doing or has done with regard to an accused. *United States v. Barket*, 530 F.2d 189, 195.

C.A.8, 1968. Com. (c) cit. but dist. The plaintiff, trustee in bankruptcy of a corporation, appealed the district court’s affirmance of a referee’s decision that the defendant bank was a secured creditor of the corporation because it held an assignment of accounts and a factor’s lien executed in its favor as security. Although the agreement between the bankrupt and the defendant stated that the signature of the secretary as well as that of the president was required to authorize borrowing with the defendant, the security agreements, although not the note which they secured, were signed only by the president. While the court recognized that implied authority may be inferred from the facts and circumstances, it found that the express provision requiring the signature of both officers negated the implied authority of the president alone to bind the bankrupt here. It thus held the security agreements invalid and, finding no equitable estoppel to run against the bankrupt as had the referee, the court reversed and remanded a judgment for the defendant. *Kenneally v. First Nat’l Bank*, 400 F.2d 838, 842, certiorari denied, 393 U.S. 1063, 89 S.Ct. 716, 21 L.Ed.2d 706 (1969).

C.A.9

C.A.9, 2008. Cit. in case quot. in sup. Criminal defendant convicted of first-degree murder and burglary petitioned for a writ of habeas corpus challenging, among other things, the jury's findings of special circumstances that made him death-eligible. The district court granted the petition as to the findings. Affirming, this court held, inter alia, that the prosecution failed to disclose that the police had provided significant inducements to a jailhouse informant who testified against defendant. The court rejected the State's argument that the prosecutor was not aware of the inducements, noting that, as a spokesperson for the government, the prosecutor had a duty to investigate all promises made on behalf of the government, including promises made by the police as spokespersons for the government. *Jackson v. Brown*, 513 F.3d 1057, 1073.

C.A.9, 2007. Cit. in case cit. in diss. op. (general cite). In a federal-racketeering-and-drug-conspiracy prosecution of alleged gang members, the district court ordered federal prosecutors to turn over to the defense local-police reports that contained witness names and both inculpatory and exculpatory evidence. After the prosecutors refused to produce the reports, asserting privileged work product, the district court ordered evidentiary sanctions against the government. A panel majority vacated and remanded based on its holding that the police reports were not discoverable because they were covered by the federal work-product privilege. This court denied defendants' petitions for panel rehearing and for rehearing en banc. The dissent argued that the panel majority's rulings effectively transformed local police officers into federal "government agents" for purposes of exempting their reports from discovery pursuant to the federal work-product privilege and merited rehearing en banc. *U.S. v. Fort*, 478 F.3d 1099, 1103.

C.A.9, 2004. Cit. in case quot. in spec. conc. op. Deputy district attorney filed § 1983 complaint, alleging adverse employment actions by county and supervisors in retaliation for plaintiff's testimony regarding his investigation of a sheriff's alleged lies in a search-warrant affidavit. District court granted defendants summary judgment. Reversing and remanding, this court held, inter alia, that fact that plaintiff prepared memorandum and gave testimony in fulfillment of a regular employee responsibility to investigate sheriff's alleged misconduct did not deprive him of protection under the First Amendment. The specially concurring opinion stated that plaintiff had no personal stake, and therefore no cognizable First Amendment interest, in the speech for which he sought protection. *Ceballos v. Garcetti*, 361 F.3d 1168, 1190, certiorari granted 543 U.S. 1186, 125 S.Ct. 1395, 161 L.Ed.2d 188 (2005), reversed and remanded 547 U.S. 410, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006).

C.A.9, 1989. Cit. in disc. A machinist who was fired from work because of excessive absenteeism and tardiness caused by his cluster migraine condition sued his employer for, inter alia, violating the state's antidiscrimination law. The trial court entered judgment for the defendant, holding that the management personnel who made the decision to terminate the plaintiff were not personally aware that his absences were attributed to his cluster migraine condition, which was protected by the antidiscrimination law. Affirming in part and reversing in part, this court held that, since the plaintiff's immediate supervisor was well aware that the plaintiff's absenteeism was caused by his migraine condition, this knowledge should have been communicated to the management personnel who made the decision to fire the plaintiff; therefore, the defendant was liable for violating the antidiscrimination law. *Kimbrow v. Atlantic Richfield Co.*, 889 F.2d 869, 876, cert. denied 498 U.S. 814, 111 S.Ct. 53, 112 L.Ed.2d 28 (1990).

C.A.9, 1979. Cit. in sup. Owner of a patent for a custom automobile wheel brought an action against a competitor for infringement. The trial court entered a directed verdict in favor of the defendant on the ground that the plaintiff's patent was procured by fraud in the Patent Office and was thereby invalid. The allegation of fraud relates to an affidavit by the president of the plaintiff company in which he swore that the company had engaged only in a small amount of advertising to promote its custom wheel. On the strength of this affidavit the Patent Office reversed its two earlier rejections of the plaintiff's design

§ 272 General Rule, Restatement (Second) of Agency § 272 (1958)

and allowed the patent to issue on the theory that the healthy sales of the wheel were due solely to its novelty of design. It was determined by the trial court, however, that in fact the plaintiff had engaged in a vigorous advertising campaign to promote its custom wheel, had run 18 advertisements for the wheel in trade publications, and spent more than \$56,000 to reach consumers and industry audiences. On appeal the plaintiff argues that the trial court erred in excluding evidence of the state of mind of the company's president relating to the scienter requirement for a finding of fraud on the Patent Office. The plaintiff's president admits that he erred in the affidavit, but insists that it was because he personally misunderstood his subordinates' reports about the advertising. The court rejected the plaintiff's contention that this presented a jury question in scienter. The court noted that under well established agency doctrines a corporate principal is considered to know what its agents discover concerning those matters in which the agents have power to bind the principal. Furthermore, even when an agent has no reason to know the falsity of the representations he makes the company is liable if it knows the falsity and has reason to know that the agent would make the statement. Thus, the court reasoned that since some agents of the plaintiff company had to know about the corporation's advertising for the wheels, the plaintiff company must be said to have known it. *W.R. Grace v. Western U.S. Industries*, 608 F.2d 1214, 1218, certiorari denied 446 U.S. 953, 100 S.Ct. 2920, 64 L.Ed.2d 810 (1980).

C.A.9, 1970. Cit. in fn. in sup. The Government and the defendant agreed in 1934 that forest lands of the defendant would be dedicated to the Government, if a nearby national forest was extended to include them. The Government then issued a public land order which seemed to relinquish any claim to defendant's lands and made no claim upon them for 30 years while the defendant improved them. It was held that the Government's action for declaratory relief and specific performance was barred by the doctrine of equitable estoppel, the knowledge of the Government's agents being imputed to it, and that specific performance would work an undue hardship upon the defendant, which the court could refuse to decree. *United States v. Georgia-Pacific Company*, 421 F.2d 92, 97.

C.A.11

C.A.11, 2011. Cit. in sup. Mexican farm workers hired as guest workers through the Department of Labor's H-2A visa program brought suit under the Fair Labor Standards Act against Georgia onion grower that employed them, alleging that they were entitled to reimbursement from defendant for the fees that employment agencies had charged them. The district court granted summary judgment for defendant. Affirming in part, this court held, inter alia, that, under principles of agency law, defendant was not liable for the fees, because plaintiffs failed to present substantial evidence that defendant provided employment agencies with the authority to collect those fees. The court rejected plaintiffs' argument that defendant was liable for the fees because contractor employed by defendant to facilitate plaintiffs' hiring was aware of the fees and this **knowledge** was **imputed** to defendant; this argument failed because the collection of the fees was outside the scope of authority granted by defendant. *Ramos-Barrientos v. Bland*, 661 F.3d 587, 602.

C.A.D.C.

C.A.D.C.1988. Quot. in disc. Black construction workers sued a local union and the international union, charging that various requirements for admission discriminatorily denied black rodmen the benefits of union membership. The trial court found for the plaintiffs. Affirming in part and reversing in part, this court held, inter alia, that the international was vicariously liable for the discriminatory conduct of its local on the basis of an agency relationship under which the local acted on behalf of the international and was subject to its control. *Berger v. Iron Workers Reinforced Rodmen Local 201*, 843 F.2d 1395, 1437, cert. denied 490 U.S. 1105, 109 S.Ct. 3155, 104 L.Ed.2d 1018 (1989).

U.S.Ct.Ct.

§ 272 General Rule, Restatement (Second) of Agency § 272 (1958)

U.S.Ct.1991. Cit. but dist. Government contractor that constructed a salmon fingerling bypass in an existing dam sued the federal government for equitable adjustment, alleging that defendant's failure to disclose its superior knowledge as to the inadequacy of plaintiff's tools and methods for the job caused plaintiff to complete the project at a financial loss. Dismissing the complaint, the court held, inter alia, that, in the absence of affirmative misrepresentations, defendant was not a guarantor against poor judgment with respect to methodologies selected by plaintiff. The court, however, rejected defendant's argument that plaintiff's consultations with a potential supplier of an excavating machine created a principal-agent relationship so as to **impute** to plaintiff the supplier's **knowledge** regarding the performance of the machine in tunneling through concrete. Granite Const. Co. v. U.S., 24 Cl.Ct. 735, 748.

E.D.Ark.Bkrcty.Ct.

E.D.Ark.Bkrcty.Ct.2013. Cit. in sup. Former clients, including a limited liability company (LLC), brought an adversary proceeding against Chapter 7 debtor/financial advisor, alleging that debtor acted as a fiduciary in selling them certificates of deposit (CDs) that he intentionally misrepresented as safe investments insured by the Federal Deposit Insurance Corporation, but which later proved worthless as part of a Ponzi scheme perpetrated by the offshore bank that issued them; plaintiffs sought to except their losses from discharge as debts that debtor had incurred by fraud, breach of fiduciary duty, willful and malicious conduct, or violations of securities laws. This court dismissed plaintiffs' complaint, holding that plaintiffs failed to prove by a preponderance of the evidence that debtor's alleged debts were nondischargeable. The court rejected plaintiffs' attempt to discredit debtor's testimony by purporting to show that debtor falsified documents to qualify plaintiffs as accredited investors who were eligible to purchase the CDs, reasoning, in part, that LLC's manager-agent knew or should have known that LLC did not qualify as an accredited investor, and, because the knowledge of LLC's manager-agent was imputed to LLC, LLC knew that it did not qualify as an accredited investor, and thus its own credibility was called into question. In re Collier, 497 B.R. 877, 892.

S.D.Cal.Bkrcty.Ct.

S.D.Cal.Bkrcty.Ct.1987. Cit. in sup., Appendix and Rptr's notes cit. in sup. A debtor's confirmed Chapter 13 bankruptcy plan included a commercial lease. The debtor renegotiated the lease with an agent of the property owner without court approval. When a new owner bought the property, he sought relief from stay to enforce the new lease. The court denied his motion, which was improperly premised on the validity of the new lease. The court rejected the argument that the lease was valid because the previous owner's agent had been unaware of the bankruptcy proceedings. Based on the fact that the original owner was aware of the proceedings, the court reasoned that both the principal and the agent were deemed to have had notice of whatever either had notice of, and ought, in good faith and the exercise of ordinary care and diligence, to have communicated to the other. In re Aneiro, 72 B.R. 424, 427.

D.Del.

D.Del.2012. Cit. in case cit. in fn. (general cite). Trustee for litigation trust created under the Chapter 11 plan of liquidation of debtors/real-estate-investment entities sued, among others, law firm that had served as legal counsel to debtors prepetition, alleging various claims arising from defendant's alleged role in an elaborate Ponzi scheme run by debtors to defraud investors. Granting defendant's motion to dismiss, this court held, inter alia, that, because the alleged wrongful conduct of debtors' officers and directors could be imputed to debtors, the doctrine of *in pari delicto* barred the claims of trustee, who stood in debtors' shoes. Zazzali v. Hirschler Fleischer, P.C., 482 B.R. 495, 513.

D.D.C.

D.D.C.1988. Cit. in disc. A home seller, who took back a second trust in the amount of the purchase price, lost all of her equity when the buyer defaulted on the first trust and the property was foreclosed. She sued the selling agent for fraud and a real estate company that had a licensing agreement with the agent's employer for negligence. After the district court entered judgment on a jury verdict for the plaintiff on both claims, the court granted the agent's motion for a judgment n.o.v., but it denied the real estate company's motion to set aside the judgment. The court rejected the plaintiff's argument that, since the selling agent was the buyer's agent and since the buyer knew that he was not being investigated further, the agent had constructive knowledge of the fact that no investigation was being made of the buyer's assets; the court said that the law of agency did not hold agents responsible for knowledge known only by the principal. The court also stated that, although the real estate company did not have control over the selling agent, she was shown to be its apparent agent for the transaction at issue. *Ago v. Begg, Inc.*, 705 F.Supp. 613, 617, affirmed 911 F.2d 819 (D.C. Cir.1990).

D.D.C.Bkrcty.Ct.

D.D.C.Bkrcty.Ct.2004. Com. (a) cit. in ftn. Adjoining property owner whose home was damaged during debtors' renovations brought adversary proceeding, seeking to have her damages claims against debtors excepted from discharge in their bankruptcy proceedings. Granting debtors' motion for summary judgment, this court held, inter alia, that debtors did not obtain property from plaintiff, and the proximate cause of plaintiff's harm was not the fraudulent procurement of building permits, imputed to defendants because obtained by their contractor, but rather the contractor's failure to conduct the renovations in a proper manner so as to avoid damage to plaintiff's property. *In re Melcher*, 319 B.R. 761, 770.

M.D.Fla.

M.D.Fla.1978. Cit. in disc. Defendant motioned for a new trial while case was pending appeal on the basis of newly gained information that a government witness lied during trial when he testified that he retained his own attorney with his own funds. In fact the Florida Department of Criminal Law Enforcement had paid the fees. Defendant's motion was denied, and the court held, inter alia, that knowledge of state officers, who cooperated with federal officers in setting up a joint investigative "task force," was not imputable to representatives of the federal government. *United States v. Diecidue*, 448 F.Supp. 1011, 1016.

N.D.Iowa

N.D.Iowa, 1968. Cit. in sup. The plaintiff prospective purchaser of the controlling interest in a bank sued the defendant vendors for breach of an oral contract to sell. A formal contract had been drawn up and signed by the defendants, but one of their daughters whose approval was needed to complete the contract refused to join in it, and, before the plaintiff had signed the contract, the defendants informed him that they would have to call off the deal. The knowledge of the defendants' attorney that the plaintiff needed a formal written contract before he could secure the necessary financing for the purchase was imputed to the defendants because receiving such information was within the scope of the attorney-agent's employment, and, this need for a formal contract having been known to all of the parties, there was no intention by any of the parties to be bound until they all had signed it. Since this was not done before the defendants' revocation, the court held that the cause must be dismissed. *Emmons v. Ingebretson*, 279 F.Supp. 558, 571.

E.D.La.

§ 272 General Rule, Restatement (Second) of Agency § 272 (1958)

E.D.La.1978. Cit. in sup. A shipyard, which had agreed to perform repairs on a vessel's turbine, brought an action against a subcontractor and sub-subcontractor demanding return of the damaged parts. The subcontractor and sub-subcontractor asserted a lien for money due from the shipyard. The vessel owners then intervened. The court held that the shipyard, subcontractor and the sub-subcontractor had all been negligent and had breached their implied obligations of diligent performance. The correct measure of damages to be awarded to the shipowners was the sum of the cost of repairs to return the turbine to the state it would have been in if it had been performed, the necessary expenses during down time of the vessel after the repairs were performed deficiently, lost profits during that down time, and costs and attorney fees. *Todd Shipyards Corp. v. Turbine Serv., Inc.*, 467 F.Supp. 1257, 1297, affirmed in part, reversed in part, modified in part C.A., 674 F.2d 401, rehearing denied 680 F.2d 1389 (5th Cir.1982), certiorari denied 459 U.S. 1036, 103 S.Ct. 447, 74 L.Ed.2d 602 (1982).

D.Mass.

D.Mass.1994. Quot. in sup., com. (a)(4) quot. in sup. Convicted criminal defendants moved under the Jencks Act to dismiss indictments against them, for judgment of acquittal, or for new trial because state police officer delegated to debrief and supervise federal government's principal witness destroyed narrative history of criminal activity that witness had prepared. The court denied defendants' motions for judgment of acquittal and to dismiss, but allowed defendants' motion for new trial to follow this mistrial on condition that plaintiff produce, within 30 days of this court's order, principal witness and state police officer for depositions so that defendants would have opportunity to reconstruct what plaintiff had destroyed; testimony elicited would be available to defendants for the retrial. The court found that actions of state police officer were those of federal government, for, by imputation, they were actions of an agent of the prosecution team. *U.S. v. Mannarino*, 850 F.Supp. 57, 66.

D.Mass.1988. Cit. in case quot. in sup. The defendants, who were previously convicted of bombing buildings used in interstate commerce, were later indicted for RICO violations predicated on the same bombings. The district court denied the defendants' motion to dismiss all counts, holding that collateral estoppel did not apply because the previous trial of some of the counts had ended in mistrials. However, the court held that the government was judicially estopped from retrying the counts that had ended in mistrials, because it had represented to the court in the Eastern District of New York that it would not retry those counts. Since the prosecuting attorney's office was the spokesperson for the government, it was the agent of the government, and its statements bound the prosecuting attorneys of other districts as well. *U.S. v. Levasseur*, 699 F.Supp. 965, 973, reversed in part 846 F.2d 786 (1st Cir.1988). See above case.

E.D.Mich.

E.D.Mich.1995. Cit. in disc. After defendant insurer removed to federal court plaintiff's lawsuit to enforce certain commercial insurance policies, plaintiff moved to remand. Denying plaintiff's motion, the court held that the notice of removal was timely filed, since service of plaintiff's state court papers on the state insurance commissioner pursuant to statute did not constitute "receipt by defendant" that would start the running of the time period for removal; the insurance commissioner was not an agent authorized to accept service of process in the place of defendant, but rather a conduit to ensure that service was made on defendant. *Taphouse v. Home Ins. Co., Inc.* 885 F.Supp. 158, 160.

E.D.Mich.1979. Cit. in disc. The defendant was convicted of a narcotics conspiracy and filed, inter alia, a motion for a new trial. The defendant argued that there had been governmental misconduct because a witness crucial to the prosecution's case was an informer and a government agent had entered into a leniency agreement with the informer, but at trial the agent denied ever having made the agreement. The Restatement was cited in holding that the government could be charged with the misconduct of its agents. The court held that with this degree of government culpability, the test for granting a new trial is whether or not the suppressed evidence would have been favorable and material to the defense. The court held that the

§ 272 General Rule, Restatement (Second) of Agency § 272 (1958)

suppressed evidence was material to the defense and granted the motion for new trial. *United States v. Turner*, 490 F.Supp. 583, 603, affirmed 633 F.2d 219 (3rd Cir.1980), certiorari denied 450 U.S. 912, 101 S.Ct. 1351, 67 L.Ed.2d 336 (1981).

E.D.N.Y.

E.D.N.Y.2008. Cit. in disc., cit. in case quot. in disc. Non-profit corporation brought ERISA class action against three non-profit organizations that were formerly participants, along with plaintiffs, in an employee welfare benefit plan, alleging that defendants failed to return reserves attributable to plaintiffs, and instead breached their fiduciary duties to plaintiffs by paying the claims of their own employees with the funds. This court ruled, inter alia, that the six-year ERISA statute of limitations applied to plaintiffs' fiduciary-duty claims, rather than the three-year limitations period, because plaintiffs did not have actual knowledge of the material facts giving rise to the causes of action; while plaintiffs' attorney conceded that he had actual knowledge of defendants' alleged diversions more than three years prior to the filing of the suit, the court applied the rule that, in a class action case, knowledge of the plaintiffs' counsel was not imputed to the plaintiffs in the class. *L.I. Head Start Child Development Services, Inc. v. Economic Opportunity Com'n of Nassau County, Inc.*, 558 F.Supp.2d 378, 396.

E.D.N.Y.1993. Cit. in case quot. in disc., quot. in ftn. Defendant convicted on racketeering charges moved for a new trial. Denying the motion, the court held, inter alia, that knowledge of potentially exculpatory information obtained in an investigation other than the one that led to charges against this defendant could not be imputed to the prosecutors in this case. *U.S. v. Gambino*, 835 F.Supp. 74, 93, 94, affirmed 59 F.3d 353 (2d Cir.1995), cert. denied 517 U.S. 1187, 116 S.Ct. 1671, 134 L.Ed.2d 776 (1996).

E.D.N.Y.1984. Quot. in part in disc., cit. gen. in disc. This court approved a settlement, subject to reconsideration, between chemical companies and class members who charged the companies with injuries to veterans who came in contact with the defoliant Agent Orange and with birth defects of the veterans' children after it weighed the obstacles the class members would face were the case to go to trial. The companies would have a defense, said the court, if they could show that the government knew about Agent Orange's dangers. The court stated that knowledge of a government employee who had a duty to transmit or receive the information was knowledge of the government or an appropriate agency, and that knowledge of one agency's employee would be imputed to another agency's employee if there was some reason for the unknowing agency to seek, or for the knowledgeable agency to transmit, the information, so that the fact that information did not reach a person with final decisionmaking authority would not be material. *In re Agent Orange Product Liability Litigation*, 597 F.Supp. 740, 796, decision affirmed 818 F.2d 145 (2d Cir.1987).

S.D.N.Y.

S.D.N.Y.2013. Quot. in sup., cit. in case cit. in sup. Defendant who was indicted on various narcotics and racketeering charges for selling marijuana and crack cocaine and murdering rival drug dealers moved to compel the government to produce posts that a cooperating witness had made on a social-networking website while incarcerated. Denying defendant's motion, this court held that the cooperating witness was not a member of the prosecution team or an arm of the prosecutor such that his **knowledge** should be **imputed** to the prosecutor, and thus the government was not compelled, pursuant to its *Brady* obligation to provide favorable evidence to a criminal defendant, to find and disclose the witness's social-networking information. The court noted that, because a prosecutor exercised greater control over federal agents than cooperating witnesses, the agency relationship between a federal agent and a prosecutor was strong, while the scope of the agency relationship between a cooperating witness and a prosecutor was narrower and warranted imputation in fewer circumstances. *U.S. v. Meregildo*, 920 F.Supp.2d 434, 443, 444.

§ 272 General Rule, Restatement (Second) of Agency § 272 (1958)

S.D.N.Y.2003. Com. (a) quot. in sup. Investors alleged securities fraud against Bermuda accounting firm serving as auditor of offshore investment fund, and auditor association of which firm was member, after fund lost in excess of \$4 million. Denying association summary judgment, this court held, inter alia, that fact issue existed as to whether firm partner involved in audit was also agent of association. *Cromer Finance Ltd. v. Berger*, 245 F.Supp.2d 552, 560.

S.D.N.Y.2001. Cit. in disc., com. (a) cit. in disc. and quot. in fn. Trustee appointed under the Securities Investor Protection Act for a bankrupt securities clearing firm sued to set aside certain stock trades. Bankruptcy court entered judgment for trustee, holding that trustee could cancel the challenged trades under the clearance agreement. This court affirmed in part, holding, inter alia, that trustee was entitled to rescind the trades under New York's common law of fraud and securities law. Clearing firm could be charged with the knowledge and/or fraudulent intent of broker within the scope of its authority to execute the trades on firm's behalf, even absent firm's knowledge of the fraud or lack of fraudulent intent. *In re Adler, Coleman Clearing Corp.*, 263 B.R. 406, 453, 454.

S.D.N.Y.1993. Cit. in disc. The drawer of a check sued the drawee bank for paying on a forged indorsement and sued the depository bank for presenting the check to the drawee bank for collection. This court, denying plaintiff's motion for summary judgment and granting partial summary judgment for the depository bank, held, inter alia, that a fact issue existed over whether the plaintiff's secretary, who delivered the check to another employee, who in turn delivered the check to the exchange house where the forgery occurred, had actual authority to do so, in which case any foreseeability to her that the endorsement would be forged would be imputed to the plaintiff. *Avila v. Bank of America Nat. Trust & Sav. Ass'n*, 826 F.Supp. 92, 96.

S.D.N.Y.1988. Com. (a) cit. in disc. The defendant contracted through an oil broker to purchase oil from the plaintiff British corporation, which represented that the deal was backed by a Saudi Arabian company. The defendant sought to compel arbitration to settle a dispute. This court found that the dispute between the parties was governed by an arbitration clause and that the Saudi company was bound to the arbitration agreement based on the plaintiff's apparent authority to contract on its behalf. The court rejected the plaintiff's argument that the fact that the defendant did not know the identity of the Saudi company prior to the contract date precluded recovery. It reasoned that the oil broker's knowledge that the Saudi company was the principal was imputed to the defendant because the broker was acting as the defendant's agent and the defendant reasonably relied on its agent's knowledge. *Oriental Commercial & Shipping Co., Ltd. v. Rosseel, N.V.*, 702 F.Supp. 1005, 1018.

