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SPECIAL FEHA ANNIVERSARY ISSUE

MCLE Self-Study

Celebrating 50 Years of Fair
Employment Laws in California:
“The Real and Earnest Journey
Into Equality and Freedom for All”¹

By Nikki Hall



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The 50th anniversary of California's fair employment law provides an ideal opportunity to reflect on the manner in which the law has evolved along with society's changing values. In its original incarnation, the Fair Employment Practices Act of 1959 (FEPA)² only prohibited an employer from discriminating against an employee based on race, religious creed, color, national origin and ancestry. Now, the Fair Employment and Housing Act (FEHA), the FEPA's successor,³ has expanded those

protections to also prohibit discrimination on the basis of sex (including pregnancy and gender identity), age, physical and mental disabilities, marital status, medical conditions (including genetic characteristics), and sexual orientation.

THE LONG ROAD TO PASSAGE OF THE FEPA

As early as 1945, there were efforts to enact fair employment legislation in

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About the 2010 Annual Meeting

Karen V. Clopton, Executive Committee outgoing Chair

Patricia C. Perez, Executive Committee incoming Chair

In 2010, the Labor & Employment Law Section is moving its Annual Meeting to March, with the inaugural spring meeting to be held at the Disneyland Hotel & Resort in Anaheim on March 26 and 27. Not only will the meeting move to the Spring, but for the first time in many years, the meeting will re-focus on the nuts and bolts of a successful employment practice for both the new and the seasoned practitioner. We are excited to provide an agenda that will be timed and focused on current events affecting labor and employment law, as well as providing a host of practical information that practitioners can utilize immediately.

In an effort to reach both sides of the employment divide, we will present programs on both how to build and maintain a successful plaintiff's practice, as well as programs featuring information about what keeps in-house counsel up at nights (and how outside counsel can help them sleep better). We will have exciting demonstrations on the art of taking an employment deposition, practical programs on picking a winning jury, mediating an employment case, determining if someone is lying, handling reductions in force and leaves of absence, and a roundup of all of the recent legal and legislative developments.

In 2010, we will also be celebrating the 75th anniversary of the National Labor Relations Act. We will have several programs focused on preparing and responding to a charge made under the NLRA, as well as a keynote speaker on the significance of the NLRA over the last 75 years, and what to expect in the next 75 years. Not only will this Annual Meeting be a great networking opportunity, but it will also be an opportunity to learn tricks of the trade from some of the leading employment lawyers in the state, and to relax and enjoy the beautiful surroundings of the "happiest place on earth" – Disneyland.

The 2010 Annual Meeting is shaping up to be one of the best opportunities to gain practical litigation and counseling advice, as well as to learn from some of the foremost experts in the field. We are also shortening the meeting from two days to one-and-a-half, so that you and your family or loved ones can enjoy Disneyland. This event will provide current and useful information for someone who is just starting out in the field, and for the seasoned practitioner who wants to learn some new tricks of the trade. We hope you join us!

SAVE THE DATE

for the 2010 Labor & Employment Law
Annual Meeting

March

26–27, 2010

**at the Disneyland Hotel &
Resort in Anaheim**



Phyllis W. Cheng is the current Director of the Department of Fair Employment and Housing. She was formerly Vice Chair of the Fair Employment and Housing Commission, where she served for two terms.



FEHA History-Makers

You must be the change you wish to see in the world.
— Mahatma Gandhi

By Phyllis W. Cheng

On this 50th anniversary of the Fair Employment and Housing Act (Cal. Gov't Code §§ 12900–12996) (FEHA), it is fitting to take a look back on the history-makers who spearheaded and developed our nation's most expansive state civil rights law.¹

THE EARLY PIONEERS

Threatened March on Washington

In 1941, civil rights leaders A. Philip Randolph and Bayard Rustin began to organize a 100,000 person March on Washington to protest against discrimination in the defense industries. Californian Cottrell Laurence “C. L.” Dellums, a leader of the Brotherhood of Sleeping Car Porters, was one of the organizers.

Executive Order 8802

That same year, to call off the March on Washington, President Franklin D. Roosevelt issued Executive Order 8802,² to establish a national Fair Employment Practices (FEP) Commission to handle complaints of race, creed, color, or national origin discrimination.

In 1945, with little power to handle complaints, the national Commission disbanded.



President Franklin D. Roosevelt



National Fair Employment Practices Commission

Thereafter, fair employment practices legislation was introduced in five states: California, New York, Pennsylvania, Massachusetts, and New Jersey. All adopted laws except California.

Cal Committee and March on Sacramento

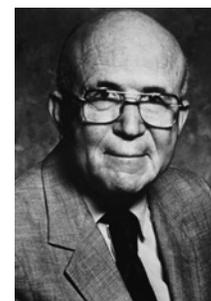
In 1945, 1949, 1951 and 1953, California's FEP bills, sponsored by Assembly members Augustus Hawkins and Byron Rumford, were rejected. In 1946, Californians rejected Proposition 11 to adopt a FEP measure.

In 1953, the California Committee for Fair Employment Practices (Cal Committee)³ mounted a March on Sacramento with hundreds to point out the need for FEP legislation. Even though the march appeared to turn the tide on public opinion, legislative efforts continued to be unsuccessful. Despite repeated defeats, the Cal Committee continued to press for FEP legislation from 1953 to 1959.



Cal Committee Forum with C.L. Dellums at Podium

These early pioneers included Assembly members Augustus Hawkins and Byron Rumford, and labor leader C.L. Dellums.



Assembly member Augustus Hawkins



Assembly member Byron Rumford



Labor leader C.L. Dellums

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No Mixed-Motive Instructions in ADEA Cases . . . At Least for Now

By Michael S. Kalt and Lois M. Kosch



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In a closely watched and arguably somewhat surprising decision, the United States Supreme Court in *Gross v. FBL Financial Services*¹ held that “mixed-motive” instructions available in some Title VII² cases are “never proper” under the federal Age Discrimination in Employment Act (ADEA).³ In its 5-4 decision, the Court concluded that ADEA plaintiffs must prove age was the “but-for” cause of the challenged employment decision, not simply a “motivating factor,” and that even if the claimant introduces some evidence that age may have played a motivating role, the burden of persuasion does not shift to the employer to prove it would have made the same decision regardless of age.

Not surprisingly perhaps, *Gross* is being widely hailed as a major victory for employers, as it will have several immediate ramifications for age discrimination claimants and employment practitioners.

First, since ADEA claimants must prove “but-for” causation without the benefit of a burden-shifting instruction, while Title VII claimants need only satisfy the less onerous “motivating-factor” standard aided by a burden-shifting instruction in “mixed-motive” circumstances, ADEA claimants will carry a tougher burden than Title VII claimants.

Second, *Gross*' majority opinion openly criticizes the Court's prior decision in *Price Waterhouse v. Hopkins*,⁴ refusing to apply it to the ADEA and generally questioning its doctrinal soundness.

Third, California courts often refer to federal authority in interpreting California's Fair Employment and Housing Act (FEHA).⁵ Since the ADEA and the FEHA both prohibit discrimination “because of” age, employers may be able to argue *Gross*' “but-for” causation standard also applies under the FEHA, even though the standard jury instructions (Judicial Council of California Civil Jury

Instructions) (CACI) seem to incorporate Title VII's “motivating-reason” causation standard.⁶ At a minimum, even if California trial courts reject *Gross* in favor of jury instructions applying a “motivating-reason” standard, it may provide a basis for California employers to seek the “mixed-motive” instruction contained in the Book of Approved Jury Instructions (BAJI) but seemingly inadvertently omitted from the CACI instructions.

Each of these ramifications, as well as *Gross*' prospects of avoiding the fate of another recent 5-4 United States Supreme Court employment decision,⁷ will be discussed below.

PRICE WATERHOUSE AND THE MIXED-MOTIVE DOCTRINE

To properly understand the reasoning and impact of *Gross* requires an appreciation of the Court's prior decision in *Price Waterhouse*.

In *Price Waterhouse*, the Court examined the respective burdens of proof in Title VII disparate treatment cases (in that case, gender) when a claimant alleges the challenged employment decision resulted from a mixture of legitimate and illegitimate motives.⁸ This question resulted in a splintered decision, with four justices joining a plurality opinion, two justices issuing a separate opinion concurring in the judgment, and three justices issuing a vigorous dissent.

Ultimately, however, six justices agreed to adopt a “mixed-motive” analysis for evaluating disparate treatment claims involving both legitimate and illegitimate motives. The resulting majority opinion concluded that a Title VII plaintiff bears the initial burden of proving his or her protected classification played a “motivating” or “substantial” factor in the challenged employment decision, and if he or she does so, the burden of persuasion shifts to the employer to prove that it would have made the same

decision even if it had not taken the protected classification into account.⁹ Notably, the four-justice plurality opinion (authored by Justice Brennan) specifically rejected the employer's contention that gender must be a “but-for” cause of a decision to bring it within Title VII's statutory prohibition of decisions made “because of” gender.¹⁰

The plurality opinion further observed that the employer's burden is essentially an affirmative defense, with the plaintiff first bearing the burden of persuasion on one point (that gender played “a” factor) and the employer bearing this burden on another point (that gender did not play “the” factor).¹¹ Justice O'Connor's concurring opinion agreed with this framework but suggested Title VII claimants were required to provide “direct” evidence of discrimination to satisfy their initial burden of persuasion.¹²

The three dissenting justices opined that Title VII's prohibition of decisions “because of” gender required a plaintiff to prove that her gender was the “but-for” cause of the challenged employment decision.¹³

Following *Price Waterhouse*, Congress passed the Civil Rights Act of 1991 which, among other things, amended Title VII and created a specific type of “mixed-motive” liability, along with a corresponding affirmative defense, albeit a narrower defense than the one initially recognized in *Price Waterhouse*. Specifically, Congress added sections 2000e-2(m) and 2000e-5(g)(2)(B) to Title VII, clarifying that a protected classification need only play a “motivating-factor” to establish an unlawful employment practice,¹⁴ but that an employer could avoid certain remedies (but not liability completely) by establishing it would have made the same decision regardless of the impermissible motivating factor.¹⁵

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FEHA by the Numbers: Preview of a Forthcoming Study

By Gary Blasi and Joseph Doherty

INTRODUCTION

In the summer of 2008, the newly appointed Director of the Department of Fair Employment and Housing (DFEH), Phyllis Cheng, did something that public officials rarely do: She asked for a thorough evaluation, without preconditions or restrictions of any kind, of how well an important law enforced by her agency was working, including how well it was being enforced by her own agency. In the fifty years since the passage of the Fair Employment Practices Act, now incorporated into the Fair Employment and Housing Act (FEHA), there had been few studies of either the effectiveness of the law or the efficiency with which it was being enforced. The DFEH had accumulated a large amount of administrative data on nearly a quarter of a million FEHA complaints since 1996, but did not have the resources to analyze it. Director Cheng expressed her desire to have the facts available for a public discussion of the FEHA's achievements, shortcomings, and proposed future direction during the law's 50th anniversary year. The newly created UCLA-RAND Center for Law and Public Policy responded to the opportunity.

In addition to analyzing DFEH data, we have been reviewing court records, interviewing scores of stakeholders with diverse perspectives, and preparing on-line surveys of attorneys (including, hopefully, most members of the Labor and Employment Law Section). We expect to conclude our work by the end of the year, and to include the recommendations for improving the efficiency and effectiveness of the law that we have received from others. In this short preview, we summarize some of the basic data regarding administrative enforcement of the FEHA between 1997 and 2008. The data are preliminary, have not been peer reviewed and are subject to change before publication in our final report.

COMPLAINTS RECEIVED

During the study period, the DFEH received 212,144 complaints of all kinds. As indicated in Table 1 below, the overwhelming majority of these (94%) were complaints of employment discrimination under the FEHA, followed by housing discrimination complaints (5%). Employment discrimination complaints remained essentially flat over that period, while housing discrimination complaints increased by 42%. The peak year for employment discrimination complaints was 2002, and housing discrimination complaints peaked in 2006.

**TABLE 1
COMPLAINTS BY TYPE PER YEAR, 1997-2008**

Year Filed	Employment	Housing	Other
1997	18,647	796	152
1998	19,059	683	161
1999	18,503	991	145
2000	17,396	910	181
2001	18,214	811	219
2002	19,151	815	264
2003	17,984	852	153
2004	16,325	884	136
2005	16,358	1037	122
2006	15,312	1226	182
2007	16,408	1160	175
2008	18,787	1131	157
Total	212,144	11,296	2,047

This is the largest number of complaints processed by any state antidiscrimination agency, and not merely because of California's size. In 2007, for example, the New York State Division of Human Rights, the analogous agency in that state, received 6,634 complaints—a rate of one complaint per year for every 2,938 residents.¹ The average complaint rate in California over the study period has been substantially higher, at one complaint per year for every 1,803 residents.²

EMPLOYMENT DISCRIMINATION COMPLAINTS

As noted, employment discrimination complaints comprise the bulk of FEHA complaints received by the DFEH. In terms of types of discrimination and persons protected, the FEHA is among the most expansive antidiscrimination law in the country. Nevertheless, the overwhelming majority of claims are made on those bases common both to the laws of other states and federal law. Table 2 below summarizes the protected categories upon which employment discrimination complaints were filed.³

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Eliminating Bias in the Legal Workplace and Beyond

By Karen V. Clopton



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"Today our schools are as segregated as they were in 1969, the year after Dr. King died. Race is the biggest challenge we face, and we have proven unequal to facing it."

Julian Bond, Chairman of the Board, NAACP (2008)

Race is also one of the biggest challenges facing the legal profession today. In light of the California Attorney General's renewed opposition to Proposition 209, recent United States Supreme Court decisions, and the 50th anniversary of California's premier civil rights law—the Fair Employment and Housing Act—a discussion of what state and local bar associations, law firms, law schools, and individual lawyers can do to stem the tide of increased segregation and prejudice in the legal profession in California is not only timely but profoundly necessary.

Recently, I was asked how one eliminates bias in the legal profession when everyone has biases. The first step is to acknowledge the fact that everyone has biases. The next step is to agree on common definitions and language to discuss those biases. Finally, we must reach an agreement about the priority of eliminating obstacles to greater participation in our profession by those of all backgrounds.

DEFINITIONS

When addressing bias issues, we often use terms that we assume everyone readily comprehends, such as stereotype, bias, fairness, prejudice, diversity, and integration. We often assume we have the same goals when discussing eliminating bias, when in fact "it depends" is often the final answer. For example, the term "stereotype" has different definitions depending upon the context. The common Webster's Dictionary definition of these terms reveal a stereotype is a conventional, formulaic, and oversimplified concept, opinion or belief.

A stereotype can also be a person, group, event or issue considered to typify or conform to an unvarying pattern or manner, or lacking any individuality. Stereotypes provide an easy way to think when confronted with new data.

Bias, which is a preference or inclination for or against a particular group, can also make thinking easier. We have all heard someone say he did not harbor ill will toward a specific group but "prefers" his own kind. While bias can be rationalized as personal preference, prejudice is an irrational suspicion or hatred of a particular group. Some would define bias and prejudice the same way, while others would make a distinction. Nonetheless, the impact remains the same: one group excludes other groups.

Eliminating bias in the legal profession often includes an imperative to create and maintain diversity. Diversity has become a ubiquitous term and has even become a profession in its own right as demographics shift, power transitions, and ethical concerns arise. Yet the diversity movement is fairly new. During the early civil rights movement, "integration" was considered the antidote to racism and segregation. Thus, integration was equated with desegregation. However, there is an inherent opposition between these two concepts. Integration is a harmonious whole, a homogeneous melting pot. On the other hand, diversity is a conglomeration of the disparate, a quilt where each piece is different but all are sewn together for a common purpose.

RACE, POLITICS, AND THE LAW: A BRIEF TIMELINE

When we deny history, we repeat mistakes. When discussing the elimination of bias, I have always found it useful to include a brief timeline of race in American history. There are critics of this approach who state that everyone knows American history and that it has nothing to do with how we should

proceed today. I must beg to differ. As physicist Albert Einstein noted, "the distinction between past, present, and future is only a stubbornly persistent illusion." Further, as the Report of the Brown University Steering Committee on Slavery and Justice notes:

If there is a single common element in all exercises in retrospective justice it is truth telling. Whether justice is pursued through prosecution, the tendering of formal apologies, the offering of material reparations, or some combination of all three, the first task is to create a clear historical record of events and to inscribe that record in the collective memory of the relevant institution or nation.

Some argue that diversity in the legal profession encompasses many more groups and concerns than just the old "black and white" race issue. Of course, one of our goals is to increase access and fairness to all, including the previously disenfranchised. However, the "original sins" have left an indelible imprint on the American psyche and ignoring the past will not assuage those sins nor alleviate their legacy. The legacy of slavery and forced labor in America is profound and in order to redress past wrongs, we must actually confront them. We must tell the truth.

As we look back to 1619, slaves from Africa, indentured servants from England, and British colonists settled in the American colonies. At first, the indentured and the enslaved were treated ostensibly the same. Over time, however, the indentured integrated into white society while the enslaved became the most easily identifiable group outside of that society. During the next 250 years, the law recognized slavery as lifelong bondage, matrilineally passed down, with

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Employment Law Case Notes

By Anthony J. Oncidi

City Violated Title VII by Discarding Results of Test That Disparately Impacted Minorities

Ricci v. DeStefano, 557 U.S. ___, 129 S. Ct. 2658 (2009)

One hundred eighteen firefighters took written examinations administered by the city of New Haven, Connecticut (the City) to qualify for promotion to the rank of lieutenant or captain. When the examination results showed that white candidates had outperformed minority candidates, the mayor and other local politicians opened a public debate that “turned rancorous.” Some firefighters argued that the tests should be discarded because the results proved the tests were discriminatory; others argued that the exams were neutral and fair. The City sided with those who protested the results and threw out the examinations. Several white and Hispanic firefighters challenged that decision under Title VII of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment, asserting that they had been discriminated against on the basis of their race. In reversing the United States Court of Appeals for the Second Circuit, the Supreme Court held that the City had violated Title VII: “We conclude that race-based action like the City’s in this case is impermissible under Title VII unless the employer can demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute.” *Cf. AT&T Corp. v. Hulteen*, 556 U.S. ___, 129 S. Ct. 1962 (2009) (employer did not violate Pregnancy Discrimination Act by paying pension benefits calculated in part under an accrual rule that gave less retirement credit for pregnancy than for medical leave generally).

Plaintiff Must Prove That Age Was the “But-For” Cause of Challenged Employment Action

Gross v. FBL Fin. Servs., Inc., 557 U.S. ___, 129 S. Ct. 2343 (2009)

Jack Gross worked for FBL as a claims administration director until he was reassigned to the position of claims project coordinator. When he was reassigned, many of Gross’s job responsibilities were transferred to a newly created position (claims administration manager) that was filled by Lisa Kneeskern, one of Gross’s former subordinate employees who was then in her early forties. Gross was fifty-four years old at that time. Although Gross and Kneeskern received the same compensation after the reassignment, Gross considered the job action to be a demotion because FBL had taken away some of his job responsibilities and given them to Kneeskern. At trial, the jury returned a verdict for Gross in the amount of \$46,945 in lost compensation after receiving a “mixed-motive” instruction from the judge (i.e., that Gross was required to prove that “age was a motivating factor” in FBL’s decision to demote him). The Supreme Court held that under the Age Discrimination in Employment Act, the plaintiff must prove by a preponderance of the evidence that age was the “but-for” cause of the challenged adverse employment action. Further, the burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in the employer’s decision. *Cf. Browning v. United States*, 567 F.3d 1038 (9th Cir. 2009) (district court did not err in failing to give jury instruction explicitly addressing pretext in race discrimination case).

Editor’s Note: This case is analyzed in depth in this issue’s article, “No Mixed-Motive Instructions in ADEA Cases . . . At Least for Now.”

Employer Was Entitled to Summary Judgment in Disability Discrimination Case

Scotch v. Art Institute, 173 Cal. App. 4th 986 (2009)

Carmine Scotch sued his former employer, the Art Institute of California-Orange County, Inc. (AIC) for discrimination based on his disability (he was HIV positive), failure to make reasonable accommodation, failure to engage in the required interactive process, failure to maintain a workplace free of discrimination, and retaliation. The court of appeal affirmed summary judgment in favor of AIC on all claims, holding that Scotch had failed to provide admissible evidence of a causal link between his revelation that he was HIV positive and the challenged adverse employment decision (assigning him to teach fewer than five course sections during an academic term). The court of appeal further held that the accommodation Scotch sought (giving him priority in the assignment of courses to ensure that he would teach five courses during the term) was not reasonable. Finally, the court held that Scotch had failed to identify a reasonable accommodation that would have been available at the time the interactive process should have occurred, so any failure on AIC’s part to engage in that process was not “material.” The court also found no evidence of constructive termination of Scotch’s employment or illegal retaliation. *Cf. Knappenberger v. City of Phoenix*, 566 F.3d 936 (9th Cir. 2009) (plaintiff failed to allege facts which, if true, would establish his early retirement from police department was involuntary and a violation of 42 U.S.C. § 1983).

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Wage and Hour Update

By Lois M. Kosch



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Appellate Court Reverses \$86 Million Tip Pooling Judgment Against Starbucks

Chau v. Starbucks, 174 Cal. App. 4th 688 (2009)

Last year, a San Diego trial court judge concluded Starbucks had violated Cal. Lab. Code § 351 by allowing shift supervisors to share in tips placed by customers in a collective tip box, and awarded \$86 million in restitution. The court of appeal reversed, holding section 351 does not prohibit shift supervisors from sharing in collective tips customers leave for a service team that included both shift supervisors and baristas. The court noted that section 351 precludes management, including shift supervisors, from collecting portions of tips left for other employees, but it does not preclude shift supervisors from receiving their portion of a collective tip left for them based on the service they provided along with others.

The appellate court also noted that the lower court had improperly based its ruling on cases addressing the circumstances under which an employer can force employees to share tips given directly to that employee with other members of a service team (i.e., “tip pooling”). The appellate court found that the Starbucks case was more properly described as a “tip allocation” case, rather than a “tip-pooling” case.

Although a favorable result for employers (and the shift supervisors in that case), it is important to note that this case involved some unique and undisputed facts including:

(1) the customers left money in collective tip boxes for a service team that included both baristas and shift supervisors; (2) shift supervisors spent over 90 percent of their time doing the exact same duties as baristas; (3) customers would not be capable of distinguishing between baristas and shift supervisors; (4) Starbucks had a

seemingly fair policy for allocating tips in proportion to the number of hours worked; (5) Starbucks’ policies prohibited store management (store managers and assistant managers) from participating in the collective tip; and (6) baristas did not have to share tips handed directly to them for personal service.

Federal Court Concludes Employers May Have to Make More Than One Premium Payment per Day for Missed Breaks

Marlo v. United Parcel Service, Inc., 2009 U.S. Dist. Lexis 41948 (C.D. Cal. 2009)

Labor Code section 226.7 requires an employer to pay one additional hour of pay (so-called “premium pay”) for each work day that a required meal or rest period was not provided. A debated issue is the number of hours of premium pay an employee can collect in a single day, with some arguing that employees are entitled to an hour of premium pay for each missed break or meal period in a day, and others arguing that the employer need only make one payment per day regardless of the number of breaks missed that day. There are no published California cases squarely addressing this issue.

