Federal Civil Procedure Two **Prof. Slomanson**
Final Examination **Spring 2007**
Exam# _______

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Memorandum of Law

May 10, 2007

To: Associate Attorney
Fm: Managing Partner
Re: Instructions

We represent Pam Plaint. We have sued Deftco, Inc. See the attached FILE. Assume the existence of the Federal Fair Employment Act in the attached LIBRARY. (No other Rule/Code provision is hypothetical.) These are not the only applicable legal rules.

Please advise me on the matters I have identified (#1 through #6) in the enclosed FILE. Tell it like it is in your analysis. For example, I need to know when there are two sides to the issues presented, but do give me your reasoned conclusion. Do not assume that every scrap of information in this exercise will be relevant to some issue.

Do not use any *subsequent* event in this case to analyze an *earlier* event. For example, that the case ultimately goes to trial should not be used in any jurisdictional analysis.

Good luck,
Jumpin' Jack Flash
Managing Partner

FILE

Pam Plaint) v.) Deftco, Inc.)	United States District Court Southern District of California Civil Action No. 654321-SOB **COMPLAINT** Wrongful Termination File Date: January 16, 2007

1. Pam Plaint is domiciled in San Diego, CA. Deftco is incorporated in Wilmington, Delaware. It is headquartered in Cincinnati, Ohio.

2. Pam was hired as an executive assistant to David Dell, a junior manager for Deftco, Inc. David demanded sexual favors as a condition for Pam's continued employment. Pam refused David's advances. As a result, Pam was fired. This violated the Federal Fair Employment Act.

3. Pam thus seeks damages, in the amount of fifty-thousand dollars ($50,000), for the wages she would have earned before she obtained new employment, and any additional damages she may prove in the trial of this action.

Signed: *Jumpin' Jack Flash*
Dewey, Cheatem & Howe
Attorneys for Plaintiff

#1. Will the court have subject matter jurisdiction to hear this case under the Federal Fair Employment Act?

<table>
<tr><td>Pam Plaint)
v.)
David Dell)</td><td>Ohio Court of Common Pleas
Hamilton County, Ohio
Civil Action No. 00421
JUDGMENT</td></tr>
<tr><td colspan="2">A Hamilton County jury has duly considered the case of Pam Plaint v. David Dell for sexual harassment, while she and David Dell were employed at the Deftco, Incorporated headquarters in Cincinnati, Ohio. That jury herein returned a unanimous verdict for the defendant David Dell. It has herein been determined that the plaintiff will take nothing by her complaint in this action.

Signed: Candice Clerkmiester
For the Ohio Court of Common Pleas
Hamilton County, Ohio
Civil Action No. 00421
on this 4th day of December, 2006</td></tr>
</table>

#2. What is the impact of the above prior judgment in Pam Plaint v. David Dell, if any, on *this* case (Plaint v. Deftco)?

#3. Assume that Deftco has answered our complaint against Deftco. Deftco timely raises the matter of the above Ohio judgment for our trial judge's consideration in this case. The judge decides that the earlier Ohio judgment, in Pam Plaint v. David Dell, has no impact on our currently pending Plaint v. Deftco case.

Deftco's lawyer might now seek appellate review of this order, before we go to trial. Is that possible? Can we successfully counter? We hope to avoid Deftco's attorney from harassing us too, on both the trial and appellate court levels.

Assume that our case (Plaint v. Deftco) is not impacted by the earlier Ohio judgment, and that any attempted pre-judgment appeal was unsuccessful. Here's a letter I sent to Dr. Phil:

February 16, 2007

Dr. Phil, M.D.
Phil's Psychiatric Place
Hotel California Way
San Diego, CA 92101

Re: Pam Plaint Evaluation

Dr. Phil:

Thank you for your recent report to me, regarding our client's mental state. We want to explore the possibility of obtaining more damages for our client, in her wrongful termination case entitled Pam Plaint v. Deftco, Inc.

