LACBA

41st Annual Labor & Employment Law Symposium

PROGRAM MATERIALS

Thursdays, March 4 & 11, 2021

Via Zoom Webinar

10.25 Hours CLE credit (including 1.0 hr. of Competence Issues Credit)

Provider #36
The Los Angeles County Bar Association is a State Bar of California approved MCLE provider. The Los Angeles County Bar Association certifies that this activity has been approved for MCLE credit by the State Bar of California.
# Labor & Employment Law Section Officers

<table>
<thead>
<tr>
<th>Katherine Forster, Chair</th>
<th>Jason C. Marsili, Vice Chair</th>
<th>Leslie Abbott, Treasurer</th>
<th>Kathleen M. Erskine, Secretary</th>
</tr>
</thead>
</table>

---

# Symposium Committee Members

<table>
<thead>
<tr>
<th>Chair</th>
<th>Vice-Chair</th>
<th>Coordinator</th>
<th>Section Liaison</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cornelia Dai Hadsell Stormer Renick &amp; Dai LLP</td>
<td>Elizabeth T. Arce Liebert Cassidy Whitmore</td>
<td>Scott R. Ames Law Offices of Scott R. Ames</td>
<td>Araceli Murillo Los Angeles County Bar Association Section Liaison</td>
</tr>
<tr>
<td>Natasha Chesler Chesler McCaffrey LLP</td>
<td>Julie Gutman Dickinson Bush Gottlieb</td>
<td>Hon. Michael D. Marcus (Ret.) ADR Services, Inc.</td>
<td>Clifford “Seth” Sethness Morgan Lewis &amp; Bockius</td>
</tr>
<tr>
<td>Roxanne A. Davis Davis*Gavsie &amp; Hakim, LLP</td>
<td>Katherine Hren Ballard Rosenberg Golper &amp; Savitt, LLP</td>
<td>Marytza Reyes Sanchez &amp; Amador LLP</td>
<td>Martin E. Sullivan Melmed Law Group, P.C.</td>
</tr>
<tr>
<td>Roufeda Ebrahim National Labor Relations Board Region 31</td>
<td>Renuka V. Jain, Law Offices of Renuka V. Jain, P.C.</td>
<td>Thomas Rimbach National Labor Relations Board Region 21</td>
<td>Caroline Vincent ADR Services, Inc.</td>
</tr>
<tr>
<td>Andrew H. Friedman Helmer Friedman LLP</td>
<td>Stacey McKee Knight, Katten Muchin Rosenman LLP</td>
<td>Leonard H. Sansanowicz Sansanowicz Law Group, P.C.</td>
<td></td>
</tr>
</tbody>
</table>
Employment Specialists

Neutrals available statewide via Zoom.

arc4adr.com • 310.284.8224
We are proud to showcase the following neutrals from our exclusive roster who specialize in resolving all types of labor and employment matters, including class actions. Thank you for your confidence in us. It’s a privilege to be of service.

- Best-in-Class Neutrals
- Comfortable and Convenient Venues with Proven Virtual Solutions
- Dedicated Staff of Experienced ADR Professionals
- Since 1993, Achieving Optimal Results Nationwide
Your Partner in Resolution

Proud Sponsor of the Los Angeles County Bar Association

Featured Employment Specialists

WWW.ADRSERVICES.COM
Alternative Dispute Resolution from anywhere.

California’s most respected Neutrals are now offering mediations nationwide using secure video conference technology.
Remote Depositions Done Right

Besides working with great reporters that have embraced remote depositions and are fluent with the technology, LitiCourt delivers the smoothest remote depositions because we use both the right videoconferencing platform and the right exhibit presentation platform.

We believe that Zoom is the best video-conferencing platform for depositions. Many reporting firms, including LitiCourt, used Zoom prior to COVID for depositions where attorneys and/or clients attended remotely. Many of the firms that used other platforms have now moved to Zoom. Why?

Zoom depositions start on time. Zoom’s mission to deliver frictionless video communications resulted in a platform that is both easy to install and an ease to use – on a computer, an iPad or a phone. As people have embraced Zoom in their personal lives, depositions over Zoom have become easier and simpler. Unlike other platforms, few deponents and even fewer attorneys need installation assistance or training because they already use Zoom.

Studies show that Zoom has better audio quality than its competitors. Critically important for court reporting, when configured correctly, Zoom captures video consistent with in-person depositions.

While exhibits can be presented using Zoom’s screen sharing and chat functions, it can be a bit clunky, especially in exhibit heavy cases. Some reporting firms have cobbled together proprietary but incomplete solutions. LitiCourt adopted the superior AgileLaw exhibit presentation platform.

AgileLaw was initially designed to allow for better exhibit presentation for in-person depositions, but ironically it really shines for remote depositions. Importantly, it not only allows you to display a specific page of an exhibit to the witness, but it also allows the witness to independently review any exhibit you’ve marked, and it allows you to follow along with what the deponent is looking at. Other features make marking exhibits easy; make getting the exhibits to the court reporter after the deposition easy; make witness annotations on an exhibit easy; and allow you to recall any documents you might have inadvertently shared. Currently about half of our clients present exhibits in Zoom and half of our clients use AgileLaw, particularly our employment law clients with exhibit heavy cases.

We would be honored to add additional LACBA member attorneys who practice labor and employment law as clients of LitiCourt. Please email Garrett Leevers at Garrett.Leevers@LitiCourt.com for more information.

---

(1) On July 1, 2020 Zoom’s CEO blogged at https://blog.zoom.us/ceo-report-90-days-done-whats-next-for-zoom/ that now Zoom strives to be the most frictionless and secure video communications platform in the world.

(2) LitiCourt provides complimentary individualized training on both Zoom and AgileLaw to our clients. While deponents and opposing counsel do not need training to participate in depositions on these platforms, we find that most of our clients want training and practice in advance of their first remote proceeding.

(3) January 2021 study by Wainhouse Research quoted on Zoom’s blog at https://blog.zoom.us/which-meeting-calling-solutions-deliver-the-best-quality-experience/

(4) For an excellent overview of AgileLaw’s features, view their demo video at https://agilelaw.wistia.com/medias/wj8yyhb2qa.
Employment Practice Group

Experienced, empathetic, effective neutrals

The JAMS Employment Practice Group includes retired federal, state trial and appellate judges and former litigators with years of dispute resolution experience, deep subject matter expertise and comprehensive knowledge of federal and state case law and statutes. They are adept at managing the emotional and legal aspects of sensitive employment matters.

Our neutrals receive ongoing training in alternative dispute resolution (ADR) and stay abreast of emerging employment law issues, including claims under the Families First Coronavirus Response Act (FFCRA) and pandemic-related unsafe working conditions and retaliation claims. JAMS also provides neutrals and parties with live tech support during virtual and hybrid sessions.

Efficient, affordable dispute resolution

JAMS offers cost-effective options to resolve employment matters of every type and size. Our highly skilled case managers can provide a list of panelists best suited to handle your dispute, based on their experience, background, availability, rates and approach to ADR. JAMS neutrals collaborate with all parties to design flexible, individualized solutions, including mediation, arbitration, neutral investigations and evaluations, mock trials, settlement allocations and reference and special master assignments.

Extensive employment law experience

JAMS has handled thousands of employment disputes, ranging from single plaintiff cases to large class and mass actions. Our neutrals have extensive experience in matters involving:

- Discrimination
- Harassment
- Retaliation
- Whistleblower
- Wrongful Discharge/Wrongful Termination
- Trade Secrets and Employee Raiding
- Employee and Executive Employment Contract Disputes
- Disability Claims, including Americans with Disabilities Act (ADA)
- Wage & Hour Claims, including individual matters and class and mass actions
- Family Medical Leave Act (FMLA) Claims
- Claims under the Federal Fair Labor Standards Act (FLSA) and the California Private Attorney General Act (PAGA)

JAMS is the world’s largest private ADR provider, with hearing facilities in major cities around the globe. Our panel includes more than 400 retired state and federal judges and attorney neutrals with proven track records and extensive practice area and industry expertise. We handle an average of 18,000 cases in person or via remote or hybrid sessions each year.

Visit jamsadr.com/employment or contact Renee Spertzel at 415.774.2684 or rspertzel@jamsadr.com to learn more.
TEMPORARY | CONTRACT STAFFING SOLUTIONS
TEMP-TO-HIRE STAFFING SERVICES
E-DISCOVERY | STAFFING PROJECT
DIRECT HIRE | FULL-TIME PLACEMENT

d3legalsearch.com
T | 213-785-2485
41st Annual
Labor & Employment Law
Symposium

Session 1, Panel 1:
State of the Court

Eric C. Taylor, Presiding Judge,
Superior Court of Los Angeles County

David J. Cowan, Supervising Judge for the Civil
Division, Superior Court of Los Angeles County
On January 1, 2021, Judge Eric C. Taylor became the 71st Presiding Judge of the Los Angeles Superior Court, having been elected on September 9, 2020 to serve for 2021 and 2022. Judge Taylor was previously elected Assistant Presiding Judge serving for 2019 and 2020.

Judge Taylor was appointed to the Inglewood Municipal Court in 1998, serving as Presiding Judge prior to trial court unification. He was subsequently appointed Superior Court Site Managing Judge for the Inglewood Courthouse. In 2001, he was appointed Assistant District Supervising Judge of the Southwest District. From 2002-3, he served as Supervising Judge of the Southwest District. In his 23 years on the bench, Judge Taylor has worked on numerous LA Court committees – including Legislative, Family, Security, Civil Grand Jury, and Bench-Bar Outreach. In 2011, he was elected to the Superior Court Executive Committee, serving from 2011-13; and is currently serving as the Chair of the Court’s Executive Committee.

In 2003, Judge Taylor was elected President of the California Judges Association (“CJA”) after serving on its board for 2 years. While president, Chief Justice Ronald George appointed him as an advisory member to the California Judicial Council. In 2015, he became the first judge to be elected for a second time as President of CJA, and to again serve on the Judicial Council under Chief Justice Tani Cantil-Sakauye.

During his first presidency, Judge Taylor helped to revitalize CJA, overhauling its publications, increasing its presence in Sacramento, and traveling to over 25 counties to expand and solidify membership, and to give judges a strong voice throughout the State. In his second term, he again led efforts to promote membership and a more proactive association concerning issues related to the quality of justice in California and the dignity of the judiciary. Judge Taylor also chaired CJA’s Public Information and Access Committee, and served on the editorial board of its main publication, “The Bench.”

Chief Justice George appointed Judge Taylor to the Judicial Council’s Access and Fairness Committee to serve from 2000-3. Judge Taylor also served on the Steering Committee for the California Judicial College, where he also served as a discussion group leader.

Prior to the bench, Judge Taylor worked as a Deputy County Counsel for Los Angeles County, practicing in the Civil Litigation, Sheriff’s Civil Defense and Public Works Divisions. He also practiced as a litigation associate at Sonnenschein, Nath and Rosenthal, and the former law offices of Pettit and Martin. In 1986, he served as an extern to California Supreme Court Justice, Allen E. Broussard.

Judge Taylor holds a J.D. from the University of Virginia School of Law, and a B.A. from Dartmouth College. At Dartmouth, Judge Taylor was a Gould Foundation Scholar and sang for four years with the Dartmouth Aires. At Virginia, he chaired the Migrant Farmworkers Legal Project and co-chaired the Law Public Services Program. Judge Taylor recently finished a 12-year term as a trustee of the Cate Preparatory School where he served as Vice President, and has taught as an adjunct professor at Loyola Marymount University since 2013.
JUDGE DAVID J. COWAN
Los Angeles County Superior Court
Stanley Mosk Courthouse
111 N. Hill Street, Dept. 1
Los Angeles, CA 90012
Tel.: (213) 633-0520; e-mail: djcowan@lacourt.org

Judicial Assignments:

Supervising Judge, Civil Division, January 2021 – Present. Master calendar for Civil trials around the County; coordination of case assignments. Oversee Division comprised of one hundred forty plus judges. Handle operations for I/C courts, Complex, Personal Injury and Unlawful Detainer Hubs, MSC Unit, Small Claims and other Civil case types. Spokesperson for Court with bar assn’s. Coordination with court administrators, incl. technology issues. Address complaints and concerns of the public. Coordinate with PJ re: personnel, policy and legislative issues.

Assistant Supervising Judge, Civil Division, March through December 2020. Individual calendar general jurisdiction courtroom, Mosk Courthouse.

Supervising Judge, Probate & Mental Health Depts., Sept. 2016 – February 2020. Supplied sixteen courtrooms; worked with the other judges, Court management and justice partners on Court operations 6 & 1/2 years managing and deciding Probate cases involving decedent estates, trusts, guardianships and conservatorships, including 2 years hearing exclusively long cause / complex trials and settlement conferences.

Appointed by Governor Edmund G. Brown, Jr., June 2014.

Court Commissioner:

Santa Monica Courthouse, Family Law calendar (6 1/2 years): Decided issues of child custody & visitation, child and spousal support, division of marital property and related matters. Heard domestic violence and civil harassment restraining order requests.

Inglewood Courthouse (1 year): Misdemeanor custody arraignments / bail determinations / sentencing on open pleas; traffic calendar:

Whittier Courthouse: misdemeanor trial calendar; felony preliminary hearings.

Elected by Judges, August 2005

Other:

Member, LASC COVID-19 Working Group, Current
Member, LASC Budget Committee, Current
Member, LASC Operations and Supervising Judges Committees. 2017-Present
Member, LASC Executive Committee, 2016-Present (elected by Central District judges, 2016; ex officio thereafter)
Member, LASC Law Clerk Committee, 2019-Present
Chair, LASC EPO Duty Working Group, 2019
Member, Probate & Mental Health Advisory Committee to Judicial Council of California, 2018-Present; Legislative and Capacity Declaration Revision Sub-Committees
Vice-Chair and Member, Probate Law Committee, Calif. Judges Ass’n, 2017-Present
Former Member: LASC Temporary Judge Committee, Calif. Judges Ass’n, LASC & Beverly Hills Bar Ass’n Family Law Committees.
Member, Board of Governors, Ass’n Business Trial Lawyers, Los Angeles Chapter
Adjunct Professor, Loyola Law School, 2007-2019. Taught Wills & Trusts, Child Custody Issues, Family Law, Marital Property, Real Property Foreclosure Law and Legal Drafting.

Frequent Speaker on Civil issues, and previously on Probate and Family Law issues, to misc. Bar Associations

Recognition:

Beverly Hills Bar Ass’n, Timothy Whitehouse Award, Contribution to LASC Probate Dept, August 2020

Prior Legal Experience:


Other:

Argued four cases leading to published appellate opinions, one establishing new law re: letters of intent. Coordinating Editor, Real Estate Issue, Los Angeles Lawyer Magazine. Member, LA Co. Bar Ass’n Commercial Law Committee.

Education:


Background:

Elected Class Speaker, Cate School, Santa Barbara, CA.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

ADMINISTRATIVE ORDER OF THE PRESIDING JUDGE RE COVID-19 PANDEMIC

GENERAL ORDER

As the number of COVID-19 cases in Los Angeles County remain at dangerous levels, the Superior Court of Los Angeles County (LASC or Court) must remain vigilant about operating safely.

THE COURT HEREBY FINDS, AND ORDERS AS FOLLOWS:

1. Courthouse Access and Remote Appearances:
   a. In the interest of safeguarding the well-being of court users and enforcing social distancing, persons seeking services from the Clerk’s Office, court support services, and/or the Self-Help Centers must have a prescheduled appointment. For telephone or video assistance, or to schedule an appointment, the telephone number for each courthouse is listed at the courthouse entry and posted on the Court’s website, www.lacourt.org.

2. Face Coverings:
   In accordance with Amended General Order 2020-016-02 issued on October 13, 2020, all persons are required to wear face coverings over their nose and mouth while in a courthouse. Persons whose disabilities preclude them from wearing face
coverings compliant with the California Department of Public Health Guidance Concerning the Use of Face Coverings issued on June 18, 2020, are urged to seek an accommodation under Rule 1.100 of the California Rules of Court in advance of their court appearance or appointment.

3. Judicial Emergency Order Continuances:

a. Juvenile Dependency

   i. The Court extends the time periods provided in section 313 of the Welfare and Institutions Code within which a minor taken into custody pending dependency proceedings must be released from custody to not more than seven (7) days, applicable only to minors for whom the statutory deadline would otherwise expire from January 29, 2021 to February 26, 2021, inclusive.

   ii. The Court extends the time periods provided in section 315 of the Welfare and Institutions Code within which a minor taken into custody pending dependency proceedings must be given a detention hearing to not more than seven (7) days, applicable only to minors for whom the statutory deadline would otherwise expire from January 29, 2021 to February 26, 2021, inclusive.

b. Criminal

   i. Pursuant to the authority granted by the March 30, 2020 Statewide Emergency Order issued by the Honorable Tani G. Cantil-Sakauye, Chief Justice of California and Chair of the Judicial Council which the Court implemented in its General Order No. 2020-GEN-007-00 issued on April 2, 2020, and until further notice, the Court extends the time provided by section 859b of the Penal Code for the holding of a preliminary examination and the defendant’s right to release from 10 court days to not more than 30 court days.
ii. The Court extends the time period provided in section 1382 of the Penal Code for the holding of a criminal trial by not more than 30 days, applicable only to cases in which the original or previously extended statutory deadline otherwise would expire from January 29, 2021 to February 26, 2021, inclusive.

iii. The Court extends by 90 calendar days post-conviction progress reports set on January 29, 2021 to February 26, 2021, inclusive.

iv. The Court extends by 90 calendar days, unless statutorily required to be held sooner and the defendant does not consent to a continuance, out-of-custody misdemeanor pretrial hearings set on January 29, 2021 to February 26, 2021, inclusive.

THIS ORDER IS EFFECTIVE IMMEDIATELY AND WILL REMAIN IN EFFECT UNTIL FURTHER NOTICE, OR UNTIL ITS PROVISIONS EXPIRE BY THEIR TERMS, ARE RESCINDED, AMENDED, OR ARE SUPERSEDED BY SUBSEQUENT ORDERS. THIS ORDER MAY BE AMENDED AS CIRCUMSTANCES REQUIRE. GOOD CAUSE APPEARING THEREFOR, IT IS SO ORDERED.

DATED: January 28, 2021

ERIC C. TAYLOR
Presiding Judge
Since March 2020, when state and local public health officials issued stay-at-home orders in response to the COVID-19 pandemic, the Court has endeavored to strike a balance between preserving access to justice and safeguarding the well-being of those who work in and use its courthouses. Initially, it continued cases pursuant to the authority the Chief Justice granted under Government Code section 68115 and limited operations to statutorily mandated, urgent or emergent matters. To operate trial courts safely during the pandemic, the Court implemented health and safety measures reviewed by the Los Angeles County Department of Public Health.

The Court began ramping up operations in June and July 2020. To reduce the number of people in its courthouses, it implemented technology to facilitate remote appearances, collaborated with justice agencies to implement multiple measures to decrease courthouse traffic, and authorized as many of its employees to telework as the work of the Court permitted.

The general orders the Court issued in response to the COVID-19 pandemic prompted lawsuits from civil litigants seeking to have the Court adjudicate their cases. While some attorneys sought jury trials, other attorneys objected to coming into court during a pandemic.

Recently, despite mandatory and previous general orders requiring the use of face masks and social distancing and ubiquitous signage in each courthouse reiterating the face mask and social distance requirements, a number of civil litigants have sought to have the Court permit jury trials and the Court has determined that it would be impossible to operate the courts safely while permitting jury trials.

1 See General Orders filed on June 5, 2020, July 6, 2020, and October 13, 2020.
distancing mandates, attorneys, litigants, and others routinely remove their masks, wear their mask
improperly, and/or fail to observe social distancing while in courthouses. Non-compliance with the
basic protective measures that this Court has repeatedly required by way of prior general orders to
reduce the spread of the SARS-CoV-2 virus may increase COVID-19 infections.

On Sunday, November 22, 2020, Los Angeles County reported 2,718 new COVID-19
infections. The highest single-day infection rate of 4,522 that the County has experienced during the
pandemic occurred on Saturday, November 21, 2020. The five-day average for COVID-19 infections
in Los Angeles County is now 4,097. There were also 34 COVID-19 deaths on Saturday and another
nine (9) yesterday, adding to the grim total of 7,438 COVID-19 deaths in Los Angeles County.
Moreover, the seven-day testing positivity rate continues to rise alarmingly and now stands at 5.9%.
Due to the rise in the spread of the SARS-CoV-2 virus, which public health officials describe as
dangerous, the Court must take the following additional protective measures.

THE COURT HEREBY FINDS AND ORDERS AS FOLLOWS:

Courthouse Access

1. In the interest of enforcing social distancing and to reduce the number of people in
courthouses, access to courthouses is restricted at all times to judicial officers, court
staff, co-lessees, Judicial Council staff, vendors, jurors, mediators, authorized
persons (which includes, but is not limited to, news media representatives and news
reporters), attorneys, litigants and witnesses with matters on calendars, and
individuals with confirmed appointments.

2. In the interest of enforcing social distancing and reducing the number of people in
courthouses, effective Monday, November 30, 2020, members of the public, not
otherwise referenced above, who wish to attend a court proceeding may do so upon
advance request and at the discretion of the judicial officer presiding over the matter.
Instructions on how to make such a request will be available on the Court’s website
at the Here for You | Safe for You page. All persons attending court proceedings,
whether in person or remotely, must comply with applicable California Rules of
Court, including Rule 1.150. There shall be no unauthorized recording of the court
proceeding, hearing or trial.

3. Attorneys, litigants, witnesses, and authorized persons are prohibited from gathering with or speaking to anyone outside their household in courthouse hallways or other public areas of the Court unless they can do so at least six feet apart from each other and while wearing a mask over their nose and mouth.

4. To enforce social distancing, each court department shall schedule only the number of matters during each session as it can accommodate consistent with social distancing requirements in courtrooms and outside hallways of the courthouse.

5. Eating in courthouse hallways and courtrooms shall be prohibited at all times.

6. Sheriff’s Department personnel are directed to enforce the General Order re Facial Coverings and Social Distancing (2020-GEN-016).

THIS ORDER IS EFFECTIVE IMMEDIATELY, EXCEPT FOR PARAGRAPH 2, WHICH SHALL BE EFFECTIVE MONDAY, NOVEMBER 30, 2020, AND THIS ENTIRE ORDER SHALL REMAIN IN EFFECT UNTIL RESCINDED OR SUPERSEDED BY ANOTHER GENERAL ORDER, AND MAY BE AMENDED AS CIRCUMSTANCES REQUIRE.

DATED: November 23, 2020

KEVIN C. BRAZILE
Presiding Judge
SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

AMENDED GENERAL ORDER

ADMINISTRATIVE ORDER OF THE PRESIDING JUDGE RE MANDATORY USE OF FACE MASKS AND SOCIAL DISTANCING REQUIREMENTS IN EFFECT DURING THE COVID-19 PANDEMIC

In response to the COVID-19 pandemic, national, state and local elected officials declared states of emergency within their respective jurisdictions. Executive orders and orders from public health authorities required individuals to remain in their homes (Safe-at-Home Orders) to slow and reduce the transmission of the novel coronavirus.

On March 4, 2020, the Los Angeles County Board of Supervisors (Board) and the Los Angeles County Department of Public Health (Public Health) declared a local and public health emergency in response to the increased spread of the novel coronavirus across the County of Los Angeles.

On Friday, March 13, 2020, President Donald J. Trump declared a national emergency over the novel coronavirus outbreak.

On March 19, 2020, Governor Gavin Newsom and City of Los Angeles Mayor Eric Garcetti both issued, respectively, Stay at Home and Safer at Home orders.