The federal district court for the central district of California recently addressed this issue in a wage and hour class action case, concluding that employees may be entitled to two premium payments in a single day under certain circumstances (one for missed meal periods and one for missed rest periods.) The district court noted that the language of Cal. Lab. Code § 226.7 and its legislative history arguably supported both the employee’s and the employer’s arguments regarding the number of collectible premium payments. The court also noted, however, that section 226.7 is based upon the wage orders, which set out the requirements for meal and rest breaks in two separate sections, each of which provides one hour of compensation for

violation. The court concluded that this signaled an intention to provide separate remedies for meal period and rest period violations.

Accordingly, the court held employees could recover up to two additional hours of pay on a single work day if both a meal period and rest break violation occurred (one for the meal period violation and one for the rest period violation). However, if more than one rest period violation occurs in a single work day, and there are no meal violations, the employee would be limited to one hour of pay (one hour for all rest period violations combined). Similarly, multiple meal period violations in the same day would result in just one hour of additional pay.

Employer Must Have Actual or Constructive Knowledge to Trigger Indemnification Obligations under Labor Code Section 2802

Stuart v. RadioShack Corporation, 2009 U.S. Dist. Lexis 41658 (N.D. Cal. 2009)

Plaintiffs sought reimbursement for expenses related to use of their personal vehicles to perform inter-company store transfers. The court considered whether an employee must first make a request for reimbursement with his or her employer before the employer’s duty to indemnify under Cal. Lab. Code § 2802 is triggered.

Because section 2802 is inherently vague about *when* the duty to reimburse is triggered, the court analogized this situation to overtime cases, where both federal and state courts have held that plaintiffs seeking unpaid overtime must prove that the employer “had actual or constructive knowledge of [the] alleged off the clock work.” Drawing a parallel between overtime liability and expense reimbursement, the court held that before an employer’s duty to reimburse is triggered, it must either know or have reason to know that the employee has incurred an expense.

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Public Sector Case Notes

By Bruce Barsook and
Connie M. Chuang

LABOR RELATIONS

Retiree Health Benefits for Current Employees, as Well as Employer "Pickup" of Employee Pension Contributions and Employer Deposits Into Employee "DROP" Accounts, Are Not Employee Vested Rights

San Diego Police Officers' Assoc. v. San Diego City Employees' Retirement Sys., 568 F.3d 725 (9th Cir. 2009)

The City of San Diego subsidizes, or "picks up," a portion of its employees' retirement contributions. In 2005, as a result of a budget crisis and failed negotiations, the city implemented a 3.2% reduction in the amount of the employees' "pickup," and an equivalent reduction in the salary of employees in the Deferred Retirement Option Program (DROP) because DROP employees did not make pension contributions and would not be subject to the reduction in pickup. DROP participants are employees who are eligible for retirement, but continue to work. Their service credit is frozen and the employer pays a sum of money into a separate account that the employee can access in full upon retirement.

Most significantly, the city's offer also made certain changes in the service eligibility requirements for retiree health benefits.

The police officers' association sued the city, claiming that the city's unilateral implementation of its last best offer violated the employees' vested rights under the Contracts Clause of the U.S. Constitution. The Ninth Circuit Court of Appeals affirmed summary judgment in favor of the city.

The Ninth Circuit found that DROP members' salaries are a term of employment and not vested pension rights. DROP participants are considered active employees. They are only considered retired for purposes of the calculation of pension benefits, and are subject to all other terms and conditions of employment. An

employee's salary is a term of employment, and not a vested contractual right subject to constitutional protections.

Further, the city's pickup of a portion of its employees' retirement contribution is also not a vested contractual right. It is equivalent to a negotiated salary item. Significantly, the parties' most recent Memorandum of Understanding (MOU) stated that with respect to the city's pickup amount, an employee, upon termination, would have no vested right to the amount so contributed by the city.

The Ninth Circuit found that retiree health benefits are a type of longevity benefit and cannot become irrevocably vested because the benefits are earned on a year-to-year basis under MOUs that expire under their own terms. Retiree medical benefits are a term of employment that can be negotiated and renegotiated through the collective bargaining process.

District Had the Right to Bar Union From Placing Literature Supporting Certain School Board Candidates in Employee Mailboxes

San Leandro Teachers Assoc. v. Governing Board of the San Leandro Unified Sch. Dist., 46 Cal. 4th 822 (2009)

The San Leandro Teachers Association distributed two employee newsletters by placing them in internal faculty mailboxes located at San Leandro Unified School District (District) schools. The newsletters encouraged members to support certain candidates for the school board. The District advised the union that it could not use the District's mail facilities to distribute materials that contain political endorsements, and that the District would bar any similar future distributions.

The union filed an unfair practice charge with the Public Employment Relations Board, alleging that the District's conduct violated the Educational Employment Relations Act

(EERA). The California Supreme Court found in favor of the District.

Education Code section 7054 provides that no school district or community college district funds, services, supplies, or equipment can be used for political campaigning. The court held that the District's mailboxes constituted "equipment" under that statute. The court found that allowing the teachers' union to use its special access to an internal channel of communication to influence elections was a potential abuse that section 7054 was designed to guard against.

The EERA gives unions the right of access to employee mailboxes subject to reasonable regulation. The court found that the District's regulation of the mailboxes was reasonable because the union still had numerous alternative channels with which to communicate its views to its members.

The court also analyzed whether the District's policy violated the union's right to freedom of speech under the U.S. or California Constitutions. The court found that the mailboxes should be considered a nonpublic forum, because public forums exist where the government allows indiscriminate use by the general public. Here, the District only granted selective access to the mailboxes to outside interests. With nonpublic forums, the District could impose viewpoint-neutral subject matter regulations on the content of what is placed in the mailboxes.

WAGE AND HOUR LAW

Public Entities Are Exempt From the Labor Code Sections Regarding Paid Overtime, Meal Breaks, and Immediate Payment of Wages Upon Termination

Johnson v. Arvin-Edison Water Storage Dist., 174 Cal. App. 4th 729 (2009)

Randell Johnson filed a lawsuit against Arvin-Edison Water Storage

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By Jeff Bosley



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Circuits Split on Authority of Two-Member Board

Laurel Baye Healthcare, Inc. v. NLRB, 564 F.3d 469 (D.C. Cir. 2009)

New Process Steel LP v. NLRB, 564 F.3d 840 (7th Cir. 2009)

Snell Island SNF, LLC v. NLRB, 568 F.3d 410 (2d Cir. 2009)

Three federal appeals courts recently issued conflicting rulings on whether a two-member National Labor Relations Board (Board) has the authority to issue decisions and orders. In late 2007, after then-Chairman Battista's term expired, the four remaining members delegated all of the Board's authority to a three-member group consisting of members Liebman, Schaumber, and Kirsanow. After the recess appointments of members Kirsanow and Walsh expired, Liebman and Schaumber were left as a quorum of the three-member group to exercise the authority of the full Board.

All three decisions turned on the interpretation of section 3(b) of the National Labor Relations Act (the Act), which states:

The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise... A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof.¹

In *Laurel Baye Healthcare*, the U.S. Court of Appeals for the District of Columbia interpreted the statement that three members shall "at all times" constitute a quorum as meaning the

overall board must have at least three members to issue decisions, even though the three-member group can decide a case based on the vote of two members. In its appeal, the employer had not challenged the merits of the unfair labor practice findings of the Board, but only the Board's authority to make findings and issue decisions as a two-member Board.

In *New Process Steel*, the employer challenged both the merits of the Board's ruling and the Board's authority to act with only two-members. The Seventh Circuit held that section 3(b) of the Act supported the Board's actions. In the court's view, section 3(b) allowed the Board "to delegate its authority to a group of three members," with two of the three members then constituting a quorum of the three-member group regardless of how many members are serving on the Board.

In *Snell Island*, the employer challenged both the two-member Board's authority to rule and the Board's Regional Director's decision to refuse to hear the employer's election objections. The Second Circuit agreed with the Seventh Circuit that the two-member Board's decision was consistent with the language of the Act and upheld the Board's ruling.

Six other circuits have cases pending that also challenge the authority of the two-member Board. The Board has issued approximately 400 decisions during a sixteen-month period with only two members serving, and immediately after the *Laurel Baye Healthcare* decision, stated that it plans to continue acting as a two-member Board while seeking a rehearing *en banc* in the D.C. Circuit. The Seventh and Second Circuits' interpretation had previously been adopted by the First Circuit in *Northeastern Land Services v. NLRB*, 560 F.3d 36 (1st Cir. 2009).

D.C. Circuit Reverses Board's Finding That FedEx Home Drivers Are Employees

FedEx Home Delivery v. NLRB, 563 F.3d 492 (D.C. Cir. 2009)

The United States Court of Appeals for the District of Columbia Circuit set aside a decision of the Board finding that FedEx Home Delivery unlawfully failed to bargain with the International Brotherhood of Teamsters, Local Union 25, after the union was certified as the bargaining agent for the drivers at two of the employer's terminals.

The employer's network operates 300 stand-alone terminals and shares space in another 200 facilities. The employer has independent contractor agreements with about 4,000 contractors nationwide for over 5,000 routes.

Each of the drivers at the two terminals signed a Standard Contractor Operating Agreement (Agreement) that defines the relationship between the employer and the driver. Under the Agreement, drivers contract to serve a route or routes in a manner they define. Drivers supply and maintain their own trucks, which they can also use for other purposes when not serving FedEx routes. Drivers can hire employees to service their routes, or subcontract out assignments. Drivers set their own schedules and break times, and are not subject to any employee reprimand or discipline system. In return, drivers must maintain their vehicle in compliance with government regulations and safety requirements, wear a uniform while delivering packages, and remove or mask the employer's logo when vehicles are used for other purposes.

In July 2006, the union filed election petitions with the Board for the Jewel Drive and Ballardvale Street terminals in Wilmington, Massachusetts. A Board Regional Director determined that the

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Phyllis W. Cheng is Director of the California Department of Fair Employment and Housing. She prepares the Labor & Employment Case Alert, a free "electronic alert service" on new cases for Section members. To subscribe online at <http://www.calbar.ca.gov>, log onto "My State Bar Profile" and follow the instructions under "Change My E-mail Addresses and List Subscriptions."



Cases Pending Before the California Supreme Court

By Phyllis W. Cheng

ARBITRATION

Pearson Dental Supplies, Inc. v. Superior Court (Turcios), 166 Cal. App. 4th 71 (2008), *review granted*, 85 Cal. Rptr. 3d 693 (2008). S167169/B206740. Petition for review after grant of petition for peremptory writ of mandate. (1) What standard of judicial review applies to an arbitrator's decision on an employee's anti-discrimination claim under the Fair Employment and Housing Act (FEHA) (Cal. Gov't Code §§ 12900–12996) that is arbitrated pursuant to a mandatory employment arbitration agreement? (2) Can such a mandatory arbitration agreement restrict an employee from seeking administrative remedies for violations of the FEHA? Reply brief due.

ATTORNEYS' FEES

Chavez v. City of Los Angeles, 160 Cal. App. 4th 410 (2008), *review granted*, 72 Cal. Rptr. 3d 783 (2008). S162313/B192375. Petition for review after reversal of order denying attorneys' fees. Whether on a modest recovery by the prevailing party under the FEHA, the court may exercise its discretion under Cal. Code Civ. Proc. § 1033(a) to deny fees as costs under § 1033.5(a)(10)(B). Fully briefed.

CLASS ACTION

Deleon v. Verizon Wireless, 170 Cal. App. 4th 519 (2008), *review granted*, 94 Cal. Rptr. 3d 322 (2009). S170377/B202838. Petition for review of reversal of sustaining of demurrer without leave to amend. Further action in this matter is deferred pending consideration of a related issue in *Arias v. Superior Court*, 46 Cal. 4th 969 (2009), or pending further order of the court. *Arias* held: (1) a representative action under the Unfair Competition Law (Cal. Bus. & Prof. Code § 17203) (UCL) must comply with class action requirements; but (2) an employee need not satisfy class action requirements to bring a representative action under the

Private Attorneys General Act (Cal. Lab. Code § 2699) (PAGA); (3) the judgment in a PAGA representative action is binding on state enforcement agencies and nonparty employees; and (4) the PAGA's one-way operation of collateral estoppel in later actions for remedies other than civil penalties does not violate the employers' right to due process. Review granted and held.

COMPENSATION

Schachter v. Citigroup, Inc., 159 Cal. App. 4th 10 (2008), *review granted*, 70 Cal. Rptr. 3d 776 (2008). S161385/B193713. Petition for review after reversal and remand of summary judgment. Whether the forfeiture provisions of a voluntary incentive compensation plan violate Cal. Lab. Code §§ 201 and 202, which require an employer to pay its employee all earned but unpaid compensation following the employee's discharge or his or her voluntary termination of employment. Fully briefed.

DISCRIMINATION/STRAY REMARKS

Reid v. Google, 155 Cal. App. 4th 1342 (2007), *review granted*, 72 Cal. Rptr. 3d 112 (2008). S158965/H029602. Petition for review after affirmance in part and reversal in part of judgment. (1) Should California law recognize the "stray remarks" doctrine, which permits the trial court in ruling on a motion for summary judgment to disregard isolated discriminatory remarks or comments unrelated to the decision-making process as insufficient to establish discrimination? (2) Are evidentiary objections not expressly ruled on at the time of decision on a summary judgment motion preserved for appeal? Fully briefed.

GOVERNMENT EMPLOYMENT

City of San Jose v. Operating Eng'rs Local Union No. 3, 160 Cal. App. 4th 951 (2008), *review granted*, 73 Cal. Rptr. 3d

159 (2008). S162647/H030272. Petition for review after affirmance of judgment of dismissal. Does the Public Employment Relations Board have the exclusive initial jurisdiction to determine whether certain "essential" public employees covered by the Meyers-Milias-Brown Act (Cal. Gov't Code §§ 3500–3511) have the right to strike, or does that jurisdiction rest with the superior court? Fully briefed.

County of Contra Costa v. Public Employees Union, 163 Cal. App. 4th 139 (2008), *review granted*, 81 Cal. Rptr. 3d 614 (2008). S164640/A115095 (lead), A115118. Petition for review after affirmance of temporary restraining orders in two civil actions. Briefing deferred pending decision in *City of San Jose v. Operating Eng'rs Local Union No. 3*, S162647, *supra*. Review granted/briefing deferred. Holding for lead case.

County of Sacramento v. AFSCME Local 146, 165 Cal. App. 4th 401 (2008), *review granted*, 85 Cal. Rptr. 3d 687 (2008). S166591/C054060 (lead)/C054233. Petition for review after the court of appeal reversal and remand of injunction prohibiting unions from ordering or encouraging certain public employees to participate in a strike. Briefing deferred pending decision in *City of San Jose v. Operating Eng'rs Local Union No. 3*, S162647, *supra*. Holding for lead case.

International Ass'n of Fire Fighters, Local 188 v. Public Employment Relations Bd. (City of Richmond), 172 Cal. App. 4th 265 (2009), *review granted*, 2009 Cal. Lexis 7262 (July 9, 2009). S172377/A114959. Petition for review after affirmance of judgment in action for writ of administrative mandate. (1) Is the decision by the Public Employee Relations Board (PERB) not to issue an unfair labor practices complaint under the Meyers-Milias-Brown Act subject to

judicial review? (2) Is a decision to lay off firefighters for fiscal reasons a matter that is subject to collective bargaining under the Act? Review granted/brief due.

HARASSMENT AND DAMAGES

Roby v. McKesson HBOC, 146 Cal. App. 4th 63 (2006), *review granted*, 53 Cal. Rptr. 3d 558 (2007). S149752/C047617, C048799. Petition for review after reversal, modification and affirmance in part of judgment. (1) In an action for employment discrimination and harassment by hostile work environment, does *Reno v. Baird*, 18 Cal. 4th 640 (1998) require that the claim for harassment be established entirely by reference to a supervisor's acts that have no connection with matters of business and personnel management, or may such management-related acts be considered as part of the totality of the circumstances allegedly creating a hostile work environment? (2) May an appellate court determine the maximum constitutionally permissible award of punitive damages when it has reduced the accompanying award of compensatory damages, or should the court remand for a new determination of punitive damages in light of the reduced award of compensatory damages? Called and continued.

KIN CARE

McCarther v. Pacific Telesis Group, 163 Cal. App. 4th 176 (2008), *review granted*, 82 Cal. Rptr. 3d 169 (2008). S164692/A115223. Petition for review after reversal of judgment. (1) Does Cal. Lab. Code § 233, which mandates that employees be allowed to use a portion of "accrued and available sick leave" to care for sick family members, apply to employer plans in which employees do not periodically accrue a certain number of paid sick days, but are paid for qualifying absences due to illness? (2) Does Cal. Lab. Code § 234, which prohibits employers from disciplining employees for using sick leave to care for sick family members, prohibit an employer from disciplining an employee who takes such "kin care" leave if the employer would have the right to discipline the employee for taking time off for the employee's own illness or injury? Fully briefed.

PENSION BENEFITS

Lexin v. Superior Ct. (People), 154 Cal. App. 4th 1425 (2007), *review granted*, 65 Cal. Rptr. 3d 574 (2007). S157341/D049251. Petition for review after denial of petition for writ of prohibition. Did petitioners' service on the Board of the San Diego Retirement System, as it related to an increase in pension benefits for members of the system, violate the conflict of interest provisions of Cal. Gov't Code § 1090, and subject them to criminal prosecution, or did the non-interest exemption of Cal. Gov't Code § 1091.5(a)(9) apply? Fully briefed.

POLICE OFFICERS

Galindo v. Superior Ct. (Los Angeles Police Dep't), 169 Cal. App. 4th 1332 (2009), *review granted*, 91 Cal. Rptr. 3d 516 (2009). S170550/B208923. Petition for review after denial of peremptory writ of mandate. Does a criminal defendant have a right to obtain *Pitchess* discovery (*Pitchess v. Superior Court*, 11 Cal. 3d 531 (1974)) prior to the preliminary hearing? Reply brief due.

PRIVACY

Hernandez v. Hillside, Inc., 142 Cal. App. 4th 1377 (2006), *review granted*, 53 Cal. Rptr. 3d 801 (2007). S147552/B183713. Petition for review after reversal and remand on grant of summary judgment. May employees assert a cause of action for invasion of privacy when their employer installed a hidden surveillance camera in the office to investigate whether someone was using an office computer for improper purposes, only operated the camera after normal working hours, and did not actually capture any video of the employees who worked in the office? Submitted, opinion due.

PROPOSITION 209

Coral Constr., Inc. v. City & County of San Francisco, 149 Cal. App. 4th 1218 (2007), *review granted*, 57 Cal. Rptr. 3d 781 (2007). S152934/A107803. Petition for review after part affirmance and part reversal of grant of summary judgment. (1) Does article I, section 31 of the California Constitution, which prohibits government entities from discriminating or showing preference on the basis of race, sex, or color in public contracting, improperly disadvantage minority

groups and violate equal protection principles by making it more difficult to enact legislation on their behalf? (See *Wash. v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982); *Hunter v. Erickson*, 393 U.S. 385 (1969).) (2) Is article I, section 31 preempted by the International Convention on the Elimination of Racial Discrimination? (3) Does an ordinance that provides certain advantages to minority- and female-owned business enterprises with respect to the award of city contracts fall within an exception to section 31 for actions required of a local governmental entity to maintain eligibility for federal funds? Supplemental briefs due.

WAGE AND HOUR

Bradley v. Networkers Int'l LLC, decision without published opinion, 2009 WL 265531, 2009 Cal. App. Lexis 347 (2009), *review granted*, 2009 Cal. Lexis 5136 (2009). S171257/D052365. Petition for review after affirmance of order denying class certification. Further action deferred pending consideration and disposition of a related issue in *Brinker Restaurant v. Superior Court*, S166305 (see below), or pending further order of the court. Review granted and held.

Brinker Restaurant v. Superior Court (Hohnbaum), 80 Cal. Rptr. 3d 781 (2008), *review granted*, 85 Cal. Rptr. 3d 688 (2008). S166350/D049331. Petition for review after grant of petition for peremptory writ of mandate. This case presents issues concerning the proper interpretation of California's statutes and regulations governing an employer's duty to provide meal and rest breaks to hourly workers. Fully briefed.

Brinkley v. Public Storage, Inc., 167 Cal. App. 4th 1278 (2008), *review granted*, 87 Cal. Rptr. 3d 674 (2009). S168806/B200513. Petition for review after affirmance of judgment. Briefing deferred pending decision in *Brinker Restaurant Corp. v. Superior Court*, S166350 (see above). Holding for lead case.

Harris v. Superior Ct. (Liberty Mut. Ins.), 154 Cal. App. 4th 164 (2007), *review granted*, 68 Cal. Rptr. 3d 528 (2007). S156555/B195121 (lead), B195370. Petition for review after grant of petition for writ of mandate. Do claims adjusters

employed by insurance companies fall within the administrative exemption (Cal. Code Regs., tit. 8, § 11040) to the requirement that employees are entitled to overtime compensation? Fully briefed.

Lu v. Hawaiian Gardens Casino, Inc. (2009) 170 Cal. App. 4th 466, 88 Cal. Rptr. 3d 345, review granted, 94 Cal. Rptr. 3d 1 (2009), S171442/B194209. Petition for review after the court of appeal affirmed in part and reversed in part motions for judgment on the pleadings and summary adjudication. This case presents the following limited issue: Does Cal. Lab. Code § 351, which prohibits employers from taking “any gratuity or part thereof that is paid, given to, or left for an employee by a patron,” create a private right of action for employees? Review granted/brief due.

Martinez v. Combs, decision without published opinion, 2003 WL 22708950 (2003), review granted, 2004 Cal. Daily Op. Service 1941; 2004 Daily Journal DAR 2859 (2004). S121552/B161773. Petition for review after partial reversal and partial affirmance of summary judgment. Briefing originally deferred pending decision in *Reynolds v. Bement*, 36 Cal. 4th 1075 (2005), which included the following issue: Can the officers and directors of a corporate employer personally be held civilly liable for causing the corporation to

violate the statutory duty to pay minimum and overtime minimum wages, either on the ground such officers and directors fall within the definition of “employer” in Industrial Welfare Commission Wage Order 9 or on another basis? Fully briefed.

Pineda v. Bank of America, N.A., 170 Cal. App. 4th 388 (2009), review granted (Apr. 22, 2009), S170758/ A122022. Petition for review after the court of appeal affirmed grant of a motion for judgment on the pleadings. (1) When a worker files an action to recover penalties for late payment of final wages under Cal. Lab. Code § 203, but does not concurrently seek to recover any other unpaid wages, which statute of limitations applies: the one-year statute for penalties under Cal. Code Civ. Proc. § 340(a), or the three-year statute for unpaid wages under Cal. Lab. Code § 202? (2) Can penalties under Cal. Lab. Code § 203 be recovered as restitution in an Unfair Competition Law action (Cal. Bus. & Prof. Code § 17203)? Reply brief due.