I will read your report ASAP. I appreciate your prompt response to our inquiry. It will be important to know your perspective, regarding Pam's trauma caused by David Dell, her Deftco supervisor.

Because you are the premiere workplace psychiatrist on the West Coast, be sure to avoid contact with Deftco's lawfirm (Defense Masters, LLP), should any of its lawyers attempt to recruit you for this case. If that happens, I assume that they will then try to secure the services of your usual competitor, Dr. Mary Lynne Shrink, at her Portland, Oregon office.

I must now attend to other pressing matters, and hope to get back to you soon, after reading your report.

Very truly yours,
Jumpin' Jack Flash
Dewey, Cheatem & Howe
Attorneys at Law
One Law Place
San Diego, CA 92101

#4. Can the defense obtain a mental examination of our client?

#5. Would Deftco's lawyer be able to obtain the report mentioned in our letter to Dr. Phil?

Pam's case against Deftco, Inc. ultimately went to trial. The essential trial testimony appears immediately below:

TRIAL TESTIMONY

Direct Examination of Pam Plaint by Counsel for the Plaintiff (Jumpin' Jack Flash):

* * *

Q: Did you complain about how David Dell treated you?
A: Yes.
Q: To whom?
A: To David Dell.
Q: Did you complain to anyone else?
A: No, but he said that he would tell his boss about my complaints.
Q: Do you know if he did so?
A: I don't know for certain. I assume he did so. When David later fired me, David told me that he told his boss about my complaints.

By Mr. Flash: No further questions, Your Honor.

Cross Examination of Pam Plaint by Counsel for the Defendant (Jane Doedeft):
Q: Ms. Plaint, did your company have a person whom you could contact, other than David Dell, to report your sexual harassment complaint?
A: I don't know.
Q: Were you ever given written materials, which described where to go, in the event that your supervisor made you feel uncomfortable about your personal relationship with him?
A: That's possible, but I don't remember.
Q: So you don't deny that such written procedures existed, and that they were given to you, when you started working at Deftco, Inc.?
A: No denial was intended. I just don't remember receiving any such procedures.
Q: Isn't it a fact that all Deftco employees are given a manual, when they are hired, that fully describes whom to contact in the event of a sexual harassment claim? And isn't it true that you sought a personal relationship with David Dell–which he refused on several occasions, because he was your boss?

By Mr. Flash: Objection, Your Honor. Ms. Doedeft has scored a triple play here. She's asked a compound question; it was already asked and answered; and in order to respond, this witness would have to speculate about what information other Deftco employees did–or did not–receive.

By the Court: Objections all sustained. Ms. Doedeft, please rephrase.

By Ms. Doedeft: On second thought, Your Honor, there's no need to proceed. The jury's heard enough. I have no further questions for Ms. Plaint.

<table>
<tr><td>Pam Plaint)
v.)
Deftco, Inc.)</td><td>United States District Court
Southern District of California
Civil Action No. 654321-SOB
JUDGMENT</td></tr>
<tr><td colspan="2">A jury duly considered the case of Pam Plaint v. Deftco, Inc., for damages arising under the Federal Fair Employment Act. That jury returned a verdict for the plaintiff Pam Plaint against the defendant Deftco Inc., in the amount of fifty-thousand dollars ($50,000).

Signed: John Deman, Clerk
For the United States District Court
Southern District of California
Civil Action No. 654321-SOB
on this 8th day of May, 2007</td></tr>
</table>

<table>
<tr><td>Pam Plaint)
v.)
Deftco, Inc.)</td><td>United States District Court
Southern District of California
Civil Action No. 654321-SOB
Defendant's
ALTERNATIVE MOTION for
JUDGMENT or NEW TRIAL
May 10, 2007</td></tr>
<tr><td colspan="2">The defendant, Deftco, Inc., hereby requests that the court grant the following alternative relief:

 <u>Motion for Judgment</u> 1. The relevant evidence in this case did not justify the verdict for Pam Plaint.
2. The court need look no further than the trial testimony of Pam Plaint, a copy of which is hereby submitted to the court (see <u>FILE</u>, p.6 above) in support of this motion. She thus failed to prove a violation of the Federal Fair Employment Act.