On March 21, 2020, Public Health issued a revised Safer at Home Order for the Control of COVID-19 that prohibits all indoor and outdoor public and private gatherings and events. The order also requires businesses, except those defined as an Essential Business, to cease in-person operations and close to the public. The order requires individuals to maintain a physical separation from others of at least six (6) feet and advises persons 65 years of age and over and persons with underlying

ADMINISTRATIVE AUTHORITY OF THE PRESIDING JUDGE RE FACE MASKS AND SOCIAL DISTANCING
health conditions to avoid person-to-person contact.

On May 29, 2020, Public Health issued a revised order regarding Reopening Safer at Work and in the Community for Control of COVID-19. Among other things, it provides, “People leaving their residences must strictly comply with the Social (Physical) Distancing requirements stated in this Order and specified in guidance or protocols established by the County Department of Public Health; this includes wearing a cloth face covering whenever there is or can be in contact with others who are non-household members in both public and private places, which reduces the risk of transmission to others from people who do not have symptoms. The use of face coverings is commonly referred to as ‘source control.’” County of Los Angeles Public Health Department Order of the Health Officer, May 29, 2020, p. 2, paragraph 3b. On April 10, 2020, Public Health issued a Guidance for Face Coverings which it subsequently amended on June 2, 2020, June 19, 2020, June 26, 2020 and July 17, 2020.¹

The Court must fulfill its statutory duties while safeguarding the well-being of the public it serves. In the absence of a cure, treatment, or effective vaccine for the highly contagious novel coronavirus, social distancing, face coverings, and good hygiene are the only tools available to slow or prevent its spread. The Court has taken extensive measures to reduce the number of persons coming to its courthouses, including limiting the cases to be heard on any given day, spreading the scheduling of cases, directing prospective jurors to courtrooms instead of jury assembly rooms, facilitating remote telephonic/video court transactions with the virtual Clerk’s Office, online and remote Self-Help services, remote mediations, teleworking employees, encouraging counsel and litigants to appear remotely, and implementing scheduled appointments for in-person transactions at the courthouse.

To prevent or slow the spread of COVID-19 and to protect the health of court users, pursuant to Code Civ. Proc. § 128, Gov. Code § 68070, Cal. Rules of Court, rule 10.603, and the inherent powers of the Court (In re Reno (2012) 65 Cal.4th 428, 522), and in compliance with federal, state and local public health guidelines, THIS COURT HEREBY FINDS, AND ORDERS² AS

¹ [http://www.publichealth.lacounty.gov/media/Coronavirus/docs/protection/GuidanceClothFaceCoverings.pdf]
² This order supersedes and replaces the Court's July 6, 2020 order on face coverings.
FOLLOWS:

1. All persons entering any courthouse or courtroom shall wear a face mask over their nose and mouth at all times within public areas of the courthouse or courtroom. Face masks with valves should not be used. Face shields may not be used without a face mask except as required by a physician. Children under the age of two (2) are exempt from the order.

2. Persons with a medical condition, mental health condition, or disability that precludes them from wearing a face mask are exempt from this order. Nevertheless, they must take whatever protective measures their condition permits, such as wearing a face shield with a drape on the bottom edge as long as their medical condition allows it. Individuals with disabilities who seek an exemption from this order as a reasonable accommodation pursuant to the Americans with Disabilities Act or Rule 1.100 of the California Rules of Court, should contact the ADA liaison at the courthouse. A list of ADA liaisons is available at www.lacourt.org/ada/adahome.aspx. To reduce the risk of contagion, the matters of individuals exempted from wearing a mask may be scheduled when fewer people are present in court.

3. Non-exempt individuals who decline or refuse to wear a face mask will be denied entry to the courthouse and/or courtroom.

4. Individuals who remove their face masks after entering the courthouse or courtroom will be reminded to wear them. If they refuse, they may be denied services, may have their legal matters rescheduled, and/or will be asked to leave the courthouse or courtroom immediately. Persons who refuse to leave voluntarily will be escorted out of the courthouse and/or courtroom by Los Angeles Sheriff Department’s personnel.

5. Maintain at least six (6) feet of physical distance from all persons (except those within your household) at all times. Comply with social distance signage throughout the courthouse.

6. Use hand sanitizer when entering the courthouse, practice good hand washing hygiene, and cover coughs and sneezes, preferably with a tissue.
THIS ORDER IS EFFECTIVE IMMEDIATELY AND REPLACES AND
SUPERSEDES THE JULY 6, 2020 FACE COVERING ORDER, AND WILL REMAIN IN
EFFECT UNTIL FURTHER NOTICE.

DATED: October 13, 2020

KEVIN C. BRAZILE
Presiding Judge
SUPEROIR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

ADMINISTRATIVE ORDER OF THE PRESIDING JUDGE RE COVID-19 PANDEMIC

GENERAL ORDER

As the COVID-19 pandemic persists in Los Angeles County, the Superior Court of Los Angeles County (LASC or Court) continues to seek to balance its obligation to render justice with its obligation to protect the health and well-being of litigants, attorneys, Court workers, judicial officers, and others who enter the courthouse during the COVID-19 pandemic. To that end, in the seven months since Governor Gavin Newsom declared a state of emergency due to the COVID-19 pandemic, the Court has taken numerous measures to reduce the risk of COVID-19 contagion and to enforce social distancing which public health authorities identify, in addition to wearing face coverings and vigorous sanitation practices, among the only effective tools available to combat the spread of the novel coronavirus. As the Court resumes criminal jury trials, it must remain vigilant about enforcing these measures in its 38 courthouses so that litigants, attorneys, witnesses, jurors, court personnel, justice partners, judicial officers and others can participate safely in court proceedings.

THE COURT HEREBY FINDS, AND ORDERS AS FOLLOWS:

1. Courthouse Access and Remote Appearances:
   a. In the interest of safeguarding the well-being of court users and enforcing social distancing, persons seeking services from the Clerk’s Office, court support services,
and/or the Self-Help Centers must have a prescheduled appointment. Appointments may be made the same day for persons seeking restraining orders who have completed paperwork and arrive at the courthouse no later than 3:00 p.m. For telephone or video assistance, or to schedule an appointment, the telephone number for each courthouse is listed at the courthouse entry and posted on the Court’s website, www.lacourt.org.

b. Access to LASC proceedings shall be limited to the judicial officer presiding, Court personnel, parties, counsel, witnesses, mediators, arbitrators, and those members of the public (including news reporters and news media representatives) that can be accommodated in the designated courtroom while enforcing mandatory social distancing of at least six (6) feet. The Judge or Commissioner presiding over the proceedings shall determine when the courtroom has reached the socially-distanced capacity established by the Court.

c. In furtherance of Executive Order N-33-20, paragraph 4, subpart (b), and as required by the California Rules of Court, Emergency Rule 12, the Court orders all parties who use electronic filing to accept electronic service, except in those circumstances when personal service is required by law or where any of the parties are self-represented.

d. Parties and counsel are strongly urged to avoid in-person appearances and make use of technology to appear remotely whenever possible.

e. Judicial officers are urged to avoid in-person hearings to the greatest extent possible and to use technology to conduct hearings and other court proceedings remotely for the duration of the state of emergency related to the COVID-19 pandemic. However, when the interests of justice require, judicial officers retain the discretion to require in-person appearances.

2. Face Masks and Social Distancing:

a. In accordance with General Order No. 2020-GEN-016-01 issued on July 6, 2020, as
amended, all persons are required to wear face masks over their nose and mouth while in a courthouse. Persons whose disabilities preclude them from wearing face masks compliant with the California Department of Public Health Guidance Concerning the Use of Face Coverings issued on June 18, 2020, are urged to seek accommodation under Rule 1.100 of the California Rules of Court in advance of their appearance.

b. To enforce social distancing, each courtroom shall schedule only the number of matters during each session that can be conducted while enforcing mandatory social distancing requirements. Judicial Officers will stagger their calendars to limit the number of persons who come to the courthouse at the same time.

3. Civil Trial Continuances:

a. Public health authorities advise that the most effective means to reduce the possibility of exposure to the virus and to slow the spread of COVID-19 is for individuals to avoid in-person gatherings with persons outside their households. County of Los Angeles and State of California public health officials have also mandated that individuals must wear face coverings over their noses and mouths, wash their hands frequently, and observe social distancing of at least six feet. Because court proceedings inherently involve many people,¹ as the Court determines how to operate during the pandemic, it cannot ignore the fact that many members of our community struggle to observe public health authority guidance.

b. Moreover, courthouses are not designed to facilitate social distancing given their fixed configuration. Changing that configuration has security implications, affects the presentation of evidence, limits public access, and requires financial and other resources that the Court lacks in light of the 10% reduction in its 2020-2021 fiscal year budget. In addition, the Court’s 2021-2022 fiscal year budget will be cut by an

¹ A typical civil jury trial with one witness testifying involves a minimum of 23 people: Judge, judicial assistant, court reporter, 12 jurors and 2 alternates, plaintiff, plaintiff’s counsel, defendant, defense counsel, and witness.
additional 5%. Furthermore, while the Court accelerated its plans to implement
technology to allow judicial officers to conduct proceedings remotely, for legal,
equitable, and logistical reasons, it cannot mandate remote appearances in every case.
Remote appearances in civil jury trials will create logistical issues with respect to jury
selection, jury deliberations, and the handling of evidence.
c. These considerations take on different urgency as the United States Centers for
Disease Control and Prevention warns that most of the U.S. population will be
exposed to the coronavirus. The Los Angeles County Department of Public Health
reports that as of October 8, 2020, there are over 278,665 COVID-19 cases in Los
Angeles County and over 6,726 deaths. The County of Los Angeles has the grim
distinction of having the highest number of cases and deaths of the 58 counties in the
State of California. Based on the foregoing, the Court finds and concludes that
conducting civil jury trials would also likely place prospective jurors, litigants,
attorneys, and court personnel at unnecessary risk and that risk outweighs the
interests of the public and the parties in a trial. Accordingly, except as noted below,
the Court finds good cause to continue any and all civil jury trials until January 2021.
d. In addition, pursuant to Penal Code section 1050 and Government Code section
68115, the Court will give priority to criminal trials that were previously continued
under a judicial emergency general order (Penal Code §1382) in assigning available
prospective jurors for either Misdemeanor or Felony jury trials. Presently, there are
approximately 7,000 criminal cases that must be tried to satisfy defendants’ statutory
speedy trial rights prescribed in Penal Code section 1382.

4. Juvenile Dependency Prioritization Plan Continuances:
a. Whereas, from March 20, 2020 to June 22, 2020, the Juvenile Dependency courts
heard only those matters defined as “Essential Functions,” in the General Orders
issued by Presiding Judge Kevin C. Brazile. All previously scheduled Dependency
matters were continued. At the direction of Presiding Judge Brazile, in preparation
for resuming full operations, the Hon. Victor H. Greenberg, Presiding Judge of
Juvenile, developed a prioritization plan (Dependency Prioritization Plan) that strictly
limited the daily number of cases each Dependency courtroom would hear. This plan
considered the social distancing capacity of the Dependency courtrooms and the
available public waiting areas in the Edmund D. Edelman Children’s Court and the
Alfred J. McCourtney Juvenile Justice Center. Such preparation was necessary and
designed to protect children, parents, family members, foster parents, other litigants,
attorneys, and court staff from the transmission of COVID-19, a highly contagious
respiratory virus while they waited in close proximity for hours in public areas of the
courthouse. It would also protect them in courtrooms that in most cases are too small
to hold all participants when the Court enforces social distancing protocols.

b. Whereas, efforts to safeguard the well-being of litigants, counsel, court personnel and
judicial officers preclude Dependency courts from handling the same number of
cases they did pre-pandemic. As a result, there is a substantial backlog of proceedings
that continues to grow as new cases are filed and the ability of judicial officers to
hear cases is constrained by social distancing protocols.

c. Whereas, when the Dependency courts reopened on June 22, 2020, they were
equipped with technology that enabled them to conduct hearings remotely. While
social distancing protocols limit courtroom capacity significantly, remote hearing
technology enables litigants and counsel to access the courts safely. Since
Dependency courts resumed full operations on June 22, 2020, they have held the vast
majority of proceedings remotely.

d. Whereas, when the Dependency court resumed operations, its judicial officers were
encouraged to use the Dependency Prioritization Plan as a guide, but were reminded
that they retained the discretion to advance hearings on cases they continued so long
as they could do so within available resources and, if in person, in compliance with
social distancing protocols.
e. Consequently, in light of the severe risks of exposure to the coronavirus that children, litigants, family members, attorneys, and court personnel would face if the Court returned to pre-pandemic calendaring practices, pursuant to Welfare and Institutions Code section 352, my authority consistent with the emergency rules the Judicial Council adopted, and my authority under rule 10.603 of the Cal. Rules of Court, I find good cause to continue dependency cases consistent with the Dependency Prioritization Plan as follows.

<table>
<thead>
<tr>
<th>Dependency Prioritization Plan</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Type of Proceeding</strong></td>
</tr>
<tr>
<td>Adjudication (detained) &amp; Disposition (detained)</td>
</tr>
<tr>
<td>Welfare &amp; Institutions Code §§366.21e, 366.21f, 366.22, and 366.25</td>
</tr>
<tr>
<td>Adjudication (in home placement) and Disposition (in home placement)</td>
</tr>
<tr>
<td>Welfare &amp; Institutions Code §364, Dependent Child Adoptions and Non-dependent (private) Adoptions, Progress Reports, Non-emergent walk-on requests</td>
</tr>
</tbody>
</table>

f. The Dependency Prioritization Plan, coupled with the discretion judicial officers have to advance cases in need of immediate attention, is designed to address the delays caused by COVID-19 public health concerns. It prioritizes dependency cases for judicial officers to hear as quickly as circumstances allow in light of COVID-19.

5. **Juvenile Dependency and Juvenile Delinquency Emergency Order Continuances:**

a. The Court extends the time periods provided in section 313 of the Welfare and Institutions Code within which a minor taken into custody pending dependency
proceedings must be released from custody to not more than seven (7) days, applicable only to minors for whom the statutory deadline would otherwise expire from October 9, 2020 to November 6, 2020, inclusive.

b. The Court extends the time periods provided in section 315 of the Welfare and Institutions Code within which a minor taken into custody pending dependency proceedings must be given a detention hearing to not more than seven (7) days, applicable only to minors for whom the statutory deadline would otherwise expire from October 9, 2020 to November 6, 2020, inclusive.

c. The Court extends the time periods provided in sections 632 and 637 of the Welfare and Institutions Code within which a minor taken into custody pending wardship proceedings and charged with a felony offense must be given a detention hearing or rehearing to not more than seven (7) days, applicable only to minors for whom the statutory deadline would otherwise expire from October 9, 2020 to November 6, 2020, inclusive.

d. The Court extends the time period provided in section 334 of the Welfare and Institutions Code within which a hearing on a juvenile dependency petition must be held by not more than fifteen (15) days, applicable only to minors for whom the statutory deadline would otherwise expire from October 9, 2020 to November 6, 2020, inclusive.

e. The Court extends the time period provided in section 657 of the Welfare and Institutions Code within which a hearing on a wardship petition for a minor charged with a felony offense must be held by not more than fifteen (15) days, applicable only to minors for whom the statutory deadline otherwise would expire from October 9, 2020 to November 6, 2020, inclusive.

6. Criminal Continuances:
   a. One of the most important principles of our constitutional democracy is the right of persons accused of a crime to have a speedy trial. Preserving that right while
protecting the well-being of all participants in a trial during a pandemic involving a highly contagious respiratory virus is an unprecedented challenge for trial courts.

b. A combination of judicial emergency orders issued pursuant to Government Code section 68115, emergency rules issued by the Judicial Council and Statewide Orders issued by Chief Justice Tani Cantil-Sakauye (collectively, "Extension Authority") have extended the time period provided by Penal Code section 1382 for the holding of a criminal trial in Los Angeles County from March 17, 2020 until November 12, 2020, inclusive. The extensions are applicable to cases in which the original or previously extended deadline otherwise would expire during the periods referenced in the Extension Authority.

c. Pursuant to the authority granted by the March 30, 2020 Statewide Emergency Order by Tani G. Cantil-Sakauye, Chief Justice of California and Chair of the Judicial Council which the Court implemented in its General Order No. 2020-GEN-07-00 issued on April 2, 2020, and until further notice, the Court extends the time provided by section 859b of the Penal Code for the holding of a preliminary examination and the defendant’s right to release from 10 court days to not more than 30 court days.

d. The Court extends the time period provided in section 1382 of the Penal Code for the holding of a criminal trial by not more than 30 days, applicable only to cases in which the original or previously extended statutory deadline otherwise would expire from September 14, 2020 to November 12, 2020, inclusive.\(^2\)

e. The Court extends by 90 calendar days the time to submit status reports and progress

\(^2\) This General Order implements the extension authority granted by the Chief Justice for all cases whose last day falls within the emergency period (i.e., August 14, 2020 to October 13, 2020), extending the Penal Code section 1382 deadline in all such cases without the need for a further order in each individual case. General Order Nos. 2020-GEN-018-00 and 2020-GEN-019-00 operate similarly to implement the applicable extensions in those orders, and those orders extending the Penal Code section 1382 deadline do not expire and remain in effect unless expressly rescinded by a subsequent order. If the last day in a case falls within the emergency period of multiple General Orders, the extension shall apply separately and consecutively under each General Order. For example, the last day for trial in a case in which the statutory deadline otherwise would expire on July 16, 2020 is extended to August 17, 2020 under No. 2020-GEN-018-00, extended to September 14, 2020 under No. 2020-GEN-019-00, and further extended to October 13, 2020 under No. 2020-GEN-020-00.
reports for defendants for whom a status report or progress report was due from

October 9, 2020 to November 6, 2020, inclusive. The court shall provide notice of
when the new proceeding will be held.

f. The Court extends by 90 calendar days, unless statutorily required otherwise, the time
to hold misdemeanor post-arraignment proceedings in which the defendant is out of
custody that would otherwise be set from October 9, 2020 to November 6, 2020,
inclusive.

7. Civil Continuances:

a. Unlawful Detainer:

The Court deems October 9, 2020 to November 6, 2020, inclusive, a holiday/holidays
for purposes of computing time under Code of Civil Procedure section 1167. The Court
finds good cause to continue all unlawful detainer trials without a determination
pursuant to Code of Civil Procedure section 1170.5(c).

b. Small Claims:

The Court deems October 9, 2020 to November 6, 2020, inclusive, a holiday/holidays
for purposes of computing the time under Code of Civil Procedure section 116.330(a)
(requires a small claims matter to be scheduled for hearing no earlier than 20 days, but
not more than 70 days from the date of the order directing the parties to appear at the
hearing).

8. Trial Continuances:

a. Except as noted below, all non-jury and jury trials, except Small Claims and Traffic
trials, unless statutorily required, including in Limited and General Civil, Mental
Health, and Probate scheduled from October 9, 2020 to November 6, 2020, inclusive,
are continued until further notice. All pre-trial dates for trials that are continued
pursuant to this paragraph are also continued consistent with the new trial date.

b. Certain Unlawful Detainer jury and non-jury trials resumed on October 5, 2020. In
addition, civil jury trials in preference cases under Code of Civil Procedure section 36
that can be tried in compliance with social distancing protocols resumed on October 5, 2020. Non-jury trials in any other preference cases also resumed as of October 5, 2020. All other civil non-jury trials may resume on or after November 16, 2020.

c. All non-preference civil jury trials may commence on or after January 4, 2021.

9. Family Law evidentiary proceedings, whether Family Code section 217 hearings or trials, other than restraining order hearings, that may be completed within two court days may be held. Family Law evidentiary proceedings the total duration of which is expected to exceed two court days shall not commence before November 16, 2020, except as authorized by the Supervising Judge of Family Law.

THIS ORDER IS EFFECTIVE IMMEDIATELY AND WILL REMAIN IN EFFECT UNTIL FURTHER NOTICE, OR UNTIL ITS PROVISIONS EXPIRE BY THEIR TERMS, ARE RESCINDED, AMENDED, OR ARE SUPERSEDED BY SUBSEQUENT ORDERS. THIS ORDER MAY BE AMENDED AS CIRCUMSTANCES REQUIRE.

GOOD CAUSE APPEARING THEREFORE, IT IS SO ORDERED.

DATED: October 9, 2020

KEVIN C. BRAZILE
Presiding Judge

Synopsis

Background: The People brought a civil action against debt payment service provider, seeking injunctive relief, restitution, and civil penalties for alleged violations of the unfair competition law (UCL) and the false advertising law (FAL). The Superior Court, Alameda County, No. RG15770490, George Hernandez, J., granted the People's motion to strike provider's jury trial demand in its answer. Provider petitioned for a writ of mandate. The First District Court of Appeal, 24 Cal.App.5th 438, 234 Cal.Rptr.3d 468, reversed. The People's petition for review was granted.

Holdings: The Supreme Court, Cantil-Sakauye, Chief Justice, held that:

- there is no statutory right to a jury trial in a cause of action under the UCL;
- there is no statutory right to a jury trial in FAL actions; and
- there is no state constitutional right to a jury trial in a cause of action under the UCL or the FAL.

Judgment of the Court of Appeal reversed and remanded.

Kruger, J., filed concurring opinion in which Liu and Cuellar, JJ., joined.

See also 2017 WL 3948396.

Procedural Posture(s): Petition for Discretionary Review; Petition for Writ of Mandate; Motion to Strike All or Part of a Pleading.

**463***716 First Appellate District, Division One A150264, Alameda County Superior Court RG15770490, George C. Hernandez, Jr., Judge.

Attorneys and Law Firms


Jeannine M. Pacioni and Dean D. Flippo, District Attorneys (Monterey), Cynthia J. Zimmer and Lisa Green, District Attorneys (Kern), Nancy E. O’Malley, District Attorney (Alameda), Lori Frugoli, Edward Berberian and Jeremy M. Fonseca, District Attorneys (Marin), Matthew L. Beltramo, Assistant District Attorney (Alameda), John F. Hubanks and Christopher Judge, Deputy District Attorneys (Monterey), John Thomas Mitchell, Deputy District Attorney (Kern), Andres H. Perez, Deputy District Attorney (Marin); Mary Ann Smith, Sean Rooney, Robert R. Lux and William Horsey for Real Party in Interest.

Xavier Becerra, Attorney General, Nicklas A. Akers, Assistant Attorney General, Michele Van Gelderen, Sheldon H. Jaffe and Vivian F. Wang, Deputy Attorneys General, for the Attorney General as Amicus Curiae on behalf of Real Party in Interest.

Mark Zahner; Matthew T. Cheever, Deputy District Attorney (Sonoma) and Patrick Collins, Deputy District Attorney (Napa) for California District Attorneys Association as Amicus Curiae on behalf of Real Party in Interest.

Opinion

Opinion of the Court by Cantil-Sakauye, C. J.

**464** *292* Under two of California’s most prominent consumer protection statutes — the unfair competition law (UCL)\(^1\) and the false advertising law (FAL)\(^2\) — the Attorney General or local prosecuting authorities may bring a civil action against a business that has allegedly engaged
in an unfair, unlawful or deceptive business act or practice or false or misleading advertising and may obtain civil penalties as well as injunctive relief and restitution in such an action. In this case we must decide whether, when the government seeks civil penalties as well an injunction or other equitable remedies under those statutes, the causes of action are to be tried by the court (that is, the trial judge) or, instead, by a jury.

For more than 45 years, a uniform line of California Court of Appeal decisions has ***717 held that such causes of action under the UCL and FAL are to be tried by the court rather than by a jury. In the current writ proceeding in this case, however, the Court of Appeal, relying primarily on a decision of the United States Supreme Court applying the civil jury trial provision of the civil jury trial provision of the California Constitution — Tull v. United States (1987) 481 U.S. 412, 107 S.Ct. 1831, 95 L.Ed.2d 365 (Tull) — disagreed with the earlier line of decisions and held that the jury trial provision of the California Constitution should be interpreted to require a jury trial in any action brought under the UCL or FAL in which the government seeks civil penalties in addition to injunctive or other equitable relief. We granted review to resolve the conflict in the Court of Appeal decisions.

