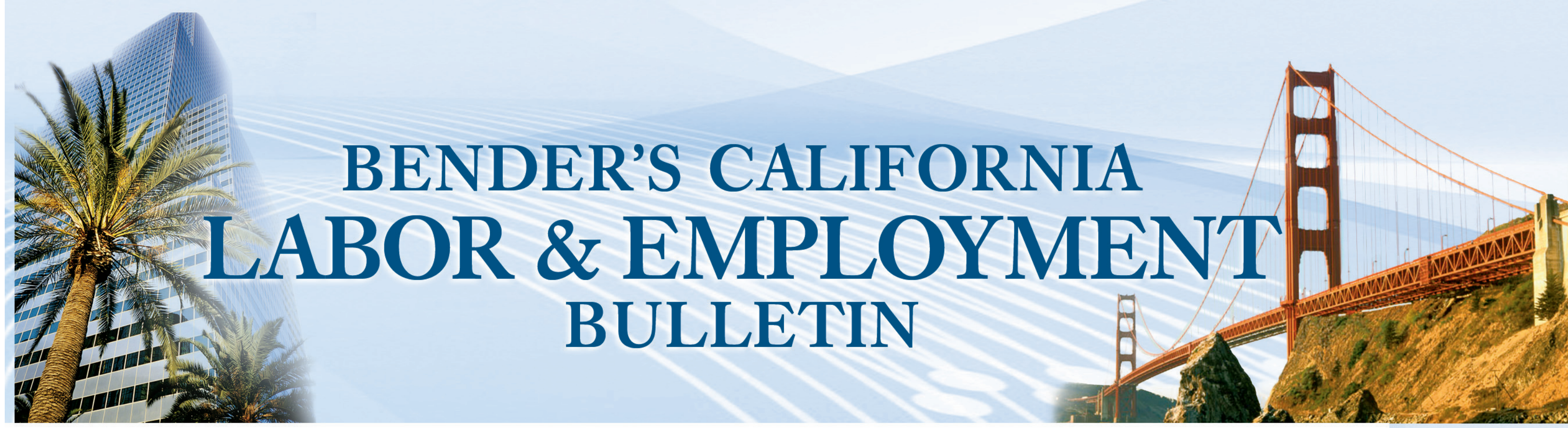

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Inside This Issue

The End of the Prudence Presumption in ERISA Stock Drop Litigation – *Fifth Third Bancorp v. Dudenhoeffer* and Its Aftermath

By Nicole A. Diller & Roberta H. Vespremi

Introduction

Last summer, the United States Supreme Court issued a much-anticipated and unanimous decision in *Fifth Third Bancorp v. Dudenhoeffer*.[1] The Court held that fiduciaries of an employee stock ownership plan ("ESOP"), which is a qualified retirement plan designed to primarily invest in employer securities, are not entitled to a "presumption of prudence" when a participant challenges decisions to acquire or hold employer stock. These "stock-drop" claims, brought as violations of the fiduciary duty of prudence under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"),[2] had become commonplace threats to ESOP fiduciaries, mitigated by holdings of seven courts of appeal that had adopted the prudence presumption.

In reversing the appellate courts, the Supreme Court held that ERISA's statutory text does not support the presumption, which it declared to be an inappropriate tool for weeding out meritless claims. It concluded that "the same standard of prudence applies to all ERISA fiduciaries, including ESOP fiduciaries, except that an ESOP fiduciary is under no duty to diversify the ESOP's holdings."[3] The Court recognized the concern that without the presumption, ESOP fiduciaries

1 134 S. Ct. 2459 (2014).

2 134 S. Ct. at 2461.

3 134 S. Ct. at 2467.

(Continued on page 145)

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that may have access to nonpublic company information have experienced tension between the prohibitions on insider trading and protecting the value of plan asserts. The Court determined that the best way to address this matter, as well as the concern that extinguishing the presumption will undercut Congress' intent to encourage ESOPs, is "through careful, context-sensitive scrutiny of a complaint's allegations" under the pleading standards established in *Twombly* and *Iqbal*.[4] To that end, the Supreme Court offered guidance for analyzing the plausibility of ERISA stock-drop allegations on a motion to dismiss.

ERISA Stock-Drop Lawsuits

Participants in ERISA stock-drop lawsuits generally allege that plan fiduciaries breached their ERISA duties of prudence and loyalty by permitting participants to invest in employer stock. These lawsuits are often filed as companion suits to federal securities fraud actions. Typically, ERISA stock-drop actions involve two core claims: (1) a prudence claim - a participant alleges that employer stock became an imprudent investment because of adverse circumstances concerning the employer that should have caused the fiduciary to divest or cease future acquisitions of employer stock; and (2) a misrepresentation claim - a participant alleges that plan fiduciaries knew or should have known about the circumstances adversely affecting the company, and that they breached their fiduciary duties by affirmatively misleading or failing to warn participants about the risks.

Moench Presumption of Prudence

Through ERISA and various provisions of the Internal Revenue Code, Congress chose not only to encourage employers to offer employee pension plans, but also to encourage ownership of employer stock in the pension plans. Via specific provisions in ERISA for individual account plans that hold employer stock, the general requirement in ERISA that holdings be diversified (to spread out risk) are not applicable to ESOPs' employer stock holdings.[5] Following this, ERISA's prudence requirement does not apply to such employer stock holdings to the extent that the prudence requirement requires diversification.[6]

In 1995, the Third Circuit Court of Appeals became the first appellate court to adopt the presumption of prudence in *Moench v. Robertson*.[7] In *Moench*, the Third Circuit held that a fiduciary's decision to hold or acquire employer stock is presumptively prudent.[8] A plaintiff could defeat the presumption solely by demonstrating that plan fiduciaries abused their discretion through investing in or holding employer stock when they knew or should have known that the employer was on the brink of collapse (or in other dire circumstances).[9]

Following *Moench*, six additional federal Courts of Appeal (Second, Fifth, Sixth, Seventh, Ninth, and Eleventh Circuits) reviewed the issue of the

4 134 S. Ct. at 2470-71.

5 Under ERISA, qualified plans generally are not permitted to acquire or hold employer securities in excess of 10 percent of plan assets. ERISA §§ 406(a)(1)(E) & (a)(2) and 407(a)(2). ERISA exempts eligible individual account plans from that 10 percent limitation and other investment diversification rules. ERISA §§ 404(a)(1)(C) & (a)(2), 407(b)(1). Because an ESOP is an eligible individual account plan under ERISA § 407(d)(3), it can hold employer securities in excess of 10 percent of plan assets if the plan document permits.

6 ERISA § 1104(a)(2).

7 62 F.3d 553 (3d Cir. 1995).

8 62 F.3d at 560.

9 *See*, *e.g.*, Kirschbaum v. Reliant Energy, Inc., 526 F.3d 243, 255-56 (5th Cir. 2008) (affirming summary judgment for defendant when no evidence showed that the company's "viability as a going concern was ever threatened, nor that [its] stock was in danger of becoming essentially worthless"); White v. Marshall & Ilsley Corp., 714 F.3d 980 (7th Cir. 2013) (dismissing plaintiffs' complaint, in part, because "plaintiffs make no allegations sufficient to indicate that [the company's] circumstances were either dire or nearing collapse").

presumption of prudence and adopted it.[10] The courts, however, diverged on key issues, including: (1) the type of plan language concerning the plan's investment in company stock needed to trigger the presumption of prudence (i.e., mandatory, permissive, or a mix); (2) the factual circumstances needed to overcome the presumption; and (3) whether the presumption applied at the motion to dismiss stage. Despite the differences, the *Moench* presumption served as a powerful defense tool utilized by defendants.

Fifth Third Bancorp v. Dudenhoeffer

District Court Proceedings[11]

Fifth Third Bancorp ("Fifth Third"), a large financial services firm, sponsored a defined contribution retirement plan under which participants made contributions to an individual account and, through a menu of preselected options, directed the investment of their contributions. There were 20 options on the menu, with one being the Fifth Third stock fund, held in an ESOP component within the plan. Under the plan, the company matched the first 4 percent of an employee's contributions and directed them to the ESOP. An employee could change the investment of the match to other investments on the menu.

During the relevant period, Fifth Third allegedly switched from a conservative to a predominately subprime lender, which plaintiffs contended exposed Fifth Third's loan portfolio to increased risk of default. Fifth Third also allegedly failed to disclose the impact of the switch on the company (and its stock) or provided misleading disclosures. During the period at issue, Fifth Third's stock dropped by 74 percent.

Employee plan participants ("Plaintiffs") filed a putative class action lawsuit under ERISA, claiming that Fifth Third, its CEO and members of the plan committee ("Defendants") breached their fiduciary duties by (1) imprudently maintaining a large investment in company stock and continuing to offer it on the plan's menu of investment options, and (2) failing to provide accurate and complete information to plan participants about the company and the risks of investing in its stock.

Defendants moved to dismiss. The district court granted their motion, holding that: (1) whether company stock was an ESOP is a question appropriate for consideration on a motion to dismiss; (2) application of the *Moench* presumption is also appropriate on a motion to dismiss because a fiduciary breach claim involving an ESOP will only be considered plausible if Plaintiffs pled facts sufficient to overcome the presumption; and (3) Plaintiffs' complaint failed to allege sufficient facts to overcome the presumption of prudence, because the company's future was never in serious doubt. The district court also found Plaintiffs' disclosure claims flawed, stating that the incorporation of the company's Securities Exchange Commission filings, which allegedly contained misstatements and omissions, in the summary plan description was not done in a fiduciary capacity.

Sixth Circuit Court of Appeals Opinion[12]

The Sixth Circuit reversed the district court, concluding that while a plan fiduciary's decision to invest in company stock is subject to a presumption of prudence, a plaintiff can rebut that presumption if he or she can show that a prudent fiduciary in similar circumstances would have made a different decision. The court also found that the presumption does not apply at the pleadings stage because it is not considered an additional pleading requirement. The Sixth Circuit determined that Plaintiffs had sufficiently pled: (1) a breach (Fifth Third's subprime lending activity made continued investment in company stock imprudent); (2) harm (significant stock drop); and (3) causation (a reasonable fiduciary would have made different investment decisions after an investigation). Finally, the court found that the incorporation of securities filings into the summary plan description was a fiduciary act.

United States Supreme Court Opinion[13]

The Supreme Court granted Fifth Third's petition for certiorari on the issue of whether the Sixth Circuit erred in its application of the presumption of prudence. The Court declined to address Plaintiffs' disclosure claim. The Court held that: "[T]he same standard of prudence applies to all ERISA fiduciaries, including ESOP

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10 In re Citigroup ERISA Litigation, 662 F.3d 128 (2d Cir. 2011); Kirschbaum v. Reliant Energy, Inc., 526 F.3d 243 (5th Cir. 2008); Kuper v. Iovenko, 66 F.3d 1447 (6th Cir. 1995); White v. Marshall & Ilsley Corp., 714 F.3d 980 (7th Cir. 2013); Quan v. Computer Sciences Corp., 623 F.3d 870 (9th Cir. 2010); Lanfear v. Home Depot, Inc., 679 F.3d 1267 (11th Cir. 2012).

11 Dudenhoeffer v. Fifth Third Bancorp, 757 F. Supp. 2d 753 (S.D. Ohio 2010).

12 Dudenhoeffer v. Fifth Third Bancorp, 692 F.3d 410 (6th Cir. 2012).

13 Fifth Third Bancorp v. Dudenhoeffer, 134 S. Ct. 2459 (2014).

fiduciaries, except that an ESOP fiduciary is under no duty to diversify the ESOP's holdings."[14]

The Court further concluded that (1) plan sponsors cannot reduce or waive the prudence standard by "hard wiring" investment in company stock; (2) the prudence presumption "is an ill-fitting means" to protect ESOP fiduciaries from conflicts with insider trading issues, and that ERISA cannot and does not require fiduciaries to violate securities laws; and (3) the presumption was not an appropriate means to "weed out" meritless lawsuits, which can be better accomplished through scrutiny of a complaint's allegations.[15]

ERISA Stock-Drop Litigation After *Dudenhoeffer*

Harris v. Amgen[16]

Per the Supreme Court's order, the Ninth Circuit reconsidered in light of *Dudenhoeffer* its ruling in *Harris v. Amgen*,[17] which allowed fiduciary breach claims to proceed against two retirement plans. In *Amgen*, plaintiff employees alleged that the company, its Board of Directors, and the plan fiduciary committee ("Defendants") acted imprudently and, therefore, violated their duty of care under ERISA by permitting the plans at issue to purchase and hold Amgen stock as a retirement savings option, when they knew, or should have known, that the stock price was artificially inflated.[18] The Ninth Circuit reaffirmed its earlier decision denying Defendants' motion to dismiss.

