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Legislation Fall 1990

I.

All Baba vs. Aramal

(1 hour - 35 points)

All Baba, an American Citizen of Iranian/Iraqi ancestry and a Moslem, was dismissed from his job with Arab-Americo Oil, Inc. (Aramal) an American Oil company doing business in Saudi Arabia. Claiming that he was discharged on account of his race, religion and national origin, he brought an action against Aramal under Title VII of the Civil Rights Act of 1964 charging that his discharge was unlawful discrimination on the basis of race, religion and national origin and seeking damages and reinstatement. The United States District Court for the District of Southern Ohio dismissed his claims squarely on the basis that Title VII's protections do not extend to U.S. Citizens employed abroad by U.S. companies.

The Court of Appeals relied in its brief opinion on a canon of statutory construction which states that "unless there is clear Congressional intent to the contrary, Congressional legislation is meant to apply only within the territory of the U.S." Finding little or no congressional intent to the contrary, the Court of Appeals affirmed the District Court's judgment.

The U.S. Supreme Court has granted certiorari.

You are Justice Scalia's law clerk.

In your research you learn the following: Title VII's §703 states that it shall be unlawful for an employer to discriminate against any individual on the basis of race, color, religion, sex, or national origin.

In a 1949 case, Foley Brothers Inc. vs. Florida, the U.S. Supreme Court used the above-referenced canon, that presumes that laws will apply only within the United States, as a basis for its holding that the federal Eight-Hour Law does not apply to U.S. citizens working for American firms abroad. That Court further inferred an intention on the part of Congress in enacting that wage and hour legislation to focus upon and protect domestic wage and employment problems.

In addition to the Civil Rights Act's non-discrimination provisions, Title VII's Sec. 702 states that "this title shall not apply to an employer with respect to employment of aliens outside of any state."

Another similar statute, the Age Discrimination in Employment Act, was amended in 1984 to provide that "the term employee includes any individual employed by an employer in a work place in a foreign country." This type of provision has been used in other recent federal statutes including the Fair Labor Standards Act, the Anti-Apartheid Act of 1986 and the Export Administration

Act of 1989.

In Hearings on the Civil Rights Act before the House Committee on the Judiciary, Representative Roosevelt explained that the alien exemption provision of Sec. 702 "is a limited exemption [intended] to remove conflicts of law which might otherwise exist between the U.S. and a foreign nation in the employment of aliens outside the U.S. by an American enterprise)' There appears to be little or no other legislative history relating to the statute's extraterritorial application to aliens or U.S. citizens.

The Equal Employment Opportunities Commission (E.E.O.C.) and the Department of Justice have both taken general positions that Title VII applies to U.S. citizens outside the U.S. reflected in testimony from House Hearings on International Trade and Commerce 1975 of Assistant Attorney General Anthony Scales and in a letter from William Carey, E.E.O.C. General Counsel to Senator Frank Church, stating the view that Congress intended Title VII to apply to employment conditions outside the U.S.

(1) Justice Scalia asks you to provide him with a preliminary memorandum that considers whether or not Title VII does apply to U.S. citizens working for U.S. Companies abroad. You are expected to utilize his textualist/plain meaning approach to statutory interpretation in your memorandum.

(2) Would another Judge or Court that took a conventional Legal Process approach to statutory interpretation be likely to find that the statute does apply to U.S. citizens working for U.S. companies abroad? Why or why not? In examining this, please use the analytical approach that such a judge or court would likely take.

## II.

### Jon Wane vs. State of Minnasodapop

(1 Hour - 35 points)

Jon Wane, 30, was recently convicted of the felony of passing a check with insufficient funds of over \$1,000 which carried with it a maximum penalty of 1 year in jail or a fine of up to \$5,000 or both. He received a 60-day jail sentence and \$2,000 fine. At his sentencing, however, he was also sentenced to 10-15 years in prison with no opportunity for parole as a Habitual Offender. Jon had been convicted of possession and distribution of marijuana, a controlled substance, at age 20 when he was in college. He had been sentenced to 1 year in jail for that offense, which sentence was suspended, and he was placed on probation for 1 year. Jon had led a fairly normal life after this first contact with the criminal justice system, had had a family, including two children, and ran his own small beer distribution business.