 <u>Motion for New Trial</u> 3. The relevant evidence in this case did not justify the verdict for Pam Plaint.
4. The court need look no further than the trial testimony of Pam Plaint, a copy of which is hereby submitted to the court (see <u>FILE</u>, p.6 above) in support of this motion. She thus failed to prove a violation of the Federal Fair Employment Act.

Signed: Jane Doedeft
Defense Masters
Attorneys for Defendant</td></tr>
</table>

#6. Should the court grant either of Deftco's timely filed post-verdict motions? (Do not discuss the amount of damages.)

LIBRARY

STATUTES

Federal Fair Employment Act, 42 U.S.C. § 123.456.789

(a) This legislation is designed to encourage fair employment practices in both public and private employment.

* * *

(c) A corporation may be liable under this Act, when it employs more than 100 individuals in the state where such alleged practice occurs.

* * *

(e) Damages may be awarded under this Act, when any senior manager fails to take all necessary steps to ensure that any junior manager under his/her supervision and control does not sexually harass any non-managerial employee.

(f) Punitive damages may be awarded for a violation of this Act.

Federal Judicial Code
28 U.S.C. §1331

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. §1332(a)

The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between–

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

FEDERAL RULES OF CIVIL PROCEDURE

FRCP 26(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) *In General*. Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii).

* * *

(3) *Trial Preparation: Materials***.** Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

FRCP 35 Physical and Mental Examinations of Persons

(a) *Order for Examination*. When the mental or physical condition (including the blood group) of a party or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner or to produce for examination the person in the party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

(b) *Report of Examiner*.

(1) If requested by the party against whom an order is made under Rule 35(a) or the person examined, the party causing the examination to be made shall deliver to the requesting party a copy of the detailed written report of the examiner setting out the examiner's findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that the party is unable to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if an examiner fails or refuses to make a report the court may exclude the examiner's testimony if offered at trial.

(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege the party may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine the party in respect of the same mental or physical condition.

(3) This subdivision applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subdivision does not preclude discovery of a report of an examiner or the taking of a deposition of the examiner in accordance with the provisions of any other rule.

FRCP 50 Judgment as a Matter of Law in Jury Trials

(a) *Judgment as a Matter of Law*.

(1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

(2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

(b) *Renewing Motion for Judgment*. After Trial; Alternative Motion for New Trial. If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment. * * *

FRCP 59 New Trials

(a) *Grounds*. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

ISSUE OUTLINE (@ = complaint)

#1: Jurisdiction Under Federal Act?

* FQ-> D's conduct w/i stat?
* 50k ok-> no min amt FQ case
* > 100 ee's?
* alleged discim apparently occurred in state where all employed?
* jr/sr mgr relationship not alleged
* No allega sr mgr failed take steps

#2: Impact of S^1 *Plaint v. Dell* on this S^2?

<u>*RJ*</u>

* can't split claim
*   S1 v. David S2 v. Deftco ~
* wrongful termina v. sr mgr lack control
* Racetrack case-> resp superior/privity = same claim
*   Suit v. 'ee vitiates suit v. 'or
* Not split: fed stat not = direct act sex harr
*   liab only if = failure sr mgr re jr mgr re sex harr

<u>*CE*</u>

* id issue?
* both sex harassmt
* both spawned when Pam fired
* issue S1 = *David's* acts
*   S2 whether Deftco *superv* failed act
* S1 basis jmt not crystal clear

#3: Pre-jmt Appeal/Counter

* order = no preclusion by S1
* if merits, not 54b
*   *entire* S2 claim would be lost
* C.O. doctrine (*if* collateral to merits)
*   SCt stingy/avoidance auto review
* 1292(b)
*   elements disc
*   jt discretion rqmt
*   what would dictate two-front war in such a case?
* writ route -> nec aid juris/diff demonstrate loss juris
*   alternative all else fails
*   what's extraordinary?