S.D.N.Y.1985. Cit. in disc. The plaintiff, a local plumbing union, and the defendant, a plumbing trade association, entered a collective bargaining agreement signed by the plaintiff's president but not ratified by the union's membership. The plaintiff sought to void the agreement and moved for summary judgment. This court granted the plaintiff's motion and held the agreement void. The court noted that both parties knew that the agreement required membership ratification and that the knowledge of the defendant's officers could be imputed to the defendant as a matter of law. *Meyerson v. Contracting Plumbers Ass'n*, 606 F.Supp. 282, 289.

S.D.N.Y.Bkrcty.Ct.

S.D.N.Y.Bkrcty.Ct.1999. Coms. (a) and (b) cit. in sup. Trustee for securities clearing firm sought to set aside certain stock trades, in which prices were manipulated by broker, as fraudulent transfers. Entering judgment for trustee, the court held, in part, that customers of broker, as principals, were liable for fraudulent acts committed by broker acting within the scope of its authority; that broker's knowledge of its inability to pay for certain stocks was imputed to customers; and that, because broker had materially breached a clearing agreement giving trustee the right to cancel the trades, the agreement was not executory and not deemed rejected under the Bankruptcy Code. *In re Adler, Coleman Clearing Corp.*, 247 B.R. 51, 98.

§ 272 General Rule, Restatement (Second) of Agency § 272 (1958)

affirmed 263 B.R. 406 (S.N.D.Y. 2001). See above case.

N.D. Ohio

N.D. Ohio, 1962. Cit. in sup. In action for declaratory judgment by an automobile liability insurer, it was held that woman who was driving dealer's automobile on a trip at time of an accident, was using it with implied-in-fact permission of dealer and was covered by dealer's liability policy, where dealer delivered possession to buyer before transfer of title was effected, received actual notice that woman who was friend of buyer would take car on a trip and made no objection thereto. *Hardware Mut. Casualty Co. v. Shelby Mut. Ins. Co.*, 213 F.Supp. 669, 673.

S.D. Ohio

S.D. Ohio, 1995. Cit. in headnote and sup. Company sued a securities corporation, alleging that defendant fraudulently induced plaintiff to enter into and to remain in two complex leveraged derivative transactions. During discovery, both parties jointly requested a restraining order to prevent a magazine from publishing a story that included confidential information contained in plaintiff's motion for leave to amend. This court granted the motion, holding that although the magazine could not publish the information it obtained illegally and in violation of a protective order, this same information had independently become a part of the public record and could be disseminated by anyone so interested. The court determined that the magazine's Cleveland bureau chief's knowledge and intent concerning the protective order and the sealed documents were properly imputed to the magazine. *Procter & Gamble Co. v. Bankers Trust Co.*, 900 F.Supp. 186, 187, 191.

D.Or.

D.Or. 1966. Cit. in sup. The Government sought to recover damages for the defendant nickel smelting company's breach of the accounting provision of a government contract, pertaining to the development and purchase of nickel ore. The court awarded damages in part to the Government based on the charges to expense items made by the defendant in breach of the contract, but in part refused to award damages where items were properly expensed or alternatively where the Government knew of the provisions previously and were, therefore, estopped from contesting them. *United States v. Hanna Nickel Smelting Co.*, 253 F.Supp. 784, 793.

E.D.Pa.

E.D.Pa. 1996. Cit. in case quot. in sup., quot. in sup. State prison inmate who was convicted of murder and other charges petitioned for habeas corpus relief, alleging, in part, that his due process rights were violated by the failure to disclose at his trial the existence of an immunity agreement between a prosecution witness and federal officials investigating a burglary ring with which petitioner had been involved. Denying the petition, the court held, inter alia, that agency principles could not be used to **impute** to Commonwealth authorities constructive **knowledge** of the federal immunity agreement. The court said that the federal officials were not acting as agents for the Commonwealth prosecution team when they gave an informal grant of immunity to the witness to testify in a federal burglary trial, since they did not have the power or authority to bind the Commonwealth to the federal immunity agreement after a Pennsylvania assistant district attorney opposed the agreement. *Johnston v. Love*, 940 F.Supp. 738, 768, 769.

E.D.Pa. 1993. Cit. in disc., com. (c) cit. in disc. The trustee administering a securities firm's liquidation in bankruptcy sought to recover under a fidelity bond for losses occasioned by the fraudulent behavior of the firm's officers, and sought damages

§ 272 General Rule, Restatement (Second) of Agency § 272 (1958)

for the bond issuer's alleged bad faith. Approving and adopting the bankruptcy court's report and recommendation that partial summary judgment should be entered in favor of the trustee, this court held, *inter alia*, that under Pennsylvania law the officers' knowledge of their wrongdoing could not be imputed to the firm so as to terminate the fidelity bond, under its own terms, upon commencement of the wrongdoing. The court noted that the general rule imputing knowledge of officers and agents to the corporation had an exception for when an agent acted adversely to the interests of the principal. *In re Lloyd Securities, Inc.*, 153 B.R. 677, 683.

E.D.Pa.1987. *Cit. in sup.* A man who developed health problems because of heavy exposure to asbestos during his employment sued numerous asbestos companies for damages. The court granted the defendants' motion for summary judgment on the ground that the two-year statute of limitations had run. The court reasoned that although the plaintiff might not personally have been aware of the cause of his illness before a certain date, his attorney's knowledge of a physician's diagnosis began the running of the statute. The court stated that the agent's knowledge concerning a matter as to which he acts within his power to bind the principal or upon which it is his duty to give the principal information affects the liability of the principal. *Owens v. Lac D'Amiante Du Quebec, Ltee.*, 656 F.Supp. 981, 983.

E.D.Pa.1977. *Cit. in sup.* Plaintiff, an international air carrier, brought an action against a bank and others to recover for damages allegedly arising out of the fraudulent procurement and use of its credit cards. A travel agency, which had booked travel accommodations through plaintiff for some time, had become dissatisfied with the airline's fifteen-day billing policy, inasmuch as it had operated on a thirty-day credit basis with its own accounts. Since it was against air transport regulations for a travel agency to receive and use plaintiff's credit card, which extended the billing cycle beyond fifteen days, two of plaintiff's executives and the travel agency circumvented the regulation by having the travel agency apply for and receive the cards through a straw corporation, which became theoretically indebted to plaintiff. The court held that plaintiff's responsible officials, acting within the scope of their authority, knew who the real party in interest in the scheme was, and, therefore, their **knowledge** was **imputed** to plaintiff so that there was no reliance on the solvency of the straw corporation and no fraud. Judgment for defendants. *Pan Am World Airways, Inc. v. Continental Bank*, 435 F.Supp. 642, 650.

E.D.Pa.1972. *Cit. in sup.* This was a diversity action to rescind an insurance contract for fraud. Plaintiff had issued an insurance policy to provide coverage for the individual defendants who were present or past officers of the defendant company. The policy would reimburse the officers and the company for legal fees spent in defending their actions. Plaintiff alleged that the officer who made the application for insurance committed fraud in denying any knowledge of potential suits that would be covered. The other defendant officers moved for summary judgment. The court held that if the applicant had committed fraud in inducing the contract, the other defendants would be bound by his fraud, even though they were innocent parties because the applicant was acting as their agent at the time, and the alleged fraudulent statement was material in forming the contract. *Bird v. Penn Central Company*, 341 F.Supp. 291, 295.

E.D.Pa.Bkrcty.Ct.

E.D.Pa.Bkrcty.Ct.1982. *Cit. in fm.* The plaintiff, a secured creditor of the debtor, filing for relief under Chapter 7 of the Bankruptcy Code, sought relief from an automatic stay granted to the trustee. The trustee alleged that the grant of a security interest should be avoided because of the knowledge possessed by the plaintiff's son, an officer of the debtor, at the time of the loan. The trustee asserted that the plaintiff's son was the agent of the plaintiff and, therefore, the **knowledge** can be **imputed** to the plaintiff. The court ruled in favor of the plaintiff. The plaintiff's son had approached the plaintiff at the request of the defendant. Although the son did handle the plaintiff's paperwork, this action could be ascribed to filial duty and did not imply an agency relationship. *In re Gruber Bottling Works, Inc.*, 16 B.R. 348, 353.

D.P.R.

D.P.R.1981. Cit. in disc., com. (c) cit. in disc. The United States brought an action to collect a civil judgment from defendant who fraudulently expropriated V.A. benefits for nonexistent students whom defendant claimed were enrolled in a school she owned. The federal government sought title to two apartment buildings which defendant had purchased with the expropriated funds. The court held, inter alia, that her conveyance of one of the apartment buildings to her son and daughter constituted fraud against the United States, and that the son and daughter were not bona fide purchasers for value of the other building because defendant had acted as their agent, within the scope of her authority in acquiring the building in both of their names, and further that they had notice of defendant's acts since they had knowledge of United States treasury checks being used in the purchase and had reason to know of the illegal circumstances under which the checks were received. *United States v. Garcia*, 532 F.Supp. 325, 332.

D.R.I.

D.R.I.1988. Quot. in disc. An attorney for eight injured seamen elected not to intervene in an action brought by the ship's owner against his insurer because the owner assured him that the seamen's claims would be paid out of a proposed settlement. When the seamen were not paid, they successfully sued the owner for fraud and the settlement was voided by this court. The court rejected the defendant's argument that he was unaware of his attorney's actions in the settlement negotiations since the liability of a principal was affected by the knowledge of an agent concerning a matter as to which he acted within his power to bind the principal. *Farland v. T & T Fishing Corp.*, 682 F.Supp. 700, 703, judgment affirmed 907 F.2d 142 (1st Cir.1990).

D.Vt.

D.Vt.1998. Subsec. (3) cit. in disc. Investors brought civil RICO action against Chapter 11 debtor and his business partners. Defendants moved for summary judgment on the ground that the claims were time-barred. The bankruptcy court granted the motion, concluding that knowledge of RICO violations on the part of attorneys appointed to negotiate a settlement in a related tax case was imputed to investors. Reversing and remanding, this court held that the knowledge of attorneys, who did not represent all or even most investors, and who had conflicts of interest either by virtue of their alleged involvement in the underlying fraudulent scheme or because they represented individuals perpetuating the fraud, could not, as a matter of law, be imputed to investors. *In re Bushnell*, 228 B.R. 811, 816.

W.D.Wash.

W.D.Wash.1989. Cit. in disc. After a boat engine failed and was subsequently replaced with an allegedly damaged engine, the owner of the boat sued the seller of the engine on theories of negligence, strict liability, and misrepresentation, inter alia. Granting the defendant's motion for summary judgment, the court held that the limitation of remedies provision contained in the contract for sale entered into by the plaintiff's agent was not unconscionable. The court stated that, because a third party purchased the engine in accordance with the plaintiff's specifications and instructions and without the exercise of independent judgment, thereby establishing an agency relationship, and the agent's **knowledge** was **imputed** to the principal, the limitation of remedies provision was enforceable. *Veeder v. NC Machinery Co.*, 720 F.Supp. 847, 850.

E.D.Wis.

E.D.Wis.1995. Cit. in ftn. Insureds sued health insurer and insurance agent, alleging that insureds were denied benefits

§ 272 General Rule, Restatement (Second) of Agency § 272 (1958)

wrongfully and that agent was liable for knowingly failing to disclose one of the insured's past health problems on the application. This court denied insurer's motion for summary judgment, holding that a reasonable jury could find that insurance agent was an agent for insurer and thus his **knowledge** could be **imputed** to insurer. The court stated that the parties' written agreement required agent to comply with several of insurer's rules, and agent was compensated by insurer. A reasonable jury could conclude that both insurer and agent manifested consent that agent would act for insurer, and that agent would be subject to its control. *Steinberg v. Mikkelsen*, 901 F.Supp. 1433, 1437.

Alaska

Alaska, 1980. Quot. in sup. and com. (a) quot. in part in sup. The plaintiff brought suit against a parent corporation, alleging tortious interference with a contract between one of its former subsidiary companies and the plaintiff. The trial court held that the defendant was liable. On appeal, this court reversed and dismissed the parent corporation from the case concluding that although a prima facie case for tortious interference with contract was established, the defendant was privileged to interfere because it had a direct financial interest in the contract. The defendant argued that the board chairman for the subsidiary was not an agent of the defendant, and, therefore, his **knowledge** could not be **imputed** to the defendant. However, this court held that the fact that the chairman had a contract with the defendant to manage the defendant's engineering resources area was sufficient to support an inference of agency. Additionally, two of the defendant's employees sat on the subsidiary's board. Even if the subsidiary's board chairman were not considered an agent, there was sufficient evidence that the defendant's employees on the subsidiary's board had some knowledge of the arrangements between the plaintiff and the subsidiary. *Bendix Corp. v. Adams*, 610 P.2d 24, 27-28.

Alaska, 1977. Cit. in sup. The estate of a motel guest who died in a motel fire brought this wrongful death action. The motel appealed from a judgment for plaintiff, and the court affirmed. It was held that no grandfather clause under the Uniform Building Code or administrative regulations exempted the motel from compliance with building code requirements and that the trial court could reasonably have concluded that the Uniform Building Code was not so "obscure" or "unknown" as to warrant a refusal to give a negligence per se instruction. It was further held that defendant's violation of the Uniform Building Code would establish a prima facie case of negligence which could be overcome only by evidence of excuse or justification for defendant's conduct. Since the record disclosed that the motel's sole shareholder and her late husband, under whose supervision the motel was built, were joint venturers, and since her agent knew of a fire inspection report disclosing safety violations, it was held that knowledge of the manner of the motel's construction was imputable by law to the sole shareholder. *Northern Lights Motel, Inc. v. Sweaney*, 561 P.2d 1176, 1188.

Alaska App.

Alaska App. 1984. Cit. in sup. in conc. op. The appellant was convicted of assault by the trial court. On appeal, the defendant urged that because a tape recording made during his arrest was not made known to him prior to the defense counsel's opening statement at trial, a mistrial should have been declared. The court held that this motion for a new trial was too late, as the defendant accepted a continuance, reviewed the tape, argued his case, and then made the motion. Affirmed. One concurring judge pointed out that there was no discovery violation. The prosecutor did not learn of the tape until he was told about it by the officer who made it, and the officer's **knowledge** could not be **imputed** to the prosecutor because this tape was not a matter about which the officer was obligated to inform the prosecutor. *O'Neill v. State*, 675 P.2d 1288, 1292.

Ariz.

Ariz. 1991. Cit. in disc. Vendors of land sued a title insurance company acting as escrow agent after the buyers defaulted on a

§ 272 General Rule, Restatement (Second) of Agency § 272 (1958)

promissory note, alleging, inter alia, that the agent failed to disclose that the buyers used the plaintiffs' loan as part of the down payment instead of for improvements as agreed. The trial court entered judgment for the defendant, and the intermediate appellate court reversed in part. Vacating, this court held that whether the defendant fulfilled its duty to disclose fraud by disclosing the source of the down payment to the real estate agent, rather than directly notifying the plaintiffs, was a question of fact whose answer depended on whether the defendant knew that the real estate agent had interests so adverse to his principal that he would be unlikely to reveal relevant knowledge. *Manley v. Ticor Title Ins. Co.*, 168 Ariz. 568, 816 P.2d 225, 229.

Ariz.App.

Ariz.App.2001. Com. (c) and illus. 6 quot. in sup. Purchasers of apartment complexes sued vendors for fraud and nondisclosure of facts, despite "as is" clause in agreement of sale, after purchasers discovered defective pipes in complexes. Trial court entered judgment on jury verdict for defendants on fraud claim, but for plaintiffs on nondisclosure claim. Affirming, this court held, inter alia, that knowledge of defective pipes could be imputed to vendors if their agents had knowledge of defect, thus imposing on vendors a duty to disclose to purchasers a known latent defect of property. *S Development Co. v. Pima Capital Management Co.*, 201 Ariz. 10, 31 P.3d 123, 133.

Ariz.App.1997. Com. (b) cit. in sup. A creditor who had obtained a California judgment against the trustee of an inter vivos trust sued the trustee, the trustee's wife, to whom the trustee had fraudulently transferred trust property, and a lender that had taken a first deed of trust on the trust property to secure a loan to the trustee's wife, seeking to declare the transfer void and to foreclose his lien. The trial court granted summary judgment for plaintiff and the lender, ordering the trust property, a residence, to be sold, subject to the lender's lien, to satisfy plaintiff's judgment. Affirming in part, this court held, inter alia, that because the lender was a good-faith lender for value without actual or constructive knowledge of any fraud, the lender's lien was valid. The court said that nothing on the face of the recorded documents alerted either the lender or its title company, acting as the lender's agent for the purpose of the title report, to the possibility of fraud or the need for further investigation. *Hall v. World Sav. and Loan Ass'n*, 189 Ariz. 495, 943 P.2d 855, 861.

Ariz.App.1989. Cit. in disc. Sellers of real estate contracted for the sale of property providing for an escrow agreement, which included a subordination agreement for a construction loan on the property, upon which the title company had knowledge that the property would be overencumbered and that the loan would be the source of the down payment. Upon the default by the purchasers, the sellers sued the title company for tortious conduct and breach of various contractual and fiduciary duties in connection with its actions as an escrow agent and title insurer. The trial court granted summary judgment in favor of the title company. Affirming in part, reversing in part, and remanding, this court held, inter alia, that the title company's escrow officer's knowledge that the property would be overencumbered and that the loan proceeds would be misused provided sufficient evidence of fraud to have caused a reasonable escrow agent to directly notify the sellers of these occurrences. It stated that a responsible escrow agent would not have relied on a dual real estate agent to pass on such material information. *Manley v. Ticor Title Ins. Co. of Cal.*, 165 Ariz. 318, 798 P.2d 1327, 1332, opinion vacated 168 Ariz. 568, 816 P.2d 225 (1991). See above case.

Ariz.App.1981. Quot. in sup. and com. (d) quot. in sup. The plaintiff sought to recover for personal injuries suffered, alleging assault and battery, negligent supervision, and negligent hiring. The jury returned a verdict against the individual defendant and in favor of the corporate defendant, the employer of the individual defendant. The trial court granted the individual defendant's motion for a new trial and denied the plaintiff's motion for a new trial against the corporate defendant. The plaintiff appealed both decisions. The court reversed the grant of a new trial for the individual defendant, but affirmed the denial of plaintiff's motion for a new trial against the corporate defendant. The plaintiff alleged that the corporate defendant was liable for negligently hiring and supervising its employee. The court disagreed because the corporate defendant was not under a duty to inquire about, or take precautions against, activities outside the intended scope of

§ 272 General Rule, Restatement (Second) of Agency § 272 (1958)

employment. *Kassman v. Busfield Enterprises, Inc.*, 131 Ariz. 163, 639 P.2d 353, 356.

Ariz.App.1973. Cit. but dist. Plaintiff recovered damages in a jury verdict on his claim that the defendant, a large retail corporation, threatened him with death or serious bodily harm after he began to display, in front of one of defendant's stores, a pickup truck upon which were various signs and paintings denigrating defendant for what plaintiff alleged were its "bait and switch" tactics. In the course of reversing and remanding the case for a new trial because of improper admission of a document which plaintiff alleged was an internal memorandum of the defendant urging its personnel to engage in "bait and switch," the court held that there was simply no evidence that any of defendant's employees in a position to exercise threats against the plaintiff knew of the latter's activities in "bait and switch" advertising. Knowledge on behalf of defendant's management could not be inferred from the fact that the plaintiff carried the internal memorandum with him as he demonstrated, that "on occasion" he would show it to defendant's customers and employees, who were never identified, and that a former salesman of defendant had knowledge of plaintiff's activities in this regard, although not knowing of the existence of the memorandum. The former salesman was the only agent identified with sufficient certainty to ascertain what his duties were, and there was no evidence that, as a function of selling vacuum cleaners, he was under a duty to give information to his superiors that a disgruntled customer was displaying documents disparaging to the defendant. *Sears Roebuck and Co. v. Jackson*, 21 Ariz.App. 176, 517 P.2d 529, 533.

Ariz.App.1966. Cit. in sup. Plaintiff's intestate was killed in an accident with a train. Plaintiff sued the railroad company on a theory of respondeat superior and elicited testimony of the fireman and head brakeman to the effect that they thought that the train was, at the time of the accident, undertaking a particularly dangerous crossing. Despite objections to this testimony the court held that the knowledge of the employees was relevant in determining the damages for which the defendant railroad would be liable, including punitive damages should wanton and willful disregard for the safety of others be found. *Southern Pacific Co. v. Barnes*, 3 Ariz.App. 483, 415 P.2d 579, 587.

Cal.App.

Cal.App.1976. Cit. in sup. and Appendix, Rptr's Notes cit. in sup. This case involves three corporations, a foreign parent corporation, its foreign wholly-owned subsidiary, and the subsidiary's wholly-owned subsidiary doing business in California. The question in this petition for mandate case was whether respondent court had jurisdiction over the foreign corporations in the underlying fraud case. The president of the foreign subsidiary was also president and chairman of the board of the California subsidiary. Plaintiff in the underlying case was induced to enter into a licensing agreement with the California subsidiary by representations by that company's employees that it and the foreign subsidiary were entering into a joint venture. The Court of Appeal held that the officer of the corporations was chargeable with knowledge of the representations and acts of the employees of the California subsidiary, and thus the foreign subsidiary was chargeable with the same **imputed knowledge**, so that the trial court could hold the foreign subsidiary responsible for the California subsidiary's representations on a theory that the California subsidiary was an agent. The Court of Appeal also held, however, that trial court erred in subjecting the foreign parent corporation to its jurisdiction when the only basis for jurisdiction was the fact that the foreign subsidiary was its wholly-owned subsidiary. *North. Nat. Gas Co. of Omaha v. Superior Ct., Etc.*, 64 Cal.App.3d 983, 992, 134 Cal.Rptr. 850, 856.

Conn.

Conn.1990. Quot. in disc. A retail company sued its insurer for failure to pay the retail company's claims under an employee dishonesty insurance policy. The trial court entered judgment for the defendant on the grounds that two of the plaintiff's employees knew of the dishonest employee's prior misappropriations and, although they did not report this to the plaintiff store owner, their **knowledge** was **imputed** to him. This court affirmed, holding that because the knowledgeable employees

§ 272 General Rule, Restatement (Second) of Agency § 272 (1958)

held positions of management or control, they had a duty to report the prior misappropriations to the plaintiff, and so imputation of their knowledge to the plaintiff was proper. *Udolf, Inc. v. Aetna Casualty & Surety Co.*, 214 Conn. 741, 573 A.2d 1211, 1213.

D.C.App.

D.C.App.1993. Cit. in case quot. in disc. A defendant was convicted of second-degree murder and this court, reversing the conviction and remanding, held, inter alia, that a statement made by a United States Attorney for another district concerning the defendant's reluctance to testify in the prosecution of another inmate due to possible retaliation could be considered an admission by the United States Attorney's office in the district of this prosecution. The two offices, said the court, could be considered one party in interest. *Freeland v. U.S.*, 631 A.2d 1186, 1192.

D.C.App.1978. Cit. in fn. in disc. Defendant husband was convicted of kidnapping his wife. Defendant appealed, contending that the prosecution's failure to disclose to him evidence of an act of perjury by his wife and key government witness, denied him the opportunity for a fair trial. Defendant argued strenuously that the government had actual knowledge of the perjury and was duty bound to disclose it. This question was never reached because the holding was based on the materiality of the undisclosed information. However, in footnote the appellate court stated that the normal rules of agency would have the court **impute the knowledge** of one prosecutor to another prosecutor; the United States Attorney's Office would serve as a conduit. The appellate court affirmed the conviction holding, inter alia, that the prosecution's failure to disclose, before trial, evidence of alleged perjury on part of the victim did not deny defendant the opportunity for a fair trial where the perjury was not sufficiently germane to the outcome of the trial. *Brooks v. United States*, 396 A.2d 200, 203.

Fla.App.

Fla.App.2002. Cit. in conc. op. Following criminal defendant's involuntary civil commitment as a sexually violent predator, trial court denied criminal defendant's motion to enforce his plea agreement. This court reversed and remanded, with directions that the trial court specifically enforce the parties' plea agreement. The court held that State breached its plea agreement to allow defendant the privilege of seeking treatment as a sexual offender during his probationary period by seeking civil commitment shortly before he had completed the incarceration portion of his sentence. Concurring opinion argued that, by executing the plea agreement, the prosecutor bound State of Florida itself, as well as the state attorney, to honor the agreed-upon disposition, so long as the trial judge approved. *Harris v. State*, 879 So.2d 1223, 1230.

Fla.App.1997. Quot. in case quot. in sup. In 1995, defendant was charged with filing a fraudulent claim of exemption for sales taxes after he used a canceled sales tax number to purchase an automobile. He moved to dismiss the information on the ground that the applicable three-year statute of limitations had expired. The trial court granted the motion, concluding that the knowledge of the Department of Motor Vehicles, which became aware of the purchase in 1990, was imputed to the Department of Revenue. Reversing, this court held that where, as here, the state agencies were separate and distinct entities, the knowledge of one could not be imputed to the other. *State v. Smith*, 697 So.2d 889, 890-891.

