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THE 31ST ANNUAL JOHN MARSHALL INTERNATIONAL MOOT COURT COMPETITION IN INFORMATION TECHNOLOGY AND PRIVACY LAW

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BENCH MEMORANDUM

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Introduction

Petitioner, Jackson Peters, is appealing the Court of Appeals' affirmation of a trial court order granting summary judgment in favor of Respondent, O'Plenty Enterprises, Inc., on its claims of intrusion upon seclusion and violation of the Marshall State Human Rights Act.

The first issue in this case concerns whether a company is liable for a claim on intrusion upon seclusion for installed software on a company owned laptop that took pictures from the laptop inside an employee's home. The final issue concerns whether a company violates the Marshall State Human Rights Act for firing an employee based on his sexual orientation.

Procedural History

Peters' complaint, filed in the Marshall County Circuit Court, alleged violations of intrusion upon seclusion and the Marshall State Human Rights Act. Following discovery, O'Plenty Enterprises, Inc. moved for summary judgment on both counts. The circuit court granted O'Plenty Enterprises Inc.'s motion as to both counts. Peters appealed to the First District Court of Appeals, which affirmed the circuit court's order. Peters then petitioned for leave to appeal to the Supreme Court of Marshall. The Supreme Court granted leave to appeal the affirmation of the summary judgment order on both counts.

Background Information

The parties have stipulated that the court of appeals decision shall serve as the record on appeal. The court of appeals decision[1] sets forth the facts of the case as follows:

O'Plenty Enterprises, Inc. is a real estate development company headquartered in the state of Marshall. The company, founded over thirty years ago by life-long Marshall resident Duffy O'Plenty ("O'Plenty"), is a family-owned, family-led corporation. O'Plenty Enterprises, Inc. evolved from O'Plenty's father's company, Donald O'Plenty & Son, which concentrated on his father's preferred field of lower and middle-class rental housing in the blue collar neighborhoods of Marshall City, the capital of the State of Marshall. With his entrepreneurial skills and hard work ethic, O'Plenty managed to transform Donald O'Plenty & Son into a significant real estate development company with numerous high profile development project deals in Marshall City and the surrounding areas. O'Plenty was known to recognize the economic opportunity in the financially troubled areas, which he transformed by engaging

1. R. at 3. The remainder of the Statement of Facts presented here is set forth verbatim as it appears in the court of appeals decision; the footnotes have been renumbered.

in large building projects, utilizing attractive architectural design. Thus, O'Plenty Enterprises, Inc. earned high profits while also gaining public recognition by creating jobs during difficult financial times. Currently, O'Plenty Enterprises, Inc. owns and runs a significant number of commercial and residential real estate properties including some of the most popular hotels in the area that it acquired for extremely low prices after the real estate crisis of 2008. Because of its aggressive acquisition plans and collegial working environment, O'Plenty Enterprises, Inc. was the fastest growing real estate company in the State of Marshall in 2010. O'Plenty Enterprises, Inc. currently employs ninety-five individuals.

O'Plenty followed in his father's footsteps and founded O'Plenty Enterprises, Inc. on biblically-based principles, including closing his business on Sundays and all major religious holidays. The company also invests in local communities, supporting religious schools and offering scholarships to underprivileged children. O'Plenty Enterprises, Inc. also sought to promote its own employees from within, including offering management-training courses and flexible and alternate work arrangements for its employees, as well as telecommuting. O'Plenty was known to be involved in the day-to-day running of the company and he had acquired the reputation of a demanding, but fair, employer.

Despite its recent growth, O'Plenty Enterprises, Inc. remains a family-run company with O'Plenty at the helm and his four children serving in executive roles. Because O'Plenty is very involved in the day-to-day operations of his company, he strives to be the face of his brand. He has also been very outspoken about his core beliefs, upon which he built and continues to run his business. O'Plenty also became involved in local politics and in early 2010, announced himself to be a potential candidate for Governor of Marshall in the 2012 elections. However, a few months later, O'Plenty decided against running. Instead, O'Plenty endorsed and supported the gubernatorial candidate Tom Timmons, who was challenging incumbent governor Ed Edison during the 2012 election season. One of Timmons' core platforms was his opposition to same-sex marriage. This was a highly debated issue in the state of Marshall since, currently, the State does not legally recognize same-sex marriage. Numerous groups had been increasingly rallying in favor of legalizing same-sex marriage in the State of Marshall. Because they shared many of the same beliefs, O'Plenty contributed financially to Timmons' campaign and made the venues owned by O'Plenty Enterprises, Inc. available for Timmons to use for fundraising locations and other campaign related events. O'Plenty himself spoke in one of the fundraising events in mid-2010 where he expressed his support for Timmons' political platform and stated: "Same sex marriage is unnatural. Homosexuality is a sin against God. It is unnatural and detrimental and ultimately destructive to the foundations of our society."

Jackson Peters ("Peters") is an at-will employee with O'Plenty Enterprises, Inc. Peters had been employed with O'Plenty Enterprises, Inc. since 2000. He was also a life-long resident of Marshall, growing up in the small town of Petersville. He began his career as a low-ranking employee in O'Plenty Enterprises, Inc. After only two years, due to his outstanding work ethic, he was offered a position in one of the company's management training courses at the company headquarters. After he completed the management-training course, Peters accepted a job at the corporate headquarters and moved 200 miles from his hometown. Peters worked his way up through company ranks and in early 2009, O'Plenty personally promoted Peters to Regional Project Supervisor. Peters' assigned territory was his hometown because of his familiarity with the city and other local businesses.

Because it offered telecommuting to its employees, O'Plenty Enterprises, Inc. provided company-issued laptops to all of its upper level managers and supervisors. According to a report issued by Henderson Databases in 2008, telecommuters made up more than one-quarter of the United States workforce. The report concluded that the number of telecommuting workers will increase substantially because new, mobile technologies will make it easier for employees to work anywhere at any time; the entering workforce will be more tech savvy; and alternative work arrangements will benefit employers. With more workers working from home, employers like O'Plenty Enterprises, Inc. are faced with several issues, including how to confirm employees are actually working when they say they are and how to ensure company information is protected from careless employees misplacing equipment. It also is concerned over the theft of its data.

O'Plenty was particularly concerned with the proprietary information that could be stolen from company-issued devices. Therefore, he had his Information Technology ("IT") department install software called Lost & Found® on all its mobile devices, including laptops. When remotely activated, the Lost & Found® software would activate a webcam embedded in the computer. The webcam would take photos every five minutes while the user was connected to the Internet and then transmit the photos back to O'Plenty Enterprises Inc.'s web server. The program would keep taking photos until an employee of the company deactivated the Lost & Found® software. The software also sent a copy of the image displayed on the laptop's screen while it was in use. The company had found the software particularly useful, recovering all ten lost or stolen devices over the eight-month period the software had been in use. Law enforcement was also able to successfully prosecute six of the ten thieves based on the pictures taken by the software showing the thieves using the stolen laptops.

As a Regional Project Supervisor, Peters was issued a company laptop. Because his territory was 200 miles away from his home near corporate headquarters, he often traveled for his job. In early 2010, after almost a year as Regional Project Supervisor, Peters was informed that in addition to his regular duties, he would be in charge of coordinating and facilitating several election fundraisers for candidate Timmons at the hotels owed by O'Plenty Enterprises, Inc. in his territory. He was uneasy with this part of his job because he supported Governor Edison who was in favor of legalizing same-sex marriage. However, Peters, a gay man, had never made known his sexual orientation in his work environment but for a limited number of friends and co-workers. As the record shows, at that time, Peters had stated to this circle of friends: "my job is what I do, not what I am, so I will just do my job as a professional and that's the end of it."