#4: Mental Exam

* two elements
* mental if she claims emo distress in @
*   @ seeks "lost wages"
* "any additional damages she may prove in the trial"
*   P would need amend, eg, specifically IED-related trauma
*   current @ not specific enough place mental contro

* Dr. Phil letter, like @, states "wrongful termination" claim
*   suitably licensed examiner

#5: Dr. Phil Report

* WP
* pierce via requisite showing
* Dr. Phil = "premiere"
* "usual competitor" Portland, Oregon
* not mean next closest consultant unsuitable
* many shrinks should be in/closer S.D. forum
* If not, share Dr. Phil's costs/fees

#6: Alternative MoJmt/NT

MoJo

* was pre-MoJo sought (facts silent)?
* F.F.E.A. requires sr mgr fail control jr mgr
* reas jury find P?
* inferences favor non-moving party (Pam)
* shaky testimony-> P supposedly no knowledge Deftco manual
*   not deny receipt written harassment procedures
* nothing directly shows *Deftco* liab re sr/jr mgr control
* P not report sr mgr-> how estab resp superior liab Deftco mgt?

NT

* prejudicial error
* discretion weigh 13th juror
* lack evid fed act basis claim re sr/jr mgr's relationship

SAMPLE STUDENT ANSWER

ID: 01797 (Exam Number)
Exam Name: Civ_Pro_Slomanson_Sp07_Final
Instructor: Professor Slomanson
Exam Date: May 10, 2007
File Name: 01797-Civ_Pro_Slomanson_Sp07_Final-070510.xmd

1) SMJ: Fed Question

SMJ is the power of the court to hear the case. There are two ways to satisfy SMJ, 1) Federal Question, or 2) Diversity Jurisdiction.

Federal Question: Federal Employment Act.

The D's conduct must be within the federal statute or law. The complaint is for wrongful termination, but also states that D's actions (requesting sexual favors) violated the Federal Employment Act (FEA). In order for this act to apply, the D corporation must employ 100 individuals in the state where the alleged advances took place, and a senior manager must fail to take the necessary steps to ensure a junior manager does not sexually harass the employees. Provided the required amount of employees are employed in the state where the act took place, it would be necessary to determine if the conduct of D fits the statute. P alleges wrong doing against Dell (a junior manager), and the act provides for damages when a senior manager fails to take steps to prevent such conduct. This statute doesn't seem to apply to the actual sexual harassment action, but rather the failure to prevent such action. The fact that P is accusing Dell of actually harassing her puts D's (as respondant superior) senior managers actions in issue as if adequate steps were taken a harassment may not have occurred. Since a sexual harassment occurred, the steps D took to prevent that are possible inadequate as FEA requires. It is likely the statute would apply and the court would have SMJ. No minimum amount is required for federal question.

D would likely argue that P is bringing an action for wrongful termination as she was terminated after refusing sexual advances. The statute requires senior managers take steps to prevent harassment, and P has not alleged D failed to take those steps. While Dell may have acted inappropriately, the fact that a sexual harassment occurred does not infer that D failed to take steps to prevent the action. This argument would likely fail as D is required to take "all steps necessary to ensure" a junior manager doesn't sexually harass the employees. Since P alleges she was in fact harassed, D then did not take the necessary steps to ensure it was prevented, so FEA would likely apply, and the court would have SMJ.