Idaho

Idaho, 1979. Cit. in sup. A personal representative brought an action against the defendant in order to collect the death benefits of certain credit life insurance policies. The trial court entered judgment in favor of the plaintiff and the insurer appealed. This court affirmed and held that the special knowledge which the defendant's agent had acquired would be

§ 272 General Rule, Restatement (Second) of Agency § 272 (1958)

imputed to the defendant because **notice** to an agent is notice to the principal and because knowledge acquired during the course of the agency relationship, when the agent is not acting in an interest adverse to the principal, is also imputed to the principal. In addition, the court stated that a contract prohibited by law is illegal and unenforceable unless certain regulations are unknown to one party, who is justified in assuming that the other party will have special knowledge concerning these regulations, then the illegality does not preclude recovery by the ignorant party. Therefore the defendant was estopped from asserting the illegality of its bargained for policies. *Williams v. Continental Life & Acc. Co.*, 100 Idaho 71, 593 P.2d 708, 710.

Idaho, 1974. Cit. in sup. The plaintiff electrician sued for personal damages he received when an electrical utility pole he was climbing collapsed. The pole was owned by the defendant farm. Five months prior to the accident, an employee of the defendant utility company discovered the defect in the pole and notified a farm employee. In reversing the trial court's verdict for the plaintiff, the court held that although the general rules are to the effect that notice to the agent establishes notice to the principal and knowledge of the agent can be imputed to the principal, the trial court erred in failing to instruct the jury on the issue of whether the farm employee was an agent authorized to receive notice of the defect, which issue was an element in the determination of whether the utility exercised reasonable care in warning of the peril. *Sulik v. Central Valley Farms, Inc.*, 95 Idaho 826, 521 P.2d 144, 146.

Mass.

Mass.1962. Cit. in sup. Where plaintiffs' property was damaged as a result of a backflow of water from city sewer which had been left unplugged by defendant contractor's employees, court held that no basis for liability on part of defendant had been established in absence of proof of negligence. *Columbia Auto Parts Co. v. Shuman Construction Co.*, 345 Mass. 82, 185 N.E.2d 746, 748.

Mass.1961. Cit. in dictum in ftm. In action against a bank for the alleged conversion of a previously stolen treasury certificate of indebtedness received by the bank in connection with a loan transaction, the bank's director who introduced borrower could have been found to have been acting for the bank in obtaining this business, and under a duty to advise the bank of what he knew of the borrower and of the serious limitations upon that knowledge. *Elbar Realty, Inc. v. City Bank & Trust Co.*, 342 Mass. 262, 173 N.E.2d 256, 262.

Mass.1959. Cit. in sup. In suit by purchaser for specific performance of contract for purchase of parcel of land included in larger tract sold by vendor to another, evidence that husband who had negotiated the sale had knowledge of prior conveyance was sufficient to be imputed to wife-purchaser. *Linse v. O'Meara*, 338 Mass. 338, 155 N.E.2d 448, 452.

Mass.App.

Mass.App.1999. Cit. in disc. After a fire destroyed an unoccupied restaurant, the restaurant owners' insurer denied coverage. Owners sued insurer for breach of contract. Trial court granted insurer summary judgment. This court affirmed, holding, inter alia, that the insured owners could not reasonably have expected that leaving the building vacant did not alter the underwriting conditions. *Aguiar v. Generali Assicurazioni Insurance Company*, 47 Mass.App.Ct. 687, 715 N.E.2d 1046, 1048.

Mass.App.1997. Cit. in headnote, cit. in disc. A motorist who was seriously injured in a head-on collision in which the other driver was killed sought payment under decedent's parents' umbrella liability insurance policy, which had expired the day

§ 272 General Rule, Restatement (Second) of Agency § 272 (1958)

before the accident. Plaintiff argued that coverage remained in effect because insurer had failed to send insureds notice that it would not renew the policy. Affirming the trial court's grant of summary judgment for insurer, this court held, *inter alia*, that, under standard agency principles, the knowledge of insureds' insurance agent, which had informed insurer that it would obtain a replacement homeowner's policy for insureds with another insurance company, that insurer would not renew the umbrella liability policy because of its practice of writing umbrella coverage only if it also wrote the homeowner's policy was imputed to insureds. Thus, the trial court was correct in concluding that the umbrella policy was not in effect at the time of the accident. *Commercial Union Ins. Co. v. Connors*, 42 Mass.App.Ct. 538, 538, 542, 679 N.E.2d 1012, 1012, 1015.

Mass.App.1995. Quot. in *ftn.* Parents of son who was treated in hospital in 1981 sued hospital for malpractice in 1990, alleging that defendant's failure to inform them of test results indicating possible lead poisoning constituted inadequate care. Defendant moved for summary judgment on the ground that the statute of limitations barred the action. It argued that plaintiffs became aware of the alleged harm, at the latest, in 1986, when their attorney, collecting documents for suit against their landlord, discovered the 1981 test results. Reversing the trial court's grant of defendant's motion, this court held that material factual issues existed as to whether knowledge of the uninterpreted and unexplained tests results, acquired for the purpose of filing suit against a different defendant, could be imputed to plaintiffs. *Castillo v. Massachusetts General Hosp.*, 38 Mass.App.Ct. 513, 649 N.E.2d, 788, 790-791.

Mass.App.1995. Cit. in headnote, *cit. in ftm.* in *sup.* Insured oil company sought coverage under its primary liability insurance policy for customers' property damage claim and sued its insurance agency for negligence in failing to provide sufficient primary coverage. Affirming the trial court's reformation of the contract, this court held, *inter alia*, that, since agency was acting as insurer's agent within the scope of its authority when negotiating the terms of the primary insurance contract with insured, agency's knowledge of insured's coverage requirements was imputed to insurer, and insurer was bound by the agreement between insured and agency; since the contract failed to reflect the parties' true intention, the contract was subject to reformation on the ground of mutual mistake and insurer was liable for the full amount of intended coverage. *Southeastern Ins. Agency v. Lumbermens Mut.*, 38 Mass.App.Ct. 642, 645, 650 N.E.2d 1285, 1285, 1288.

Mich.

Mich.1981. Cit. in *sup.* The plaintiff, a construction performance bond underwriter, sued to recover from indemnitors pursuant to an indemnity contract. The plaintiff's agents led the defendants to believe that there would be other indemnitors and that a bank would subordinate its security interest in the chosen contractor's assets. These bond requirements were not met. When the construction company defaulted under its labor and material bond, the plaintiff settled the claims and then brought suit against the sureties who signed the indemnity agreement. The lower courts found that the defendants' affirmative defense of actionable fraud was not established and that the doctrine of silent fraud did not apply. This court held that the innocent misrepresentation defense was incorrectly applied by the lower court, and that the defendants should have been permitted to prove the affirmative defense of silent fraud. Because the individuals the defendants dealt with were agents of the plaintiff, their knowledge that the defendants were relying on all the bond requirements being complete was imputed to the principal. The agents therefore had a duty to disclose that all the bond requirements had not been met. It is a general rule that a party to a business transaction is under an obligation to disclose to the other party any information which renders previous representations untrue or misleading. The jury could have found that the agents did not fulfill this duty. The case was therefore reversed and remanded for reconsideration of both the defenses of innocent misrepresentation and silent fraud. *U.S. Fidelity and Guaranty Co. v. Black*, 412 Mich. 99, 313 N.W.2d 77, 88.

Minn.

Minn.1962. Cit. in *sup.* in *ftm.* Where liquor wholesalers' salesmen were usual contact between wholesalers and

§ 272 General Rule, Restatement (Second) of Agency § 272 (1958)

licensee-owner of bar, they had apparent authority to accept notification of sale of bar, and licensee was not required to send written notice to wholesaler to escape liability for later sales made to purchaser of bar. *Distillers Distributing Co. v. Young*, 261 Minn. 549, 113 N.W.2d 175, 177.

Miss.

Miss.1978. Cit. in sup. in appendix. Defendant appealed from a conviction of murder and a sentence to life imprisonment by the trial court. The court reversed and remanded on the ground that the trial court erred in allowing the jury to be led to believe that an alleged coconspirator who testified against defendant had not been granted immunity, and thus defendant was not accorded a fair trial commensurate with state or federal constitutional standards. The court also held that even though the coconspirator claimed that his attorney had not informed him of a deal granting him immunity in exchange for testimony, and that the court approval of the grant of immunity directed that it not be disclosed, since the coconspirator testified and incriminated himself in defendant's murder trial as well as at another coconspirator's trial, the **knowledge** of his attorney was **imputed** to him. *King v. State*, 363 So.2d 269, 278.

N.H.

N.H.1965. Cit. in sup. The plaintiff brought an action under the total disability insurance policy after allegedly failing to include previous chest pains on the insurance application pursuant to the agent's instructions. This court held that the false answer's effect on risk acceptance and the agent's power to bind his principal were issues of fact for the jury as was the plaintiff insured's reasonable reliance on the agent's information that the previous ailment was irrelevant. *Taylor v. Metropolitan Life Ins. Co.*, 106 N.H. 455, 214 A.2d 109, 113.

N.J.

N.J.1998. Quot. in case quot. in sup. Defendant, who was sentenced to death after pleading guilty in trial court to the killing of two police officers and to the second-degree aggravated assault of a third officer, appealed the imposition of the death sentence. Vacating the death sentence and remanding, this court held, inter alia, that the prosecution's suppression of evidence of the injured police officer's civil complaint, which alleged that county and municipal authorities acted unreasonably in failing to provide proper training to ensure the safety of the officers who had attempted to serve a search warrant on defendant, violated the rule requiring the prosecution to disclose to defendant all evidence of which the prosecution was actually or constructively aware that was material to either guilt or punishment, and warranted retrial of defendant's sentence. The court said that awareness of the officer's civil complaint, which was served on the county prosecutor's office, would be imputed to the trial prosecutor. *State v. Nelson*, 155 N.J. 487, 499, 715 A.2d 281, 287.

N.J.Super.

N.J.Super.1960. Cit. in sup. Where title insurance company assumed charge of entire transaction revolving around sale of property not only as insurer of title, but also as adjuster at closing, receiver and disbursing of purchase moneys, examiner of title between date of closing and date of recordation, and recorder of deed and mortgage, insurance company stood in a fiduciary relationship to purchasers and to mortgagee and since it had a duty on learning of trust agreement with respect to proceeds from sale before deed was recorded and moneys disbursed, knowledge of trust agreement must be imputed to purchaser and mortgagee. *Colegrove v. Behrle*, 63 N.J.Super. 356, 164 A.2d 620, 626.

N.M.App.

N.M.App.2012. Cit. in sup. Owner of a motor vehicle and vehicle's permissive user who had failed to pay a car repair bill that she had incurred sued repair shop, arguing that defendant's enforcement of its mechanic's lien against the vehicle and the sale of the vehicle were improper because defendant never provided notice to user, and that such notice was statutorily required because user was the debtor. The trial court granted summary judgment for defendant. Affirming, this court held that user did not have to be given notice before enforcement of the mechanic's lien under New Mexico's mechanic's lien statute, and that notice to owner was sufficient. The court rejected plaintiffs' argument that user deserved notice as owner's agent, concluding that, if user were owner's agent within this transaction, she should have accepted notice sent via a certified mail package addressed to her principal and delivered directly to her home, rather than intentionally depriving herself of notice by allowing the package to go unclaimed. *Harris v. Vasquez*, 2012-NMCA-110, 288 P.3d 924, 927.

N.M.App.2002. Cit. in conc. op. Liability insurer for guest ranch sought declaratory judgment that ranch operator's coverage for liability to guest who had fallen from horse while riding was barred by "saddle animal liability exclusion clause" in policy. The trial court granted insurer summary judgment. Affirming, this court held, inter alia, that the operator had no reasonable expectation of liability coverage due to the written exclusion. The concurring opinion stated that broker who obtained policy for ranch operator was operator's agent; thus broker's **knowledge** of the exclusion was **imputed** to operator, thereby negating any reasonable expectation of coverage for saddle animal liability. *Berlangieri v. Running Elk Corp.*, 132 N.M. 92, 44 P.3d 538, 545.

N.M.App.2002. Cit. in sup. Homeowner sued company that had contracted to build custom doors and other items for the home, alleging breach of contract, UCC violations, and violation of Uniform Practices Act. Company counterclaimed for breach of contract and malicious abuse of process. Trial court held that neither party had valid claim for breach of contract, but it granted judgment for company on counterclaim for malicious abuse of process. This court affirmed, holding, inter alia, that homeowner lacked reasonable factual basis for believing that company's corner section sample constituted breach of contract, because he was aware that his agent had consented to a sample made of fir, not sabino. *Dawley v. La Puerta Architectural Antiques*, 133 N.M. 389, 396, 62 P.3d 1271, 1278.

N.M.App.1996. Quot. in diss. op. Tractor-trailer driver who was terminated when he refused to return to work after his day shift had ended sued employer for retaliatory discharge. Driver alleged that he was fired even though he informed the answering service that employer used to call drivers back that additional driving that night would violate state law. The trial court granted employer's motion for summary judgment. Affirming, this court held that employer had no actual knowledge of driver's reason for not returning to work and, therefore, could not have discharged him in retaliation. Furthermore, answering service's knowledge of the reason could not be imputed to employer where employer's ill will or malicious intent was central to driver's cause of action. Dissent believed that employer's intent was irrelevant; thus, where employer and answering service had a typical agency relationship pursuant to which service was authorized to receive information from drivers, it was appropriate to treat information received as relayed to employer. *Lihosit v. I & W, Inc.*, 121 N.M. 455, 913 P.2d 262, 268.

N.Y.

N.Y.1985. Cit. in disc. The plaintiff transferee sought specific performance of a transfer agreement after the shareholder and his estate transferred the shares to the defendants. The defendants contended that they had purchased the shares without notice of any adverse claim and in good faith. The lower court denied a motion for summary judgment by the defendants. The intermediate appellate court reversed, holding that the defendants were good-faith purchasers. Affirming as modified, this court stated that the corporate defendant's allegations that its director/agent and the shareholder had tried to defraud the corporation did not establish sufficient adversity to negate **imputed knowledge** to the corporation of the plaintiff's adverse

§ 272 General Rule, Restatement (Second) of Agency § 272 (1958)

claim. However, the court held that the corporate defendant did not have actual knowledge of the adverse claim. *Center v. Hampton Affiliates, Inc.*, 66 N.Y.2d 782, 497 N.Y.S.2d 898, 899, 488 N.E.2d 828.

N.Y.1980. Com. (a) cit. in disc. The plaintiff bank brought an action in fraud and conversion against two corporate customers for “check-kiting”, a practice in which checks are drawn against deposits which have not yet cleared. Two of the defendants were the parents of the third defendant. The two defendants owned one defendant company while their son owned the other defendant company. The mother worked as the bookkeeper for both companies. The defendants had been covering-overdraft checks to the plaintiff bank by depositing checks from another account which was often low on funds. The plaintiff suffered a \$309,800 loss because of the lag time in the check collection process. The jury found in favor of all of the defendants. The intermediate court, inter alia, affirmed the jury verdict for the son’s firm and held that the bookkeeper’s kiting could not be imputed against that firm or its managing officer and the plaintiff appealed. This court stated that in order for the son’s company to be liable, scienter could be imputed to the company if the agent drawing the checks knew that the balance was composed in part of kited funds. The court stated that the general assumption is that the agent will live up to the duty to act in the principal’s best interests and therefore the agent’s **knowledge** will be **imputed** to the principal. However, the court stated that in this case the agent may have had an interest adverse to the purported principal, the son’s company, and therefore knowledge may not be imputable. The court held that this was a question for the jury and therefore modified the holding of the intermediate court. The court added that if the bookkeeper’s interests were found to be adverse to the principal’s thereby precluding the imputation of knowledge to the son’s firm, the plaintiff may still prevail on the theory of unjust enrichment because a principal who accepts the benefits of its agent’s misdeeds is estopped from denying knowledge of the facts of which the agent was aware. *Marine Midland Bank v. John E. Russo Produce*, 50 N.Y.2d 31, 427 N.Y.S.2d 961, 405 N.E.2d 205, 211.

N.Y.Sup.Ct.App.Div.

N.Y.Sup.Ct.App.Div.1994. Cit. in sup. Defendant brought third-party complaint for judgment declaring that insurer had duty to defend and indemnify it in the underlying personal injury action involving a dog bite. Reversing the trial court’s judgment against insurer, this court held that insurer was not obligated to defend and indemnify defendant, since defendant did not establish reasonable excuse for its failure to notify insurer of the incident until defendant had received plaintiff’s summons and complaint nearly one year later. The court said that defendant’s purported lack of actual knowledge of dog bite did not amount to reasonable excuse for its delay in notification. *Smalls v. Reliable Auto Service, Inc.*, 205 A.D.2d 523, 612 N.Y.S.2d 674, 676.

N.Y.Sup.Ct.App.Div.1963. Cit. in sup. In an action for specific performance of a contract for purchase and sale of realty, the purchaser was bound by any knowledge gained by his attorney while engaged on behalf of the purchaser even though the attorney because of forgetfulness failed to make proper inquiries based on this knowledge. *Farr v. Newman*, 18 App.Div.2d 54, 238 N.Y.S.2d 204, 209, affirmed 14 N.Y.2d 183, 250 N.Y.S.2d 272, 199 N.E.2d 369.

N.Y.Sup.Ct.App.Div.1960. Cit. in sup. Where independent contractor’s employees were killed while painting transit authority’s subway station, employees’ maintenance of an unsafe scaffolding was cause of their death and not any negligence on part of transit authority. *Chaney v. New York City Transit Authority*, 12 App.Div.2d 61, 208 N.Y.S.2d 205, 211, affirmed 10 N.Y.2d 871, 223 N.Y.S.2d 502, 179 N.E.2d 507.

N.Y.Sup.Ct.App.Div.1960. Cit. in sup. Where husband acquired certain shares of stock in name of his wife in breach of duty to acquire such stock for beneficiaries of a trust, his **knowledge** was **imputed** to wife, and she could not qualify as a bona fide purchaser but took the shares subject to the right of the beneficiaries. *Reynolds v. Snow*, 10 App.Div.2d 101, 197 N.Y.S.2d 590, 598, affirmed 8 N.Y.2d 899, 204 N.Y.S.2d 146, 168 N.E.2d 822.

Ohio

Ohio, 1995. Cit. in diss. op. When building owner discovered asbestos in its edifice, it sued asbestos manufacturer under various tort and contract theories, seeking to recover damages for the cost of removing the dangerous material. The trial court granted defendant's motion for summary judgment and the intermediate appellate court affirmed, concluding that the statute of limitations, which began to run when plaintiff discovered the presence of the asbestos, had expired. Reversing and remanding, this court held that the limitations period began to run when plaintiff learned that the asbestos posed a potential health hazard requiring extraction. The dissent would have held the suit barred, imputing to plaintiff the decade-old knowledge on the part of its maintenance manager of the flaking and release of asbestos fibers into the air. *NCR Corp. v. U.S. Mineral Products Co.*, 72 Ohio St.3d 269, 649 N.E.2d 175, 179.

Or.

Or.1975. Com. (b) quot. in part in sup. The plaintiff pension trust fund trustees brought an action against the defendant employer to collect payments allegedly due under collective bargaining agreements. Over a four year period the Trust had been sending forms to the defendant which were filled in to list the rate of contribution at fifteen cents per hour, the previous rate, instead of the proper rate of twenty cents. Payments were made on the basis of the fifteen cent rate throughout the period. When the trustees demanded payment for the discrepancy, the employer refused, claiming that it was ignorant of the amount actually due under the contract. The trial court entered judgment for the plaintiffs, and the defendant appealed. The state supreme court held that the plaintiffs were not estopped from requiring the defendant to pay the twenty cent rate of contribution despite the defendant's plea of ignorance, since the defendant was a party to the collective bargaining agreements which expressly provided for the twenty cent rate and the agreements were available to it at all times. *Shaw v. Northwest Truck Repair, Inc.*, 541 P.2d 1277, 1279.

Or.1975. Cit. in ftm. in sup.; cit. in diss. op. in ftm. in sup. An automobile liability insurer brought an action for a declaratory judgment that it had validly rescinded a policy where, in applying for coverage, the insured told plaintiff's agent that he had been arrested and convicted of driving while intoxicated. However, the agent wrote on the policy that defendant had never been arrested or convicted of a traffic violation. After defendant had an accident, plaintiff discovered the misrepresentation and tried to rescind. The trial court held that plaintiff was not entitled to rescind, and plaintiff appealed. In affirming, the court stated that notice to plaintiff's agent of the arrest and conviction was imputed to the insurer, and since it did not rescind promptly, it lost its right to do so. Also, although the question of collusion between the agent and the insured was unclear, even if there were collusion, the agent's **knowledge** still would be **imputed** to the plaintiff, since the insurer was being sued by an innocent third party, and not by the insured who had participated in the fraud against it. The dissent said that if the insured could not recover under the policy due to collusion between himself and the agent, then likewise, an innocent third party could not. *State Farm Fire & Casualty Co. v. Sevier*, 272 Or. 278, 537 P.2d 88, 93, 100.

Pa.

Pa.1959. Cit. in sup. In action against a stock brokerage concern for damages based on its alleged breach of fidelity owed to principal, by its acting as agent for both purchaser and principal in the sale of a large block of common stock of a railroad, evidence sustained finding that principal had knowledge that brokerage firm was acting as agent for the purchasers, as well as for plaintiff, and that it was to receive double commissions, and that principal had knowledge that broker was going to purchase a portion of the block of stock, and therefore firm was not guilty of any breach of fiduciary responsibility. *Claughton v. Bear Stearns & Co.*, 397 Pa. 480, 156 A.2d 314, 320.

Tex.App.

Tex.App.2009. Cit. in case quot. in sup. Defendant was convicted by a jury of tampering with physical evidence and hindering apprehension, after she helped an individual flee the country to avoid a murder charge and helped dismember the murder victim's body with intent to impede its use as evidence. Affirming as to the findings of guilt, this court held, *inter alia*, that the state's failure to disclose impeachment evidence with regard to one witness who had been charged by the state with tampering with a government record did not constitute a due-process violation, because the undisclosed evidence was not material in the constitutional sense. The court, however, rejected the state's argument that its prosecutors were unaware of the evidence because the prosecution of that witness was handled by a section of the prosecutor's office that was not part of the prosecution team in defendant's case, noting that the prosecutor's office was an "entity," and that information in the possession of one attorney in the office had to be attributed to the office as a whole. *Hall v. State*, 283 S.W.3d 137, 171.

Tex.Civ.App.

Tex.Civ.App.1970. Cit. in sup. Insurer brought action against defendant driver to recover amount paid to its assured for damages arising out of a collision with defendant. Defendant pleaded a release secured by his mother. The trial court entered judgment for the defendant. The court reversed and remanded, holding that the trial court's finding that the defendant had no notice of the insurer's claim was against the great weight and preponderance of the evidence, and that the release was only a partial release which did not bar the insurer's cause of action against the defendant. *Triton Insurance Company v. Garner*, 460 S.W.2d 262, 264.

Utah

Utah, 2002. Quot. in case quot. in disc. After real estate broker's agent fraudulently changed the duration of four listing agreements, broker sued sellers, buyer, and another brokerage agency that was owned by buyer, alleging breach of contract and seeking to recover commissions for the sale of real property; sellers counterclaimed for negligence, fraud, and breach of contract. Trial court ruled against plaintiff broker on all claims, but it denied buyer's motion for attorneys' fees. Appellate court affirmed. This court reversed and remanded with directions to award attorneys' fees, holding that the agent's knowledge of the fraudulent listing agreements was imputable to broker for the purpose of determining attorneys' fees, and that broker pursued its meritless claim in bad faith. *Wardley Better Homes and Gardens v. Cannon*, 2002 UT 99, 61 P.3d 1009, 1016.

Utah, 1996. Cit. in disc. In probate action, husband of decedent who died during divorce proceedings challenged, *inter alia*, decedent's unilateral severance of the joint tenancy in their home and her consequent conveyance of her interest to a newly created revocable trust, as well as a change-of-beneficiary form sent by decedent's attorney-in-fact to her insurance company. The trial court concluded that the severance was ineffective because decedent did not effectively convey her interest to a third party and because it violated a court order prohibiting the sale or encumbrance of marital assets, but found the change of beneficiary valid. Affirming in part, reversing in part, and remanding, this court held, *inter alia*, that severance of the joint tenancy was effective; conveyance of decedent's interest to the trust did not violate the trial court's earlier order, and therefore revocation of the trust was not required; and, where attorney-in-fact was acting as decedent's agent, his ignorance of her insurer's name did not invalidate the change of beneficiary. *In re Knickerbocker*, 912 P.2d 969, 970, 980.

Utah, 1991. Quot. in sup., com. (c) cit. and quot. in sup. An employee was fired and subjected to criminal proceedings for a

§ 272 General Rule, Restatement (Second) of Agency § 272 (1958)

theft, which was later discovered to have been committed by the manager who accused her. The theft charges were dropped after the manager admitted the crime. The employee sued the company and the manager for malicious prosecution, intentional infliction of emotional distress, and wrongful termination. The trial court entered judgment on a jury verdict for the employee on the malicious prosecution and wrongful termination claims. Affirming, this court held, *inter alia*, that the plaintiff had sufficiently met her burden of proving the requisite elements of the malicious prosecution tort. The court determined that the company could be held vicariously liable for the malicious prosecution because the officers who made the charges were acting within the scope of their delegated authority in bringing the charges, were motivated to carry out the company's purposes, and had the express approval and direction of the company's higher officials. *Hodges v. Gibson Products Co.*, 811 P.2d 151, 157, 159.