In the new decision, the Ninth Circuit held that whether company stock is a good investment is irrelevant when the stock price is artificially inflated. The panel further determined that Plaintiffs had adequately alleged that Defendants violated their duty of loyalty and care under ERISA by not providing material information concerning investment alternatives to plan participants. The panel concluded that it was "at least plausible" that Defendants could have removed the Amgen Stock Fund from the list of investment options available to the plans "without causing undue harm to plan participants."[19]

Gedek v. Perez

In Gedek v. Perez, Plaintiffs were participants and beneficiaries of the Savings and Investment Plan of Eastman Kodak Company ("SIP") and the Eastman Kodak Stock Ownership Plan ("ESOP") (collectively, the "Plans") brought an action against the administrators and fiduciaries of the Plans alleging that they violated ERISA by failing to prudently manage the Plans' assets.[20] Specifically, Plaintiffs alleged that Defendants acted imprudently by continuing to invest assets of the Plans in Kodak stock after "it became obvious that Kodak was headed for bankruptcy, and its stock was going to plummet in value."[21] Defendants brought motions to dismiss under Federal Rule of Civil Procedure 12(b)(6).

In assessing Defendants' motions, the district court recognized the Supreme Court's rejection of the presumption of prudence, but distinguished *Dudenhoeffer* on the basis that Kodak's stock had been on a decline for a number of years and was not alleged to be overvalued like the stock at issue in *Dudenhoeffer*. However, based on the public documentation of Kodak's "slide toward bankruptcy," the district court could not rule at the pleading stage that Plaintiffs failed to state a claim as to the ESOP because "a reasonable factfinder could conclude that at some point during the class period, the ESOP fiduciary should have stepped in and, rather than blindly following the plan directive to invest primarily in Kodak stock, shifted the plan's assets into more stable investments, as permitted by the plan document."[22] As to the SIP, the district court also found that Plaintiffs had adequately alleged that Defendants violated their duty to act prudently by continuing to offer Kodak stock as an investment option. The district court, therefore, permitted all claims to proceed and denied Defendants' motions.

Tatum v. RJR Pension Investment Committee

In Tatum v. RJR Pension Investment Committee, the Fourth Circuit partially vacated a district court ruling that fiduciaries of RJR's 401(k) plan were not liable for selling stock of a subsidiary before its stock price rose dramatically.[23]

In the complaint, Plaintiffs centrally alleged that Defendants breached their fiduciary duties under ERISA

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14 *Dudenhoeffer*, 134 S. Ct. at 2467.

15 134 S. Ct. at 2469-70.

16 770 F.3d 865 (9th Cir. 2014).

17 717 F.3d 1042 (9th Cir. 2013).

18 770 F.3d at 874.

19 770 F.3d at 877-78.

20 No. 12-CV-6051L, 2014 U.S. Dist. LEXIS 174338 (W.D.N.Y. Dec. 17, 2014).

21 2014 U.S. Dist. LEXIS 174338, at *8.

22 2014 U.S. Dist. LEXIS 174338 at *26-29.

23 761 F.3d 346 (4th Cir. 2014).

when two funds held by the plan were liquidated ''on an arbitrary timeline without conducting a thorough investigation, thereby causing a substantial loss to the plan.''[24] The district court found that Defendants did not act in a procedurally prudent fashion and, as a result, the burden of proof shifted to Defendants to establish that their conduct did not harm plan participants. However, the court concluded that Defendants had met that burden by establishing that a reasonable and prudent fiduciary *could* have made the same decision after performing a proper investigation.

On appeal, the Fourth Circuit found that the district court applied the wrong legal standard in assessing Defendants' liability. The appellate court noted that the burden on the Defendants was ''to prove that despite [their] imprudent decision-making process, [their] ultimate investment decision was 'objectively prudent.' ''[25] In order to determine if a decision is ''objectively prudent,'' the court explained, the standard to be applied is whether a ''hypothetical prudent fiduciary *would* have made the same decision'' had it ''undertaken a proper investigation.''[26] Accordingly, the Fourth Circuit reversed and remanded the case for further proceedings under the appropriate standard.[27]

What Plan Sponsors Should Consider Post-*Dudenhoeffer*

In response to *Dudenhoeffer*, plan sponsors may wish to reevaluate the pros and cons of offering employer stock in their pension plans. While *Dudenhoeffer* has favorable language making the pleading of a stock-drop case subject to strong plausibility requirements, the impact of the decision continues to unfold in the lower courts giving rise to uncertainty as to the standards to which ESOP fiduciaries will be held until the case percolates through the courts.

Nicole Diller is a partner in Morgan Lewis' Labor and Employment Practice Group who specializes in ERISA litigation and related counseling.

Roberta Vespremi is an associate in Morgan Lewis' Labor and Employment Practice Group.

24 761 F.3d at 351.

25 761 F.3d at 363.

26 761 F.3d at 363-64 (emphasis added).

27 761 F.3d at 368.

WAGE & HOUR ADVISOR: Ninth Circuit Asks California Supreme Court to Clarify "Day of Rest" Requirements

By Aaron Buckley

Introduction

On February 19, 2015, the Ninth Circuit Court of Appeals asked the California Supreme Court for guidance on the proper interpretation of California's "Day of Rest" statutes. The state high court's answers to those questions could have a major impact on California businesses and their employees, and could expose employers to class action lawsuits for past practices they had every reason to believe were lawful.

The Statutes at Issue

California Labor Code section 551 provides: "Every person employed in any occupation of labor is entitled to one day's rest therefrom in seven."

California Labor Code section 552 provides: "No employer of labor shall cause his employees to work more than six days in seven."

California Labor Code section 556 provides: "Sections 551 and 552 shall not apply to any employer or employee when the total hours of employment do not exceed 30 hours in any week or six hours in any one day thereof."

Mendoza v. Nordstrom, Inc.[1]

Two former Nordstrom employees filed a proposed class action on behalf of themselves and a class of similarly situated hourly Nordstrom employees, alleging that on a combined total of four occasions, Nordstrom violated California law by failing to provide them with one day's rest in seven.[2] Here are the key facts as determined by the trial court:

- None of the four occasions included seven consecutive days within the same workweek.[3]
- All four occasions included days on which the employees worked less than six hours.[4]
- On each of the four occasions, the employees were not originally scheduled to work more than six consecutive days, but agreed to do so after being asked to fill in for other employees.[5]

After a bench trial, the district court granted judgment to Nordstrom, interpreting the relevant statutes as follows: (1) Section 551 applies on a "rolling" basis to *any* consecutive seven-day period, rather than by the workweek; (2) Section 556 operates as an exemption from Section 551 when, as here, each of the seven days of consecutive work included at least one day when the employee worked less than six hours; and (3) even if the exemption did not apply, Nordstrom did not "cause" the employees to work more than seven consecutive days and, therefore, did not violate Section 552 because Nordstrom did not coerce the employees into working more than seven consecutive days; they waived their rights by voluntarily accepting additional shifts.[6] The employees appealed.[7]

Faced with the task of determining the precise meaning of each of the three statutes, the Ninth Circuit found they were unclear, that both the employees and Nordstrom had plausible arguments in support of their differing interpretations, and that no legislative history or appellate decision was available to provide definitive guidance.[8] Recognizing that its decision would have "profound legal, economic, and practical consequences for employers and employees throughout the state of California,"[9] the court certified the following three questions to the California Supreme Court:

(A) California Labor Code section 551 provides that "[e]very person employed in any occupation of labor is entitled to one day's rest therefrom in seven." Is the required day of rest calculated by

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1 778 F.3d 834 (9th Cir. Feb. 19, 2015).

2 778 F.3d at 837-38.

3 778 F.3d at 838 & n.1.

4 778 F.3d at 837.

5 778 F.3d at 837.

6 778 F.3d at 838.

7 778 F.3d at 838.

8 778 F.3d at 838-41.

9 778 F.3d at 841.

the workweek, or is it calculated on a rolling basis for any consecutive seven-day period?

(B) California Labor Code section 556 exempt employers from providing such a day of rest "when the total hours of employment do not exceed 30 hours in any week *or six hours in any one day thereof.*" (Emphasis added.) Does that exemption apply when an employee works less than six hours in *any one* day of the applicable week, or does it apply only when an employee works less than six hours in *each day* of the week?

(C) California Labor Code section 552 provides that an employer may not "cause his employees to work more than six days in seven." What does it mean for an employer to "cause" an employee to work more than six days in seven: force, coerce, pressure, schedule, encourage, reward, permit, or something else?[10]

The state's high court has discretion to grant or deny the request, and "may consider whether resolution of the question is necessary to secure uniformity of decision or to settle an important question of law, and any other factor the court deems appropriate."[11]

Conclusion

Given the importance of this issue to California employers, it seems a safe bet the California Supreme Court will grant the Ninth Circuit's request to establish a uniform, state-wide interpretation of the day of rest statutes. What seems odd to many observers is the fact that until the Ninth Circuit certified these questions, there seemed to be widespread agreement that (1) the "one day of rest in seven" applies to seven days *within the same workweek*, and not to any "rolling" seven-day period; (2) the Section 556 exemption applies in any week when an employee works less than six hours on any *one day*; and (3) to "cause" an employee to work more than six days in seven means to "require" the employee to do so. As a result, California employers have generally set schedules based on workweeks, and many employers - especially in retail and hospitality industries - have felt comfortable allowing employees to swap shifts, with the result that many employees often work more than six consecutive days.

If the California Supreme Court interprets the day of rest statutes in a manner different from the interpretations that have prevailed for decades, many California employers can expect to be on the receiving end of class-action lawsuits based on their past practices, and may no longer allow employees the flexibility to swap shifts. In the long run, that could result in far less flexibility, fewer hours, and lower incomes for employees.

Aaron Buckley is a partner at Paul, Plevin, Sullivan & Connaughton LLP in San Diego. He represents employers in cases involving wage and hour, discrimination, wrongful termination and other issues. The bulk of Mr. Buckley's practice is devoted to the defense of wage and hour class actions.

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10 778 F.3d at 837.

11 Cal. Rules of Court 8.548(f)(1).

High Court Affirms Right of Federal Air Marshal to Sue as Whistleblower

By N. Peter Lareau

Introduction

On July 26, 2003, the Department of Homeland Security (DHS) issued a confidential advisory concerning a potential plot by al Qaeda to attack passenger flights in the United States and elsewhere using suicide hijackings and bombings to destroy aircraft in flight and strike ground targets. The Transportation Security Administration (TSA) briefed all air marshals about the hijacking plot, informing them, among other things, that the hijackers were planning to smuggle weapons in camera equipment or children's toys through security screens in foreign countries, and then fly into airports in the United States that didn't require security screening, board U. S. flights, overpower the crew or the air marshals, and fly the planes into East Coast targets.

Shortly after issuing this briefing, TSA cancelled all overnight air marshal missions from Las Vegas until early August 2003. Robert MacLean, an air marshal stationed in Las Vegas, believed, in light of the DHS advisory, that the cancellations were dangerous and illegal because federal law required TSA to assign air marshals on every high security risk flight. MacLean approached his supervisors, voicing his concerns. Eventually, he informed a reporter for MSNBC about the problem, and MSNBC published a story. When TSA discovered that MacLean had disclosed the information on which the story was based, it terminated his employment.

Federal law generally provides whistleblower protections to an employee who discloses information revealing "any violation of any law, rule, or regulation," or "a substantial and specific danger to public health or safety."[1] An exception exists, however, for disclosures that are "specifically prohibited by law."[2] After he was fired, MacLean filed suit against TSA alleging his termination violated the law protecting whistleblowers. Although the Ninth Circuit and, later, the Merit Service Protection Board (MSPB), concluded that MacLean's disclosures were not protected by law, the Federal Circuit ruled that they were, and the Supreme Court affirmed. This article examines the Court's reasoning.

Facts

In July 2003, all federal air marshals received a briefing from the TSA that there was a " 'potential plot' to hijack U.S. Airliners." Soon after that briefing, however, the TSA sent an unencrypted text message to the Marshals' cell phones cancelling all missions on flights from Las Vegas until early August. Federal Air Marshal Robert MacLean was concerned that cancelling those missions during a hijacking alert was dangerous and that the cancellations were illegal, given that federal law required the TSA to put an air marshal on every flight that "present[s] high security risks,"[3] and also provided that "nonstop, long distance flights, such as those targeted on September 11, 2001, should be a priority."[4] MacLean voiced his concerns to TSA supervisory personnel and, when he did not receive a satisfactory response, told an MSNBC reporter. MSNBC published an article criticizing the directive, and the TSA withdrew it after several members of Congress joined in the criticism.

In 2004, MacLean appeared on NBC Nightly News in disguise to criticize the TSA dress code, which he believed allowed Marshals to be easily identified. However, someone from the TSA recognized his voice and, during the investigation that ensued, MacLean admitted that he had revealed the cancellation directive to an MSNBC reporter. Eventually, MacLean was removed from his position because, according to TSA, his contact with the MSNBC reporter constituted an unauthorized disclosure of sensitive security information (SSI). Although the TSA had not initially labeled the text message as SSI when it was sent, it subsequently issued an order stating that its content was SSI.