After four months of coordinating these election events, Peters had grown increasingly tired and stressed and his performance started to slightly suffer. On two separate occasions, Peters raised his objections with his supervisors that overseeing Timmons' political campaign was not part of his job and took a toll on him physically and mentally. O'Plenty Enterprises, Inc.'s representatives dismissed his concerns stating that part of his job was making sure that any event and project taking place in his assigned territory was successful. During the last trip to Petersville, in July 2010, he received news that his beloved Labrador Retriever had suddenly died of unknown causes. Distracted, Peters e-mailed the wrong VIP list to the security before the start of the event.[2] He also forgot to arrange transportation for candidate Timmons. Timmons eventually made it to the event, but arrived thirty minutes late. Some VIPs were initially denied entry to the event, only being permitted entry when Timmons showed up. After the event, Timmons was upset and personally called O'Plenty to complain about the "fiasco" as he characterized the event. Peters was advised to fly back and provide the headquarters with a detailed report on the events of Petersville within the next forty-eight hours. Peters, significantly upset, checked out of his hotel in a hurry and forgot his company-issued laptop. When he got to the airport, he realized his laptop was missing. Peters immediately called O'Plenty Enterprises Inc.'s help line to report his missing laptop.

The next morning, Peters received a call from the hotel informing him he left his laptop in his room. Because Peters was a frequent guest at the hotel, the hotel manager told him that he arranged for the laptop to be sent to Peters' home address via overnight courier because he knew how important the laptop was to Peters. The laptop arrived later that

2. Instead of attaching the Petersville VIP list, he attached the VIP list for the Almonville event held three weeks earlier.

morning. Peters called the IT department at O'Plenty Enterprises, Inc. to inform it that his laptop had been recovered, but he had to leave a voicemail message. He immediately checked his laptop to make sure it was working. After about forty-five minutes he moved to his home office and begun working on his report that was due the next morning.

From the time Peters called the IT Department to report his laptop had been recovered and when the IT Department received his voicemail message, the Lost & Found® software had been running on Peters' laptop for approximately four hours. Almost fifty still photos were captured and transmitted back to O'Plenty Enterprises, Inc.'s web server. Most of the photos included pictures Peters had on the wall directly behind him visible by the webcam while he worked at his desk. Several of the photos showed Peters with his partner, including one where they were embracing and kissing during what appeared to be a "commitment" ceremony. Peters was also in a photo shaking hands with a prominent gay activist in Marshall, who was a big supporter of the incumbent governor. Additionally, several rainbow colored flags surrounded the pictures.[3]

Per company policy, whenever a device was reported lost or stolen, any information sent to the web server by the Lost & Found® software was to be immediately sent to Human Resources. Human Resources was then required to send the information to O'Plenty because he liked to work directly with law enforcement to help recover lost or stolen items.

Shortly after this incident, Peters was informed that he was suspended from his duties pending investigation of the event. During this time period, Peters found himself isolated in the workplace. The record shows that on two separate occasions, his co-workers did not invite him to company-related social events.

Three weeks after O'Plenty received the photos taken from Peters' company-issued laptop, Peters was called into Human Resources ("HR"). He was informed that he was being terminated due to poor job performance. He was given his exit interview and instructed to turn over all company-issued electronics. At the end of the meeting, Peters requested a copy of his employee file, per the Employee Handbook (see Appendix A). Among the various progress reports discussing his tenure with the company, he discovered a document titled "Stolen/Lost Laptop Report." The Report made reference to the incident that had taken place a few weeks back and included a description of pictures taken of him while working from his home office. He asked the HR representative about the Report

3. The rainbow flag is an international symbol of the lesbian, gay, bisexual and transgender movement. *See Colors of the Cause*, LGBT MOVEMENT, http://www.colourlovers.com/blog/2008/02/15/colors-of-the-cause-lgbt-movement (last visited Apr. 30, 2012).

and she informed him about the Lost & Found® software. After asking for copies of the photos, HR eventually turned over copies to Peters.

Peters demanded a full investigation into the matter claiming that his termination was not due to the unfortunate incident at Petersville, but due to the revelation of his sexual orientation. Peters claimed that his performance was excellent with the exception of the aforementioned event and only after it was revealed he was homosexual did he suffer alienation at the workplace and finally termination. Peters pointed out that there have been instances in the past where regional supervisors failed in their duties, but they were treated much more leniently. More specifically Peters mentioned J. Erwin who, in March 2009, accidentally included in an e-mail to a provider a document containing sensitive proprietary information. J. Erwin was reprimanded and re-assigned to another position but not terminated. Similarly, in fall of 2009, L. Walker refused to invite several of the women in O'Plenty Enterprises, Inc.'s management training course to a major business conference at the downtown Sharwood Hotel. At that point, HR suspended Walker with pay while it investigated the incident. In February 2010, Walker was ordered to attend sensitivity training. He never completed his training and was allowed to resume his duties. Even with several complaints filed against him for this incident, he was not demoted or penalized for any of his behavior. Both Erwin and Walker were heterosexual and supporters of Timmons. Peters also complained that the mistake, which was the reason for his termination, related to a project that was not even included in the job description when he accepted the position of Regional Project Supervisor.

O'Plenty Enterprises, Inc. refused to initiate an investigation and claimed that it does not need a reason to terminate Peters since he is an at-will employee. However, the company pointed out that the Petersville incident was a major public relations blunder that cost the company and O'Plenty tremendously, both in terms of credibility in the marketplace, in the community and O'Plenty's reputation. Peters has not been able to present any other comparable incidents within the company. In addition, O'Plenty Enterprises, Inc. reminded him that overseeing projects, no matter the nature of the project, in his assigned territory, was part of his job.

In 2011, Jackson Peters filed suit against O'Plenty Enterprises, Inc. for: (1) intrusion upon seclusion; and (2) discrimination in violation of the Marshall Human Rights Act. Following discovery, O'Plenty Enterprises, Inc. moved for summary judgment on both counts. The circuit court granted the motion on both counts.

ISSUES PRESENTED FOR REVIEW

The two issues raised on appeal are: (1) whether the court erred in affirming O'Plenty Enterprises, Inc.'s summary judgment on Peters' claim of intrusion upon seclusion; and, (2) whether the court erred in affirming O'Plenty Enterprises, Inc.'s summary judgment on Peters' claim of violation of the Marshall Human Rights Act.

ANALYSIS

Standard of Review

Summary judgment is a procedural device that enables a court to dispose of part or all of a case prior to trial. In the State of Marshall, Rule 56 of the Marshall Rules of Civil Procedure governs summary judgment. Under this rule, summary judgment is proper only if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.[4] The court considers the pleadings, depositions, answers to interrogatories, admissions, and affidavits in assessing whether summary judgment is proper.[5] A genuine issue of material fact exists only if "a fair-minded jury could return a verdict for the [non-moving party] on the evidence presented."[6]

An appellate court reviews a grant of summary judgment *de novo,* applying the same standard as the trial court.[7] The reviewing court determines whether a genuine issue of material fact exists by viewing the evidence in the light most favorable to the non-moving party and drawing all reasonable and justifiable inferences in favor of that party.[8] The moving party has the burden of identifying the material facts that are without genuine dispute and support the entry of summary judgment in favor of the moving party.[9] The non-moving party, for its part, must identify which material facts raise genuine issues of dispute.[10] Because the entry of summary judgment "is a drastic means of disposing of litigation,"[11] it should be granted only when the moving party's right to relief is "clear and free from doubt."[12] However, the mere fact that there exists "some alleged factual dispute between the parties"[13] or "some metaphys-

4. Marshall R. Civ. P. 56(c) (cited at R. 3). Rule 56(c) is similar or identical to the corresponding provision of the federal rules, Fed. R. Civ. P. 56(c).