Utah App.

Utah App.2001. Cit. in case quot. but dist. (Erron. cit. as Restatement Second of Torts.) Real estate broker sued sellers, buyer, and sellers' subsequent broker to recover commission under listing agreements for sale of property. Sellers brought third-party claim against plaintiff broker's agent for fraud, *inter alia*, alleging that agent altered listing agreements by filling in false expiration dates. Trial court ruled against plaintiff, but denied defendants' requests for statutory attorneys' fees for filing a frivolous lawsuit. This court affirmed, holding that agent's knowledge that listing agreements were invalid could not be imputed to plaintiff under vicarious-liability theory so as to render plaintiff liable for attorneys' fees. *Wardley Better Homes and Garden v. Cannon*, 21 P.3d 235, 239, cert. granted 32 P.3d 249 (Utah 2001).

Vt.

Vt.1989. Cit. in disc. The administrator of a decedent's estate sued an investment broker for the alleged misuse of money entrusted by the estate to the defendant for investment. The trial court held that the defendant's deposit of the estate's funds in a real estate investment trust (REIT), even though the REIT, which was run by the defendant and subsequently went bankrupt, was specifically ruled out by the plaintiff as an investment choice, constituted a material breach of the agreement under which the defendant had undertaken to invest the estate's money. Affirming, this court held that the plaintiff was not chargeable with actual or constructive knowledge of the REIT investment as a result of his secretary's receipt of a letter from the defendant containing that information, since the defendant failed to prove that it was within the scope of the secretary's authority to inquire where the estate's funds were invested or know that there was any restriction on the investment. The court concluded, therefore, that the plaintiff's failure to repudiate the REIT investment at that time did not constitute ratification of it. *Estate of Sawyer v. Crowell*, 151 Vt. 287, 559 A.2d 687, 690.

Wash.App.

Wash.App.1992. Cit. in disc. A high school student had sexual contact with a school librarian, after a teacher at the school had been informed of prior sexual advances allegedly committed by the librarian. The student and his parents sued the school district and the teacher for negligence in hiring, retaining, and supervising the librarian, and for negligence in supervising the student. The trial court granted the defendants' motion for summary judgment. Affirming, this court held, *inter alia*, that the teacher's **knowledge** should not be **imputed** to the school district, since the conversation in which the alleged misconduct was disclosed related to the librarian's conduct with adults outside of the school, and the teacher did not have any supervisory authority over the librarian. The court noted that it was not reasonable to expect the teacher to report the conversation to school district officials, nor was it reasonable to infer that his job imposed upon him a duty to do so. *Peck v. Siau*, 65 Wash.App. 285, 827 P.2d 1108, 1111-1112.

§ 272 General Rule, Restatement (Second) of Agency § 272 (1958)

Wash.App.1985. Cit. in disc. A home vendor brought an action against a realty, a mortgage company, their owner, a real estate broker, and a salesman to recover damages, cancel a deed of trust, and quiet title to her land. The vendor claimed that the broker and the salesman breached their fiduciary duty by failing to disclose to her that the purchaser owned the mortgage company and planned to fraudulently subordinate her security interest, and by failing to attend closing. The trial court foreclosed the deed of trust and quieted title in the vendor's name, but dismissed the actions against the broker, the salesman, and the realty. The court of appeals affirmed, holding, inter alia, that although the broker and the salesman breached their duty to disclose material facts, that breach was not the cause of the vendor's loss; rather, the purchaser's fraud was the cause. Furthermore, the vendor's son-in-law, whom the vendor used as an agent, knew of the purchaser's status, and therefore this **knowledge** was **imputed** to the vendor as the principal. *Pilling v. Eastern & Pacific Enterprises*, 41 Wash.App. 158, 702 P.2d 1232, 1236.

Wash.App.1978. Cit. in sup. Prospective buyer brought an action against prospective seller and against the buyer's agent to recover a down payment. The agent and the seller had entered a contract whereby the agent was to purchase the seller's products in his capacity as designer of the buyer's storage facilities. Although there had been no formal contract between buyer and agent and although the prospective storage facility was only tentative, the agent placed an order with the seller for the buyer who made a down payment after having received the agent's assurances that the order could be adjusted, depending upon the buyer's final decision with regard to the tentative storage facility. Subsequently, the buyer dismissed his agent who, in turn, cancelled the order. Seller, ignoring the buyer's demands, deducted a cancellation fee for itself from the down payment and forwarded the balance to the agent. The trial court found the seller liable to the buyer for the balance of the down payment over and above the damages which the seller suffered. On the seller's appeal, the court held that the trial court had erroneously concluded that the agent's purchase order had not incorporated the seller's standard terms and conditions of sale which included the cancellation fee, and, having not been apprised of the terms, the buyer was not liable for the cancellation fee. The court stated that it made no difference that the agent had failed to apprise the buyer of all the terms and provisions of the contract which it had effectuated on its behalf. The knowledge of the agent acting within the scope of his authority was imputed to the buyer. *Coast Trading Co., Inc. v. Parmac Inc.*, 21 Wash.App. 896, 587 P.2d 1071, 1078.

Wis.

Wis.1997. Cit. in disc. Alleging that a priest assigned as a hospital chaplain by the Roman Catholic Diocese abused his position to engage her in a sexual relationship, a woman sued the Diocese for vicarious liability and negligent supervision of the priest. Trial court granted the Diocese summary judgment. The intermediate appellate court affirmed as to vicarious liability and reversed as to the negligent supervision claim. This court reversed, holding, inter alia, that the First Amendment precluded plaintiff's claim for negligent supervision, because a court would not be able to apply neutral principles of law. Even if the court assumed that the First Amendment did not preclude plaintiff's claim, the court concluded that there was no fact issue as to whether the Diocese knew or should have known about the priest's alleged propensity to use his position as chaplain to sexually exploit patients whom he counseled. Even if the Diocese had constructive knowledge of the priest's prior relationship with another woman, this would have put the Diocese on notice, at most, that the priest might again have consensual sexual relations with a single, adult nonpatient. *L.L.N. v. Clauder*, 209 Wis.2d 674, 563 N.W.2d 434, 443.

Wis.1962. Quot. in sup. In action by city against hotel operator for violating city ordinance prohibiting blocked passageways, conviction was reversed since the defendant's hotel met standard of Industrial Commission. *City of Milwaukee v. Zurich*, 15 Wis.2d 469, 113 N.W.2d 159, 161.

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150 Wash.App. 1003

NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR 14.1

Court of Appeals of Washington,
Division 1.

Robert P. ERICKSON, Appellant,
v.
FISHER COMMUNICATIONS, INC., a
Washington corporation, and Robert Boyd,
Respondents.

No. 62252-8-I. | May 4, 2009.

Appeal from King County Superior Court; Honorable
Joan E. Dubuque, J.

Attorneys and Law Firms

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Island, WA, for Appellant.

Nancy Williams, Perkins Coie LLP, Seattle, WA, for
Respondents.

Opinion

UNPUBLISHED OPINION

APPELWICK, J.

*1 Robert Erickson claims he suffered unlawful disparate treatment, because of his disability when in 2007 his employer, Fisher, sought to address his perceived poor workplace attitude by offering him a performance improvement plan or transition to other employment. Fisher had no knowledge that Erickson suffered from depression and Erickson did not disclose this information before, during, or after the 2007 meeting when the PIP was proposed. Based on these facts, we hold the disability was not a substantial factor in Fisher’s employment decisions. We affirm.

Facts

In 1995, Robert Erickson was diagnosed with Dysthymic Disorder. The essential feature of Dysthymic Disorder is a chronically depressed mood that occurs for most of the day, more days than not, for at least 2 years. The condition is characterized by mild to moderate depression, anxiety, irritability, and low energy. After his diagnosis, Erickson began a regime of counseling and medication in order to deal with the condition.

Erickson joined **Fisher** Communications, Inc. in the summer of 2001 as a senior advertising account executive. Erickson enjoyed his job and performed well.

West KeySummary

- I Civil Rights**
 - Constructive discharge
 - Civil Rights**
 - Harassment; work environment

Disability was not a substantial factor in employment decisions made by an employer regarding a former employee. The employee alleged that he felt compelled to resign, because a Performance Improvement Plan (PIP) targeted his depressed behavior, which resulted from his disability. However, the employee’s argument failed to establish that objectively a reasonable person would have resigned. The employer had no knowledge that the employee suffered from depression and the employee did not disclose that information before, during, or after the meeting when the PIP was proposed. The employee did not make a prima facie showing that a pattern existed, but rather pointed to isolated incidents. The employee acknowledged that he never felt that the workplace was hostile until the meeting in which he was presented with the PIP. West’s RCWA 49.60.010, 49.60.180(2).

I Cases that cite this headnote

Erickson v. Fisher Communications, Inc., Not Reported in P.3d (2009)

150 Wash.App. 1003

At his 2004 annual review, for example, Erickson met or exceeded expectations. Erickson concedes that he never discussed his diagnosis of Dysthymic Disorder with anyone at Fisher.

In the spring of 2007, Robert Boyd began working for Fisher as a general sales manager. He supervised Erickson. Boyd was charged with increasing sales and profits. To these ends, Boyd instituted a series of changes, including reconfiguring the sales teams and revamping the commission structure. At some point in 2007, Boyd became concerned that Erickson's unhappy attitude about the new business direction was disruptive—impacting both the morale and the overall development of the advertising team.

On November 7, 2007 Boyd met with Sherry Pelletier, the senior human resources manager, to discuss Erickson's attitude. Boyd and Pelletier decided a meeting should be held to discuss Erickson's perceived dissatisfaction with the job. They decided to provide him with two options: Erickson could continue his employment subject to a Performance Improvement Plan (PIP) or he could resign and transition out of the position.

Several hours later, Dan Stewart, another account executive, stopped by Boyd's office. The two discussed how things were going for Stewart. Stewart told Boyd that he was miserable. At some point, Boyd asked Stewart if he liked working with Erickson. Stewart admitted that "[s]ometimes it was tough. When he was up he was up; when he was down, I was down." Boyd responded by saying that "maybe someone should up his meds." Stewart considered this merely a flippant comment. At that point, Stewart disclosed to Boyd that Erickson's moods had, on occasion, caused him concern, like when he sent text messages and e-mails suggesting that he was suicidal or homicidal. Stewart hoped this disclosure would help Boyd understand Erickson better. They did not discuss whether Erickson was actually taking medication.

*2 Later that evening, on November 7, after the discussion with Stewart, Boyd e-mailed Erickson asking to meet at 9 a.m. the next day. Soon after, Stewart and Erickson discussed Boyd's e-mail about the meeting. Stewart disclosed to Erickson the content of his prior conversation with Boyd, including Boyd's comment that somebody should increase his (Erickson's) "meds."

On November 8, 2007, Boyd, Erickson, and Pelletier met. Boyd expressed concerns about what he believed to be

Erickson's unsupportive attitude of the workplace changes. Boyd then told Erickson that Erickson had two choices: (1) to remain at the company under a PIP or (2) gracefully transition out of the company over several months. The PIP is not included in the record. But, Boyd states in his declaration that it did not impact Erickson's compensation, benefits, or job title. Pelletier recalled that the PIP required Erickson to provide constructive comments to management and to approach management with his concerns, rather than confronting other employees.

Erickson immediately told Boyd that as a result of these options he had been placed in a hostile work environment. Erickson did not consider the PIP, "[b]ecause it was going to put me under different requirements than the other executives, which I perceived to be also another form of discrimination."

At the meeting, Erickson told Boyd and Pelletier, "effective immediately, I'm quitting right now." Erickson penned a resignation letter stating that "[i]t is my decision, not the company's to terminate employment based upon the status quo." In the meeting, neither Erickson, Boyd, or Pelletier ever mentioned Erickson's medical condition or disability.

At his deposition, Erickson stated that he did not perceive Fisher as a hostile work environment until the meeting and proposed options.

On August 28, 2007, Erickson accepted an offer to work as a sales associate for Bravo!. On November 8, 2007, the day he quit **Fisher, Erickson** immediately began employment with Bravo! on a full-time basis.

On May 8, 2008, Erickson filed an amended complaint in King County Superior Court claiming Fisher discriminated against him because of his disability, in violation of the Washington Law Against Discrimination, Chapter 49.60 RCW (WLAD). On July 2, 2008, Fisher filed for summary judgment. The trial court granted the motion in August 2008. Erickson appeals.

Analysis

Erickson appeals the trial courts grant of summary judgment to Fisher. Summary judgment is appropriate if there is no genuine issue of material fact and the moving

Erickson v. Fisher Communications, Inc., Not Reported in P.3d (2009)

150 Wash.App. 1003

party is entitled to judgment as a matter of law. CR 56(c); *Wilson v. Steinbach*, 98 Wash.2d 434, 437, 656 P.2d 1030 (1982). We review a summary judgment order by engaging in the same inquiry as the trial court, viewing the facts of a case and reasonable inferences drawn therefrom in the light most favorable to the nonmoving party. *Degel v. Majestic Mobile Manor, Inc.*, 129 Wash.2d 43, 48, 914 P.2d 728 (1996); *Michak v. Transnation Title Ins. Co.*, 148 Wash.2d 788, 794, 64 P.3d 22 (2003). The nonmoving party must set forth specific facts to defeat a motion for summary judgment. *Young v. Key Pharms., Inc.*, 112 Wash.2d 216, 225–26, 770 P.2d 182 (1989). In discrimination cases, the plaintiff must establish specific and material facts to support each element of a prima facie case. *Marquis v. City of Spokane*, 130 Wash.2d 97, 105, 922 P.2d 43 (1996). We will sustain the trial court’s judgment on any theory established by pleadings and supported by proof. *Wendle v. Farrow*, 102 Wash.2d 380, 382, 686 P.2d 480 (1984).

*3 An employer cannot terminate an employee because of any sensory, mental, or physical disability. RCW 49.60.010, .180(2). Washington courts have adopted the *McDonnell–Douglas* three-part burden allocation framework for disability discrimination claims. *Anica v. Wal-Mart Stores, Inc.*, 120 Wash.App. 481, 488, 84 P.3d 1231 (2004). (citing *McDonnell–Douglas, Corp. v. Percy Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973)). Under the *McDonnell–Douglas* framework, Erickson has the initial burden to prove a prima facie case. 411 U.S. at 802. If Erickson establishes a prima facie case, the burden shifts to Fisher to present evidence of a legitimate nondiscriminatory reason for its actions. *Id.* at 803. The burden then shifts back to Erickson to produce evidence that the asserted reason was merely a pretext. *Id.* at 805; *Anica*, 120 Wash.App. at 488, 84 P.3d 1231. Erickson carries the ultimate burden at trial to prove that discrimination was a substantial factor in Fisher’s decision to subject him to disparate treatment. But, to survive summary judgment Erickson need only show that a reasonable judge or jury could find that his disability was a substantial motivating factor for Fisher’s adverse actions. *Hill v. BCTI Income Fund-I*, 144 Wash.2d 172, 185–87, 23 P.3d 440 (2001) (*Hill II*); *Wilmot v. Kaiser Aluminum and Chem. Corp.*, 118 Wash.2d 46, 71–72, 821 P.2d 18 (1991).

Erickson asserts that sufficient material facts support his claim that Fisher directly discriminated against him, because of his disability. He argues that Fisher acted unlawfully when it forced him to either resign or accept the PIP. Erickson claims he was subjected to disparate

treatment, because of his disability.

To establish a prima facie case of disparate treatment based on disability, Erickson must show that he (1) belongs to a protected class (disabled), (2) suffered an adverse employment action, (3) was doing satisfactory work, and (4) was treated differently than someone not in the protected class.¹ *Kirby v. City of Tacoma*, 124 Wash.App. 454, 468, 98 P.3d 827 (2004).

To establish the first prong of a claim for disparate treatment, Erickson must show he was disabled within the meaning of the statute. In 1995, Erickson was diagnosed with Dysthymic Disorder, a condition characterized by long lasting depression. The record is sufficient to establish for summary judgment that he falls within the protected class.

For the second prong, Erickson must establish that he was subject to an adverse employment action. An adverse employment action requires “an actual adverse employment action, such as a demotion or adverse transfer, or a hostile work environment that amounts to an adverse employment action.” *Robel v. Roundup Corp.*, 148 Wash.2d 35, 74 n. 24, 59 P.3d 611 (2002). An adverse employment action, therefore, is more than an “inconvenience or alteration of job responsibilities.” “*Kirby*, 124 Wn.App. 465 (quoting *DeGuiseppe v. Vill. of Bellwood*, 68 F.3d 187, 192 (7th Cir.1995)).

*4 Erickson argues that he was subject to an adverse employment action based on two legal theories: (1) that the offer of the PIP constitutes an adverse employment action, and (2) he was constructively discharged when told to either accept the PIP or resign. First, Erickson characterizes the November 8, 2007 meeting and offer of the PIP as disciplinary steps and therefore necessarily adverse employment actions. But, an employee’s placement on a PIP does not itself constitute an adverse employment action where no demotion, reduction in pay, or significant modification of responsibility occurs. *Haynes v. Level 3 Commc’ns, LLC*, 456 F.3d 1215, 1224–1225 (10th Cir.2006), *cert. denied*, 549 U.S. 1252, 127 S.Ct. 1372, 167 L.Ed.2d (2007). The PIP was not before the trial court and is not included in the record here. The only testimony about the PIP indicates that it had no impact on compensation, benefits, or job title. In his brief before this court, Erickson characterizes the PIP as “monitoring of his negative attitude under a threat of termination.” He does not assert that it impacted compensation, benefits, or job title. Because Erickson fails to include the PIP in the record, it is impossible to

Erickson v. Fisher Communications, Inc., Not Reported in P.3d (2009)

150 Wash.App. 1003

determine whether it was an adverse employment action—more than an inconvenience or alteration of job responsibilities.

Erickson alternatively claims that he was subject to an adverse employment action, because he was constructively discharged when he did not accept the PIP. Erickson submitted both an oral and written resignation. A resignation is presumed to be voluntary, unless the employee can introduce evidence to rebut that presumption. *Washington v. Boeing Co.*, 105 Wash.App. 1, 16, 19 P.3d 1041 (2000). To establish constructive discharge the employee must show: (1) a deliberate act by the employer that made his working conditions so intolerable that a reasonable person would have felt compelled to resign, and (2) that he resigned, because of the conditions and not for some other reason. *Boeing*, 105 Wash.App. at 15, 19 P.3d 1041. Whether or not the conditions are intolerable is a question of fact. *Id.* The inquiry is whether “ ‘working conditions would have been so difficult or unpleasant that a reasonable person in the employee’s shoes would have felt compelled to resign.’ ” *Id.* (quoting *Sneed v. Barna*, 80 Wash.App. 843, 849, 912 P.2d 1035 (1996)). Here, the presumption is that Erickson voluntarily resigned unless he can show that Fisher made his working conditions so intolerable that a reasonable person would have felt compelled to resign.

Erickson alleges that he felt compelled to resign, because the PIP targeted his depressed behavior, which resulted from his disability. But, Erickson’s argument fails to establish that objectively a reasonable person would have resigned. Intolerable working conditions require proof of either (1) a continuous pattern of discriminatory treatment or (2) aggravating circumstances. *Sneed*, 80 Wash.App. at 850, 912 P.2d 1035. Here, Erickson does not make a prima facie showing that a pattern existed. Instead he points to isolated incidents, including the comments of Boyd to Stewart outside of Erickson’s presence and the November 8 meeting offering a PIP. Erickson acknowledges that he never felt that the workplace was hostile until the meeting on November 8 when he was presented with the PIP. Moreover, Erickson fails to make a prima facie showing that aggravating circumstances were present. On this record, even construing the facts in a light most favorable to Erickson, we cannot conclude that a reasonable person could find that Erickson’s working conditions were so intolerable that he felt compelled to resign. He fails to make a prima facie showing that he was constructively discharged and therefore subject to an adverse employment action.

*5 We hold that Erickson failed to establish any genuine issues of material fact that he was subjected to an adverse employment action, as required for a prima facie claim of disparate treatment.

For the third prong, Erickson must establish he was doing satisfactory work. The record indicates that Erickson met or exceeded his sales goals in 2007. Additionally, the record shows that he consistently received positive evaluations during his employment with Fisher. We hold that for the purposes of summary judgment, Erickson established the third element of his prima facie case for disparate treatment.

For the fourth prong, Erickson must establish that he was treated differently than someone not in the protected class. He argues that Stewart projected an objectively negative attitude, but was not subject to a PIP or asked to transition to other employment. As evidence, he relies on Stewart’s informing Boyd that he was miserable and that when Stewart learned of Boyd’s hire he complained to the general manager. But, the record shows that Boyd was concerned about negativity when Erickson sent negative e-mails to all of the account executives, confronted a co-worker, and engaged in non-constructive actions. Erickson did not let management handle his concerns. These acts are substantially different from those of Stewart, who directly approached management with his concerns. But, viewed in the light most favorable to Erickson, these facts are sufficient to survive summary judgment on this element of the claim.

Finally, to succeed on a claim for disability discrimination, Erickson must establish that the disability was a substantial factor motivating his disparate treatment. Erickson was diagnosed in 1995. But, the record is undisputed that **Fisher** did not know **Erickson** was disabled as of the November 8, 2007 meeting. We hold that on these facts Erickson fails to show the disability was a substantial factor in Fisher’s actions.

Based on *Riehl v. Foodmaker Inc.*, 152 Wash.2d 138, 152, 94 P.3d 930 (2004); and *Gambini v. Total Renal Care, Inc.*, 486 F.3d 1087 (9th Cir.2007), **Erickson** nonetheless claims that **Fisher’s** actions were unlawful, because the actions targeted *symptoms* of his disability. Unlike *Gambini* or *Riehl*, Fisher had no notice of Erickson’s disability. Erickson did not affirmatively disclose his Dysthymic Disorder to Fisher, either before the November 8 meeting or during it or prior to his resignation letter. Neither *Gambini* nor *Riehl* stand for the proposition that an employer may be liable for

Erickson v. Fisher Communications, Inc., Not Reported in P.3d (2009)

150 Wash.App. 1003

employment decisions when the employer has no knowledge of a disability. Instead, both hold that an employee's conduct resulting from a disability, not merely the disability, may be protected under WLAD when the employer knows or should have known of a disability. Erickson fails to show that Fisher knew or should have known about the disability. Boyd's comment that someone should "up his [Erickson's] meds," was made in a conversation where medication was actually never discussed. Given the nature of this disability, factual context, and substantial changes in the workplace Fisher had no reason to believe that Erickson's conduct or attitude were attributable to a disability rather than merely to unhappiness with the changes. We hold that Erickson's disability was not a substantial factor in Fischer's actions.

*6 Because the trial court did not rule on whether the after

acquired evidence rule applies here, we decline Erickson's request to evaluate whether damages should be limited.

We affirm.

WE CONCUR: LAU and ELLINGTON, JJ.

Parallel Citations

2009 WL 1194526 (Wash.App. Div. 1)

Footnotes

¹ Citing *Anica*, 120 Wash.App. at 488, 84 P.3d 1231, Fisher claims that to present a prima facie case for a disparate treatment case of disability discrimination, the plaintiff must establish that he was (1) disabled, (2) subject to an adverse employment action, (3) doing satisfactory work, and (4) his discharge occurred under circumstances that raise a reasonable inference of unlawful discrimination. In *Riehl v. Foodmaker, Inc.*, 152 Wash.2d 138, 152, 94 P.3d 930 (2004), and other cases, the Supreme Court applied the test as articulated in *Kirby*, 124 Wash.App. at 468, 98 P.3d 827.

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Haley v. Kinko's Inc., Not Reported in P.3d (2002)

111 Wash.App. 1037

111 Wash.App. 1037

NOTE: UNPUBLISHED OPINION, SEE WA R GEN
GR 14.1

Court of Appeals of Washington,
Division 1.

Gustav HALEY, Plaintiff,
and
Harvey Jaffe, Appellant,
v.

KINKO'S, INC., and Paul Orfalea, Respondents.

No. 47443-0-I. | May 13, 2002.

Appeal from Superior Court of King County; Hon. Larry
Jordan.

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Opinion

UNPUBLISHED OPINION

GROSSE, J.

*I Finding that Harvey Jaffe either failed to set forth a prima facie case of a number of his wrongful discharge claims or that he failed to show that the employer's stated reasons for his termination were pretext for a discriminatory purpose, we affirm the dismissal of his complaint by way of summary judgment.

FACTS

In June 1993, Harvey Jaffe, age 44, was hired by Kinko's, Inc. (Kinko's) to work as a commercial account manager at the Redmond, Washington store. He was the first commercial account manager to be hired by Kinko's for

that area. He was hired as an at-will employee. Jaffe signed two employment agreements with Kinko's, one in June 1993 and the other in May 1994. He was hired to work out of the Redmond store as part of a sales team to increase sales for that store, specifically commercial accounts. He was paid a base salary and a commission on his sales. The position was classified as an exempt outside sales position.