2) Prior Case:

Res Judicata:

The element for res judicata is a party can not split their claim. To determine whether a claim has been split the focus is on the "wrong" the D did to the P. (The "Wrong Rule"). Generally the same parties are required in both suits, however res judicata would also apply to parties in privity to a party in the original suit. In this case suit 1 is against

Dell, and suit 2 is against his employer. Deftco is in privity with Dell (repondant superior), and res judicata consequences can apply.

Res Judicata consequences encompass that which was actually litigated and that which should have been litigated. The claim brought in suit 1 is sexual harassment against Dell (The "wrong" would be the sexual harassment act). The date of the occurrence is not in the facts, but provided the actions of Dell were that which is sued upon in suit 1, it would be regarding the same "wrong" of the defendant. Additionally, the action under FEA addresses the conduct of the senior manager to prevent harassment, so if this is a new "act" of harassment the same conduct (wrong) of the senior managers to prevent it is at issue. Suit 2 is for violation of the FEA, and suit 1 is for sexual harassment. However, since the claims both relate to the same wrong, both should have been litigated at one time, and P would lose the right to later bring a later suit. P should have brought suit against both Dell and Deftco in one suit and brought all claims regarding the "wrong" at one time. The judgment of suit one merges all which should have been brought into that judgment and P can no longer bring actions which should have been in suit one.

D will argue that violating FEA is a different "wrong" as the act of harassment is one wrong and steps to prevent is seperate. This arguement will likely not succeed as the prevention of the action relates to the harassment committed, and should all be litigated at one time. The overall wrong is "sexual harassment", the act of harassing and preventing such action.

Suit 1 did take place in a state court, and suit 2 is in regards to a federal statute which would be heard by a federal court. It is likely P will still lose the ability to bring the later claim as the federal court can exercise supplemental jurisdiction over the state claim and hear both at one time rather than piecemeal litigation between both state and federal court. Therefore res judicata will apply and P will be prevented from re-litigating.

Collateral Estoppel:

Collateral estoppel requires 1) identical issue, 2) actually litigated, and 3) necessarily decided. The same parties are not required for CE, but a party to suit 1 may not assert CE against a non-party to suit 1. A non-party, however, may assert CE against a party to suit 1. P was a party to suit 1, so D could potentially assert CE.

Identical Issue:

As stated above, provided this is the same act being sued upon, we may have an identical issue. However, suit 1 was for sexual harassment, the conduct of Dell, while suit 2 which alleges violation of FEA regards the conduct of the senior manager. There is however a common issue between the suits, sexual harassment. Whether it was committed by Dell, and whether the senior manager took steps to prevent it. Therefore there would be an identical issue in suit 1 and suit 2. D would be able to use the sexual harassment portion of the judgment to prevent re-litigation of that issue, but the remaining elements needed to establish FEA would still be necessary to establish.

Actually Litigated:

Suit 1 was actually litigated, and a judgement in favor of Dell was reached. So there was litigation regarding the harassment claim against Dell regarding sexual harassment. While the actions of the Senior manager (whether they took steps to prevent) was not litigated, the issue of whether Dell harassed P was litigated and a verdict was reached. The portion of suit 2 that was not at issue in suit one was not actually litigate, and suit 1 would have no effect on that, but the sexual harassment portion was actually litigated.

Necessarily Decided:

The sexual harassment issue was necessarily decided as the jury returned a verdict for Dell for the sexual harassment claim. The verdict returned was a general verdict, but nothing in the facts state any other claims or defenses were raised that the jury would based the finding for Dell on rather than just the sexual harassment claim. This would establish that Dell did not sexually harass P, and D may use that in suit 2 to prevent the re litigation of the harassment element of the new suit. While it shows that harassment did not take place this would not conclusively show that steps were being taken to prevent such acts, so it will unlikely completely dispose of the suit but may limit the scope of suit 2.