5. Fed. R. Civ. P. 56(c).

6. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

7. *Delta Sav. Bank v. United States*, 265 F.3d 1017, 1021 (9th Cir. 2001).

8. *Anderson*, 477 U.S. at 255.

9. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986).

10. *Id.* at 324.

11. *Purtill v. Hess*, 489 N.E.2d 867, 871 (Ill. 1986).

12. *Id.*

13. *Anderson*, 477 U.S. at 247 (emphasis omitted).

ical doubt as to the material facts"[14] is insufficient to defeat a motion for summary judgment.

Intrusion into Seclusion

General

Peters will assert that the software installed on his company laptop issued by O'Plenty Enterprises, Inc. took pictures of him inside his home and therefore, constituted an invasion of his privacy because it intruded upon his seclusion. In general, Peters will argue that the photographs taken via the webcam was an intentional intrusion. Furthermore, Peters will argue that because he was in his home he had a reasonable expectation of privacy. He will also assert that his former employer not only activated the webcam through the Lost & Found® software, but left it running for four hours after he had called the company to inform it that the laptop was found. Finally, Peters will argue that the fifty pictures taken inside his home without his knowledge and permission would be highly offensive to a reasonable person.

O'Plenty Enterprises, Inc. will argue that it did not intentionally intrude upon Peters' privacy because it only ran the software until it received a message that the lost laptop had been found. Further, the company will argue that it was specifically authorized to activate the webcam as the computer was company property and Peters was put on notice through his acceptance of the Employee Handbook. Finally, O'Plenty Enterprises, Inc. will argue that a reasonable person would not find the intrusion offensive or objectionable because of the limited scope, and that revealing Peters' sexual orientation is not highly offensive to a reasonable person.

Elements

This issue was a case of first impression before the district court and the first time the State of Marshall allowed a cause of action for intrusion upon seclusion. In situations like this, Marshall courts have turned to the *Restatement (Second) of Torts*, which describes the tort of intrusion upon the seclusion of another in the following manner: "(o)ne who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person."[15] There is no requirement of publication or communication to a third party in cases of intrusion upon a plaintiff's

14. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

15. *Restatement (Second) of Torts* § 652B (1977).

seclusion.[16] Both parties should consider "both the manner of intrusion as well as the nature of the information acquired that must rise to the level of being highly offensive to a reasonable person."[17]

Therefore, to assert a successful claim for intrusion upon seclusion, Peters must prove the following elements: (1) the pictures taken by the company laptop was an intentional intrusion into his solitude or seclusion; and (2) the intrusion was highly offensive to a reasonable person.

1. *Intrusion into the Solitude or Seclusion of Another*

Peters will argue that it has been well settled that an intrusion does not have to be a physical intrusion. *Restatement (Second) of Torts* states that the invasion may be physical, but it may also be through "the use of the defendant's senses, with or without mechanical aids, to oversee or overhear the plaintiff's private affairs, as by looking into his upstairs windows with binoculars or tapping his telephone wires."[18] Peters will argue that the use of a webcam encompasses this type of intrusion and without a homeowner's knowledge and consent is a form of eavesdropping in the twenty-first century. Furthermore, even though people expose themselves to family and friends in their homes, "that does not mean they have opened the door to television cameras."[19] In the case at bar, the pictures recorded by the software may not have been taken in front of others, but the pictures taken of Peters while in his home captured the intimate details of his life.[20]

O'Plenty Enterprises, Inc. will counter-argue that the case at bar was not an intrusion because the camera was inside a company-issued laptop and not placed inside Peters' home. For example, in *Burns v. Masterbrand Cabinets, Inc*., an agent of an employer gained access to the inside of an employee's home under false pretenses and secretly recorded the conversation.[21] Furthermore, Peters voluntarily placed the laptop in his home with the knowledge it contained tracking software.

Peters will also argue that because he was in his home he had a reasonable expectation of solitude or seclusion. The home has long been considered an area where people have an objectively reasonable expectation of privacy.[22] Peters will argue that courts have found that the non-

16. *Plaxico v. Michael*, 735 So.2d 1036, 1039 (Miss. 1999).

17. *Werner v. Kliewer*, 710 P.2d 1250, 1255 (Kan. 1985).

18. *Restatement (Second) of Torts* § 652B cmt. B (1977).

19. *See Stressman v. Am. Black Hawk Broad. Co*., 416 N.W.2d 685, 687 (Iowa 1987).

20. R. at 6, discussing the pictures taken included photos showing Peters with his partner, and a photo of him shaking hands with a prominent gay activist in Marshall, who was a big supporter of the incumbent governor.

21. 874 N.E.2d 72, 74 (Ill. App. Ct. 2007).

22. *Shulman v. Group W Prods. Inc*., 18 Cal. 4th 200, 230-31 (Cal. 1998) ("[a] man whose home may be entered at the will of another. . .whose marital and familial intimacies

physical intrusions similar to what happened in his case have been found to be intrusions upon seclusion. For example, in *Summers v. Bailey*, the court found that a non-physical intrusion was analogous to a trespass into the plaintiff's home through eavesdropping by a microphone.[23] Peters will likely argue that courts have held that an intrusion takes place if a person "had an objectively reasonable expectation of seclusion or solitude in the place, conversation, or data source."[24]

O'Plenty Enterprises, Inc. will likely counter-argue that Peters was in his home office and captured him working and not in any type of personal situation. Additionally, as case law has developed through the years, to support a claim for intrusion upon seclusion more is required than just an oblique reference to private sexual matters.[25] Courts have ruled that sexual comments and brief touching could not support a claim of intrusion upon seclusion.[26] Therefore, O'Plenty Enterprises, Inc. will draw the analogy that the pictures captured by the company software in Peters' home office was not an intrusion because the pictures only contained references to Peters' sexual orientation.

2. *Intentional Intrusion*

Peters will then argue that the intrusion by O'Plenty Enterprises, Inc. was intentional. Per company policy, the IT Department activated the software when Peters reported his laptop lost. However, the software should have been deactivated when Peters called the company back to report his laptop had been recovered. He will argue that liability is based on the "the manner in which an individual obtains information."[27] In *Purrelli v. State Farm Fire & Casualty Company*, the court found that intrusion upon seclusion "must always be intentional to be tortious and cannot arise from a mere lack of due care."[28] Furthermore, a defendant's "motive or malice is not an element, for liability turns upon the defendant's action as opposed to motives."[29] Peters will argue that O'Plenty Enterprises, Inc. acted intentionally simply by installing the

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may be overseen at the will of another, is less of a man, has less human dignity, on that account"); s*ee also Kyllo v. United States*, 533 U.S. 27, 34 (2001) (where the Supreme Court held that "*all* details are intimate details").

23. 55 F.3d 1564, 1566 (11th Cir. 1995); *see also Restatement (Second) of Torts* § 652B cmt. b (1977) ("when a picture is taken of a plaintiff while he is in the privacy of his home. . .the taking of the picture may be considered an intrusion into the plaintiff's privacy just as eavesdropping or looking into his upstairs windows with binoculars are considered an invasion of his privacy").