History Below

Ninth Circuit and Merit Systems Protection Board

MacLean's challenge of the SSI order was rejected by the Ninth Circuit,[5] which held that substantial evidence supported designating the text message as SSI under the

1 5 U.S.C. § 2302(b)(8)(A).

2 5 U.S.C. § 2302(b)(8)(A).

3 49 U.S.C. § 44917(a)(2).

4 49 U.S.C. § 44917(b).

5 MacLean v. Dep't of Homeland Sec., 543 F.3d 1145 (9th Cir. 2008).

applicable regulations, and that the TSA did not engage in retroactive action because it "applied regulations . . . in force in 2003"[6] to determine that the text message was SSI. MacLean than challenged his removal before the MSPB, arguing that his disclosure of the text message was protected under the Whistleblower Protection Act of 1989 (WPA).[7]

The WPA prohibits adverse employment actions against a federal employee:

> because of any disclosure of information by an employee . . . which the employee . . . reasonably believes evidences . . . a substantial and specific danger to public health or safety, if such disclosure is not specifically prohibited by law . . . .[8]
>
> The MSPB held that the disclosure of the text message did not qualify for WPA protection because it was directly prohibited by 49 U.S.C. § 40119.[9]

Decision of the Federal Circuit

On appeal, the Federal Circuit reversed and remanded.[10] Before the Federal Circuit, MacLean argued that the information that he disclosed was protected under the WPA because he reasonably believed that the cancellation of the air marshals' missions constituted a substantial and specific danger to public safety and that the disclosure was not "prohibited by law." More specifically, MacLean argued that the statute relied upon by the TSA for its assertion that disclosure was prohibited by law - the Aviation and Transportation Security Act (ATSA) - does not prohibit disclosure.

ATSA provides in relevant part:

> the Secretary of Transportation shall prescribe regulations prohibiting disclosure of information obtained or developed in ensuring security under this title if the Secretary of Transportation decides disclosing the information would . . . be detrimental to transportation safety.[11]

MacLean argued that the Board erroneously concluded that the ATSA's mandate to "prescribe regulations prohibiting disclosure" of certain kinds of information is a specific prohibition under the WPA because the phrase "specifically prohibited by law" in the WPA requires explicit statutory language that identifies specific classes of information that may not be disclosed. The TSA countered that MacLean violated a regulation promulgated pursuant to an express legislative directive in the ATSA, and that made his disclosure "specifically prohibited" by a statute.

The Federal Circuit agreed with MacLean that the ATSA did not "specifically prohibit" the disclosure:

> The ATSA's plain language does not expressly prohibit employee disclosures, and only empowers the Agency [TSA] to prescribe regulations prohibiting disclosure of SSI "if the Secretary decides disclosing the information would . . . be detrimental to public safety." Thus, the ultimate source of prohibition of Mr. MacLean's disclosure is not a statute but a regulation, which the parties agree cannot be "law" under the WPA.[12]

Although concluding the language of the ATSA was not sufficiently specific to qualify as prohibition "by law" within the meaning of the WPA, the court did recognize that "[r]egulations promulgated pursuant to Congress's express instructions would qualify as specific legal prohibitions."[13] In other words, if Congress, in the ATSA, had incorporated sufficiently detailed criteria with regard to the type of information as to which the Secretary of Transportation could impose disclosure prohibitions by regulation, such regulations would qualify as disclosures prohibited by law within the meaning of the WPA. However:

> given the clarity of the statutory language and legislative intent behind the WPA's specificity requirement, the parameters set by Congress are not enough to push the ATSA over that threshold.[14]
>
> Accordingly, the Federal Circuit vacated the Board's decision remanded for a determination of whether MacLean entertained a reasonable belief that cancellation of the air marshal missions presented a substantial and specific danger to public health or safety.

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6 543 F.3d at 1152.

7 5 U.S.C. § 2302(b)(8).

8 5 U.S.C. § 2302(b)(8).

9 MacLean v. Dep't of Homeland Sec., 2011 M.S.P.B. 70, at *1 (2011). As noted in the Supreme Court's opinion, the provisions of 49 U.S.C. § 40119 relied upon by the MSPB has been recodified at 49 U.S.C. § 114(r)(1).

10 MacLean v. Dep't of Homeland Sec., 714 F.3d 1301 (Fed. Cir. 2013).

11 49 U.S.C. § 40119(b)(1) (2009).

12 *MacLean*, 714 F.3d at 1309 (citing 49 U.S.C. § 40119(b)).

13 714 F.3d at 1310.

14 714 F.3d at 1310.

On May 19, 2014, the Supreme Court granted TSA's petition for writ of certiorari[15] and affirmed.[16]

Decision of the Supreme Court

Whistleblower Protection Act (WPA)

In Part II(A)(1) of its opinion, the Court succinctly describes the issue before it and its answer:

> In 2003, the TSA's regulations prohibited the disclosure of "[s]pecific details of aviation security measures . . . [such as] information concerning specific numbers of Federal Air Marshals, deployments or missions, and the methods involved in such operations." 49 CFR § 1520.7(j). MacLean does not dispute before this Court that the TSA's regulations prohibited his disclosure regarding the canceled missions. Thus, the question here is whether a disclosure that is specifically prohibited by regulation is also "specifically prohibited by law" under Section 2302(b)(8)(A). (Emphasis added.)

The answer is no.[17]

Citing three separate subsections of Section 2302 as examples, the Court observed that Congress repeatedly used the phrase "law, rule, or regulation" when describing what is permitted or prohibited under Section 2302, but did not do so in the statutory language relied upon by TSA to support the discharge of MacLean. Instead, the statutory language at refers only to disclosures prohibited by "law."[18] And "Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another[,]" suggesting "that Congress meant to exclude rules and regulations."[19]

The Court found that this interpretative canon applied with particular force in the case before it for two reasons:

> First, Congress used "law" and "law, rule, or regulation" in close proximity - indeed, in the same sentence. . . . Second, Congress used the broader phrase "law, rule, or regulation" repeatedly - nine times in Section 2302 alone.[20]

The Court also felt that interpreting the statute in manner urged by TSA would serve to defeat the intent of the statute:

> If "law" included agency rules and regulations, then an agency could insulate itself from the scope of [the WPA] merely by promulgating a regulation that "specifically prohibited" whistleblowing. But Congress passed the whistleblower statute precisely because it did not trust agencies to regulate whistleblowers within their ranks.

> The Court concluded, therefore, that MacLean's disclosure was not specifically prohibited by law within the meaning of the WPA.

TSA argued to the Court that, while some regulations are not "laws," others - specifically "legislative regulations" - do constitute "laws." In making this argument TSA relied upon the Court's decision in *Chrysler Corp. v. Brown*,[21] in which the Court held that legislative regulations generally fall within the meaning of the word "law" absent a clear showing of contrary Congressional intent. The Court agreed with TSA's interpretation of *Chrysler* but found the clear showing of contrary intent in Congress' use of the word "law" in close proximity of the phrase "law, rule, or regulation."[22]

TSA next argued that the word "law," as used in the WPA, included regulations "promulgated pursuant to an express congressional directive." The Court found the argument unpersuasive, noting, first, that TSA could not find a dictionary definition, statute, or case that had interpreted "law" to include regulations adopted pursuant to the direction of Congress; and, second, that TSA had specifically renounced that interpretation before the Court of Appeals.[23]

Aviation and Transportation Security Act (ATSA)

Having concluded that TSA could not succeed under the WPA, the Court turned its attention to TSA's argument that MacLean's disclosures were prohibited by the ATSA, itself. The ATSA provides in relevant part that TSA:

> shall prescribe regulations prohibiting the disclosure of information obtained or developed in

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15 Dep't of Homeland Sec. v. MacLean, 134 S. Ct. 2290, 189 L. Ed. 2d 172 (U.S. 2014).

16 Dep't of Homeland Sec. v. MacLean, No. 13-894, 2015 U.S. LEXIS 755 (Jan. 21, 2015). At the opening of its opinion the Court noted the ATSA's complicated history and the fact that the provisions previously codified at 49 U.S.C. § 40119(b)(1) (the reference used by the Federal Circuit in its opinion) are now codified at 49 U.S.C. § 114(r)(1) - the reference that is used by the Court.

17 2015 U.S. LEXIS 755, at *13.

18 2015 U.S. LEXIS 755, at *14.

19 2015 U.S. LEXIS 755, at *14.

20 2015 U.S. LEXIS 755, at *14.

21 441 U.S. 281 (1979).

22 *MacLean*, 2015 U.S. LEXIS 755, at *17.

23 2015 U.S. LEXIS 755, at *18-19.

> carrying out security . . . if the Under Secretary decides that disclosing the information would . . . be detrimental to the security of transportation.[24]

Although acknowledging that the statutory language did not expressly prohibit anything, indeed *authorized* the Under Secretary to prescribe regulations, TSA contended that the ATSA prohibited MacLean's disclosure "by imposing a "legislative mandate" on the TSA to promulgate regulations to that effect."[25] The Court rejected the argument because the statutory authorization vested too much discretion in the Under Secretary to determine what is "detrimental to the security of transportation." It stated:

> when Section 114(r)(1) gave the TSA the discretion to prohibit the disclosure of information, the statute did not create a prohibition—it gave the TSA the power to create one. And because Section 114(r)(1) did not create a prohibition, MacLean's disclosure was not "prohibited by law" under Section 2302(b)(8)(A), but only by a regulation issued in the TSA's discretion.[26]

Policy Argument

Finally, TSA argued that providing whistleblower protection to individuals like MacLean would "gravely endanger public safety." While conceding the legitimacy of the argument, the Court held that it was not its role to affirmatively address those concerns, but that such concerns could be address by either Congress or the President (via Executive Order).[27] Indeed, the Court states that "Congress could also exempt the TSA from the requirements of Section 2302(b)(8)(A) entirely,"[28] and that the President could "entirely duplicate" TSA's regulations, and if he did so, "[s]uch an action would undoubtedly create an exception to the whistleblower protections found in Section 2302(b)(8)(A)."[29]

Dissenting Opinion

Justice Sotomayor, in a dissenting opinion joined by Justice Kennedy, disagrees with the majority opinion's conclusion that 49 U. S. C. § 114(r)(1), itself, did not prohibit MacLean's disclosure. In doing so, she disagrees with the majority's conclusion that the discretion vested in the Under Secretary to determine what information would be detrimental to the security of transportation precludes enforcement of the regulation promulgated by TSA. She points out that the ASTA *requires* TSA to prevent disclosure of information that Congress intended to prohibit and that TSA's: "discretion pertains only to identifying whether a particular piece of information falls within the scope of Congress' command." From a practical point of view, she notes that Congress could not be expected to identify with particularity each piece of information, disclosure of which would be detrimental to public safety.[30] In summary, the dissent states:

> [W]ith Section 114(r)(1), Congress has required agency action that would preclude the release of information "detrimental to the security of transportation." In so doing, Congress has expressed its clear intent to prohibit such disclosures. I would respect its intent, and hold that a disclosure contravening that mandate is "prohibited by law" within the meaning of the WPA.[31]

Finally, the dissent provides a blueprint for the action necessary to avoid the results of the majority's decision:

> The Court's conclusion that Section 114(r) does not itself prohibit any disclosures depends entirely on the statutory language directing the agency to "prescribe regulations," and providing that the agency will "decid[e]" what information falls within the statue's purview. From all that appears in the majority opinion, then, this case would likely have turned out differently if Section 114(r) instead provided: "The disclosure of information detrimental to the security of transportation is prohibited, and the TSA shall promulgate regulations to that effect," or "The Under Secretary shall prescribe regulations prohibiting the disclosure of information detrimental to the security of transportation; and such disclosures are prohibited." I myself decline to surrender so fully to sheer formalism, especially where transportation security is at issue and there is little dispute that the disclosure of air marshals' locations is potentially dangerous and was proscribed by the relevant implementing regulation. In so surrendering, however, the Court would appear to have enabled future courts and Congresses to avoid easily the consequences of its ruling, and

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24 49 U.S.C. § 114(r)(1)(c).

25 *MacLean*, 2015 U.S. LEXIS 755, at *20.

26 2015 U.S. LEXIS 755, at *23.

27 2015 U.S. LEXIS 755, at *25-26.

28 2015 U.S. LEXIS 755, at *25.

29 2015 U.S. LEXIS 755, at *26.

30 2015 U.S. LEXIS 755, at *29.