3) Appeal:

54(b)

When there are multiple claims, and there is a disposition of less than all claims, on the merits, there may be an immediate appeal in the discretion of the trial court. The trial court must expressly allow for the immediate appeal of the order. In this case the disposition on the matter of the impact of the prior suit seems not to be on the merits. While allowing suit 1 to apply would effect the suit, the courts order not allowing the res judicata/CE application has nothing to do with the actual merits of the suit. The merits being did D take steps to prevent harassment as required under FEA.

While the issue of whether harassment took place may be vital in proving the merits of the suit, the actual order is unlikely to be considered on the merits. This would affect the merits of P's suit as D senior manager obviously took steps to prevent harassment if none actually took place. The order itself does not directly deal with the merits of P's claim, and would only have a consequential impact on them. Therefore it is unlikely an appeal could occur under 54(b).

Collateral Order Doctrine:

There is an automatic right to appeal orders within this doctrine. An order must be not on the merits and be to important to be denied immediate review. The order should also be effectively unreviewable on appeal from final judgment. The supreme court has not specifically stated which orders fall within this doctrine, but it is very narrowly construed as to prevent parties from waging war on two fronts. The order is likely collateral to the merits (as discussed above), but it is unlikely appeal would be permitted as the order would be reviewable after final judgement, and a reversal of the order would unlikely completely terminate the litigation. Few orders are permitted appeal under this doctrine as there is an automatic right to

appeal, so while this order does seem to be collateral, it could be later reviewed so it is unlikely to be immediately reviewable under this doctrine.

1292(b)

An order which is collateral or on the merits may be appealed under 1292(b) in the joint discretion of both the Trial court and Appellate court provided there is 1) a controlling question of law, 2) substantial grounds for difference of opinion, and 3) order materially affects the outcome. 1292(b) allows for the appeal of orders not otherwise reviewable under the other sections (54(b), collateral order, etc), and which are to important to be denied such review.

First, there is a controlling question of law as the application of res judicata/CE would be a controlling question of law in this case. Second, there may be substantial grounds for difference of opinion. Determining whether the prior should apply to the current case is not completely clear, and reasonable minds could differ on whether or not to allow the application. So it is likely the grounds for difference of opinion are here. Last, the order may materially affect the outcome. The prior suit would establish no sexual harassment took place, which would provide a substantial basis for D to show they did not violate FEA. It could possible stop the litigation completely as that would be a crucial piece of evidence, but it is not certain to do so. Allowing the claim would likely greatly assist in the advancement of the litigation, it would still be necessary to litigate some matters, but the scope of issues would be narrower.
Provided both the trial court and appellate court allow it, the order would like be appealable under 1292(b).

WRIT:

The Appellate court, in its discretion, can issue all writs necessary and appropriate to aid in their jurisdiction. Writs are usually issued in exceptional circumstances such as when a trial judge abuses his discretion. The writ route provides an equitable remedy when there is not an adequate remedy at law. A writ may likely be granted as the trial judge may have abused their discretion in denying the application of suit 1, and that order will have a great impact on the suit. Although the order could potentially be reviewed after final judgment, and allowing would necessarily dispose of the suit (prevent the need for litigation), so while it is possible a writ could be issued, it seems unlikely.

4) Mental Examination:

A mental exam of a party can be obtained provided the mental condition is "in controversy", and there is "good cause".

In Controversy:

To determine if the mental condition is in controversy you must look to the pleadings. The pleadings allege a wrongful termination as the result of refusing sexual advances. The pleadings do not state that these actions caused an mental or physical injury as P is seeking lost wages (not damages for mental anguish). While the pleadings also

state "any additional damages" that may be proved at trial, any special mental or physical injury that does not reasonably related to the action must be specifically plead. Since P did not plead any mental injuries, there are none that are "in controversy" and D would not be permitted to obtain an exam.

Good Cause:

Good cause weighs the intrusiveness, painfulness and danger of the exam against the value of the information received. The facts do not state what type of exam would be given, but provided it was a normal psychiatric test that was not intrusive, unreasonable, or painful it is likely D would have good cause. But again, since there is not a mental condition in controversy, D would be unable to perform such a test.