24. *Sanchez-Scott v. Alza Pharms*, 86 Cal.App. 4th 365, 372 (2001).

25. *Stien v. Marriott Ownership Resorts,* 944 P.2d 374, 378 (C.A. Utah 1997).

26. *Haehn v. City of Hoisington*, 702 F. Supp. 1526, 1531-32 (D. Kan. 1988).

27. *Ali v. Douglas Cable Commc'ns*., 929 F.Supp. 1362, 1382 (D. Kan. 1996).

28. 698 So. 2d 618, 620 (Fla. Dist. Ct. App. 1997)

29. *Ali,* 929 F.Supp. at 1382.

software. He will further argue it is irrelevant that the company did not intend to leave the software running because motive is irrelevant; it is sufficient that the company left the software running.

However, O'Plenty Enterprises, Inc. will argue that the laptop was company property and it had a right to monitor it. O'Plenty Enterprises, Inc. will likely discuss that in *Ali v. Douglas Cable Communications*, the defendant-company recorded employee telephone calls at work through the employer's telephone lines to determine if employees were making personal calls.[30] The court in that case found that the plaintiffs could not claim an offensive intrusion because the calls that were supposed to take place were to be "made for the benefit and in the interest of their employer."[31] Furthermore, the monitoring was for only as long as necessary to determine if the calls were of a personal nature.[32] O'Plenty Enterprises, Inc. will likely draw a similar conclusion and argue that the software was deactivated as soon as practicable. However, Peters will likely counter-argue that O'Plenty Enterprises, Inc. should have turned the software off as soon as he called to report the laptop was recovered.

Based on the above, Peters will likely argue that even though the use of the software and recording was to catch thieves, courts have found that an intentional intrusion upon a person's seclusion can occur when pictures have been taken for unrelated purposes. In *Koeppel v. Speirs*, the court weighed an employee's right to seclusion against an employer's attempts to justify invasions of privacy to present illegal activity.[33] The court in that case found that if a recording device "could have intruded into the privacy of the plaintiff" it was an intrusion.[34] In the case at bar, this went even further, because the recording equipment actually recorded information and intruded into Peters' privacy.

O'Plenty Enterprises, Inc. will also argue that it did not intentionally intrude upon Peters' privacy. The meaning of intent is "that the actor desires to cause the consequences of his act, or that he believes that the consequences are substantially certain to result from it."[35] O'Plenty Enterprises, Inc. did not intend to record Peters. Rather, the tracking software was only installed as a means to recover lost or stolen equipment. And in this case, the software was only activated on the computer because Peters reported it lost. The company, therefore, did not intend the consequences of the software, namely the webcam photos taken of Peters inside his home.

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30. *Id.* at 1373
31. *Id.* at 1382.
32. *Id.*
33. 808 N.W.2d 177, 183 (Iowa 2011).
34. *Id.* at 185.
35. *Mauri v. Smith*, 929 P.2d 307, 310 (Or. 1996).

The company will also argue that intent centers on the idea that a person does not believe "he has either the necessary personal permission or legal authority to do the intrusive act."[36] O'Plenty Enterprises, Inc. believed it had the authority to use this software. The software was designed and installed to be used in exactly this type of situation: when company equipment was reported lost or stolen. Additionally, Peters was aware of the use of the tracking software via notice in his employee handbook (see Appendix A). Because Peters was aware tracking of company-issued electronics may take place, and Peters made no objection to this when he received his handbook, the company had legal authority to engage in this type of tracking.

Peters will then counter-argue that the intrusion was intentional because the company policy did not make any reference to video recording or webcam photos as part of its software tracking. In *Hernandez v. Hillsides, Inc.*, an employer installed recording equipment to watch and record employee activities in the office.[37] The court found that this recording rose to the level of intentional monitoring.[38] Additionally, the court determined that the written computer policy in effect was vague because it only:

> made clear that any monitoring and recording of employee activity, and any resulting diminution in reasonable privacy expectations, were limited to 'use of Company computers' in the form of 'e-mail' messages, electronic 'files,' and 'web site' data. . .there is no evidence that employees . . . had any indication that Hillsides would take the next drastic step and use cameras and recording devices to view and videotape employees sitting at their desks and computer workstations, or moving around their offices within camera range.[39]

Based on *Hernandez*, Peters will argue that the policy in place at O'Plenty Enterprises, Inc. is vague at best. O'Plenty Enterprises, Inc.'s policy makes no specific reference to webcam photos. Therefore, Peters had no warning that his laptop use could subject him to being photographed in his private home. He also followed proper protocol and reported his laptop had been recovered. The *Hernandez* court found there was no egregious behavior on the part of the company, because the cameras were placed in the office and the employees "were not at risk of being monitored or recorded during regular work hours and were never actually caught on camera or videotape."[40] However, Peters will distinguish his situation from the *Hernandez* case on that point because he

36. *O'Donnell v. United States*, 891 F.2d 1079, 1083 (3d Cir. 1989).
37. 47 Cal. 4th 272, 289-90 (Cal. 2009).
38. *Id*. at 292.
39. *Id.* at 294.
40. *Id*. at 301.

was actually recorded in the privacy of his own home and not at the office.

However, O'Plenty Enterprises, Inc. will point out that the recording was made from company property that had been lost. Peters was not recorded with a stand-alone camera while working at the company headquarters like in the *Hernandez* case. Furthermore, the *Hernandez* court points out that there is no cause of action "for accidental, misguided or excusable acts of overstepping upon legitimate privacy rights."[41] O'Plenty Enterprises, Inc. accidentally left the software on longer than it needed to only because it did not receive the voicemail for several hours. Once the IT Department received notice the laptop had been recovered, it immediately deactivated the software. O'Plenty Enterprises, Inc. will show that the "[a]ctivation of the surveillance system was narrowly tailored in place, time, and scope, and was prompted by legitimate business concerns."[42] The software was only to be activated when company equipment was reported lost or stolen and the record shows the software was activated based upon Peters' call. Furthermore, the software ran no longer once the IT Department listened to the voicemail message from Peters informing it that his laptop had been recovered.

O'Plenty Enterprises, Inc. will also argue that as a company it had the right to monitor its own property. In *Lewis v. Dayton Hudson Corporation*,[43] a retail store concerned with shoplifters had signs in the dressing rooms informing customers the area was under surveillance by store personnel, and the fitting room doors did not have locks nor did the doors extend all the way down to the floor.[44] A suspicious security guard viewed a man in a dressing room from a grate in the ceiling above the dressing room, and called the police.[45] The appellate court upheld the trial court in dismissing the plaintiff's claim, because the security guard's conduct did not constitute an unwarranted invasion of privacy because the dressing room signs indicated that the area was under surveillance,[46] and any "expectation of privacy he may have had in the absence of such signs was removed by the placement of the signs in the fitting room."[47] The court also found that since retailers were faced with an epidemic of shoplifting, and that fitting rooms provided the ideal location to conceal stolen property, it was not unreasonable for store security "to view patrons in fitting rooms."[48] Likewise, in the case at bar,

41. *Id.* at 296.
42. *Id.* at 301.
43. 128 Mich.App. 165 (1983).
44. *Id.* at 167.
45. *Id.*
46. *Id*. at 172-73.
47. *Id*. at 172.
48. *Id*. at 169-170.