For the reasons discussed hereafter, we conclude that the causes of action established by the UCL and FAL at issue here are equitable in nature and are properly tried by the court rather than a jury. As we explain, the legislative history and underlying purpose of the statutory provisions in question demonstrate that these very broadly worded consumer protection statutes were fashioned to permit courts to utilize their traditional flexible equitable authority, tempered by judicial experience and familiarity with the treatment of analogous business practices in this and other jurisdictions, in evaluating whether a challenged business act or practice or advertising should properly be considered impermissible under these statutory provisions.

With regard to petitioners’ constitutional claim, it is firmly established that California’s constitutional jury trial provision preserves the right to jury trial *293 in civil actions comparable to those legal causes of action in which the right to jury trial existed at the time of the first Constitution’s adoption in 1850 and does not apply to causes of action that are equitable in nature. At early common law, “legal” causes of action (or “actions at law”) typically involved lawsuits in which the plaintiff sought to recover money damages to compensate for an injury caused, for example, by the defendant’s breach of contract or tortious conduct, whereas “equitable” causes of action (or “suits in equity”) sought relief that was unavailable in actions at law, such as an injunction to prohibit ongoing or future misconduct or an order requiring a defendant to provide specific performance or disgorge ill-gotten gains. The consumer protection statutory causes of action at issue here are quite different from any early common law cause of action that was in existence at the time the civil jury trial provision of the California **465 Constitution was first adopted. Given the nature of the substantive standard to be applied and the remedies afforded by the statutes, we conclude that the gist of both the UCL and FAL causes of action at issue here is equitable and consequently such actions are properly tried by the court rather than by a jury.

As further explained, the United States Supreme Court decision in Tull, supra, 481 U.S. 412, 107 S.Ct. 1831, relied upon by the Court of Appeal below, does not govern this case for a variety of reasons. To begin with, the Tull decision rests upon the federal high court’s interpretation of the civil jury trial provision of the Seventh Amendment to the federal Constitution, and that court’s decisions explicitly hold that the Seventh Amendment applies only to federal court proceedings, not state court proceedings. The constitutional right to jury trial in state court civil proceedings is governed only by the civil jury trial provisions of each individual state’s own state constitution. In several important respects, California decisions have construed the civil jury trial provision of the California Constitution in a manner differently ***718 from how the federal high court has interpreted the federal civil jury trial provision. These differences are significant in this context and serve to distinguish the Tull decision from this case. Second, unlike the broad, flexible standards embodied in the two consumer protection statutes at issue in this case, there is no indication that the relevant substantive statutory standard at issue in Tull called for the exercise of a court’s traditional equitable authority and discretion in determining whether a violation of the statute had occurred. Accordingly, the court in Tull had no occasion to determine how the federal constitutional civil jury trial provision should be interpreted or applied in such a setting.
Because the nature of the substantive statutory standards and remedies embodied in the civil causes of action under the UCL and the FAL establish the equitable nature of the actions, we limit the holding in this case to the UCL and FAL setting and express no opinion regarding how the state constitutional jury trial right applies to other statutory causes of action that authorize both injunctive relief and civil penalties.

I. FACTS AND PROCEEDINGS BELOW

Petitioners Nationwide Biweekly Administration, Inc., Loan Payment Administration LLC, and Daniel S. Lipsky, the alleged alter ego, principal and sole shareholder of both entities (hereafter collectively referred to as Nationwide) operated a debt payment service in California and other states. Nationwide’s program claimed to save debtors money through a process in which the debtor would reduce the amount of interest owed over the life of a loan by having the debtor accelerate the repayment of the debt through an extra monthly payment each year. Under the program, a debtor would pay to Nationwide one-half the debtor’s ordinary monthly loan payment every two weeks (biweekly) rather than one full payment once a month, resulting in an extra month’s payment each year (26 half-payments equal 13 full payments), and Nationwide would in turn pay those amounts to the debtor’s lender. Nationwide advertised its services statewide, mostly through direct mailers to consumers with outstanding residential mortgages, and through follow-up telephone conversations with consumers who responded to the mailers.

In May 2015, the district attorneys of four counties, acting on behalf of the People, filed a civil complaint alleging that Nationwide had violated the UCL and FAL by, among other things, employing business practices that: (1) misleadingly implied that Nationwide was affiliated with the consumer’s lender; (2) disguised the amount that Nationwide’s services actually cost by failing to fully and adequately disclose the amount, payment schedule, and effect of Nationwide’s fees; and (3) overstated the amount of savings a consumer could reasonably expect to receive through Nationwide’s services. The complaint also stated that Nationwide’s practices have been the subject of numerous consumer complaints and regulatory and law enforcement activities around the country, including an action brought by the federal Consumer Financial Protection Bureau.

The complaint’s prayer for relief requested that the court (1) issue an injunction prohibiting the business practices found to violate the provisions of the UCL or FAL, (2) order restitution of all money wrongfully acquired by Nationwide from California consumers in violation of the UCL and FAL, and (3) impose civil penalties up to $2,500 for each violation of the UCL or FAL found by the court.

In its amended answer to the complaint, Nationwide demanded a jury trial “on all issues so triable,” and the People, in response, filed a motion to strike the jury demand “based on well settled law that this is an equity action requiring a court trial.” After briefing, the trial court granted the People’s motion to strike the jury demand.

Nationwide then filed a petition for writ of mandate in the Court of Appeal, challenging the trial court’s ruling striking the jury demand. After the Court of Appeal initially summarily denied the writ petition, this court granted Nationwide’s petition for review and transferred the matter to the Court of Appeal with directions to issue an order requiring the People to show cause why Nationwide does not have a right to jury trial when the government seeks the civil penalties authorized under the UCL and FAL.

After briefing and argument, the Court of Appeal held that under article I, section 16 of the California Constitution — the jury trial provision — Nationwide has a right to a jury trial in this matter and that the trial court erred in striking the jury demand.
In the course of its opinion, the Court of Appeal rejected the People’s contention that there is “an unbroken line of appellate decisions finding no right to a jury trial [under the California Constitution] in UCL or FAL actions ... where the People sought penalties’” (Nationwide Biweekly, supra, 24 Cal.App.5th at pp. 457-459, 234 Cal.Rptr.3d 468.) Although the Court of Appeal acknowledged that at least one appellate court decision — People v. Bhakta (2008) 162 Cal.App.4th 973, 76 Cal.Rptr.3d 421 — clearly held that the gist of an action under the UCL is equitable in nature and that there is no right to a jury trial in such an action under the California constitutional jury trial provision, the Court of Appeal disagreed with that decision’s analysis and declined to follow its holding. (Nationwide Biweekly, supra, 24 Cal.App.5th at pp. 459-460, 234 Cal.Rptr.3d 468.) In addition, the Court of Appeal questioned the validity of another appellate court decision relied upon by the People — DiPirro v. Bondo Corp. (2007) 153 Cal.App.4th 150, 62 Cal.Rptr.3d 722 (DiPirro) — which held that there is no right to a jury trial in an action seeking injunctive relief, restitution, and civil penalties under the Safe Drinking Water and Toxic Enforcement Act of 1986 (Health & Saf. Code, § 25249.5 et seq.) (commonly known as Prop. 65). The Court of Appeal found that the DiPirro decision had not adequately analyzed the United States Supreme Court’s reasoning in Tull. (Nationwide Biweekly, supra, 24 Cal.App.5th at pp. 461-463, 234 Cal.Rptr.3d 468.)

Accordingly, the Court of Appeal concluded that a writ of mandate should issue, directing the trial court to vacate its order striking Nationwide’s request for jury trial and to grant a jury trial on all issues except the amount of any statutory penalties to be awarded. (Nationwide Biweekly, supra, 24 Cal.App.5th at p. 463, 234 Cal.Rptr.3d 468.)

We granted the People’s petition for review to determine whether there is a right to a jury trial in a UCL or FAL action brought by the government when the government seeks civil penalties as well as injunctive relief and restitution.

II. GENERAL PRINCIPLES REGARDING THE RIGHT TO JURY TRIAL IN CIVIL CASES UNDER CALIFORNIA LAW

As this court recently explained in Shaw v. Superior Court (2017) 2 Cal.5th 983, 216 Cal.Rptr.3d 643, 393 P.3d 98 (Shaw): “Under California law, the right to a jury trial in a civil action may be afforded either by statute or by the California Constitution. ... As a general matter, the California Legislature has authority to grant the parties in a civil action the right to a jury trial by statute, either when the Legislature establishes a new cause of action or with respect to a cause of action that rests on the common law or a constitutional provision. [Citations.] Given the Legislature’s broad general legislative authority under the California Constitution and in the absence of any constitutional prohibition [citations], the Legislature may extend the right to a jury trial to instances in which the state constitutional jury trial provision does not itself mandate a right to a jury trial. ... But even when the language and legislative history of a statute indicate that the Legislature intended that a cause of action established by the statute is to be tried by the court rather than a jury, if the California constitutional jury trial provision itself guarantees a right to a jury trial in such a cause of action, the Constitution prevails and jury trial cannot be denied.” (2 Cal.5th at pp. 993-994, 216 Cal.Rptr.3d 643, 393 P.3d 98, fn. omitted.)

III. IS THERE A STATUTORY RIGHT TO JURY TRIAL UNDER EITHER THE UCL OR FAL
WHEN THE GOVERNMENT SEEKS CIVIL PENALTIES AS WELL AS INJUNCTIVE RELIEF?

Neither the UCL nor the FAL explicitly addresses the question whether the causes of action created by the two statutes — both of which authorize the government to seek civil penalties as well as injunctive relief and restitution — are to be tried by the court or by a jury. As we shall see, however, the legislative history and legislative purpose of both statutes convincingly establish that the Legislature intended that such causes of action under those statutes would be tried by the court, exercising the traditional flexible discretion and judicial expertise of a court of equity, and not by a jury, including when civil penalties as well as injunctive relief and restitution are sought.

A. The UCL

Prior to 1933, former section 3369 of the Civil Code provided simply that “[n]either specific nor preventive relief can be granted to enforce a penal law, except in a case of nuisance, nor to enforce a penalty or forfeiture in any case.” The current provisions of the UCL — set forth in **Business and Professions Code section 17200 et seq. — derive from a 1933 amendment of Civil Code former section 3369. (Stats. 1933, ch. 953, § 1, p. 2482.) The 1933 amendment broadened the exception in the statute to include “unfair competition” as well as “nuisance” (Civ. Code, former § 3369, subd. (1)) and added additional subdivisions that: (a) provided that “[a]ny person performing or proposing to perform an act of unfair competition within this State may be enjoined in any court of competent jurisdiction” (id., subd. (2), italics added); (b) defined “unfair competition” as used in the statute to “mean and include unfair or fraudulent business practice and unfair, untrue or misleading advertising” (id., subd. (3), italics added); and (c) authorized actions for injunction under the statute to be brought “by the Attorney General or any district attorney in this State in the name of the people of the State of California” or by “any board, officer, ... corporation or ... person acting for the interests of itself, its members or the general public” (Civ. Code, former § 3369, subd. (5)). Because the unfair competition cause of action established by the 1933 amendment of former section 3369 authorized the government (as well as private parties) to seek only injunctive relief, there is no question that the civil cause of action created in 1933 was equitable in nature and, as such, was intended to be tried by the court and not a jury. (See 3 Witkin, Cal. Procedure (5th ed. 2008) Actions, § 126, p. 205 [“Actions seeking injunctive relief are, of course, equitable in nature”].) Nationwide does not suggest otherwise.

In 1972, as part of a legislative measure that expanded the reach of former **section 3369 of the Civil Code to include “deceptive,” as well as “unfair,” “untrue,” or “misleading,” advertising (Stats. 1972, ch. 1084, § 1, p. 2021), the Legislature added former section 3370.1 to the Civil Code, authorizing the Attorney General or any district attorney (but not private parties) to seek and obtain, in addition to injunctive relief, “a civil penalty not to exceed two thousand five hundred dollars ($2,500) for each violation” of former section 3369 (Stats. 1972, ch. 1084, § 2, p. 2021 [enacting Assem. Bill No. 1937 (1971-1972 Reg. Sess.)]). The 1972 legislation was proposed by the Attorney General and district attorneys who were charged with enforcing the prohibition on unfair competition embodied in former section 3369. In support of the legislation, the proponents maintained that “[i]t is our experience that an injunction without a civil penalty is not a deterrent to future consumer fraud abuses.” (Atty. Gen. Evelle J. Younger, letter to Sen. Alfred H. Song re Assem. Bill No. 1937 (1971-1972 Reg. Sess.) July 13, 1972.) A legislative committee analysis of the proposed bill after its final amendment set forth the purpose of the legislation as intended to “[p]ermit the Attorney General and a district attorney to collect civil penalties in addition to either specific or preventive relief in actions they commence to enjoin acts of unfair competition,” explaining that “[i]t is felt that the allowance of civil penalties, in addition to the requested injunctive relief, will provide a sufficient deterrent to the resumption of these unlawful practices.” (Sen. Com. on Judiciary, Analysis of Assem. Bill No. 1937 (1971-1972 Reg. Sess.) as amended May 25, 1972, pp. 1, 2.) There is no indication in the legislative history of the 1972 enactment that the Legislature, in providing an additional remedy that could be sought in actions under former section 3369 to enjoin acts of unfair competition, intended to transform such actions from ones that were to be tried by the court into actions that were to be tried by a jury. Civil actions under the UCL that were filed by private parties, in which only injunctive relief was authorized, continued to be tried by the court.

In 1977, the Legislature moved the relevant sections of the Civil Code embodying the unfair competition law into the **Business and Professions Code at sections 17200
Section 3370 of the Civil Code — the section authorizing the Attorney General or a district attorney to seek civil penalties as well as injunctive relief — was moved to Business and Professions Code section 17206. In 1992, the Legislature added subdivision (b) to Business and Professions Code section 17206, which provides in relevant part that “[i]n assessing the amount of the civil penalty, the court shall consider any one or more of the relevant circumstances presented by any of the parties to the case, including, but not limited to, the following: the nature and seriousness of the misconduct, the number of violations, the persistence of the misconduct, the length of time over which the misconduct occurred, the willfulness of the defendant’s misconduct, and the defendant’s assets, liabilities, and net worth.” (Stats. 1992, ch. 430, § 4, p. 1708, italics added.) Nothing in these further amendments suggests that in an action under the UCL in which the government seeks civil penalties as well as injunctive or other equitable relief, the Legislature intended that the action would be tried by a jury rather than by the trial court, and the language of Business and Professions Code section 17206, subdivision (b) clearly indicates that the amount of civil penalties is intended to be determined by the court.

The factors just discussed — namely (1) the origin of the government’s cause of action under the UCL as an action simply to enjoin an unfair business practice and (2) the language of the statutory provision relating to the awarding of civil penalties in such an action — clearly support the conclusion that the Legislature, in enacting the UCL, intended to create an equitable, rather than a legal, cause of action. Furthermore, from the statute’s inception, California decisions interpreting and applying both the provisions of former section 3369 and its current counterparts have explained that the exceedingly broad and general language that the Legislature incorporated in the statute to define the business practices that are proscribed by the statute — in the original language, “unfair or fraudulent business practice and unfair, untrue, or misleading advertising” — was adopted with the specific understanding that this broad language would be applied by a court of equity in determining whether a challenged business practice violated the statutory prohibition.

For example, in Barquis v. Merchants Collection Assn. (1972) 7 Cal.3d 94, 101 Cal.Rptr. 745, 496 P.2d 817 (Barquis) — one of this court’s seminal decisions applying the UCL — we emphasized that past cases under the statute “have frequently noted that the section was intentionally framed in its broad, sweeping language, precisely to enable judicial tribunals to deal with the innumerable ‘ “new schemes which the fertility of man’s invention would contrive.” ’ ” (Barquis, at p. 112, 101 Cal.Rptr. 745, 496 P.2d 817, italics added.) Quoting from American Philatelic Soc. v. Claibourne (1935) 3 Cal.2d 689, 698-699, 46 P.2d 135 — one of the earliest decisions discussing the appropriate reach of the broad language of the statute at issue — Barquis observed: “When a scheme is evolved which on its face violates the fundamental rules of honesty and fair dealing, a court of equity is not impotent to frustrate its consummation because the scheme is an original one. There is a maxim as old as law that there can be no right without a remedy, and in searching for a precise precedent, an equity court must not lose sight, not only of its power, but of its duty to arrive at a just solution of the problem.” (Barquis, supra, 7 Cal.3d at p. 112, 101 Cal.Rptr. 745, 496 P.2d 817, italics added.)

The objective that the Legislature sought to accomplish through its adoption of the broad standard embodied in the UCL fits perfectly with the role historically exercised by a court of equity. As Pomeroy explained in his classic treatise on equity jurisprudence: “[E]quity is] much more elastic and capable of expansion and extension to new cases than the common law. Its very central principles, its foundation upon the eternal verities of right and justice, its resting upon the truths of morality rather than arbitrary customs and rigid dogmas, necessarily gave it this character of flexibility, and permitted its doctrines to be enlarged so as to embrace new cases as they constantly arose. It has, therefore, as an essential part of its nature, a capacity of orderly and regular growth, — a growth not arbitrary, according to the will of individual judges, but in the direction of its already settled principles.” (1 Pomeroy, Equity Jurisprudence (5th ed. 1941)
§ 59, p. 76.) As the Court of Appeal observed in *A-C Co. v. Security Pacific Nat. Bank* (1985) 173 Cal.App.3d 462, 473, 219 Cal.Rptr. 62: “The tradition and heredity of the flexible equitable powers of the modern trial judge derive from the role of the trained and experienced chancellor and depend upon *301* skills and wisdom acquired through years of study, training and experience which are not susceptible of adequate transmission through instructions to a lay jury.”

Over the more than 80-year history of the UCL, scores of decisions of both this court and the Courts of Appeal have uniformly recognized that the cause of action established by this statute is equitable in nature. (See, e.g., *SoluS Industrial Innovations, LLC v. Superior Court* (2018) 4 Cal.5th 316, 340, 228 Cal.Rptr.3d 406, 410 P.3d 32 [the UCL “ ‘provides an equitable means through which both public prosecutors and private individuals can bring suit to prevent unfair business practices’ ” (italics added and omitted)]; *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1144, 131 Cal.Rptr.2d 29, 63 P.3d 937 [“A UCL action is equitable in nature; damages cannot be recovered. ... Civil penalties may be assessed in public unfair competition actions, but the law contains no criminal provisions” (citation omitted).]

In *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 83 Cal.Rptr.2d 548, 973 P.2d 527 (*Cel-Tech*), our court addressed questions arising from the expansive scope of the language of the UCL in a case in which the plaintiff cell phone vendor challenged the business practices of the defendant competitor cell phone company as unfair under the UCL. In that case, the plaintiff contended that the defendant had assertsly taken improper advantage of its privileged position as one of only two cell phone companies licensed to provide cellular service in the Los Angeles area when it engaged in the practice of selling **471** cell phones to its cellular service customers at below cost. In *Cel-Tech*, we noted that our court had not yet defined the term “unfair” as used in the UCL and determined that although two Court of *302* Appeal decisions ***725*** had attempted such a definition, *9* the suggested definitions in those appellate decisions were “too amorphous and provide too little guidance to courts and businesses.” (*Cel-Tech*, at p. 185, 83 Cal.Rptr.2d 548, 973 P.2d 527.)

Thereafter, in devising “a more precise test for determining what is unfair under the unfair competition law”, the court in *Cel-Tech* “turn[ed] for guidance to the jurisprudence arising under the ‘parallel’ section 5 of the Federal Trade Commission Act (*15 U.S.C. § 45(a))*” (FTC Act), observing that “ ‘[i]n view of the similarity of language and obvious identity of purpose of the two statutes, decisions of the federal court on the subject are more than ordinarily persuasive.’ ” (*Cel-Tech, supra*, 20 Cal.4th at p. 185, 83 Cal.Rptr.2d 548, 973 P.2d 527.) After describing a number of federal high court decisions considering the types of practices that would be considered “ ‘unfair methods of competition’ “ between competitors under section 5 of the FTC Act (*Cel-Tech*, at p. 186, 83 Cal.Rptr.2d 548, 973 P.2d 527) — federal decisions that the *Cel-Tech* court emphasized it considered persuasive but not “controlling or determinative” (*id. at p. 186, fn. 11, 83 Cal.Rptr.2d 548, 973 P.2d 527) — the court in *Cel-Tech* concluded that “to guide courts and the business community adequately and to promote consumer protection, we must require that any finding of unfairness to competitors under [Business and Professions Code] section 17200 be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition. We thus adopt the following test: *When a plaintiff who claims to have suffered injury from a direct competitor’s ‘unfair’ act or practice invokes section 17200 [the relevant provision of the UCL], the word ‘unfair’ in that section means conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition*” (*20 Cal.4th at pp. 186-187, 83 Cal.Rptr.2d 548, 973 P.2d 527, italics added).
or applied by a jury. Indeed, the Cel-Tech court’s detailed description of the analysis that would have to be undertaken on remand of that case in determining whether the challenged practice meets the test of unfairness adopted in Cel-Tech *303 makes it clear that our opinion in that case recognized that the test was to be applied by the trial court and not a jury. (See Cel-Tech, supra, 20 Cal.4th at pp. 188-191, 83 Cal.Rptr.2d 548, 973 P.2d 527; cf. F. T. C. v. Motion Picture Adv. Co. (1953) 344 U.S. 392, 396, 73 S.Ct. 361, 97 L.Ed. 426 [“The point where a method of competition becomes ‘unfair’ ... will often turn on the exigencies of a particular situation, trade practices, or the practical requirements of the business in question”].)

The court in Cel-Tech explicitly noted that the case before it involved “an action by a competitor alleging anticompetitive practices” and emphasized that the specific test adopted in that decision was limited to that context and did not apply to “actions by consumers or by competitors alleging other kinds of violations of the unfair competition law.” (***472 Cel-Tech, supra, 20 Cal.4th at p. 187, fn. 12, 83 Cal.Rptr.2d 548, 973 P.2d 527.) Subsequent to the decision in Cel-Tech, our court has not addressed the question whether in actions under the UCL brought on behalf of consumers rather than competitors, the term “unfair” in the UCL needs to be similarly defined in a more prescribed standard or test, and, if so, what that test should be. In the years since Cel-Tech, a split of authority has developed in the Courts of Appeal with regard to the proper test for determining whether a business practice is unfair under the UCL in consumer cases, with appellate decisions adopting three different tests for determining unfairness in the consumer context. (See, e.g., Zhang v. Superior Court (2013) 57 Cal.4th 364, 380, fn. 9, 159 Cal.Rptr.3d 672, 304 P.3d 163 [describing split of authority].)***726 The issue of the proper test for defining the term “unfair” as used in *304 the UCL in the consumer context is not raised in the present case, and we have no occasion to address it here. Nonetheless, we note that all the tests that have been proposed in the appellate court decisions are ones that, like the test adopted in Cel-Tech, can reasonably be applied only by courts, rather than by juries.

Accordingly, both (1) the fact that the cause of action under the UCL originated solely as an action to enjoin an unfair or misleading business practice — an equitable action triable only by a court and not a jury — and (2) the fact that the broad and general standard of unfair competition that was incorporated into the statute contemplated ***727 that the standard would be applied by a court exercising its traditional, flexible equitable authority rather than by a jury, support the conclusion that the Legislature, in enacting the UCL, intended that a cause of action under the UCL would be tried by the court and not a jury, even when the government seeks civil penalties as well as injunctive relief.