WHISTLEBLOWER PROTECTION ACT

Brand v. Regents of Univ. of Cal., 159 Cal. App. 4th 1349 (2008), review granted, 76 Cal. Rptr. 3d 681 (2008). S162019/D049350. Petition for review after affirmance in part and reversal in part following sustaining of demurrer. Briefing

originally deferred pending decision in *State Bd. of Chiropractic Exam'rs v. Superior Ct.*, 45 Cal. 4th 963 (2009), which held: (1) administrative exhaustion of a whistleblower retaliation claim did not require challenge to State Personnel Board (SPB) findings; (2) an employee adequately exhausted administrative remedies when adverse findings became the final decision of the SPB; and (3) adverse findings by the SPB did not have a preclusive effect in the superior court, disapproving *California Public Employees' Retirement System v. Superior Court*, 160 Cal. App. 4th 174 (2008). Case initiated.

Runyon v. California State Univ., decision without published opinion, 2008 WL 4741061 (2008), review granted, 2009 Cal. Lexis 1263 (2009). S168950/B195213. Petition for review after affirmance of summary judgment. (1) Must an employee of the California State University exhaust administrative and judicial remedies with respect to a challenged administrative decision in order to bring a claim under the California Whistleblower Protection Act (Cal. Gov't Code §§ 8547–8547.12)? (2) What standard governs the determination whether the employee's internal complaint has been “satisfactorily addressed” (Cal. Gov't Code § 8547.12(c)) by the California State University? Answer brief due. ☞

LABOR & EMPLOYMENT LAW SECTION PRESENTS 2009

Trade Secrets, Non-Competes, Interference & the Duty of Loyalty: Basics & Recent Law

Friday, October 9, 2009

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California.⁴ Communities were forced to address problems associated with discrimination and bigotry, as the state's population became increasingly diverse.⁵ Despite these changing demographics, efforts to enact fair employment legislation floundered for years.⁶

That all changed when Governor Edmund G. Brown took office in January 1959, backed by a Democratic majority in the Legislature.⁷ In his inaugural address before a joint session of the Legislature, the Governor urged legislators to pass fair employment legislation, stating that "discrimination in employment is a stain upon the image of California."⁸ Governor Brown introduced a fair employment measure in the Legislature during his second week in office.⁹ On April 16, 1959, he signed the FEPA into law, proclaiming it "a great moment in the history of California" and "a milestone in the long fight for equal opportunity and freedom from poverty."¹⁰ During a ceremony marking the first anniversary of the law, Governor Brown noted that the FEPA, although a significant legislative accomplishment, marked only the beginning of "the real and earnest journey into equality and freedom for all."¹¹ The first Chairman of the Fair Employment Practices Commission echoed the Governor's sentiments when he stated that "prejudice persists, and much enforcement and educational work must be done before the ideal of equal opportunity for all is realized."¹²

THE JOURNEY FROM THE FEPA TO TODAY'S FEHA

In the 50 years following the FEPA's enactment, California's fair employment law has been repeatedly amended to broaden the scope of its protections, so that today, it provides more protections to employees than do the federal civil rights laws. The following are the most significant of these amendments.

1970 – 1978: Sex, Marital Status and Pregnancy Become Protected Traits

In 1970, a little over a decade after the FEPA's passage into law, it was

amended to prohibit employment discrimination on the basis of sex.¹³ In a letter urging Governor Reagan's support of the amendment, Assembly member Charles Warren wrote that the bill "will help to bring about a greater utilization of the talents and skills of all Californians."¹⁴

The FEPA was again amended in 1976, to prohibit discrimination against an employee on the basis of his or her marital status.¹⁵ Analyzing the need for the change, the Legislature noted that "unmarried men often find it hard to secure promotions; unmarried women may find it hard to find jobs as they are deemed less stable; and married women are discriminated against as they are deemed temporary employees."¹⁶ Therefore, the amendment was needed to "[e]nsure that no individual be discriminated against either because they are or are not married."¹⁷

Although sex was added as a legally protected trait in 1970, specific protections for pregnant employees were not added to the FEPA until the mid-1970's. Even then, only pregnant women who worked for, or sought employment from, school districts were protected from discrimination based upon pregnancy.¹⁸ In 1978, however, the Legislature amended the law to protect employees from being discriminated against by *any* employer due to pregnancy, childbirth, or a related medical condition.¹⁹ The amended law also required employers to offer up to six weeks of leave "on account of normal pregnancy," and allowed an employee to take up to four months of pregnancy disability leave.²⁰

Currently, the FEHA requires an employer to allow an employee disabled by pregnancy, childbirth, or a related medical condition to take up to four months of pregnancy disability leave.²¹ Moreover, an employer must provide reasonable accommodation to an employee for conditions caused by pregnancy, childbirth, or a related medical condition.²²

1972 – 2002: Age as a Protected Trait

The FEPA was amended in 1972 to make it an unlawful employment practice to discriminate against an employee *between the ages of forty and sixty-four* on the basis of age.²³ However, the Legislature carved out an exception in circumstances

where the employee "failed to meet bona fide requirements" for the job or position sought or held.²⁴ The Legislature also made clear that this new protection was not to be construed to affect bona fide retirement or pension plans, or to preclude physical and medical examinations of applicants and employees to determine fitness for the job.²⁵

In 1977, the upper age limit of sixty-four was removed when the Legislature amended former Labor Code section 1420.1 to prohibit employment discrimination against those over the age of forty.²⁶ The amendment was enacted in response to the practice of employers requiring employees to retire at the age of fifty-five. According to the Legislature, the "[u]se of chronological age as an indicator of ability to perform on the job and the practice of mandatory retirement ... are obsolete and cruel practices."²⁷

More recently, the FEHA was amended to address certain court decisions that undermined the prohibition on age discrimination.

1999: S.B. 26 – Rejection of Marks v. Loral Corp.

In 1999, S.B. 26 was enacted to explicitly reject *Marks v. Loral Corp.*, 57 Cal. App. 4th 30 (1997), in which the court of appeal held that, in determining which employees to lay off, an employer may "[p]refer workers with lower salaries to workers with higher ones, even if the preference falls disproportionately on older, generally higher paid workers."²⁸ With S.B. 26, the Legislature both overturned *Marks* and instructed courts to interpret the state's statutes prohibiting age discrimination "broadly and vigorously," with the "[g]oal of not only protecting older workers as individuals, but also of protecting older workers as a group, since they face unique obstacles in the later phases of their careers."²⁹

2002: A.B. 1599 – Rejection of Esberg v. Union Oil Co.

A few years after enacting S.B. 26, the Legislature rejected another court of appeal decision narrowly interpreting the FEHA's prohibition on age discrimination. In 2002, the Legislature passed A.B. 1599,³⁰ which overturned the decision of *Esberg v. Union Oil Co.*, 87 Cal. App. 4th 378 (2001). In *Esberg*, an employer refused to pay for a master's



"The time has come to reaffirm our enduring spirit; to choose our better history; to carry forward that precious gift, that noble idea, passed on from generation to generation: the God-given promise that all are equal, all are free, and all deserve a chance to pursue their full measure of happiness."

~ President Barack Obama,
Excerpt from Inaugural Address,
January 20, 2009

degree for an employee who, in his mid-fifties, was "too old to invest in," according to the employee's supervisor. The court of appeal ruled in favor of the employer, holding that *Union Oil* was not required to extend educational and training benefits to employees over the age of forty. In response to *Esberg*, the Legislature amended the FEHA to clarify that it is also an unlawful employment practice to discriminate against an employee in the terms, conditions, or privileges of employment on the basis of age.³¹

1973 – 2000: Protections for Persons with Disabilities

The first disability-based protection came in a 1973 amendment to the FEPA that prohibited employment discrimination against those with a "physical handicap," which was narrowly defined as an "impairment of sight, hearing, or speech, or impairment of physical ability because of amputation or loss of function or coordination, or any other health impairment which requires special education or related services."³² Even though discriminating against someone with a physical handicap was prohibited, an employer had no duty to provide accommodation to an employee or applicant with a physical handicap.³³ Despite the obvious limitations of the initial protections for persons with disabilities, supporters of the legislation argued that it would "[c]ontribute to the

handicapped and disabled attaining independence and self-support."³⁴

It was not until nearly twenty years later, after the passage of the Americans with Disabilities Act of 1990 (ADA), that the FEHA was amended to prohibit employment discrimination against those with a mental disability.³⁵ At the same time, the FEHA was amended to conform to the ADA requirement that an employer make reasonable accommodation for an employee with a physical or mental disability, if it can do so without undue hardship.³⁶

1975 & 1998: "Medical Condition" as a Protected Trait

In 1975, two years after the Legislature added "physical handicap" as a legally protected trait, it also prohibited an employer from discriminating on the basis of "medical condition." Initially, "medical condition" only included a "health impairment related to or associated with a diagnosis of cancer, for which a person has been rehabilitated or cured, based on competent medical evidence."³⁷ This amendment was a response to the policy of many employers at the time of refusing to hire persons who had been treated for cancer, or requiring such persons to wait for a period of five years after their "cure" to be eligible for hire.³⁸

More than two decades later, in 1998, the definition of "medical

condition" was expanded to include genetic characteristics.³⁹ Given that some employers had terminated employees, or refused to hire qualified, currently healthy, individuals, based on a finding of a genetic predisposition toward illness, the Legislature believed this was a necessary expansion of the law.⁴⁰ The Legislature further reasoned that genetic tests, although capable of pinpointing a predisposition to a particular condition, are a "[p]oor predictor of disease – and even poorer predictors of disabling disease"⁴¹

It took the federal government 10 years to catch up with California when, in 2008, it enacted the Genetic Information Nondiscrimination Act.⁴²

2000: A.B. 2222 – the FEHA Declared More Protective Than the ADA

A.B. 2222 was passed in 2000⁴³ and clarified that the FEHA's protection of persons with disabilities is broader than that provided by the ADA.⁴⁴ Most significantly, the Legislature explained that a person with a disability need only prove he or she is "limited" in a "major life activity." The ADA, on the other hand, requires a showing of a "substantial limitation" in a major life activity.⁴⁵

In enacting A.B. 2222, the Legislature explicitly rejected a trilogy of U.S. Supreme Court decisions which held that one must look to the mental or physical impairment in its "mitigated" state to

determine whether an employee has a qualifying disability. Under California law and pursuant to A.B. 2222, whether a physical or mental impairment limits a major life activity is determined *without* reference to any mitigating measures (i.e., medications, prosthetics, assistive listening devices, etc.).⁴⁶ The Legislature also clarified that working is considered a “major life activity,” regardless of “whether the actual or perceived working limitation implicates a particular employment or a class or broad range of employments.”⁴⁷

In 2008, the United States Congress enacted the ADA Amendments Act, which makes it easier for an individual to prove he or she is disabled under the ADA.⁴⁸ Despite these amendments to the ADA, the FEHA remains broader and more protective of persons with disabilities.

1991 – 2008: Family Medical Leave

In 1991, two years before the landmark Family Medical Leave Act (FMLA) was enacted, California passed the California Family Rights Act (CFRA).⁴⁹ According to the Legislature, “surveys indicate[d] that about one-quarter of all workers must provide elder care support,” and “the current trends towards home care ... add to the tension between work demands and family needs.”⁵⁰ Further, acknowledging “the changing roles of men and women in the work force and the family” the Legislature stated that “both men and women should have the option of taking leave for child-rearing purposes.”⁵¹

Under the CFRA as originally enacted, an employee with one year of continuous service to an employer⁵² could take up to four months of unpaid leave in a twenty-four month period to care for a spouse, parent, or child with a serious health condition or for the birth of a child or placement of a child with the employee in connection with an adoption.⁵³ Prior to the 1993 amendments (discussed below), an employer could raise the defense of undue hardship to a request for leave under CFRA.⁵⁴ In addition, an employee who had already taken four months of

pregnancy disability leave was only entitled to an additional one month of CFRA leave.⁵⁵

1993: Amendments to the CFRA Following Enactment of the FMLA

The CFRA was amended in 1993 to reconcile it with the recently enacted FMLA.⁵⁶ In accordance with the FMLA, the CFRA now allows an employee to take leave for his or her own serious health condition, and the leave period has been changed to allow an employee to take up to twelve workweeks of leave in a twelve-month period.⁵⁷

The following amendments were also made to ensure that the CFRA conformed with the FMLA: (1) eliminating the undue hardship defense; (2) requiring an employee to have worked at least 1,250 hours in the year preceding the leave to be eligible for leave; (3) requiring an employee to submit a medical certification supporting the need for leave for the employee’s own serious health condition; (4) requiring the employer to maintain the employee’s medical coverage; (5) stating that the employer can only limit CFRA leave if both parents of a child are employed by the same employer and the leave is in connection with the birth, adoption or foster care placement of a child; and (6) providing that a female employee is entitled to twelve weeks of CFRA leave for the birth of a child *in addition to* up to four months of pregnancy disability leave. More recently, state law has been amended to allow employees to take CFRA leave to care for registered domestic partners or the children of domestic partners.⁵⁸

Just last year, the FMLA was expanded for the first time since its enactment in 1993, and there are now two additional bases for taking FMLA leave.⁵⁹

1999 & 2003: Sexual Orientation and Gender Identity Become Protected Traits

In 1999, the protections of the FEHA were expanded once again, this time to make it unlawful for an employer to

discriminate against an employee based on the employee’s (actual or perceived) sexual orientation.⁶⁰ Although the Labor Code had prohibited employment discrimination based upon sexual orientation since 1992,⁶¹ the Legislature concluded that it was necessary to include sexual orientation as a protected trait under the FEHA because different administrative procedures and remedies applied to claims brought by gay, lesbian, and bisexual individuals under the Labor Code, than those applied to claims brought under the FEHA by persons in other legally protected categories.⁶²

Thereafter, in 2003, the definition of “sex” under the FEHA was amended to include a person’s “gender identity and gender related appearance and behavior whether or not stereotypically associated with the person’s assigned sex at birth.”⁶³ The purpose of this amendment was not only to “[o]ffer protection to transgender individuals,” but to “[b]enefit any person who does not possess traits or conduct themselves in ways stereotypically associated with his or her sex.”⁶⁴

Federal law still does not prohibit employment discrimination based on sexual orientation or gender identity, despite recent efforts to change that.⁶⁵

1982 – 2004: The FEHA’s Anti-Harassment Provision

In 1982, the FEHA was amended to prohibit harassment of an applicant or employee for any of the traits protected under the law.⁶⁶ Initially, the anti-harassment provision only applied to employers of five or more persons; however, the statute was amended in 1984 to define an employer, for purposes of the anti-harassment provision only, to include those employing one or more person(s).⁶⁷

1999: Protecting Independent Contractors from Harassment

In 1999, independent contractors were added to those protected from workplace harassment.⁶⁸ Such protection was needed, according to the Legislature, due to the “[e]ver-growing numbers of

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workers who are hired as independent contractors rather than employees, and who currently work unprotected against harassment simply by virtue of the contractual nature of their work and their lesser cost to businesses who hire them.”⁶⁹

2003: Third Party Sexual Harassment

The FEHA was amended in 2003 to provide that an employer may be held liable for sexual harassment of employees and independent contractors by *non-employees* (i.e., customers, clients, and other third parties) if the employer knew or should have known of the harassment and failed to take appropriate corrective action.⁷⁰ However, the amendment made clear that in such cases the “extent of the employer’s control and any other legal responsibility which the employer may have with respect to the conduct of those non-employees shall be considered.”⁷¹

2004: Mandatory Supervisor Anti-Harassment Training

The most recent change with respect to the FEHA’s anti-harassment provision was enacted in 2004. The Legislature mandated that, effective January 2006, and every two years thereafter, employers with fifty or more employees must provide at least two hours of training regarding sexual harassment to all supervisory employees and to all new supervisors within six months of their assumption of a supervisory position.⁷² The Legislature noted that although employers could certainly provide longer, more frequent training regarding all types of workplace harassment or other forms of unlawful discrimination, supervisory training with respect to sexual harassment needed to be a mandatory requirement, given that sexual harassment “remains a major problem” in the state and continues to financially impact businesses.⁷³ Moreover, under the FEHA, employers are strictly liable for harassment committed by supervisors.⁷⁴ That aspect of the law provides strong support for the mandated proactive measures.

WHAT’S NEXT ON THE ROAD TO EQUAL EMPLOYMENT OPPORTUNITY?

Those of us who practice employment law are often too busy to consider California’s fair employment law from a broad perspective or to reflect on how the law has evolved over the past half century.

Indeed, our task is to remain focused on the present rights and obligations of our clients. However, when we take the time to consider the evolution of the law, we can see how far we have come as a state in the pursuit of equal employment opportunity for all.

Furthermore, given the history presented here, the law will continue to evolve based on changing societal values. We know this because the words of the first Chairman of the Fair Employment Practices Commission, noting that “prejudice persists” and that “much . . . work must be done before the ideal of equal opportunity for all is realized,”⁷⁵ remain true today. ⁴²

ENDNOTES

1. Governor Edmund G. Brown’s Address at the FEPA First Anniversary Observance (Sept. 21, 1960), in FEPC First Annual Report, at 15.
2. Cal. Lab. Code §§ 1410–1432.
3. Cal. Gov’t Code §§ 12926 et seq., added by 1980 Cal. Stat. ch. 992.
4. Lawrence E. Davies, *Pacific States – Fair Employment Measures Face Strong Opposition*, N.Y. Times, Apr. 1, 1945, at E6.
5. Richard L. Neuberger, *The Changing Face of the West*, N.Y. Times Sunday Magazine, Sept. 12, 1948, at 42.
6. Lawrence E. Davies, *Drive on Job Bias Pushed on Coast*, N.Y. Times, Dec. 23, 1956, at 15 [noting that in every general session since 1945, efforts to enact fair employment legislation had failed].
7. *Gov. Brown Takes California Office*, N.Y. Times, Jan. 6, 1959, at 22.
8. *Id.*
9. *Id.*
10. Robert Blanchard, *Brown Signs FEPC Bill; Effective Sept. 18*, L.A. Times, Apr. 17, 1959, at 1.
11. Governor Edmund G. Brown, Address at the FEPA First Anniversary Observance (Sept. 21, 1960), in FEPC First Annual Report, June 30, 1961, at 15.
12. Letter from John Anson, FEPC Chairman, to Governor Edmund G. Brown (June 30, 1961), in FEPC First Annual Report, June 30, 1961, at 5 (emphasis added).
13. 1970 Cal. Stat. ch. 1508 (A.B. 22, 1969–1970 Reg. Sess.).
14. Letter from Charles Warren, Assemblyman, to Governor Ronald Reagan (addressing A.B. 22 (1969–1970 Reg. Sess.) (Aug. 24, 1970)), in Governor’s Chaptered Bill Files, ch. 1508.
15. Assembly Office of Research Analysis (Third Reading) of S.B. 1642, 1975–1976 Reg. Sess., as amended Aug. 13, 1976.

16. Letter from Joint Commission on Legal Equality to Governor Edmund G. Brown (addressing S.B. 1642 (1975–1976 Reg. Sess.) (Sept. 14, 1976)), in Governor’s Chaptered Bill Files, ch. 1195.
17. *Id.*
18. Former Cal. Lab. Code § 1420.2, added by 1975 Cal. Stat. ch. 914.
19. Former Cal. Lab. Code § 1420.35, added by 1978 Cal. Stat. ch. 1321. This law still allowed an employer to refuse to select a pregnant employee for a training program leading to promotion, provided she was unable to complete the training program at least three months prior to her anticipated pregnancy leave.
20. *Id.*
21. Cal. Gov’t. Code § 12945(a).
22. Cal. Gov’t. Code § 12945(b)(1).
23. Former Cal. Lab. Code § 1420.1, added by 1972 Cal. Stat. ch. 1144.
24. *Id.*
25. *Id.*
26. Former Cal. Lab. Code § 1420.1, amended by 1977 Stat. ch. 851.
27. *Id.* at § 1 (emphasis added).
28. *Marks v. Loral Corp.*, 57 Cal. App. 4th 30, 36 (1997).
29. Cal. Gov’t. Code § 12941 (formerly § 12941.1), added by 1999 Cal. Stat. ch. 222 (S.B. 26), § 2 (*renumbered* § 12941 and amended by 2002 Cal. Stat. ch. 525 (A.B. 1599), § 3).
30. 2002 Cal. Stat. ch. 525, § 4 (A.B. 1599, 2001–2002 Reg. Sess.).
31. *Id.*
32. Since 1992, the FEHA has defined “physical disability” to include (1) having any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that affects one or more of the . . . bodily systems [and] limits an individual’s ability to participate in major life activities; (2) any other health impairment not described [above] that requires special education or related services; (3) being regarded as having or having had a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment; or (4) being regarded as having, or having had, a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment that has no present disabling effect but may become a physical disability. Cal. Gov’t. Code § 12926(k). In 1999, with the enactment of A.B. 1670, the Legislature clarified that the FEHA’s protections against employment discrimination also cover discrimination based on an employee’s *perceived* membership in a legally protected class (not just disability), as well as *association* with persons in a protected category (or perceived to be in a protected category).