O'Plenty Enterprises, Inc. did what it needed to do to recover stolen and lost equipment. The software had even helped to recover and prosecute six of the ten thieves of O'Plenty Enterprises, Inc.'s laptops.[49]

Peters will argue that unlike the *Lewis* case where signs were prominent that shoppers would be monitored, in this case, he had no notice that there was a possibility that pictures could be taken from the tracking software. He will reiterate the arguments based on the *Hernandez* case, namely that the written policy in effect at O'Plenty Enterprises, Inc. was vague and therefore ineffective to put him on notice of the tracking software's capability to take pictures through the laptop's webcam. Furthermore, Peters will contend that the fact that O'Plenty Enterprises, Inc. left the Lost & Found® software running for four hours and produced fifty still photographs is sufficient to rise to the level of an intrusion or at the very least, a genuine issue of material fact of whether or not this was an intentional intrusion.

Peters may also cite to *Acuff v. IBP, Inc*. for the proposition that the use of cameras for innocent and unrelated purposes have been found to constitute intentional intrusion upon a person's seclusion.[50] In *Acuff*, the defendant installed cameras to record the premises, as he had been subject to theft and was looking to catch the thief.[51] Unbeknownst to the defendant while the camera was recording the premises, it captured nurses treating patients within the cameras' view.[52] The court still found that it would be possible for a jury to conclude that the defendant had acted intentionally.[53]

O'Plenty Enterprises, Inc. will seek to distinguish *Acuff* from the case at bar. Unlike the defendant in *Acuff* who did not cease recording when it became aware that physical examinations were taking place in the room in question,[54] O'Plenty Enterprises, Inc. will argue that it immediately ceased using the Lost & Found® software once the IT department had received the voicemail message from Peters reporting his laptop had been recovered.

3. *Highly Offensive to a Reasonable Person*

The last element of the intrusion upon seclusion tort requires that Peters show the intrusion of the webcam photos taken by O'Plenty Enterprises, Inc.'s software was highly offensive to a reasonable person.

The issue of whether a defendant's "intrusion is 'highly offensive to a

49. R. at 5.
50. 77 F. Supp. 2d 914 (C.D. Ill. 1999).
51. *Id*. at 918.
52. *Id*.
53. *Id*.
54. *Id.* at 923.

reasonable person' is for a jury to decide."[55] However, in *Candebat v. Flanagan,* the court found that a plaintiff has to meet a heavy burden of showing that an interference with his seclusion is of the "kind that 'would be highly offensive to the ordinary, reasonable man, as the result of conduct to which the reasonable man would strongly object.'"[56]

Peters will likely argue that being photographed inside one's home is highly offensive. For example, in *Miller v. Brooks*, the plaintiff's estranged wife placed a video camera in her husband's bedroom.[57] The court found that a jury could conclude that such intrusion is highly offensive to a reasonable person.[58] Peters will argue that the pictures taken by his company issued laptop captured personal images taken inside the privacy of his own home and the pictures were taken without his knowledge. Additionally, Peters will discuss courts that have found liability merely by setting up recording equipment capable of this type of intrusion without any evidence that pictures or recordings were taken.[59]

O'Plenty Enterprises, Inc. will distinguish the *Candebat* case by arguing that a "plaintiff must show some bad faith or utterly reckless prying to recover on an invasion of privacy cause of action."[60] A court should consider factors including "'the degree of intrusion, the context, conduct and circumstances surrounding the intrusion as well as the intruder's motives and objectives, the setting into which he intrudes, and the expectations of those whose privacy is invaded.'"[61] In this case, the company will argue that there was no bad faith. Peters was aware of tracking software in the laptop and that it would be activated if a laptop was reported lost or stolen. Furthermore, the goal of the software was to help recover lost or stolen property and not to monitor or spy on employees. The software was deactivated as soon as the IT department listened to the message from Peters about the laptop's recovery.

O'Plenty Enterprises, Inc. will argue that the pictures were not highly offensive because they did not catch Peters in any type of compromising positions. He was merely in his home office working. Furthermore, the company will also reiterate that for the pictures to support a claim for intrusion upon seclusion more is required than just an oblique reference to sexual matters.[62] Simply by capturing some images show-

55. *Rafferty v. Hartford Courant Co*., 36 Conn.Supp. 239, 241 (Conn. Super. Ct. 1980).

56. *Candebat v. Flanagan*, 487 So.2d 207, 209 (Miss. 1986).

57. 472 S.E.2d 350, 352 (N.C. Ct. App. 1996).

58. *Id.* at 354.

59. *Harkey v. Abate*, 346 N.W.2d 74, 76 (Mich. Ct. App. 1983) (where the court found that the mere "installation of the hidden viewing devices along constitutes an interference with that privacy which a reasonable person would find highly offensive").

60. 487 So.2d at 209.

61. *Stien v. Marriott Ownership Resorts,* 944 P.2d 374*,* 379 (Utah Ct. App. 1997).

62. *Id.* at 378.

ing Peters with his partner does not rise to the level of highly offensive.

Peters will counter-argue this point by discussing the *In re Marriage of Tigges* case, where the court found that it is not the content of the recording that triggers liability, but the fact that the recording was without "consent at a time and place and under circumstances in which" a person has "a reasonable expectation of privacy."[63] It is not what the laptop captured (personal pictures of Peters), but just the fact that the laptop captured anything at all inside Peters' home that is highly offensive. Peters will also argue that courts have considered people's sexual lives "normally entirely private matters."[64]

NOTE: Some courts have required a fourth element namely that the intrusion cause anguish and suffering.[65] This element may be discussed, but is not necessary for establishing liability under the Restatement. Moreover, there are relatively no facts to support this element.

VIOLATION OF MARSHALL STATE HUMAN RIGHTS ACT

General

The Marshall State Human Rights Act is located in the Marshall State Code. Under the statute, an employer may not "act with respect to. . .discharge, discipline, tenure or terms, privileges or conditions of employment on the basis of unlawful discrimination." The statute defines "unlawful discrimination" as "discrimination against a person because of his or her. . .sexual orientation."[66]

Elements

Marshall has adopted the two approaches for determining employment discrimination cases under the MHRA: 1) by "direct evidence" of discrimination; or, 2) in an absence of direct evidence, the four-part *McDonnell Douglas* analysis.[67]

Under the *McDonnell Douglas* analytical framework, an employee bears the initial burden of establishing a *prima facie* case of discrimination by showing that: (1) he or she is a member of a protected class; (2) he or she was performing satisfactorily; (3) he or she was discharged despite the adequacy of his or her work; and (4) a similarly situated employee

63. 758 N.W.2d 824, 830 (Iowa 2008).

64. *Y.G. v. Jewish Hosp. Of St. Louis*, 795 S.W.2d 488, 498 (Mo. Ct. App. 1990).

65. *Melvin v. Burling*, 49 N.E.2d 1011, 1012 (Ill. App. Ct. 1986).