31 2015 U.S. LEXIS 755, at *32.

thus to have limited much of the potential for adverse practical effects beyond this case.[32]

Comment

Whether or not one believes that MacLean performed a public service by disclosing TSA's decision to cancel air marshals on the Las Vegas flights probably depends on whether one believes that Edward Snowden performed a public service by disclosing NSA's telephone surveillance program. Certainly, given the DHS advisory and the possibility of leaks, TSA's move appears ill-advised from a PR point of view. But did it give Robert MacLean a right to go public with the information? One may argue that his decision to do so served an important policy goal because it forced TSA to reinstate air marshals to the flights. One may also argue that his decision was a disservice to public safety because it involved the release of security sensitive information.

More important to the issue at hand, however, is whether Congress intended such disclosure to be exempt from the protections afforded by the WPA. A majority of the Supreme Court's justices, including Chief Justice Roberts (who authored the majority opinion) determined that Congress did not so intend and that MacLean was free to pursue his suit for damages and reinstatement under the WPA. In doing so, the Court relied on a highly technical review of the statutory language, ultimately deciding the issue based on: (1) the fact that, in drafting the language defining which disclosures were exempt from the WPA's protections, it omitted disclosures prohibited by "rule or regulation" and included only disclosures prohibited by "law;" and (2) its determination that the ATSA did not constitute a "legislative mandate" that effectively converted TSA's regulation to a disclosure "prohibited by law" within the meaning of the WPA. It is possible, of course, that the omission of "rule and regulation" from the definition of disclosures exempt from WPA protection was merely a Congressional oversight and does not reflect and intent to expressly omit TSA regulations.

Justice Sotomayor, in dissent, would have concluded that MacLean's disclosures were "prohibited by law." In doing so, however, she does not quarrel with the majority's determination that the phrase "specifically prohibited by law," as used in the WPA, does not encompass disclosures prohibited only by regulation. Instead, she would find that the provisions of 49 U.S.C. § 114(r)(1) prohibited MacLean's disclosure. She also points out that if Congress *did* intend to preclude such disclosures, it is a fairly easy task for it to plug the hole opened the Court's decision. It will be interesting to see if Congress determines to do so. But, as the dissent points out, in the interim, the Court has left important decisions regarding the disclosure of critical information completely to the whims of individual employees.

Pete Lareau writes from his office in Paso Robles, California.

[32] 2015 U.S. LEXIS 755, at *32-33.

VERDICTS & SETTLEMENTS

By Deborah J. Tibbetts

Below are summaries of recent California labor and employment cases with published verdicts or settlements.

White v. City of Los Angeles, et al., Case No. BC486269, Los Angeles Superior Court, Long Beach (Jan. 27, 2015) (Hon. Peter J. Mirich).[1]

Summary: A jury returned a defense verdict on a supervisor's claims that his public employer failed to accommodate his disability and discriminated against him based thereon after he returned from an extended medical leave.

Plainitff's Case: From 1999 to 2010, plaintiff Anthony White was employed as a custodial supervisor at Los Angeles World Airports (LAWA), a department of the city of Los Angeles. White contended that after he returned to work from a 22-month medical leave of absence, LAWA unlawfully failed to return him to the day shift, which he worked prior to his leave, and failed to accommodate his disabilities by refusing to transfer him to a day-shift custodial supervisor position, which was recommended by his doctors. White also alleges that upon his return, LAWA refused to renew his security badge, refused to allow him to work, and initiated termination proceedings against him. White ultimately resigned from his position in 2010.

White sued LAWA, as well as his supervisor and three corporate directors. White brought causes of action for disability discrimination and harassment, retaliation, failure to accommodate, failure to engage in the interactive process, and failure to prevent discrimination.

White claimed $28,182.39 in lost wages for the time period he was not permitted to work due to LAWA's refusal to issue him a security badge. He also sought damages for his emotional distress.

The individual defendants were never served and were dismissed from the case prior to trial.

Defendant's Case: After White rested his case, LAWA's motion for nonsuit was granted as to White's claims of retaliation and harassment.

LAWA disputed White's allegations of discrimination, arguing that the company's actions were all motivated by legitimate, non-discriminatory and non-retaliatory reasons, including its obligation to comply with United States Transportation Security Authority (TSA) regulations. Specifically, LAWA argued that TSA regulations prevented the company from providing White with a security badge after he pled guilty to felony identity theft and forgery.

With respect White's claims for failure to engage in the interactive process and failure to accommodate, LAWA argued that White's own testimony confirmed that the company met with him in an attempt to obtain additional information regarding his specific medical limitations, so that LAWA could assess the universe of available accommodations if White qualified for a reasonable accommodation. However, LAWA contended, White refused to provide the requested information demonstrating any limitations he might have had, and ceased all contact with LAWA Human Resources personnel. Thus, LAWA argued that the company did not fail to reasonably accommodate White's disabilities.

Finally, LAWA argued that White resigned from his position and was not entitled to any damages.

Verdict: After a 14 day trial and 3 hours of deliberations, the jury rendered a defense verdict on all causes of action.

Equal Employment Opportunity Commission v. Sal's Mexican Restaurant, Equal Employment Opportunity Commission (Aug. 20, 2014).

Summary: The parties entered into a $15,000 settlement of claims that a restaurant supervisor sexually harassed a teenaged hostess.

Abstract of Case: A teenaged female hostess who worked at Sal's Mexican Restaurant alleged that she was sexually harassed by a male supervisor from 2009 to 2010. The hostess claimed that her supervisor made unwanted sexual advances and propositions, grabbed parts of her body, and attempted to kiss her. She further alleged that as a condition of employment

[1] 2015 Jury Verdicts LEXIS 1661.

her supervisor required her to give him hugs and back rubs. The hostess also asserted that restaurant management failed to address her repeated complaints about the supervisor's conduct. As a result, the hostess claimed, she was forced to resign in 2010.

Subsequently, the former hostess timely filed a charge of discrimination with the EEOC. The agency found reasonable cause to believe that the hostess was subjected to sexual harassment, intimidation, discrimination, and constructive discharge due to her gender in violation of Title VII of the Civil Rights Act.

Settlement: Without admitting liability, Sal's Mexican Restaurant entered into a two-year conciliation agreement with the EEOC and the former hostess. The terms of the settlement require Sal's to provide $15,000 in monetary relief; hire a third-party consultant to assist with the creation, revision, and implementation of new discrimination and harassment prevention policies and procedures; provide live discrimination and harassment awareness and prevention training to all employees; and establish a record-keeping system to track and monitor discrimination and harassment complaints. The EEOC will monitor compliance for the duration of the agreement.

Sweet v. Russell Construction Company dba Texas Russell Construction Company, et al., Case No. 37-2013-00044063-CU-WT-CTL, San Diego Superior Court (July 29, 2014) (Hon. Kevin A. Enright).[2]

Summary: A jury returned a defense verdict on a journeyman laborer's claims that he was constructively discharged from his job with a construction company after his project supervisor coerced him to engage in oral sex in exchange for job benefits.

Plainitff's Case: Plaintiff Michael Sweet was hired as a journeyman laborer by Russell Construction Company, doing business as Texas Russell Construction Company, on August 2, 2012. Sweet was to perform finish work on a retail store renovation project in San Diego. Eight days later on August 10, 2012, Sweet met his project supervisor, Kent Davis, at an RV park for drinks after work. Sweet alleges that Davis coerced him to engage in oral sex in exchange for job benefits. Sweet further asserts that as a result of the incident, he could not return to work.

Sweet sued Davis and Russell Construction, alleging sexual harassment, sexual orientation discrimination, failure to prevent harassment and discrimination, constructive discharge in violation of public policy, and intentional infliction of emotional distress. Sweet sought non-economic damages for severe emotional distress, including bouts of depression and anxiety, which allegedly resulted from the incident. He also sought loss of earnings of approximately $35 per hour, claiming that he would have continued to work for Russell Construction on projects for 10 years but for defendants' wrongful conduct.

Defendants' Case: Defendants denied all of Sweet's claims, arguing that they were completely fabricated. Russell Construction further argued that regardless of what Sweet alleged, any off-duty interactions between Sweet and Davis on the evening of August 10, 2012 were not work-related.

Defendants also challenged Sweet's claim for non-economic damages, contending that neither Davis nor Russell Construction engaged in any conduct that caused Sweet emotional distress, and that Sweet failed to present any evidence of the alleged psychological injuries. Defendants also contended that Sweet quit the project on his own terms, and therefore, was not entitled to any damages for lost earnings.

Verdict: After a four-day trial and 35 minutes of deliberations, the jury rendered a defense verdict.

Teresa Bergren v. Fu-Gen Inc., et al., Case No. BC463918, Los Angeles Superior Court (July 25, 2014) (Hon. Mel Red Recana).[3]

Summary: After rendering a mixed verdict, a jury awarded an investigator damages totaling $979,575.50 against her employer for unpaid wages, gender discrimination, retaliation, failure to prevent discrimination, and wrongful termination.

Plaintiff's Case: In September 2009, Teresa Bergren was hired as an investigator by Fu-Gen Inc., an investigation firm that investigates transportation and workers' compensation, and performs background checks, among other services. Bergren alleged that during her employment, she was the only female investigator and was discriminated against and harassed based on her gender.

Specifically, Bergren contended that she was singled out as the only female investigator and was given more work than her male colleagues, was not paid for meal and rest breaks, was not paid for overtime or

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2 2014 Jury Verdicts LEXIS 6825.

3 2014 Jury Verdicts LEXIS 7813.

double-time hours, and that harassing comments were made to her about her cleavage, among other things. Bergren further claimed that when she complained to the company in May 2010 - after Marsha Brown, the president of the firm and one Bergren's supervisors made a comment about Bergren being forbidden to take her meal and rest breaks with male employees - she was retaliated against by being continually harassed and criticized for her job performance, and that Brown immediately started documenting non-existent performance issues until Bergren was ultimately terminated on June 30, 2010.

Bergren claimed that as a result of the harassment and social isolation at Fu-Gen, Inc., she suffered emotional distress, including depression, anxiety and excessive weight gain, for which she was receiving treatment with a psychologist.

Bergren sued Fu-Gen Inc. and Marsha Brown alleging that Fu-Gen Inc. failed to properly pay her for meal and rest breaks, and for overtime and double-time hours in violation of the California Labor Code. She also alleged that Fu-Gen Inc. and Brown violated the California Fair Employment and Housing Act[4] ("FEHA") by creating a hostile work environment based on gender, and engaging in gender discrimination, workplace harassment, and retaliation. Bergren further alleged that their actions also constituted wrongful termination in violation of public policy and intentional infliction of emotional distress.

Bergren sought recovery of unpaid wages for meal and rest breaks, and for overtime and double-time hours worked. She also sought recovery of emotional distress and punitive damages.

After plaintiff's case in chief, Judge Mel Red Recana granted defendant's motion for non-suit and dismissed with prejudice several of the causes of action against Brown, including Bergren's FEHA claims of gender discrimination and retaliation, and her common law claim of wrongful termination in violation of public policy.

Defendant's Case: The defendants denied all of Bergren's allegations.

Verdict: The jury rendered a mixed verdict. It found for both Brown and Fu-Gen Inc. on Bergren's claims of harassment and intentional infliction of emotional distress, and rendered a complete defense verdict as to all of the individual causes of action against Brown, including the claim of a hostile environment gender harassment. However, the jury found for Bergren on her claims of unpaid wages, gender discrimination, retaliation, failure to prevent discrimination, and wrongful termination. As a result, the jury awarded Bergren damages totaling $979,575.50, including $59,783 in future lost earnings capability, $71,877 in unpaid wages, $97,916 in emotional distress damages, and $750,000 in punitive damages.

Post Trial: Fu-Gen will move for judgment notwithstanding the verdict in an attempt to overturn the punitive damages verdict on the ground that Bergren failed to present any evidence of the company's wealth as is required to support a punitive damages award.

Heredia v. Fu-Gen Inc., et al., Case No. BC463888, Los Angeles Superior Court (June 9, 2014) (Hon. Mel Red Recana).[5]

Summary: A judge found that an investigation firm owed an investigator $122,732.26 as a result of the company's failure to pay overtime.

Plaintiff's Case: In 2003, Luis Heredia, a Peruvian, was hired as an investigator by Fu-Gen Inc., an investigation firm that investigates transportation and workers' compensation, and performs background checks, among other services. Heredia claimed that during his employment, he was misclassified as an independent contractor. As a result, he alleged, he was not paid for meal and rest breaks, or for overtime hours worked during his regular shift, or for overtime hours worked as an independent contractor. Heredia also claimed that Marsha Brown, president of the firm and one of Heredia's supervisors, discriminated against him based on his national origin. Heredia was terminated from on April 27, 2011.

Heredia sued Fu-Gen and Brown, alleging wrongful termination, national origin discrimination, and failure to pay overtime and to provide meal and rest breaks in violation of the California Labor Code. Although Heredia claimed he was not paid for overtime and breaks during his entire time with the company, in accordance with the Labor Code, Heredia's claims were limited to the time worked between 2007 and 2011.