We note that the nature of the principal issue presented in a great many UCL actions additionally supports the conclusion that such causes of action were intended to be decided by the court rather than a jury. A cursory review of the numerous UCL actions that have been brought in recent years (see Stern, Cal. Practice Guide: Bus. & Prof. Code § 17200 Practice (The Rutter Group 2019) § 3:131, pp. 3-39 to 3-44 [describing 41 recent UCL cases] ) reveals that such cases often concern a nuanced and qualitative determination regarding whether a business practice should properly be considered unfair or deceptive within the meaning of the UCL. (See, e.g., Klein v. Chevron U.S.A., Inc. (2012) 202 Cal.App.4th 1342, 1376-1382, 137 Cal.Rptr.3d 293 [considering whether failing to sell temperature-adjusted motor fuel or to disclose the effect of temperature increases on the volume of fuel sold could constitute an unfair or fraudulent business practice]; Jolley v. Chase Home Finance, LLC (2013) 213 Cal.App.4th 872, 907-908, 153 Cal.Rptr.3d 546 [considering whether bank’s practice of “dual tracking” — agreeing to a loan modification while continuing to pursue foreclosure — could constitute an unfair or fraudulent business practice].) This type of qualitative determination — often requiring the consideration of a variety of factors or circumstances identified in prior cases in California or other jurisdictions or in administrative guidelines developed by the Federal Trade Commission or other consumer protection administrative agencies — is the type of decision that has traditionally been viewed as the province of courts rather than juries.

*305 Moreover, we have emphasized that “‘the overarching legislative concern [in enacting the UCL is] to provide
a streamlined procedure for the prevention of ongoing or threatened acts of unfair competition’ ” (Cortez v. Purolator Air Filtration Products Co. (2000) 23 Cal.4th 163, 173-174, 96 Cal.Rptr.2d 518, 999 P.2d 706), an objective that is inconsistent with the unavoidable delays and increased costs inherent in a jury, as compared to a court, trial. Furthermore, having a court, rather than a jury, decide the question whether a business practice is properly considered unfair or deceptive for purposes of the UCL has the additional significant benefit — for both defendants and plaintiffs — of facilitating appellate review of that determination, because a trial court, unlike a jury, is required to provide, upon request of any party, “a statement of decision explaining the factual and legal basis for its decision.” (Code Civ. Proc., § 632.) And having appellate courts in the position in which they can adequately review trial courts’ evaluations of the validity of business practices under the UCL, in turn, promotes the creation of a cumulative body of precedent that improves the consistency of future determinations under the UCL and provides needed guidance to companies in the formulation of their business practices. In sum, for all of the foregoing reasons, we believe that it is clear that the Legislature intended that a cause of action under the UCL — including an action brought by the government that seeks both injunctive relief and civil penalties — is to be tried by the court rather than by a jury.

B. The FAL

The FAL (Bus. & Prof. Code, § 17500 et seq.) has been accurately described as “the major California legislation designed to protect consumers from false or deceptive advertising.” (People v. Superior Court (Olson) (1979) 96 Cal.App.3d 181, 190, 157 Cal.Rptr. 628.) The procedures set forth in the FAL and UCL are in many respects parallel to one another, and the UCL specifically provides that any practice that violates the FAL is also prohibited by the UCL. (See Bus. & Prof. Code, § 17200.)

The original version of the FAL creating a civil cause of action was enacted in 1941. (Stats. 1941, ch. 63, § 1, pp. 727-729 [enacting Bus. & Prof. Code, §§ 17500-17535].) The statute broadly prohibited false or misleading advertising, declaring that it is unlawful for any person or business to make or distribute any statement to induce the public to enter into a transaction “which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading.” (Bus. & Prof. Code, § 17500.) Like the civil cause of action authorized by the original version of the UCL, the FAL, as originally enacted, explicitly authorized only injunctive relief (Bus. & Prof. Code, former § 17535), permitting civil actions for injunction under the act to be prosecuted by the Attorney General or any district attorney on behalf of the People, and also “by any [entity or] person acting for the interests of itself, its members or the general public.” (Ibid.) Because the civil action established by the 1941 legislation authorized only injunctive relief, it is clear that, as originally enacted, a civil action under the FAL, like that under the UCL as originally enacted, was equitable in nature and was intended to be tried by a court and not a jury. Again, Nationwide does not argue otherwise.

In 1965, the Legislature added Business and Professions Code section 17536 to the FAL, authorizing the Attorney General or a district attorney, but not a private party, to seek a civil penalty not to exceed $2,500 for each violation of the FAL. (Stats. 1965, ch. 827, § 1, pp. 2419-2420.) The enactment of section 17536 as part of the FAL in 1965 predated the enactment in 1972 of the comparable provision of the UCL, discussed above, authorizing the Attorney General or a district attorney to seek civil penalties as well as injunctive relief in an action under the UCL. (See, ante, 261 Cal.Rptr.3d at pp. 721-722, 462 P.3d at p. 468.) As with the comparable provision of the UCL, the legislative history of the 1965 enactment of section 17536 indicates that the legislation was introduced at the request of the Attorney General to provide an additional remedy in actions to enjoin fraudulent sales schemes. (See Assemblyman George E. Danielson, letter to Gov. Edmund G. Brown, June 14, 1965 [urging approval of 1965 bill introduced by Danielson].) Nothing in the legislative history of the 1965 enactment indicates any legislative intent to change the nature of a civil action under the FAL from an equitable action that is tried to the court to one that is tried by a jury. As under the UCL, actions under the FAL that were filed by private parties, in which injunctive relief was the prescribed remedy, continued to be tried by the court, not a jury.
**475 In *Jayhill*, supra, 9 Cal.3d 283, 107 Cal.Rptr. 192, 507 P.2d 1400, this court also addressed a separate issue concerning the application of Business and Professions Code section 17536, the provision of the FAL authorizing the trial court to impose civil penalties in a civil action under the FAL. We found that the trial court in that case had erred in determining that “‘each claim for penalty is a separate cause of action’” which must be separately stated, concluding instead that “[t]he Attorney General has only one cause of action against a particular defendant for violating section 17500; for this he seeks several forms of relief, including the civil penalty of $2,500 set forth in section 17536.

Since multiple victims are involved he prays for a penalty for each violation, but this does not elevate each violation to a separate cause of action. ... We hold that the Attorney General has only one cause of action against a defendant for violating section 17500, but that the amount of civil penalties which may be imposed under section 17536 is dependent upon the number of ‘violations’ committed by a defendant.” (9 Cal.3d at p. 288, 107 Cal.Rptr. 192, 507 P.2d 1400, italics added.) Because, as *308 we have seen, the court in *Jayhill* had already ***730 explained that the cause of action for violating section 17500 is an equitable action (*Jayhill*, at p. 286, 107 Cal.Rptr. 192, 507 P.2d 1400), the clear implication of the decision in *Jayhill* is that even when the Attorney General or a district attorney seeks civil penalties as well as injunctive relief in such an action, the action under the FAL remains an equitable action, and, as such, is to be tried by the court, rather than by a jury.

In 1992, Business and Professions Code section 17536 was amended to provide that “[i]n assessing the amount of the civil penalty, the court shall consider any one or more of the relevant circumstances presented by any of the parties to the case, including, but not limited to, the following: the nature and seriousness of the misconduct, the number of violations, the persistence of the misconduct, the length of time over which the misconduct occurred, the willfulness of the defendant’s misconduct, and the defendant’s assets, liabilities, and net worth.” (Stats. 1992, ch. 430, § 5, p. 1709, italics added.) This wording directly tracks the language that was added to section 17206 of the UCL in the same 1992 legislation. (See, *ante*, 261 Cal.Rptr.3d at p. 722, 462 P.3d at pp. 468-469.) Again, this terminology makes it clear that the Legislature intended that the amount of civil penalties under the FAL is to be determined by the court, not by a jury.

As with respect to the UCL, past decisions of both this court and the Courts of Appeal have consistently described the civil cause of action authorized by the FAL as an equitable action that is to be tried by the court rather than by a jury, including when the action is one brought by a government attorney and seeks civil penalties as well as injunctive relief.
It is true that the broad reach and scope of the FAL’s untrue or misleading standard is often framed in language (whether members of the public are likely to be deceived) that is not, on its face, beyond the ken of a jury. As employed in the FAL (as well as in the UCL), however, a determination that advertising poses a sufficient risk or tendency to deceive or confuse the public may potentially result in an injunctive order prohibiting what may be a common and widely utilized advertising, labeling, or promotional practice. (See, e.g., People v. Overstock.com, Inc. (2017) 12 Cal.App.5th 1064, 1091, 219 Cal.Rptr.3d 65 (Overstock.com) [the “ ‘equitable’ ... ‘remedial power granted under [the UCL and FAL] is extraordinarily broad’ ”].)

Like the choice of the term “unfair” in the UCL, the governing substantive standard of the FAL — prohibiting advertising that is “untrue or misleading” (Bus. & Prof. Code, § 17500, italics added) — is set forth in broad and open-ended language that is intended to permit a court of equity to reach any novel or creative scheme of false or misleading advertising that a deceptive business may devise. (See, e.g., Kwikset Corp. v. Superior Court (2011) 51 Cal.4th 310, 320, 120 Cal.Rptr.3d 741, 246 P.3d 877; Overstock.com, supra, 12 Cal.App.5th 1064, 1091, 219 Cal.Rptr.3d 65 [“ ‘ ‘Probably because false advertising and unfair business practices can take many forms, the *309 Legislature has given the courts the power to fashion remedies to prevent their ‘use or employment’ in whatever context they may occur’ ’ ”].) As this court explained in Kasky v. Nike (2002) 27 Cal.4th 939, 119 Cal.Rptr.2d 296, 45 P.3d 243, the FAL prohibits “ ‘not **476 only advertising which is false, but also advertising which[,] although true, is either actually misleading or which has a capacity, likelihood or tendency to deceive or confuse the public.’ [Citation.] Thus, to state a claim under either the UCL or the false advertising law, based on false advertising or promotional practices, ‘it is necessary only to show that “members of the public are likely to be deceived.” ’ ” (Kasky, at p. 951, 119 Cal.Rptr.2d 296, 45 P.3d 243, quoting ***731 Leoni v. State Bar (1985) 39 Cal.3d 609, 626, 217 Cal.Rptr. 423, 704 P.2d 183 and Committee on Children’s Television, Inc. v. General Foods Corp. (1983) 35 Cal.3d 197, 211, 197 Cal.Rptr. 783, 673 P.2d 660 (Com. on Children’s Television).)
In *Brady v. Bayer Corp.* (2018) 26 Cal.App.5th 1156, 237 Cal.Rptr.3d 683, for example, the Court of Appeal determined that the One A Day label on a bottle of gummy vitamins that required, in “miniscule” instructions on the back of the label (*id.* at p. 1159, 237 Cal.Rptr.3d 683), that two gummies be taken daily to provide the recommended daily vitamin dosage was sufficiently potentially misleading to support ***732*** a cause of action for violation of the FAL. The *Brady* court pointed out that despite the well understood traditional meaning of the One A Day brand, consumers who take one gummy a day “end up receiving only half the daily vitamin coverage ***477*** they think they are getting.” (*Brady* at p. 1160, 237 Cal.Rptr.3d 683.)

In the course of its opinion, the *Brady* court discussed at some length a number of factors that past decisions had considered and balanced in determining whether a product label could be found sufficiently misleading to violate the FAL, including “common sense,” the factual context in which literally true or literally false statements are made, the degree to which back-of-the-label qualifiers ameliorate any tendency to mislead, and the tendency of particular brand names to mislead. (*Brady*, at pp. 1165-1174, 237 Cal.Rptr.3d 683.)

Considering these factors as a whole, the *Brady* court found that the One A Day label had a sufficient “capacity, likelihood or tendency to deceive or confuse the public’’ to support a cause of action under the FAL. (*Brady*, at p. 1173, 237 Cal.Rptr.3d 683.)

As a further example, in *Day v. AT&T Corp.* (1998) 63 Cal.App.4th 325, 74 Cal.Rptr.2d 55, the Court of Appeal determined that although the defendant phone company’s policy of rounding up charges for phone calls longer than a minute to the next full minute was permissible under the “filed rate” doctrine, the failure of the packaging of defendant’s prepaid phone cards to disclose this rounding-up practice was sufficiently misleading to violate the FAL. In reaching this conclusion, the *Day* court considered but distinguished two earlier out-of-state decisions that had rejected a claim by ordinary phone subscribers that a telephone company’s failure to disclose the rounding-up practice was misleading. The court relied on the fact that unlike ordinary phone bills that disclosed to consumers that all phone calls were charged for full minutes, “[t]he phone cards in question, whose outer packagings do not reveal the practice of rounding up, are prepaid. A consumer cannot read any materials provided by the carrier with the card before buying the card, which will advise him or her of the practice. Based on the advertising a consumer will not know that whole minutes are being credited for each fraction of a minute until the card has been used.” (*Day*, at p. 334, 74 Cal.Rptr.2d 55.)

Under these circumstances, the *Day* court concluded “that the practices alleged here were likely to mislead, confuse or deceive members of the public.” (*Ibid.*)

And in *Overstock.com, supra*, 12 Cal.App.5th 1064, 219 Cal.Rptr.3d 65, the Court of Appeal upheld a trial court finding that the defendant online bargain retailer had violated the FAL through its online advertising practices. The defendant had used a number of different methods to indicate the purported bargain nature of its prices. At first, its advertisements displayed a “list price” that was shown stricken through, along with the retailer’s own lower price and the difference that the consumer would assertedly save. Later, the advertisements changed “list price” to “compare at,” and thereafter, to “compare.” The evidence at trial showed, however, that (1) the defendant failed to have a reliable procedure in place to verify that the comparator prices were realistic and (2) that the prices being compared frequently were not for the same or similar item. In affirming the trial court’s finding that the challenged advertising was false or misleading within the meaning of the FAL, the *Overstock.com* court relied in part on the Federal Trade Commission (FTC) Guides Against Deceptive Pricing (16 C.F.R. § 233 (2020)). (*Overstock.com, supra*, 12 Cal.App.5th at p. 1081, 219 Cal.Rptr.3d 65.) That FTC guide sets forth in considerable detail the numerous ways in ***733*** which advertised pricing practices may be misleading or deceptive. (See 16 C.F.R. §§ 233.1-233.5 (2020).) Specifically with respect to retail value comparisons, the guide provides that the advertiser “should be reasonably certain that the higher price he advertises does not appreciably exceed the price at which substantial sales of the article are being made in the area — that is, a sufficient number of sales so that a consumer would consider a reduction from the price to represent a genuine bargain or saving” and also that the
compared merchandise is “of essentially similar quality and obtainable in the area.” (16 C.F.R. § 233.2(a), (c) (2020).)

The Court of Appeal decision in *Overstock.com* illustrates that, as with the determination whether a business practice is unfair within the meaning of the UCL, the complexities and nuances that are often involved in the determination whether an advertisement should properly be considered untrue or misleading for purposes of the FAL are often ameliorated by judicial reference to the relevant guidelines developed by the FTC regarding deceptive advertising. (See *generally Stern, Cal. Practice Guide: Business & Prof. Code § 17200 Practice,* *supra,* §§ 4:46-4:80.4, pp. 4-14 to 4-32.)


And a brief look at just one of these FTC guidelines — the Guides Concerning Use of Endorsements and Testimonials in Advertising — provides a good indication of the type of equitable consideration and evaluation of a substantial variety of factors that often goes into the determination whether advertising is properly considered untrue or misleading for purposes of the FAL. The guide on endorsements declares, for example, that “[e]ndorsements must reflect the honest opinions, findings, beliefs, or experience of the endorser,” and that “[a]n advertiser may use an endorsement of an expert or celebrity only so long as it has good reason to believe that the endorser continues to subscribe to the views presented. An advertiser may satisfy this obligation by securing the endorser’s views at reasonable intervals where reasonableness will be determined by such factors as new information on the performance or effectiveness of the product, a material alteration in the product, changes in the performance of competitors’ products, and the advertiser’s contract commitments.” (16 C.F.R. § 255.1 (a), (b) (2020).) This FTC guide also distinguishes between advertising that uses “consumer endorsements” and advertising that uses “expert endorsements.” (Id., §§ 255.2, 255.3 (2020).) With respect to consumer endorsements, the guide provides in part: “An advertisement employing endorsements by one or more ***734*** consumers about the performance of an advertised product or service will be interpreted as representing that the product or service is effective for the purpose depicted in the advertisement. Therefore, the advertiser must possess and rely upon adequate substantiation, including, when appropriate, competent and reliable scientific evidence, to support such claims made through endorsements in the same manner the advertiser would be required to do if it had made the representation directly, i.e., without using endorsements.” (Id., § 255.2(a) (2020).) With respect to expert endorsements, the guide requires that “the endorser’s qualifications must in fact give the endorser the expertise that he or she is represented as possessing with respect to the endorser,” ***313*** and that “the endorsement must be supported by an actual exercise of that expertise in evaluating product features or characteristics with respect to which he or she is expert and which are relevant to an ordinary consumer’s use of or experience with the product and are available to the ordinary consumer. This evaluation must have included an examination or testing of the product at least as extensive as someone with the same degree of expertise would normally need to conduct in order to support the conclusions presented in the endorsement.” (Id., § 255.3(a), (b) (2020).) Further, the guide provides with respect to all endorsers that “[w]hen there exists a connection between the endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorsement (i.e., the connection is not reasonably expected by the audience), such connection must be fully disclosed.” (Id., § 255.5 (2020).) Finally, the guide discusses numerous hypothetical examples that further explain the guide’s provisions. (See id., §§ 255.1-255.5 (2020).)

Thus, as past FAL decisions and the numerous FTC guidelines indicate, the determination whether an advertising...
or promotional practice should properly be found untrue or misleading within the meaning of the FAL depends upon the exercise of the type of equitable discretion and judgment typically employed by a court of equity. Federal cases examining whether an advertising practice is sufficiently deceptive to violate analogous federal consumer protection statutes also support this conclusion. (See, e.g., FTC v. Colgate-Palmolive Co. (1965) 380 U.S. 374, 385-392 [discussing competing considerations involved in determining whether an undisclosed televised mock-up of a product demonstration could properly be found to constitute deceptive advertising even if the underlying product claim was true]; FTC v. Mary Carter Paint Co. (1965) 382 U.S. 46, 47-48, 86 S.Ct. 219, 15 L.Ed.2d 128 [upholding FTC finding that advertisement offering a free can of paint if the consumer bought a can of the same paint at the advertised price was deceptive when the manufacturer never sold single cans of paint, even if the advertised price was a fair price for a single can of comparable paint]; FTC v. Direct Mktg. Concepts, Inc. (D.Mass. 2008) 569 F.Supp.2d 285, 298-299 [discussing numerous factors to be considered in determining whether an advertiser had sufficient “substantiation for the representation prior to making it in an advertisement” so as to render the advertisement nondeceptive.])

Furthermore, past FAL decisions also make clear the propriety and importance of a court’s exercise of its equitable authority not only in determining whether an advertisement is untrue or misleading, but also in determining (1) the number of violations for which a defendant may properly be held responsible (see, e.g., Jayhill, supra, 9 Cal.3d 283, 288-289, 107 Cal.Rptr. 192, 507 P.2d 1400; Overstock.com, supra, 12 Cal.App.5th 1064, 1087-1088, 219 Cal.Rptr.3d 65; People v. JTH Tax, Inc. (2013) 212 Cal.App.4th 1219, 1249-1255, 151 Cal.Rptr.3d 728; People ex rel. Kennedy v. Beaumont Investment, Ltd. (2003) 111 Cal.App.4th 102, 127-130, 3 Cal.Rptr.3d 429 (Beaumont Investment); People v. Toomey (1985) 157 Cal.App.3d 1, 22-23, 203 Cal.Rptr. 642; People v. Superior Court (Olson), supra, 96 Cal.App.3d 181, 197-198, 157 Cal.Rptr. 628), and (2) the reasonable amount of civil penalties to be imposed for each violation. (See, e.g., Overstock.com, supra, 12 Cal.App.5th at pp. 1087-1091, 219 Cal.Rptr.3d 65; Beaumont Investment, supra, 111 Cal.App.4th at pp. 130-131, 3 Cal.Rptr.3d 429; People v. First Federal Credit Corp. (2002) 104 Cal.App.4th 721, 733-734, 128 Cal.Rptr.2d 542.)

In sum, in light of the language and legislative history of the FAL and the relevant judicial precedent, we believe it is clear that, as with the UCL, the Legislature intended that the civil cause of action embodied in the FAL would be tried by a court of equity rather than by a jury in all FAL actions, including instances in which the Attorney General or another governmental entity seeks civil penalties for a violation of the FAL as well as injunctive relief.

**IV. UNDER THE CALIFORNIA CONSTITUTION, IS THERE A CONSTITUTIONAL RIGHT TO JURY TRIAL IN A UCL OR FAL ACTION WHEN THE PEOPLE SEEK BOTH INJUNCTIVE RELIEF AND CIVIL PENALTIES?**

As already noted, in our recent decision in Shaw, we explained that “even when the language and legislative history of a statute indicate that the Legislature intended that a cause of action established by the statute is to be tried by the court rather than by a jury, if the California constitutional jury trial provision itself guarantees a right to a jury trial in such a cause of action, the Constitution prevails and a jury trial cannot be denied.” (Shaw, supra, 2 Cal.5th at p. 994, 216 Cal.Rptr.3d 643, 393 P.3d 98.) Thus, we turn to the question whether, notwithstanding the Legislature’s intent that such actions be tried by the court rather than a jury, the jury trial provision of the California Constitution itself guarantees a right to jury trial in an action brought by the People under the UCL or FAL that seeks both injunctive relief and civil penalties.

A. General California Constitutional Jury Trial Principles

Article I, section 16 of the California Constitution — the jury trial provision — states in relevant part that “[j]trial by jury is an inviolate right and shall be secured to all. . .” From the outset of our state’s history, our courts have explained that this provision was intended to preserve the right to a civil jury as it existed at common law in
1850 when the jury trial provision was first incorporated into the California Constitution. (See, e.g., Cassidy v. Sullivan (1883) 64 Cal. 266, 266, 28 P. 234; Koppikus v. State Capitol Comm’rs (1860) 16 Cal. 248, 253-255.) As this court observed in People v. One 1941 Chevrolet Coupe (1951) 37 Cal.2d 283, 231 P.2d 832 (One 1941 Chevrolet Coupe): “The right to trial by jury guaranteed by the Constitution is the right as it existed at common law at the time the Constitution was adopted.... It is the right to trial by jury as it existed at common law which is preserved; and what that right is, is a purely historical question, a fact which is to be ascertained like any other social, political or legal fact. The right is the historical right enjoyed at the time it was guaranteed by the Constitution.” (Id. at pp. 286-287, 231 P.2d 832.) “Our state Constitution essentially preserves the right to a jury in those actions in which there was a right to a jury trial at common law at the time the Constitution was first adopted.” (Crouchman v. Superior Court (1988) 45 Cal.3d 1167, 1175, 248 Cal.Rptr. 626, 755 P.2d 1075 (Crouchman).)

Pursuant to this historical approach, as a general matter the California Constitution affords a right to a jury trial in common law actions at law that were triable by a jury in 1850, but not in suits in equity that were not triable by a jury in 1850. (C & K Engineering Contractors v. Amber Steel Co. (1978) 23 Cal.3d 1, 8-9, 151 Cal.Rptr. 323, 587 P.2d 1136 (C & K Engineering).) In applying this test, our cases have explained that the form or title of a statutory cause of action is not controlling and that if the substance of the cause of action is one that would have been triable by a jury at common law, there is a right to a jury trial even if the statute’s designation might suggest that it is an equitable proceeding. (See, e.g., One 1941 Chevrolet Coupe, supra, 37 Cal.2d at p. 299, 231 P.2d 832.) “In determining whether the action was one triable by a jury at common law, the court is not bound by the form of the action but rather by the nature of the rights involved and the facts of the particular case — the gist of the action. A jury trial must be granted where the gist of the action is legal, where the action is in reality cognizable at law.” (Ibid.) In the One 1941 Chevrolet Coupe decision, for example, the court held that the gist of the action at issue in that case — a civil lawsuit by *316* the government seeking forfeiture of an automobile that was allegedly used to illegally transport a prohibited drug — was legal because at common law a similar cause of action for forfeiture of otherwise lawful property that was allegedly used for unlawful purposes was triable by a jury in a court of law. (Id. at pp. 297-300, 231 P.2d 832.) The court ruled that the fact that the statutory provision authorizing the cause of action designated the forfeiture action as a “‘special proceeding’” did not change the legal nature of the action. (Id. at p. 299, 231 P.2d 832.)