66. Appendix B.

67. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973); *see also Griffith v. City of Des Moines*, 387 F.3d 733, 736 (8th Cir. 2004); *Zaderaka v. Ill. Human Rights Comm'n,* 545 N.E.2d 684, 687 (Ill. 1989).

who was not a member of the protected group was not discharged.[68]

If the plaintiff establishes a prima facie case, the burden of production shifts to defendant to show a legitimate, nondiscriminatory reason for the adverse employment action.[69] If the employer articulates such a reason, the plaintiff then bears the burden of establishing that the proffered nondiscriminatory reason was mere pretext for discriminatory animus.[70] However, a final determination of unlawful discrimination must be established by and supported with a factual finding.[71] Throughout the proceedings, the ultimate burden of persuasion is on the employee.[72]

McDonnell Douglas Analysis

1. *Member of a Protected Class*

O'Plenty Enterprises, Inc. is specifically barred from terminating Peters' employment on the basis of his sexual orientation. "It is the public policy of this State . . . [t]o secure for all individuals within the State of Marshall freedom from discrimination . . . because of his or her . . . sexual orientation . . . in connection with employment . . ."[73] As a result, Peters will likely argue that he can make a prima facie case for discrimination under the MHRA. Peters will argue that he is part of a protected class, namely because of his sexual orientation. Some state courts have held that sexual orientation is a suspect[74] or quasi-suspect classification[75] and thus, classifications that discriminate against gay persons are to be reviewed under the intermediate scrutiny test.

O'Plenty Enterprises, Inc. will not dispute that Peters, as a homosexual male, is a member of a protected class under the MHRA.[76] Rather, O'Plenty Enterprises, Inc. will likely argue that Peters fails to establish the other three elements of the *McDonnell Douglas* test, i.e. that he was performing satisfactorily, that he was discharged even with an adequate work performance and that O'Plenty Enterprises, Inc. treated him differently from similarly situated employees.

2. *Satisfactory Performance*

Peter will argue that this court should consider evidence that he was

68. *McDonnell Douglas Corp.,* 411 U.S. at 802; *see also Owens v. Dep't of Human Rights*, 826 N.E.2d 539, 544 (Ill. App. Ct. 2005).

69. *McDonnell Douglas Corp*., 411 U.S. at 802; *Zaderaka* 545 N.E.2d at 687.

70. *McDonnell Douglas Corp.,* 411 U.S. at 802.

71. *Ill. J. Livingston Co. v. Human Rights Comm'n,* 704 N.E.2d 797 (Ill. App. Ct. 1998).

72. *Owens,* 826 N.E.2d at 539.

73. Marshall Human Rights Act § 1-102(A) (2010).

74. *See Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

75. *See Kerrigan v. Commissioner of Public Health*, 957 A.2d 407 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

76. R. at 15.

meeting O'Plenty Enterprises, Inc.'s expectations.[77] Peters will claim that his performance during his twelve year history with the company has consistently been more than satisfactory, evidenced by his promotions and increased job responsibilities. He will state that the only instance of poor performance was related to the coordination of Timmons' political fundraising event in Petersville, which was not related to his core job responsibilities as Regional Project Supervisor. He will argue that there were other personal circumstances that lead to the mix-up with the event in Petersville, namely that he was distraught over the death of his beloved Labrador Retriever.

O'Plenty Enterprises, Inc. will counter-argue that his performance had been slipping. His performance had started to suffer and he made significant mistakes at a campaign event.[78] The company ordered him to fly back due to the mistakes at the event.[79] Furthermore, Peters also lost his company issued laptop because he was distracted.[80]

3. *Discharge/Adverse Employment Action*

Peters will argue that he was summarily discharged after it was revealed that he was homosexual, and that adverse employment action resulted from O'Plenty Enterprises, Inc.'s discrimination against his sexual orientation.[81] Peters will focus on the fact that he was terminated shortly after Mr. O'Plenty, who had openly condemned homosexuality, discovered Peters' sexual orientation.[82] Peters, therefore, will draw the conclusion that he suffered a decidedly adverse employment action under circumstances that give rise to an inference of discrimination.

O'Plenty Enterprises, Inc. will counter-argue that Peters fails to make a prima facie case for discrimination under the MHRA because his performance was not satisfactory. The company might cite to *Hong v. Children's Memorial Hospital*, and argue that the focus should not be on an employee's past performance, but this court should look to whether the employee was performing satisfactorily at the time of the adverse employment action.[83] Ignoring the shifting nature of performance from time to time would render the satisfactory performance requirement

77. *See Cline v. Catholic Dioceses of Toledo,* 206 F.3d 651, 662-63 (6th Cir. 2000) (citing *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 504-05 (1993)).

78. R. at 5- 6.

79. R. at 6.

80. *Id.*

81. *See Lewis v. City of Chicago*, 496 F.3d 645, 652 (7th Cir. 2007); *Rhodes v. Ill. Dep't of Transp*., 359 F.3d 498, 504 (7th Cir. 2004).

82. R. at 7.

83. 993 F.2d 1257, 1262 (7th Cir. 1993)

meaningless.[84] Moreover, O'Plenty Enterprises, Inc. may argue that the determination of whether a job performance is satisfactory belongs to the employer.[85] It will point to the Record, which it will claim provides sufficient evidence to support the fact that Peters' performance at the time of his termination was not satisfactory. O'Plenty Enterprises, Inc. will reiterate the fact that Peters' performance "has suffered during the last four months of his employment"[86] and there were mistakes made by Peters during recent events.[87] The company will seek to show that those errors caused "major backlash" and were "extremely harmful" to the company's reputation, thus fully supporting the company's determination of Peters' performance as less than satisfactory at the time of discharge.

Should Peters insist on rebutting these claims by arguing that the events in which he exhibited poor performance "were not even part of his duties" and "something incidental,"[88] O'Plenty Enterprises, Inc. will argue that courts have routinely deferred to employers on issues relating to the reasonableness of its employment criteria.[89] In effect, a plaintiff is not entitled to get his or her case before a jury by contending that the demands of the employer were not reasonably related to the performance of the job.[90]

4. *Similarly Situated Employees Were Treated Differently*

Peters will argue that he was "treated differently than similarly situated non-protected employees."[91] Peters will provide evidence that showed that in at least two other cases, where the employees were known to be heterosexual and affiliated with the same political party as Mr. O'Plenty, Mr. O'Plenty treated them much more leniently. More specifically J. Erwin, who accidentally communicated proprietary information to a third party, was just re-assigned to a different position. Similarly, L. Walker, a regional supervisor discriminated against women working for O'Plenty Enterprises, Inc. and was not terminated. He was suspended with pay, and after a few months, was able to resume his duties without fully completing the sensitivity training he was ordered to

84. *See Weihaupt v. Am. Med. Ass'n*., 874 F.2d 419, 427 (7th Cir. 1989).

85. *See Thornley v. Penton Publ'g, Inc*., 104 F.3d 26, 29 (2d Cir. 1997) ("Whether job performance was satisfactory depends on the employer's criteria for the performance of the job—not the standards that may seem reasonable to the jury or judge.").

86. R. at 12.

87. R. at 6 (where it is described how Peters e-mailed the wrong VIP list to security and forgot to arrange the gubernatorial candidate's transportation).

88. R. at 11.

89. *See, e.g., Stanojev v. Ebasco Servs., Inc*., 643 F.2d 914, 921–22 (2d Cir. 1981) (defending the notion that an employee may be discharged "on the basis of subjective business judgments, for any reason that is not discriminatory").

90. *Thornley*, 104 F.3d at 29.

91. *White v. Baxter Healthcare Corp*., 533 F.3d 381 (6th Cir. 2008).

take. Peters will claim that if it had not been revealed by the photographs taken by the Lost & Found® software that he is homosexual, he would likely still be employed by O'Plenty Enterprises, Inc.