- Cal. Gov't. Code § 12926(m) (emphasis added).
33. Former Cal. Lab. Code § 1413(h), added by 1973 Cal. Stat. ch. 1189; Former Cal. Lab. Code § 1432.5.
 34. Letter from W.C. Bradshaw, Chairman, California Governor's Committee for Employment of the Handicapped, to Governor Ronald Reagan (addressing A.B. 1126, 1973–1974 Reg. Sess.) (Sept. 26, 1973), *in* Governor's Chaptered Bill Files, ch. 1189.
 35. Cal. Gov't. Code § 12926(i) ["mental disability" defined to include "any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities."] It was not until 1999 that the Legislature eliminated a discrepancy in the treatment of physical and mental disabilities. Prior to 1999, only employers with fifteen or more employees were prohibited from discriminating against an employee with a mental disability; whereas, employers with more than five employees were prohibited from discriminating on the basis of an employee's physical disability. Added by 1999 Cal. Stat. ch. 591 (A.B. 1670, 1999–2000 Reg. Sess.). The Legislature came to realize that employees with mental disabilities had the same need for protection as those with physical disabilities. It found: "FEHA's current employer size requirement means that qualified individuals with psychiatric disabilities who work for smaller employers . . . effectively have no legal recourse against disability based termination, harassment or demotion. Further, qualified individuals with psychiatric disabilities have no access to basic accommodations such as time off for therapy, a leave of absence . . . , a quieter work space, or periodic breaks to take medications. Assembly Comm. on Judiciary Analysis of A.B. 1670 at 13–14 (May 11, 1999).
 36. Subsequently, in 2000, California adopted the requirement that employers engage in an "interactive process" with employees to determine if reasonable accommodation can be made. Cal. Gov't. Code §§ 12926.1(e), 12940(n). The concept of an interactive process requirement was originally developed by the EEOC with respect to the ADA. *Id.*
 37. Former Cal. Lab. Code § 1413(i), added by 1975 Cal. Stat. ch. 431.
 38. Assembly Office of Research, Analysis of A.B. 1194 (1975–1976 Reg. Sess.), *as amended* June 19, 1975.
 39. Cal. Gov't. Code § 12926(h), added by 1998 Cal. Stat. ch. 99 (S.B. 654, 1997–1998 Reg. Sess.).
 40. Senate Judiciary Comm. Bill Analysis of S.B. 654 at 1 (Apr. 8, 1997).
 41. *Id.*, at 4.
 42. H.R. 493, 110th Cong. (2008) (enacted).
 43. Cal. Gov't. Code § 12926.1, added by 2000 Cal. Stat. ch. 1049, §6 (A.B. 2222, 1999–2000 Reg. Sess.).
 44. *See* Cal. Gov't. Code § 12926.1(a) [noting "the law of this state in the area of disabilities provides protections independent from those in the federal Americans with Disabilities Act . . . Although the federal act provides a floor of protection, this state's law has always, even prior to the passage of the federal act, afforded additional protections."] *See also* Senate Rules Comm. Analysis (Third Reading) of A.B. 2222 at 2 (August 28, 2000) (noting "[t]his bill is intended to assert the independence of FEHA as more protective of persons with disabilities than under the federal ADA").
 45. Cal. Gov't. Code § 12926.1(c), (d) (explicitly rejecting the decision in *Cassista v. Community Foods, Inc.*, 5 Cal. 4th 1050 (1993), in which the court asserted that the ADA's "substantial limitation" standard applied in cases brought under the FEHA).
 46. Cal. Gov't. Code § 12926.1(c) (refusing to follow *Sutton v. United Airlines*, 527 U.S. 471 (1999), *Murphy v. United Parcel Serv.*, 527 U.S. 516 (1999), and *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999)).
 47. Cal. Gov't. Code § 12926.1(c).
 48. 42 U.S.C. §§ 12102, et seq.
 49. Cal. Gov't. Code § 12945.2, added by 1991 Cal. Stat. ch. 462, §§ 2, 3 (A.B. 77, 1991–1992 Reg. Sess.).
 50. *Id.*
 51. *Id.*
 52. Definition of "employer" included those employing 50 or more employees and excluded state and local governmental entities.
 53. Cal. Gov't. Code § 12945.2, added by 1991 Cal. Stat. ch. 462 (A.B. 77, 1991–1992 Reg. Sess.).
 54. *Id.*
 55. *Id.*
 56. Cal. Gov't. Code § 12945.2, *as amended* by 1993 Cal. Stat. ch. 827 (A.B. 1460, 1993–1994 Reg. Sess.).
 57. *Id.*
 58. Domestic Partners Rights and Responsibilities Act of 2003, added by 2003 Cal. Stat. ch. 421 (A.B. 205, 2003–2004 Reg. Sess.).
 59. An eligible employee may now also take FMLA leave to care for a spouse, parent, child or next of kin who is currently serving in the military and is seriously injured in the line of duty ("military caregiver leave"), and "qualifying exigency" leave resulting from a spouse, parent or child of an employee being called to active duty or notified of an impending call to active duty. 29 U.S.C. § 2612; 29 C.F.R. § 825.112. Notably, an employee is entitled to take up to 26 weeks of military caregiver leave during a single 12 month period, as opposed to the typical 12 weeks of leave afforded employees for all other types of family medical leave. 29 C.F.R. § 825.200.
 60. 1999 Cal. Stat. ch. 592, § 7.5 (A.B. 1001, 1999–2000 Reg. Sess.).
 61. Cal. Lab. Code § 1102.1, added by 1992 Cal. Stat. ch. 951 (A.B. 2601, 1991–1992 Reg. Sess.).
 62. Assembly Comm. on Appropriations Analysis of A.B. 1001 at 1-2 (May 26, 1999); *see also* Assembly Comm. on Labor and Employment Analysis of A.B. 1001 at 3-4 (Apr. 21, 1999).
 63. Cal. Gov't. Code § 12926(p), added by 2003 Cal. Stat. ch. 164 (A.B. 196, 2003–2004 Reg. Sess.).
 64. Senate Judiciary Comm. Analysis of A.B. 196 at 5 (June 17, 2003).
 65. *See, e.g.*, Employment Non Discrimination Act introduced in Congress in 2007.
 66. 1982 Cal. Stat. ch. 1193 (A.B. 1985, 1981–1982 Reg. Sess.).
 67. Assembly Office of Research Analysis (Third Reading) of S.B. 2012, 1983–1984 Reg. Sess., *as amended* Aug. 21, 1984. (added by 1984 Cal. Stat. ch. 1754).
 68. Cal. Gov't. Code § 12940(j), added by 1999 Cal. Stat. ch. 591, § 8 (A.B. 1670, 1999–2000 Reg. Sess.).
 69. Assembly Comm. on Judiciary Analysis of A.B. 1670 at 9 (May 11, 1999).
 70. Cal. Gov't. Code § 12940(j)(1), added by 2003 Cal. Stat. ch. 671, § 1 (A.B. 76, 2003–2004 Reg. Sess.) (noting rejection of *Salazar v. Diversified Paratransit, Inc.*, 103 Cal. App. 4th 131 (2002), which held that a paratransit driver subject to repeated sexual harassment by a passenger had no remedy under the FEHA).
 71. *Id.*
 72. Cal. Gov't. Code § 12950.1, added by 2004 Cal. Stat. ch. 933, §1 (A.B. 1825, 2003–2004 Reg. Sess.).
 73. Assembly Comm. on Labor and Employment Analysis of A.B. 1825 at 2 (Mar. 31, 2004).
 74. Cal. Gov't. Code § 12940(j)(1); *see also* *Department of Health Services v. Superior Court* (2003) 31 Cal. 4th 1026, 1041.
 75. Letter from John Anson, FEPC Chairman, to Governor Edmund G. Brown (June 30, 1961), *in* FEPC First Annual Report, June 30, 1961, at 5.

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Name _____	Bar Number _____	E-mail _____
1) The FEHA provides fewer protections to employees than do federal civil rights laws. <input type="checkbox"/> True <input type="checkbox"/> False		11) It was not until 2008 that the definition of “medical condition” in the FEHA was amended to prevent discrimination on the basis of genetic characteristics. <input type="checkbox"/> True <input type="checkbox"/> False
2) In amending the FEPA in 1976 to prohibit discrimination against employees on the basis of marital status, the Legislature focused only on prejudice against unmarried and married women. <input type="checkbox"/> True <input type="checkbox"/> False		12) Under California law, a person must be substantially limited in a “major life activity” in order to have a qualifying disability. <input type="checkbox"/> True <input type="checkbox"/> False
3) The Legislature amended the FEPA in 1978 to protect employees from being discriminated against by any employer due to pregnancy, childbirth, or related medical condition. <input type="checkbox"/> True <input type="checkbox"/> False		13) The FEHA requires that in determining whether a mental or physical impairment amounts to a qualifying disability, one must look at the impairment with reference to mitigating measures such as medications, prosthetics, and assistive listening devices. <input type="checkbox"/> True <input type="checkbox"/> False
4) In its present form, the FEHA provides that an employer must allow an employee disabled by pregnancy, childbirth or a related medical condition to take up to four months of pregnancy disability leave. <input type="checkbox"/> True <input type="checkbox"/> False		14) Under the FEHA, working is considered a “major life activity” only if a person’s limitation on working implicates a broad range of employment categories. <input type="checkbox"/> True <input type="checkbox"/> False
5) An employer is exempt from the obligation to provide accommodation for an employee for conditions caused by pregnancy, childbirth or related medical conditions if the employee occupies an “essential and indispensable” supervisory or management position. <input type="checkbox"/> True <input type="checkbox"/> False		15) The California Family Rights Act, included within the FEHA, allows an employer to raise the defense of undue hardship to a request for leave under the Act. <input type="checkbox"/> True <input type="checkbox"/> False
6) In <i>Marks v. Lorai Corp.</i> , 57 Cal. App. 4th 30 (1997), the court of appeal held that it was permissible for an employer, in deciding which employees should be laid off, to prefer lower-paid employees to higher-paid employees, even if this had a disproportionate impact on older, generally higher paid workers. <input type="checkbox"/> True <input type="checkbox"/> False		16) The FEHA makes it unlawful for an employer to discriminate against an employee based on the employee’s actual or perceived sexual orientation, the employee’s gender identity, or the employee’s gender-related appearance or behavior. <input type="checkbox"/> True <input type="checkbox"/> False
7) The Legislature overturned <i>Marks v. Lorai Corp.</i> in 1999 with the passage of S.B. 26, which directed courts to interpret state age discrimination law “broadly and vigorously,” so as to protect older workers both as individuals and as members of a group. <input type="checkbox"/> True <input type="checkbox"/> False		17) The FEHA’s anti-harassment provisions only apply to employers of five or more persons. <input type="checkbox"/> True <input type="checkbox"/> False
8) <i>Esberg v. Union Oil Co.</i> , 87 Cal. App. 4th 378 (2001) is valid precedent for the argument that an employer may lawfully refuse to extend higher education and training benefits to employees older than 40. <input type="checkbox"/> True <input type="checkbox"/> False		18) Independent contractors, because they do not qualify as employees, do not qualify for protection under the FEHA’s anti-harassment provisions. <input type="checkbox"/> True <input type="checkbox"/> False
9) Since its inception, the FEHA has provided protections against discrimination on the basis of disability. <input type="checkbox"/> True <input type="checkbox"/> False		19) Under the FEHA, an employer may be held liable for the sexual harassment of its employees or contractors by non-employees, such as customers or other third parties, if the employer knew or should have known of the harassment and failed to take appropriate corrective action. <input type="checkbox"/> True <input type="checkbox"/> False
10) In 1990, the FEHA was amended to require that an employer provide reasonable accommodation for an employee with a physical or mental disability, if doing so would not pose an undue hardship. <input type="checkbox"/> True <input type="checkbox"/> False		20) Under the FEHA, an employer is liable for harassment carried out by supervisors only if the employer knew, or should have known, of the conduct and failed to address it in a timely and appropriate manner. <input type="checkbox"/> True <input type="checkbox"/> False

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Saturday, October 24, 2009

7:45 a.m.

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Has Labor Law's Time For (R)evolution Come? A Review of New and Pending Legislation and Significant Developments in Labor Law

2:00 p.m. – 3:15 p.m.

So Much to Talk About, So Little Time: Recent Developments in the Area of Disability Discrimination

EPLI
Public Sector Update

3:30 p.m. – 4:45 p.m.

The Nuts and Bolts of the DFEH Administrative Process
Employment Mediation in the 10's: What Has Time Wrought
Recent Developments in Employment Class Action Litigation

Saturday, October 24, 2008

10:30 a.m. – 11:45 a.m.

Sexual Harassment Investigations: Conducting Them, Attacking Them, and Pitfalls With Witnesses

Trial Demonstrations: Direct and Cross of Expert Witnesses

Professional Responsibility and the Discrimination Lawyer

1:30 p.m. – 2:45 p.m.

Religion, God in the Workplace

Comparative Models for Addressing Workplace Discrimination

Gaze Into Our Crystall Ball as We Reveal Labor and Employment Trends for the Future

3:00 p.m. – 4:15 p.m.

Race, Color, National Origin and Ancestry: Is it a Postracial Society? How and Why Should the Legal Profession Address Diversity in its Ranks?

FEHA Focus: the Evolution of FEHA Litigation
UCLA Rand Corporation Research Presentation

FEHA History-Makers

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THE FAIR EMPLOYMENT PRACTICES ACT

On April 16, 1959, Governor Pat Brown signed into law California's Fair Employment Practices Act (FEPA), which took effect September 18, 1959.



Governor Pat Brown signs the Fair Employment Practices Act into law on April 16, 1959. Joining the ceremony (left to right) are: William Becker, Jewish Labor Committee; Senator Richard Richards (D-LA County); Neil Haggerty, California Labor Federation; Senator George Miller (D-Contra Costa County); Nathan Colley, NAACP; Assembly member Byron Rumford (D-Berkeley and Oakland); C.L. Dellums, Sleeping Car Porters and NAACP; Max Mont, Jewish Labor Committee; Assembly member Augustus Hawkins (D-LA); and Franklin Williams, NAACP.

The FEPA prohibited discrimination in employment on the basis of race, religious creed, color, national origin, and ancestry. The Act's jurisdiction included employers of five or more persons, labor organizations, employment agencies, and any person aiding or abetting the forbidden actions.

The new law established a five-member Fair Employment and Practices Commission (FEPC)⁴ appointed by the Governor, and an administrative agency, the Division of Fair Employment and Practices,⁵ housed in the Department of Industrial Relations, to carry out the policies of the Commission.



*John Anson Ford
First FEPC Chairperson*



Alice Lytle, Former Chief, Division of Fair Employment Practices

THE RUMFORD FAIR HOUSING ACT

The 1963 Rumford Fair Housing Act barred discrimination on the bases of race, color, religion, national origin, and ancestry in the sale and rental of housing accommodations.

Massive resistance to passage of the Rumford Fair Housing Act led to voter passage of Proposition 14, a constitutional amendment prohibiting limits on a landlord's absolute discretion to refuse to sell or lease real property. Following the 1964 election, the federal government cut off all housing funds to California. Finally, in 1967, the United States Supreme Court declared Proposition 14 unconstitutional in *Reitman v. Mulkey*, 387 U.S. 369 (1967). Thereafter, the Rumford Act was restored.

THE FAIR EMPLOYMENT AND HOUSING ACT

In 1980, Governor Jerry Brown and the Legislature reorganized civil rights enforcement. The FEPA and the Rumford Act were combined and renamed as the Fair Employment and Housing Act (FEHA) to protect Californians from both employment and housing discrimination.



Governor Jerry Brown

Under the FEHA, the Department of Fair Employment and Housing (DFEH)⁶ investigates, conciliates, and prosecutes discrimination complaints, and the Fair Employment and Housing Commission (FEHC)⁷ adjudicates these claims and promulgates regulations.

Hundreds of thousands of FEHA cases have been investigated, conciliated, and prosecuted by the DFEH to date. Many of these cases resulted in California Supreme Court and United States Supreme Court decisions.



Lydia I. Beebe, former FEHC Chairperson, Headed the Commission for two terms, ruled on more than 100 decisions and promulgated four sets of administrative regulations, including the California Family Rights Act.



In California Federal Savings and Loan Ass'n v. Guerra, 479 U.S. 272 (1987), then-Supervising Deputy Attorney General Marian Johnston successfully argued before the United States Supreme Court that pregnancy disability leave under the FEHA was not preempted by Title VII.



Steven C. Owyang served as the Executive and Legal Affairs Secretary for the FEHC for 20 years. During this time, Steve worked with Commissioners appointed by four Governors; led the FEHC to conduct its own administrative hearings with knowledgeable administrative law judges; assisted the Commission in issuing numerous precedential decisions that expanded the FEHA; and was instrumental in the promulgation of regulations on the California Family Rights Act, sexual harassment, pregnancy disability, physical disability, and administrative procedures.



Nancy C. Gutierrez was Director of the DFEH from 1991–1999. During the eight years she served in this capacity, Nancy filed hundreds of FEHA accusations before the FEHC and numerous civil complaints, modernized the Department, established its Communications Center and TTY lines, computerized its case processing system, formulated timelines and processes for the investigation of complaints, and improved customer service.

The FEHA's half-century of achievements was made possible by the work of these valiant pioneers and many other champions of the law. The fiftieth anniversary of the Act promises to launch a challenging new chapter for civil rights in California. ⁴¹

ENDNOTES

1. See generally, The Annual Symposium, California's Golden Years: Preserving Civil Rights—The Work, The Joy, The Pain, 40th Anniversary Celebratory Luncheon, Fair Employment and Housing Act 1959-1999 (hereafter, FEHA 40th Anniversary Brochure.)
2. See the text of Executive Order 8802 in the FDR Library at: <http://www.fdrlibrary.marist.edu/od8802t.html>. An image of the signed Executive Order may be viewed at http://www.ourdocuments.gov/doc_large_image.php?flash=true&doc=72.
3. The Cal Committee pioneers included: Susan D. Adams, Frank Barnes, Helen Biales, Harry Block, Wesley Brazier, Dr. H.H. Brookins, Assembly member Philip Burton, Rev. E. Dean Canady, Rev. H.B. Charles, Cesar Chavez, Frank Chuman, Susie Clifton, Controller Alan Cranston, Rev. Maurice A. Dawkins, John Despol, Rev. John N. Doggett, Jr., Rev. St. Paul Epps, Harry Finks, John Anson Ford, Nathan Gierowitz, Robert Giesick, Jack Goldberger, Charleton B. Goodlet, M.D., Gwen Green, Albin J. Gruhn, George Hardy, John F. Henning, Dr. Claude B. Johnson, Rev. Wilbur R. Johnson, Dr. Julian J. Keiser, Hideo Kodani, Rev. C. Travis Kendall, Rev. N. Robert Kesler, Hon. Stanley Mosk, Thomas Neusom, Hon. Isaac Pacht, Pearl Paull, Sam Paull, Rev. Ernest Pipes, Terea Hall Pittman, Rev. Earl A. Pleasant, William Pollard, Alfred K. Quinn, Sven Reher, Senator Richard Richards, Anthony Rios, J.J. (Rod) Rodriguez, Joseph Roos, Los Angeles City Councilmember Edward R. Roybal, Dr. Carl W. Segerhammer, Paul Schrade, Dr. Otto Schim, Fred Schreiber, Harvey Seifert, Leslie Shaw, Dr. Carroll L. Shuster, William Sidell, Rev. John G. Simmons, Rabbi Matthew Simon, Lionel Steinberg, Isadora Sensor, George L. Thomas, Hon. Matthew Turbine, Rev. D. Dewitt Tourneau, Jr., Herbert Ward, Carmen Warschaw, Rev. Kenneth Watson, Rev. Saul E. White, Franklin H. Williams, Joseph Wyatt, Jr., and David Ziskind. (FEHA 40th Anniversary Brochure.)
4. The original FEPC Commissioners included: John Anson Ford, Chair; Elton Brombacher; C.L. Dellums; Carmen Warschaw; and Dwight Zook. (FEHA 40th Anniversary Brochure.)

5. The Chiefs of the Division of Fair Employment Practices included: Edward Howden, Peter Johnson, JoAnne A. Lewis (last), Hon. Alice Lytle, Paul Meaney, Roger Taylor, and Charles Wilson. (FEHA 40th Anniversary Brochure.)
6. The Directors of the DFEH include: Suzanne Ambrose, Phyllis W. Cheng (current); Mark Guerra, Nancy C. Gutierrez, Hon. Dennis W. Hayashi, Dorinda V. Henderson, Hon. Talmadge Jones, and JoAnne Lewis (first). (FEHA 40th Anniversary Brochure and updated DFEH records.)
7. FEPC and FEHC Chairpersons include: Lydia I. Beebe, C.L. Dellums, John Anson Ford, Clive Graham, Pier Gherini, Osias Goren, Betty Lim Guimares, John A. Martin, Jr., Cruz Sandoval, Carmen Warschaw, and George Woolverton (current). (FEHA 40th Anniversary Brochure and updated DFEH records.)

FEPC and FEHC Commissioners include: Patrick Adams, Paul Bannai, Omar Barbosa, George Bond, Carlos Bustamante, Dave Carothers (current), Phyllis W. Cheng, Euiwon Chough, Donald Diers, Lisa Duarte, Carol Freeman (current), Louis Garcia, Lois Graham, Mark Guerra, Catherine F. Hallinan, Tamiza Hockenhull, Thomas Hom, Harvey Horikawa, T. Warren Jackson, Hon. Michael Johnson, Theron Johnson, Joseph Julian, Stuart Leviton (current), Ronald Lucas, Art Madrid, Helen R. Mars, Georgia Megue, Catherine Montgomery, Mauricio Munoz, Linda Ng (current), Patricia Perez (current), Charles Poochigian, Anna Ramirez, Ann Ronce, Henry Rodriguez, Joseph Roos, Herschel Rosenthal, Stella Sandoval, Virginia Sanchez, Elsa Saxod, Hon. Milan Smith, Joan Sparks, Brenda St. Hilaire, Audrey Sterling, J.M. Stuchen, Michael Vader, Ann-Marie Villicana, Susan Weiner, Naomi Young. (FEHA 40th Anniversary Brochure and updated DFEH records.)

FEPC Executive and Legal Affairs Secretaries include: David A. Garcia, Ann M. Noel (current), and Steven C. Owyang. (FEHA 40th Anniversary Brochure and updated DFEH records.)

No Mixed-Motive Instructions

continued from page 4

Subsequently, many lower courts applied *Price Waterhouse's* analysis and Title VII's "mixed-motive" affirmative defense in non-Title VII cases, including under the ADEA.¹⁶ However, courts and practitioners struggled with certain aspects of *Price Waterhouse's* burden-shifting framework, particularly in fashioning jury instructions or determining the type of evidence needed to satisfy proof burdens. It was this confusion that set the stage for *Gross*.

GROSS v. FBL FINANCIAL SERVICES, INC.

In *Gross*, a fifty-four year old plaintiff filed suit under the ADEA challenging his reassignment.¹⁷ The district court issued a "mixed-motive" instruction, instructing the jury to rule in the claimant's favor if he proved age was a "motivating factor" (i.e., "it played a part or a role in" the reassignment), unless the employer also proved it would have demoted the claimant regardless of age. After a jury verdict in the claimant's favor, the employer appealed and the Eighth Circuit Court of Appeals reversed and remanded for a new trial, finding the jury had been improperly instructed.¹⁸ Adopting Justice O'Connor's concurring opinion in *Price Waterhouse*, the Eighth Circuit held the ADEA claimant needed to present "[d]irect evidence" of age-related bias, not simply any category of evidence, to satisfy his initial burden to obtain a mixed-motive instruction.¹⁹

Both parties appealed, and the United States Supreme Court granted review on whether a plaintiff "must present direct evidence of discrimination in order to obtain a mixed-motive instruction in a non-Title VII discrimination case."²⁰

Ultimately, however, a bare majority of the justices decided they did not need to answer the question upon which review was granted, because the case could be disposed of on a more preliminary inquiry: namely, whether the burden of persuasion ever shifts to a defendant against whom a mixed-motive

claim under the ADEA has been made. Five of the justices, including two of the dissenting justices from *Price Waterhouse*,²¹ concluded the burden does not shift under the ADEA and that mixed-motive instructions are never appropriate under the ADEA.