**481** The court in One 1941 Chevrolet Coupe, supra, 37 Cal.2d 283, 231 P.2d 832, further explained that the fact that the statute under which the forfeiture proceeding in that case was brought was enacted after the adoption of the California Constitution did not in itself bring the statutory cause of action outside the guarantee of the constitutional jury trial provision. The court observed in this regard: “The constitutional right of trial by jury is not to be narrowly construed. It is not limited strictly to those cases in which it existed before [37]737 the adoption of the Constitution but is extended to cases of like nature as may afterwards arise. It embraces cases of the same class thereafter arising.” (One 1941 Chevrolet Coupe, at p. 300, 231 P.2d 832.) In explaining why the lawsuit at issue was of “‘like nature’” or “‘the same class’” as the common law action at law, the court stated: “At common law, prior to the adoption of the Constitution, a party against whom the forfeiture of property used in violation of law (then a carriage, wagon, horse or mule, now usually an automobile), was sought to be enforced was entitled to a trial by jury. Consequently such right exists now.” (Ibid.; see also Franchise Tax Bd. v. Superior Court (2011) 51 Cal.4th 1006, 1012, 125 Cal.Rptr.3d 158, 252 P.3d 450 (“We look to whether a claim arising under a modern statute is ‘of like nature’ or ‘of the same class’ as a common law right of action.”)"

In a case like One 1941 Chevrolet Coupe that involves a single cause of action that at common law in 1850 was triable only by a jury, or conversely a case involving a single cause of action that at common law was triable only by the court (see, e.g., People v. Englebrecht (2001) 88 Cal.App.4th 1236, 1245, 106 Cal.Rptr.2d 738 [action for injunctive relief to abate a nuisance] ), the determination whether the gist of the action
in question is legal or equitable is relatively straightforward. When a case involves multiple causes of action or multiple issues, some of which are legal in nature and would have been triable by a jury at common law and some of which are equitable in nature and would have been triable by the court at common law, the analysis is somewhat more complex.

B. Cases Involving Severable Legal and Equitable Issues

When the legal and equitable causes of action or issues presented in a case are severable, past California decisions establish that a party retains the right to a jury trial of the severable legal issues and a court trial of the severable equitable issues. (See, e.g., *Connell v. Bowes* (1942) 19 Cal.2d 870, 871, 123 P.2d 456 (“It is now established in this state ... that if a complaint states two complete rights of action, one legal and one equitable, a jury trial may be obtained upon the issues raised by the legal cause”); see generally 7 Witkin, *Equitable Issues*, Trial, § 86, p. 113 (“Where the action is of a hybrid character, raising legal and equitable issues, a party is entitled to a jury trial of the severable legal issues”).

At the same time, California decisions have also repeatedly held that when severable legal and equitable causes of action or issues are present in a single proceeding, the trial court generally has authority to determine in what order the matters should be heard, and if the equitable issue is tried by the court first and if the court’s resolution of that issue determines a matter that would otherwise be resolved by a jury with regard to the legal claim or issue, the court’s resolution of the matter will generally be binding and may leave nothing for a jury to resolve. (See, e.g., *Raedeke v. Gibraltar Sav. & Loan Assn.* (1974) 10 Cal.3d 665, 671, 111 Cal.Rptr. 693, 517 P.2d 1157 (Raedeke) (“It is well established that, in a case involving both legal and equitable issues, the trial court may proceed to try the equitable issues first, without a jury ... , and that if the court’s determination of those issues is also dispositive of the legal issues, nothing further remains to be tried by a jury”).) And although a trial court retains discretion regarding the order in which the issues should be tried, the governing California cases express a preference that the equitable issues be tried first. (See, e.g., ***738 Orange County Water Dist. v. Alcoa Global Fasteners, Inc.* (2017) 12 Cal.App.5th 252, 355, 219 Cal.Rptr.3d 474 [citing cases].) This general “equity first preference” is a long standing feature of California law and has always been viewed as fully compatible with the right to jury trial embodied in the California Constitution. (See, e.g., *Raedeke*, supra, 10 Cal.3d at pp. 670-671, 111 Cal.Rptr. 693, 517 P.2d 1157; *Connell v. Bowes*, supra, 19 Cal.2d 870, 872, 123 P.2d 456; *Thomson v. Thomson* (1936) 7 Cal.2d 671, 682-683, 62 P.2d 358; *Angus v. Craven* (1901) 132 Cal. 692, 699, 33 P.2d 1091 (conc. opn. of Henshaw, J.); *Swasey v. Adair* (1891) 88 Cal. 179, 180, 25 P. 1119; *Fish v. Benson* (1886) 71 Cal. 428, 433-435, 12 P. 454; *Lestrange v. Barth* (1862) 19 Cal. 660, 671-672.)

**318 C. Cases Involving Nonseverable Legal and Equitable Issues**

Unlike proceedings in which multiple legal and equitable causes or issues are severable, when a cause of action involves legal and equitable aspects that are not severable California decisions have relied upon the “gist of the action” standard in determining whether the action should be considered legal or equitable for purposes of the constitutional jury trial issue. (See, e.g., *C & K Engineering*, supra, 23 Cal.3d 1, 9-11, 151 Cal.Rptr. 323, 587 P.2d 1136 [in action seeking damages for breach of contract (“in form an action at law”) but relying solely on the equitable doctrine of promissory estoppel, court concluded “[t]he ‘gist’ of such an action is equitable”]; *Central Laborers’ Pension Fund v. McAfee*, Inc. (2017) 17 Cal.App.5th 292, 344-350, 225 Cal.Rptr.3d 249 [in action by shareholders seeking money damages for breach of corporate directors’ and officers’ breach of fiduciary duty, court concluded that the gist of the action was equitable]; *Interactive Multimedia Artists, Inc. v. Superior Court* (1998) 62 Cal.App.4th 1546, 1552-1556, 73 Cal.Rptr.2d 462 [in action seeking money damages for breach of a trustee’s fiduciary duty, court held that the gist of the action was equitable when, under the applicable Delaware law, the determination of whether a breach occurred turned on a multifactor ‘‘ ‘entire fairness test’ ’’ that required the application of equitable principles in ‘‘weighing various considerations” ***739 in order to reach a just result’’]; *Martin v. County of Los Angeles* (1996) 51 Cal.App.4th 688, 695-697, 59 Cal.Rptr.2d 303 [although a tort defendant’s claim for “equitable indemnity” seeking recovery of money damages for the proportional fault of a cotortfeasor involved...
application of equitable principles, court concluded the gist of the claim was legal because ascertaining the relative fault of cotortfeasors for equitable indemnity “involves determinations of rights and liabilities traditionally arising in common law suits for negligence”). In our decision in **C & K Engineering**, we noted that “[a]lthough we have said that “the legal or equitable nature of a cause of action ordinarily is determined by the mode of relief to be afforded ....’ the prayer for relief in a particular case is not conclusive” and “‘[t]he fact that damages is one of a full range of possible remedies does not guarantee ... the right to a jury.’” (**C & K Engineering**, at p. 9, 151 Cal.Rptr. 323, 587 P.2d 1136, citations omitted.)

**483** *319 Two Court of Appeal decisions that have grappled with the proper characterization of an action as legal or equitable involved statutory causes of action, like those at issue in the present case, in which both equitable and legal relief may be awarded.

In the first case, **Southern Pac. Transportation Co. v. Superior Court** (1976) 58 Cal.App.3d 433, 129 Cal.Rptr. 912 (**Southern Pac. Transportation**), the plaintiffs, who claimed that they had made improvements to real property in the good faith belief that they were the owners of the property, brought the underlying action against the true owner of the property seeking damages as good faith improvers of the property. The action was brought pursuant to a recently enacted “good faith improver” statutory scheme (Code Civ. Proc., §§ 871.1-871.7) that authorized a good faith improver of real property to bring an independent civil cause of action for relief. (Id., § 871.3.) The legislation provided that in such an action the court, under appropriate circumstances, “may ... effect such adjustment of the rights, equities, and interests of the good faith improver, the owner of the land, and other interested parties ... as is consistent with substantial justice to the parties under the circumstances of the particular case.” (Id., § 871.5.)

The question before the Court of Appeal in **Southern Pac. Transportation** was whether the plaintiffs had a right to a jury trial in their action against the owner. The plaintiffs claimed that because their complaint sought only money damages from the landowner, the action was one at law in which they had a right to a jury trial. The Court of Appeal rejected the plaintiffs’ contention. After noting that the right to a jury trial under the California Constitution is the right “existing at common law at the time the Constitution was adopted” (**Southern Pac. Transportation**, supra, 58 Cal.App.3d at p. 436, 129 Cal.Rptr. 912), the court explained: “Because the provisions of [Code of Civil Procedure] sections 871.1-871.7 have no counterpart in English law, classification of the action as either legal or equitable depends upon characterization of the nature of the relief sought. Although [the plaintiffs] assert that they seek damages only, by bringing an action under section 871.3, they have invited the court to ‘effect such an adjustment of the rights, equities, and interests’ of the parties as is consistent with substantial justice. (§ 871.5.) ‘Under this section, the court has considerable discretion to select appropriate relief from the full range of equitable and legal remedies.’” (**Southern Pac. Transportation**, supra, 58 Cal.App.3d at p. 437, 129 Cal.Rptr. 912.)

***484*** *320* The Court of Appeal continued: “The fact that damages is one of a full range of possible remedies does not guarantee [the plaintiffs] the right to a jury for their good faith improver action. We recognize that where a complaint raises both legal and equitable issues, a jury trial may be obtained upon the issues raised by the legal cause. [Citation.] Here, however, there is *320* no possibility of severing the legal from the equitable. The trier of fact must determine whether to quiet title in the improver on the condition he pay to the landowner the value of the unimproved land, or whether and in what amount, to award damages to the improver, or whether to require a completely different form of relief. [Citation.] Such a determination is not susceptible of division into one component to be resolved by the court and another component to be determined by a jury. Only one decision can be made, and it must make a proper adjustment of the ‘rights, equities, and interests’ of all the parties involved.” (**Southern Pac. Transportation**, supra, 58 Cal.App.3d at pp. 437-438, 129 Cal.Rptr. 912.)

Under these circumstances the **Southern Pac. Transportation** court concluded: “Because of the wide range of equitable and legal relief authorized by Code of Civil Procedure section 871.5, it would be an impossible task for a jury to determine the appropriate relief and to resolve the rights, equities, and interests of all of the parties.... We have concluded, therefore, that it is the function of the court and not the jury to be the trier of fact in a good faith improver action.” (**Southern Pac. Transportation**, supra, 58 Cal.App.3d at p. 437, 129 Cal.Rptr. 912.)
In this court’s subsequent decision in *C & K Engineering, supra*, 23 Cal.3d 1, 151 Cal.Rptr. 323, 587 P.2d 1136, we specifically cited **484** and discussed the *Southern Pac. Transportation* decision with approval, quoting at some length the Court of Appeal’s reasoning in that case. (*C & K Engineering, supra*, 23 Cal.3d at p. 11, 151 Cal.Rptr. 323, 587 P.2d 1136.)

In the second case, *DiPirro, supra*, 153 Cal.App.4th 150, 62 Cal.Rptr.3d 722, the Court of Appeal addressed whether there is a right to a jury trial in an action seeking enforcement of the provisions of the Safe Drinking Water and Toxic Enforcement Act of 1986 (Health & Saf. Code, §§ 25249.5-25249.13), a legislative measure adopted by the voters through the initiative process and most commonly known as Proposition 65. 18 That measure — which generally prohibits businesses from (1) knowingly discharging chemicals known to cause cancer or reproductive toxicity into any source of drinking water (Health & Saf. Code, § 25249.5) or (2) knowingly exposing any individual to such chemicals without first giving clear and reasonable warning (id., § 25249.6) — authorizes government officials and, under specified circumstances, private persons, to bring a cause of action seeking injunctive relief and civil penalties against any person who violates the statute. (*Id., *321 § 25249.7.*) Like the UCL and FAL, Proposition 65 provides that once a statutory violation is found, the court may issue an injunction and shall impose a civil penalty not to exceed $2,500 per day for each violation (Health & Saf. Code, § 25249.7, subsd. (a), (b)(1)), and, again like the UCL **741** and FAL, Proposition 65 sets forth a list of multiple factors, including “[a]ny other factor that justice may require,” that the court is to consider in determining the amount of the civil penalties to be imposed. (Health & Saf. Code, § 25249.7, subd. (b)(2)(G).) 19 Because the determination whether a statutory violation has been established itself triggers the availability of both injunctive relief and civil penalties, the equitable and legal aspects of the action are not severable.

In deciding whether the plaintiff had a right to a jury trial in the civil action authorized by Proposition 65, the *DiPirro* court examined the statutory scheme as a whole to determine whether the gist of the action was legal or equitable. (*DiPirro, supra*, 153 Cal.App.4th at pp. 180-184, 62 Cal.Rptr.3d 722.) In concluding that the legislation is “thoroughly infused with equitable principles that must be considered and adjudicated in an enforcement action” (*Id. at p. 180, 62 Cal.Rptr.3d 722*), the court relied in part on the fact that “Proposition 65 is ‘“a remedial statute intended to protect the public’ ’ ” (*ibid.*), along with its determination that the remedies authorized by the act were primarily equitable in nature, including injunctive relief to prevent the sale of offending products that lack the required warning. (*Id. at p. 181, 62 Cal.Rptr.3d 722.*)

The *DiPirro* court acknowledged that Proposition 65 also authorized an award of civil penalties (*DiPirro, supra*, 153 Cal.App.4th at p. 181, 62 Cal.Rptr.3d 722) and explicitly recognized “the “general rule” ’ that monetary relief is a legal remedy, ‘an award of statutory damages may serve purposes traditionally associated with legal relief, such as compensation and punishment.’ ” (*Id. at p. 182, 62 Cal.Rptr.3d 722.*) The Court of Appeal pointed out, however, **485** that the civil penalties that are authorized by Proposition 65 are to be determined by a highly discretionary consideration of multiple factors “that do not primarily take into account any harm suffered by the plaintiff ... [and are] the kind of calculation traditionally performed by judges rather than a jury ....” (*DiPirro, at p. 182, fn., 62 Cal.Rptr.3d 722omitted.*) Emphasizing that “[t]he Act is informational and preventative rather than compensatory in its nature and function” (*ibid.*), and that “[t]he primary right to bring an action for civil penalties pursuant to the Act is ... given to the state rather than individuals seeking compensation” (*id. at p. 183, 62 Cal.Rptr.3d 722*), the *DiPirro* court determined that “the statutory remedies afforded by the Act, including civil penalties, are not damages at law, but instead constitute equitable relief appropriate and incidental to enforcement of the Act, which do not entitle the plaintiff to a jury trial” (*id. at p. 184, 62 Cal.Rptr.3d 722.*).
D. Application of Constitutional Principles to UCL and FAL Actions

As we shall explain, in light of the particular nature of the civil causes of action authorized by the UCL and FAL, we conclude that the gist of a civil action under the UCL and FAL is equitable rather than legal in nature. Such causes of action are equitable either when brought by a private party seeking only an injunction, restitution, or other equitable relief or when brought by the Attorney General, a district attorney, or other governmental official seeking not only injunctive relief and restitution but also civil penalties. Accordingly, we conclude that there is no right to a jury trial in such actions under the California Constitution.

To begin with, the statutory causes of action established by the UCL and FAL are clearly not of like nature or of the same class as any common law right of action. (Cf. One 1941 Chevrolet Coupe, supra, 37 Cal.2d 283, 300, 231 P.2d 832.) As the leading treatise on California’s consumer protection statutes explains, under the common law only a business adversely affected by trademark or trade name infringement by a business competitor could file an action for unfair competition against the competitor and such an action could be brought only as a suit in equity. (See Cal. Practice Guide: Stern, Bus. & Prof. Code § 17200 Practice, supra, § 2:1, p. 2-1.) “At common law, deceived consumers had no claim for unfair competition. This made little sense, since ultimately it is the consumer who is harmed by a business that passes off goods or services as genuine, or as those of another. ... No matter; consumers were left without a claim or remedy. This was the era of caveat emptor [that is, let the buyer beware].” (Id., § 2:3, p. 2-1)

The UCL and FAL were enacted for the specific purpose of creating new rights and remedies that were not available at common law. (See, e.g., Bank of the West v. Superior Court (1992) 2 Cal.4th 1254, 1263-1264, 10 Cal.Rptr.2d 538, 833 P.2d 545.) The statutes deliberately broaden the types of business practices that can properly be found to constitute unfair competition (see, e.g., Barquis, supra, 7 Cal.3d at p. 112, 101 Cal.Rptr. 745, 496 P.2d 817), and eliminate a number of elements that were required in common law actions for fraud (see, e.g., In re Tobacco II Cases (2009) 46 Cal.4th 298, 312, 93 Cal.Rptr.3d 559, 207 P.3d 20; Com. on Children’s Television, supra, 35 Cal.3d 197, 211, 197 Cal.Rptr. 783, 673 P.2d 660). The statutes explicitly authorize government officials and injured private individuals to obtain injunctive relief to prevent a business from continuing to use the practice to the detriment of other consumers and to obtain restitution and other clearly equitable relief. (Bus & Prof. Code, §§ 17203, 17204.) Such causes of action for unfair competition that authorize injunctive relief against unfair or deceptive business practices had no close or analogous counterpart at common law.

Furthermore, when the Legislature adopted the civil penalty provisions of the UCL and FAL in 1972 and 1965 respectively, permitting government officials, and government officials alone, to seek civil penalties along with injunctive or other equitable relief in the civil actions such officials bring under the UCL and FAL (see Jayhill, supra, 9 Cal.3d at p. 288, 107 Cal.Rptr. 192, 507 P.2d 1400), the causes of action under the UCL and FAL continued to constitute causes of action that were not of like nature or of the same class as any common law action. Prior to 1850, early English law embodied numerous statutes imposing civil penalties for a variety of specifically delineated impermissible business practices — like using false weights and measures in the sale of a product or failing to pay the appropriate excise taxes due — that were enforced by the government through a civil action in the Court of Exchequer in which a jury was available. (See One 1941 Chevrolet Coupe, supra, 37 Cal.2d at pp. 295-296 & fn. 15, 231 P.2d 832.) We are unaware, however, of any early English statute that defined the business conduct proscribed by the statute in the type of broad and sweeping language adopted in the UCL and FAL, which was specifically intended to reach novel but offensive business practices that were not encompassed by more specific statutory prohibitions. (See, e.g., Barquis, supra, 7 Cal.3d at p. 112, 101 Cal.Rptr. 745, 496 P.2d 817.) Furthermore, the early English statutes generally set forth a specific amount of civil penalty that was to be imposed for each violation; again, we are aware of no such statute that required the amount of the civil penalty to be determined by a consideration of multiple factors comparable to those set out in the relevant provisions of the UCL and FAL. (Bus & Prof. Code, §§ 17206, subd. (b), 17536, subd. (b).)
The Court of Appeal decision under review here was the first appellate decision to reach a contrary conclusion. Although the Court of Appeal suggested that the numerous prior Court of Appeal decisions cited above were either not on point or did not fully analyze the jury trial issue (Nationwide Biweekly, supra, 24 Cal.App.5th at p. 457, 234 Cal.Rptr.3d 468), our review of those appellate court decisions does not support the Court of Appeal’s characterization of those decisions. Those prior decisions, contrary to the Court of Appeal’s suggestion, directly analyze the question whether there is a right to a jury trial in such actions under the California Constitution and conclude that there is no state constitutional right to a jury trial in such actions.

The 1972 decision in Witzerman, supra, 29 Cal.App.3d 169, 105 Cal.Rptr. 284 — the initial decision in this line of cases — demonstrates this point. Witzerman was an enforcement action brought by the Attorney General under the FAL seeking both injunctive relief and civil penalties. After noting that the defendants’ jury trial claim relied on both the federal and state constitutional jury trial rights, the court initially addressed the state constitutional claim and rejected the defendants’ argument that the trial court’s denial of a jury trial was improper under the California Constitution because the issues to be tried were assertedly legal rather than equitable in nature. (Witzerman, at p. 176, 105 Cal.Rptr. 284.) The court in Witzerman explained: “Assuming, without so deciding, that the civil penalties sought represent legal rather than equitable relief, we do not believe that in this case such issues could have been severed from the equitable ones. The same alleged misconduct on the part of appellants was the basis for both types of relief sought by the People. (Cf. Jaffé v. Albertson Co. [1966] 243 Cal.App.2d 592, 610, 53 Cal.Rptr. 25.) Under these circumstances trial to the court of the People’s case for injunctive relief disposed of as well the People’s case for relief by way of civil penalties. (Cf. Veale v. Pierry [1962] 206 Cal.App.2d 557, 562-563, [24 Cal.Rptr. 91].)” (Witzerman, supra, 29 Cal.App.3d at pp. 176-177, 105 Cal.Rptr. 284.) Contrary to the Court of Appeal’s critique below, only after rejecting the defendants’ state constitutional jury trial claim did the court in Witzerman turn to and reject the defendants’ federal Sixth
Although the Witzerman decision directly addressed and rejected the defendant’s state constitutional jury trial claim, it is not clear that the decision applied the proper mode of analysis. After correctly observing that the equitable and legal aspects of the FAL action before it were nonseverable, the court did not explicitly apply the “gist of the action” test but instead appears to have applied the “equity first preference” doctrine. (**488 Witzerman, supra, 29 Cal.App.3d at pp. 176-177, 105 Cal.Rptr. 284.) Nonetheless, we conclude that the Witzerman court reached the correct result.

All parties before us agree that the legal and equitable aspects of the UCL and FAL actions at issue are nonseverable and that the gist of the action standard applies. The legal and equitable aspects of these actions are nonseverable not only because, as the Witzerman court indicated (Witzerman, supra, 29 Cal.App.3d at pp. 176-177, 105 Cal.Rptr. 284), the determination whether a defendant’s alleged conduct constitutes a violation of the statute provides the basis *326 for all of the relief authorized by the statutes, but also because the amount of civil penalties that would be appropriate may well depend on the equitable remedies, including restitution, that are or are not imposed. (See, e.g., Overstock.com, supra, 12 Cal.App.5th 1064, 1088-1089, 219 Cal.Rptr.3d 65; People ex rel. Harris v. Sarpas (2014) 225 Cal.App.4th 1539, 1567, 172 Cal.Rptr.3d 25.)

With respect to the application of the gist of the action standard, our independent analysis of the UCL and FAL causes of action as **488 a whole convinces us that the gist of the civil causes of action authorized by the UCL and FAL must properly be considered equitable, rather than legal, in nature.

To begin with, the bulk of the remedies provided for in the statutes — injunctive relief, restitution, and other clearly equitable remedies such as the appointment of a receiver (see Bus. & Prof. Code, §§ 17203, 17535) — are clearly equitable in nature. As the legislative history of both the UCL and FAL make clear, the primary objective of both statutes is preventive, authorizing the exercise of broad equitable authority to protect consumers from unfair or deceptive business practices and advertising.

