

SAMPLE ANSWER TO (PRACTICE) MINI-EXAM

This case is based on *Washington State University v. Industrial Rock Products, Inc.*, 37 Wash.App. 586, 681 P.2d 871 (1984), which upheld a jury verdict rejecting a negligence claim and affirmed the trial court's dismissal of the ADA theory based on the failure to show that injury arose from the type of harm that makes the activity abnormally dangerous.

The claim by Washington State University ("WSU") against Industrial Rock Products ("IRP") would require proof of a breach of duty on the part of IRP, either in the form of negligence or strict liability.

*Negligence.* IRP could be liable on a negligence theory if they failed to use the care that a reasonable person would have used in the same or similar circumstances. One theory that would not be available is vicarious liability. It applies where an employee acts negligently while in the course and scope of employment. Here what Freund did was clearly outside the course and scope of employment, and any argument based on vicarious liability would be rejected.

On the other hand, an act committed outside the course and scope of employment can subject the employer to liability if the employer failed to exercise reasonable care in the hiring and/or supervision of the employee. Alternatively, one could argue that the storage of explosives in a place vulnerable to employee theft was a form of "negligent entrustment," like giving the car keys to an alcoholic.

In deciding whether or not IRP was negligent in its hiring or supervision of Freund, we would need more information about what signs he may or may not have given of being emotionally unstable and unsuitable for entrustment with access to explosives. We also would want to look at industry custom regarding the access to or storage of explosives, or the monitoring of employees who have access to them. Finally, the plaintiff might try to employ a Learned Hand calculus to show that the burden on IRP was slight to prevent this kind of tragedy, and the downside risk very high.

*Strict Liability.* Even if IRP wasn't negligent, they could be held liable if their conduct falls within a category of activities subject to strict liability. WSU would undoubtedly argue that blasting as an abnormally dangerous activity subject to strict liability under Restatement §§ 519 and 520. Section 520 defines what is an ADA according to six factors, but it seems obvious that blasting falls within that category. The more difficult question is whether the case fits within § 519, which requires that the injury arise from the aspect of the activity that makes it abnormally dangerous. In this case it is the potential for use of explosives to cause unintended damage that makes it abnormally dangerous. IRP would undoubtedly argue that use of explosives as a murder / suicide weapon is not what makes the activity abnormally dangerous. Still, the argument that IRP "keeps the dangerous item at their peril" seems like a strong one.

## CHECKLIST

- Overview**
- Claim v. **IRP**
- Breach** of Duty: Negligence or SL
- Negligence**
- Defined** as failure to use reasonable care
  
- No** vicarious liability
- Not in **course and scope** of employment
- But negligent **hiring / supervision**?
- Negligent **entrustment**?
- What is industry **custom** regarding storage?
- What about **Learned Hand** formula?
- 
- Strict** liability
- ADA**
- § 520** criteria for determining
- Probably **qualifies**
- § 519 limits to **type** of harm
- weapon was not **typical** use
- But would "keep it at **your peril**" apply?
  
- 

Exam Number \_\_\_\_\_