The Habitual Offender Statute of the state of Minnasodapop states in pertinent part the following:

Sec. 20.2

Any person convicted of two felony crimes within any ten-year period will be sentenced to a minimum of ten to fifteen years in prison, with no opportunity for parole before ten years, as a Habitual Offender, said sentence to be served consecutively with any other sentence to be served....

...

(a) except that

(1) conviction of two or more felony crimes involving the unauthorized taking of property without violence, such as shoplifting, fraud or deception by check, or simple theft, shall not constitute conviction of the felony crimes under this section.

Wane has appealed his conviction to the Minnasodapop Supreme Court and has asked you to represent him.

Your research reveals that the Supreme Courts of three neighboring states and one federal court of appeals have struck down similar Habitual Offender statutes as unconstitutional "Cruel and Unusual Punishment" under state and federal constitutional Cruel and Unusual Punishment clauses in cases where the statutes had been applied either to offenders convicted of two non-violent felony crimes or two felony crimes against property.

You also discover that the Minnasodapop Habitual Offender bills that had passed the Senate just prior to the enactment of the present law included a provision that exempted felons who had not been convicted of a violent crime.

Indeed, the sponsor of the Bill stated on the Floor of the Senate after the final version of the Bill emerged from Conference Committee that the "Bill would be a model of modern legislation in this area, that it would not be subject to constitutional challenge because it did not apply to people convicted of non-violent crimes. I am fully satisfied with this Bill, he stated."

In your appeal you claim that the statute should not be read to apply to Jon and his two convictions, and that if it did apply to him it would constitute "Cruel and Unusual Punishment" under the Minnasodapop and federal constitutions, and would therefore be unconstitutional.

As Wane's lawyer how would you frame your argument to the Court with respect to the application and meaning of the Habitual Offender Statute in Mr. Wane's case? In setting forth your argument please be sure to take cognizance of appropriate approaches and aids to statutory interpretation. Also take into

consideration the views and approach that you would anticipate the Prosecuting Attorney to take in the appeal. (You are not expected to make the constitutional law arguments that would be raised in this case.)

### III

#### Life, Death and the Court

(1 Hour - 30 points)

Adele Adare, twenty-four years old, was out with her friends, Moses Hammer and Isaac and Sarah Race, partying when the car which Sarah was driving went out of control and into a water-filled ditch on a country road outside the town of Nighton, Ohigho. The occupants were thrown from the vehicle. Moses, Isaac and Sarah apparently died almost immediately from their injuries. Adele was found, probably about ten to fifteen minutes after the accident, face down immersed in water. When discovered, she was not breathing but had a faint pulse. She was immediately treated by a local police rescue unit. Her breathing was resuscitated.

Adele, who suffered severe cranial bruising in addition to spending some period of time under water, was unconscious for two days, after which she regained consciousness for a brief two-day period. When conscious Adele, who was being administered food and water through tubes, spoke twice, once only to say "Mama" in recognition of her mother, Roseanna, who stood at her bedside and later when her twin sister, Amelia, stood beside her bed, she twisted her face grotesquely and said "My God..., not this." Adele relapsed into unconsciousness the next night and has remained in that state for the past two years. While she still breathes on her own, she has been fed and hydrated exclusively by tubes, and is otherwise, of course, unable to care for herself.

Adele's physicians state that she is highly unlikely to ever regain consciousness. Her bleeding which has continued from time to time the past two years, and the effects of the accident causing bruises and swelling in her brain, make it unlikely that she would regain cognitive function sufficient that she could ever reason, speak or otherwise function or care for herself in a meaningful way. Her twin sister has asked doctors to remove her food and hydration tubes and permit Adele to die with dignity.