The majority declined to rely on *Price Waterhouse* and other cases interpreting Title VII, noting "Title VII is materially different with respect to the relevant burden of persuasion[.]"²² The majority opinion noted that, subsequent to *Price Waterhouse*, Congress amended Title VII explicitly authorizing discrimination claims in which an improper consideration was a "motivating factor" and expressly adopting the "mixed-motive" affirmative defense.²³ The Court also noted that Congress did not make similar amendments to the ADEA, which continued to prohibit employment decisions "because of" an individual's age. The majority noted, "[w]e cannot ignore Congress' decision to amend Title VII's relevant provisions but not make similar changes to the ADEA."²⁴

The majority also addressed the causation standard needed to establish whether an action was "because of" age for ADEA purposes. The Court applied statutory construction rules requiring it to look to the statute's language and its "ordinary meaning." The Court noted that various dictionaries defined "because of" as meaning "by reason of, on account of," meaning age was "the 'reason' that the employer decided to act."²⁵ In effect, the Court concluded that age must have a "determinative influence on the outcome;" to wit, to be *the* factor, not simply *a* factor.²⁶ The majority concluded, "[t]o establish a disparate-treatment claim under the plain language of the ADEA, therefore, a plaintiff must prove that age was the 'but for' cause of the employer's adverse action."²⁷

Significantly, the Court also concluded that the claimant bore the entire burden of proving the challenged decision was "because of" age, and that the burden of persuasion never shifts to the employer to prove it would have taken the same action regardless of age. This rule applies "even when a plaintiff has produced some evidence that age was one motivating factor in that decision."²⁸

For good measure perhaps, the

majority called into question the continuing viability of *Price Waterhouse*, observing "it is far from clear that the Court would have the same approach were it to consider the question today in the first instance."²⁹ It further noted that "whatever the deficiencies of *Price Waterhouse* in retrospect" and later noted "even if *Price Waterhouse* was doctrinally sound," there was no public policy basis to extend its application to the ADEA.³⁰

The four dissenting justices, including one of the justices from *Price Waterhouse's* majority opinion (Justice Stephens), objected vigorously, arguing that the Court should have focused solely on the question originally presented. The dissenting justices observed they would have applied *Price Waterhouse's* rationale and Title VII's "mixed-motive" framework to the ADEA, and that applying *Desert Palace, Inc. v. Costa*,³¹ would not require a plaintiff to provide "direct evidence" to obtain a mixed-motive instruction.³²

A LONG-TERM EMPLOYER VICTORY, OR A SHORT-LIVED "GROSS" INJUSTICE?

As mentioned at the outset, *Gross* appears to be a significant victory for employers defending ADEA claims for several reasons. First, ADEA claimants bear a higher burden of proof requiring them to prove "but-for" causation rather than "motivating-factor" causation, and the burden never shifts to the employer to prove its decision was legitimate. Further, the majority opinion's open skepticism of *Price Waterhouse's* viability suggests it likely will not apply its rationale or "mixed-motive" instructions beyond the context of Title VII or any discrimination statute explicitly authorizing its usage.

In some respects, *Gross* arguably reflects a victory for several of the justices who did not prevail when *Price Waterhouse* first framed this debate. It remains to be seen, however, who will get the last laugh. As employment practitioners know, this exact same 5-4 split and alignment of justices issued the equally controversial decision in *Ledbetter v. Goodyear Tire & Rubber Co.*³³ That decision, however, proved short-lived and was quickly reversed by the new administration's first legislative enactment.³⁴ Given the current congressional majorities, it is reasonably foreseeable that legislation will soon be introduced to nullify *Gross*.³⁵ What is less clear is

whether this will be accomplished through ADEA amendments explicitly adding Title VII's "motivating-factor" language and a "mixed-motive" defense to the ADEA, or through amendments to Title VII adding age as a protected classification, or some other means.

IMPACT FOR CALIFORNIA EMPLOYERS

At least initially, it does not appear *Gross* will have major implications for California employers, even if it avoids *Ledbetter*'s fate. The ADEA is a federal statute, and most plaintiff's attorneys in California prefer to allege the age discrimination protections contained within the Fair Employment and Housing Act (FEHA) to avoid removal to federal court. Moreover, since the FEHA addresses age in the same statutory provisions as all other protected classifications, whereas the federal discrimination protections for age and other criteria are contained in two statutes (the ADEA and Title VII), it does not appear California age claimants will face a higher evidentiary standard than other California discrimination plaintiffs.

However, the result in *Gross*, coupled with its criticisms of *Price Waterhouse*, potentially assists employers in arguments concerning the standard of proof and jury instructions in FEHA cases, at least until such arguments are expressly rejected. For instance, California courts have repeatedly looked to federal laws and federal decisions interpreting those laws, including *Price Waterhouse*, when interpreting the FEHA's provisions.³⁶ Thus, *Gross* cannot be totally and summarily ignored for FEHA purposes.

Notably, the FEHA uses the same "because of" language for age discrimination claims as the ADEA. Notably also, like the ADEA, the FEHA was never amended following *Price Waterhouse* and it contains no express statutory provisions suggesting discrimination claimants need only prove a protected classification was a "motivating factor" in the challenged decision. In this regard, the FEHA reads more like the ADEA interpreted in *Gross* than the current version of Title VII. Accordingly, *Gross* may potentially assist California employers in arguing FEHA age discrimination plaintiffs must prove age was the "but-for" cause of any



"Injustice anywhere is a threat to justice everywhere."

~ Martin Luther King Jr.

challenged employment decision, at least in "pretext" or "single-motive" age cases rather than "mixed-motive" FEHA age discrimination cases. The California Supreme Court has not squarely addressed this issue, but several California appellate courts have suggested "but-for" causation is required in FEHA pretext cases.³⁷

Lastly, *Gross*' highlighting of causation standards, proof burdens and jury instructions in discrimination cases may provide the opportunity to address a seeming anomaly in the CACI instructions: the inexplicable disappearance of the "mixed-motive" instruction from California's judicially approved jury instructions. As mentioned above, *Price Waterhouse* and the resulting Title VII amendments reflected a two-step compromise for mixed-motive cases: (1) plaintiffs need only prove a protected classification was a "motivating factor" (rather than a "but-for" factor), and (2) an employer would have the opportunity to escape some liability by proving it would have made the same decision regardless of the protected classification.

California's BAJI instructions for employment cases continue to incorporate both aspects of *Price Waterhouse*'s and Title VII's "mixed-motive" analysis.³⁸ For instance, BAJI 12.00 reflects the "motivating-factor" causation standard, BAJI 12.01.1 defines "motivating-factor" (consistent with *Price Waterhouse*), and BAJI 12.26 sets forth the employer's "mixed-motive" affirmative defense instruction. In contrast, however, the current CACI instructions incorporate the "motivating-factor" causation standard (CACI 2500) and *Price Waterhouse*'s definition of "motivating factor" (CACI 2507), but there is no CACI instruction setting forth

the affirmative-defense/limitation-on-remedies portion of the "mixed-motive" defense. Under this current formulation, FEHA discrimination plaintiffs seemingly benefit from the less-onerous "motivating-factor" causation standard for potentially all FEHA cases, while employers do not have the opportunity to prove they would have made the same decision regardless of the protected factor.

Conspicuously missing from the CACI instructions is any language suggesting a deliberate intent to delete the "mixed-motive" affirmative-defense instruction, which potentially suggests a simple drafting mistake. Armed with *Gross*, employers may argue that the FEHA, like the ADEA, was never amended to explicitly incorporate the "mixed-motive" defense and "motivating-factor" standard and thus, a "but-for" standard applies rather than the CACI's current "motivating-factor" standard. At a minimum, employers may also argue that, to the extent CACI's "motivating-factor" standard is applied in cases involving "mixed motives," the judge should also instruct with the affirmative-defense portion of the *Price Waterhouse* "mixed-motive" formulation, either through BAJI 12.26 or a special-instruction equivalent.

CONCLUSION

In the short term, *Gross* is undeniably a victory for employers likely to be sued under the ADEA, rather than the FEHA. Whether *Gross* survives this congressional session and its impact on California employers remains to be seen. Regardless of how this "motivating-factor" versus "but-for" factor debate is resolved, employers are probably best served by continuing to ensure age plays no factor in employment decisions. ⁴²

ENDNOTES

1. *Gross v. FBL Fin. Servs., Inc.*, ___ U.S. ___, 129 S. Ct. 2343 (2009).
2. 42 U.S.C. §§ 2000e-2(m), 2000-5(g)(2)(B).
3. 29 U.S.C. § 623(a).
4. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).
5. Cal. Gov't. Code §§ 12940 *et seq.*; *Cassita v. Community Foods, Inc.*, 5 Cal. 4th 1050, 1063 (1995) (California courts may rely on federal authorities interpreting Title VII when interpreting the FEHA).
6. *See, e.g.*, Judicial Council of California, Civil Jury Instructions (June 2009 Edition) CACI No. 2500 (in FEHA disparate treatment case, plaintiff must prove protected status was a “motivating reason” for challenged decision) and CACI No. 2507 (defining “motivating reason”).
7. In *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), the United States Supreme Court held that the statute of limitations for gender compensation discrimination claims under Title VII accrues when the original discriminatory decision occurred. In 2009, Congress passed and President Obama signed the Lilly Ledbetter Fair Pay Act (H.R. 11), specifically overruling *Ledbetter*, and making the new legislation retroactive to May 27, 2007, the day before *Ledbetter* was decided.
8. *Price Waterhouse*, 490 U.S. at 231.
9. *Id.* at 258.
10. *Id.* at 239 (“we take these words [‘because of’] to mean that gender must be irrelevant to employment decisions. To construe the words ‘because of’ as colloquial shorthand for ‘but for causation,’ as does *Price Waterhouse*, is to misunderstand them.”).
11. *Id.* at 246.
12. *Id.* at 276 (O’Connor, J., concurring). In *Desert Palace v. Costa*, 539 U.S. 90, 94-95 (2003), the United States Supreme Court concluded Congress’s post-*Price Waterhouse* amendments to Title VII explicitly authorized a “mixed-motive” instruction, but it also clarified that plaintiffs were not required to present “direct” evidence to satisfy their initial burden of persuasion.
13. *Price Waterhouse*, 490 U.S. at 295 (Kennedy, J., dissenting).
14. 42 U.S.C. § 2000e-2(m) (“Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.”)
15. 42 U.S.C. § 2000e-5(g)(2)(B) (“On a claim in which an individual proves a violation under Section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court may (i) grant declaratory relief, injunctive relief . . . and attorneys fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion or payment[.]”)
16. *See, e.g., Febres v. Challenger Caribbean Corp.*, 214 F.3d 57 (1st Cir. 2000); *Hutson v. McDonnell Douglas Corp.*, 63 F.3d 771 (8th Cir. 1995); *but see Cassino v. Reichold Chems., Inc.*, 817 F.2d 1338, 1343-1344 (9th Cir. 1987) (in a pretext case under the ADEA, the plaintiff must show that age was the determining factor, or the “but-for” cause of the termination).
17. *Gross v. FBL Fin. Servs.*, ___ U.S. ___, 129 S. Ct. 2343 (2009).
18. *Id.* at 2347.
19. *Gross v. FBL Fin. Servs.*, 526 F.3d 356, 360 (8th Cir. 2008), *vacated by* 129 S. Ct. 2343.
20. *Gross*, 129 S. Ct. at 2348.
21. Justice Anthony Kennedy authored the dissenting opinion in *Price Waterhouse*, joined by current Justice Antonin Scalia (along with former Chief Justice William Rehnquist).
22. *Gross*, 129 S. Ct. at 2348.
23. *Id.* at 2348-2349.
24. *Id.* at 2349.
25. *Id.* at 2350 (citing *The Random House Dictionary of the English Language* at 132 (1966), 1 *Webster’s Third New International Dictionary* at 194 (1966), and 1 *Oxford English Dictionary* at 746 (1933)).
26. *Id.*
27. *Id.*
28. *Id.* at 2350-2351.
29. *Id.* at 2352.
30. *Id.*
31. *Desert Palace v. Costa*, 539 U.S. 90, 94-95 (2003).
32. *Gross*, 129 S. Ct. at 2356-2357 (Justice Stevens’ dissenting opinion).
33. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007).
34. *See* The Lilly Ledbetter Fair Pay Act (H.R. 11).
35. As of the time this article was being written, at least one powerful congressman (Representative George Miller, D-CA) has signaled he intends to convene hearings regarding *Gross*.
36. *Cassita*, 5 Cal. 4th at 1063.
37. *See, e.g., Ewing v. Gill Indus.*, 3 Cal. App. 4th 601, 612 (1992) (in age discrimination case asserting “pretext” theory of liability, trial court did not error in instructing jury that age must be a determining factor); *Huffman v. Interstate Brands Co.*, 121 Cal. App. 4th 679, 702-703 (2004) (in age discrimination case where plaintiff was pursuing a “pretext” rather than a “mixed-motive” age discrimination theory, trial court did not error in refusing to provide a “mixed-motive” instruction); *cf. Caldwell v. Paramount Unified Sch. Dist.*, 41 Cal. App. 4th 189, 206 (1995) (in race and age discrimination case tried under pretext theory, special verdict form required plaintiff to prove discharge was “because of” age and race, despite jury instruction identifying race and age as “motivating factor”).
38. BAJI California Jury Instructions (Spring 2009 Edition), Instruction 12.26 sets forth the “mixed-motive” affirmative defense. The accompanying Use Notes and Comments observe this instruction is taken from the United States Supreme Court’s decision in *Price Waterhouse*. These notes further observe that “[n]o California appellate court decision has dealt with these issues. However, since the federal statute and Government Code language in critical areas is similar, the instruction is presented should the trial court deem it appropriate and applicable.”

**TABLE 2
EMPLOYMENT COMPLAINTS BY PRIMARY PROTECTED
CATEGORY (1997-2008)**

Primary Protected Category	Complaints	Percent
Sex	60,009	30.95%
Mental or Physical Disability	38,172	19.69%
Race / Color	37,829	19.51%
Age	29,295	15.11%
National Origin / Ancestry	14,022	7.23%
Denial of Family & Medical Care Leave	4,363	2.25%
Sexual Orientation	3,176	1.64%
Religion	3,000	1.55%
Medical Condition	2,692	1.39%
Marital Status	1,313	0.68%

The numbers of complaints received changed considerably during the study period, with claims of disability discrimination rising sharply, while sex, race, and national origin complaints declined significantly. Given the complex interplay of ethnicity and immigration patterns, it is useful to combine race and color with national origin claims. Together, these declined 26.7% during the study period. Table 3 illustrates the most common complaints. These data are merely descriptive, not explanatory. Changes can be the result of shifts in prevalence of discrimination, claiming rates, the difficulty of filing a complaint, and other factors—and are most likely the result of some combination of all of these.

**TABLE 3
EMPLOYMENT DISCRIMINATION COMPLAINTS BY
MOST COMMON PROTECTED CATEGORIES**

Year	Sex	Disability	Race/ Color	National Origin	Age
1997	5,919	2,235	3,735	1,528	2,709
1998	5,874	2,728	3,885	1,522	2,422
1999	5,816	2,835	3,603	1,502	2,369
2000	5,386	2,626	3,374	1,275	2,431
2001	5,411	3,051	3,679	1,311	2,410
2002	5,665	3,404	3,571	1,404	2,409
2003	4,862	3,401	3,300	1,192	2,374
2004	4,230	3,355	2,558	892	2,345
2005	4,207	3,487	2,551	922	2,446
2006	3,756	3,515	2,171	847	2,207
2007	4,327	3,610	2,463	707	2,332
2008	4,556	3,925	2,939	920	2,841
% Change	-23.0%	75.6%	-21.3%	-39.8%	4.9%

Complaints are also characterized in the DFEH data by up to four types of acts alleged to constitute a violation of the FEHA. As with the protected categories, we determined that the first listed of these can reasonably be said to be the “primary” alleged act. By far, the most common act alleged in the complaint is termination (49.9%), followed by harassment (26.6%). Table 4 below summarizes the other primary acts alleged during the study period. There is some variation based on the primary protected category.

**TABLE 4
PRIMARY ACTS ALLEGED AS VIOLATION
ALL EMPLOYMENT CASES**

Alleged Act	%
Termination	49.9
Harassment	24.6
Failure to hire	4.4
Working conditions	3.9
Refusal to accommodate	3.8
Denied promotion/upgrade	3.4
Demotion	2.8
Unequal pay	1.7
All Other	5.2
Total	100

Age discrimination complaints accounted for the highest percentage of unlawful termination allegations (58%); the highest percentage of harassment allegations (39.9%) is found among sex discrimination complaints. For all protected categories, termination is the most common primary alleged act, by a wide margin.

COMPLAINANTS

As complaints vary, so too do complainants. The characteristics of complainants vary according to the nature of

the complaint, in both expected and unexpected ways. The median age of people filing complaints for termination on account of age is 53.5, compared to a median age of all complainants of 34. The vast majority (84%) of sexual harassment cases are filed by women. Whether one finds some of the other data about complainants surprising depends on one's starting assumptions. Table 5 below provides profiles of some of the more common combinations of protected category and alleged act.

TABLE 5 SELECTED CHARACTERISTICS OF COMPLAINANTS

	Age Termination Complaints	Race/Nat. Origin Termination Complaints	Disability Refuse to Accommodate Complaints	Sex Termination Complaints	Sex Harassment Complaints	All Complaints	California Population ⁴
Median Age	53.25	41	45	36.35	35.81	34	33.3
Male/Female	55%-44.9%	57%-43%	44%-56%	18%-82%	16%-84%	41%-58%	49.8%/50.2%
% Black	9.0%	36.0%	15.3%	10.9%	11.8%	18.5%	7.4%
% White	51.5%	15.6%	46.4%	46.7%	45.8%	38.4%	63.4%
% Hispanic	19.2%	25.4%	18.7%	22.5%	20.4%	20.7%	32.4%
% Asian/Pacific Islander	7.3%	10.5%	5.0%	5.3%	5.5%	6.1%	13%
Occupation:							California Occupations ⁵
% Clerical	11.2%	11.8%	14.1%	19.7%	19.4%	14.8%	13.7%
% Craft	1.5%	1.6%	1.7%	0.89%	0.96%	1.4%	1%
% Laborer	13.5%	17.3%	14.7%	9.9%	9.2%	13.2%	10.3%
% Manager	15.2%	10.0%	5.8%	11.6%	8.0%	9.8%	9.7%
% Equipment Operator	3.6%	4.0%	4.8%	1.7%	1.9%	3.2%	2.3%
% Professional	20.0%	16.4%	23.8%	16.0%	18.0%	19.0%	12.8%
% Sales	10.0%	8.3%	5.1%	11.5%	10.9%	8.8%	10.7%
% Service	13.0%	17.7%	14.3%	18.8%	21.2%	17.5%	16.7%
% Supervisor	4.0%	3.5%	2.8%	2.5%	2.1%	3.0%	7.3%
% Technician	5.5%	6.3%	8.2%	4.0%	4.0%	5.7%	2.5%
% Para-professional	3.0%	3.2%	4.7%	3.4%	4.1%	3.7%	9.0%

Complainants are also not evenly distributed across California. By dividing the population of each county by the number of complaints filed by residents of that county, we can determine the complaint rate by geography. During the study period, one employment discrimination complaint was filed for every 1,521 Californians. The rate in Sacramento County, however, was one complaint per 953 residents, the highest rate in the state. At the other end of the spectrum, in Modoc County the rate was one complaint for every 4,519 residents. The lowest complaint rates are found in the rural counties of Northern California, while the top 10 counties include not only San Francisco, Alameda, and Contra Costa County in the Bay Area, but also Fresno, Kern, and San Joaquin counties in the Central Valley.

Respondents

In FEHA and DFEH nomenclature, employers against whom complaints are filed are called “respondents.” Respondents are as diverse as complainants. The respondent named in the largest number of complaints (3,242) was the State of California itself, along with its various departments and subdivisions. This is not surprising, given that the state had 479,594 employees in 2007. The Department of Corrections and Rehabilitation accounted for 1,175 (36%) of complaints against state agencies, nearly three times the rate for the State of California as a whole, given that CDCR employs about 13% of all state employees. Among all employers against whom complaints were filed, the median firm size (as estimated by the complainant at the time of filing) is 100 employees. Table 6 provides an overview of estimated firm size among all firms against whom complaints were filed.

**TABLE 6
FEHA COMPLAINTS BY FIRM SIZE**

Number of Employees	Complaints	% of Complaints
5 or less	11,616	5.5%
6-14	18,233	8.6%
15-99	70,605	33.5%
100-499	57,309	27.2%
500-999	12,558	6.0%
1000-4999	26,822	12.7%
5000-9999	5,135	2.4%
10000-99999	8,718	4.1%
	210,996	100.0%

Representation

During the study period, 44.5% of all complaints resulted in the issuance of a “Right to Sue” (RTS) letter within seven days of the filing of the complaint. It is reasonable to assume that nearly all of these complainants either had a lawyer or had been told by a lawyer to file a complaint and seek a RTS letter. This number has been rising steadily, passing the 50% mark in 2007. Determining whether respondents are represented by an attorney during the administrative process is a bit trickier, but from the titles and names of respondent representatives, it appears that about half of respondents are represented in the DFEH administrative process by attorneys or law firms. Most of the remainder are handled by human resources professionals or business owners themselves.

PROCESSING BY THE DFEH

The FEHA complaint resolution and enforcement system is bifurcated. Complainants can elect to obtain a RTS letter from the DFEH and pursue the matter in the courts, or to have the DFEH investigate and attempt to resolve the matter, including taking cases to the Fair Employment and Housing Commission or to the courts in appropriate cases. We are examining what happens to complaints in which the complainant elected an RTS letter at the outset, but report in this section, in some detail, only on cases resolved by the DFEH. During the study period, the DFEH closed 114,688 cases by means other than issuance of an RTS letter. The number of such cases closed per year by the DFEH declined from 11,514 in 1998 to 5,854 in 2008.

The DFEH asks consultants (the current job title of DFEH investigators) to keep time records, but these are not used for administrative purposes and hence are somewhat suspect. With that caveat, Table 7 provides the median amounts of time reported by the DFEH consultants for various stages of case handling in which any amount of time was reported.

**TABLE 7
DFEH STAFF TIME TO PROCESS FEHA COMPLAINTS**

Activity	Median Time Spent	Cases in Which Activity Reported
Intake	1.5 hours	147,104
Investigation	6.0 hours	44,554
Consultation Processing	0.5 hours	12,277
Case Management	1.0 hours	108,064
Report Writing	1.5 hours	33,668

By statute, the DFEH must resolve a FEHA complaint within one year. That imperative, combined with high caseloads, means that a large number of complaints are resolved near the 365-day deadline. Of those cases accepted for investigation and resolved administratively over the study period, 32% percent were closed in the last 30 days, including 21% resolved in the last 10 days. The median time to case closing has averaged 284 days. These numbers have improved more recently, with only 17% of complaints closed in the last 30 days in 2008. Recent changes by DFEH Director Phyllis Cheng to focus resources according to case merits rather than case age are likely to further improve this pattern.

OUTCOMES

Our study of complaints filed by employees who forgo the administrative process and request an immediate right to sue is continuing, but thus far it appears that court cases are filed in about half of the cases in which an RTS letter is issued. The outcomes of cases decided in the DFEH administrative system (in which an RTS letter is not issued in the first week) are recorded in detail in the DFEH's administrative data. These outcomes are summarized in Table 8 below.