Second, although the statutes also authorize in actions brought by the Attorney General, a district attorney, or other government officials (but not private parties), the imposition of civil penalties — a type of remedy that in some contexts is properly considered legal in nature — the UCL and FAL statutes specify that in assessing the amount of the civil penalty to be imposed under these statutes, the court is afforded broad discretion to consider a nonexclusive list of factors that include the relative seriousness of the defendant’s conduct and the potential deterrent effect of such penalties, the type of qualitative evaluation and weighing of a variety of factors that is typically undertaken by a court and not a jury. (Bus. & Prof. Code, §§ 17206, 17536.) Notably, the civil penalties that may be awarded under the UCL and FAL, unlike the classic legal remedy of damages, are noncompensatory in nature; they require no showing of actual harm to consumers and are not based on the amount of losses incurred by the targets of unfair practices or misleading advertising. Like the civil penalties at issue in Kizer v. County of San Mateo (1991) 53 Cal.3d 139, 147-148, 279 Cal.Rptr. 318, 806 P.2d 1353, although the civil penalties under the UCL and FAL “may have a punitive or deterrent aspect, their primary purpose is to secure obedience to statutes and regulations imposed to assure important public policy objectives.... The focus of [both] statutory scheme[s] is preventative.” (Kizer, at p. 147-148, 279 Cal.Rptr. 318, 806 P.2d 1353, citation omitted.) And like the civil penalties in Kizer (id. at p. 147, 279 Cal.Rptr. 318, 806 P.2d 1353), the civil penalties obtained by the government in actions under the UCL and FAL are to be utilized for the enforcement of the statutes in question. (See Bus. & Prof. Code, §§ 17206, subd. (c), 17536, subd. (c).)

***488 *327 Finally, as discussed above (ante, 261 Cal.Rptr.3d at pp. 722-726, 730-734, 462 P.3d at pp. 469-472, 475-479), the expansive and broadly worded substantive standards that are to be applied in determining whether a challenged business practice or advertising is properly considered violative of the UCL or FAL call for the exercise of the flexibility and judicial expertise and experience that was traditionally applied by a court of equity. Particularly in
light of the equitable nature of the substantive standards that apply in UCL and FAL actions — both in actions brought by private parties and by government officials — we conclude that the gist of the civil causes of action authorized by the UCL and FAL must properly be considered equitable in nature. Accordingly, we conclude that under the California Constitution, there is no right to a jury trial in a cause of action under the UCL and FAL, including when the action is brought by a government official and seeks both injunctive relief and civil penalties.

We emphasize that this conclusion does not deprive a defendant in a UCL or FAL action of any constitutional right afforded by the jury trial provision of the California Constitution. As we have explained (ante, 261 Cal.Rptr.3d at p. 736, 462 P.3d at p. 480), that constitutional provision grants the right to jury trial in actions “‘of like nature’” “‘or of the same class’” in which a jury trial was provided at common law in 1850, when the jury trial provision of the California Constitution was first adopted. (One 1941 Chevrolet Coupe, supra, 37 Cal.2d 283, 300, 231 P.2d 832.) The consumer protection actions authorized in the UCL and FAL are not of like nature or of the same class as an action that was triable by jury at common law. In actions like those under the UCL and FAL, in which the equitable and legal aspects are inseverable, there is no constitutional right **489 to a jury trial when, as here, the gist of the action is equitable rather than legal.

In sum, we conclude that there is no right to a jury trial under the California Constitution in a cause of action under the UCL or FAL, including an action in which civil penalties as well as an injunction or other equitable relief are sought. Because our conclusion rests in significant part on the fact that the substantive standards embodied in the UCL and FAL contemplate the exercise of the type of equitable discretion and judgment traditionally applied by a court of equity, we have no occasion in this case to decide how the California constitutional jury trial provision applies to other statutory causes of action that authorize both injunctive relief and civil penalties. 21

***747 **328 E. Inapplicability of Tull

As already noted, in reaching a contrary conclusion, the Court of Appeal relied heavily upon the United States Supreme Court’s decision in Tull, supra, 481 U.S. 412, 107 S.Ct. 1831. As we explain, for a variety of reasons we conclude that the Court of Appeal’s reliance upon Tull was unwarranted.

Tull involved a civil action filed by the federal government against a real estate developer, alleging that the developer had dumped fill on wetlands without a permit in violation of the federal Clean Water Act. (33 U.S.C. § 1251 et seq.) As authorized by that act, the government sought both injunctive relief (id., § 1319(b)) and civil penalties (id., § 1319(d)). The court in Tull observed, however, that at the time the complaint in that case was filed the developer had sold most of the properties in question to a third party, and “[i]n injunctive relief was therefore impractical except with regard to a small portion of the land.” (Tull, supra, 481 U.S. at p. 415, 107 S.Ct. 1831.) After denying the developer’s demand for a jury trial, the trial court conducted a 15-day bench trial, concluded that the property on which the defendant had admittedly dumped fill constituted “wetlands” within the meaning of the federal statute, and ultimately imposed injunctive relief and civil penalties on defendant.

On appeal, the United States Supreme Court reversed, concluding that the developer was entitled to a jury trial under the Seventh Amendment to the federal Constitution. (Tull, supra, 481 U.S. at pp. 417-425, 107 S.Ct. 1831.) The court in Tull acknowledged that a proceeding under the Clean Water Act seeking both injunctive relief and civil penalties is analogous to two different common law causes of action — an action to abate a nuisance in which there was no right to *329 a jury trial and an action in debt to impose a civil penalty in which there was a right to a jury trial. (Tull, at pp. 420-421, 107 S.Ct. 1831). However, the court concluded that it need not decide which common law action was the closer historical analog, because prior Supreme Court precedent established that “characterizing the relief sought is ‘[m]ore important’ than finding a precisely analogous common-law cause of action in determining whether the Seventh Amendment guarantees a jury trial.” (Id. at p. 421, 107 S.Ct. 1831, citing Curtis v. Loether (1974) 415 U.S. 189, 196, 94 S.Ct. 1005, 39 L.Ed.2d 260.)
Thereafter, in discussing the relief sought in the action, the court in *Tull* focused primarily on the civil penalties that had been sought and obtained in the action, emphasizing that “[a] civil penalty was a type of remedy at common law that could only be enforced in courts of law” (*Tull, supra*, 481 U.S. at p. 422, 107 S.Ct. 1831) in which a jury trial was available. Although the government had also sought and obtained injunctive relief in the action, the *Tull* court observed that under the applicable federal statute the government was free to seek an equitable remedy independent of legal relief (*id.* at p. 425, 107 S.Ct. 1831) and further explained that prior federal decisions established that “if a ‘legal claim is joined with an equitable claim, the right to jury trial on the legal claim, including all issues common to both claims, remains intact. The right cannot be abridged by characterizing the legal claim as ‘incidental’ to the equitable relief sought’ ” (*ibid.*, citing *Curtis v. Loether, supra*, 415 U.S. at p. 196, fn. 11, 94 S.Ct. 1005). (See also, e.g., *Ross v. Bernhard* (1970) 396 U.S. 531, 537-538, 90 S.Ct. 733, 24 L.Ed.2d 729 [“where equitable and legal claims are joined in the same action, there is a right to jury trial on the legal claims which must not be infringed either by trying the legal issues as incidental to the equitable ones or by a court trial of a common issue existing between the claims”]; *Dairy Queen v. Wood* (1962) 369 U.S. 469, 473, 82 S.Ct. 894, 8 L.Ed.2d 44 [requiring “that any legal issues for which a trial by jury is timely and properly demanded be submitted to a jury” “whether the trial judge chooses to characterize the legal issues presented as ‘incidental’ to equitable issues or not”]; *Beacon Theatres v. Westover* (1959) 359 U.S. 500, 510-511, 79 S.Ct. 948, 3 L.Ed.2d 988 [“only under the most imperative circumstances ... can the right to a jury trial of legal issues be lost through prior determination of equitable claims”].) Thus, because prior federal decisions had interpreted the Seventh Amendment generally to require a jury trial whenever a legal claim is joined with an equitable claim, the court in *Tull* held that, for Seventh Amendment purposes, the fact that the government sought civil penalties in the action before it was itself sufficient to conclude that the developer had “a constitutional right to a jury trial to determine his liability on the legal claims.” (*Tull, supra*, 481 U.S. at p. 425, 107 S.Ct. 1831.)

***748***

For a number of reasons, we conclude that the Court of Appeal erred in relying upon the *Tull* decision. First and most fundamentally, the decision in *Tull* rested exclusively on the United States Supreme Court’s interpretation of the right to civil jury trial embodied in the Seventh Amendment to the United States Constitution. The federal civil jury trial provision of the Seventh Amendment applies only to civil trials in *federal court*; federal decisions explicitly hold that the civil jury trial provision of the Seventh Amendment does not apply to *state court proceedings.* (See, e.g., *Osborn v. Haley* (2007) 549 U.S. 225, 252, fn. 17, 127 S.Ct. 881, 166 L.Ed.2d 819; *Gasperini v. Ctr. For Humanities, Inc.* (1996) 518 U.S. 415, 432, 116 S.Ct. 2211, 135 L.Ed.2d 659; *Curtis v. Loether, supra*, 415 U.S. at p. 192, fn. 6, 94 S.Ct. 1005; *Minn. & St. Louis R. R. v. Bombolis* (1916) 241 U.S. 211, 217-223, 36 S.Ct. 595, 60 L.Ed. 961.) Instead, the right to jury trial in state court proceedings is governed by the provisions and ***749*** judicial interpretation of each state’s own constitutional jury trial provision.  

In California, the constitutional right to a civil jury trial under the California Constitution is entirely independent of the federal constitutional civil jury trial right under the Seventh Amendment (Cal. Const., art. I, § 24), and past California cases have not hesitated to decline to follow the federal interpretation of the Seventh Amendment when the federal interpretation has been found inconsistent with a proper reading of the California provision. (See, e.g., *Jehl v. Southern Pacific Co.* (1967) 66 Cal.2d 821, 835 & fn. 17, 59 Cal.Rptr. 276, 427 P.2d 988; *Rankin v. Frebank Co.* (1975) 47 Cal.App.3d 75, 91-92, 121 Cal.Rptr. 348.) The *Tull* decision rested on several points in ***331*** which the federal interpretation of the Seventh Amendment departs from California’s interpretation of the California jury trial provision.

Initially, unlike actions under the UCL and FAL in which the equitable (injunctive relief) and legal (criminal penalties) nature of the available remedies are unquestionably nonseverable features of a single cause of action (see *Jayhill, supra*, 9 Cal.3d at p. 288, 107 Cal.Rptr. 192, 99 Cal.Rptr. 276, 261 Cal.Rptr. 713, 20 Cal. Daily Op. Serv. 3783...)

© 2021 Thomson Reuters. No claim to original U.S. Government Works.
507 P.2d 1400), in *Tull* the court held that under the applicable Clean Water Act, the equitable (injunctive relief) and legal (criminal penalties) remedies were severable. (See *Tull, supra*, 481 U.S. at p. 425, 107 S.Ct. 1831 [“[T]he Government was free to seek an equitable remedy in addition to, or independent of, legal relief. Section 1319 [the relevant provision of the Clean Water Act] does not intertwine equitable relief with the imposition of civil penalties. Instead each kind of relief is separably authorized in a separate and distinct statutory provision. Subsection (b), providing injunctive relief, is independent of subsection (d), which provides only for civil penalties.”].) And the *Tull* court went on to rely on the severable nature of the claims at issue in finding that the issue of liability was to be tried by a jury rather than by the court, because federal decisions dictate that in cases involving severable legal and equitable issues, the legal issues should be tried prior to the equitable issues. (*Tull, supra*, 481 U.S. at p. 425, 107 S.Ct. 1831 [“In such a situation, if a ‘legal claim is joined with an equitable claim, the right to jury trial on the legal claim ... remains intact. ... Thus, petitioner has a constitutional right to a jury trial to determine his liability on the legal claims’”].) By contrast, as noted above, the governing California decisions hold that when the legal and equitable aspects are separable, there is a preference for trying the equitable issues first and that if common facts are resolved in a manner that obviates the need to try the legal issue, there is no right under the California Constitution to have the legal issues submitted to the jury. (See ***750 ante*, 261 Cal.Rptr.3d at pp. 737-738, 462 P.3d at pp. 481-482; *Hoopes v. Dolan* (2008) 168 Cal.App.4th 146, 156-158, 85 Cal.Rptr.3d 337 [discussing difference in California and federal rules]; see also Hamilton, *Federalism and the State Civil Jury Rights* (2013) 65 Stan. L.Rev. 851, 864-865, 869-870 [same].) Thus, the conclusion reached in *Tull* under the Seventh Amendment is not necessarily the same result as would follow under California law.

**492** Moreover, the *Tull* court’s analysis of the jury trial question also demonstrates a second difference between the interpretation and application of the federal and state constitutional civil jury trial provisions. As we have explained, in cases in which a cause of action contains nonseverable legal and equitable aspects, California cases undertake a qualitative, holistic analysis of the action in its entirety to determine whether the gist of the action is legal or equitable, that is, whether the legal or equitable aspects predominate. (See *332 ante*, 261 Cal.Rptr.3d at pp. 737-741, 462 P.3d at pp. 481-484.) In *Tull*, by contrast, the court, in determining that under the Seventh Amendment there is a right to a jury trial for the statutory cause of action for civil penalties at issue in that case, relied primarily on its determination that the civil penalties in question were intended, at least in part, to be punitive in nature, which in the court’s view was apparently sufficient to render the action legal in nature and require a jury trial. (*Tull, supra*, 481 U.S. at pp. 422-424, 107 S.Ct. 1831.) In reaching this conclusion, however, the *Tull* court did not take into account a number of nonseverable equitable aspects of the action for civil penalties at issue there. Thus, the court does not appear to have thought it at all significant that the civil penalties were also intended in part to further the equitable purpose of ***751*** restitution. (*Ibid.*) Moreover, and significantly, the court did not consider that, unlike actions for civil penalties at common law that typically provided a specific and fixed penalty for each violation, the civil penalties authorized by the statutory cause of action at issue in that case were to be determined by the equitable weighing and balancing of a number of factors similar to the list of factors set forth in the UCL and FAL (see *Tull, supra*, 481 U.S. at p. 422, fn. 8, 107 S.Ct. 1831) — a determination that the *Tull* court itself recognized was more appropriate for a court than a jury. (*Id. at p. 427, 107 S.Ct. 1831.*) Thus, rather than determining whether *333* the statutory cause of action for civil penalties at issue should be characterized as legal or equitable by considering all of the legal and equitable aspects of that cause of action holistically, the *Tull* court somewhat artificially severed the cause of action for civil penalties into two parts — one that the court held is to be decided by a jury and one that is to be decided by the court — creating a novel type of cause of action that, as Justice Scalia’s dissent in *Tull* pointed out, was unknown at common law. (*Id. at pp. 427-428, 107 S.Ct. 1831 (dis. opn. of Scalia, J.).*) As *Tull* demonstrates, in applying the Seventh Amendment federal courts generally have not applied the **493** type of holistic gist of the action standard that California decisions have utilized in applying California’s constitutional jury trial
provision, and thus the *Tull* decision is distinguishable from the case before us on this ground as well.

Finally, in addition to the differences attributable to disparate interpretations of the federal and state constitutional civil jury trial provisions, the decision in *Tull* is distinguishable from the present case in yet another significant respect. Unlike the relevant broadly worded and expansive substantive standards embodied in the UCL and FAL — which, as we have explained, call for the exercise of the type of equitable discretion and judgment traditionally employed by a court of equity — under the statute at issue in *Tull*, the question of liability turned simply on the question whether the defendant had, without a permit, deposited fill into an area constituting “wetlands” within the meaning of the Clean Water Act. (*Tull*, supra, 481 U.S. at pp. 414-415, 107 S.Ct. 1831.) The parties in *Tull* apparently did not dispute that the substantive statutory standard of liability at issue in that case involved the type of factual determination that in other contexts has traditionally been made by juries. Accordingly, the court in *Tull* had no occasion to decide whether a jury trial is constitutionally required under the Seventh Amendment whenever a statute permits the recovery of civil penalties, even when the applicable substantive statutory standard clearly contemplates the exercise of equitable judicial discretion and judgment. We note in this regard that when the court in *Tull* addressed a substantive standard as to which the exercise of such equitable discretion was contemplated — that is, in assessing the *amount* of civil penalties to be imposed through “highly discretionary calculations that take into account multiple factors ... traditionally performed by judges” (*Tull*, at p. 427, 107 S.Ct. 1831) — the *Tull* court found that the trial court could properly resolve that matter without violating the federal constitutional civil jury trial right. (*Ibid.*)

Because of the significant differences in the manner in which the federal and California constitutional civil jury trial provisions have been interpreted and applied and because the court in *Tull* did not address a statutory standard, like those involved in the UCL and FAL, which contemplates the exercise *334* of the type of equitable discretion typically undertaken by a court of equity, we conclude that the Court of Appeal’s reliance upon the *Tull* decision was misplaced. 25

V. CONCLUSION

For the reasons set forth above, we conclude that in causes of action under the UCL or FAL seeking injunctive relief and civil penalties, the gist of the actions is equitable, and there is no right to a jury trial in such actions under California law either as a statutory or constitutional matter. Given the specific attributes of the UCL and FAL discussed above, we have no occasion to determine whether there is a right to a jury trial in other settings in which the government seeks injunctive relief and civil penalties under other statutes authorizing those remedies.

The judgment of the Court of Appeal, holding that Nationwide has a right to a jury trial under the California Constitution in such actions, is reversed and the matter is remanded to the Court of Appeal for further proceedings consistent with this opinion.

We Concur:

CHIN, J.

CORRIGAN, J.

GROBAN, J.

Concurring Opinion by Justice Kruger

**494** I concur in the judgment. I agree with the majority that article I, section 16 of the California Constitution does not guarantee a jury trial in this action for equitable relief and civil penalties under the unfair competition law (UCL; *Bus. & Prof. Code, § 17200* et seq.) and false advertising law (FAL; *Bus. & Prof. Code, § 17500* et seq.). But I arrive at that conclusion by a somewhat different—and narrower—path.

As the majority notes, California courts have assumed for decades that the UCL and FAL create causes of action that are equitable in character and thus must be tried to a judge rather than a jury. This assumption only makes sense, since,
at their inception, the only remedy under both statutes was injunctive relief, the quintessential equitable remedy. Even today, only equitable remedies are available to private parties who bring UCL and FAL actions. (Bus. & Prof. Code, §§ 17203 [injunction and restitution as remedies for UCL violation], 17535 [same for FAL].)

*335 But many years after the statutes were first passed, the Legislature authorized certain public officials—including, primarily, the Attorney General and district attorneys—to seek civil penalties as well as injunctive relief. (Bus. & Prof. Code, §§ 17206 [UCL], 17536 [FAL].) This development has called into question the courts’ long-held assumption about the availability of jury trial. That is because government actions seeking civil penalties, generally speaking, sound in law rather than equity and thus carry with them a constitutional right of jury trial under both the Seventh Amendment to the United States Constitution (applicable in federal courts) and article I, section 16 of the California Constitution (applicable in state courts). (Tull v. United States (1987) 481 U.S. 412, 420, 107 S.Ct. 1831, 95 L.Ed.2d 365 (Tull), ***753 People v. One 1941 Chevrolet Coupe (1951) 37 Cal.2d 283, 295 & fn. 15, 231 P.2d 832.)

It is not uncommon for the Legislature to enact a statutory cause of action that has some equitable features and some legal features. Our case law instructs that in such cases, we are to determine which feature predominates in defining its essential character—which, in the distinctive terminology of our precedents, represents the “gist” of the action. (People v. One 1941 Chevrolet Coupe, supra, 37 Cal.2d at p. 299, 231 P.2d 832; C & K Engineering Contractors v. Amber Steel Co. (1978) 23 Cal.3d 1, 9, 151 Cal.Rptr. 323, 587 P.2d 1136.) If the gist is legal, then the parties are constitutionally entitled to a jury. If the gist is equitable, then they are not.1

Our cases also instruct that the nature of the remedies sought is an important—if not necessarily controlling—consideration in this analysis. (C & K Engineering Contractors v. Amber Steel Co., supra, 23 Cal.3d at p. 9, 151 Cal.Rptr. 323, 587 P.2d 1136.) In *336 some cases where plaintiffs seek both equitable and legal remedies, courts have determined whether jury trial is available by comparing the relative **495 significance of the two kinds of remedies. Where the government asks for massive penalties and only very minor injunctive restrictions on the defendant—or, conversely for highly burdensome injunctive orders and only nominal penalties—one form of relief might be deemed incidental to the other and the jury trial right recognized, or not, accordingly. (Cf. Tull, supra, 481 U.S. at pp. 424–425, 107 S.Ct. 1831 [where relief “would be limited primarily to civil penalties, since petitioner had already sold most of the properties at issue, the potential penalty of $22 million hardly can be considered incidental to the modest equitable relief sought”].)

But that is not this case. The present case comes to us in an early procedural posture—on a motion to strike the jury trial demand from defendant’s answer—and the parties dispute both the size of potential penalties and the significance of the injunctive relief sought. It does not appear possible here to characterize either form of relief as clearly predominant over, or incidental to, the other. We must therefore look more broadly at the bases for liability alleged in the complaint and the relationships between these causes of action ***754 and between the liability and remedy issues presented.

Taking this broader look at the UCL, I agree with the majority that the gist of the statutory action is equitable.2 Whatever type of relief a government plaintiff might seek in a particular case, liability under the UCL inherently rests on equitable considerations—considerations of a sort that only the trial court can effectively weigh and determine. (Maj. opn., ante, 261 Cal.Rptr.3d at pp. 724-726, 462 P.3d at pp. 470-472.) The central provision of the UCL, Business and Professions Code section 17200, prohibits “unfair competition,” which it defines to include “unfair” business practices. Determining what is unfair calls on courts to exercise the sort of flexible discretion that characterized the courts of equity—a kind of judgment that juries have not historically made, nor are well suited to make. It is hard to imagine drafting jury instructions, for example, to embody the “unfairness” test enunciated in Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co. (1999) 20 Cal.4th 163, 187, 83 Cal.Rptr.2d 548, 973 P.2d 527, which refers to “conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit” of those laws.
The liability determinations at issue in *Tull* were of a different character. The question was whether the defendant had, without a permit, dumped fill into an area constituting “wetlands” within the meaning of the Clean Water Act. (*Tull*, supra, 481 U.S. at pp. 414–415, 107 S.Ct. 1831.) The statutory rules governing this determination were certainly complicated and technical. (See 33 U.S.C. § 1344(f); 33 C.F.R. § 328.3(b) (2020).) But they did not call on the decisionmaker’s equitable discretion, and no one in *Tull*, including the court, disputed that this was the type of factual determination that has traditionally been made by juries in otherwise appropriate cases. Indeed, the Clean Water Act also provides for criminal penalties for willful or negligent violations (33 U.S.C. § 1319(c))—which means that in some set of Clean Water Act cases, the relevant factual disputes are, of necessity, resolved by juries. *Tull* is thus distinguishable from this case by the nature of the liability decision there, which required only the determination of the historical facts and the application of legal standards to those facts—tasks central to the traditional role of trial juries—in contrast to the balancing of interests typically called for in assessing liability under the UCL.

But here is where my analysis differs from the majority’s: While UCL liability can readily be characterized as dependent on equitable considerations, I do not believe the same can be said of liability under the FAL. To be sure, the FAL, much like the UCL, is broadly written: The statute is designed to encompass any novel scheme for misleading the public. (Maj. opn., ante, 261 Cal.Rptr.3d at p. 730, 462 P.3d at p. 475.) The statute makes claims relatively easy to prove, compared to common law fraud, by employing a negligence standard and omitting the elements of reliance and injury; the plaintiff need show only that the challenged advertisement or promotion is likely to mislead members of the public. (*Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 951, 119 Cal.Rptr.2d 296, 45 P.3d 243.) But at least by its text, the FAL does not create a standard of liability that depends on the exercise of a court’s equitable judgment. No balancing of harms and benefits or weighing of the parties’ and public interests are involved in determining liability; no equitable principles like laches or unclean hands come into play. Rather, as other state courts have observed in evaluating similar laws, the FAL in significant respects resembles the common law cause of action for negligent misrepresentation, a species of the tort of deceit. (See *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 407, 11 Cal.Rptr.2d 51, 834 P.2d 745; cf. *State v. Abbott Laboratories* (2012) 341 Wis.2d 510, 533, [816 N.W.2d 145, 156] [holding that Wisconsin’s Deceptive Trade Practices Act, as “an essential counterpart to the common law claim of ‘cheating,’ ” carries a right to jury trial].) Though the FAL requires only a misleading advertisement, not necessarily one containing express falsehoods, the same is true for tortious deceit in California. (*Universal By-Products, Inc. v. City of Modesto* (1974) 43 Cal.App.3d 145, 151, 117 Cal.Rptr. 525 [“A misrepresentation need not be express but may be implied by or inferred from the circumstances.”]; *Sullivan v. Helbing* (1924) 66 Cal.App. 478, 483, 226 P. 803 [“Fraudulent representations may consist of half-truths calculated to deceive. Thus a representation literally true is actionable if used to create an impression substantially false.”].) At least considered in isolation, then, nothing about the nature of liability determination under the FAL suggests it sits beyond the scope of the jury right.