At the beginning of the bench trial, Heredia dismissed with prejudice all of the discrimination, wrongful termination, and related claims against both Fu-Gen and

[4] Cal. Gov't Code § 12900 et seq.

[5] 2014 Jury Verdicts LEXIS 7812.

Brown. Thus, the matter continued on only the wage and hour claims asserted against Fu-Gen.

Defendant's Case: Fu-Gen Inc. denied Heredia's allegations and asserted that it appropriately paid Heredia for all the hours he worked.

Award: After a bench trial, Judge Mel Red Recana found that Heredia was owed for the overtime hours he worked as both an employee of Fu-Gen and as an independent contractor for the firm. Thus, he awarded Heredia $122,732.26, which included $11,875 in overtime pay, $21,016 in costs, $3,842 in interest, and $86,000 in attorneys' fees. In addition, Judge Recana determined that Brown was a prevailing party due to the dismissals with prejudice of Heredia's discrimination and related claims.

Wang v. Rees Scientific Corporation, Case No. CGC 13 528233, San Francisco Superior Court (June 9, 2014) (Hon. Garrett L. Wong).

Summary: A jury awarded a sales representative $498,906 in damages after finding that her employer, a manufacturer and supplier of temperature monitoring equipment, terminated her based on gender.

Plaintiff's Case: In October of 2011, Elaine Wang, a woman of Chinese ancestry, was hired as the Northern California Area Representative for Rees Scientific Corporation. Wang asserted that shortly after she was hired, several of the company's male supervisors and employees began making inappropriate comments about her and other female employees in her presence.

The Mid-Atlantic Regional Director allegedly asked Wang if her husband "lets her run around," whether she planned to have children, and whether her husband would permit her to continue working if they had children. Wang also claimed that he made inappropriate comments about another female salesperson's body, including the size of her breasts and whether cosmetic enhancements had been made to her breasts, butt, and lips. The Eastern Regional Director allegedly stated that a woman's place is in the kitchen, not the working world.

Wang also contended that during the company's annual meeting in May 2012, the Mid Atlantic Regional Director and several other male employees took her to a strip club and made her feel extremely uncomfortable. She stated that once she realized it was a strip club, she immediately called a cab and then left.

Lastly, Wang claimed that despite being recognized as one of the company's top performers and being awarded a certificate of appreciation, she was wrongfully terminated on December 31, 2012. Wang alleged that her supervisor told her that she was being terminated to create a position for a white, male colleague who was transferring from New York, even though Wang had outsold him in every quarter in 2012.

Wang sued Rees Scientific alleging gender, race, and national origin discrimination in violation of the Fair Employment and Housing Act, wrongful termination, and intentional infliction of emotional distress. She sought recovery of lost past and future earnings, as well as emotional distress and punitive damages.

Defendant's Case: Rees Scientific argued that the same managers who hired Wang instead of a well-qualified white male, the other finalist for the job, also made the decision to terminate her employment and replace her with the more qualified East Coast sales representative. The company asserted that it reviewed and compared the merits of both salespeople and concluded the East Coast representative would be more successful than Wang because he used his time more effectively and closed more deals than Wang did. Rees Scientific also argued that Wang had only worked for the company for one year, lacked product knowledge and failed to follow simple company directives, such as keeping her client-relationship-management database updated with detailed notes.

Verdict: After a three week trial and two days of deliberations, the jury found that Rees Scientific terminated Wang based on her gender, but not based on her race or national origin. The jury awarded Wang damages totaling $498,906: $332,604 for economic loss and $166,302 for emotional distress. However, the jury did not award Wang punitive damages, finding that Rees Scientific's actions did not constitute malice, oppression, or fraud.

Deborah J. Tibbetts is a labor and employment attorney who handles both plaintiff and defense cases in San Diego, California. Ms. Tibbetts is also the Associate Editor of the Bulletin.

CASE NOTES

AGE DISCRIMINATION

Hardin v. Wal-Mart Stores, Inc., No. 13-15098, 2015 U.S. App. LEXIS 4400 (March 12, 2015)

On March 12, 2015, the U.S. Court of Appeals for the Ninth Circuit ruled that an employee failed to establish a prima facie case for discrimination or retaliation under the California Fair Employment and Housing Act (''FEHA'') based on the employer's alleged failure to promote as the employee pointed to no evidence showing that the employer failed to promote him; the employee failed to establish a prima facie case for discrimination or retaliation under FEHA based on the employer's requirement that the employee park in a different disabled parking spot as the change in parking spaces did not materially affect the terms, conditions, or privileges of the employee's employment and therefore did not constitute an adverse employment action.

Ruth Hardin (''Hardin''), personal representative for Zane Hardin, alleged age and disability discrimination in violation of the California Fair Employment and Housing Act (FEHA), Cal. Gov't Code §§ 12900–12996, in addition to various other state law claims. Hardin appealed the district court's judgment in favor of Wal-Mart on Hardin's 14 claims.

The U.S. Court of Appeals for the Ninth Circuit observed that Hardin had failed to establish a prima facie case for discrimination or retaliation based on Wal-Mart's alleged failure to promote. Hardin pointed to no evidence showing that Wal-Mart failed to promote him. In fact, Hardin admitted that he never applied for a promotion using Wal-Mart's required computer system. To the extent Hardin argued that he applied for a promotion through other channels, Hardin could not identify the open position he applied for, the person who vacated the position, or the person who ultimately received the position. The Ninth Circuit held that the district court properly granted summary judgment against Hardin on these claims.

The Ninth Circuit observed that Hardin had failed to establish a prima facie case for discrimination or retaliation based on Wal-Mart's requirement that Hardin park in a different disabled parking spot. The change in parking spaces did not materially affect the terms, conditions, or privileges of Hardin's employment and therefore did not constitute an adverse employment action. The Ninth Circuit held that the district court properly granted summary judgment against Hardin on these claims.

The Ninth Circuit further observed that Hardin had failed to establish a prima facie case for age discrimination based on Wal-Mart's reduction of his hours. Hardin pointed to no evidence creating a genuine issue of material fact as to whether there was a causal link between the reduction in hours and Hardin's age. One stray remark about Hardin's age by an employee in 2002 did not suggest that a different employee had similar motivations in reducing Hardin's hours in 2009. Likewise, a preliminary research memo about the rising costs of healthcare circulated only to a small number of Wal-Mart executives did not suggest a link between the reduction in hours and Hardin's age. The Ninth Circuit therefore held that the district court properly granted summary judgment against Hardin on this claim.

The Ninth Circuit found that Hardin had failed to establish a prima facie case for retaliation based on Wal-Mart's Coaching Report. Hardin argued that Wal-Mart authored this report out of a retaliatory motive for Hardin's workers compensation claim. Hardin pointed to no facts in the record showing that Wal-Mart subsequently used the negative evaluation to substantially and materially change the terms and conditions of Hardin's employment. Therefore, the Ninth Circuit agreed with the district court that the Coaching Report was not an actionable adverse employment action.

The Ninth Circuit also held that Hardin had failed to establish a genuine issue of material fact on his harassment claim. Hardin pointed to four incidents scattered over a span of eight years: (1) several threats to fire Hardin or reduce his hours; (2) a manager's comment that Hardin's wife did not need health insurance; (3) an isolated incident where a manager yelled at Hardin; and (4) Wal-Mart's alleged conversion of Hardin's sitting stool. These events did not form a pattern of behavior that was sufficiently severe to constitute an FEHA violation. The Ninth Circuit concluded that the district court properly granted summary judgment against Hardin on this claim.

Accordingly, the district court's judgment was affirmed.

References. See e.g., Wilcox, California Employment Law, § 41.31, *Age Discrimination;* § 41.130, *Governing Law* (Matthew Bender).

Weiland v. Am. Airlines, Inc., No. 11-56088, 2015 U.S. App. LEXIS 3242 (9th Cir. March 2, 2015)

On March 2, 2015, the U.S. Court of Appeals for the Ninth Circuit ruled that a pilot did not qualify for the exception to non-retroactivity under the Fair Treatment for Experienced Pilots Act found at 49 U.S.C. § 44729(e)(1)(A) because, although he was in the employment of the carrier as an inactive check airman on the day he turned 60, he was not employed "in such operations" as required by the exception, as he was ineligible to be so under the Age 60 Rule; nor was he a required flight deck crew member on that date because by virtue of the Age 60 Rule, he was excluded from that general class.

Until December 13, 2007, airline pilots at air carriers operating under 14 C.F.R. § 121.1(a) ("Part 121 air carriers") were subject to the FAA's Age 60 Rule. 14 C.F.R. § 121.383(c). That rule required Part 121 air carriers to cease scheduling pilots from operating aircraft when they turned 60. On December 13, 2007 the Fair Treatment for Experienced Pilots Act ("FTEPA") was enacted and abrogated the Age 60 Rule, delaying the age at which pilots must cease flying from 60 to 65. 49 U.S.C. §§ 44729(a), (d).

Henry Weiland ("Weiland") was a check airman when he turned 60 on December 7, 2007. The Age 60 Rule was in effect when Weiland turned 60 and American Airlines ("American") ceased scheduling him for active duty. Weiland requested to be reinstated in lieu of the FTEPA, and received a response from American on December 24, 2007. American explained that it interpreted § 44729(e)(1)(A) to not apply to Weiland, and accordingly he would remain "inactive" and be retired on his normal retirement date pursuant to the retirement plan. Weiland filed a charge of discrimination with the California Department of Fair Employment and Housing, and filed a complaint in the U.S. District Court for the Central District of California. The district court granted American's motion to dismiss. Weiland filed an appeal before the U.S. Court of Appeals for the Ninth Circuit.

The Ninth Circuit held that Weiland did not qualify for the exception to non-retroactivity under the FTEPA found at 49 U.S.C.S. § 44729(e)(1)(A) because, although he was in the employment of the carrier as an inactive check airman on the day he turned 60, he was not employed "in such operations" as required by the exception, as he was ineligible to be so under the Age 60 Rule; nor was he a required flight deck crew member on that date because by virtue of the Age 60 Rule, he was excluded from that general class.

The Ninth Circuit found that Weiland was employed by American on December 13 as an inactive check airman/pilot. American did not terminate Weiland's employment on December 7; it only ceased scheduling him for check airman and pilot duties pursuant to the FAA's Age 60 Rule then in effect. His retirement date was not until January 1, 2008 pursuant to American's policy. The record was unclear when Weiland received his final paycheck, but the California Unemployment Insurance Appeals Board found Weiland's end of employment date was after December 24, 2007 for purposes of calculating his unemployment insurance. That finding provided further support for concluding that Weiland was employed by American on December 13. Moreover, presumably he continued to be eligible for employee benefits provided by American.

The Ninth Circuit further observed that pursuant to § 44729(e)(1)(A), Weiland could not have been lawfully engaged in any such operations on December 13, 2007—the effective date of the FTEPA—because he was ineligible to do so under the FAA's Age 60 Rule when he turned 60 on December 7. On December 13, 2007, he was employed by American as an inactive check airman. Likewise, it could not be said that Weiland was a required flight deck crew member on December 13, 2007. As a pilot and check crew airman, he certainly fell in the class of required flight deck crew member. But, by virtue of the FAA's Age 60 Rule in effect when he turned 60 on December 7, 2007, Weiland also fell within a subclass that was excluded from the general class of required flight deck crew member. Not only was he not a required flight deck crew member, he was, as of December 7, 2007, prohibited from being a flight deck crew member. The Ninth Circuit believed the district court was correct in holding so.

The Ninth Circuit concluded that because Weiland did not qualify for an exception to the FTEPA's non-retroactivity, its abrogation of the FAA's Age 60 Rule was inapplicable to Weiland, who turned 60 on December 7, 2007. American acted in conformance with both the Age 60 Rule and the FTEPA when each was in effect, thereby immunizing American from any civil liability. 49 U.S.C. § 44729(e)(2). Accordingly, Weiland could not recover on his claims under California's FEHA.

The district court's order was affirmed.

References. See e.g., Wilcox, California Employment Law, § 41.31, *Age Discrimination* (Matthew Bender).

ARBITRATION

Lanquist v. Ventura County Employees' Retirement Assn., B251179, 2015 Cal. App. LEXIS 239 (March 16, 2015)

On March 16, 2015, a California appellate court ruled that because two county employees were former commissioned officers who separated from the military and became civilian public employees before retiring, the military would consider their attendance at the U.S. Naval Academy to be "military service" and "active duty" for purposes of retirement service credit under 5 U.S.C. §§ 8332(c)(1)(B), 8331(13), 8411(c)(1), 8401(31), and the language of the County Employees Retirement Law, Gov't Code § 31450 et seq., did not suggest the legislature intended more restrictive use of the terms.