TABLE 8
OUTCOMES OF COMPLAINTS RESOLVED BY THE DFEH

Closing Category (Simplified)	Number	Percent
Refused for investigation	22,007	19.19%
Transferred to other agency	4,809	4.19%
Complainant decision or action	15,485	13.50%
Insufficient jurisdiction, evidence, probable cause	54,621	47.63%
Settled or resolved by parties	14,377	12.54%
Closed after accusation filed	934	0.81%
Other	2,455	2.14%
Total	114,688	100.00%

As is apparent from Table 8, most employees pursuing claims through the DFEH administrative process obtain no relief, primarily because the DFEH either lacks jurisdiction over their claims or does not find sufficient evidence of a FEHA violation. During our study period, about 9% of complainants who stayed in the administrative process obtained some benefit, monetary or otherwise. In 84% of these successful claims,



"It was we, the people; not we, the white male citizens; nor yet we, the male citizens; but we, the whole people, who formed the Union . . . Men, their rights and nothing more; women, their rights and nothing less."

~ Susan B. Anthony

complainants received some monetary relief. For cases resolved prior to a transfer to the DFEH legal division, the median amount of monetary relief was \$3,444 (in 8,765 cases) over the study period. In 2008, the median relief in the administrative process returned to 1999 levels (\$3,251), after peaking at \$5,000 in 2004 and 2005. For the relatively small percentage (2.26%) of cases that are referred to the DFEH legal division, the median monetary benefit achieved was \$10,000, in 639 cases.

CONCLUSION

Obviously, making sense of these data and the implications they might have for law, policy, or practice requires more than analyzing the numbers. It is for this reason that we have conducted approximately 100 confidential interviews with knowledgeable people with diverse points of view and are conducting surveys to assess how well the views we have heard represent broader constituencies. Moreover, the data has much more to tell us, using statistical techniques beyond simple tables. When our report is complete, we hope it will be seen as a fair, balanced and—most important—accurate assessment of how the FEHA is working in this, its 50th anniversary year. ⁴²

ENDNOTES

1. Complaint data are from http://dhr.state.ny.us/division's_performance_html/how_many.html. The New York population (6635) estimate for 2008 is from <http://quickfacts.census.gov/qfd/states/36000.html>.
2. The mean number of complaints per year (1997–2008) of all kinds received was 18,791. The California population (33,871,650) as of April 1, 2000 is from <http://quickfacts.census.gov/qfd/states/06000.html>.
3. Of course, a claim may include various and/or “intersectional” claims. A 50 year-old Filipino American woman who is a lesbian

may have claims under the prohibitions against discrimination based on age, sex, race or color, national origin, and sexual orientation. The DFEH reports data on 4 possible bases of discrimination for each complaint. For purposes of simplifying our analysis and presentation here, we examined the patterns of complaints with multiple bases and concluded that in the great majority of cases it is reasonable to assume that the basis listed first is likely the “primary” basis alleged to be the basis of discrimination. Moreover, some of the “bases” captured in the data under that category, like retaliation or association, do not pertain to a protected category but to a prohibited act. We thus exclude them here.

4. California demographic data are from 2000 Census, SF-1 File tables. Race data do not sum to 100% because of omission of Native Americans, because some people report more than one race, and because “Hispanic” is not a racial category for Census Bureau purposes.
5. California occupational data are from the 2003 American Community Survey, calculated by the authors. Data do not sum to 100% because of not all ACS occupational categories align with DFEH definitions.

On the occasion of the 50th anniversary year of the Fair Employment and Housing Act (FEHA), The UCLA-RAND Center for Law and Public Policy is conducting a study of the effectiveness of the FEHA and the efficiency with which it is enforced. As a part of that study, the researchers seek the views of California attorneys experienced in representing either employees or employers under the law, by means of an on-line survey. All survey responses are completely voluntary and confidential and no information is retained from which the identity of a survey respondent could be determined. The *California Labor & Employment Law Review* encourages subscribers to share their experiences, knowledge, and suggestions by participating in the survey, which takes about 7 minutes to complete. The survey can be accessed at http://www.surveymonkey.com/s.aspx?sm=YfSCfcKK_2btjbDlkiGv9ZZQ_3d_3d. Further information is provided there about the survey and how to obtain additional information about your rights as a potential research subject.

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Eliminating Bias

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skin color as an emblem of slavery. The systematic elimination of indigenous people began at this time as well.

In 1776, Thomas Jefferson (a slaveholder) ironically wrote in the Declaration of Independence that “All men are created equal. . .” Africans fought with the British forces and with the colonists, both having promised freedom and equality. Slavery continued in the new republic, reinforced by the United States Constitution considering slaves as “three-fifths” human beings in a compromise gesture among the drafters.

During the Civil War, the Emancipation Proclamation freed slaves in territory held by the Confederate states. Following the war, three landmark amendments were added to the Constitution: the Thirteenth Amendment abolished slavery, the Fourteenth Amendment provided for equal protection under the law, and the Fifteenth Amendment provided that the right to vote “shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”

While the Reconstruction era brought some hope, the reality, as fully documented in Douglass Blackmon’s brilliantly researched “Slavery by Another Name,” was that nothing much changed and under color of law, the enslaved remained in the same condition as before the war. In 1896, the United States Supreme Court endorsed separate treatment based upon skin color in *Plessy v. Ferguson*, 163 U.S. 537 (1896). This remained the law until *Brown v. Board of Education*, 347 U.S. 483 (1954), when the Court found that the concept of separate but equal is inherently unequal.

CALIFORNIA ANTI-DISCRIMINATION LAWS

California’s anti-discrimination laws now prohibit discrimination based on many characteristics other than race and color. A cursory review of California’s labor and employment laws (codified in the Fair Employment and Housing Act, the Labor Code, and the Business and Professions

Code) reveals *over 35 prohibited bases of discrimination*, including:

- Age
- AIDS and related conditions
- Ancestry
- Bankruptcy
- Citizenship or citizenship status
- Color
- Crime victim
- Disability or perception of disability (mental or physical)
- Filing a worker’s compensation claim
- Garnishment because of a single debt
- Illiteracy
- Jury duty service
- Lactation
- Marital status
- Medical condition, including cancer in remission
- Missing work to accompany a child to school who is under threat of suspension
- National origin
- Participation in union activities
- Personal relationship with a person employed by a competitor
- Political beliefs
- Pregnancy
- Race
- Religion
- Sex
- Sexual orientation
- Taking up to forty hours off each year to attend school with a child
- Taking time off to perform emergency duty as a volunteer firefighter
- Use of family and/or medical leave
- Use of leave
- Veteran status
- Victim of domestic violence

This list is daunting, and not exhaustive, but it speaks volumes about individual rights, the collective and community good, and the broadening of protections in California.

PROPOSITION 209 AND ITS IMPACT ON THE LEGAL PROFESSION

“I will never forget that I became chairman of the Joint Chiefs of Staff because of the (Massachusetts) 54th Regiment (in the Civil War). I was not the first who was qualified, and I was not the first who had the potential. I was the first to come along after the government had secured our right to equal treatment and affirmative action so I could be measured by my performance and not by the color of my skin.”

Colin Powell, retired United States General, former Secretary of State (2003)

“But for affirmative action laws, God knows where I would be today.”

United States Supreme Court Justice Clarence Thomas (1983, in a speech to Equal Employment Opportunity Commission staff)

Segregation persisted in the legal profession even after *Brown*, with the American Bar Association remaining exclusively white until 1960. In the meantime, African American attorneys had formed their own bar association, the National Bar Association. Today, bar associations no longer deny membership based on race. Nonetheless, many previously disenfranchised groups have established their own bar associations, such as La Raza, the Asian Pacific Bar, and local minority bar associations throughout the country. However, despite the move toward greater diversity in the legal profession nationwide, California appears to be moving in the opposite direction, partly as a result of Proposition 209’s prohibition of affirmative action by public entities.

The California Constitution was amended by Proposition 209 in 1996. Proposition 209 was passed by 54.6 percent of California voters, and prohibits state and local government agencies from discriminating against or granting preferential treatment to any individual or group on the basis of race, sex, color, ethnicity, or national origin in

the operation of public employment, education, or contracting. Proposition 209 does not, however, prohibit the collection of statistical data and the reporting of underutilization by racial or gender categories in the monitoring of employment practices. Proposition 209 also “does not prevent government agencies from engaging in inclusive public sector outreach and recruitment programs that, as a component of general recruitment, may include, but not be limited to, focused outreach and recruitment of minority groups and women if any group is underrepresented in entry level positions of a public sector employer.” Attorney General Edmund G. Brown, Jr.’s letter brief to the California Supreme Court on April 22, 2009, regarding the constitutionality of Proposition 209 is an excellent starting point for continued concern, research, public discourse, and analysis of the harmful impact of Proposition 209.

Since 1996, research undertaken by academics and advocacy organizations has evaluated the effects of ending affirmative action in local public contracting as well as the status of equal access to public higher education. Most alarming is the precipitous drop in matriculation of minority applicants to professional schools in California, specifically law schools and medical schools.¹

This has created a significant decline in the number of minority physicians and attorneys. As a result, historically underserved minority communities have even fewer healthcare and legal resources, as well as fewer role models for youth. This disparity has far-reaching consequences beyond the loss of individual opportunities to potentially disastrous results for the greater community.

What impact has Proposition 209 had on the legal profession in California? According to the American Bar Association, after reaching a peak in 1994, the number of African-American law school students has significantly declined. In a recent study by the State Bar of California, the number of African-American members declined from 2.4% in 2001 to 1.7% in 2006 (in 1991 it was 2%). Other minority representation also declined, with the exception of Hispanics, who slightly increased from 3.7% to 3.8%. In 2006, the State Bar’s Council on Access and Fairness issued its exhaustive

“Report and Recommendations—Diversity Pipeline Task Force.” The report and resource guide of various diversity programs focuses on entry and advancement in the legal profession and obstacles minorities face in our profession.

The Final Report of Results for the State Bar of California Survey revealed:

<u>Ethnic/ Racial Background</u>	1991	2001	2006
White	91%	83%	84.4%
African-American	2%	2.4%	1.7%
Latino/Hispanic	3%	3.7%	3.8%
Asian/Pacific Islander	3%	6%	5.3%
Other/Mixed	1%	4.9%	4.8%

This preliminary data links the implementation of Proposition 209 with the precipitous decline in public law school enrollment of minority students and the concomitant decline in minority attorneys in California. As a result of Proposition 209, the number of minority lawyers available to serve as public defenders, prosecutors and judges in the criminal justice system has sharply declined. Further research needs to be conducted into the impact of the lack of minority attorneys in the state’s district attorney offices and the role of bias in the administration of justice and prosecutorial

discretion in sentencing, plea bargains, and diversion program placement and referral. The number of minority attorneys in large private firms has also significantly declined. On a positive note, women have made some gains and represent nearly half the attorneys thirty-five and younger in California.

Demographic data compiled in 2007 by the State Bar Diversity Task Force Court’s Working Group revealed that California’s diverse population was not adequately represented in the state’s judiciary. A goal of The State Bar Council on Access & Fairness is to assist the Governor in encouraging the recruitment of more women attorneys, attorneys of color, gay and lesbian attorneys, and attorneys with disabilities who meet all of the qualifications and eligibility criteria to submit an application to the bench.

The decline in minority attorneys has not been adequately addressed by state agencies, such as the State Bar, due to Proposition 209. For example, Proposition 209 forced the State Bar to curtail many of its diversity outreach programs, including support for minority bar associations and minority student activities. The State Bar is very careful not to utilize any of its mandatory dues for its diversity efforts. As a result, local bar associations have instituted diversity outreach and minority scholarship programs to reverse the situation. Both the Bar Association of San Francisco and the Los Angeles County Bar Association have diversity initiatives.

"We have talked long enough in this country about equal rights. We have talked for a hundred years or more. It is time now to write the next chapter, and to write it in the books of law."



~ Lyndon B. Johnson, former U.S. President

ANTI-DISCRIMINATION RULES FOR LAW PRACTICE

The California Rules of Professional Conduct obligate practitioners to conduct themselves in a non-discriminatory manner. This obligation should translate into positive action, while reinforcing the elimination of bias in the legal profession.

RULE 2-400 PROHIBITED DISCRIMINATORY CONDUCT IN A LAW PRACTICE.

(A) For purposes of this rule:

(1) “law practice” includes sole practices, law partnerships, law corporations, corporate and governmental legal departments, and other entities which employ members to practice law;

(2) “knowingly permit” means a failure to advocate corrective action where the member knows of a discriminatory policy or practice which results in the unlawful discrimination prohibited in paragraph (B); and

(3) “unlawfully” and “unlawful” shall be determined by reference to applicable state or federal statutes or decisions making unlawful discrimination in employment and in offering goods and services to the public.

(B) In the management or operation of a law practice, a member shall not unlawfully discriminate or knowingly permit unlawful discrimination on the basis of race, national origin, sex, sexual orientation, religion, age or disability in:

(1) hiring, promoting, discharging, or otherwise determining the conditions of employment of any person; or

(2) accepting or terminating representation of any client.

(C) No disciplinary investigation or proceeding may be initiated by the State Bar against a member under this rule unless and until a tribunal of competent jurisdiction, other than a disciplinary tribunal, shall have first adjudicated a complaint of alleged discrimination and found that unlawful conduct occurred. Upon such adjudication, the tribunal finding or verdict shall then be admissible evidence of the occurrence or non-occurrence of the alleged discrimination in any disciplinary proceeding initiated under this rule. In order for discipline to be imposed under this rule, however, the

finding of unlawfulness must be upheld and final after appeal, the time for filing an appeal must have expired, or the appeal must have been dismissed.

In order for discriminatory conduct to be actionable under this rule, it must first be found to be unlawful by an appropriate civil administrative or judicial tribunal under applicable state or federal law. Until there is a finding of civil unlawfulness, there is no basis for disciplinary action under this rule.

A complaint of misconduct based on this rule may be filed with the State Bar following a finding of unlawfulness in the first instance even though that finding is thereafter appealed.

A disciplinary investigation or proceeding for conduct coming within this rule may be initiated and maintained, however, if such conduct warrants discipline under California Business and Professions Code sections 6106 and 6068, the California Supreme Court’s inherent authority to impose discipline, or other disciplinary standard. (Added by order of Supreme Court, effective March 1, 1994.)

WHAT YOU CAN DO TO ELIMINATE BIAS IN THE LEGAL PROFESSION

Education

- Educate yourself.
- Research your own ethnic background and those of your relatives.
- Read books by authors from different ethnic backgrounds.
- Travel.
- Take courses about other cultures.
- Learn about American history.

Observation

- Observe how other ethnic or gender groups are treated.
- Notice whether people are comfortable talking about differences.
- How does your workplace treat people who are different?
- How does your neighborhood treat people who are different?
- Notice whether certain groups are missing in meetings, leadership posit-

ions, job training opportunities, etc.

Familiarity

- Get to know co-workers and neighbors from different cultures.
- Attend local cultural fairs and programs.
- Learn how to prepare culturally diverse foods and share with others.
- Learn basic conversational greetings in another language.
- When traveling, immerse yourself in the local culture.

Intervention

- Stand up for yourself and others, speak up when you witness racially motivated or sexist conduct.
- Let the speaker know that such speech or conduct is offensive.
- Let everyone know that you do not agree.
- Actively refute others’ denial that racism or bias exists.

10 THINGS THAT WILL ENCOURAGE DIVERSITY IN THE LEGAL WORKPLACE

1. Make it clear that you want diversity.
2. Diversify how you recruit and where you recruit.
3. Build on the diversity you have; create a nucleus.
4. Support activities and organizations that support diversity.
5. Create a mentorship system and be a mentor.
6. Make sure diversity is more than numbers.
7. Diversify your staff.
8. Establish diversity in management at the senior levels.
9. Reward diversity.
10. Become comfortable with diversity.

This article is based upon MCLE presentations on the elimination of bias in the legal profession. [↗](#)

ENDNOTES

1. See Leigh Jones, *Minority Enrollment Is Faltering*, National Law Journal (January 21, 2008); *California Medical Schools Continue to Have Low Enrollment Among Minority Students*, Medical News Today (July 24, 2008).

MCLE Specialty Credit Self-Assessment Test

MCLE CREDIT

Earn one hour of specialty MCLE credit by reading “Eliminating Bias in the Legal Workplace and Beyond” and answering the questions that follow, choosing the one best answer to each question.

Mail your answers and a \$25 processing fee (\$20 for Labor and Employment Law Section members) to:

Labor and Employment Law Section • State Bar of California
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Make checks payable to The State Bar of California. You will receive the correct answers with explanations and an MCLE certificate within six weeks. *Please include your bar number and e-mail.*

CERTIFICATION

The State Bar of California certifies that this activity conforms to the standards for approved education activities prescribed by the rules and regulations of the State Bar of California governing minimum continuing education. This activity has been approved for minimum education credit in the amount of one hour.

Name _____	Bar Number _____	E-mail _____
1) Bias is a preference for or inclination against a particular group that can be rationalized as a personal preference. <input type="checkbox"/> True <input type="checkbox"/> False		11) California’s judiciary reflects the diversity of California’s population. <input type="checkbox"/> True <input type="checkbox"/> False
2) Integration and diversity mean the same thing. <input type="checkbox"/> True <input type="checkbox"/> False		12) Proposition 209 has not affected the State Bar’s minority outreach programs. <input type="checkbox"/> True <input type="checkbox"/> False
3) The Thirteenth, Fourteenth, and Fifteenth Amendments to the United States Constitution ended legal endorsement of different treatment based on race. <input type="checkbox"/> True <input type="checkbox"/> False		13) The State Bar may not use any of its mandatory dues to support diversity efforts. <input type="checkbox"/> True <input type="checkbox"/> False
4) <i>Brown v. Board of Education</i> ended segregation in the legal profession. <input type="checkbox"/> True <input type="checkbox"/> False		14) Local bar associations may not use any of their membership dues to support diversity efforts. <input type="checkbox"/> True <input type="checkbox"/> False
5) California labor and employment laws prohibit discrimination based on over 35 different characteristics. <input type="checkbox"/> True <input type="checkbox"/> False		15) California Rule of Professional Conduct 2-400 prohibits discrimination only with regard to an attorney’s employment practices. <input type="checkbox"/> True <input type="checkbox"/> False
6) Proposition 209 prohibits discrimination or preference based on race, sex, color, ethnicity, or national origin in public employment, education, or contracting. <input type="checkbox"/> True <input type="checkbox"/> False		16) A discrimination complaint against an attorney may only be filed with the State Bar after a court or administrative agency has found the attorney liable for discrimination. <input type="checkbox"/> True <input type="checkbox"/> False
7) Proposition 209 prohibits governmental agencies from collecting statistical data about race and gender to monitor employment practices. <input type="checkbox"/> True <input type="checkbox"/> False		17) Noticing and pointing out that certain groups are not represented in meetings, leadership positions, job training opportunities, etc. does not promote diversity. <input type="checkbox"/> True <input type="checkbox"/> False
8) Proposition 209 prohibits public employers from including outreach to underrepresented minorities as part of their recruitment efforts. <input type="checkbox"/> True <input type="checkbox"/> False		18) Learning about other cultures helps to promote diversity. <input type="checkbox"/> True <input type="checkbox"/> False
9) Minority representation in the membership of the State Bar of California has declined since the passage of Proposition 209. <input type="checkbox"/> True <input type="checkbox"/> False		19) Diversifying where the firm recruits and providing mentorship by minority attorneys are two ways a law firm may promote diversity among its attorneys and staff. <input type="checkbox"/> True <input type="checkbox"/> False
10) Almost half of California attorneys under thirty-five years of age are female. <input type="checkbox"/> True <input type="checkbox"/> False		20) Diversity means simply the number of minority attorneys in the workplace. <input type="checkbox"/> True <input type="checkbox"/> False

Trustee of Estate Did Not Sexually Harass Widow

Hughes v. Pair, 46 Cal. 4th 1035 (2009)

Suzan Hughes, the third wife of Herbalife founder Mark Hughes, sued Christopher Pair, one of the three trustees of Mark's estate, for sexual harassment under Cal. Civ. Code § 51.9 (which prohibits sexual harassment in certain business, service, and professional relationships) and for intentional infliction of emotional distress. (Although this case did not involve an employment relationship, the California Supreme Court held that the Legislature intended section 51.9 to be applied in a manner consistent with the FEHA and Title VII.) The court affirmed summary judgment in favor of Pair after concluding that Hughes had failed to establish either quid pro quo sexual harassment or conduct that was so severe or pervasive as to constitute "hostile environment" sexual harassment. As for the latter form of harassment, the court noted that Pair had not physically touched Hughes and that Pair's "vulgar and highly offensive" comments to Hughes in the presence of other people attending a private showing at a museum were an isolated incident and could not plausibly be construed by a reasonable trier of fact as a threat to commit a sexual assault on her. Similarly, the court held that Pair's actions were not sufficiently extreme or outrageous and Hughes' alleged emotional injuries were not severe enough to warrant liability for intentional infliction of emotional distress.

Court Affirms \$1.1 Million Verdict in Favor of Terminated Preschool Director

Scott v. Phoenix Schools, Inc., 175 Cal. App. 4th 702 (2009)

Jennifer Scott was terminated from her position as director of one of Phoenix Schools' preschools. Her responsibilities included assigning personnel to comply with the state regulation that set the minimum teacher-student ratios for child care centers (Cal. Code Regs., tit. 22, § 101216.3). Scott was terminated shortly after she informed the

parents of a prospective student that the school had no room for the child. Scott sued Phoenix Schools for wrongful termination in violation of the public policy embodied in the regulation setting teacher-student ratios. A jury awarded Scott more than \$1.1 million in compensatory and \$750,000 in punitive damages. The court of appeal affirmed the compensatory damages award, but reversed the award of punitive damages on the ground that there was insufficient evidence of malice or oppression on the part of Phoenix Schools. *Cf. McConnell v. Innovative Artists Talent & Literary Agency, Inc.*, 175 Cal. App. 4th 169 (2009) (employer's anti-SLAPP motion to strike former employees' retaliation and wrongful termination claims was properly denied because claims did not arise from employer's protected First Amendment activity).

Employer Is Permitted to Deny Employees Vacation Benefits That Had Not Yet Vested

Owen v. Macy's, Inc., 175 Cal. App. 4th 462 (2009)

Lisa Owen worked as a sales associate at a Robinsons-May department store (Robinsons) until it was acquired by Macy's in August 2005. In January 2006, employees at the Arcadia store where Owen worked were informed that the store would close by April. After the store closed on March 18, 2006, Owen received her final paycheck, which included no pay for unused vacation benefits. The somewhat unconventional Robinsons vacation policy provided that employees would not earn or vest vacation benefits until they had completed six months of continuous employment and, thereafter, employees earned vacation during the "vacation year" that ran from May 1 through April 30 – with 50 percent of the annual benefits accruing and vesting on May 1 and the remaining 50 percent accruing and vesting on August 1. According to a Robinsons executive, this meant that employees' annual vacation benefits vested before they were actually earned. However, employees like Owen who left the company before May 1 would not receive the first half of their vacation entitlement for the vacation year beginning on May 1. Owen challenged this policy under Cal. Lab. Code § 227.3, on the ground that new employees were

denied vacation benefits for six months and because she was terminated just six weeks before vesting in the 50% of the vacation benefits that she would have earned between May 1, 2006 and April 30, 2007. The court of appeal affirmed summary judgment in favor of the employer, finding no violation of the statute. The court of appeal reasoned that Cal. Lab. Code §227.3 does not require employers to provide any vacation, and where an employer does provide vacation benefits, such benefits are to be provided in accordance with the employer's policy. The court explained that the Legislature left it to the employer to determine variables such as when vacation accrues and vests. Therefore, the employer's policy providing that no vacation time is earned during the first six months was lawful, as was its policy that vacation benefits accrued and vested beginning May 1 of each year.