Kinko's company-wide policy is that commissions for commercial account managers are paid out of the store in which the commercial account manager is based. The general manager of a store is the supervisor of the commercial account manager from that store. When Jaffe made a sale, he would attempt to have the work done at his home store to increase both his own sales and that of his home store. Jaffe admits that if work from one of his client accounts went to a different store there was no absolute requirement that the general manager of that store pay him a commission on that work. If he made a good argument to the general manager of the other store, that general manager could, and sometimes did, pay a commission to him.

Although Jaffe noted there were no territory restrictions when he was first hired, he admits that by the end of 1993, other commercial account managers had been hired in the area, and geographic sales territories and restrictions were established. Jaffe's territory included the area surrounding Redmond. He acknowledged that commercial account managers were 'not allowed to actively solicit business from outside { their } territories' and was well aware of the territorial restrictions. Jaffe was also aware he was not entitled to commissions for out-of-territory sales, even if he brought them to the Redmond store. Jaffe knew the only exception to this rule was between the Bellevue I and Bellevue II stores.

Over the years Jaffe was a consistent top sales performer, but compliance with management requests, requirements for the reporting of information on his top client accounts, and the timely filing of his end-of-the-month sales reports became problematic. In a memo dated August 1, 1995, the Redmond general manager sent a memo to Jaffe identifying deficiencies that Jaffe needed to correct in his reporting. The general manager made it clear that improvement was necessary and established specific deadlines and goals. Although Jaffe initially made improvement, by November 1995 the regional sales manager placed him on a 60-day special evaluation

Haley v. Kinko's Inc., Not Reported in P.3d (2002)

111 Wash.App. 1037

status.²

*2 Marya Jefferson, a woman younger than Jaffe, was hired to work in the Redmond store as a sales trainee. She was promoted quickly. When Jaffe was placed on special evaluation status he was aware that Jefferson was going to be promoted to a second commercial account manager position at the Redmond store, effective in January of 1996. Jaffe concluded that Kinko's was going to elevate and accelerate Jefferson's involvement in case he no longer worked at Kinko's for whatever reason. In January, a new regional sales manager sent Jaffe a memo outlining additional actions he needed to make within a specific amount of time before he would be released from special evaluation status. Jaffe was told that he should take leave with pay during the week of January 8, 1996 after completing the requirements. On February 9, 1996, the regional sales manager sent a letter to Jaffe confirming that he fulfilled all tasks and requirements listed in the special evaluation status form and those added in January. The letter stated that Jaffe was officially released from all conditions and obligations of the special evaluation status documents. The note was complimentary and stated that continued performance in accord with the changes accomplished would make him a strong candidate for future consideration as a key account manager.

Unfortunately, after release from special evaluation status, the changes in Jaffe's internal work performance and attitude did not last. A friend and fellow commercial account manager from a nearby store went on disability leave and asked Jaffe to oversee his accounts. Rather than have the work done at the usual store, Jaffe brought the projects to Redmond and expected to be paid commissions for the work. The regional sales manager called Jaffe into his office to discuss the projects and Jaffe's expectations. Following this meeting, Jaffe reportedly became anxious and called his doctor. At that time, he had again fallen behind in making his internal reports. He worked all that night to prepare his end-of-the-month report.

After reviewing this end-of-the-month report, the Redmond general manager found a number of discrepancies in it. The general manager wrote Jaffe outlining the discrepancies. The net effect of the discrepancies was approximately a \$900 reduction in Jaffe's claimed commissions. Jaffe responded to his general manager with a copy to the regional sales manager with an eight-page memo challenging the denial of sales credits and commissions. He vented his dissatisfaction with company policies and actions and

made strong requests for changes in those policies.

The regional sales manager responded to most of the issues raised by Jaffe and expressed concern about his unprofessional performance and attitude. While the regional sales manager supported some of Jaffe's concerns, he defended management's right to refuse payment for the claimed commissions and also defended the company policies. The regional sales manager told Jaffe that if he found the current conditions too onerous, too restrictive, too 'siege-like,' that Jaffe would be faced with a choice of working in a positive way to change the conditions, or resign.

*3 After receiving this memo, Jaffe notified the assistant general manager of the Redmond store that he would take vacation on May 28 and May 29 and would return on May 30 and May 31 to do his next end-of-the-month report. Jaffe indicated that he would then take the following week off. Before taking vacation, Jaffe had a conversation with his doctor. Jaffe admits he did not tell anyone at Kinko's about any physical or mental health issues.

After Jaffe returned from vacation, he was asked to meet on June 11, 1996 with his general manager and the regional operations manager. At the meeting, Jaffe was placed on a 72-hour administrative leave pending further investigation due to a suspicion that Jaffe violated Kinko's policies and procedures including the discrepancies in his end-of-the-month reports. Jaffe was instructed to return on June 13, 1996 at 4 p.m. for a meeting in Redmond.

According to the general manager of the Redmond store, at least three specific problems were identified that led to placing Jaffe on administrative leave. First, Jaffe continued to claim commissions for accounts he called on and serviced outside of his territory. Second, Jaffe's end-of-the-month reports were inaccurate. Third, Jaffe failed to meet internal deadlines regarding the reporting of his 'Top 80' list, leading to additional end-of-the-month problems because the general manager refused to recognize a number of accounts claimed by Jaffe.

Following the June 11 meeting, Jaffe was concerned that he was about to be terminated. After the meeting he phoned his physician and made an appointment to see him. He requested a note recommending a leave of absence. The doctor wrote a note on June 13, 1996 stating:

Haley v. Kinko's Inc., Not Reported in P.3d (2002)

111 Wash.App. 1037

Harv Jaffe is under my care and is being treated with medication. He will be undergoing continued evaluation and will continue with treatment until further notice. I recommend he take a leave of absence from his job at this time.

This note makes no reference to a specific disability or any expected duration.

On June 11 and 12, Jaffe made calls to Kinko's Human Resources Department in California to inquire about his rights and benefits, including disability benefits and benefits in the event of termination. Jaffe claims he informed the Human Resources Department personnel that he thought he needed a disability leave, but does not claim he advised anyone that he had been diagnosed with a disability or that his doctor recommended a disability leave of absence.

Jaffe called his regional sales manager on June 12 to request a personal meeting before the 4 p.m. meeting on June 13. The regional sales manager agreed to meet with him at 1:30 p.m. on June 13. Jaffe alluded to clearing up problems with the administrative leave, his personal state of affairs, and some official business, but did not inform the regional sales manager about any disability, or his plan to take or request a medical disability leave.

After Jaffe was placed on administrative leave at the time of the June 11 meeting, internal investigations revealed additional reporting discrepancies in Jaffe's commission calculations.⁴ Based on the results of the internal investigation, Kinko's management decided to terminate Jaffe.

*4 On June 13, 1996, Jaffe arrived to meet with the regional sales manager as planned, but when he arrived he was handed a note from the regional sales manager stating that he was unable to meet with Jaffe at that time. The regional sales manager indicated he would see him at the 4 p.m. meeting. Jaffe asked the regional sales manager's secretary to accept delivery of a packet of materials which included a note explaining that he planned to take a 90 day medical leave beginning June 14. The packet also contained a response to various issues raised in the June 11 meeting. The regional sales manager did not receive these materials until after the 4 p.m. meeting.

Jaffe was extremely anxious about the fact that the

regional sales manager did not meet with him and was concerned that he would not be allowed to take a medical disability leave. He believed that management was plotting against him. He went home and contacted his father, requesting that he accompany Jaffe to the 4 p.m. meeting in Redmond. The general manager, the regional sales manager, and the regional operations manager indicated that Jaffe's father was not welcome in the meeting. But, after it became obvious that no meeting would take place without including Jaffe's father, the Kinko's management team relented. Jaffe told the three men that he was going to take medical leave and that he was on medication. He handed them a packet containing his request for medical leave. Jaffe was told that his paperwork did not change anything as a decision had already been made to terminate his employment. He was given the official reasons, but refused to sign the notice of termination.

Although terminated, Jaffe had his physician complete an attending physician's statement for disability benefits that Jaffe delivered to Kinko's on June 14, 1996. Kinko's returned the paperwork to Jaffe by certified mail indicating that 'unfortunately we find ourselves unable to complete it due to termination of your employment.' A copy of the termination statement was enclosed for Jaffe's records. The termination statement, which Jaffe had refused to sign on June 13, stated the following reasons for Jaffe's termination:

Failure to provide accurate reporting information related to the following: Quota, and accurate sales totals to include documents (from October of 1994 through April of 1996). Submitting { end-of-the-month} sales reports which reflect duplicated dates creating inflated sales totals.

Jaffe and another Kinko's co-worker, Gustav Haley, brought suit against Kinko's and Paul Orfalea, its founder and chief executive officer, asserting claims for age and disability discrimination, wrongful termination in violation of public policy, retaliatory discharge, breach of contract, fraud, negligent misrepresentation, and an accounting. Kinko's denied the claims and counterclaimed for fraud and unjust enrichment. Kinko's filed a motion for summary judgment seeking dismissal of Jaffe's claims on grounds that Jaffe could not meet his burden of proof on any of his claims. After a hearing, the

Haley v. Kinko's Inc., Not Reported in P.3d (2002)

111 Wash.App. 1037

trial court granted summary judgment to Kinko's. The trial court denied a motion for reconsideration. Jaffe appeals.

DISCUSSION

*5 'When reviewing an order of summary judgment, this Court conducts the same inquiry as the trial court. Summary judgment is proper if pleadings, depositions, affidavits, and admissions, viewed in a light most favorable to the nonmoving party, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.¹⁵ Once a moving party meets its initial burden of showing there is no dispute as to any genuine issue of material fact,¹⁶ the burden shifts to the nonmoving party to set forth specific facts showing there is a genuine issue of material fact for trial.¹⁷ The nonmoving party must respond with more than opinions, conclusory allegations, argumentative assertions that material facts exist, or conclusory statements of fact.¹⁸

Specific Burdens of Proof/Production in Wrongful Discharge Cases

Jaffe asserts that he was wrongfully discharged based on claims of age discrimination, disability discrimination, retaliation, and wrongful discharge in violation of public policy. Generally, the central issue in these cases is the employer's motive. Where the employer's motive is at issue, Washington courts generally apply a process developed by the U.S. Supreme Court in *McDonnell Douglas Corporation v. Green*,⁹ as later clarified in *Reeves v. Sanderson Plumbing Products, Inc.*,¹⁰ and adopted in *Washington by Hill v. BCTI Income Fund-I*.¹¹

This approach begins by (1) requiring the plaintiff/employee to bear the first immediate burden, namely that of setting forth a prima facie case of discrimination, retaliation, or wrongful discharge in violation of public policy.¹² If a prima facie case is established, a rebuttable presumption of discrimination temporarily takes hold and then (2) the evidentiary burden shifts to the defendant/employer to produce admissible evidence of a legitimate, nondiscriminatory, nonretaliatory reason for the discharge.¹³ This is merely a burden of production, not of persuasion.¹⁴ If the defendant/employer fails to meet this production burden, then the plaintiff/employee is entitled to an order establishing liability as a matter of law.¹⁵ But if the defendant/employer meets the burden, the temporary

presumption established by the prima facie evidence is rebutted and the presumption is removed. Once the presumption is removed, (3) the burden shifts back to the plaintiff/employee who is afforded the opportunity to show that the employer's stated reason for the adverse employment action was in fact pretext for what was a discriminatory or retaliatory purpose.¹⁶ If the plaintiff/employee proves incapable of doing so, the defendant/employer is entitled to dismissal as a matter of law.¹⁷

Age Discrimination

Applying these principles to the instant case, we first consider whether the trial court erred in dismissing Jaffe's age discrimination claim. To establish a prima facie case of age discrimination, Jaffe had to produce evidence that he was (1) between 40 and 70 years old, (2) discharged, (3) doing satisfactory work, and (4) replaced by a significantly younger person.¹⁸

*6 Here, Jaffe was over 40 years old, discharged, and replaced by Jefferson, who was under the age of 40. Although undisputed that Jaffe had been an excellent sales performer, Kinko's produced a significant amount of evidence that Jaffe's work performance and adherence to company policy was less than satisfactory. This included his chronic inability to meet internal reporting deadlines and other reasons for his placement on special evaluation status. In addition, his performance was less than satisfactory due to the misrepresentation of his quota and/or the sales figures used to inflate the commissions he indicated were due to him. Once Kinko's produced this evidence of legitimate nondiscriminatory reasons for Jaffe's discharge, Jaffe has the burden to establish that Kinko's reasons were unworthy of belief or a mere pretext for intentional age discrimination.

Jaffe failed to produce any credible evidence that Kinko's reasons for discharging him were a mere pretext for age discrimination. Jaffe was 44 when he was hired. The only evidence presented was that Jaffe felt the woman who replaced him was younger than he was and that Kinko's promoted the younger woman, a less experienced, lower cost employee, for the purpose of replacing him. But, as noted above, to overcome the summary judgment motion, Jaffe is required to do more than speculate or make conclusory statements without providing more. He has failed to provide any real evidence of pretext. The trial court did not err in dismissing the age discrimination claim.

Disability Discrimination and Failure to Accommodate

Jaffe claims the trial court erred in dismissing his disability discrimination and failure to accommodate claims. Washington's Law Against Discrimination (WLAD) protects employees from discrimination based on a disability.¹⁹ Under WLAD it is unlawful for an employer to discriminate against any person in the terms or conditions of employment, or discharge any employee because of the presence of any sensory, mental, or physical disability.²⁰ To establish a prima facie case of disability discrimination, a plaintiff/employee must show:

- (1) The employee had a sensory, mental, or physical abnormality that substantially limited his or her ability to perform the job;
- (2) The employee was qualified to perform the essential functions of the job with or without reasonable accommodation, or was qualified to fill vacant positions;
- (3) The employee gave the employer notice of the disability and its accompanying substantial limitations; and
- (4) Upon notice, the employer failed to reasonably accommodate the employee.²¹

When an employee like Jaffe claims that an employer fired him because of a disability, there must be evidence of the plaintiff's actual disability and that the condition was the reason for the discharge.²² Even assuming, without deciding, that Jaffe has or had some physical or mental condition properly termed a disability,²³ he is required to produce evidence that the disability was the reason for his termination. Jaffe has not done so.

*7 More importantly, it is clear that an employer cannot terminate an employee because of a disability unless it actually knows of the disability.²⁴ The employee bears the burden of notifying the employer of a disability. Thus, absent notice to Kinko's of Jaffe's alleged disability, Jaffe could not establish that he was discharged because of his alleged disability.²⁵ The decision to terminate Jaffe was made before Jaffe provided actual notice of a disability due to depression. And, it was clearly based on his poor performance.

Further, there is no evidence that Kinko's failed to

undertake any measure that was medically necessary to accommodate Jaffe. In fact, no accommodation was requested other than a sudden 90-day leave, and that was requested after the fact. '{ T} he duty to reasonably accommodate an employee's handicap does not arise until the employee makes the employer aware of the disability.'²⁶ The employee has to show that a reasonable accommodation was available to the employer at the time the physical limitation became known and that accommodation was medically necessary.²⁷ Kinko's did not have sufficient timely notice of Jaffe's alleged medical disability so there was no duty to provide a reasonable accommodation. The trial court was correct in granting summary judgment on this claim.²⁸

Retaliatory Discharge

Jaffe asserts the trial court erred in dismissing his retaliation claim on summary judgment. RCW 49.60.210(1) prohibits an employer from discharging an employee because the employee has opposed any unfair labor practices forbidden by WLAD. 'To establish a prima facie case for retaliatory discharge, a plaintiff must show that he engaged in statutorily protected activity, that he was discharged, and that retaliation was a substantial factor behind the discharge.'²⁹

Jaffe fails to present any evidence that he engaged in any statutorily protected opposition activity under the law against discrimination. He has not produced evidence that retaliation or any other reason was the real reason for his termination, and that the other reasons were mere pretext. Although he asserts that he opposed the discriminatory treatment of one of his co-workers, Jaffe failed to present specific facts supporting that assertion.

He asserts that Kinko's failed to pay him commissions to which he was entitled. However, the record shows that Jaffe was unhappy about Kinko's commission policies and that he did not like territorial sales restrictions, but also shows Jaffe knew of these policies and restrictions. He presents no evidence that Kinko's actions were illegal or that his complaints about the commission structure constituted statutorily protected opposition activity.

Once again, there is no evidence to show that the reasons for his dismissal were unworthy of belief, contained no basis in fact, or were otherwise pretextual. Jaffe was an employee that believed he was about to be discharged and attempted to forestall the inevitable. The trial court did not err in dismissing this claim on summary judgment.

Wrongful Discharge in Violation of Public Policy

*8 Jaffe asserts that the trial court erred in dismissing his claim for wrongful discharge in violation of public policy. Generally, absent a contract requiring cause for termination, employment relationships in Washington are at-will by either employer or employee.³⁰ Thus, under the at-will doctrine an employer can with limited exception discharge an employee with immunity.³¹ One of the exceptions to the at-will rule is a violation of public policy.³² The public policy tort exception provides relief for an employee whose discharge contravenes a clear mandate of public policy.³³

The purpose of the exception is to prevent employers from using the at-will doctrine to shield themselves from actions that frustrate public policy. The exception is not designed to protect an employee's purely private interest in his or her continued employment. The tort operates to vindicate the public interest in prohibiting employers from acting in a manner contrary to fundamental public policy.³⁴ Our State Supreme Court has recently recognized that the wrongful discharge exception should be applied cautiously in order to avoid allowing an exception to swallow the general rule that employment is terminable at will.³⁵

Four elements are required to prove a wrongful termination tort claim based upon a violation of a public policy: (1) existence of a clear mandate of public policy (clarity); (2) jeopardizing the public policy by discouraging the favored conduct (jeopardy); (3) the public policy linked conduct was the reason for termination (causation); and (4) the defendant cannot provide an overriding justification for the termination (absence of justification).³⁶

Although the existence of public policy is a question of law,³⁷ to survive a motion for summary judgment, Jaffe has the burden of establishing the existence of a clear mandate of public policy. The public policy must be judicially or legislatively created. Furthermore, the court must be careful to 'find' a clear public policy not 'create' it.³⁸ Although not clear from his briefing, Jaffe's claim seems to be based on assertions that Kinko's failed to pay him commissions for out-of-territory sales in violation of RCW 49.46.100(2),³⁹ for opposing the discriminatory termination of a co-worker, and for Kinko's hiring of a younger salesperson for his territory.

A review of the record shows that his vocal and written complaints to Kinko's management about its commission policies, or Jefferson's hiring or promotion to a second commercial accounts manager position at the Redmond store, were not made to further any public good, but were made to further Jaffe's private and proprietary interests. The record also does not support Jaffe's claim that he necessarily opposed the termination of his co-worker, but his anger was more in the form of additional complaints about a commission he felt he deserved through that employee. As a favor to the co-worker who was on leave and eventually terminated, Jaffe handled some of the co-worker's out-of-territory accounts at the co-worker's request. Jaffe was adamant he should be paid the commission. Even if these claims somehow rise to a level showing the existence of a clear public policy, Jaffe has not shown any link to his dismissal. As stated a number of times previously, Kinko's is able to offer an overriding justification for the dismissal. Jaffe's wrongful discharge in violation of public policy tort claim was properly dismissed.

*9 Jaffe asserts that it was error for the trial court to grant summary judgment dismissing his claims for breach of contract for unpaid commissions and for violation of wage and hour laws. Jaffe contends that Kinko's breached his employment contract by failing to provide him with disability benefits or to process the disability paperwork he submitted to Kinko's on June 14, 1996, the day following his termination. He bases his claim on Kinko's co-worker handbook. While true that the handbook provides for short- and long-term disability benefits for regular full-time coworkers who are on approved medical leave, Jaffe is unable to show that he was on such an approved leave or complied with the procedures for obtaining a medical leave.⁴⁰

Jaffe claims that his employment agreement lacked terms addressing post-termination commissions and that under the 'procuring cause' doctrine, he was entitled to receive post-termination commissions.⁴¹ However, under the case cited, the standard for receiving post-termination commissions is the employee's activity that sets the chain of events in motion, eventually culminating in a sale. Jaffe has not identified any sale that transpired due to his work before he was terminated that would result in any post-termination commission.

Following a similar line of argument, Jaffe claims that Kinko's violated various wage and hour laws relating to record keeping and payment of wages. However, he failed to set forth any specific facts establishing that Kinko's did

Haley v. Kinko's Inc., Not Reported in P.3d (2002)

111 Wash.App. 1037

not keep wage and hour records or failed to pay any compensation it was legally required to pay. His claims are all based on opinion and conjecture and are insufficient to survive summary judgment.

Jaffe asserts that his claims of fraud and negligent misrepresentation, or his claim for an accounting, were dismissed in error. However, Jaffe has not provided any argument or citation to authority in regard to the dismissal of these claims. Their only mention is in his opening brief in a sentence suggesting that the court bear in mind that he prayed for an accounting in his complaint. This is not sufficient. Assignments of error contained in a brief that are not supported by argument or citation to authority are waived and will not be considered on appeal.⁴²

Citing *Jackson v. Peoples Federal Credit Union*,⁴³ Jaffe asserts in his opening brief that Kinko's conduct was

outrageous and that his tort claim of outrage should be remanded for trial on liability and damages. Jaffe did not allege a tort of outrage claim in his complaint or raise it to the trial court. He did not raise the issue in opposition to Kinko's summary judgment motion. This court refuses to review this claim of error that was not pleaded or raised in the trial court.⁴⁴

We affirm the trial court's dismissal of Jaffe's complaint by way of summary judgment.

Parallel Citations

2002 WL 986840 (Wash.App. Div. 1)

Footnotes

- 1 The agreements provided:
Kinko's and the co-worker understand that the co-worker is employed atwill, which means that the co-worker or Kinko's may terminate the employment at any time, with or without cause and with or without advance notice. Kinko's reserves the right to amend, revoke or cancel this agreement at any time, in its sole and absolute discretion.
Further, the agreements stated:
As a member of the Kinko's management team, the co-worker will be expected to comply with all provisions of the Kinko's Policies and Procedures manual, as amended from time to time. The co-worker acknowledges, by signature on this agreement, that failure to comply with and ensure enforcement of company policies, procedures and all federal/state laws relating to business operation, sales and employment can result in immediate termination of employment.
In addition, the Kinko's co-worker handbook provided that ' [d] ishonesty or falsification of employment records, time records, benefit records, or any Company documents' was unacceptable conduct which provided grounds for immediate dismissal without benefit of progressive disciplinary measures.
- 2 The Kinko's co-worker handbook defined Special Evaluation Status as follows:
This status may be enacted whenever a supervisor determines that ongoing training/counseling has not resolved a co-worker's performance problems that are detrimental to the operation of the business. It is extremely important for co-workers to understand that at any time during the time frame established for Special Evaluation, or at the end of the time frame, if improvement has not been satisfactory, the consequence will be termination of their employment with Kinko's.
- 3 In two months. Jaffe had based calculations on a previous lower quota resulting in an alleged overpayment. In May 1996, he claimed sales from April that would have resulted in an overpayment.
- 4 There were misrepresented quotas for some months, his end-of-the-month and point-of-sale reports reflected commission calculations based on figures in a 'price' column, rather than the 'discounted amount' column, inflating commissions, and also some end-of-the-month reports reflected duplicate dates and sales.
- 5 *Pulcino v. Fed. Express Corp.*, 141 Wn.2d 629, 639, 9 P.3d 787 (2000) (citing *East Wind Express, Inc. v. Airborne Freight Corp.*, 95 Wn.App. 98, 102, 974 P.2d 369 (1999) (citing *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982)); CR 56(c).
- 6 A defendant moving for summary judgment 'can attempt to establish through affidavits that no material factual issue exists or, alternatively, the defendant can point out to the trial court that the plaintiff lacks competent evidence to support an essential element of his or her claim.' *Guile v. Ballard Cmty. Hosp.*, 70 Wn.App. 18, 23, 851 P.2d 689 (1993).
- 7 CR 56(c).

Haley v. Kinko's Inc., Not Reported in P.3d (2002)

111 Wash.App. 1037

8 *Hiatt v. Walker Chevrolet Co.*, 120 Wn.2d 57, 66, 837 P.2d 618 (1992).

9 *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

10 *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000).

11 *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 185–87, 23 P.3d 440 (2001).

12 See *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 362–64, 753 P.2d 517 (1988). To establish a prima facie case of termination, an employee must demonstrate that he or she (1) belongs in a protected class, (2) was discharged, (3) was doing satisfactory work, and (4) was replaced by someone not in the protected class.

13 *Grimwood*, 110 Wn.2d at 363–64.

14 *Grimwood*, 110 Wn.2d at 364.

15 *Kastanis v. Educ. Employees Credit Union*, 122 Wn.2d 483, 490, 859 P.2d 26, 865 P.2d 507 (1993) (citing *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981)).

16 An employee can demonstrate that the reasons given by the employer are not worthy of belief with evidence that: (1) the reasons have no basis in fact, or (2) even if based in fact, the employer was not motivated by these reasons, or (3) the reasons are insufficient to motivate an adverse employment decision. *Chen v. State*, 86 Wn.App. 183, 190, 937 P.2d 612 (1997).