Timothy S. Lanquist ("Lanquist") and Thomas W. Temple ("Temple") served as midshipmen at the U.S. Naval Academy ("Academy") for about four years before they became commissioned naval officers. Temple was enlisted before he attended the Academy; Lanquist was not. Both men later became employees of Ventura County. Lanquist was a deputy sheriff, and Temple was an assistant county counsel. They were members of Ventura County Employees' Retirement Association ("VCERA").

Lanquist and Temple applied to VCERA to purchase retirement service credit for their military service. VCERA denied Lanquist's and Temple's requests to purchase retirement service credit for midshipmen service at the Academy. It granted, however, their requests to purchase retirement service credit for all other military service. This included 40 weeks Temple spent at the Naval Academy Preparatory School before he attended the Academy and two years Lanquist spent afterward at the Naval Postgraduate School earning a master's degree. VCERA explained that it did not consider service as a midshipman at the Academy to be creditable "active duty." Lanquist and Temple appealed VCERA's denial to the VCERA retirement board. The retirement board upheld VCERA's denial, on a two-to-six vote, with one abstention.

Lanquist and Temple filed a petition for writ of mandamus and complaint for declaratory relief in the trial court. In addition to the administrative record, they requested judicial notice of various legislative, administrative, and other official acts of the U.S. government pertaining to cadets and midshipmen. The trial court denied the petition. Lanquist and Temple filed an appeal before a California appellate court.

The California appellate court observed that the employees were former commissioned officers who separated from the military and became civilian public employees before retiring. The military therefore would consider their attendance at the academy to be "military service" and "active duty" for purposes of retirement service credit under 5 U.S.C. §§ 8332 (c)(1)(B), 8331(13), 8411(c)(1), 8401(31).

The California appellate court further observed that the language of the County Employees Retirement Law ("CERL") (Gov't Code § 31450 et seq.) did not suggest the Legislature intended more restrictive use of the terms. The county board of supervisors had adopted Gov't Code § 31641.4, and had not acted to limit credit for military service under the CERL. Accordingly, the court interpreted the terms "public service" and "military service," as used in the CERL, and adopted by the board, to include service as a midshipman at the academy.

Accordingly, the California appellate court reversed the judgment and directed the trial court to issue a writ of mandamus requiring the retirement association to allow the employees to purchase retirement service credit for midshipman service at the U.S. Naval Academy.

Accordingly, the trial court's judgment was reversed and the trial court was directed to issue a writ of mandamus.

References. See e.g., Wilcox, California Employment Law, § 1.04A, *Public Employers and Employees*; § 41.67, *Retirement or Pension Plans and Benefits* (Matthew Bender).

Serafin v. Balco Properties Ltd., LLC, A141358, 2015 Cal. App. LEXIS 238 (March 16, 2015)

On March 16, 2015, a California appellate court ruled that mutual assent existed under Civ. Code, § 1565(3), because an employer's mandatory arbitration policy was not buried in a lengthy employee handbook but was separate from other documents and was explained to the employee.

Madeline Serafin ("Serafin") was employed by Balco Properties Ltd., LLC and related individuals and entities (collectively "Balco") as director of property management. A few days after she began work, she executed a two-page arbitration agreement, entitled "Mandatory Arbitration Policy."

After Balco terminated Serafin's employment, Balco submitted a demand to the American Arbitration Association to arbitrate a conversion claim against Serafin for return of an overpayment of wages. The parties selected an arbitrator. Serafin initiated the underlying lawsuit in Contra Costa County Superior Court, alleging numerous employment-related causes of action against Balco, including retaliation, harassment, wrongful termination, unpaid earnings, breach of oral contract, common counts, conversion, and defamation. Balco filed a motion to stay pending litigation based on the arbitration agreement Serafin signed shortly after she was hired. Despite Serafin's opposition, the trial court granted Balco's motion to stay, and directed the parties to complete arbitration. The arbitrator issued an arbitration award. The arbitrator found in Balco's favor on all of Serafin's employment-related claims. The arbitrator also determined that Balco was entitled to return of the overpayment from Serafin. The trial court confirmed the arbitration decision and award, and entered judgment in Balco's favor. Serafin filed an appeal before a California appellate court, claiming the trial court erred in ordering this case into arbitration.

The California appellate court affirmed, holding that mutual assent existed under Civ. Code, § 1565(3) because Balco's mandatory arbitration policy was not buried in a lengthy employee handbook but was separate from other documents and was explained to Serafin. Because California law prevented a party from exercising a discretionary power, such as the power to modify, in bad faith or in a way that deprived the other party of the benefits of the agreement, Balco's discretionary power to modify the agreement did not render it illusory.

The California appellate court further held that the lack of Balco's signature did not preclude enforcement because, pursuant to Civ. Code § 3388, Balco had at all times performed all the duties required of it under the arbitration agreement and thus Balco had carried its burden in proving the arbitration agreement was a mutually binding agreement. It held that severing a fees and costs provision that was inconsistent with the employee's statutory rights under Gov't Code § 12965(b), and then compelling arbitration was within the trial court's discretion. Finality language did not preclude judicial review of an arbitration award under Code Civ. Proc., §§ 1286.2, 1286.6.

The California appellate court concluded that the trial court did not err in compelling Serafin to arbitrate her employment-related claims against Balco because the substantively unconscionable attorney fees provision was severed by the trial court before arbitration was commenced and, thus, no substantive unconscionability had been shown.

Accordingly, the trial court's judgment was affirmed.

References. See, e.g., Wilcox, *California Employment Law*, § 90.20[2][a][i], *Signature of Parties Assenting to Arbitration* (Matthew Bender).

OVERTIME COMPENSATION

Navarro v. Encino Motorcars, LLC, No. 13-55323, 2015 U.S. App. LEXIS 4773 (9th Cir. March 24, 2015)

On March 24, 2015, the U.S. Court of Appeals for the Ninth Circuit ruled that service advisors who worked at a car dealership did not fall within a statutory exemption under 29 U.S.C. § 213(b)(10)(A) from the Fair Labor Standard Act's overtime pay requirements for any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles because they did not sell cars, stock parts, or perform mechanical work on cars; the Ninth Circuit deferred to the U.S. Department of Labor's regulatory definitions, set out at 29 C.F.R. § 779.372(c), because the statute was ambiguous, and under the Chevron standard, the regulation was reasonable.

Encino Motorcars, LLC ("defendant"), sold and serviced new and used Mercedes-Benz automobiles. The defendant employed Hector Navarro, Mike Shirinian, Anthony Pinkins, Kevin Malone, and Reuben Castro (collectively "plaintiffs") as service advisors. The defendant paid service advisors on a commission basis only; the plaintiffs received neither an hourly wage nor a salary. The plaintiffs filed the instant action alleging, among other things, that the defendant had violated the Fair Labor Standards Act ("FLSA") of 1938, 29 U.S.C. §§ 201–219 by failing to pay overtime wages. The district court dismissed the overtime claim because, the court concluded, the plaintiffs fell within the FLSA's exemption for any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles. 29 U.S.C. § 213(b)(10)(A). The plaintiffs filed an appeal before the U.S. Court of Appeals for the Ninth Circuit.

The Ninth Circuit held that, as the U.S. Department of Labor explained, the regulatory definitions limit the exemption to salesmen who sell vehicles and partsmen and mechanics who service vehicles. Because the plaintiffs did not fit within any of those definitions, they were not exempt from the FLSA's overtime wage provisions.

The Ninth Circuit observed that the statutory text and canons of statutory interpretation yielded no clear answer to whether Congress intended to include service advisors within the exemption. Because Congress had not directly spoken to the precise question at issue, the statute was ambiguous. The Ninth Circuit further observed that *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*,[1] provided the appropriate legal standard.

The Ninth Circuit concluded that the agency had made a permissible choice. The interpretation accorded with the presumption that the 29 U.S.C. § 213 exemptions should be construed narrowly. The Ninth Circuit's decision to uphold the agency's interpretation conflicted with decisions of the Fourth and Fifth Circuits, several district courts, and the Supreme Court of Montana. The Ninth Circuit agreed with the Fourth Circuit that the "functionally similar" inquiry cannot be squared with FLSA's plain statutory and regulatory language. Nothing in the statutory text suggested that Congress meant to exempt salesmen, partsmen, mechanics, and any other employees with functionally similar job duties and pay structure; the text exempted only certain salesmen, partsmen, and mechanics. In effect, the agency read the statute as exempting salesmen who sell cars and partsmen and mechanics who service cars.

The Ninth Circuit observed that there were good arguments supporting both interpretations of the exemption. But where there were two reasonable ways to read the statutory text, and the agency had chosen one interpretation, the Ninth Circuit had to defer to that choice. Accordingly, it held that the plaintiffs were not exempt under 29 U.S.C. § 213(b)(10)(A).

The Ninth Circuit reversed the dismissal of the FLSA overtime claim and supplemental state-law claims.

References. See e.g., Wilcox, California Employment Law, § 2.06, *Employees Exempt from Overtime Pay Requirements* (Matthew Bender).

OVERTIME WAGES

Velazquez v. Costco Wholesale Corp., Nos. 13-55241 and 13-55822, 2015 U.S. App. LEXIS 4859 (March 25, 2015)

On March 25, 2015, the U.S. Court of Appeals for the Ninth Circuit ruled that a district court properly awarded the employees unpaid overtime wages under Lab. Code §§ 510 and 1194 because the employer failed to prove the employees spent more than half of their time on managerial duties under Code Regs. tit. 8, § 11070 subd. 1(A)(1)(e), (1)(A)(2)(f). The district court erred in requiring the employer to pay continuing wages under Lab. Code §§ 202 and 203(a) because there was no evidence suggesting the employer willfully failed to pay the employee's unpaid overtime upon his termination.

Costco Wholesale Corporation ("Costco") appealed the district court's judgment (1) awarding Virginia Velazquez and Steven Berry (collectively "plaintiffs") unpaid overtime wages as well as interest, costs, and fees under Lab. Code §§ 510 and 1194 and Bus. & Prof. Code § 17200 through 17210, and (2) ordering Costco to pay a continuing-wages penalty under Lab. Code §§ 202 and 203.

The U.S. Court of Appeals for the Ninth Circuit ruled that the district court properly awarded the employees unpaid overtime wages under Lab. Code §§ 510 and 1194 because the employer failed to prove the employees spent more than half of their time on managerial duties under Code Regs. tit. 8, § 11070 subd. 1(A)(1)(e), (1)(A)(2)(f).

The Ninth Circuit held that the district court neither misread *Ramirez v. Yosemite Water Co., Inc.*,[2] nor "invented" any requirement for Costco to prove that it affirmatively complained to plaintiffs about the nature of the work they performed as warehouse receiving managers. On the contrary, the district court correctly applied *Ramirez* and considered any expression of displeasure (or lack thereof) as one factor weighing against Costo's executive-exemption defense.

The Ninth Circuit further held that the district court erred by ordering Costco to pay continuing wages after his termination as a penalty under Lab. Code § 203, in addition to the back pay award to plaintiff Berry. There was no evidence in the instant case to support a "willful" failure to pay by Costco. There was no showing here of bad faith or deliberate intent to violate the requirements of the statute. The Ninth Circuit therefore vacated the portion of the district court's judgment ordering Costco to pay plaintiff Berry $14,520 in continuing wages.

The Ninth Circuit affirmed the district court's decision not to reduce plaintiffs' damages for failure to mitigate on the basis of the "avoidable consequences doctrine" because under the applicable doctrine, the employer's invocation of the employees' duty to mitigate is

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[1] 467 U.S. 837, 842, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984).

[2] 20 Cal. 4th 785, 85 Rptr. 2d 844, 978 P.2d 2, 8 (1999).

effective only where the employer has taken 'reasonable steps to prevent and correct" the wrong leading to the employees' damages and, here, the district court found no such steps on Costco's part.

Accordingly, the district court's judgment was affirmed in part and reversed in part.

References. See e.g., Wilcox, California Employment Law, § 2.06, *Employees Exempt from Overtime Pay Requirements*; (Matthew Bender).

PREGNANCY DISCRIMINATION

Young v. UPS, Inc., No. 12-1226, 2015 U.S. LEXIS 2121 (March 25, 2015)

On March 25, 2015, the U.S. Supreme Court ruled that an individual pregnant worker who seeks to show disparate treatment under 42 U.S.C. § 2000e(k) may make out a prima facie case under the McDonnell Douglas framework; in a pregnancy discrimination case, grant of summary judgment in favor of the employer was improper because the pregnant employee's evidence created a genuine dispute as to whether the employer provided more favorable treatment to at least some employees whose situation could not be distinguished.