Adele's mother, Rosanna, is a very religious person. She will not affirmately agree to terminating Adele's life, but would like to leave the choice with Adele's physicians. The physicians are unwilling to remove the tubes unless all of the members of Adele's immediate family agree to do so, or they are ordered to do so by a court. Adele's sister brings an action in the Court of Common Pleas of Montgomery County to order the removal of the tubes under Ohigho law.

Ohigho Revised Code Sec. 99.1 entitled Treatment Decisions Affecting Life, enacted in 1980, states in pertinent part:

"In the matter of a terminally ill individual who is not mentally competent..., and who has not made a living will or otherwise clearly and convincingly expressed his/her desire to have life sustaining medical treatment withdrawn, members of the immediate family including the parents and siblings of the individual may authorize the withdrawal of medical treatment except in the following situations:

- (1) the individual has expressed a desire not to have medical treatment withdrawn;
  
- (2) medical treatment may improve the likelihood of the individual's survival.

Judge Marr of the Common Pleas Court dismissed the action on the grounds that the requested withdrawal does not constitute the withdrawal of medical treatment. Amelia appeals the case to the Ohio Supreme Court.

Research would reveal that the Treatment Decisions Bill when introduced included definitions of medical treatment. In the Bill that was introduced, definitions of "medical treatment" stated that medical treatment includes the artificial administration of food and hydration.

The Bill's definition of "terminal illness" stated that a terminal illness was "any illness where it was beyond reasonable doubt that the withdrawal of medical treatment artificially maintained for the present illness would lead to the individual's death within a reasonably short and definite period of time."

The definition of medical treatment provision was dropped from the Bill during the House's Health and Welfare Committee proceedings. The Report of the House Committee stated that "while the meaning of phrase medical treatment is reasonably clear today, its meaning may change with changes in medical science and technology over time and is best left to the medical and scientific committees."

There was little discussion of the phrase on the floors of the House and Senate, except that one member of the Senate, Senator Deetz, who was also one of 25 sponsors of the Bill did say during a response to a question from another Senator that he did not see this Bill resulting in the intentional starvation of people or terminating lives where death was not reasonably imminent.

The Bill's definition of terminal illness was included in the law that was finally enacted, presented to and signed by the Governor. In his signing message the Governor remarked on the momentousness of the occasion, and of his pleasure in signing a comprehensive bill that would provide families and individuals a vehicle to resolve all the agonizingly long vigils that accompany the maintenance of lives without meaning."

Ohio also has a Durable Power of Attorney Statute which was enacted in 1977. Under that statute, a competent individual may authorize another individual to authorize the withdrawal of life-sustaining

medical treatment whenever the individual becomes terminally ill and physically or mentally unable to make such a decision. In a 1978 Ohio Supreme Court case, the Court in dicta assumed that life-sustaining medical treatment did not include withdrawal of food and hydration.

There have been a number of highly publicized lower court cases beginning in the early 1980's in which withdrawal of life-sustaining food and hydration was permitted by the courts. Subsequent to these cases, bills were filed in both the House and Senate on at least two occasions by sponsors seeking to explicitly limit the definition of medical treatment to exclude the withdrawal of food and hydration. No bill ever reached the floor of either House.

(1) Justice Franchisconti of the Ohio Supreme Court, believing this matter to be one of the most important decisions for the Court in years, asks you, his law clerk, to examine for him each of the sources of the meaning of the term "medical treatment" including the legislative history and to describe to him the legitimacy or likely constitutional significance and the reliability of each of the sources described.

BONUS (10 Points)

(2) If Judge Franchisconti in the matter above were a disciple of Professors Eskridge and Frickey and their Practical Reasoning/Dynamic Statutory Interpretation Approach, briefly describe how he might use the sources you have described to resolve the matter before the court.

End of Examination

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