5) Dr. Phil's Report: Work Product

Information sought during the discovery phase must be within the scope of discovery (rule 26(b)). Information must be relevant, not privileged, and admissible or reasonably calculated to lead to admissible evidence. The report of an expert may fall within the privileged category.

Privilege:

The privilege at issue is the work product privilege. Work product is material which is obtained in preparation for or anticipation of litigation. There are two types of work product, conditional and absolute. An example of Conditional WP would be the mental impressions of an expert. Absolute WP would be the reports and mental impressions of the attorney. Information falling under conditional work product, such as the reports and mental impressions of an expert (which is the case here), may not be discovered unless there is an exceptional circumstance and the substantial equivalent can not be obtained elsewhere (26(b)4). In this case the reports of Dr. Phil would fall under conditional WP, and D would not be permitted to discover those reports unless the substantial equivalent could not be obtained elsewhere. While the facts state Dr. Phil is the "premier workplace psychiatrist" it would have to be shown that D could not obtain similar info from another doctor. The facts do state that Dr. Mary is his usual competitor (which likely means she is similarly skilled) but she is located in Oregon. The case is taking place in CA, so it may be unreasonable or very expensive to retain her services. If no other doctors in the area can provide the substantially similar info as Dr. Phil, D would be able to discover the info, but would have to share the cost.

Additionally, there are 2 types of experts, consultants and trial experts. Consultants are hired to assist the attorney with a case, and do not testify. Consultants fall under conditional WP, and provided Dr. Phil is a consultant, his reports would be subject to conditional WP (as discussed above). An expert that is designated (by the party who hired the expert) as a trial expert waives the conditional WP, and their reports may be discovered and the could be disposed. If we designate Dr. Phil as a trial expert, D would then be able to discover the reports.

6)

MOTION FOR JUDGMENT 50(b) - Renewed Motion for judgement

A renewed motion for judgment should be granted if "no reasonable jury" could find for the non-moving party. Juries are permitted to make reasonable inferences, but not

big inferential leaps which are unsupported. Matters and inferences are to be made in favor of the non-moving party, and the court is not able to weight the evidence (is a matter of law). A renewed motion for judgment (50(b)) can only be brought provided a 50(a) motion is brought prior to the verdict. (A 50(a) motion can be brought an time prior to submission to the jury). The facts do not state whether a 50(a) motion was brought, if it was not then the motion would be denied.

If D did bring a 50(a) motion, then in order for the court to grant this motion it must be determined that no reasonable jury could have found as they did. With the matters being construed in favor of P (non-moving party) the court would likely deny this motion. The trial testimony is unclear as to the steps D took to prevent harassment. D may or may not have distributed a handbook, as P did not recall, nothing was presented to establish it in fact was. Additionally, whether the process on how to handle a sexual harassment claim set forth in the manual may possible be insufficient to be considered an adequate step to prevent harassment. All of this being construed in favor of P, it is unlikely the court would grant this motion.

MOTION FOR NEW TRIAL (Rule 59)

Courts have broad discretion to grant a new trial. A new trial can be granted on the basis of 1)irregularity, 2) jury misconduct, 3) verdict is against the weight of the evidence (which overlaps with the grounds for which a motion for judgment can be brought), or 4) prejudicial err. Unlike a motion for judgment, the court in deciding to grant a new trial may act as the 13th juror and weighs the evidence. In this case the court may weigh the trial testimony and find that the jury should have concluded a handbook was issued and that this was adequate to prevent harassment. If the court determines that the verdict was against the weight of the evidence after the court weighs the evidence, the judge can grant a new trial. It is likely a new trial would be granted since the courts do have broad discretion, and P's action of going to the person harassing her to report and not going to someone else or referring to the handbook will likely weigh in favor of a finding for D, so the court would allow a new trial.