Peggy Young ("Young"), worked as a part-time driver for United Parcel Service ("UPS"). Her responsibilities included pickup and delivery of packages that had arrived by air carrier the previous night. After suffering several miscarriages, she became pregnant. Her doctor told her that she should not lift more than 20 pounds during the first 20 weeks of her pregnancy or more than 10 pounds thereafter. UPS required drivers like Young to be able to lift parcels weighing up to 70 pounds (and up to 150 pounds with assistance). UPS told Young she could not work while under a lifting restriction. Young consequently stayed home without pay during most of the time she was pregnant and eventually lost her employee medical coverage. Young subsequently brought this federal lawsuit. She claimed that UPS acted unlawfully in refusing to accommodate her pregnancy-related lifting restriction. Young said that her co-workers were willing to help her with heavy packages. She also said that UPS accommodated other drivers who were similar in their inability to work.

Young filed a pregnancy discrimination charge with the Equal Employment Opportunity Commission ("EEOC"). The EEOC provided her with a right-to-sue letter. Young then filed the instant complaint in the federal district court. She argued, among other things, that she could show by direct evidence that UPS had intended to discriminate against her because of her pregnancy and that, in any event, she could establish a prima facie case of disparate treatment under the *McDonnell Douglas* framework.

After discovery, UPS filed a motion for summary judgment pursuant to Fed. Rule Civ. Proc. 56(a). In reply, Young pointed to favorable facts that she believed were either undisputed or that, while disputed, she could prove. The district court granted UPS' motion for summary judgment. The Fourth Circuit affirmed.

Young filed a petition for certiorari essentially asking the U.S. Supreme Court to review the Fourth Circuit's interpretation of the Pregnancy Discrimination Act ("Act").

The Supreme Court held that an individual pregnant worker who seeks to show disparate treatment under 42 U.S.C. § 2000e(k) may make out a prima facie case under the *McDonnell Douglas* framework by showing that she belongs to the protected class, that she sought accommodation, that the employer did not accommodate her, and that the employer did accommodate others similar in their ability or inability to work. The employer may then seek to justify its refusal to accommodate the plaintiff by relying on legitimate, nondiscriminatory reasons for denying accommodation. If the employer offers a legitimate, nondiscriminatory reason, the plaintiff may show that it is in fact pretextual. The plaintiff can create a genuine issue of material fact as to whether a significant burden exists by providing evidence that the employer accommodates a large percentage of nonpregnant workers while failing to accommodate a large percentage of pregnant workers.

Under this interpretation of the Act, the Supreme Court vacated the Fourth Circuit's judgment. It concluded that the record showed that Young created a genuine dispute as to whether UPS provided more favorable treatment to at least some employees whose situation could not reasonably be distinguished from hers. It is left to the Fourth Circuit to determine on remand whether Young also created a genuine issue of material fact as to whether UPS' reasons for having treated Young less favorably than these other nonpregnant employees were pretextual.

References. See e.g., Wilcox, California Employment Law, § 41.36[2][c], *Pregnancy* (Matthew Bender).

RACIAL DISCRIMINATION

DeCambre v. Rady Children's Hospital-San Diego, D063462, 2015 Cal. App. LEXIS 224 (March 11, 2015)

On March 11, 2015, a California appellate court ruled that a doctor's claims for harassment, intentional *infliction of emotional distress, and defamation did not arise from a protected peer review process for purposes of a motion under the anti-SLAPP statute, even though they sought damages for non-renewal of the doctor's contract following peer review, because they alleged that incidents of disparate treatment occurred throughout the doctor's employment and outside the context of peer review.*

Marvalyn DeCambre (''DeCambre''), a physician specializing in pediatric urology, filed an action against Rady Children's Hospital-San Diego (''RCHSD''), Children's Specialist San Diego and the Regents of the University of California (collectively, ''defendants''), alleging retaliation, harassment, racial discrimination, failure to prevent discrimination and wrongful termination under the California Fair Employment and Housing Act (Gov. Code § 12900 et seq.). DeCambre also brought claims against all defendants for intentional infliction of emotional distress (''IIED''), defamation, and violations of the unfair competition law (''UCL'') (Bus. & Prof. Code § 17200 et seq.) and the Cartwright Act (Bus. & Prof. Code § 16700 et seq.).

Each defendant filed a special motion to strike DeCambre's complaint. The trial court granted the motions in full on the ground that all of DeCambre's causes of action arose from RCHSD's decision not to renew its contract for DeCambre's services, which was the culmination of a peer review process that is protected as an official proceeding authorized by law under Code Civ. Proc. § 425.16(e). The court also sustained defendants' demurrers to DeCambre's claims for IIED, defamation, unfair competition and violation of the Cartwright Act and denied DeCambre's request for leave to amend. DeCambre filed an appeal before a California appellate court.

The California appellate court held that the claims for harassment, IIED, and defamation did not arise from the protected peer review process, even though they sought damages for nonrenewal of the doctor's contract following peer review, because those claims alleged that incidents of disparate treatment occurred throughout the doctor's employment and outside the context of peer review.

The California appellate court observed that the gravamen and principal thrust of DeCambre's causes of action for harassment and IIED was conduct that occurred independent of the peer review proceedings. More specifically, these claims were not based on defendants' investigation of staff complaints, their referral of DeCambre to the well-being committee, or the ultimate decision not to renew her contract. Rather, the claims arose from incidents of allegedly disparate treatment that DeCambre claimed occurred throughout her employment by defendants. Thus, these causes of action did not arise from the nonrenewal of DeCambre's contract and the peer review activity that preceded that decision. The California appellate court further held that DeCambre's cause of action for defamation did not arise from defendants' peer review proceedings. This claim was based on statements allegedly made by defendants to prospective employers of DeCambre after defendants had decided not to renew her contract. Any defamatory statements made by defendants to employers after the peer review process concluded were not statements in furtherance of defendants' right of petition or free speech and, therefore, were not protected by Code Civ. Proc. § 425.16.

The California appellate court held that DeCambre's remaining claims arose from protected activity because they rested on the peer review decision not to renew the contract. It agreed with the trial court that DeCambre failed to adequately show a probability of prevailing on the merits of these claims. With respect to her claims for retaliation, discrimination and failure to prevent discrimination, and wrongful termination, dismissal of these claims was appropriate because DeCambre failed to make a sufficient showing that defendants' asserted rational for the decision not to renew her contract was pretextual.

The California appellate court held that DeCambre had also failed to meet her burden as to her claims under the UCL and Cartwright Act. DeCambre's allegation that defendants' actions had prevented her, alone, from working as a pediatric urologist in San Diego was insufficient to show antitrust injury. DeCambre had thus failed to show that she was likely to succeed on the merits of her Cartwright Act claim. The California appellate court also held that as to the UCL claim, there was no evidence of an unlawful business practice.

Accordingly, the superior court's judgment was reversed in part and remanded with directions.

References. See e.g., Wilcox, California Employment Law, § 41.34, *Race and Color Discrimination* (Matthew Bender).

RAILWAY LABOR ACT

Aircraft Serv. Int'l, Inc. v. Int'l Bhd. of Teamsters, Local 117, No. 12-36026, 2015 U.S. App. LEXIS 3733 (9th Cir. March 10, 2015)

On March 10, 2015, the U.S. Court of Appeals for the Ninth Circuit ruled that an employer seeking an injunction under the Railway Labor Act to prevent a strike is not relieved of its obligation to comply with the *provisions of 29 U.S.C. § 108; the employer had not satisfied § 108's "reasonable effort" requirement, as the employer sought an injunction without first attempting to settle the dispute.*

Aircraft Service International, Inc., doing business as Aircraft Service International Group ("ASIG") indefinitely suspended one of its fuelers, Alex Popescu ("Popescu"). Popescu and other ASIG fuelers alleged that he was suspended in retaliation for his leadership on workplace safety issues, including testifying at a public hearing of the Seattle Port Commission. After his suspension, Popescu and other ASIG fuelers decided to organize a group response to press for his reinstatement. Working Washington, a local coalition united in support of quality jobs and a fair economy, was heavily involved in this effort. After unsuccessfully advocating for Popescu's reinstatement for two weeks, and at Working Washington's recommendation, the fuelers began distributing strike ballots. By an overwhelming margin, the fuelers voted to approve a strike to get Popescu back to work and to protest retaliation and intimidation by ASIG. Working Washington held a press conference soon after to publicize the fuelers' vote. ASIG filed a complaint in the Western District of Washington seeking to enjoin any anticipated strike pursuant to the Railway Labor Act.

The district court issued a temporary restraining order prohibiting the fuelers from engaging in any strike activity or other concerted action which was intended to interfere with ASIG's operations. The district court entered the injunction without analyzing or citing § 8 of the Norris-LaGuardia Act ("NLGA"). Popescu and the other defendants filed an appeal before the U.S. Court of Appeals for the Ninth Circuit.

The Ninth Circuit ruled that the employer was not relieved of its obligation to comply with the provisions of § 8 of the NLGA. The district court erred by entering the injunction because the record lacked evidence that ASIG made every reasonable effort to settle the dispute.

The Ninth Circuit observed that nothing in the record permitted it to hold that ASIG satisfied 29 U.S.C. § 8's "reasonable effort" requirement. Although the district court erred by failing to undertake a § 8 analysis, the record revealed that ASIG sought an injunction from the district court without first attempting to settle the dispute. Even if the employees lacked an identified union representative, that did not relieve ASIG of its obligations under § 8 to make "every reasonable effort" to resolve the disagreement before seeking the injunction.

The Ninth Circuit concluded that ASIG was not relieved of its obligation to comply with the provisions of 29 U.S.C. § 108. ASIG had not satisfied § 108's "reasonable effort" requirement, as the employer sought an injunction without first attempting to settle the dispute.

Accordingly, the district court's order was reversed.

References. See, e.g., Wilcox, *California Employment Law*, § 60.03, *Statutory Prohibitions and Limitations on Employer's Right to Terminate or Discipline Employees* (Matthew Bender).

SEXUAL HARASSMENT

Dickson v. Burke Williams, Inc., B253154, 2015 Cal. App. LEXIS 209 (March 6, 2015)

On March 6, 2015, a California appellate court ruled that there cannot be a valid claim under Gov't Code § 12940(k) for an employer's failure to take reasonable steps necessary to prevent sexual harassment if the jury finds that the sexual harassment that occurred was not sufficiently severe or pervasive as to result in liability. Similarly, a jury finding that a defendant was not liable on the employee's sex discrimination claim because there was no adverse employment action precludes the employer's liability for failure to take reasonable steps necessary to prevent sex discrimination.

Burke Williams, Inc. ("defendant") appealed before a California appellate court from a judgment entered in favor of Domaniqueca Dickson ("plaintiff") on her claims under the California Fair Employment and Housing Act ("FEHA") (Gov't Code § 12900 et seq.) for failure to take reasonable steps necessary to prevent sexual harassment or discrimination (Gov't Code § 12940(k)), and the trial court's denial of its motion for judgment notwithstanding the verdict ("JNOV motion"). Defendant also appealed from the award of punitive damages.

The California appellate court ruled that the trial court erred in failing to give the jury its special verdict form and in denying its JNOV motion on plaintiff's claim for failure to take reasonable steps necessary to prevent sexual harassment because the jury found that defendant was not liable on plaintiff's underlying sexual harassment claim.

The California appellate court observed that there could be no claim for failure to take reasonable steps necessary to prevent sexual harassment when an essential element of sexual harassment liability had not been established. It further observed that the plaintiff argued, but cited no authority for the proposition, that defendant could be liable under § 12940(k) for failing to take reasonable steps necessary to prevent sexual harassment, even if that harassment was not severe and pervasive. It would be anomalous to provide a remedy for failure to prevent acts that were not ''unlawful'' under the FEHA. (§ 12940.) Otherwise punitive damages could be awarded for not preventing underlying conduct that was legally permissible. Therefore, the California appellate court held that the trial court erred in failing to provide the jury with defendant's special verdict form and in denying defendant's JNOV motion.

The California appellate court further held that, similarly, the jury's finding that defendant was not liable on plaintiff's sex discrimination claim because there was no adverse employment action precluded defendant's liability for failure to take reasonable steps necessary to prevent sex discrimination.

The California appellate court reversed the trial court's judgment.

References. See, e.g., Wilcox, *California Employment Law*, § 41.81, *Sexual Harassment* (Matthew Bender).

WAGE & HOUR LAWS

Perez v. Mortgage Bankers Ass'n, Nos. 13-1041 and 13-1052, 2015 U.S. LEXIS 1740 (March 9, 2015)

On March 9, 2015, the U.S. Supreme Court held that the Paralyzed Veterans doctrine is contrary to the clear text of the Administrative Procedure Act's (''APA'') rulemaking provisions and improperly imposes on agencies an obligation beyond the APA's maximum procedural requirements.