17 *Kastanis*, 122 Wn.2d at 491; *Grimwood*, 110 Wn.2d at 365.

18 *Hill*, 144 Wn.2d at 188 & n. 10 (citing *O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 312–13, 116 S.Ct. 1307, 134 L.Ed.2d 433 (1996)); see also *Hume v. Am. Disposal Co.*, 124 Wn.2d 656, 667, 880 P.2d 988 (1994).

19 RCW 49.60.030(1).

20 RCW 49.60.180(2), (3).

21 *Davis v. Microsoft Corp.*, 109 Wn.App. 884, 890, 37 P.3d 333 (2002) (citing *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 193, 23 P.3d 440 (2001); *Dean v. Municipality of Metro. Seattle*, 104 Wn.2d 627, 639, 708 P.2d 393 (1985)); *Wurzbach v. City of Tacoma*, 104 Wn.App. 894, 897–98, 17 P.3d 707, review denied, 144 Wn.2d 1017 (2001)).

22 *Parsons v. St. Joseph's Hosp. & Health Care Ctr.*, 70 Wn.App. 804, 808, 856 P.2d 702 (1993).

23 This normally would be an issue of fact for the trier of fact. *Pulcino*, 141 Wn.2d at 642.

24 *Goodman v. Boeing Co.*, 127 Wn.2d 401, 408, 899 P.2d 1265 (1995). See also *Wilking v. County of Ramsey*, 153 F.3d 869, 874 (8th Cir.1998).

25 *Hume*, 124 Wn.2d at 670–72.

26 *Snyder v. Medical Serv. Corp.*, 145 Wn.2d 233, 239, 35 P.3d 1158 (2001) (citing *Pulcino*, 141 Wn.2d at 643).

Haley v. Kinko's Inc., Not Reported in P.3d (2002)

111 Wash.App. 1037

- 27 *Pulcino*, 141 Wn.2d at 643 (citing *MacSuga v. County of Spokane*, 97 Wn.App. 435, 442, 983 P.2d 1167 (1999)).
- 28 Even if Kinko's had known that Jaffe suffered from depression at the time, Kinko's did not have to accept nonprofessional behavior simply because the employee had a disability. Jaffe could still be held accountable for his actions and discharged for wrongful conduct.
- 29 *Vasquez v. State*, 94 Wn.App. 976, 984, 974 P.2d 348 (1999) (citing *Kahn v. Salerno*, 90 Wn.App. 110, 128–29, 951 P.2d 321 (1998)).
- 30 *Selix v. Boeing Co.*, 82 Wn.App. 736, 740, 919 P.2d 620 (1996).
- 31 *Sedlacek v. Hillis*, 104 Wn.App. 1, 13, 3 P.3d 767 (2000) (citing *Bakotich v. Swanson*, 91 Wn.App. 311, 314–15, 957 P.2d 275 (1998)), *aff'd in part, rev'd in part*, 145 Wn.2d 379, 36 P.3d 1014 (2001).
- 32 *Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wn.2d 46, 53, 821 P.2d 18 (1991) (citing *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 232, 685 P.2d 1081 (1984)).
- 33 *Thompson*, 102 Wn.2d at 232.
- 34 *Smith v. Bates Technical Coll.*, 139 Wn.2d 793, 801, 991 P.2d 1135 (2000).
- 35 *Sedlacek v. Hillis*, 145 Wn.2d 379, 390, 36 P.3d 1014 (2001).
- 36 *Sedlacek*, 145 Wn.2d at 387 (citing *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 941, 913 P.2d 377 (1996)). See also *Roberts v. Dudley*, 140 Wn.2d 58, 64–65, 993 P.2d 901 (2000).
- 37 *Dicomes v. State*, 113 Wn.2d 612, 617, 782 P.2d 1002 (1989).
- 38 *Selix*, 82 Wn.App. at 741.
- 39 Nothing in the statute provides that employers must pay outside sales personnel commissions for out-of-territory sales. More importantly, an outside salesperson is not an employee to which the provisions of chapter 49.46 RCW apply. See RCW 49.46.010(5)(c) and RCW 49.46.130(1).
- 40 Those procedures required an employee to submit a doctor's certificate to his or her immediate supervisor indicating the nature of the disability and the expected duration. Jaffe did not follow this procedure until the day after he was discharged. The note from his doctor, that he attempted to give his employer on the day he was discharged, did not identify the nature of the alleged disability or its expected duration.
- 41 *Syputa v. Druck, Inc.*, 90 Wn.App. 638, 954 P.2d 279 (1998).
- 42 *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); *Lindblad v. Boeing Co.*, 108 Wn.App. 198, 207–08, 31 P.3d 1 (2001).
- 43 *Jackson v. Peoples Fed. Credit Union*, 25 Wn.App. 81, 604 P.2d 1025 (1979).
- 44 RAP 2.5(a); *Cox v. Spangler*, 141 Wn.2d 431, 447, 5 P.3d 1265, 22 P.3d 791 (2000) (citing *Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983)).

Haley v. Kinko's Inc., Not Reported in P.3d (2002)

111 Wash.App. 1037

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94 Wash.App. 1045

NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR 14.1
Court of Appeals of Washington, Division 1.

Renita R. OWENS and Virgil E. Owens, husband and wife, Appellants,
v.
FARMERS INSURANCE EXCHANGE, one of the **FARMERS** INSURANCE GROUP OF COMPANIES,
Respondent.

No. 41712-6-I. | March 22, 1999.

Appeal from Superior Court of King County, Docket No: 95-2-31958-1, judgment or order under review date filed 10/29/1997; Kathleen J. Learned, Judge.

Attorneys and Law Firms

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Opinion

UNPUBLISHED OPINION

BECKER.

*1 An employer who does not have adequate **notice** of an employee's **disability** will not be held liable for discriminating on the basis of that **disability**. Similarly, an employer who does not have **notice** of an employee's serious health condition will not be held liable for failing to grant a medical leave. Because the record here before us contains evidence of **notice** to the employer that the plaintiff employee was disabled and suffering a serious health condition, we reverse the order of summary judgment dismissing the plaintiff's claims arising from her termination.

Review of a summary judgment dismissal is de novo and the appellate court engages in the same inquiry as the trial court. That inquiry is whether there is a genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law. The court considers the evidence in the light most favorable to the nonmoving party.¹

Renita Owens, appellant here and plaintiff below, worked as a claims adjuster for **Farmers** Insurance Exchange from 1986 until her termination on September 14, 1994. In the months prior to her termination, Owens' work performance at **Farmers** declined, provoking numerous complaints from clients of **Farmers** and a formal warning from her supervisor.

Owens' decline in work performance coincided roughly with an onset of depression. In mid-1994, Owens began to experience suicidal thoughts. She contacted the Employee Assistance Program (EAP) at **Farmers**, where a counselor diagnosed her with major depression. Owens' symptoms included lapses in short term memory and concentration as well as depressed mood and sleep deprivation, all of which interfered with her ability to function at work. Owens told her supervisor, William Ruther, that she was undergoing mental health counseling.

Farmers had an employee handbook stating the terms of an attendance policy. That policy required all employees absent on any day to call their supervisor or other manager within one hour of their starting time. If two days went by without the employee calling in, **Farmers** would presume the employee had resigned. The call-in requirement did not apply during an approved leave.

On Friday, September 9, 1994, Owens' counselor, increasingly concerned about Owens' suicidal thoughts, referred her for hospital treatment. The following Monday, September 12, Owens did not show up at **Farmers** for a scheduled meeting with Ruther at 8 a.m., her normal starting time during the week. She called **Farmers** shortly after 8 a.m. that day and spoke to Ruther and to another supervisor. "I advised them that my company car and all of **Farmers**' property had been placed in the parking lot and I was not of any sound mind to perform my duties for **Farmers** Insurance." Owens told the supervisors she would be seeing a doctor that day, needed a leave, and would be sending **Farmers** a doctor's note. Owens said she would let the company know how long she expected the leave to last after she consulted with the doctor. Ruther responded to Owens, "Do what you have to do." He then reassigned Owens' files and had a colleague list Owens on the employee schedule as being on medical leave for the following week.

*2 Two days later, at approximately 10 a.m. on Wednesday, September 14, Owens contacted the human resources department at **Farmers** to request a medical leave. Susie DePinto, an administrative assistant, told Owens about the federal Family and Medical Leave Act (FMLA). The Act allows covered employees to take medical leave for up to 12 weeks for serious health conditions and protects their right, upon return, to be placed in the same or a similar position.² Owens responded that she wanted to apply for a leave under the FMLA. She said she would be away "maybe 8 weeks, maybe 12." Owens told DePinto that she had seen a doctor and would send a doctor's note right away. According to Owens, she mailed a note at that time to **Farmers** from her psychiatrist, stating that Owens was in treatment and needed a medical leave from work. **Farmers** claims to have never received that note.

That same morning, on September 14, Ruther was arranging to terminate Owens' **employment**. In faxed correspondence to the human resources department, Ruther explained that Owens had not timely called in to report her absence either that day, Wednesday, or the previous day, Tuesday, as required under company policy. By 10:30 a.m., Ruther obtained final approval for terminating Owens. He notified Owens by mail. Upon receiving the letter, Owens called Ruther and Human Resources Supervisor Robert Evoy. She expressed surprise over having been fired because she thought that she was on an approved leave and that a continuing call-in to **Farmers** was not required. Neither Ruther nor Evoy inquired about her medical condition. Evoy responded that Ruther's letter explained why Owens was fired. "I have nothing to say to you", Evoy told her.

Owens' condition deteriorated and her treatment continued for several days. Then, on September 27, Owens wrote to Evoy asking for an explanation. She later wrote to Ruther asserting that she had never intended to resign. Owens' letter said she merely requested a leave of absence and had taken his "Do what you have to do" response to her September 12 telephone call as an approval of her leave request. Owens' letter also related that she had mailed a letter from her doctor to Human Resources on September 14. Rebecca Seeley, Evoy's successor as the Human Resources Manager, responded in a letter dated October 7, 1994, that she found "no record" of Owens being on an approved leave of absence. And Seeley wrote that **Farmers** still had not received a "doctor's statement." The letter explained the termination would stand because Owens had not called in about her absence, but added that **Farmers** would reevaluate Owens' termination if she had "any documentation" in support of her request, other than her letters. On October 31, **Farmers** wrote a follow up letter to Owens saying that because she had failed to respond to the October 7 letter, **Farmers** would consider the matter of her **employment** closed if **Farmers** did not hear from her by November 7.

*3 Owens claims she did not receive the October 7 letter from **Farmers** and did not become aware of its contents until she saw it as an attachment to the October 31 letter. Owens retained an attorney, Pamela McClaran. On November 3, McClaran contacted the Human Resources Department. Laura Wampler, a supervisor there, told McClaran that **Farmers** policy required Owens to submit written documentation in support of a medical leave of absence within five days of her oral request for a leave. McClaran argued with Wampler, trying to establish that **Farmers** terminated Owens only two days after her oral request and that in any event, the FMLA does not impose a five-day limit for the receipt of written documentation or require that a medical leave request be in writing. McClaran was unable to resolve these issues with Wampler. According to McClaran, Wampler did not deny that **Farmers** received a note from Owens' doctor. McClaran asked **Farmers** to have its own attorney contact her about Owens' termination. **Farmers** did not do so, even after McClaran repeated her request in a letter.

Owens submitted no further documentation to **Farmers** about her medical treatment. **Farmers** let the termination stand. Owens filed a wrongful termination suit against **Farmers** in December, 1995. Among the causes of action she alleged were **disability discrimination**, a violation of the FMLA, and breach of an **employment** contract. **Farmers** moved for a summary judgment dismissal of all claims. The trial court granted the motion. According to the court's memorandum opinion, **Farmers** had enough information on September 12, 1994 to understand that Owens intended to request a medical leave. But, the trial court reasoned, "**Farmers** essentially cured any earlier failure to clarify the communication" by

informing Owens that **Farmers** would reconsider if she sent documentation from a doctor that would support a leave request.

It is inexplicable why in late October/early November she or her attorney did not obtain a letter from her doctor confirming her diagnosis, the need for a leave and the time period for the necessary leave.... Ms. Owens did not meet her obligation to provide **notice** of her condition and confirmation of her need for a leave of absence. Owens appeals from the order of dismissal.

DISABILITY DISCRIMINATION

Owens brought her **disability** claim under the Washington Law Against **Discrimination**, RCW 49.60. She claims that **Farmers** discriminated against her in two ways: (1) failure to accommodate her **disability**, and (2) disparate treatment as reflected in her termination.

To establish a prima facie case of **disability discrimination**, Owens must show both (1) the presence of an abnormal condition, and (2) **Farmers** discriminated against her because of that condition.³ **Farmers** does not dispute that Owens' depression was an abnormal and serious mental condition. The issue is whether **Farmers** discriminated against her because of that condition.

There can be no **disability discrimination** where the employer lacks **notice** that the employee suffers from a serious medical condition.⁴ The employee is not obligated to inform the employer of the full nature and extent of the **disability**, but still must give **notice** of the **disability** sufficient to initiate an interactive exchange with the employer about what accommodations would be reasonable.⁵

*4 In *Martini v. Boeing Co.*,⁶ this court held there was sufficient **notice** to the employer of a **disability** after EAP counselors diagnosed a plaintiff employee with major depression and referred him for training to assist him with that condition. Like the plaintiff in *Martini*, Owens saw an EAP counselor, who diagnosed her with major depression. **Farmers** argues that seeing an EAP counselor is not enough by itself to trigger the employer's duty because EAP programs operate under principles of confidentiality.

Even if this is so, there is substantial evidence that **Farmers** had **notice** of Owens' depression apart from any **notice** through the EAP program. Weeks before Owens' termination, the supervisors at **Farmers** learned from Owens herself that she was receiving mental health counseling. Then, on the Monday before her scheduled appointment with the psychiatrist, Owens called in and told her supervisor she was "not of any sound mind" to perform her duties for **Farmers**. Finally, while **Farmers** maintains it did not receive the note from the psychiatrist, Owens insists that she mailed it. Viewed in the light most favorable to Owens, **Farmers** received information specific enough to put **Farmers** on **notice** that the counseling Owens was receiving was for a disabling mental condition. A jury could conclude that **Farmers** breached its duty by firing Owens hastily, without first inquiring whether accommodations were possible.

The trial court viewed **Farmers** as having cured any deficiency in its initial response by giving Owens another chance to document her condition before the termination became final. The court used the word "inexplicable" in reference to Owens' failure to supply **Farmers** with a doctor's note or other medical documentation after she received **Farmers**' letters of October 7 and 31. This assessment does not take the evidence in the light most favorable to Owens. According to McClaran's version of her telephone conversation with Laura Wampler of Human Resources, Wampler did not endorse the idea that Owens would be reinstated if she simply provided medical documentation of her condition. Instead, Wampler insisted that to be entitled to a medical leave, Owens had to request the leave in writing within five days, which Owens did not do. A jury could find that Owens followed up on **Farmers**' letters through attorney McClaran, that McClaran's efforts to explain Owens' circumstances were met by argumentative and legally inaccurate responses by Wampler, and that McClaran reasonably concluded that sending more information to **Farmers** would be futile since **Farmers** refused to put her in touch with an attorney.

We conclude Owens has presented evidence of adequate **notice**. Because **notice** triggers the employer's burden to take "positive steps" to accommodate the employee's limitations,⁷ Owens must be allowed to proceed further with her claim of **disability discrimination** arising from a failure to accommodate.

Owens' second theory of **disability discrimination** is disparate treatment in her termination. This claim involves the burden allocation scheme developed by the United States Supreme Court in *McDonnell-Douglas Corp. v. Green*.⁸ Under

this scheme, applied in Washington to **discrimination** claims under RCW 49.60, the worker must first make out a prima facie **discrimination** case by a preponderance of the evidence.⁹ Second, the employer then assumes the burden of producing a legitimate nondiscriminatory reason for the challenged act. The burden then shifts back to the worker to show the employer's claimed reasons are pretext.¹⁰ If there is no evidence of pretext, the employer is entitled to a dismissal as a matter of law, whereas evidence of pretext makes summary judgment inappropriate because the case must go to the fact-finder.¹¹

*5 Except for arguing **notice** as discussed above, **Farmers** does not dispute the presence of Owens' prima facie case. Instead, **Farmers** argues that Owens' failure to comply with the call-in policy was a legitimate, nondiscriminatory reason for her termination and she has not shown this reason to be pretextual.

Farmers' policy excuses employees from calling in if they are on an approved leave. Ruther's ambiguous response to Owens' September 12 request for leave, "Do what you have to do", could reasonably be understood as approving her leave request. The evidence that Ruther reassigned Owens' files and listed her on the schedule as being on medical leave further suggests he approved medical leave for Owens, thus excusing her from calling in each day. And even if Owens was not on an approved leave, she has provided evidence that **Farmers** applied its absentee policy more leniently to non-disabled employees than in her own case. Out of eleven people **Farmers** terminated under the call-in policy, Owens was the only person fired immediately after failing to call in for two days. Other employees who were not disabled were not terminated until substantially more time had passed. A jury could conclude that Ruther's use of Owens' two-day absence as the stated reason for firing her was a pretext, and that his actual reason was to avoid having to deal with an employee who was not of sound mind. We conclude Owens has sufficiently raised material issues of fact with respect to her claim of disparate treatment.

FMLA LEAVE

Under the federal Family and Medical Leave Act, an eligible employee is entitled to a total of 12 work weeks of leave during any 12-month period for a serious health condition.¹² **Farmers** does not dispute that Owens' mental condition was a serious health condition. The issue is whether Owens gave adequate **notice** of a condition qualifying her for FMLA leave.

The Act itself is silent as to **notice** requirements when, as in this case, the need for leave is unforeseeable.¹³ Federal regulations under FMLA provide that "an employee should give **notice** to the employer of the need for FMLA leave as soon as practicable under the facts and circumstances of the particular case."¹⁴ Such **notice** can be verbal, but should in any case be sufficient to notify the employer that the employee needs FMLA-qualifying leave and should state the anticipated timing and duration of the leave.¹⁵

Owens first told her supervisor that she was not of sound mind on Monday, September 12, the first day of her extended absence. On Wednesday, September 14, Owens told DePinto, the administrative assistant in Human Resources, that the duration of her leave would be "maybe 8 weeks, maybe 12." She also told DePinto that she would mail a note from her doctor, and did so the same day. This evidence satisfies her burden of giving **notice** under the FMLA.

Farmers contends, however, that even if the initial **notice** was adequate, Owens' FMLA claim must fail because she did not provide medical certification when **Farmers** requested her to do so in its letters of October 7 and 31. Under FMLA regulations, an employer may require the employee to provide medical certification to verify the existence of a serious health condition.¹⁶

*6 **Farmers'** two letters did not make reference to the Act, and did not explain that **Farmers** wanted Owens' doctor to verify the existence of a serious health condition. Further, as discussed in connection with Owens' **disability discrimination** claim, Owens did not ignore **Farmers'** letters, but instead sought clarification of them through her attorney, Pamela McClaran. DePinto did not advise McClaran that the medical information supplied by Owens thus far was insufficient. Instead, she took the position that Owens was not entitled to FMLA leave because she did not make a timely written request for it within five days of her oral request. A jury could conclude that sending medical documentation would not have made any difference and thus excuse Owens' failure to provide medical records.

In short, **Farmers'** argument that Owens should have responded to **Farmers'** letters of October 7 and 31 by supplying more medical documentation raises issues of fact for a jury to decide. The FMLA claim accordingly must be reinstated.

PROMISE OF SPECIFIC TREATMENT

Owens contends **Farmers** breached the absentee policy in the employee handbook by firing her for not calling in even though she was on approved leave.

To prevail on a breach of contract claim based on promises of specific treatment in specific circumstances, the employee must establish: (1) such a promise contained in an employee manual or handbook or the like; (2) the employee's justifiable reliance; (3) and breach by the employer.¹⁷ An employer is not bound by the terms in **employment** manuals if they state "in a conspicuous manner that nothing contained therein is intended to be part of the **employment** relationship and are simply general statements of company policy."¹⁸

Farmers' employee handbook contained an explicit disclaimer of contract: "the statements contained within the Handbook are not intended to create any contractual or other legal obligations." In view of this disclaimer, Owens has no case for breach of contract. This claim was properly dismissed.

ATTORNEY FEES

Owens requests attorney fees and costs on appeal. That request is denied. Entitlement to attorney fees, including fees for an appeal necessary to get the case to trial, cannot be determined until after a trial on the merits.¹⁹

If Owens ultimately prevails on remand, the trial court should include fees incurred for this appeal as part of its award.

The order granting summary dismissal is reversed as to the **disability discrimination** and FMLA claims, and is affirmed as to the claim for breach of contract.

Parallel Citations

1999 WL 170432 (Wash.App. Div. 1), 137 Lab.Cas. P 33,832

Footnotes

1 *Marquis v. City of Spokane*, 130 Wash.2d 97, 104-05, 922 P.2d 43 (1996).

2 29 U.S.C. sec. 2612(a)(1)(D).

3 *Hume v. American Disposal Co.*, 124 Wash.2d 656, 670, 880 P.2d 988 (1994).

4 *Hume v. American Disposal Co.*, 124 Wash.2d at 671-72, 880 P.2d 988.

- 5 *Goodman v. Boeing*, 127 Wash.2d 401, 408–09, 899 P.2d 1265 (1995).
- 6 *Martini v. Boeing Co.*, 88 Wash.App. 442, 457, 945 P.2d 248 (1997).
- 7 *Goodman v. Boeing*, 127 Wash.2d at 408, 899 P.2d 1265.
- 8 *McDonnell–Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).
- 9 *Fell v. Spokane Transit Authority*, 128 Wash.2d 618, 634, 911 P.2d 1319 (1996).
- 10 *Fell v. Spokane Transit Authority*, 128 Wash.2d at 634, 911 P.2d 1319.
- 11 *Kastanis v. Educational Employees Credit Union*, 122 Wn.2d 483, 491, 859 P.2d 26, 859 P.2d 507 (1994).
- 12 29 U.S.C. sec. 2612(a).
- 13 *Satterfield v. Wal–Mart Stores, Inc.*, 135 F.3d 973, 976 (5th Cir.), cert. denied, 525 U.S. 826, 119 S.Ct. 72, 142 L.Ed. 2d 57 (1998).
- 14 29 C.F.R. sec. 825.303.
- 15 29 C.F.R. sec. 825.302(c).
- 16 29 C.F.R. sec. 825.305(b).
- 17 *DePhillips v. Zolt*, 136 Wash.2d 26, 36, 959 P.2d 1104 (1998).
- 18 *Thomas v. St. Regis Paper Co.*, 102 Wash.2d 219, 230, 685 P.2d 1081 (1984).
- 19 *Hinman v. Yakima School District 7*, 69 Wash.App. 445, 453, 850 P.2d 536 (1993), review denied, 125 Wn.2d 1010 (1994).

107 Wash.App. 1039

NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR 14.1
Court of Appeals of Washington, Division 1.

James RIGBY, Bankruptcy Trustee for Renita R. OWENS and Virgil E. Owens, husband and wife, Respondents,
v.
FARMERS INSURANCE EXCHANGE, one of the **Farmers** Insurance Group of Companies, foreign insurers,
Appellants.

No. 46575-9-I. | Aug. 6, 2001.

Appeal from Superior Court of King County, Docket No. 95-2-31958-1, judgment or order under review, date filed 04/14/2000; Kathleen J. Learned, Judge.

Attorneys and Law Firms

Thomas A. Lemly, Holly M. Hearn, Kristin E. Sweeney, Davis Wright Tremaine, Seattle, WA, for appellant(s).

Sidney J. Strong, Strong & Konat P.S., Kimberly A. Konat, Seattle, WA, for respondent(s).

Opinion

UNPUBLISHED OPINION

BECKER.

*1 This is the second appeal in this case involving an **employment discrimination** claim. The trial court entered an order dismissing the claim on summary judgment, and our decision in the first appeal reversed that order. The plaintiff employee proceeded to trial and won a verdict for \$275,000 in damages. The defendant employer has appealed, essentially still arguing that the facts do not support the plaintiff's legal theories. The law has not changed, and the evidence adduced at trial was essentially the same as the evidence we relied on in our previous decision. We therefore affirm the judgment.

Renita Owens worked for **Farmers** Insurance Exchange as a claims adjuster for eight years. In 1994, **Farmers** terminated her. Owens sued **Farmers**. The trial court granted **Farmers**' motion for summary judgment and dismissed all of Owens' claims. On appeal, we held that Owens had alleged sufficient facts to show that she was suffering from severe depression at the time and that **Farmers** had discriminated against her on account of it. We also remanded for trial on her claim that **Farmers** violated the federal Family Medical Leave Act by denying her request for a medical absence.

Owens prevailed at trial on both claims. After the trial, **Farmers** made a motion for judgment notwithstanding the verdict.

¹ The trial court denied **Farmers**' motion and **Farmers** appeals.