O'Plenty Enterprises, Inc. will likely focus on the differences between Peters' conduct and that of the allegedly similarly situated employees. The company may cite *City of North Las Vegas v. State Local Government Employee-Management Relations Board*, which states:

> [i]n determining whether two employees are similarly situated as required for employment discrimination claim, a court must look at all relevant factors, depending upon the context of the case, and such factors may include: (1) whether the employees were subject to the same performance evaluation standards, (2) whether the employees engaged in comparable conduct, (3) whether the employees dealt with the same supervisor, (4) whether the employees were subject to the same disciplinary standards, and (5) whether the employees had comparable experience, education, and qualifications, if the employer took these factors into account in making its decision.[92]

O'Plenty Enterprises, Inc. will explain that the facts and circumstances of the other employees' conduct were substantially different than Peters' conduct and therefore they cannot be considered comparators.

Should Peters argue that comparators do not have to be identical situations, O'Plenty Enterprises, Inc. may counter that while the situations do not have to be identical, "there must be a reasonably close resemblance of the facts and circumstances of the plaintiff's and comparator's cases."[93] The company may also cite to *City of West Palm Beach v McCray*, which elaborates on the requirement for comparators to have engaged in the same or similar conduct, "[i]n determining whether employees are similarly situated for purposes of a disparate treatment employment discrimination claim, the most important factors are the nature of the offenses and punishments imposed; however, the quantity and quality of the comparator's misconduct must be nearly identical."[94] The similarly situated element does not require a strict "one-to-one mapping between employees."[95] O'Plenty Enterprises, Inc. will claim that the cases of Erwin and Walker do not share enough features with Peters to allow for a "meaningful comparison."[96]

O'Plently may also cite to *Perez-Dickson v. City of Bridgeport*, in which the court stated:

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92. 261 P.3d 1071, 1079 (Nev. 2011).

93. *Id*. at 1079.

94. 91 So.3d 165, 171 (Fla. 2012).

95. *Humphries v. CBOCS W., Inc*., 474 F.3d 387, 405 (7th Cir. 2007).

96. *See Argyropoulos v. City of Alton*, 539 F.3d 724, 735 (7th Cir. 2008) (describing a meaningful comparison as one that serves to eliminate variables to isolate discriminatory animus).

> [a]n employee who is offered as an individual to whom plaintiff in employment discrimination case seeks to compare herself in *McDonnell Douglas* analysis on question of whether adverse action took place under circumstances permitting an inference of discrimination will be deemed to be similarly situated in all material respects, if (1) the plaintiff and those he maintains were similarly situated were subject to the same workplace standards, and (2) the conduct for which the employer imposed discipline was of comparable seriousness.[97]

Consequently, O'Plenty will argue that because Peters' misconduct was substantially more serious, it is not comparable to the two other employees mentioned in this action.

5. *Employer Non-Discriminatory Justification for Adverse Employment Action*

If the plaintiff establishes a prima facie case, the burden of production shifts to the defendant to show a legitimate, nondiscriminatory reason for the adverse employment action.[98] If the employer articulates such a reason, the plaintiff then bears the burden of establishing that the proffered nondiscriminatory reason was mere pretext for discriminatory animus.[99] However, a final determination of unlawful discrimination must be established by and supported with a factual finding.[100]

In this case, O'Plenty Enterprises, Inc. might argue that where the court may decide that Peters met his burden to prove his prima facie case, it will still prevail because it is able to produce evidence that Peters' employment was terminated for a legitimate, non-discriminatory reason.[101] "The defendant need not persuade the court that it was actually motivated by the proffered reasons. It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff."[102] The company will contend that, after deliberations by the Executive Board, the company terminated Peters' employment because of poor performance. The significance of the adverse employment action was due to the impact of Peters' actions to the reputation and image of O'Plenty Enterprises, Inc. O'Plenty Enterprises, Inc. provided evidence of extensive negative publicity of the company and Mr. O'Plenty personally, related to the incident, including press releases, posts on several political and industry related websites and blogs that pointed out the "fiasco" and the incompetency of O'Plenty Enterprises, Inc.'s employees. In response to Peters argument that the discipline he

97. 43 A.3d 69, 93 (Conn., 2012).
98. *McDonnell Douglas Corp*., 411 U.S. at 802; *Zaderaka* 545 N.E.2d at 687.
99. *McDonnell Douglas Corp.,* 411 U.S. at 802.
100. *Ill. J. Livingston Co. v. Human Rights Comm'n,* 704 N.E.2d 797 (Ill. App. Ct. 1998).
101. *See Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981).
102. *Id.*

received (termination) was more severe than that administered to other similarly situated employees, the company is likely to argue that "the unfairness or unreasonableness of an employer's conduct is irrelevant, so long as it was not motivated by an employee's protected characteristic."[103]

Peters will argue that "poor performance" was merely pretext for terminating him because he is homosexual. O'Plenty Enterprises, Inc. will counter-argue that Peters failed to provide any evidence that it terminated his employment because he was homosexual. Since O'Plenty Enterprises, Inc. has articulated a legitimate, non-discriminatory reason for Peters' termination, Peters must persuade the trier of fact that the company intentionally discriminated against him.[104] "[I]n attempting to satisfy this burden, the plaintiff . . . must be afforded the opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination."[105] "To prove by a preponderance of the evidence that the reason articulated by the employer was merely a pretext for discrimination and not the true reason. . . the plaintiff must show that the employer's reason was both false and motivated by discriminatory intent."[106] O'Plenty may also refer to *Rice v. Offshore Systems, Inc*., which explains:

> employee[s] can show that the employer's proffered reason for an adverse employment action is pretext for discrimination in several ways: (1) the employer's reasons have no basis in fact; (2) if employer's reasons have a basis in fact, by showing that they were not really motivating factors; or (3) if they are factors, by showing that they were jointly insufficient to motivate the adverse employment decision, e.g., the proffered reason was so removed in time that it was unlikely to be the cause, or the proffered reason applied to other employees with equal or greater force and the employer made a different decision with respect to them.[107]

6. *Termination of an At-Will Employee*

Peters will rebut O'Plenty Enterprises, Inc.'s argument that since Peters was an at-will employee, the company was within its rights to terminate Peters at any time and for any reason it chose. Peters may argue that even though it is widely recognized that based on the at-will doctrine "if the employee is free to quit at any time, then the employer

103. *Young v Ill. Human Rights Comm'n*, 2012 Ill. App. 112, 204 (1st Cir. 2012).

104. *Reeves v. Sanderson Plumbing Prods., Inc*., 530 U.S. 133, 142-43, (2000).

105. *Id.* at 143.

106. *Henry v New Jersey Dept. of Human Serv.*, 9 A.3d 882, 889 (N.J., 2010).

107. 272 P.3d 865, 872 (Wash. Ct. App. 2004).

must be free to dismiss at any time."[108] Peters will claim that the at-will doctrine has evolved to accommodate changes in legal, economic, and social perspectives. Peters will likely refer to a number of cases that have established that, employees discharged for reasons judged to be "retaliatory," "abusive," "malicious," "in bad faith," or against public policy an employee have a cause of action for wrongful discharge.[109]

Peters will likely argue that the court in *Smith* rejected an argument that an at-will employee could be fired for any reason, including a discriminatory one. There, an at-will employee claimed she was terminated because of her gender, in violation of Title VII of the Civil Rights Act of 1964.[110] The court found that even an at-will employee like Smith was protected from discriminatory termination because Title VII "codifies the public policy against gender-based discrimination."[111] Therefore, an at-will employee cannot be terminated for discriminatory reasons when such an action is prohibited by public policy or statute.[112] Therefore, Peters will argue that an employer may not terminate an at-will employee if the particular basis for that termination is forbidden by statute.[113] Similarly, Peters' termination from O'Plenty Enterprises, Inc. falls clearly into the public policy exception of the at-will doctrine because the Act specifically identifies discrimination on the basis of sexual orientation as a violation of public policy.[114]

O'Plenty Enterprises, Inc. will likely argue that Peters was an at-will employee during that time and could be terminated without cause.[115] The company will refer to the established at-will doctrine that provides that if an employee is classified as at-will, an employer may ordinarily discharge that employee for good cause, for no cause, or for a

108. *Smith v. Atlas Off-Shore Boat Serv., Inc.*, 653 F.2d 1057, 1061 (5th Cir. 1981), there are some limitations.