In 1999 and 2001, the U.S. Department of Labor's Wage and Hour Division (''Department'') issued letters opining that mortgage-loan officers do not qualify for the administrative exemption to overtime pay requirements under the Fair Labor Standards Act of 1938 (''FLSA''), 52 Stat. 1060, as amended, 29 U.S.C. § 201 *et seq*. In 2004, the Department issued new regulations regarding the exemption. Mortgage Bankers Association (''MBA'') requested a new interpretation of the revised regulations as they applied to mortgage-loan officers, and in 2006, the Wage and Hour Division issued an opinion letter finding that mortgage-loan officers fell within the administrative exemption under the 2004 regulations. In 2010, the Department again altered its interpretation of the administrative exemption. Without notice or an opportunity for comment, the Department withdrew the 2006 opinion letter and issued an Administrator's Interpretation concluding that mortgage-loan officers do not qualify for the administrative exemption.

MBA filed suit contending that the Administrator's Interpretation was procedurally invalid under the decision of the U.S. Court of Appeals for the District of Columbia Circuit (''D.C. Circuit'') in *Paralyzed Veterans of Am. v. D. C. Arena L. P.*[3] The *Paralyzed Veterans* doctrine held that an agency must use the Administrative Procedure Act's (''APA'') notice-and-comment procedures when it wishes to issue a new interpretation of a regulation that deviates significantly from a previously adopted interpretation. The district court granted summary judgment to the Department, but the D. C. Circuit applied *Paralyzed Veterans* and reversed.

The U.S. Supreme Court held that the *Paralyzed Veterans* doctrine is contrary to the clear text of the APA's rulemaking provisions and improperly imposes on agencies an obligation beyond the APA's maximum procedural requirements.

The Supreme Court held that the APA's categorical exemption of interpretive rules from the notice-and-comment process is fatal to the *Paralyzed Veterans* doctrine. The D. C. Circuit's reading of the APA conflates the differing purposes of 5 U.S.C. § 551 and § 553. 5 U.S.C. § 551(5) requires agencies to use the same procedures when they amend or repeal a rule as they used to issue the rule, but it does not say what procedures an agency must use when it engages in rulemaking. That is the purpose of 5 U.S.C. § 553. And 5 U.S.C. § 553 specifically exempts interpretive rules from notice-and-comment requirements. Because an agency is not required to use notice-and-comment procedures to issue an initial interpretive rule, it is also not required to use those procedures to amend or repeal that rule.

The Supreme Court further held that this straightforward reading of the APA harmonizes with longstanding principles of the Court's administrative law jurisprudence, which has consistently held that the APA sets forth the full extent of judicial authority to review executive agency action for procedural correctness. The APA's rulemaking provisions are no exception: 5 U.S.C. § 553 establishes ''the maximum procedural requirements'' that courts may impose upon agencies engaged in rulemaking. By mandating notice-and-comment procedures when an agency changes its interpretation of one of the regulations it

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3 117 F.3d 579, 326 U.S. App. D.C. 25, 1997 U.S. App. LEXIS 16148 (Paralyzed Veterans).

enforces, *Paralyzed Veterans* creates a judge-made procedural right that is inconsistent with Congress' standards.

Accordingly, the Supreme Court concluded that the D. C. Circuit erred when it found that the Department violated the APA when it issued the administrator's interpretation declaring that mortgage-loan officers did not qualify as "administrative employees" under the FLSA without notice or an opportunity for comment. It further concluded that although the court of appeals had ruled in a long line of cases beginning with *Paralyzed Veterans* that agencies had to use the APA's notice-and-comment procedures when they issued a new interpretation of a regulation that deviated significantly from one previously adopted, that approach was contrary to the clear text of the APA's rulemaking provisions, and improperly conflated the differing purposes of 5 U.S.C. §§ 551 and 553.

Accordingly, the D. C. Circuit's judgment was reversed.

References. See, e.g., Wilcox, *California Employment Law*, § 1.06[1] *Fair Labor Standards Act* (Matthew Bender).

WHISTLEBLOWER RETALIATION

Tamosaitis v. URS Inc., No. 12-35924, 2015 U.S. App. LEXIS 3595 (9th Cir. March 4, 2015)

On March 4, 2015, the U.S. Court of Appeals for the Ninth Circuit ruled that before an employee may opt out of the agency process and bring an Energy Reorganization Act retaliation suit against a respondent in federal court, that respondent must have had notice of, and an opportunity to participate in, the agency action for one year.

The Hanford Nuclear Site is a former nuclear weapons production facility in Washington state. The Department of Energy ("DOE") leads the effort to clean up the pollution at Hanford. The clean-up plan includes construction and management of a Waste Treatment Plant ("WTP"). To assist in its clean-up effort at Hanford, DOE contracts with Bechtel National, Inc. ("Bechtel"). Bechtel subcontracts with URS Energy & Construction, Inc., ("URS E&C") for work on the WTP. In the wake of a report detailing problems with the Hanford clean-up, Dr. Walter Tamosaitis ("Tamosaitis"), an employee of URS E&C, was appointed to lead a study reviewing technical challenges within the WTP project. The study identified 28 technical issues, 27 of which were resolved. The remaining issue, termed the "M3 mixing issue," required solving a design problem. The M3 mixing issue proved to be a lingering and complex challenge. Tamosaitis wanted to extend the deadline for solving the issue to September 2010, while Bechtel wanted it resolved by June 2010. Failure to resolve the M3 mixing issue by June would have jeopardized Bechtel's six-million-dollar fee. Bechtel rejected Tamosaitis's advice and announced closure of the M3 mixing issue by June. Tamosaitis objected: He brought a fifty-point list of environmental and safety concerns to a meeting hosted by Bechtel; forwarded the same list to a URS employee and WTP Assistant Project Manager; and reached out to several WTP consultants by email, hoping that they would oppose closure and publicize his concerns. Two days later, Tamosaitis was fired from the WTP project. URS Operations Manager personally terminated Tamosaitis. Tamosaitis was reassigned, in a nonsupervisory role, to a basement office in a URS facility off the Hanford site. He was later offered other positions with URS, but they required relocation.

Tamosaitis filed his complaint in federal court. The suit named URS Corporation ("URS Corp."), URS E&C, and DOE as defendants, and alleged violations of the ERA whistleblower protection provision, 42 U.S.C. § 5851. Tamosaitis also requested a jury trial. The district court granted DOE's motion to dismiss. As to URS Corp. and URS E&C, the district court granted summary judgment. In a separate order, the district court granted the URS defendants' motion to strike Tamosaitis's jury demand, ruling that Tamosaitis had no statutory or constitutional right to a trial by jury.

Tamosaitis filed an appeal before the U.S. Court of Appeals for the Ninth Circuit.

Addressing the issue of administrative exhaustion, the Ninth Circuit held that before an employee may opt out of the agency process and bring a retaliation suit against a respondent in federal court, the respondent must have had notice of, and an opportunity to participate in, the agency action for one year. The Ninth Circuit affirmed the dismissal of DOE because there was no administrative complaint pending against DOE for one year before the Tamosaitis filed suit against DOE in federal court, and 42 U.S.C. § 5851(b)(4)'s administrative exhaustion requirement was not satisfied as against DOE.

Furthermore, the Ninth Circuit held that administrative exhaustion was sufficient as to URS Energy where Tamosaitis gave adequate notice to URS Energy that it was the named respondent to his complaint. Finally, it affirmed the district court's dismissal of URS Corp. for lack of administrative exhaustion where URS Corp. was not adequately named in the employee's original administrative complaint.

The Ninth Circuit held that Tamosaitis introduced sufficient evidence to create a triable issue as to whether his whistleblowing activity was a contributing factor in the adverse employment action URS Energy took against him. It also held that there was a genuine issue of fact as to whether the Tamosaitis's compensation, terms, conditions, or privileges of employment were affected by his transfer to another position. Accordingly, the Ninth Circuit reversed the grant of summary judgment to URS Energy for ERA whistleblower retaliation.

The Ninth Circuit further held that Tamosaitis did not have a statutory jury trial right for his ERA whistleblower suit. It held that Tamosaitis did have a constitutional right to a jury trial for his claims seeking money damages under 42 U.S.C. § 5851(b)(4), and reversed.

The district court's judgment was affirmed, in part, reversed, in part, and remanded.

References. See, e.g., Wilcox, *California Employment Law*, § 60.03[3][d][ii], *Whistleblowing Activities* (Matthew Bender).

CALENDAR OF EVENTS

2015

May 7-8	NELI: Employment Law Conference - Mid Year	Westin St. Francis 335 Powell Street San Francisco, CA 94102 (415) 397-7000
May 8	CALBAR Workers' Compensation Section, Webinar: The AMA Guides: Development of the Record for PD Rebuttal Methods	12:00 PM - 1:00 PM
May 16	CALBAR Workers' Compensation Section, 2015 Spring Conference	The Cliffs Resort 2757 Shell Beach Road Pismo Beach, CA 93449 (803) 773-5000
May 20	DFEH Webinar: Sexual Harassment Prevention Training	10:00 AM - 12:00 PM
May 29	CALBAR Workers' Compensation Section, Webinar: Advanced Issues with Workers' Compensation Fraud / RICO	12:00 PM - 1:00 PM
June 12	CALBAR Workers' Compensation Section, Webinar: The AMA Guides: Application of the AMA Guides Using the Correct Medical Lingo	12:00 PM - 1:00 PM
July 9-10	CALBAR Labor and Employment Law Section, Fifth Annual Advanced Wage & Hour Conference and Annual Meeting	J.W. Marriott at L.A. Live in Los Angeles
July 10	CALBAR Workers' Compensation Section, Webinar: The AMA Guides: Quirky Appointment Issues and the AMA Guides	12:00 PM - 1:00 PM
July 15	DFEH Webinar: Sexual Harassment Prevention Training	10:00 AM - 12:00 PM
July 16-17	NELI: Employment Discrimination Law Update	Westin St. Francis 335 Powell Street San Francisco, CA 94102 (415) 397-7000
Aug. 14	CALBAR Workers' Compensation Section, Webinar: The AMA Guides: Can You Use the AMA Guides to Rebut a GAF/WPI Rating? If So, How?	12:00 PM - 1:00 PM
Aug. 18	NELI: California Disability Law Workshop	Westin St. Francis 335 Powell Street San Francisco, CA 94102 (415) 397-7000

Aug. 19	NELI: Americans With Disabilities Act Workshop	Westin St. Francis 335 Powell Street San Francisco, CA 94102 (415) 397-7000
Aug. 20-21	NELI: Public Sector EEO and Employment Law Conference	Westin St. Francis 335 Powell Street San Francisco, CA 94102 (415) 397-7000
Aug. 24	NELI: California Disability Law Workshop	Luxe Sunset Boulevard Hotel 11461 Sunset Boulevard Los Angeles, CA 90049 (310) 476-6571
Aug. 25	NELI: Americans With Disabilities Act Workshop	Luxe Sunset Boulevard Hotel 11461 Sunset Boulevard Los Angeles, CA 90049 (310) 476-6571
Sept. 16	DFEH Webinar: Sexual Harassment Prevention Training	10:00 AM - 12:00 PM
Oct. 7	NELI: Affirmative Action Workshop	Westin St. Francis 335 Powell Street San Francisco, CA 94102 (415) 397-7000
Oct. 8-9	NELI: Affirmative Action Briefing	Westin St. Francis 335 Powell Street San Francisco, CA 94102 (415) 397-7000
Oct. 8-11	CALBAR: 88th Annual Meeting of the State Bar of California	Anaheim, CA (415) 538-2210
Nov. 18	DFEH Webinar: Sexual Harassment Prevention Training	10:00 AM - 12:00 PM
Dec. 3-4	NELI: Employment Law Conference	Westin St. Francis 335 Powell Street San Francisco, CA 94102 (415) 397-7000

COLUMNISTS
Contact Information

Eye on the Supreme Court

Brian M. Ragen
Mitchell Silberberg & Knupp LLP
Los Angeles
byr@msk.com

Verdicts and Settlements

Deborah J. Tibbetts
Paul, Plevin, Sullivan & Connaughton LLP
San Diego

Wage & Hour Advisor

Aaron Buckley
Paul, Plevin, Sullivan & Connaughton LLP
San Diego

DFEH Update

Phyllis W. Cheng
Director, Dep't of Fair
Employment & Housing

REPORTERS
Contact Information

Michael J. Etchepare
(Public Sector)
Paul, Plevin, Sullivan & Connaughton LLP
San Diego
metchepare@paulplevin.com

Brit K. Seifert
(Wage and Hour)
Paul Hastings LLP
San Diego
britseifert@paulhastings.com

April Love
(Labor)
Littler Mendelson, P.C.
Houston
alove@littler.com

GUEST AUTHORS

N. Peter Lareau
Paso Robles, CA
nplareau@gmail.com

Roberta H. Vespremi
Morgan, Lewis & Bockius LLP
San Francisco, CA
rvespremi@morganlewis.com