Sales Representative Was Not Entitled to Post-Termination Commissions

Nein v. HostPro, Inc., 174 Cal. App. 4th 833 (2009)

Randy Nein was employed by HostPro as a salesperson. In December 2000, he approached AT&T and suggested that HostPro provide web-hosting services to some of AT&T's business customers. The transaction was still being negotiated a year later when Nein's employment was terminated. He filed this lawsuit to recover commissions associated with the AT&T transaction, which was completed shortly after Nein's termination. The trial court granted summary judgment to HostPro on the ground that Nein was not a licensed business opportunity broker and because his termination cut off his right to receive any additional commission payments under the plain language of his written employment agreement. The court of appeal affirmed summary judgment on the second but not the first ground, holding that the employment agreement clearly provided that Nein would "be eligible for commission pay...so long as [he] remains employed with the Company as a Sales Representative." Accordingly, the court affirmed dismissal of Nein's claims for breach of contract, breach of the implied covenant of good faith and fair dealing, violation of Cal. Lab. Code §§ 206 and 2926, and the

Unfair Competition Law (Cal. Bus. & Prof. Code § 17200). Finally, the court affirmed an award of attorney's fees in favor of HostPro.

Class Action Pleading Requirements Need Not Be Satisfied to Assert Private Attorneys General Act Claim

Arias v. Superior Court, 46 Cal. 4th 969 (2009)

Jose Arias sued his former employer, Angelo Dairy, for a number of alleged violations of the California Labor Code, including five claims that he asserted on behalf of himself and other current and former employees under the Unfair Competition Law (UCL). The trial court granted the employer's motion to strike all five claims that Arias purported to assert on behalf of himself and others, on the ground that he had failed to comply with the pleading requirements for a class action (Cal. Code Civ. Proc. § 382). The court of appeal held that all causes of action brought in a representative capacity alleging violations of the UCL were subject to the class action pleading requirements, with the exception of the claim asserting a violation of the Labor Code Private Attorneys General Act of 2004 (the PAGA) (Cal. Lab. Code §§ 2698–2699.5). The California Supreme Court affirmed, holding that

although Proposition 64 (passed by the voters in 2004) requires a private party asserting a UCL claim in a representative capacity to satisfy the class action requirements, an aggrieved employee need not satisfy those requirements to assert a representative action under the PAGA. *Cf. Amalgamated Transit Union v. Superior Court*, 46 Cal. 4th 993 (2009) (labor union could not bring representative action under PAGA either as assignee or association whose members had suffered actual injury); *In re Tobacco II Cases*, 46 Cal. 4th 298 (2009) (class action standing requirements for UCL claim need only be satisfied by class representatives and not unnamed class members); *Sanders Constr. Co. v. Cerda*, 175 Cal. App. 4th 430 (2009) (employees of unlicensed subcontractor may assert wage claims against general contractor under Cal. Lab. Code § 2750.5).

Class Member Who Failed to Timely Submit Claim Form Could Not Recover Unpaid Wages

Martorana v. Marlin & Saltzman, 2009 WL 1875681, 2009 Cal. App. Lexis 1167 (2009)

Ron Martorana was a class member in a wage and hour class action that had been filed against his former employer, Allstate Insurance Company. The Los

Angeles Superior Court approved a settlement of the class action, but Martorana did not recover any portion of the settlement because he had failed to timely submit a claim form. Although Martorana received notice of the settlement and the accompanying claim form, he failed to submit the form because he had been diagnosed with prostate cancer and was experiencing the physical effects of the disease and treatment. Martorana subsequently filed this action against Allstate and the various law firms that had prosecuted the class action, alleging that the defendants were negligent in failing to take reasonable steps to contact him about his failure to file a claim and to make sure his claim form was submitted in a timely manner. The trial court dismissed that action against Allstate and granted Allstate's request for sanctions against Martorana and his attorney. Martorana filed an amended complaint asserting malpractice against class counsel, but the trial court sustained class counsel's demurrer to Martorana's amended complaint as well, finding that "it would defeat the purpose of mass notification to a large number of class members if, after written notice, Class Counsel were required to follow up . . . with every class member who neglected to

From the Editors

EDITORIAL POLICY

We would like the *Law Review* to reflect the diversity of the Section's membership in the articles and columns we publish. We therefore invite members of the Section and others to submit articles and columns from the points of view of employees, unions, and management. Our resources are you, the reader, so we count on you to provide us with the variety of viewpoints representative of more than 6,000 members. In addition, although articles may be written from a particular viewpoint (i.e., management or employee/union), whenever possible, submitted articles should at least address the existence of relevant issues from the other perspective. Thank you for all of your high quality submissions to date, and please...keep them coming! Please e-mail your submission to Section Coordinator Susan Orloff at susan.orloff@calbar.ca.gov.

The Review reserves the right to edit articles for reasons of space or for other reasons, to decline to print articles that are submitted, or to invite responses from those with other points of view. We will consult with authors before any significant editing. Authors are responsible for Shepardizing and proofreading their submissions. Articles should be no more than 2,500 words. Please follow the style in the most current edition of *The Bluebook: A Uniform System of Citation* and put all citations in endnotes.

file a timely claim.” The court of appeal affirmed dismissal of Martorana’s claims but reversed the award of sanctions to Allstate because of its failure to comply with the safe harbor provisions of Cal. Code Civ. Proc. § 128.7. *Cf. In re Consumer Privacy Cases*, 175 Cal. App. 4th 545 (2009) (trial court did not abuse its discretion in approving attorney’s fees award to class counsel and in using lodestar method); *Hernandez v. Vitamin Shoppe Indus. Inc.*, 174 Cal. App. 4th 1441 (2009) (class counsel’s communications with conditionally certified and separately represented class members urging them to opt out of settlement were properly enjoined by trial court).

FLSA Action Could Not Be Certified Under California Class Action Statute

Haro v. City of Rosemead, 174 Cal. App. 4th 1067 (2009)

Randy Haro and Robert Ballin filed an action against the City of Rosemead, alleging a violation of the federal Fair Labor Standards Act (FLSA). The trial court denied plaintiffs’ motion to have the class certified pursuant to Cal. Code Civ. Proc. § 382 (the California class action statute), on the ground that an FLSA collective action (which requires members of the collective action affirmatively to opt in) cannot be prosecuted as a class action under California law (which requires class members to opt out). The court of appeal dismissed the appeal from the trial court’s orders denying class certification and denying leave to amend the complaint, holding that “an FLSA action has to be litigated according to rules that are specifically applicable to these actions and if litigants do not like these rules, they should not file under the FLSA.” *Cf. Smith v. T-Mobile USA Inc.*, 2009 WL 1651531, 2009 U.S. App. Lexis 12706 (9th Cir. 2009) (plaintiffs who had voluntarily settled their FLSA claims before appeal was filed could not continue to prosecute action, rendering appeal moot).

Trade Secret Action Was Prosecuted in Bad Faith; \$1.6 Million in Sanctions Upheld

FLIR Sys., Inc. v. Parrish, 174 Cal. App. 4th 1270 (2009)

FLIR Systems purchased Indigo Systems, which manufactures and sells microbolometers (a device used in connection with infrared cameras, night

vision and thermal imaging), for \$185 million in 2004. William Parrish and Timothy Fitzgibbons were shareholders and officers of Indigo before the company was sold to FLIR; after the sale, they continued working for Indigo. In 2005, Parrish and Fitzgibbons decided to start a new company (Thermicon) to mass produce bolometers, and they gave notice to Indigo that they would quit their employment in January 2006. When Parrish and Fitzgibbons entered into negotiations with Raytheon to acquire licensing, technology, and manufacturing facilities for Thermicon, they assured FLIR that they would not misappropriate any of Indigo’s trade secrets and that the new company would use an intellectual property filter similar to the one used at Indigo to prevent the misuse of trade secrets. In response, FLIR sued for injunctive relief on the theory that Thermicon could not mass produce low-cost microbolometers without misappropriating FLIR’s trade secrets. The trial court found no misappropriation of FLIR’s trade secrets and determined that the action had been brought in bad faith because it was based on the theory of “inevitable disclosure” – a doctrine rejected by California courts because “it contravenes a strong public policy of employee mobility that permits ex-employees to start new entrepreneurial endeavors.” The trial court awarded Parrish and Fitzgibbons \$1,641,261.78 in attorney’s fees and costs pursuant to Cal. Civ. Code § 3426.4 (misappropriation of trade secrets claim made in bad faith). The court of appeal affirmed and further awarded respondents the costs and attorney’s fees they incurred in connection with the appeal.

Ninth Circuit Certifies Questions to California Supreme Court Regarding Pharmaceutical Sales Reps

D’Este v. Bayer Corp., 565 F.3d 1119 (9th Cir. 2009)

The Ninth Circuit certified two questions of law to be answered by the California Supreme Court pursuant to Cal. Rule of Court 8.548: (1) Does a pharmaceutical sales representative (“PSR”) qualify as an “outside salesperson” under Industrial Welfare Commission Wage Orders 1-2001 and 4-2001 if the PSR spends more than half of his or her working time away from the

employer’s place of business and personally interacts with doctors and hospitals on behalf of drug companies for the purpose of increasing individual doctors’ prescriptions of specific drugs? (2) In the alternative, is a PSR involved in duties and responsibilities that meet the requirements of the administrative exemption under California law? On June 10, the Supreme Court issued a brief order declining to answer either of the two certified questions, citing its prior decision in *Ramirez v. Yosemite Water Co.*, 20 Cal. 4th 785 (1999) ⁴³.

Wage and Hour Update

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In this case, plaintiffs had not established that the employer knew or had reason to know that employees were incurring mileage expense just because they used (and the company expected them to use) their personal vehicles to perform inter-company store transfers. To prevail, plaintiffs would have to show who logged such information or otherwise received it and whether those persons’ knowledge was imputable to the company. Simply having a mileage reimbursement policy was not enough.

Employer May File Motion to Deny Class Certification and District Court Properly Denied Class Certification Where Individual Issues Predominated

Vinole v. Countrywide Home Loans, 2009 U.S. App. Lexis 14771 (9th Cir. 2009)

In this case, plaintiffs, who were employed by a mortgage company as External Home Loan Consultants (HLCs), alleged that their employer misclassified them as exempt outside sales employees and sought overtime pay and other wages. The employer filed a motion to deny class certification before the plaintiffs had filed a motion to certify and prior to the pretrial and discovery cutoffs. The district court granted the employer’s motion, finding certification under Fed. R. Civ. P. 23(b)(3) inappropriate because individual issues predominated over common issues. Plaintiffs appealed.

The Ninth Circuit Court of Appeals held that the employer's motion to deny class certification and the district court's consideration of the motion was appropriate, because the plaintiffs could show no procedural prejudice from the timing of the motion's filing and consideration. The appellate court further ruled that the district court did not abuse its discretion in denying class certification. The district court had properly focused on whether class certification would enhance efficiency and further judicial economy, and properly concluded that resolution of the plaintiffs' claims would require inquiries into how much time each HLC spent in or out of the office and how each HLC performed his or her job in a situation where he or she had been granted almost unfettered autonomy to do the job.

Order Approving Class Action Settlement Vacated Where Trial Court Lacked Sufficient Information to Properly Evaluate the Fairness of the Settlement

Clark v. American Residential Servs., 175 Cal. App. 4th 785 (2009)

Plaintiffs filed a class action lawsuit against their employer, seeking damages and penalties for unpaid minimum and overtime wages, failure to provide meal and rest periods and other Labor Code violations. Eighteen months later, the parties attended one day of mediation and agreed to settle the matter for \$2 million, out of which each of the two named plaintiffs would receive enhancement payments of \$25,000 each and the other 2,360 class members would receive average payments of \$561.44. Twenty putative class members objected to the proposed settlement. They argued the settlement would compensate them for only about one percent of the total value of their claims and that no evidence had been presented to the court to justify the settlement. The trial court approved the settlement and the objectors appealed.

Following the recent decision in *Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App. 4th 116 (2008), the appellate court sought not to independently determine whether the settlement terms were fair, adequate, and reasonable, but rather to determine whether the trial court acted within its discretion. It found that the trial court had not acted within its

discretion, because the court did not sufficiently consider information on a core legal issue which affected the strength of the plaintiff's case, and thus could not make an independent assessment of the reasonableness of the terms of the settlement. The trial court had apparently relied on class counsel's evaluation of the class's overtime claim as having "absolutely no" value, without regard to the objectors' claim that counsel's evaluation was based on an allegedly "staggering mistake of law." The appellate court further held that the trial court abused its discretion in finding the \$25,000 enhancements for the named plaintiffs were fair and reasonable, and also erred in awarding costs greater than the maximum amount specified in the notice provided to the class.

Employee of Unlicensed Subcontractor May Assert a Wage Claim Against the General Contractor
Sanders Const. Co. v. Cerda, 175 Cal. App. 4th 430 (2009)

This case involved six laborers who worked for an unlicensed drywall subcontractor. When the subcontractor failed to pay their wages, they filed a wage claim against the general contractor. The appellate court held that the general contractor could be held liable for the wages of the workers hired by its unlicensed subcontractor. The court found that Cal. Lab. Code §2750.5 provided a basis for determining that a general contractor is the employer of both its unlicensed subcontractors and those employed by the unlicensed subcontractors, and that it would not be unfair to apply this section to wage payments. Moreover, Cal. Bus. and Prof. Code §7031, which prohibits an unlicensed contractor from recovering payment for services, did not extend to the unlicensed subcontractor's employees.

DLSE Opinion Letter Regarding Meal Periods for Hazardous Waste Drivers

The Division of Labor Standards Enforcement (DLSE) recently issued Opinion Letter 2009.06.09, discussing the application of California's meal period requirements to employees engaged in the transportation of hazardous explosive materials. Specifically, the DLSE examined whether truck drivers who could not leave their trucks unattended due to federal safety regulations would be so restricted

that any meal period would not be an off-duty meal period, and if so, whether these restrictions were such that they would qualify for an on-duty meal period.

The DLSE concluded that the restrictions imposed on the drivers during deliveries (i.e., they could not leave the truck unattended and had to stay within visual distance of the truck at all times) were such that the employees would not be considered sufficiently relieved of all duty so as to have an off-duty meal period. The DLSE noted that this result is the same regardless of whether these restrictions were imposed directly by the employer, or indirectly by federal regulations or third-parties (e.g., service stations receiving the delivery), because these restrictions ultimately were for the employer's benefit (i.e., they precluded accidents, thus avoiding liability or lawsuit). Accordingly, the DLSE concluded that hazardous material drivers who could not be relieved of all duty because of the Federal Hazardous Materials Act would not receive an off-duty meal period as provided for under Wage Order 9-2001. Thus, the drivers would be entitled to an additional hour of pay at their regular rate of compensation unless they qualified for an on-duty meal period, in which case the period would be counted as time worked.

The DLSE concluded that the application of these federal regulations may, in some circumstances, satisfy the requirements of an on-duty meal period. The DLSE reiterated that the following three requirements must be met to qualify for an on-duty meal period: (1) the nature of the work prevents an employee from being relieved of all duty; (2) the employer and employee have agreed in writing to an on-the-job paid meal period; and (3) the written agreement states that the employee may, in writing, revoke the agreement at any time. The DLSE noted that these drivers generally could not be relieved of all duties without exposing the company to liability for violating federal safety regulations or potential loss of valuable product, and it would be impossible or impractical to send another employee to relieve the driver of duties for 30 minutes. However, the DLSE stated that just because these requirements would often be met did not mean they would always be met (e.g., if the drivers were not subject to federal

regulations on a particular day, or if there was another driver or an employer-owned facility where they could park the truck and take lunch).

Applying the recent federal court decision in *McFarland v. Guardsmark*, 538 F. Supp. 2d 1209 (N.D. Cal. 2008), the DLSE also opined that these drivers, who typically worked 12-hour shifts and would be entitled to a second meal period, could take two on-duty meal periods during their shift. In other words, the Wage Orders did not require that the second meal period be an “off duty” meal period, provided the conditions for an on-duty meal period remained. Lastly, the DLSE opined that if the requirements for on-duty meal periods were met, the employer and employee could enter into a blanket agreement for on-duty meal periods, and would not have to enter into separate agreements for each meal period. The DLSE reaffirmed that these meal period agreements must state in writing that the employee may revoke the agreement, but it provided no guidance on how much notice must be provided and what the employer’s remedies would be if the employee did revoke. The full text of this Opinion Letter may be found on the DLSE’s website: <http://www.dir.ca.gov/dlse/opinionletters>. ☞

Public Sector Case Notes

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District (District), alleging the District failed to comply with California Labor Code provisions regarding payment of overtime, provision of meal breaks, and immediate payment of wages upon an employee’s termination or resignation. Johnson also alleged that the District failed to comply with the applicable Industrial Welfare Commission (IWC) wage order. The trial court granted the District’s demurrer to dismiss Johnson’s claims on the ground that the District, as a municipal corporation, is exempt from the specified Labor Code provisions and IWC wage order. The court of appeal affirmed the judgment.

The District is a municipal corporation that stores and distributes water. Under the Water Code, the District

has the authority to set employees’ compensation. Generally, Labor Code provisions only apply to private sector employees, unless they are specifically made applicable to public employees. Labor Code section 510 provides that eight hours of labor constitutes a day’s work and requires that overtime be paid for work in excess of eight hours in one workday, 40 hours in one workweek, and hours worked on the seventh day of work in a workweek. Labor Code section 512 sets forth requirements for meal periods for employees working more than five hours per day. Because neither section expressly applies to public entities, the court ruled that neither section applied to the District. The court also found that none of the IWC’s wage orders applied to the District.

Government agencies are excluded from statutes if their inclusion would infringe on their sovereign governmental powers. A statute infringes on a public entity’s sovereign powers if the statute affects the entity’s governmental purposes and functions. If Cal. Lab. Code §§ 510 and 512 applied to the District, reasoned the court, the statutes would infringe on its power to set employees’ compensation.

Labor Code sections 201, 202, and 203 require an employer to immediately pay wages to an employee upon that employee’s termination, layoff or resignation, and penalizes employers who willfully fail to pay such wages. However, Cal. Lab. Code § 220 specifically states that these sections do not apply to public employees.

PUBLIC SAFETY OFFICERS

Law Enforcement Agency Could Charge Police Officer With Misconduct and Dishonesty for Lying During Investigation

Crawford v. City of Los Angeles, 175 Cal. App. 4th 249 (2009)

James Crawford was a detective in the Los Angeles City Police Department. He was terminated after he was found guilty of six counts of misconduct. Crawford brought a petition for a writ of mandate to challenge the termination decision. The trial court found that the one-year statute of limitations was tolled for 183 days while a criminal investigation was being conducted. But the court also found that five of the six

counts of misconduct were time-barred even with the tolling. The court of appeal reversed in part.

The Public Safety Officers Procedural Bill of Rights Act (POBRA) provides for a one-year statute of limitations. The agency must complete its investigation and advise the officer of the intent to discipline within one year of the agency’s discovery of the alleged misconduct. The court of appeal found that the trial court had miscalculated the statute of limitations and tolling period and only three of the six charges were time-barred.

The POBRA tolls the statute of limitations while there is a criminal investigation of the same activity underlying the administrative investigation. Crawford argued that the tolling provision should not apply here because some of the alleged misconduct was not investigated as part of the criminal investigation. The court of appeal rejected Crawford’s argument and held that the tolling provision applies with equal force to the acts and the allegations of noncriminal misconduct which are also the subject of the criminal investigation.

Crawford also argued that the dishonesty charge was time-barred because dishonesty in denying an underlying charge does not start a new limitations period for discipline of peace officers under the POBRA. But Crawford’s false statements were made before the one-year statute of limitations expired as to the underlying misconduct. Thus, there was no danger that the city used the false statement to resuscitate a charge that was time-barred. Although Crawford was not notified of the city’s intended discipline until after the statute of limitations as to the underlying misconduct had expired, the court found that it remained a viable charge at the time of Crawford’s false statement.

Statute of Limitations Period to Notify Officer of Pending Discipline Is Tolled While Officer Is Terminated, Even if Officer Is Later Reinstated

Melkonians v. Los Angeles County Civil Service Comm’n, 174 Cal. App. 4th 1159 (2009)

Ara Melkonians was a deputy sheriff with the Los Angeles County Sheriff’s Department (Department). On March 7, 2003, he broke into his estranged

girlfriend's apartment, physically assaulted her, and threatened her. On May 27, 2003, the prosecutor indicated that he did not intend to prosecute Melkonians for the assault. Nevertheless, the Department conducted an internal affairs investigation into the March 2003 assault incident.

On August 27, 2003, Melkonians was terminated for misconduct which occurred in 2002. The Department's investigator tried to contact Melkonians for an interview regarding the assault case. Melkonians' attorney said that he was not willing to make a voluntary statement and that he could be deemed unavailable to participate in an interview. On July 15, 2004, the Department and Melkonians reached a settlement regarding the 2002 misconduct and Melkonians was reinstated.

On July 22, 2004, the Department notified Melkonians that he was going to be terminated because of the March 2003 assault incident.

Melkonians appealed the termination, and the Civil Service Commission upheld the discipline. He then filed a petition for a writ of mandate. Melkonians argued that the discipline was not timely. The trial court denied the petition, finding that the statute of limitations period was tolled while Melkonians was unemployed by the Department and unavailable for interview. The court of appeal affirmed.

The POBRA has a one-year limitations period to investigate and discipline public safety officers for misconduct, but the limitations period is tolled while a criminal investigation or prosecution is ongoing regarding the same misconduct. The limitations period is also tolled if the subject officer is incapacitated or otherwise unavailable.

Here, the court found that the limitations period was tolled until May 27, 2003, when the prosecutor decided not to file a criminal complaint. In addition, because Melkonians was not a public safety officer between the dates of August 27, 2003 and July 15, 2004, he was not entitled to the POBRA protections during that time period, even if he was later reinstated. Finally, Melkonians' counsel had told the Department that Melkonians should be considered unavailable because he refused to participate in an interview. Consequently,

the limitations period was tolled while Melkonians was unavailable, and the July 22, 2004 termination notice was timely.

Supervisor Who Went to Officer's Home After Officer Called in Sick to Confirm That Officer Was Sick Conducted an Investigation Under the POBRA

Paterson v. City of Los Angeles, 174 Cal. App. 4th 1393 (2009)

Robert and Scarlett Paterson are married and officers employed by the City of Los Angeles Police Department (City). On December 4, 2004, R. Paterson called in sick. His supervisor suspected that he was not sick and was actually abusing sick leave. The supervisor instructed Sergeant Adrian Legaspi to go to Paterson's house to confirm Paterson's status. When Legaspi arrived, the Patersons were not home. The Patersons were at a family member's house and R. Paterson was sleeping there. Legaspi called R. Paterson's cell phone. S. Paterson answered and told Legaspi that R. Paterson was at home and asleep. Legaspi then spoke to R. Paterson and R. Paterson confirmed that he was at home sleeping. Legaspi then told R. Paterson that he had made a false and misleading statement to a supervisor because he was not actually at home. Legaspi then called the supervisor and said, "Guess what . . . he's not home. I have it all on tape, the conversation."