109. *Gibson v. Estes*, 338 F. App'x 476, 477 (5th Cir. 2009); *Clark v. Modern Grp. Ltd.*, 9 F.3d 321, 323 (3d Cir. 1993); *LaScola v. U.S. Sprint Commc'ns*, 946 F.2d 559, 566 (7th Cir. 1991); *Terry v. Legato Sys., Inc.*, 241 F. Supp. 2d 566, 569 (D. Md. 2003); *Silva v. Albuquerque Assembly & Distribution Freeport Warehouse Corp.*, 738 P.2d 513, 515 (N.M. 1987) ("The sources of public policy include legislation; administrative rules, regulations or decisions; and judicial decisions."); *Pierce v. Ortho Pharm. Corp.*, 417 A.2d 505, 512 (N.J. 1980); *see also Palmateer v. Int'l Harvester Co*., 421 N.E.2d 876, 878 (Ill. 1981) ("The at-will employment doctrine can be modified "through public policy reflected in the constitution [or in] a statute.") *Fleshner v. Pepose Vision Inst., P.C*., 304 S.W.3d 81, 92 (Mo. 2010).

110. *Smith*, 76 F.3d at 419-20.

111. *Id.* at 427, 429.

112. *Id.* at 426.

113. *Id.*

114. Marshall Human Rights Act, § 1-102 (2010). Section 1-102 of the the Act further notes that discriminatory practices linked to employment practices are consummately against public policy.

115. R. at 11-12.

cause that some might even view as morally indefensible.[116] O'Plenty Enterprises, Inc. will likely also argue that the company did not terminate Peters for any reason that could be determined as "retaliatory," "abusive," "malicious," "in bad faith," or against public policy, but because Peters' work performance during the Timmons campaign led to negative publicity and a loss of company reputation.

O'Plenty Enterprises, Inc. will also argue that Peters also failed to demonstrate a nexus between the allegedly discriminatory statements and the employer's decision to terminate the employee.[117] O'Plenty Enterprises, Inc. will further argue that the statements made by O'Plenty during a fundraising event do not constitute direct evidence of discrimination based on sexual orientation. Direct evidence is defined as evidence submitted by plaintiff that, if believed, proves the existence of discriminatory intent without an additional inference.[118]

O'Plenty Enterprises, Inc. may look to *Perry v. Woodward*, in support of its argument. In *Perry*, a Hispanic employee introduced evidence that while at work the employer made demeaning and derogatory comments to and about Hispanics.[119] The court rejected the comments as direct evidence because the comments by the employer were not directed at the employee and there was no indication that the employer intended the comments to be directed to the employee.[120] The employer's comments were nothing more than an expression of personal opinion and did not constitute direct evidence of a racially motivated discharge.[121] Similarly, O'Plenty Enterprises, Inc. will argue that those statements by Mr. O'Plenty were made during a campaign fundraiser, expressing his personal views of homosexuality, the statements were not directed at Peters, the statements were not purporting to describe Peters, nor were the statements made at a time when Peters' employment prospects were at issue. Rather, Mr. O'Plenty's statements were made in his personal capacity and it was the Executive Board of O'Plenty Enterprises, Inc. that terminated Peters. Thus, the company will argue that this court should find that there is no sufficient evidence to support Peters' claim that his termination was in violation of public policy.

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116. *Miracle v. Bell Cnty. Emergency Med. Servs.*, 237 S.W.3d 555, 558 (Ky. Ct. App. 2007).

117. *Cone v. Longmont United Hosp. Ass'n*, 14 F.3d 526, 531 (10th Cir.1994) (citing *E.E.O.C. v. Clay Printing Co.*, 955 F.2d 936, 942 (4th Cir.1992)).

118. *Schoenfeld v. Battitt*, 168 F.3d 1257, 1266 (11th Cir. 1999).

119. 199 F.3d 1126, 1142 (10th Cir. 1999).

120. *Id.*

121. *Id.* at 1134-35.

APPENDIX A

EMPLOYEE HANDBOOK OF O'PLENTY ENTERPRISES, INC. ("COMPANY").

Section 1.1 – The following terms and conditions are designed to tell you ("employee") about Company's policies.

PLEASE READ THESE TERMS CAREFULLY AS YOUR EMPLOYMENT WITH COMPANY CONSTITUTES ACCEPTANCE OF THEM.

[. . .]

Section 2.5 – Computer equipment, including laptops, may not be used for personal use – this includes word processing and computing functions. It is forbidden for employee to install any other programs to a company computer without the written permission of employee's supervisor. These forbidden programs include, but are not limited to, unlicensed software, pirated music, and pornography. The copying of programs installed on Company computers is not allowed unless you are specifically directed to do so in writing by your supervisor.

Section 2.6 – Company reserves the right to initiate and activate tracking software in order to track lost or stolen any type of company issued electronic equipment.

Section 2.7 – Employee must report if company issued electronic equipment has been recovered.

[. . .]

Section 3.5 – An employee is allowed access to employee's Human Resources file during or after employee's tenure with Company.

APPENDIX B

MARSHALL HUMAN RIGHTS ACT

Sec. 1-102. Declaration of Policy. It is the public policy of this State:

(A) Freedom from Unlawful Discrimination. To secure for all individuals within the State of Marshall freedom from discrimination against any individual because of his or her race, color, religion, sex, national origin, ancestry, age, order of protection status, marital status, physical or mental disability, military status, sexual orientation, or unfavorable discharge from military service in connection with employment, real estate transactions, access to financial credit, and the availability of public accommodations.

[. . .]

ARTICLE 2. EMPLOYMENT

Sec. 2-101. Definitions. The following definitions are applicable strictly in the context of this Article.

(A) Employee.

(1) "Employee" includes:

(a) Any individual performing services for remuneration within this State for an employer;

(b) An apprentice;

(c) An applicant for any apprenticeship.

(B) Employer.

(1) "Employer" includes:

(a) Any person employing 15 or more employees within Marshall during 20 or more calendar weeks within the calendar year of or preceding the alleged violation;

(b) Any person employing one or more employees when a complainant alleges civil rights violation due to unlawful discrimination based upon his or her physical or mental handicap unrelated to ability or sexual harassment;

(c) . . .

(d) . . .

(e) . . .

[. . .]

ARTICLE 10. CIRCUIT COURT ACTIONS

Sec. 10-102. Court Actions. (A) Circuit Court Actions. (1) An aggrieved party may commence a civil action in an appropriate Circuit Court not later than 2 years after the occurrence or the termination of an

alleged civil rights violation or the breach of a conciliation or settlement agreement entered into under this Act, whichever occurs last, to obtain appropriate relief with respect to the alleged civil rights violation or breach.

(2) The computation of such 2-year period shall not include any time during which an administrative proceeding under this Act was pending with respect to a complaint or charge under this Act based upon the alleged civil rights violation. This paragraph does not apply to actions arising from a breach of a conciliation or settlement agreement.

(3) . . .

(4) . . .