In characterizing the nature of the FAL action as equitable, the majority emphasizes that appellate courts analyzing FAL liability have discussed a “variety of factors” relevant to whether a particular advertisement is misleading. (Maj. opn., ante, 261 Cal.Rptr.3d at p. 731, 462 P.3d at p. 476.) These appellate discussions, though, tell us little about the legal or equitable character of FAL liability. The issues before the appellate courts were ones of legal sufficiency: whether allegations of misleading advertising were sufficient to survive demurrer (*Brady v. Bayer Corp.* (2018) 26 Cal.App.5th 1156, 237 Cal.Rptr.3d 683; *Day v. AT & T Corp.* (1998) 63 Cal.App.4th 325, 74 Cal.Rptr.2d 55) or whether substantial evidence supported a trial court’s finding of an FAL violation (*People v. Overstock.com, Inc.* (2017) 12 Cal.App.5th 1064, 219 Cal.Rptr.3d 65 (*Overstock.com*)). In answering these questions, the courts did cite a number of factual considerations that supported the complaint’s evidentiary showing’s sufficiency, but those factual discussions are not particularly suggestive of an inherently equitable approach to FAL liability. What the
appellate courts did in these cases does not differ in any meaningful way from what courts do when they review evidentiary sufficiency questions in cases involving causes of action that are tried to juries, such as common law fraud. (See, e.g., Dore v. Arnold Worldwide, Inc. (2006) 39 Cal.4th 384, 393, 46 Cal.Rptr.3d 668, 139 P.3d 56 [in suit for fraudulent inducement to enter into at-will employment contract, evidence was insufficient to show reliance where employment offer did not specifically guarantee the plaintiff “would be employed there so long as his work was satisfactory or that he could be fired only for good cause” or contain any other “promises of long-term employment”]; AREI II Cases (2013) 216 Cal.App.4th 1004, 1022, 157 Cal.Rptr.3d 368 [detailing several “facts and circumstances that permit a reasonable inference” defendant participated in fraud].) Indeed, even in criminal cases tried to juries, appellate decisions on sufficiency of evidence often articulate a number of factual considerations to guide the analysis. (See, e.g., People v. Banks (2015) 61 Cal.4th 788, 804–811, 189 Cal.Rptr.3d 208, 351 P.3d 330 [detailed analysis of sufficiency of evidence to show major participation in felony and reckless indifference to human life]; People v. Koontz (2002) 27 Cal.4th 1041, 1081–1082, 119 Cal.Rptr.2d 859, 46 P.3d 335 [discussing three nonexclusive factors relevant to sufficiency of evidence for premeditation and deliberation].)

None of the cases the majority cites discusses the possibility of a jury trial when civil penalties are sought. Indeed, the only case in which the issue could have arisen is Overstock.com—the only action brought by a public plaintiff entitled to seek civil penalties—but it was not raised there. Nor do any of the cases hold or state that determining an FAL violation requires weighing competing interests, applying equitable doctrines such as laches, estoppel, or unclean hands, or balancing the harms and benefits of a requested remedy. Indeed, the considerations discussed in the opinions appear fairly typical of issues that, in a jury trial, might be used by the jury to resolve the question of liability under the FAL: the inability of consumers to learn the terms of a prepaid phone card before buying the card (Day v. AT & T Corp., supra, 63 Cal.App.4th at p. 334, 74 Cal.Rptr.2d 55); the application of “common sense” (Brady v. Bayer Corp., supra, 26 Cal.App.5th at p. 1165, 237 Cal.Rptr.3d 683); the possibility that a brand name by itself would mislead consumers (id. at p. 1170, 237 Cal.Rptr.3d 683); and the likelihood a consumer would understand “‘Compare at’” in an advertisement boasting of a low price to refer to another seller’s price for the same item (Overstock.com, supra, 12 Cal.App.5th at p. 1081, 219 Cal.Rptr.3d 65).

The Overstock.com court did cite as consistent with its own analysis a regulation of the Federal Trade Commission (FTC), part of the agency’s Guides Against Deceptive Pricing (FTC Guides), stating that price comparisons to other merchandise can be “‘useful and legitimate’” when the comparison items are of essentially similar quality and are obtainable in the area. (Overstock.com, supra, 12 Cal.App.5th at p. 1081, 219 Cal.Rptr.3d 65, quoting 16 C.F.R. § 233.2(c) (2017).) The majority holds this up as an example of how “the complexities and nuances” of FAL liability “are often ameliorated by judicial reference to the relevant guidelines developed by the FTC regarding deceptive advertising.” (Maj. opn., ante, 261 Cal.Rptr.3d at p. 733, 462 P.3d at p. 478, citing Stern, Cal. Practice Guide: Bus. & Prof. Code § 17200 Practice (The Rutter Group 2019) §§ 4:46–4:80.4, pp. 4-14–4-32.)

This overstates the significance of the FTC Guides to the question before us. For one thing, the link between the FTC Guides and liability under the FAL appears rather tenuous. The FTC Guides are not comprehensive or definitive regulations even for interpreting the FTC Act, and certainly nothing suggests they were intended, or have functioned, to define deceptive practices for purposes of state law. In any event, while the FTC Guides offer guidance on what sort of practices will be considered deceptive, none of this guidance appears to turn on the application of equitable judgment. For example, the Guides Concerning Use of Endorsements and Testimonials in Advertising, which the majority describes as illustrating the type of “equitable consideration” that goes into an FAL liability determination (maj. opn., ante, 261 Cal.Rptr.3d at p. 733, 462 P.3d at pp. 477-478), covers such questions as when an advertiser should confirm that the endorser’s views have not changed (16 C.F.R. § 255.1(b) (2020)) and what kind of substantiation must support the claims of effectiveness implied by a consumer endorsement (id., § 255.2(a), (b) (2020)). The FTC Guides illustrate the potential factual
The majority also argues that because of the FAL’s potential breadth, it is important that the FAL liability standard be administered by trial courts, which can “set forth their reasoning for a determination that the FAL has been violated so that a body of precedent can evolve to inform businesses of advertising practices they must avoid.” (Maj. opn., ante, at pp. 261 Cal.Rptr.3d at p. 731, 462 P.3d at p. 476.) As an argument for cabining the scope of the constitutional jury trial right, I find this reasoning unpersuasive. Binding precedent is made only by appellate courts, and an appellate decision on sufficiency of the evidence fills out the precedential picture regardless of whether trial was to a jury or to the bench. And while it might be thought desirable from some points of view to have all FAL actions heard by judges, the same might be said for any number of civil causes of action. Defendants in insurance bad faith cases, for example, might well prefer bench trials and could argue that they, too, need a body of precedent to guide their actions. But they get such precedential guidance from *341 appellate decisions on legal issues. (E.g., ** Wilson v. 21st Century Ins. Co. (2007) 42 Cal.4th 713, 721–726, 68 Cal.Rptr.3d 746, 171 P.3d 1082 [propriety of summary judgment].) It would not be consistent with the constitutional ***758 mandate that trial by jury “is an inviolate right and shall be secured to all” (Cal. Const., art. I, § 16) for us to pick out categories of civil actions that, because they sometimes raise complicated factual issues or implicate common business decisions, we regard as more suitable for trial to the court.

In the end, however, while it seems to me the majority comes up short in its effort to show that FAL claims implicate inherently equitable judgment uniquely suited to a court, I agree that the present action was nonetheless predominantly equitable in character.

First, as the majority explains, even if liability for civil penalties is deemed a legal question, the amount of such penalties under the UCL and FAL is decided by the court on an equitable basis, along with questions of injunctive relief and appropriate restitution. (Maj. opn., ante, 261 Cal.Rptr.3d at p. 745, 462 P.3d at p. 488 ["[T]he UCL and FAL statutes specify that in assessing the amount of the civil penalty to be imposed under these statutes, the court is afforded broad discretion to consider a nonexclusive list of factors that include the relative seriousness of the defendant’s conduct and the potential deterrent effect of such penalties, the type of qualitative evaluation and weighing of a variety of factors that is typically undertaken by a court and not a jury. (Bus. & Prof. Code, §§ 17206, 17536.)"]). The parties do not dispute that even if the request for civil penalties triggered a jury trial right, the right would extend only to the trial on liability; the ultimate amount of any penalties awarded would be decided by the court. Such an arrangement is not unprecedented (see ** Tull, supra, 481 U.S. at pp. 425–427, 107 S.Ct. 1831), but this allocation of remedial authority **499 does diminish the practical importance of the jury’s factfinding role and, in my view, strains the idea that the gist of the action is predominantly legal.

Second, and equally important, the causes of action under the UCL and the FAL are inherently intertwined. This is because “unfair” competition under the UCL expressly includes “any act prohibited by” the FAL (Bus. & Prof. Code, § 17200), meaning that every violation of the FAL is therefore also a violation of the UCL. When, as here, allegedly deceptive conduct is pleaded as a violation of both statutes, the same liability questions that a jury would decide for purposes of the FAL would be decided by the court for purposes of the UCL. And while it might be theoretically possible to separate out the UCL claims that depend on equitable principles from those that do not, in practice the effort to keep the claims separate would be bound to collapse, since each UCL cause of action in a complaint is not necessarily limited to a single type of conduct or a single legal theory of liability.

*342 In these circumstances, trying liability under the FAL to the jury, while the rest of the action was decided by the court, would create procedural complications without significant benefit to the defendant demanding jury trial. Because the FAL and the UCL are intertwined in this manner, a trial court that considered the defendant’s advertising deceptive could impose liability under the UCL before even putting the FAL liability question to the jury. (See maj. opn., ante, 261 Cal.Rptr.3d at p. 737, 462 P.3d at p. 481 [trial
court has discretion as to order of trying severable legal and equitable issues.) The court could then exercise its equitable judgment to impose both injunctive relief and substantial civil penalties for the UCL violation, regardless of the jury’s view as to FAL liability. In other words, although every found violation of the FAL triggers civil penalties under the UCL, the reverse is **not** true; a jury’s finding of no FAL liability would not preclude a judge from awarding substantial civil penalties under the UCL. Because of the way these intertwined causes of action relate when the same conduct is at issue, the jury’s verdict does not ultimately determine whether civil penalties are imposed.

Plaintiffs here seek a traditionally legal remedy, civil penalties, along with the equitable remedies of injunction and restitution. They also plead causes of action under the FAL, for which liability appears to rest on factual determinations rather than equitable judgment, as well as the UCL. But in the end, the equitable facets of this action predominate over the legal ones. The amount of any civil penalties would be determined by the trial court on the basis of equitable principles, allowing the court to nullify any jury finding of an FAL violation. What is more, the court could effectively override any jury decision against FAL liability by imposing liability for the same conduct under the UCL before the FAL issue is ever tried, then awarding plaintiffs injunctive relief and penalties for that violation. For these reasons, I agree with the majority that the action is predominantly equitable in nature.

We Concur:
LIU, J.
CUÉLLAR, J.

All Citations

Footnotes

1 The unfair competition law is set forth at Business and Professions Code section 17200 et seq. Although the Legislature has not given an official name to these statutory provisions, the legislation has generally been referred to as the unfair competition law, and we will refer to this statute as the UCL. (See Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co. (1999) 20 Cal.4th 163, 169, fn. 2, 83 Cal.Rptr.2d 548, 973 P.2d 527.)

2 The false advertising law (FAL) is set forth at Business and Professions Code section 17500 et seq.

3 As initially filed, the complaint also alleged that Nationwide’s practices violated the Check Sellers, Bill Payers, and Proraters Law (Fin. Code, § 12200 et seq.) and asserted causes of action under that statute. While this case was pending before this court, those causes of action were dismissed as part of a larger settlement between the Department of Business Oversight and Nationwide. The underlying action now rests solely on the causes of action under the UCL and FAL set forth in the complaint.

4 In the action brought by the CFPB, the federal district court, after a seven-day bench trial, found that although some of the claims advanced by the CFPB were not meritorious, Nationwide had made a variety of misleading statements in its marketing materials. The court imposed injunctive relief and civil penalties of more than $7 million against Nationwide based on that misleading conduct. (Consumer Financial Protection Bureau v. Nationwide Biweekly Admin., Inc. (N.D.Cal., Sept. 8, 2017, No. 15-cv-02106-RS) 2017 WL 3948396, pp. *6-9, *12-13.) Both parties filed appeals from the district court’s decision, that are pending in the United States Court of Appeals for the Ninth Circuit. (Case Nos. 18-15431 & 18-15887, filed Mar. 15, 2018 & May 10, 2018.)
In the answer brief filed in this court, Nationwide claims that the government seeks to impose “over $19.25 billion” in civil penalties. The complaint, however, seeks no specific amount in penalties, and, as explained hereafter, the applicable statutes and case law grant trial courts broad, but not unlimited, discretion to impose penalties in a reasonable amount (up to $2,500 per violation) in light of the nature and severity of an offending business’ conduct. (Post, 261 Cal.Rptr.3d at pp. 722, 729-730, 734, 462 P.3d at pp. 468-469, 475, 479.) The answer’s hyperbole in this regard does not advance its legal argument.

The 1933 amendment also defined “unfair competition” to include any violation of the then-existing provisions of Penal Code former sections 654a, 654b, or 654c, all of which prohibited different specific forms of false advertising. (Stats. 1933, ch. 953, § 1, p. 2482 [Civ. Code, former § 3369, subd. (3)].)

In the statewide election held in November 2004, the voters approved Proposition 64, an initiative statute that restricted the kinds of private plaintiffs that may seek an injunction or other equitable relief under the UCL or FAL (Bus. & Prof. Code, §§ 17203, 17204, 17535) and provided that the revenue from the civil penalties imposed under the UCL or FAL may be used only by the Attorney General and local public prosecutors for the enforcement of consumer protection laws. (Bus. & Prof. Code, §§ 17206, subd. (c), 17536, subd. (c).) The changes effectuated by Proposition 64 have no direct bearing on the issue before us.

The very broad consumer protective language set forth in the UCL closely tracks the broad language that Congress embodied in the Federal Trade Commission Act to reach business practices that were not specifically forbidden by the common law or other statutes. (See 15 U.S.C. § 45(a) [“Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce” are declared unlawful]; see generally Baker & Baum, Section 5 of the Federal Trade Commission Act: A Continuing Process of Redefinition (1962) 7 Vill. L.Rev. 517, 525-542.) California decisions have long recognized the close relationship between the language of the UCL and the Federal Trade Commission Act. (See, e.g., People ex rel. Mosk v. National Research Co. (1962) 201 Cal.App.2d 765, 772-773, 20 Cal.Rptr. 516.) The United States Supreme Court, in discussing the Federal Trade Commission’s exercise of its authority to determine whether a trade practice is “unfair” under the Federal Trade Commission Act in FTC v. Sperry & Hutchinson Co. (1972) 405 U.S. 233, 244, 92 S.Ct. 898, 31 L.Ed.2d 170, concluded that “legislative and judicial authorities alike convince us that the Federal Trade Commission does not arrogate excessive power to itself if, in measuring a practice against the elusive, but congressionally mandated standard of fairness, it, like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of antitrust laws.” (Italics added.)

See People v. Casa Blanca Convalescent Homes, Inc. (1984) 159 Cal.App.3d 509, 530, 206 Cal.Rptr. 164, which stated that “an ‘unfair’ business practice occurs when it offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers,” and State Farm Fire & Casualty Co. v. Superior Court (1996) 45 Cal.App.4th 1093, 1104, 53 Cal.Rptr.2d 229, which declared that in determining whether a business practice is unfair “ ‘the court must weigh the utility of the defendant’s conduct against the gravity of the harm to the alleged victim.’ ”

One line of Court of Appeal decisions has held that a balancing test, which the Cel-Tech court declined to adopt in the competitor context (see Cel-Tech, supra, 20 Cal.4th at pp. 184-185, 83 Cal.Rptr.2d 548, 973 P.2d 527), should nonetheless be applied in the consumer context, under which the determination whether a business practice is unfair to consumers “ ‘involves an examination of [that practice’s] impact on its alleged victim, balanced against the reasons, justifications and motives of the alleged wrongdoer. In brief, the court must weigh the utility of the defendant’s conduct against the gravity of the harm to the alleged victim.” ’
A second line of Court of Appeal decisions has adopted what has been termed a “tethering test,” requiring that “the public policy which is a predicate to [a consumer unfair competition action under the ‘unfair’ prong of the UCL] must be ‘tethered’ to specific constitutional, statutory or regulatory provisions” in a manner similar to which " Cel-Tech requires a competitor’s cause of action to be tethered to the antitrust laws. ( Gregory v. Albertson’s, Inc. (2002) 104 Cal.App.4th 845, 854, 128 Cal.Rptr.2d 389; see, e.g., Scripps Clinic v. Superior Court (2003) 108 Cal.App.4th 917, 940, 134 Cal.Rptr.2d 101.)

A third line of Court of Appeal cases has adopted the three-part definition of unfairness applied under section 5 of the FTC Act since 1980, namely that: “(1) The consumer injury must be substantial; (2) the injury must not be outweighed by any countervailing benefits to consumers or competition; and (3) it must be an injury that consumers themselves could not reasonably have avoided.” ( Camacho v. Automobile Club of Southern California (2006) 142 Cal.App.4th 1394, 1403, 48 Cal.Rptr.3d 770; see, e.g., Rubenstein v. The Gap (2017) 14 Cal.App.5th 870, 880, 222 Cal.Rptr.3d 397.) This test has sometimes been termed the “section 5 test.”

The FAL traces its origin to the 1915 version of former Penal Code section 654a (Stats. 1915, ch. 634, § 1, pp. 1252-1253), which, in turn, was based upon a model false advertising statute that was first proposed in 1911 in Printer’s Ink magazine, an advertising journal. (See Note, The Regulation of Advertising (1956) 56 Colum. L.Rev. 1018, 1058; Note, Enforcing California’s False Advertising Law: A Guide to Adjudication (1974) 25 Hastings L.J. 1105, 1106.) The 1911 model statute proposed to make it a misdemeanor to publish an advertisement containing “‘any assertion, representation or statement of fact which is untrue, deceptive or misleading’ ” and was quite stringent, omitting any requirement that the advertiser be shown to have intended to deceive or to know the improper character of the advertisement. (Note, The Regulation of Advertising, supra, 56 Colum. L.Rev. at pp. 1058-1059 & fn. 245.) In adopting the statute in California in 1915, however, the Legislature added a scienter requirement, requiring a showing that the advertiser knew or, in the exercise of reasonable care, should have known of the false, deceptive or misleading character of the advertisement. (Stats. 1915, ch. 634, § 1.)

After the trial court ruling but prior to our decision in Jayhill, the Legislature had explicitly amended Business and Professions Code section 17535 to authorize the court to order restitution as well as injunctive relief. (Stats. 1972, ch. 244, § 1, p. 494.) In Jayhill, the court found that in light of its legislative history, the 1972 amendment was not intended “to create a new power in the trial court but simply to clarify existing law on the point.” ( Jayhill, supra, 9 Cal.3d at p. 287, fn. 1, 107 Cal.Rptr. 192, 507 P.2d 1400.)

As noted above ( ante, 261 Cal.Rptr.3d at p. 721, 462 P.3d at p. 468), the UCL contains an overlapping prohibition of impermissible advertising, barring, in addition to “any unlawful, unfair or fraudulent business act or practice,” any “unfair, deceptive, untrue or misleading advertising.” ( Bus. & Prof. Code, § 17200.)

For a general discussion of the numerous and complex factors and considerations that may affect the determination whether advertising should properly be viewed as deceptive or misleading, see Developments in the Law — Deceptive Advertising (1967) 80 Harv. L.Rev. 1005, 1038-1063.

At oral argument, counsel for Nationwide suggested that in federal court juries often decide such questions in actions under the FTC Act in which civil penalties are sought. Under the FTC Act, however, civil penalties
may be sought only for a defendant’s violation of a prior cease and desist order (15 U.S.C. §§ 45(l),
45(m)(1)(B)) or for a defendant’s knowing violation of a specific trade regulation rule (45 U.S.C. § 45(m)
(1)(A)). Although federal courts have held that there is a right to a jury trial in such actions, the jury in such
actions does not determine whether the practice is unfair or deceptive within the meaning of the FTC Act,
but rather determines only whether the defendant violated the existing cease and desist order or the specific
trade regulation rule. (See, e.g., United States v. J.B. Williams Co. (2d Cir. 1974) 498 F.2d 414, 421-430;
(2) [providing that when the cease and desist order was not issued against the particular defendant from
whom civil penalties are sought, upon request “the court shall ... review the determination of law made by
the Commission ... that the act or practice which was the subject of such proceeding constituted an unfair or
deceptive act or practice in violation of subsection (a)” (italics added) ].)

In Raedeke itself, the court, after confirming the existence and validity of the “equity first preference,” held
that a plaintiff who brings an action presenting both legal and equitable issues can avoid the potential loss of
a jury trial on common issues by electing to forgo the equitable claim and thus removing the equitable issues
from the case. (See Raedeke, supra, 10 Cal.3d at pp. 671-672, 111 Cal.Rptr. 693, 517 P.2d 1157.)

Contrary to the implication of the Court of Appeal decision below (see Nationwide Biweekly, supra, 24
Cal.App.5th at p. 456, 234 Cal.Rptr.3d 468), this court’s recent decision in Shaw, supra, 2 Cal.5th 983, 216
Cal.Rptr.3d 643, 393 P.3d 98 did not purport to abrogate or change this state’s well-established “equity first
preference” doctrine. In Shaw, we interpreted one provision of the statute before the court — Health and
Safety Code section 1278.5, subdivision (m), which provided that nothing in the new legislation “abrogate[s]
or limit[s] any other theory of liability or remedy otherwise available at law” — as preserving in full a plaintiff’s
839, 610 P.2d 1330, including the plaintiff’s right to obtain a jury resolution of the Tameny claim. (Shaw,
supra, 2 Cal.5th at p. 1006, 216 Cal.Rptr.3d 643, 393 P.3d 98.) Shaw did not purport to overrule or disapprove
the numerous California decisions cited above that have applied the “equity first preference” doctrine for
more than a century.

Because in this case the equitable and legal aspects of the UCL and FAL actions are nonseverable and
because Nationwide has not questioned the continued vitality of the “equity first preference” doctrine, we
have no occasion to consider whether there is any reason to reevaluate this doctrine or to determine its
proper application in a particular context.

The legislation was adopted by the voters at the November 4, 1986 General Election. The Legislature has
amended relevant provisions of the act on numerous occasions since its inception. (See Stats. 1999, ch. 599,
§ 1; Stats. 2001, ch. 578, § 1; Stats. 2002, ch. 323, § 1; Stats. 2003, ch. 62, § 185; Stats. 2013, ch. 581, §
1; Stats. 2014, ch. 71, § 90; Stats. 2014, ch. 828, § 1; Stats 2017, ch. 510, § 1.) For convenience, we shall
refer to the legislation in its current form as Proposition 65.