In reviewing a trial court's decision to deny such a motion, this court applies the same standard as the trial court. *Hizey v. Carpenter*, 119 Wn.2d 251, 271, 830 P.2d 646 (1992). A judgment notwithstanding the verdict is proper only when the court can find, "as a matter of law, that there is neither evidence nor reasonable inference therefrom sufficient to sustain the verdict." *Goodman v. Goodman*, 128 Wn.2d 366, 371, 907 P.2d 290 (1995) (quoting *Brashear v. Puget Sound Power & Light Co.*, 100 Wn.2d 204, 208-09, 667 P.2d 78 (1983)); *Hizey*, 119 Wn.2d at 271-72. A motion for a judgment notwithstanding the verdict admits the truth of the opponent's evidence and all inferences that can be reasonably drawn therefrom, and requires the evidence to be interpreted most strongly against the moving party and in the light most favorable to the opponent. *Goodman*, 128 Wn.2d at 371. **Farmers** relies on the evidence it presented contradicting Owens' version of events, and fails to recognize or apply the appropriate standard of review at this juncture.

DISABILITY DISCRIMINATION

In order to establish a claim for **disability discrimination** under RCW 49.60, a plaintiff must prove the existence of a **disability**, and **discrimination** by the employer because of that **disability**. The **discrimination** element is met by demonstrating that the employer took action against the employee because of his or her condition (disparate treatment), or failed to take steps reasonably necessary to accommodate the employee's **disability** (failure to accommodate). *Sommer v. Department of Social and Health Services*, 104 Wn.App. 160, 172–73, 15 P.3d 664 (2001). For a disparate treatment claim, the 'because of' language means that the **disability** must have been a substantially motivating factor in the employer's decision. *Mackay v. Acorn Custom Cabinetry, Inc.* 127 Wn.2d 302, 310, 898 P.2d 284 (1995). **Farmers** claims that Owens did not give reasonable **notice** of her **disability**, an issue we addressed in our previous opinion. An appellate court 'will generally not make a redetermination of the rules of law which it has announced in a prior determination in the same case or which were necessarily implicit in such prior determination.'" *Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91, 113, 829 P.2d 746 (1992) (quoting 15 L. Orland & K. Tegland, *Wash. Prac.*, Judgments sec.380 at 55–56 (4th Ed.1986)). Owens testified at trial to the same facts that we held to be legally sufficient in the first appeal. During the weeks before she was fired she told several supervisors that she was receiving counseling and that she was suffering from stress. On the morning she called in to request an emergency medical leave of absence she told one of the supervisors of her 'mental instability'. Within two days of that request, she mailed a doctor's note confirming that she was in treatment. The sufficiency of this evidence is the law of the case, and seeing no reason to revisit it, we once again hold it sufficient.

*2 The same considerations apply to **Farmers'** argument that Owens' **disability** was not a substantially motivating factor in its decision to terminate her. **Farmers** introduced considerable evidence tending to show that Owens was terminated for her failure to comply with the company's call-in policy. But failing to call in was not a violation of policy if **Farmers** had actually approved Owens' medical leave request. There was evidence that Owens did receive such approval. When Owens telephoned to request emergency medical leave, her supervisor responded that she should 'do what you have to do.' Although **Farmers** claims that any approval was for that day only, the jury was free to believe the other possible inference. Owens was listed on medical leave on the calendar for the rest of the week and her files were reassigned. Owens also submitted proof that **Farmers** was not consistent in terminating employees for violating the call-in policy. The evidence showed that other, non-disabled employees were not terminated immediately on the second day of failing to call in. A jury could therefore conclude that the alleged violation of the call-in policy was a pretext for firing Owens and that a substantial factor in the company's decision to get rid of her was to avoid having to deal with her depression. See *Hill v. BCTI Income Fund-I*, Wn.2d, 23 P.3d 440, 448 (2001)(when an employee establishes a prima facie case of **discrimination** and offers evidence from which a jury could conclude that the employer's explanation for its action is a pretext, judgment as a matter of law is ordinarily inappropriate).

Farmers further contends that the evidence was insufficient to support the jury's conclusion that **Farmers** failed to accommodate Owens. Once an employer is notified of an employee's **disability**, the law requires the employer to take positive steps to accommodate the **disability**. *Goodman v. The Boeing Co.*, 127 Wn.2d 401,408, 899 P.2d 1265 (1995). **Farmers** claims it was unable to accommodate Owens because she refused to disclose the nature of her **disability** and she failed to cooperate with **Farmers'** reasonable requests for information. But, again, this assertion disregards the evidence presented by Owens. She testified that she told one supervisor that she was feeling mentally unstable when she made her request for medical leave. She also claimed to have sent a doctor's note within a couple of days of her request. Nevertheless, no one at **Farmers** inquired about the nature of her **disability** before terminating her **employment**. **Farmers** relies heavily on the testimony from its own employees that no doctor's note ever arrived. But the attorney who Owens originally consulted testified that **Farmers** refused to reconsider the termination when provided with more detail about Owens' depression. The jury could have concluded that Owens co-operated adequately and that the company nevertheless failed to accommodate her.

FAMILY MEDICAL LEAVE ACT

The Family Medical Leave Act entitles employees to 12 weeks of leave during a 12 month period for a serious health condition. **Farmers** contends that the evidence was insufficient for the jury to find that Owens gave **Farmers** reasonable **notice** of her need for leave under the Act. The Act itself does not specify **notice** requirements, but federal regulations provide that when the need for leave is unforeseeable, **notice** should be given 'as soon as practicable'. 29 C.F.R. sec. 825.303. Such **notice** can be verbal but should be sufficient to notify the employer that the employee has a need qualifying her for leave under the Family Medical Leave Act, and should state the anticipated timing and duration of the leave. 29 C.F.R. sec. 825.302(c).

*3 **Farmers** contends that because Owens failed to disclose the nature of her need for leave and failed to tell **Farmers** the expected duration of her leave, her acts cannot be construed as reasonable **notice** under the Act. This argument fails for the same reasons discussed in connection with **notice of disability**. Owens testified that she told a supervisor of her mental instability when she called to request the emergency medical leave, but no one asked her at that time how long she expected to be gone. She also said that she told human resources personnel a few days later that although she did not know the exact duration of her leave, she thought it would be around eight to 12 weeks. **Farmers** appears to argue that Owens' communications cannot qualify as reasonable **notice** under the Act because she did not tell her supervisors in the same conversation what her **disability** was and the anticipated duration of the leave. **Farmers** cites no authority for the proposition that such formality is required, or that an employee must have sufficient knowledge of the law to volunteer an anticipated duration of leave when the employer does not ask. As we held in our previous opinion, the proof presented by Owens met her burden of providing **notice** under the Act.

An employer has the right to request medical certification under the Act. 29 C.F.R. sec. 825.305(b). **Farmers** contends that Owens forfeited her right to leave under the Act by failing to provide medical certification. As we previously observed, there was a factual dispute in the testimony. Owens claimed she initially sent documentation by way of the doctor's note. **Farmers** claimed it did not receive the note, and made a later request for medical certification to which Owens failed to respond. The jury obviously resolved the dispute in favor of Owens. The standard of review requires us to consider the evidence favorable to Owens, and we find it sufficient to establish her claim.

ATTORNEY FEE MULTIPLIER

Farmer contends that the trial court abused its discretion by awarding a 1.2 multiplier to the attorney fee award in Owens' case. Courts may apply a multiplier to attorney fee awards to compensate for the risk that the litigation would be unsuccessful and that no fee would be obtained, and when the quality of the work is exceptional. *Bowers v. Transamerica Title Ins. Co.*, 100 Wash.2d 581, 598-99, 675 P.2d 193 (1983). While it does not appear that the multiplier was unjustified, given that Owens' counsel took the case on contingency and incurred substantial risk, we are unable to review the issue absent the trial court's findings. See *Henningsen v. Worldcom, Inc.*, 102 Wn.App. 828, 832, 9 P.3d 948 (2000) (appellate court is unable to review an attorney fee award including a multiplier without findings and conclusions explaining the basis for a multiplier); see also *Mahler v. Szucs*, 135 Wn.2d 398, 435, 957 P.2d 632 (1998) (the trial court must enter findings of fact and conclusions of law supporting an award of attorney fees). Accordingly, as it does not appear that the trial court entered findings on this issue, we remand for entry of findings and conclusions sufficient to permit review of the multiplier.

*4 As Owens has prevailed in this appeal, she is entitled to attorney fees on appeal under RCW 49.48.030, RCW 49.60.030(2), 29 U.S.C. sec. 2617(a)(3), and 29 U.S.C. sec.2617(a)(1)(ii). On remand, the trial court should include fees for this appeal in the award of attorney fees it makes after entering findings.

The judgment is affirmed. The award of attorney fees is remanded for findings.

Parallel Citations

2001 WL 882183 (Wash.App. Div. 1)

Footnotes

- 1 Motions for judgments notwithstanding the verdict were renamed "motions for judgment as a matter of law" effective September 17, 1993. See *Litho Color, Inc. v. Pacific Employers Ins. Co.*, 98 Wn.App. 286, 298, 991 P.2d 638 (1999).

FILED

13 NOV 01 PM 2:30

KING COUNTY
SUPERIOR COURT CLERK
Honorable Jean R. Rietschel
E-FILED
CASE NUMBER: 12-2-23827-8 SEA

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

DENNIS WILLHITE,

Plaintiff,

v.

FARMERS INSURANCE GROUP, d/b/a
FARMERS NEW WORLD LIFE
INSURANCE COMPANY, a Washington
corporation, ZURICH AMERICAN
INSURANCE CO., a corporation,

Defendants.

No. 12-2-23827-8 SEA

FARMERS NEW WORLD LIFE
INSURANCE COMPANY'S NOTICE
OF INTENTION TO OFFER
DOCUMENTS TO BE DEEMED
AUTHENTIC AND ADMISSIBLE
PURSUANT TO ER 904

Pursuant to ER 904, Farmers New World Life Insurance Company ("FNWL") provides notice of its intention to offer certain documents that shall be deemed authentic and admissible without testimony or further identification, unless objection is served within 14 days of the date of this notice. The documents subject to this notice are listed in the following table. Pursuant to agreement of counsel, the only copies attached to this notice are copies of listed documents not previously numbered and produced in discovery.

FNWL'S ER 904 NOTICE - 1

Tab	Document No.	Description
1	EVERGREEN 000001-135	Records of Dennis Willhite maintained by Evergreen Medical Group
2	EVERGREEN 000136-263	Additional records produced by Evergreen Medical Group
3	LM 000001-122	Records of Dennis Willhite maintained by Liberty Life Assurance Company
4	EMMAUS 0001-14	Records of Dennis Willhite maintained by Emmaus Counseling Center
5	000001-59	Washington State Human Rights Commission file for Case No. 17EA-0832-10-1
6	BANKR 000014-65	Voluntary Petition filed under U.S. Bankruptcy Court No. 09-20648 with exhibits
7	BANKR 000001-13	Chapter 7 Trustee's Final Account and Distribution Report filed in U.S. Bankruptcy Court No. 09-20648
8	BANKR 000066-76	Docket in U.S. Bankruptcy Court No. 09-20648
9	ESD 00001-55	Washington State Employment Security Department file on Dennis Willhite claim

DATED: November 1, 2013.

STOEL RIVES LLP

s/Jill D. Bowman

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Counsel for Defendant, Farmers New World Life Insurance Company

FNWL'S ER 904 NOTICE - 2

1 **CERTIFICATE OF SERVICE**

2 I certify that I electronically filed the foregoing with the Clerk of Court using the
3 CM/ECF system, and served a true and correct copy upon the following parties in the manner
4 indicated below:

5 Brian H. Krikorian, WSBA 27861
6 LAW OFFICES OF BRIAN H. KRIKORIAN
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- E-Mail

15
16
17 DATED: November 1, 2013, at Seattle, Washington.

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19 STOEL RIVES LLP

20 s/ Debbie Dern
21 Debbie Dern, Practice Assistant
22
23
24
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Farmers Group, Inc.
Employees' Pension Plan

Summary Plan Description

Effective January 1, 2009

27-0069 9-10



FARMERS

Administration of the Plan

The Plan Administrator has the sole discretion to resolve issues that arise relating to the operation of the Plan, including, but not limited to, issues relating to your eligibility to become a Participant or to receive benefits under the Plan. The Plan Administrator also has the sole discretion to interpret, construe and apply the terms of the Plan. (See "Claims Procedure" for a description of how to appeal a decision of the Plan Administrator.) The Plan Administrator must exercise its discretion in a manner that does not discriminate in favor of officers or other highly compensated Employees.

The Fund Manager has the responsibility to control, hold, and administer the assets of the Plan. The Employer Companies make contributions to the Fund Manager necessary to fund the Plan as required by law. The Fund Manager invests all funds as directed by one or more Investment Managers appointed by the Investment Committee, or, as directed by the Investment Committee itself.

The Recordkeeper, Vanguard, at the direction of the Plan Administrator, disburses funds to Participants and beneficiaries.

The Investment Committee has the ultimate authority over the Fund and the power to appoint the Fund Manager and one or more Investment Managers.

Basic Information About the Plan

How the Plan Works

The Plan has two components: a Final Average Earnings Benefit and a Cash Balance Benefit. Each of these two components is described in detail in this Summary. Grandfathered Participants participate only in the Final Average Earnings component. Cash Balance Participants participate in the Cash Balance component, and also retain any frozen Final Average Earnings Benefit they accrued prior to January 1, 2009.

Your total benefit under the Plan is the sum of your Final Average Earnings Benefit and your Cash Balance Benefit.

In order to receive a benefit under the Plan, you must be vested (see "Vesting"). If you are vested, you will receive a monthly benefit (or another form of benefit that you may elect) from the Plan when you retire. Depending on the circumstances, you may receive benefits as a normal retiree, early retiree, disabled retiree, or a vested former employee, or, you may receive a pre-retirement death benefit. Each of these types of benefit is more fully described in this Summary.

Eligibility

There are no age or service requirements to participate in the Plan, and if you otherwise meet the requirements to be an Eligible Employee, you may participate in the Plan immediately. Prior to January 1, 2009, you had to be at least 21 years of age with one Year of Service to participate in the Plan.

It is important to note that certain individuals, such as Agents and temporary employees, are not included in the definition of Eligible Employee and therefore are not eligible to participate in the Plan. In addition, the Board of Directors of Farmers Group, Inc. may establish special eligibility conditions for individuals who become Eligible Employees in connection with a business acquisition or combination.

Vesting

Vesting determines your right to receive a benefit when you retire or your employment is terminated. *In order to receive a benefit under the Plan, you must be vested.*

Effective January 1, 2009, you become vested after you have completed three or more Years of Service or after reaching your Normal Retirement Date. If you are hired as an Eligible Employee on or after your Normal Retirement Date, you are immediately 100% vested in the Plan.

Transfer to an Affiliated Company

Transfers of employment (without an intervening retirement or termination of employment) between or among companies that are affiliated companies of Farmers Group, Inc. do not affect your status as a Grandfathered Participant under the Plan, even if you are employed for a period of time at an affiliated company that is not an Employer Company.

Reemployment

If you retire or terminate employment with the Company and all affiliated companies and are rehired as an Eligible Employee on or after January 1, 2009, you will accrue a Cash Balance Benefit under the Plan on and after such date (without Transition Pay Credits) (see "Cash Balance Benefit").

If you were vested in your benefit at the time of your termination, generally you will receive credit for Years of Service from your previous employment with the Company and all affiliated companies regardless of the length and number of your Breaks in Service.

If you were not vested at the time of your termination, you will receive credit for Years of Service and Credited Service from your previous employment with the Company and all affiliated companies if you did not incur five consecutive Breaks in Service.

If you terminate your employment with the Company to become an Agent and are subsequently rehired as an employee within 60 days after the termination of your agency contract, and you had no intervening employment with any other organization not affiliated with the Company (including self-employment), then all Credited Service earned as an Eligible Employee will be reinstated unless you already received payment for your vested interest in the form of a lump sum payment.

21st Century Participants

21st Century Participants should refer to [Appendix B](#) for a description of their frozen benefit under the AIG Plan.

Final Average Earnings Benefit

Overview

The Final Average Earnings Benefit is a traditional pension benefit that typically is paid in the form of monthly payments over the life of the Participant (called a "single life annuity"), or, over the joint lives of the Participant and his or her spouse (called a "joint and survivor annuity"). Other forms of payment also are available and are described under "Forms of Payment." The value of the Final Average Earnings Benefit will depend on when you retire (i.e., Normal or Early Retirement), the reason for the termination of your employment (e.g., Disability or death), and other factors. All of these features are described in this section in further detail.

Applicability

The Final Average Earnings Benefit applies to Grandfathered Participants. The Final Average Earnings Benefit also applies to Cash Balance Participants with respect to frozen benefits accrued through December 31, 2008 (meaning without regard to Compensation and Credited Service earned or accrued after that date).

Normal Retirement

This section describes the standard Final Average Earnings Benefit that you will receive if you retire on or after your Normal Retirement Date. The Final Average Earnings Benefit is paid in the form of a single life annuity if you are not married, or a 50% joint and survivor annuity if you are married. If you wish to choose another optional form, you must make an election within 180 days before your Normal Retirement Date, as explained in "Forms of Payment." *For these purposes, a Participant with a Domestic Partner is considered to be not married, and therefore will receive a single life annuity unless he or she elects otherwise.*

Your Final Average Earnings Benefit, if paid in the form of a single life annuity, is calculated according to the following formula:

- (a) 1.30% of your Average Monthly Compensation not in excess of the "Break Point Amount,"* in effect on the date you cease to accrue Credited Service;
- plus
- (b) 1.75% of your Average Monthly Compensation in excess of the Break Point Amount in effect on the date you cease to accrue Credited Service;
- multiplied by
- (c) Your Credited Service (not to exceed 35 years).

The following illustration provides an example of this formula:

Jane retired on January 1, 2008 at age 65. Her Average Monthly Compensation was \$4,000, and she accrued 29 years and six months of Credited Service (or 29.5 years).

(a) $.0130 \times \$1,808^* = 23.50$

plus

(b) $.0175 \times (\$4,000 - \$1,808^*) = 38.36$

multiplied by

(c) $29.5 = \$1,824.87$ per month payable to Jane as a single life annuity.

*The "Break Point Amount" is a figure which is adjusted for each Plan Year beginning on or after December 1, 1989 to take into account changes in the Consumer Price Index. For the purpose of the foregoing illustration, the Break Point Amount is the 2010 Break Point Amount. To learn the Break Point Amount in future Plan Years, you may contact Vanguard or the Plan Administrator using the contact information in the "Plan Information" section of this Summary.

If you elect to receive your benefit in one of the optional forms described in "Forms of Payment," your monthly benefit amount will be actuarially adjusted to take into account your selected payment method.

Note that a different formula applies to Participants who retired before December 1, 1994. For more information, you may contact the Plan Administrator.

In general, you must begin receiving your benefit no later than April 1 after the Plan Year in which you either attain age 70 1/2 or retire, whichever is later.

Early Retirement

If you retire on an Early Retirement Date, your benefit will be calculated in the same way as shown above in "Final Average Earnings Benefit – Normal Retirement," taking into account your Credited Service and Average Monthly Compensation as of your Early Retirement Date, *except that* your benefit will be reduced by some percentage, depending on your Years of Service and your age when your payments commence. The following table shows the early retirement percentages that determine how much your benefit is reduced if you retire on an Early Retirement Date:

Age at Benefit Commencement	Percent of Accrued Benefit with 30 Years of Service	Percent of Accrued Benefit with 15 or More but Fewer than 30 Years of Service	Percent of Accrued Benefit with 5 or More but Fewer than 15 Years of Service
65	100%	100%	100%
64	100%	97%	94%
63	100%	94%	88%
62	100%	91%	82%
61	96%	88%	76%
60	92%	85%	70%
59	88%	81%	66%
58	84%	77%	62%
57	80%	73%	58%
56	76%	69%	54%
55	72%	65%	50%

The reductions shown in the table above are pro-rated for fractional ages. As an example, the early retirement percentage for an individual with 30 or more Years of Service who retires and begins to receive a pension at age 60-1/2 is 94.0%.

A different reduction formula applies to payments to participants whose employment terminates before Early Retirement. (See "Termination Before Being Retirement Eligible").

If you meet the eligibility for Early Retirement at the time of termination, payments may begin as early as the first day of the month after which your employment terminates. The default forms for payment of your pension are the same as described under "Final Average Earnings Benefit – Normal Retirement."

Disability Retirement

If your employment terminates because of your Disability before your Normal Retirement Date, you will be eligible for a Disability pension. This means that you will begin receiving payments even if you were not retirement eligible (i.e., on or after age 55 with 5 or more Years of Service, or age 65) at the time you became Disabled.

The payment of your Disability pension will start in the month after (i) the Plan Administrator receives satisfactory proof of your Disability and (ii) the date you exhaust short-term disability payments. Your Disability pension will be paid in the form of a single life annuity calculated in the same way as described above under "Final Average Earnings—Normal Retirement," taking into account your Average Monthly Compensation and years and completed months of Credited Service at the time you became Disabled, subject to a minimum payment of \$50 per month. There is no reduction in benefits due to the early initiation of payments (i.e., before your Normal Retirement Date).

Your Disability pension payments will continue during your lifetime, except that if you should cease to have a Disability before your Normal Retirement Date, engage in gainful employment, or elect an Early Retirement, your Disability pension payments

will stop, and will not resume again until your Early or Normal Retirement Date. Before your Early or Normal Retirement Date, the Company has the right to have you examined by a doctor of the Company's choice from time to time. If you should die before your Normal Retirement Date and if you have a spouse to whom you have been married for at least a year on the date of your death, your spouse will receive the payments he or she would have received under a 50% Joint and survivor annuity after your death.

When you reach age 65, your benefit will be recalculated to take into account any additional Credited Service you have earned while covered under a Company provided long-term disability plan. The default forms for payment of your pension are the same as described under "Final Average Earnings Benefit – Normal Retirement."

Termination Before Being Retirement Eligible

If you are vested in your benefit and your employment with the Company terminates before you are retirement eligible (i.e., on or after age 55 with 5 or more Years of Service, or age 65), then you will not begin to receive your Final Average Earnings Benefit until you do become retirement eligible.

When you do become retirement eligible, the calculation of your Final Average Earnings Benefit will be different depending on whether you are eligible and elect to begin receiving payments on an Early Retirement Date before age 65, or whether you begin receiving payments on or after your Normal Retirement Date.

If you begin receiving payments on or after your Normal Retirement Date, your benefit will be calculated as explained above under "Final Average Earnings Benefit – Normal Retirement," taking into account your Average Monthly Compensation and years of Credited Service as of the date your employment terminated. If, on the other hand, you are eligible and elect to begin receiving payments on an Early Retirement Date before age 65, then your benefit will be reduced in accordance with the following table:

Age at Benefit Commencement	Percent of Accrued Benefit
65	100%
64	94%
63	88%
62	82%
61	76%
60	70%
59	66%
58	62%
57	58%
56	54%
55	50%

Pre-Retirement Death Benefit

If you are vested in your benefit and you die before you begin receiving benefits, then your spouse (or Domestic Partner) will receive payments for the rest of his or her life. In order to receive this benefit, you must have been married (or registered) throughout the one-year period ending on the date of your death. If you were married (or registered) for less than one year before your date of death, or, if you were not married (or had no Domestic Partner) at the time of your death, then no Final Average Earnings Benefit is available to anyone on your behalf upon your death.

Honorable Jean Rietschel
Hearing with oral argument
November 1, 2013 at 9:00 a.m.

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

DENNIS WILLHITE,

Plaintiff,

v.

FARMERS INSURANCE GROUP, d/b/a
FARMERS NEW WORLD LIFE INSURANCE
COMPANY, a Washington corporation,
ZURICH AMERICAN INSURANCE CO, a
corporation,

Defendants.

CAUSE NO. 12-2-23827-8SEA

DECLARATION OF DENNIS
WILLHITE IN OPPOSITION TO
DEFENDANT FARMERS
INSURANCE GROUP, d/b/a NEW
WORLD LIFE INSURANCE
COMPANY'S MOTION FOR
SUMMARY JUDGMENT AND
DECLARATION OF ERICA A.
KRIKORIAN

I, Dennis Willhite, declare:

1. I am plaintiff in this matter. The following facts are within my personal knowledge and, if called upon to testify, I could and would competently testify with respect thereto.

2. I started at Farmers on July 11, 1978, as a Premium Accounting Clerk. I was regularly promoted over the years and earned a salary increase in every year, except for the year of my termination. True and correct copies of my annual salary notification forms are attached

1 hereto as **Exhibit 18**. In 2000, I moved into marketing and discovered that I had a unique gift.
2 In 2005 and 2006, I worked on the marketing launch of "Simple Term" – an automated product
3 and system whereby agents could sell policies online, in a fraction of the time it took to do so
4 manually. Simple Term was a huge success, due in large part to the marketing launch that I
5 orchestrated.

6
7 3. On March 16, 2007, I was promoted to the position of Senior Marketing
8 Consultant and received a mid-year salary raise based on a performance score of, "exceeds
9 expectations". That year was Farmers Life's best year in history. A true and correct copy of
10 Farmers press release for the year is attached hereto as **Exhibit 16**.