The City suspended both of the Patersons for making false statements to a supervisor, but a Board of Rights reversed the discipline and reinstated them with back pay. The Patersons sued the City for violation of their POBRA rights. The trial court granted summary judgment in favor of the City. The court of appeal reversed.

The City argued that the POBRA did not apply because both officers were exonerated by the Board of Rights. Consequently, the Board of Rights nullified any punitive action such that the punitive action should be deemed not to have been taken. However, the court found that the POBRA's procedural rights apply when an investigation may lead to adverse consequences at some future time; further, the application of the POBRA is determined at the beginning of the action, not at its end.

Here, the court found that the sick check was not simply a routine sick check

where the supervisor only posed innocent preliminary and casual questions. The supervisor suspected wrongdoing and sent Legaspi to investigate. Legaspi reported back, "Guess what . . . he's not at home. I have it all on tape." These statements are not consistent with a routine communication, a training session, or a call to see whether an officer is okay. As the supervisor and Legaspi were seeking to confirm a suspicion of misconduct, the POBRA's provisions applied to the investigation.

DUE PROCESS

Where Employee's Notice of Appeal to the Civil Service Commission Was Untimely Because Employee's Attorney Had Only Served the Department's Attorney With the Notice, the Employee Did Not Have Good Cause to Excuse the Untimely Appeal

Munroe v. Los Angeles County Civil Serv., Comm'n, 173 Cal. App. 4th 1295 (2009)

The Los Angeles County Department of Public Works (Department) terminated Massie Munroe's employment for misconduct. The Department provided Munroe with a *Skelly* hearing (*Skelly v. State Personnel Bd.*, 15 Cal. 3d 194 (1975)), after which the Department issued her a notice of discharge. The notice stated that Munroe had a right to appeal the action and request a hearing before the Civil Service Commission. The notice stated that Munroe's "request must be sent within fifteen business days from the date on which this letter was mailed or given to you to the Civil Service Commission." The letter included the Commission's address and stated that a copy of the request should be sent to the Director of Public Works. Munroe had until December 4, 2006 to request an appeal hearing, but Munroe did not file a request with the Commission until January 29, 2007. Munroe's attorney had previously, and mistakenly, sent a request for appeal to the attorney who represented the Department during the *Skelly* meeting.

The Commission denied the request for a hearing because it was untimely. Munroe filed a petition for a writ of mandate, seeking to direct the Commission to hold an appeal hearing. The trial court granted Munroe's writ

petition. The court of appeal reversed the trial court.

The court found that the Department's notice of discharge to Munroe notified her of the appeal rights and clearly specified that a notice of appeal be sent to the Commission within 15 days. Munroe's attorney's letter to the Department's attorney did not constitute a proper filing with the Commission. The court found that the Commission's procedure for a hearing request was clear and straightforward.

Although the Commission's rules allow for an extension of time after a showing of good cause for the delay, the rules also state that the filing of a departmental grievance or an appeal with another jurisdiction shall not constitute good cause for extending the time limits for filing a petition with the Commission. The court found that the Commission did not abuse its discretion in denying the appeal hearing, and any asserted absence of prejudice was immaterial.

When Employee Was Terminated for Cause, and Employer Subsequently Also Filed an Involuntary Disability Retirement Application for Employee, Employee Was Entitled to Disciplinary Appeal Hearing

Riverside Sheriff's Ass'n v. County of Riverside, 173 Cal. App. 4th 1410 (2009)

Leisha Fauth worked as a senior deputy attorney investigator for the County of Riverside (County). A County psychologist found that Fauth was not fit for duty and should not be permitted to carry a gun because she failed to meet the minimum qualifications for psychological fitness for peace officers.

The County initiated an interactive process with Fauth, but later recognized no need to continue because there was no evidence Fauth had a disability requiring accommodation or evidence of a disability that would qualify her for retirement. Fauth repeatedly asserted that she did not have a disability. On March 17, 2007, the County terminated Fauth from employment on the ground that she was no longer qualified to perform her job duties. The County found that Fauth was not entitled to an appeal hearing because she was not being terminated for disciplinary reasons, but rather because

she was not qualified for the job. In November 2007, the County applied for involuntary disability retirement on behalf of Fauth on the ground that she had a psychiatric disability and thus was incapacitated.

Fauth filed a petition for a writ of mandate, alleging that the County failed to provide her an appeal under the Memorandum of Understanding (MOU) between the County and plaintiff Riverside Sheriff's Association, had violated the POBRA, and had violated her due process rights. The court of appeal found in favor of Fauth on all three causes of action.

The County argued that appeal of the involuntary disability retirement under PERS law (i.e., California state Public Employees' Retirement System) was Fauth's exclusive remedy. However, the court found that Fauth remained entitled to an MOU appeal hearing challenging her termination for cause, in addition to a separate appeal contesting the involuntary disability retirement. Termination for cause and involuntary disability retirement are two distinct, incompatible means of removing an employee from a job. The two means of removal cannot coexist because once an employee is terminated for cause, the employment relationship is severed and retirement benefits are no longer possible. The court found that the County had simultaneously taken two incompatible employment actions in removing Fauth from her job, and she was entitled to appeal both actions in the separate forums available for challenging each.

The POBRA provides that no punitive action shall be undertaken by a public agency against any public safety officer without providing the officer with an opportunity for administrative appeal. Here, Fauth's termination was a punitive action and she was entitled to an administrative appeal. ⁴²

drivers were employees, as defined by the Act, and directed elections. The union won the elections and was certified as the collective bargaining representative at both terminals. The employer refused to negotiate with the union, not contesting the vote but challenging the classification of the drivers as employees under the Act. The Board rejected the employer's request for review, finding that its objections had been properly addressed during the representation proceedings, and that it had violated sections 8(a)(1) and (5) of the Act by refusing to bargain with the union. The employer filed for review and the Board cross-filed for enforcement.

The court reversed. It held that the Board had improperly emphasized elements of employer control, such as the requirements to wear uniforms and conform to FedEx's grooming standards, and had not given sufficient weight to the importance of the entrepreneurial opportunities available to the drivers, such as the ability to sell, trade, or even sub-contract routes. Citing its decision in *Corporate Express Delivery Sys. v. NLRB*, 292 F.3d 777 (D.C. Cir. 2002), the court stated, "whether the putative independent contractors have 'significant entrepreneurial opportunity for gain or loss,'" prevails over competing evidence of employer control. *Id.* at 780 (quoting *Corporate Express Delivery Sys.*, 332 NLRB No. 144, at 6 (Dec. 19, 2000)). Judge Brown, writing for the majority, highlighted the significance of the drivers' ability to assign their contractual rights to others. He opined that, coupled with the ability to hire others, this right, "novel under our precedent," clearly delineated the drivers as contractors with independent agency.

Judge Garland, in a partial dissent, criticized the majority for its emphasis on entrepreneurial opportunity as a dispositive factor in the common-law agency test. Citing *Corporate Express* for the principle that entrepreneurial opportunity is only one of numerous elements used to evaluate employer

control against independence, Judge Garland also focused on the actual exercise of that opportunity. He stated that a “material number of workers must actually take advantage of an opportunity before [the NLRB] will conclude that the opportunity is significant and realistic.” 563 F.3d at 517. The Board and the union are seeking *en banc* review of the case.

**Court Reverses and Remands
Decision Concerning Use of
Employer’s E-mail System
for Section 7 Activity**

Guard Publishing Co. v. NLRB, ___ F.3d ___, 2009 WL 1930179 (D.C. Cir. 2009).

The United States Court of Appeals for the District of Columbia reversed a Board decision that Guard Publishing d/b/a the Register-Guard had properly disciplined a union employee for using work e-mail for non-work, union purposes.

Guard Publishing Co. publishes a daily newspaper, the Register-Guard, in the Eugene, Oregon area. In 1996, the Register-Guard installed a new computer system and adopted a new Communications Systems Policy (CSP) for all communications, including e-mail. The CSP prohibited employees from using their work e-mail to “solicit or proselytize for commercial ventures, religious or political causes, outside organizations, or other non-job related solicitations.”

In May and August 2000, Suzi Prozanski, a copy editor and president of the Eugene Newspaper Guild, CWA Local 37194, AFL-CIO, received several written warnings for violating the CSP with regard to three e-mails that Prozanski had sent from her work account to other union employees at their work e-mail addresses. On May 4, Prozanski sent an e-mail titled “setting it straight,” concerning a union rally held on May 1. The next day, Prozanski was disciplined for using the company’s e-mail system for union business. In August, Prozanski sent two additional e-mails to coworkers, reminding them of upcoming union events and encouraging them to participate. The employer’s human relations director gave Prozanski another disciplinary warning that Prozanski had violated the CSP by using work e-mail to spread union information. On September 5, the union filed an unfair labor practice

charge with the Board. The union alleged that the CSP violated sections 8(a)(1) and (3) of the Act because it was overly broad and discriminatorily enforced.

The Board adopted the administrative law judge’s recommendation that the CSP was not overbroad and that an employer may lawfully limit employee use of its equipment, including e-mail. The administrative law judge had also found, however, that the employer violated the Act by allowing other kinds of non-work e-mail while discriminatorily enforcing the prohibition against union e-mail. The Board adopted the recommendation as to the May 4 e-mail about the union rally, but set aside the challenge to the August e-mails. The Board reasoned that although there was evidence that the employer had allowed other non-work, non-union e-mails, such as requests for sports tickets, there was “no evidence” that the newspaper had “permitted employees to use e-mail to solicit other employees to support any group or organization.” *Guard Publishing Co.*, 351 NLRB No. 70, at 1119 (Dec 16, 2007). Because enforcement of the CSP against the August e-mails did not expressly discriminate against union communications, the disciplinary warnings did not violate section 8(a)(1). Both the union and employer sought review.

The court of appeals reversed the Board’s decision that the August e-mails warranted disciplinary action, finding that the CSP was discriminatorily enforced against union communications. Rejecting the Board’s distinction between solicitations for personal requests and organizations as a “post hoc invention,” the court focused on the express language of the CSP. Because the CSP prohibits all “non-job-related solicitations,” the court’s inquiry focused on whether the employer allowed other non-job-related solicitations with no union purpose. The court stated: “In short, neither the company’s written policy nor its express enforcement rationales relied on an organizational justification.” Because neither the CSP nor the disciplinary warnings drew any distinctions between personal or organizational solicitations, the court reasoned that the only difference between Prozanski’s e-mails and other permitted non-job-related solicitations was the union content.

**D.C. Circuit and the Board Interpret
“Perfectly Clear” Successor Rule**

S & F Market St. Healthcare LLC v. NLRB, ___ F.3d ___, 2009 WL 1851770 (D.C. Cir. 2009)

A & C Healthcare Servs., 354 NLRB No. 33 (June 8, 2009)

Two recent decisions have applied the *Burns* “perfectly clear” successor rule. See *NLRB v. Burns Int’l Security Servs.*, 406 U.S. 272 (1972).

In *S & F Market St. Healthcare LLC v. NLRB*, the Court of Appeals for the D.C. Circuit reversed a Board finding that S & F Healthcare was a *Burns* “perfectly clear” successor. The court held that the “perfectly clear” successor rule only applies when the successor employer has led employees to believe “their employment status would continue unchanged after accepting employment.”

The employer took over the Candlewood Care Center on July 1, 2004. In June 2004, the employer had distributed applications to Candlewood employees, announcing that it would interview applicants for 90-day temporary employment, and that the employer could change the conditions of employment at any time. When the employer issued offers of employment, it included language that the temporary employment would end on or before the end of the 90-day period unless the employee were offered regular employment. Offer letters also announced that temporary employees were not eligible for benefits, and that additional terms and conditions would be distributed through the employee handbook. When the employer began operations in July, ninety of the facility’s 120 employees were former Candlewood employees.

The Board rejected the administrative law judge’s finding that the employer was not a “perfectly clear” successor because it had notified employees that the terms and conditions of employment would change upon hire and that it was entitled to create initial terms and conditions of employment. 351 N.L.R.B. No. 44 (Sept. 30, 2007). The Board found that the employer had “failed to clearly announce its intent to establish a new set of conditions prior” to offering employment to Candlewood employees.

The court of appeals reversed, finding that the Board had misapplied the *Burns* exception. The court focused on the timing of the employer's announcement in June that the predecessor's employees were being hired on a temporary basis. Whereas the Board had given weight to some former Candlewood employees receiving offers of employment after the employer began managing the facility on July 1, the court found that there was substantial evidence that the employer gave notice of employment changes prior to that date. Citing the distributed application packets, interviews and employment letters, the court found the employer had not created an expectation that employment would continue with unchanged terms and conditions.

In another recent case applying the *Burns* "perfectly clear" successor rule, the Board found that A & C Healthcare Services violated sections 8(a)(1) and (5) of the Act by making unilateral changes to the terms and conditions of employment without first informing and negotiating with the union. In July, 2007, the employer purchased the predecessor's nursing home facility as the low bidder in a bankruptcy auction.

The bankruptcy court kept jurisdiction over the purchase and transfer process until the employer acquired the proper state license and replaced the predecessor as the legal owner/operator of the facility. A portion of the bankruptcy court's order reads, "The buyers are not successors of the Debtors, and the buyers shall have no successor liability as a result of purchasing any of the Debtors' facilities."

The employer became the interim operator of the facility on August 8, 2007, and informed all the employees of the predecessor that it was hiring them on a 90-day probationary basis. The nonsupervisory employees were told that they would get their regular pay but would not receive health or other benefits, and the employer announced that this action was not setting initial terms and conditions of employment. This changed the employees' wages, hours, and benefits, as set forth in a collective bargaining agreement between

the union and the predecessor employer.

On November 8, at the close of the 90-day probationary period, the employer hired all but six of the nonsupervisory/managerial employees that had been previously employed by the predecessor, and unilaterally established terms and conditions of employment. The employer admitted that the union requested that the employer recognize and bargain collectively with it, as the representative of the unit employees, but that it did not respond until almost three months later. In its response, the employer agreed to recognize the union conditionally, provided the employer was properly licensed and able to close its purchase, able to employ people directly as a healthcare employer, and that a majority of employees currently employed were previously bargaining unit employees of the predecessor. The above conditions were met sometime before January 3, 2008, when the employer recognized the union. On January 15, the employer issued an employee handbook which unilaterally established wages, hours, and working conditions that amended those it had established earlier, on November 8.

The Board held that the employer violated sections 8(a)(1) and (5) by refusing to recognize and bargain with the union prior to November 8, and that the changes made on and after November 8 to the terms and conditions of employment were unilateral. The Board did not focus on the timing issue that was highlighted in the D.C. Circuit Court case discussed above. The Board did not consider the employer's announcement on August 8 that employees were being hired only on a probationary basis as sufficient notice that the employer was setting new forms of employment and was not a "perfectly clear" successor. The Board was also unwilling to carve out a bankruptcy exception to *Burns*, particularly without any evidence that the facility was anything other than a functioning institution with proper licensing both before and after the sale. The employer argued that its purchase of the facility in bankruptcy and the governance of the successorship process by the bankruptcy court and its order

removed it from both the *Burns* line of cases and the jurisdiction of the Board. Further, the employer argued it was not "perfectly clear" that a majority of employees would remain after the probationary period, because it had a limited ability to investigate the facility it was purchasing, a function of the bankruptcy sale.

The Board accepted that bankruptcy transfers may be relevant to the profitability of a facility, but reasoned that lack of profitability does not automatically render employees less qualified or more likely to be replaced. It maintained that obligations to the union survived the bankruptcy court's order because they are mandated by the Act, rather than being simply contractual, and that even if the employer could distinguish itself from *Burns*, it still would have had a bargaining obligation. Ultimately, the Board held that the bargaining obligation attached at some point after the union requested recognition, but before the employer unilaterally adopted terms of employment.

"Shame" Campaign Against CEO Did Not Violate the Act

Local 79, Laborers Int'l Union, 354 NLRB No. 14 (April 30, 2009)

The Board affirmed an administrative law judge's findings that the union did not violate section 8(b)(1)(A) with its "shame" campaign against the CEO of Marathon Assets (Marathon), in an attempt to persuade him to pressure JMH Development (JMH) to use a union contractor. The Board also found that the union violated section 8(b)(4)(ii)(B) of the Act by threatening to picket the secondary employer's jobsite.

The jobsite at issue was a large warehouse in Brooklyn, purchased for conversion into apartments by JMH, with some of the investment supplied by Marathon. JMH hired a general contractor, which hired Breeze to do the demolition work. The union represented Breeze employees. In December 2007, JMH terminated its contracts with both the general contractor and Breeze, and set up a subsidiary to manage construction. A non-union company was hired to finish the demolition. In January 2008, union organizers threatened to picket the jobsite

unless Breeze or another union-represented company completed the demolition work.

In March 2008, the union began a campaign to “shame” the CEO of Marathon, by passing out leaflets at his office, home, a business meeting in California, and at a charity event that he attended with his wife in New York City. On March 6, union representatives approached the CEO’s spouse as she entered the charity event with her mother and son. According to the allegations, union representatives blocked her path, attempted to hand her leaflets and shouted obscenities. The next week, a Marathon employee reported that one of the leafleting union representatives told her that they “were not going anywhere soon” and that they “know his children, and where his children go to school.” Marathon alleged that these actions constituted a threat of physical action against the CEO’s family.

The Board disagreed. There was no evidence, other than the statements above, of physical action ever being considered or taken. Instead, the “shame” campaign was founded on embarrassing the CEO. Within that context, approaching his wife with leaflets and adding his children’s school as a leafleting location was neither a restraint nor a threat of violence.

The Board further held, however, that the union violated section 8(b)(4) of the Act by making unqualified threats to picket the JMH jobsite where the non-union contractor was working, without providing assurances that such picketing would be lawfully conducted to minimize its impact on neutral employers. Even without relying on the unqualified nature of the union’s threats, a violation existed based on direct evidence of the union’s unlawful secondary objective of forcing JMH to cease doing business with the non-union contractor. The Board found that the union was planning the strike to exert pressure on JMH to remove the contractor and replace it with a unionized contractor. ⁴⁷

ENDNOTES

1. 29 U.S.C. § 153(b).

Visit the Section’s Website

Those who haven’t visited the
Labor & Employment Law Section’s
website in a while are in for a surprise!

www.calbar.ca.gov/laborlaw

We’ve added news of upcoming Section events and activities and full length articles and excerpts from past issues of the Law Review. Additionally, there is a comprehensive set of “links” to websites that all labor and employment lawyers should have at their fingertips, including links to legal research sites, state and federal resources, and the official websites of the EEOC, NLRB, DLSE, DFEH, DOL, FCC, OSHA and many others.



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Karen V. Clopton is the Chief Administrative Law Judge for the California Public Utilities Commission. She has practiced labor and employment law since 1983, including her tenure with the National Labor Relations Board, private practice on behalf of management, seven years as a San Francisco Civil Service Commissioner, and her gubernatorial appointment as General Counsel for the Department of Corporations.

Message From the Chair

By Karen Valentia Clopton

REACHING EXCELLENCE AND INTEGRITY TOGETHER

As my year as Chair of the Executive Committee for the State Bar's Labor and Employment Law Section comes to a close, I wish to take this opportunity to thank all of the hard-working members of the Committee and Section who have volunteered countless hours to achieving our mission. During the Executive Committee's July meeting, we distilled our mission into a simple statement: "Provide diverse educational opportunities and perspectives regarding labor and employment law issues to our Section, the State Bar, and the general public." Over the last twelve months, we have reached this goal through webinars, regional presentations, workshops, the public sector conference, e-mail case updates, and this law review.

Every year, the Section hosts a meeting highlighting significant developments and trends in the field of labor and employment law. This year, the meeting will be held on October 23–24 at the Claremont Hotel and Spa in Berkeley, California. The title of this year's meeting is "Commemorating the 50th Anniversary of the Fair Employment and Housing Act and California's Civil Rights Year." The program will showcase the legal, social, and economic debates that are at the core of our more than 6,000 members' work. It will include MCLE programs on a variety of current topics, including the DFEH administrative process, wage and hour law, collective bargaining, EPLI, class action practice, privacy issues in the employment setting, public sector employment law, and federal and state anti-discrimination laws. This year, there will also be a tribute to legends and pioneers of the FEHA and

civil rights in California. The conference will feature several keynote speakers, as well as a wealth of distinguished panelists, including leading practitioners, scholars, and professors.

The conference is attended by a wide range of labor and employment professionals, including private practitioners, corporate in-house counsel, state and federal government representatives, and scholars. To encourage such wide participation, the cost of tickets to attend this two-day meeting is kept to a minimum. As a result, only a portion of the cost of this event is paid for with ticket sales. Corporate sponsors, law and mediation firms, and individual practitioners underwrite the rest of the cost of the program through voluntary contributions. We also have done outreach to law students and first-year lawyers to ensure greater participation by them and to encourage them to join our ranks.

The Labor and Employment Law Section has 6,426 members, making it the fourth largest section of the State Bar, after Litigation, Business, and Real Estate. Our mission is in keeping with the results of a recent State Bar survey to determine how to improve or expand the State Bar's educational courses, professional development programs, and other services and benefits. We hope that many of our members attend at least some part of our annual meeting this year, both because of the historic celebration of the 50th anniversary of California's Fair Employment and Housing Act and because of the excellent topics and presenters.

I am very proud that the Section is in great financial health, with a strong membership and superlative member benefits. My greatest hope is that we will continue our efforts to diversify the Section and eliminate bias in the legal

profession as a whole. Our grants program is an important step in fostering diversity. We solicit grants from organizations that will carry out our mission by bringing educational opportunities to under-served and under-represented members of the Bar. We also hope that participants will join our Section and develop a passion for the practice.

2009 continues to be an amazing, transformative year for our profession, the state, and the nation. We have witnessed so many milestones: the inauguration of the first President of color, the 100th anniversary of the National Association for the Advancement of Colored People, and the 50th anniversary of California's own civil rights act, the Fair Employment and Housing Act. Throughout the year, we have collaborated with many bar associations, state agencies, and other organizations, along with the Department of Fair Employment and Housing, to celebrate this important Civil Rights Year. We still have much to do, more to achieve, and goals to reach, but we can continue to reach excellence and integrity together. I look forward to seeing many of you at our annual meeting this year. I salute this year's leadership team, Vice Chair (and recently appointed FEHC Commissioner) Patti Perez, Secretary Wil Harris, Treasurer Bruce Barsook, and the Immediate Past Chair Phil Horowitz. Special thanks to Co-Editors in Chief of the Labor & Employment Law Review, Julia Lapis Blakeslee and Emily Prescott, for their dedication to excellence and diversity. Finally, I must thank the Director of the Department of Fair Employment and Housing, Phyllis Cheng, for her amazing and tireless work this year; she is a great inspiration for all of us! 

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