11 4. In early 2008, Farmers decided to expand Simple Term and initiated a two year
12 pilot referred to as Independent Agents Simple Term ("IAST"). Keller asked me to join the
13 IAST team to handle the marketing aspects of the pilot. I designed the marketing material for the
14 launch, which was well received. I reported to Michelle Douvia ("Douvia") during the pilot and
15 she gave me a favorable year-end review rating for 2008. Attached hereto, marked **Exhibit 13**
16 and by this reference is incorporated herein are all of my performance reviews from 2000 to
17 2009. I was not given a performance review in 2010. While I completed my portion of the
18 performance review for 2009, I do not believe I ever met with Douvia to discuss my performance
19 or received any written performance review comments.

20
21
22 5. In April 2008, Brian Fitzpatrick ("Fitzpatrick") joined the Mercer Island office of
23 Farmers as Executive Director of Life Sales. I rarely saw Fitzpatrick as he was not often in the
24 office. However, sometime in early 2009, I came to realize that Fitzpatrick did not like me very
25 much. I never understood why and still don't understand it to this day.

1 6. By June 2009, the IAST pilot began to wind down and Keller announced his plan
2 to retire. At this point, Fitzpatrick began taking an unusual interest in my career. In mid-June,
3 2009, I met with Fitzpatrick and Douvia to talk about the transition out of IAST. At that time, I
4 was advised that there was no longer a place for me at Farmers. I had invested my entire career
5 at Farmers and had every intention of remaining there through retirement.

6 7. I could not believe that my job could just come to an end, without any warning.
7 Farmers has a very rigorous review system and a detailed progressive discipline plan. Based
8 upon these policies, it seemed impossible for someone to be fired without some kind of advanced
9 warning and probation. Farmers strictly enforced its internal policies and all employees were
10 required to sign a statement annually that they had re-read the policies and agreed to abide by
11 them. I relied on those policies and assumed that they would be enforced.

12 8. At the meeting with Fitzpatrick and Douvia I made a suggestion for a new
13 position that would expand the reach of the wildly successful Simple Term project, while
14 building upon the efforts invested in the IAST pilot. Five days passed without any feedback on
15 the proposal and I emailed Douvia to follow up. True and correct copies of emails and
16 communication between myself and others at Farmers dated 2008 to 2010 and attached hereto as
17 **Exhibit 14**. Douvia did not respond. At that point, I started to worry that something big was
18 happening that could affect my job. I met with HR manager Brian Hogan (“Hogan”) and told
19 him of the situation. He did not have much advice to offer.

20 9. Two months passed without any word on my proposal to expand Simple Term.
21 On August 22, 2009 I sent Douvia another follow-up email. She did not respond. Two weeks
22 later, I received an email from Douvia that confirmed my fears. Specifically, on September 4,
23 2009, I received an email from Douvia outlining a series of events that purportedly transpired
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26

1 over the prior year and the way in which those events served to foreclose all future opportunities
2 at Farmers. I was completely stunned. The email seemed to be telling a story about someone
3 else or addressed to the wrong person. It was fiction and I responded, point by point. What
4 made the situation even more bizarre was that Douvia had never been critical of me in the past,
5 personally or professionally. I suspected that Fitzpatrick was behind the email, which would
6 explain why it took so long for Douvia to respond.
7

8 10. That September 4, 2009 email changed the landscape. The work environment
9 grew hostile and I began to feel symptoms of anxiety and depression. My stress level increased
10 by the day and I found it difficult to concentrate or focus. I did not understand what was
11 happening or why I was being targeted. I went back to Hogan in HR for advice and support. I
12 told him about the stressful effect the situation was having on me. Hogan told me to take
13 whatever job Fitzpatrick offered and do as he instructs.
14

15 11. Then Fitzpatrick told me that he had created a "special project" for me in sales.
16 The objective of the "special project" was to measurably increase the life sales of agents in
17 Washington, Oregon and Idaho – a goal that had eluded even the most seasoned members of the
18 sales unit. The downward economy was cited for the lack of sales in the IAST pilot that
19 wrapped only months earlier. Fitzpatrick knew that my skills were in marketing and he knew
20 that I had no background or experience in sales and that I certainly did not have the secret to
21 outwitting a recession. I was not qualified for the position and I felt that Fitzpatrick was setting
22 me up to fail.
23

24 12. Nonetheless, I jumped in and attempted to tackle the project. However, it
25 became immediately clear that Fitzpatrick had no intention of allowing me to succeed, no matter
26 what I produced. For example, at the beginning of the project, I asked Fitzpatrick to provide me

1 with excel files for the agents in each state. Fitzpatrick waited five days before providing the
2 requested information. I reached out to the State Executive Directors in Oregon, Idaho, and
3 Washington in an attempt to gain an understanding of their world. On November 4, 2009, I
4 provided Fitzpatrick with a written status report of the first few weeks of the "special project."
5 Two weeks passed with no response. On November 20, 2009, Fitzpatrick emailed me and
6 demanded a follow up on the information in my prior report – a report to which he had yet to
7 respond.
8

9 13. At this point, it was abundantly clear that Fitzpatrick had no intention of
10 recognizing any of my achievements, no matter how impressive. Fitzpatrick was only interested
11 in evidence of failure. So the criticism and accusations mounted. I began to lose confidence and
12 started developing significant signs of depression, which was affecting my ability to function,
13 day to day.
14

15 14. I met again with Hogan and advised that the stress of the situation was becoming
16 unbearable. Hogan stated that there was nothing he could do and suggested that I simply
17 continue doing good work. I felt isolated and helpless. The whole thing was surreal. I
18 desperately wanted help and for Fitzpatrick to give up the vendetta. The stress continued to
19 mount affecting my ability to focus and concentrate. I was exhausted, physically and
20 emotionally.
21

22 15. On December 16, 2009, I spoke with Fitzpatrick hoping to have a candid
23 discussion that would allow for a fresh start in the New Year. I candidly stated that being forced
24 to perform in a position where I was doomed to fail was embarrassing and stressful. I told
25 Fitzpatrick that if my work was truly as bad as he described, it could only be due to lack of
26

1 experience, expertise and training in Life Sales and not lack of effort. I felt like a failure and
2 Fitzpatrick's unrelenting criticism only served to make my anxiety and depression worse.

3 16. I take time off every Christmas because that is when my kids and wife (who
4 works for the school district) are on winter break. When I returned from vacation I asked
5 Fitzpatrick to put me in touch with Phil Wilson, who Fitzpatrick indicated had analytics that
6 would help me in carrying out the "special project." Fitzpatrick waited over 2 weeks before
7 making the introduction.
8

9 17. On May 14, 2010, Fitzpatrick emailed me asking that I have certain documents
10 available for discussion on May 18, 2010. I could sense the hostility in the email and, on the
11 morning of May 17, 2010, I went to see Matt Crook ("Crook"), head of HR. I told Crook that I
12 was on the verge of a breakdown and begged him for some kind of intervention. Like Hogan,
13 Crook told me to soldier on, that there was nothing HR could do and that I should just try to get
14 along with Fitzpatrick. Problem was, Fitzpatrick hated me. My anxiety morphed into nausea
15 and I literally felt physically sick.
16

17 18. Two days later I went to see Dr. Luba Kihichak, who diagnosed me with anxiety
18 and depression. She prescribed Xanax and Citalopram and referred me to Dr. Wemhoff for
19 counseling. She also recommended a medical leave of absence. I took a medical leave from
20 May 18, 2010 to August 12, 2010. During that time, I sank further into depression and had
21 thoughts of suicide.
22

23 19. I returned to work on August 12, 2010 determined to convince Fitzpatrick to
24 reconsider his animosity. It quickly became clear that that was not going to happen. I invested
25 considerable time assembling data for the preparation of spreadsheets reflecting target agents in
26 Washington and Oregon. I sent the spreadsheets to Fitzpatrick and invited his feedback.

1 Fitzpatrick ignored the email for two weeks before responding with his “disappointment” and an
2 unfounded accusation that the spreadsheets were a product of a “cut and paste.” Given the effort
3 invested in the spreadsheets and the baseless accusation, I responded in detail. I further advised
4 Fitzpatrick that his repeated claims of “disappointment” were frustrating and stressful.

5 20. On November 11, 2010, I was fired and asked to leave that day. I have been
6 looking for employment ever since and remain unemployed as of this day.

7 21. Attached hereto, marked **Exhibit 1** and by this reference incorporated herein is a
8 true and genuine copy of Zurich’s Group Performance Management Handbook: Year-End
9 Assessment.

10 22. Attached hereto, marked **Exhibit 2** and by this reference incorporated herein is a
11 true and genuine copy of Zurich’s Group Performance Management Handbook: Mid-Year
12 Review.

13 23. Attached hereto, marked **Exhibit 3** and by this reference incorporated herein is a
14 true and genuine copy of How GPMS Works – Objective Setting.

15 24. Attached hereto, marked **Exhibit 4** and by this reference incorporated herein is a
16 true and genuine copy of Zurich’s Group Performance Management Handbook: Calibration.

17 25. Attached hereto, marked **Exhibit 5** and by this reference incorporated herein is a
18 true and genuine copy of Zurich’s Group Performance Management Handbook: Objective
19 Setting.

20 26. Attached hereto, marked **Exhibit 6** and by this reference incorporated herein is a
21 true and genuine copy of Zurich’s Group Performance Management Handbook: Performance
22 Culture & Philosophy.

1 27. Attached hereto, marked **Exhibit 7** and by this reference incorporated herein is a
2 true and genuine copy of Zurich's Group Learning & Development Handbook: Development.

3
4 28. Attached hereto, marked **Exhibit 8** and by this reference incorporated herein is a
5 true and genuine copy of Zurich's Basics: Our Group's code of conduct.

6 29. Attached hereto, marked **Exhibit 9** and by this reference incorporated herein is a
7 true and genuine copy of Zurich's Group Human Resources – HR Policy Manual.

8 30. Attached hereto, marked **Exhibit 10** and by this reference incorporated herein is a
9 true and genuine copy of Equal Employment Opportunity Handbook.

10 31. Attached hereto, marked **Exhibit 11** and by this reference incorporated herein is a
11 true and genuine copy a Procedure Bulletin dated September 30, 2005 RE 2006 Compensation
12 Management for the Management Company.

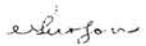
13
14 32. I did not receive a performance review of any kind in 2010. In 2009, I completed
15 my portion of the performance review, but I do not believe Douvia ever entered any comments
16 or narrative or met to discuss my 2009 review. In or about April 2010, I learned from HR that
17 Douvia had given me a "2" rating in 2009. This is the first time in my career that I had been
18 given a rating lower than "meets expectations." Douvia never discussed the rating with me.

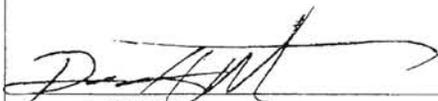
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20 I declare, under penalty of perjury, under the laws of the State of Washington, that the
21 foregoing is true and correct.

22 DATED this 21st day of October, 2013

23 I certify under penalty of perjury under the laws of the State
24 of Washington that on October 21, 2013, I emailed all
25 counsel of record containing a copy of the document on
26 which this declaration appears.

Executed at Lynnwood, Washington


Signed: Nicole Jones


Dennis Willhite

DECLARATION OF DENNIS WILLHITE IN OPPOSITION TO
DEFENDANT FARMERS INSURANCE GROUP, D/B/A NEW
WORLD LIFE INSURANCE COMPANY'S MOTION FOR
SUMMARY JUDGMENT AND DECLARATION OF ERICA A.
KRIKORIAN - 8

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33 BRBS 15 (DOL Ben.Rev.Bd.), 1999 WL 197776
*1 NOTE: This is an PUBLISHED LHCA Document.

Benefits Review Board

United States Department of Labor

CARLOS BUSTILLO, Claimant-Respondent

v.

SOUTHWEST MARINE, INCORPORATED

and

LEGION INSURANCE COMPANY, Employer/Carrier-Petitioners

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF
LABOR, Party-in-Interest

BRB No. 98-0824
March 8, 1999

DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Paul A. Mapes, Administrative Law Judge, United States Department of Labor.

Stephen Birnbaum, San Francisco, for claimant.

Frank B. Hugg, San Francisco, California, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (96-LHC-102, 96-LHC-103) of Administrative Law Judge Paul A. Mapes awarding benefits on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. § 921(b)(3).

This appeal involves a claim by claimant, a shipyard worker whose duties included sandblasting and painting, for compensation for the aggravation of his pre-existing asthma by work-related exposure to toxic substances. Claimant worked for employer until November 1, 1992, when he sustained a sandblasting injury to his face.¹ Claimant did not return to work after recovering from his sandblasting injury because his respiratory condition had worsened.

In his initial Decision and Order Awarding Medical Benefits filed November 8, 1996, the administrative law judge found that claimant's asthma was causally related to his employment, but that the claim was not timely filed pursuant to Section 13(b)(2) of the Act, 33 U.S.C. § 913(b)(2). The administrative law judge's finding that the claim was barred under Section 13(b)(2) was based on his determination that claimant was, or should have been, aware of the relationship between his employment, his respiratory condition and his disability no later than October 23, 1992. The administrative law judge concluded that, inasmuch as the claim for respiratory impairment was not filed until October 31, 1994, the claim was not filed within requisite two-year period following claimant's date of awareness pursuant to Section 13(b)(2). Accordingly, the administrative law judge found that while claimant is entitled to medical benefits under Section 7 of the Act, 33 U.S.C. § 907, he was not entitled to disability compensation.²

CARLOS BUSTILLO, Claimant-Respondent v. SOUTHWEST..., 33 BRBS 15 (1999)

On modification, in a Decision and Order Awarding Benefits issued January 28, 1998, the administrative law judge found that the claim was not barred under Section 13(b)(2) inasmuch as the statute of limitations was tolled pursuant to Section 30(f) of the Act, 33 U.S.C. § 930(f), by employer's failure to file a timely first report of injury under Section 30(a), 33 U.S.C. § 930(a).¹ Next, the administrative law judge found that the claim is not barred by claimant's failure to give timely notice of his injury under Section 12(a) of the Act, 33 U.S.C. § 912(a), inasmuch as employer failed to meet its burden of proof under Section 12(d), 33 U.S.C. § 912(d), that it was prejudiced by claimant's failure to provide timely notice of his injury. The administrative law judge awarded claimant temporary total disability benefits from November 2, 1992 to December 13, 1994, permanent total disability benefits from December 14, 1994 to April 9, 1996, and permanent partial disability benefits commencing April 10, 1996, and granted employer credit for all compensation paid to claimant since November 1, 1992. Lastly, the administrative law judge awarded employer Section 8(f) relief, 33 U.S.C. § 908(f).

*2 On appeal, employer contends that the administrative law judge erred in finding that the claim is not barred under Section 13 and in finding that employer was not prejudiced by claimant's failure to provide timely notice of his injury under Section 12. Claimant responds, urging affirmance.

In the absence of evidence to the contrary, Section 20(b) of the Act, 33 U.S.C. § 920(b), presumes that the notice of injury and the filing of the claim were timely. *See Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140 (1989). In the instant case, the administrative law judge found that claimant was, or should have been, aware of the relationship between his employment, his asthma and his disability no later than October 23, 1992. A claim was not filed until October 31, 1994. This was also the first notice of injury received by employer.⁴

Claimant's failure to give employer timely notice of his injury pursuant to Section 12 of the Act is excused if employer had knowledge of the injury or employer was not prejudiced by the failure to give proper notice. 33 U.S.C. § 912(d)(1), (2). Prejudice under Section 12(d)(2) is established where employer provides substantial evidence that due to claimant's failure to provide timely written notice, it was unable to effectively investigate to determine the nature and extent of the illness or to provide medical services. A conclusory allegation of prejudice or of an inability to investigate the claim when it was fresh is insufficient to meet employer's burden of proof. *See Kashuba v. Legion Ins. Co.*, 139 F.3d 1273, 32 BRBS 62 (CRT) (9th Cir.1998), *cert. denied* 119 S.Ct. 866 (1999); *ITO Corp. v. Director, OWCP [Aples]*, 883 F.2d 422, 22 BRBS 126 (CRT) (5th Cir.1989); *Bivens v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 233 (1990).

In his January 28, 1998 Decision and Order, the administrative law judge, noting that the only specific allegation of prejudice made by employer was that claimant's failure to provide timely notice precluded employer from obtaining Dr. Lee's treatment notes, determined that the unavailability of Dr. Lee's notes actually strengthened employer's case. The administrative law judge concluded, therefore, that employer failed to meet its burden of proving that it was prejudiced by claimant's failure to provide timely notice. We note that, on appeal, employer does not assign error to the administrative law judge's finding that employer's inability to obtain Dr. Lee's records did not prejudice employer. Rather, employer asserts on appeal that the delay in receiving notice made it difficult to identify witnesses and precluded employer from supervising claimant's medical care. We reject employer's arguments and affirm the administrative law judge's determination that employer was not prejudiced by claimant's failure to provide timely notice.

We note, first, that employer's conclusory allegation on appeal that the delayed notice made the identification of witnesses difficult is unsupported by evidence in the record. Indeed, our review of the hearing testimony of Paul Harris, the claims administrator who handled the claim for employer, indicates that Mr. Harris conceded that any potential difficulty in identifying witnesses did not prejudice him in investigating this particular claim. *See Hearing Tr.* at 346-355. Moreover, while employer generally asserts that it was prejudiced by its inability to supervise claimant's medical care, it does not allege that the medical care received by claimant was inappropriate. The instant case is thus distinguishable from *Kashuba*, in which the United States Court of Appeals for the Ninth Circuit held that, had timely notice allowed the employer to participate in the claimant's medical care, the employer might have been able to take measures to prevent the claimant from suffering additional disability and possibly to avoid surgery. 139 F.3d at 1276, 32 BRBS at 64 (CRT). As employer in the case at bar fails to support its generalized assertion of prejudice based on the delay in its ability to supervise claimant's medical care with any evidence that such supervision would have altered the course of claimant's medical treatment, we reject employer's assertion that it was prejudiced on this basis. Consequently, we affirm the administrative law judge's determination that

CARLOS BUSTILLO, Claimant-Respondent v. SOUTHWEST..., 33 BRBS 15 (1999)

Section 12 does not bar claimant's claim.

*3 Employer also argues that the claim is barred by the two-year limitations period of Section 13(a), (b)(2), since the claim was filed over two years after claimant's October 23, 1992, date of awareness.⁵ As we previously noted, Section 20(b) of the Act provides a presumption that the claim was timely filed; to overcome the Section 20(b) presumption, employer must preliminarily establish that it complied with the requirements of Section 30(a). Section 30(a), as amended, provides in pertinent part:

Within ten days from the date of any injury which causes loss of one or more shifts of work, or death or from the date that the employer has knowledge of a disease or infection in respect of such injury, the employer shall send to the Secretary a report setting forth (1) the name, address, and business of the employer; (2) the name, address, and occupation of the employee; (3) the cause and nature of the injury or death; (4) the year, month, day, and hour when and the particular locality where the injury or death occurred; and (5) such other information as the Secretary may require.

33 U.S.C. § 930(a); *see also* 20 C.F.R. §§ 702.201–205. Section 30(f), 33 U.S.C. § 930(f), provides that where employer has been given notice or has knowledge of any injury and fails to file the Section 30(a) report, the statute of limitations provided in Section 13(a) does not begin to run until such report has been filed. *See Nelson v. Stevens Shipping & Terminal Co.*, 25 BRBS 277 (1992); *Ryan v. Alaska Constructors, Inc.*, 24 BRBS 65 (1990). Thus, for Section 30(a) to apply, the employer or its agent must have notice of the injury or knowledge of the injury and its work-relatedness; the employer may overcome the Section 20(b) presumption by proving it never gained knowledge or received notice of the injury for Section 30 purposes. *See Steed v. Container Stevedoring Co.*, 25 BRBS 210 (1991). *See also Stark v. Washington Star Co.*, 833 F.2d 1025 (D.C.Cir.1987). Knowledge of the work-relatedness of an injury may be imputed where employer knows of the injury and has facts that would lead a reasonable person to conclude that compensation liability is possible so that further investigation is warranted. *See Steed*, 25 BRBS at 218; *Kulick v. Continental Baking Corp.*, 19 BRBS 115 (1986).

In the instant case, employer did not file the Section 30(a) report of injury until November 2, 1994; employer, argues, however, that it did not have knowledge of the injury for Section 30 purposes prior to the filing of the claim on October 31, 1994. Employer contends on appeal that it was erroneous for the administrative law judge to **impute knowledge** to the employer on the basis of the receipt by Mr. Harris, employer's **claims administrator**, of Dr. Cappelletti's medical report dated December 3, 1993, Cl.Ex. 11, and claimant's attorney's letter dated May 27, 1994, Cl.Ex. 9. We disagree, and hold that the administrative law judge rationally concluded that the information contained in Dr. Cappelletti's report and claimant's counsel's letter was sufficient to impute to employer the knowledge that claimant suffered from a work-related respiratory impairment and that, on the basis of this information, employer should have concluded that compensation liability was possible and, thus, that further investigation was warranted. *See Steed*, 25 BRBS at 218–219. We note, in this regard, that the administrative law judge first found that Dr. Cappelletti's report stating that claimant had not worked since January 16, 1993, because of chronic asthma provided employer with the knowledge that claimant had missed work due to asthma. Next, the administrative law judge found that employer was given sufficient reason to believe the asthma could be work-related, and, thus, was apprised of possible compensation liability, by claimant's counsel's letter requesting that the issue of claimant's asthma be resolved in the state forum⁶ with an agreed medical examiner. We therefore affirm the administrative law judge's determination that employer had knowledge that claimant sustained a work-related injury with possible compensation liability as of June 1994, when Mr. Harris received claimant's attorney's letter. Employer's knowledge as of that date, combined with employer's failure to file the required Section 30(a) report of injury within the requisite ten days, thus tolls the Section 13 statute of limitations. *See Steed*, 23 BRBS at 218–219. We therefore affirm the administrative law judge's finding that the instant claim was timely filed.

*4 Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

CARLOS BUSTILLO, Claimant-Respondent v. SOUTHWEST..., 33 BRBS 15 (1999)

ROY P. SMITH

Administrative Appeals Judge

JAMES F. BROWN

Administrative Appeals Judge

Footnotes

¹ Claimant's sandblasting injury was the subject of a separate claim and is not relevant to the instant appeal.

² Thereafter, claimant filed a motion for reconsideration of the administrative law judge's Decision and Order. By Order dated December 4, 1996, the administrative law judge denied claimant's motion as untimely filed. The administrative law judge noted that information set forth in claimant's motion suggested that the Section 13(b)(2), 33 U.S.C. § 913(b)(2), limitations period may have been tolled under the provisions of Sections 13(d) and 30(f), 33 U.S.C. §§ 913(d), 930(f), and that, therefore, there could be grounds for modifying the Decision and Order under Section 22, 33 U.S.C. § 922. Accordingly, the administrative law judge ordered the parties to show cause why a Section 22 hearing should not be held for the purpose of determining whether the Section 13(b)(2) limitations period had been tolled.

Both employer and claimant thereafter filed appeals with the Board. BRB Nos. 97-0462/A. On January 13, 1997, the administrative law judge issued a Notice of Intent to Conduct a Section 22 Hearing to determine whether there was a mistake of fact concerning the statute of limitations. By Order dated May 16, 1997, the Board dismissed both employer's and claimant's appeals as untimely filed, and remanded the case to the administrative law judge for Section 22 modification proceedings.

A Section 22 hearing on the statute of limitations issue was held on September 22, 1997, followed by oral argument on December 17, 1997. The administrative law judge determined that a mistake in fact in the initial Decision and Order warranted modification of that decision, and, accordingly, on January 28, 1998, issued the Decision and Order Awarding Benefits that is the subject of the instant appeal.

³ The administrative law judge determined that the tolling provision of Section 13(d) of the Act, 33 U.S.C. § 913(d), is not applicable to the instant case.

⁴ In an occupational disease case such as this one, claimant must give employer notice of his injury within one year of his awareness of the relationship between the employment, the disease and the disability. 33 U.S.C. § 912(a).

⁵ The occupational disease provisions of Section 13(b)(2), 33 U.S.C. § 913(b)(2), which apply to the instant claim, provide that a timely claim is one which is filed within two years of claimant's awareness of the relationship between the employment, the disease and the disability.

⁶ We note that application of Section 30(f) does not require employer to have definite knowledge that the injury comes within the jurisdiction of the Act; the fact that the claim may arise under a state workers' compensation law does not excuse employer's failure to file a Section 30(a) report. *See Spear v. General Dynamics Corp.*, 25 BRBS 132 (1991).

⁷ As noted by the administrative law judge, receipt of claimant's counsel's letter prompted Mr. Harris to forward the letter to employer's attorney with the notation "asthma?!" *See* Hearing Tr. at 329-331. Thus, the administrative law judge rationally found that the information in claimant's counsel's letter did, in fact, apprise employer of the need for further investigation. *See* Decision and Order at 5-6.

33 BRBS 15 (DOL Ben.Rev.Bd.), 1999 WL 197776

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