Health & Safety Code section 25249.7, subdivision (b)(2) provides in full: “In assessing the amount of a
civil penalty for a violation of this chapter, the court shall consider all of the following:
“(A) The nature and extent of the violation.
“(B) The number of, and severity of, the violations.
“(C) The economic effect of the penalty on the violator.
“(D) Whether the violator took good faith measures to comply with this chapter and the time these measures
were taken.
“(E) The willfulness of the violator’s misconduct.
“(F) The deterrent effect that the imposition of the penalty would have on both the violator and the regulated community as a whole.
“(G) Any other factor that justice may require.”

20 In his seminal article on the right to civil jury trial, Professor Fleming James observed that, at common law, when a plaintiff was seeking to obtain both injunctive relief and civil penalties for a defendant’s alleged statutory violation, the plaintiff would have been required to bring two separate actions — one in equity and one in law. As Professor James explained: “B’s violation of A’s statutory right ... might entitle A to an injunction, to compensatory damages, and to a penalty. The right to any relief would turn on whether B violated the statute. A might get a determination of that issue without a jury in an equity suit, seeking an injunction and perhaps compensatory damages as incidental to an injunction. Or he might get such determination in an action at law for damages or for the penalty. Since equity refused to enforce a penalty and the law would not give an injunction, two suits would be required for complete relief. A had the choice which to bring first. And the first determination of the common issue (violation vel non) would bind the parties in the second action. The plaintiff then had the power to choose the mode of trial of the common issue, and he could so exercise it as to leave no room for judicial discretion.” (James, Right to a Jury Trial in Civil Actions (1963) 72 Yale L.J. 655, 671-672, fns. omitted.) Thus, as a general matter, at common law when a plaintiff sought both injunctive relief and civil penalties based upon a business’s alleged violation of a statute, the business was by no means guaranteed that the question whether it violated the statute would be determined by a jury rather than by a court.

21 In concluding that the gist of the causes of action created by the UCL and FAL is equitable even when civil penalties as well as injunctive relief are sought, we have relied on the specific attributes of the California UCL and FAL statutes, as well as the established understanding of the scope of the California constitutional jury trial provision.

Although the court in *Tull* held that the Seventh Amendment granted the developer a right to a jury trial on the issue of liability, the majority went on to hold that the Seventh Amendment did not require a jury trial on the amount of civil penalties. The majority explained that because “highly discretionary calculations that take into account multiple factors are necessary in order to set civil penalties under the Clean Water Act” and “[t]hese are the kinds of calculations traditionally performed by judges,” “the Seventh Amendment does not require a jury trial for that purpose in a civil action.” (*Tull*, supra, 481 U.S. at p. 427, 107 S.Ct. 1831.) Justice Scalia, joined by Justice Stevens, dissented from the latter holding, objecting that by fashioning a civil action in which liability but not the amount of damages is to be decided by a jury, “the Court creates a form of civil adjudication I have never encountered.” (*Tull*, supra, 481 U.S. at p. 428, 107 S.Ct. 1831 (dis. opn. of Scalia, J.).)

We note that since the decision in *Tull*, a number of state courts, in interpreting and applying their own state constitutional civil jury trial provisions, have concluded, unlike the *Tull* decision, that there is no right to a jury trial in statutory causes of action authorizing both injunctive relief and civil penalties. (See, e.g., *State ex rel. Darwin v. Arnett* (Ct.App. 2014) 235 Ariz. 239, 330 P.3d 996, 1002; *Commissioner of Environmental Protection v. Connecticut Bldg. Wrecking Co.* (1993) 227 Conn. 175, 629 A.2d 1116, 1121-1123; *Dept. of Environmental Protection v. Emerson* (Me. 1992) 616 A.2d 1268, 1271; *Dept. of Environmental Quality v. Morley* (2015) 314 Mich.App. 306, 885 N.W.2d 892, 897; *State v. Irving Oil Corp.* (2008) 183 Vt. 386, 955 A.2d 1098, 1106-1108; *State v. Evergreen Freedom Foundation* (2002) 111 Wash.App. 586, 49 P.3d 894, 908-909.) A few states that have traditionally looked to the Seventh Amendment in interpreting their own state jury trial provision have followed *Tull*. (See, e.g., *Dept. of Revenue v. Printing House* (Fla. 1994) 644 So.2d 498, 500-501; *Bendick v. Cambio* (R.I. 1989) 558 A.2d 941, 943-944.) California is by no means alone in employing a holistic, qualitative standard for determining whether an action involving both legal and equitable aspects should be characterized as legal or equitable for purposes of an applicable constitutional jury trial provision. (See, e.g., *Miller v. Carnation Co.* (1973) 33 Colo.App. 62, 516 P.2d 661, 663 [“Where there are legal and equitable claims joined in the complaint the court must determine whether the basic thrust of the action is equitable or legal in nature”]; *Commissioner of Environmental Protection v. Connecticut Bldg. Wrecking Co.*, supra, 629 A.2d 1116, 1121 [“In a case that involves both legal and equitable claims, ‘whether the right to a jury trial attaches depends upon the relative importance of the two types of claims’”]; *Shaner v. Horizon Bancorp.* (1989) 116 N.J. 433, 561 A.2d 1130, 1139 [“we have eschewed a focus solely on the remedy sought and have espoused a more eclectic view of the standards that serve to characterize the essential nature of a cause of action in giving meaning and scope to the right to a jury trial conferred by article I, paragraph 9 of the New Jersey Constitution”]; *Insurance Financial Services, Inc. v. So. Carolina Ins. Co.* (1978) 271 S.C. 289, 247 S.E.2d 315, 318 [“Since the appellant has prayed for money damages in addition to seeking equitable relief, characterization of the action as equitable or legal depends on the appellant’s ‘main purpose’ in bringing the action”]; *Norback v. Bd. of Directors of Church Extension Soc.* (1934) 84 Utah 506, 37 P.2d 339, 345 [“If the issues are legal or the major issues legal, either party is entitled upon proper demand to a jury trial; but, if the issues are equitable or the major issues to be resolved by an application of equity, the legal issues being merely subsidiary, the action should be regarded as equitable and the rules of equity apply”]; *Brown v. Safeway Stores* (1980) 94 Wash.2d 359, 617 P.2d 704, 709 [“In determining whether a case is primarily equitable in nature or is an action at law, the trial court is accorded wide discretion [which] should be exercised with reference to a variety of factors including, but
not necessarily limited to, [seven factors set forth in an earlier Washington decision]; Hyatt Bros. ex rel. Hyatt v. Hyatt (Wyo. 1989) 769 P.2d 329, 333 ["the right to a jury trial in cases involving mixed issues of law and equity [is] resolved by examining the entire pleadings and all the issues raised to determine whether the action is primarily legal in nature or primarily equitable in nature]."

In its answer brief filed in this court, Nationwide maintains that if this court rejects its state constitutional claim, we should address the question whether it has a right to a jury trial under the Sixth or Seventh Amendment to the United States Constitution and should hold, notwithstanding the absence of federal decisional support, that it has a right to jury trial in a state court action under those federal provisions. The Court of Appeal did not address these issues, neither the petition for review nor any answer to the petition raised these issues, and thus we decline to address those issues. (See Cal. Rules of Court, rule 8.516(b)(1).)

Despite what the term “gist” might otherwise call to mind, the aim of this inquiry is not to identify a single essential element at the action’s theoretical core. We instead try to understand how the statutory cause of action, considered as a whole, relates to the historical division between law and equity, the goal being to place the cause of action appropriately among its possible historical analogues.

I do not believe federal law differs a great deal on this basic point. Though the majority reads Tull as establishing a strict rule that the plea for a legal remedy carries a jury trial right notwithstanding any other substantial equitable characteristics the action might have (maj. opn., ante, 261 Cal.Rptr.3d at pp. 749-750, 462 P.3d at pp. 491-492), I do not read Tull this way. The high court’s case law has long made clear that the federal jury trial inquiry turns on a holistic examination of both “the nature of the action and of the remedy sought”—a rule Tull cited without signaling any intent to depart from it. (Tull, supra, 481 U.S. at p. 417, 107 S.Ct. 1831; see also id. at p. 422, 107 S.Ct. 1831, fn. 6 ["Our search is for a single historical analog, taking into consideration the nature of the cause of action and the remedy as two important factors."]; accord, e.g., Feltner v. Columbia Pictures Television, Inc. (1998) 523 U.S. 340, 348, 118 S.Ct. 1279, 140 L.Ed.2d 438 [7th Amend. to the U.S. Const. intended to apply to actions “in which legal rights were to be ascertained and determined” (italics omitted and added)].)

In any event, Tull is distinguishable from this case on other, more case-specific grounds, which I discuss later in this opinion. We need not rely here on any broad generalizations about how, if at all, the federal approach to the civil jury right differs from California’s.

The majority discusses the equitable character of the UCL and FAL in detail only in part III of the opinion, which addresses statutory jury trial rights. The majority concludes there that in enacting and amending both statutes, “the legislative history and legislative purpose of both statutes convincingly establish that the Legislature intended that such causes of action under these statutes would be tried by the court, exercising the traditional flexible discretion and judicial expertise of a court of equity ....” (Maj. opn., ante, 261 Cal.Rptr.3d at p. 721, 462 P.3d at pp. 467-468.) In its constitutional analysis, the majority simply cross-references this discussion. (Id. at p. 745, 462 P.3d at pp. 487-488.) Readers should not be confused, however, by this organizational choice: The Legislature’s intent does not control whether there is a constitutional right to jury trial. (See id. at p. 735, 462 P.3d at p. 479.)

Business and Professions Code section 17500 defines the scope of false advertising liability: “It is unlawful for any person ... with intent directly or indirectly to dispose of real or personal property or to perform services ... to make or disseminate or cause to be made or disseminated before the public ... any statement, concerning that real or personal property or those services ... which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading, or for any person ... to so make ... any such statement as part of a plan or scheme with the intent not to sell that
personal property or those services, professional or otherwise, so advertised at the price stated therein, or as so advertised."

4 The FTC Guides on testimonials and endorsements, for example, simply "provide the basis for voluntary compliance with the law by advertisers and endorsers." (16 C.F.R. § 255.0(a) (2020); see also id., § 260.1(a) (2020) [Guides on environmental claims “help marketers avoid making environmental marketing claims that are unfair or deceptive,” but “do not operate to bind the FTC or the public.”]; FTC v. Mary Carter Paint Co. (1965) 382 U.S. 46, 47–48, 86 S.Ct. 219, 15 L.Ed.2d 128 [“These, of course, were guides, not fixed rules as such, and were designed to inform businessmen of the factors which would guide Commission decision.”].) And while the Stern treatise describes some of the FTC Guides as potentially relevant to FAL liability, it gives no examples of their use by courts for this purpose and does not describe such use as common. (See Stern, Cal. Practice Guide: Bus. & Prof. Code § 17200 Practice, supra, §§ 4:46, 4:72, 4:80.2–4:80.4.)

5 The same is true of the cited federal decisions upholding FTC findings of deceptiveness (maj. opn., ante, 261 Cal.Rptr.3d at p. 734, 462 P.3d at pp. 478-479), such as FTC v. Colgate-Palmolive Co. (1965) 380 U.S. 374, 384–390, 85 S.Ct. 1035, 13 L.Ed.2d 904 and FTC v. Mary Carter Paint Co., supra, 382 U.S. at pages 47 to 48, 86 S.Ct. 219: They may show that deceptiveness can be factually complicated, but not that it depends on application of equitable principles.
383 F.Supp.3d 959
United States District Court, N.D. California.

James HARALSON, Plaintiff,
v.
U.S. AVIATION SERVICES CORP., Defendant.

Case No. 16-cv-05207-JST

Signed 06/07/2019

Synopsis
Background: Employee brought putative class action against employer alleging violations of California Labor Code, California's Unfair Competition Law (UCL), and California's Private Attorneys General Act (PAGA), arising out of failure to provide employees with meal periods and rest periods, failure to pay premium wages for unprovided breaks, automatic deduction of time for meal period breaks, requirement that employees work after clocking out, and inaccurate wage statements. Employee filed motion for preliminary approval of a class action settlement and preliminary certification of a settlement class.

Holdings: The District Court, Jon S. Tigar, J., held that:

- class action settlement's release of Fair Labor Standards Act (FLSA) claims weighed against preliminary approval of settlement;
- application of settlement's release provision to company that was voluntarily dismissed from action weighed against approval;
- range of recovery weighed against approval;
- allocated recovery for PAGA claims weighed against approval; and
- defects in proposed notice plan weighed against approval.

Motion denied.

Procedural Posture(s): Motion to Approve Settlement; Motion to Certify Class.

Attorneys and Law Firms

*962 Chaim Shaun Setareh, William Matthew Pao, Thomas Alistair Segal, Setareh Law Group, Beverly Hills, CA, Howard Scott Leviant, Moon & Yang, APC, Los Angeles, CA, for Plaintiff.


ORDER DENYING MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT AND CERTIFICATION OF SETTLEMENT CLASS

Re: ECF No. 73

JON S. TIGAR, United States District Judge

*963 Before the Court is Plaintiff's motion for preliminary approval of a class action settlement and preliminary certification of a settlement class. ECF No. 73. The Court will deny the motion without prejudice.

I. BACKGROUND

A. The Parties and Claims
In this wage-and-hour putative class action, Plaintiff James Haralson alleges violations of the California Labor Code against Defendant U.S. Aviation Services Corp. ("USAS"). Third Amended Complaint ("TAC"), ECF No. 31. The factual basis for Plaintiff's claims is set forth more fully in the Court's December 12, 2016 order granting in part a motion to dismiss in a subsequently consolidated case, Haralson v. United Airlines, 224 F.Supp.3d 928 (N.D. Cal. 2016). In brief, Plaintiff alleges that USAS failed to provide him and similarly situated employees with meal periods and rest periods, or pay premium wages for those unprovided breaks. TAC ¶ 1. Further, Plaintiff contends that USAS had impermissible policies or practices of automatically deducting time for meal
period breaks, id. ¶ 77-78, and requiring employees to work after clocking out or reducing their recorded hours, id. ¶ 82. Plaintiff also alleges that USAS provided inaccurate wage statements as a result of failing to account for these hours worked and wages earned. Id. ¶¶ 89-99.


B. Procedural Background
On August 9, 2016, Plaintiff filed this action against USAS and United Airlines, Inc. in California state court. ECF No. 1 ¶ 1. Both Defendants removed to federal court. ECF No. 1; Haralson v. United Airlines, Inc., No. 16-cv-05226-JST (N.D. Cal.), ECF No. 1. On December 12, 2016, the Court granted in part and denied in part United Airlines' motion to dismiss, in which USAS had joined. United Airlines, 224 F.Supp.3d 928 (N.D. Cal.).

After Plaintiff filed the operative TAC, USAS, No. 16-cv-05207-JST (N.D. Cal.), ECF No. 31, the Court consolidated the two cases, ECF No. 35. Plaintiff later agreed to dismiss United Airlines from the case without prejudice. ECF No. 51.

The parties mediated this matter before professional mediator Mark Rudy on February 7, 2018 in San Francisco, California, but did not settle at that time. ECF No. 74 ¶ 7

On May 4, 2018, Plaintiff filed a motion for class certification, which USAS opposed. ECF Nos. 62, 64, 67. On October 24, 2018, before the Court took the motion under submission, Plaintiff filed a notice of *964 a settlement in principle and withdrew the motion. ECF No. 68.

On January 8, 2019, Plaintiff filed this unopposed motion for preliminary settlement approval and preliminary settlement class certification. ECF No. 73.

C. Terms of the Settlement Agreement

The proposed settlement agreement (“Settlement”) resolves claims between USAS and the settlement class, defined as follows: “All current and former non-exempt airplane cabin cleaners who performed services for USAS in California during the Class Period.” ECF No. 74-1 at 10. 1

Under the Settlement, USAS agrees to pay $ 880,000 (the “Settlement Amount”) to the settlement administrator, which will ultimately be distributed to the Class. Id. at 17-18. The following amounts will be deducted from the Settlement Amount: (1) attorneys' fees and expenses; (2) a service award to Plaintiff; (3) settlement administration costs; and (4) taxes. Id. at 17. The Settlement permits Plaintiff's counsel to seek one-third of the Settlement Amount, or $ 293,333.33 in attorneys' fees, 2 $ 15,000 in litigation costs, and a $ 7,500 service award. Id. Further, the Settlement limits administrative costs to $ 20,000, and estimates $ 25,000 in employer taxes. Id. at 17-18.

The Settlement also allocates $ 25,000 to PAGA penalties, of which $ 18,750 will paid to the California Labor Workforce Development Agency, ECF No. 74-1 at 17, as required by statute, Cal. Lab. Code § 2699(i).

The remaining Settlement Amount will be allocated to each class member according to the number of weeks he or she worked during the Class Period. ECF No. 73 at 17; ECF No. 74-1 at 18. Assuming none of the approximately 630 class members opts out of the Settlement, each class member will receive a gross amount of approximately $ 1,400 prior to deducting the above fees and costs. ECF No. 73 at 17.

In exchange, the class members will release all Covered Claims:

[A]ny and all federal (including under the Fair Labor Standards Act (“FLSA”) if the Class Member submits a Claim Form), state, local and common law claims for unpaid wages and overtime compensation (including but not limited to any claims based on working “off-the-clock”), unpaid minimum wages (including but not limited to any claims based on arriving
at or departing from work or passing through airport security), unpaid rest breaks, unpaid meal periods, waiting time penalties, statutory penalties (including but not limited to penalties based on alleged wage statement and/or payroll record violations), any and all civil penalties under PAGA based on any claims related to the Class Action, and any alleged violation of any wage and hour, wage payment, wage deduction, meal and rest break, recordkeeping, unfair business practice or any other wage-related statutes, laws or regulations that are or could be asserted by any Class Member arising out of the acts alleged in the TAC or arising out of the facts, matters, transactions or occurrences set forth in the TAC.

ECF No. 74-1 at 11-12. The release “specifically exclude[s] ... claims that cannot be waived as a matter of law, including claims for workers’ compensation and unemployment insurance benefits.” Id. at 12.

The release applies to all Covered Claims against USAS and United Airlines, and their associated entities. Id. at 20. In order for a class member’s release of FLSA claims to be effective, the class member must both submit a claim form and cash a settlement check. Id. at 11, 20-21, 45.

In order to inform class members of the Settlement, Plaintiff proposes the following notice plan. Within 14 days of preliminary approval, USAS will provide the Settlement Administrator with a confidential class list of names and contact information, as well as the dates of employment and qualifying workweeks for each class member. Id. at 21-22. The Settlement Administrator will mail notice of the Settlement and a Claim Form to class members within another 14 days. Id. at 22. The Settlement Administrator will also perform address verification and skip tracing in a further attempt to locate other class members. Id. at 22-23.

Class members will have 60 days from the mailing deadline to opt out of the Settlement or object to its terms, and for class members participating in the Settlement, to submit a Claim Form (the “Notice Period”). Id. at 23. Thirty days after the original mailing, the Settlement Administrator will mail a Reminder Notice to all class members who have not yet responded. Id. at 24. If any class members submit a deficient Claim Form, the Settlement Administrator will notify them of the deficiency and provide an opportunity to correct it. Id.

In the event that more than ten percent of class members opt out of the Settlement, their claim shares will be subtracted from the total Settlement Amount. Id. at 28. If more than 60 class members opt out, USAS will have the unilateral right to terminate the Settlement. Id.

II. JURISDICTION

This Court has jurisdiction of this action under the Class Action Fairness Act (“CAFA”) because the amount in controversy exceeds $5,000,000, there is minimal diversity, and the number of class members exceeds 100. 28 U.S.C. § 1332(d)(2).

III. LEGAL STANDARD

A. Class Certification

Class certification under Federal Rule of Civil Procedure 23 is a two-step process. First, a plaintiff must demonstrate that the four requirements of Rule 23(a) are met: numerosity, commonality, typicality, and adequacy. “Class certification is proper only if the trial court has concluded, after a ‘rigorous analysis,’ that Rule 23(a) has been satisfied.” Wang v. Chinese Daily News, Inc., 737 F.3d 538, 542-43 (9th Cir. 2013) (quoting Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 351, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011)).

Second, a plaintiff must establish that the action meets one of the bases for certification in Rule 23(b). Plaintiff relies on Rule 23(b)(3) and must therefore establish that “questions of law or fact common to class members predominate over any questions affecting only individual members, and that a
class action is superior to other available methods for fairly and efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3).

When determining whether to certify a class for settlement purposes, a court must pay “heightened” attention to the requirements of Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 620, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997). “Such attention is of vital importance, for a court asked to certify a settlement class will lack the opportunity, present when a case is litigated, to adjust the class, informed by the proceedings as they unfold.” Id.

B. Preliminary Settlement Approval
The Ninth Circuit maintains a “strong judicial policy” that favors the settlement of class actions. Class Plaintiffs v. City of Seattle, 955 F.2d 1268, 1276 (9th Cir. 1992). Rule 23 requires courts to employ a two-step process in evaluating a class action settlement. First, the parties must show “that the court will likely be able to ... (i) approve the proposal under Rule 23(e)(2).” Fed. R. Civ. P. 23(e)(1)(B). In other words, a court must make a preliminary determination that the settlement “is fair, reasonable, and adequate” when considering the factors set out in Rule 23(e)(2). Fed. R. Civ. P. 23(e)(2). The court's task at the preliminary approval stage is to determine whether the settlement falls “within the range of possible approval.” In re Tableware Antitrust Litig., 484 F. Supp. 2d 1078, 1080 (N.D. Cal. 2007) (citation omitted); see also Manual for Complex Litigation, Fourth (“MCL, 4th”) § 21.632 (FJC 2004) (explaining that courts “must make a preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms and must direct the preparation of notice of the certification, proposed settlement, and date of the final fairness hearing”). “The initial decision to approve or reject a settlement proposal is committed to the sound discretion of the trial judge.” City of Seattle, 955 F.2d at 1276 (citation omitted). Courts “must be particularly vigilant not only for explicit collusion, but also for more subtle signs that class counsel have allowed pursuit of their own self-interests and that of certain class members to infect the negotiations.” In re Bluetooth Headset Prods. Liab. Litig., 654 F.3d 935, 947 (9th Cir. 2011).

If no class has yet been certified, a court must likewise make a preliminary finding that it “will likely be able to ... (ii) certify the class for purposes of judgment on the proposal.” Fed. R. Civ. P. 23(e)(1)(B). If the court makes these preliminary findings, it “must direct notice in a reasonable manner to all class members who would be bound by the proposal.” Id.

Second, courts must hold a hearing pursuant to Rule 23(e) (2) to make a final determination of whether the settlement is “fair, reasonable, and adequate.”

Within this framework, preliminary approval of a settlement is appropriate if “the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls within the range of possible approval.” *967 In re Tableware, 484 F. Supp. 2d at 1079 (citation omitted). The proposed settlement need not be ideal, but it must be fair and free of collusion, consistent with counsel's fiduciary obligations to the class. Hanlon v. Chrysler Corp., 150 F.3d 1011, 1027 (9th Cir. 1998) (“Settlement is the offspring of compromise; the question we address is not whether the final product could be prettier, smarter or snazzier, but whether it is fair, adequate and free from collusion.”). To assess a settlement proposal, courts must balance a number of factors:

[T]he strength of the plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement.
IV. DISCUSSION

While some of the above factors lend support for finding that the Settlement falls within the range of possible approval, there are a number of obvious deficiencies that prevent the Court from granting preliminary approval at this time.

1. Release of FLSA Claims

The Court observes several problems with the Settlement's release of FLSA claims. See ECF No. 74-1 at 11-12, 20-21.

First, at no point has Plaintiff pleaded or otherwise attempted to pursue an FLSA claim in this action. Cf. ECF No. 1-1; ECF No. 28; TAC. As a general rule, the Court disfavors settlement release provisions that go "beyond the scope of the present litigation." Terry v. Hoovestol, Inc., No. 16-CV-05183-JST, 2018 WL 4283420, at *5 (N.D. Cal. Sept. 7, 2018) (quoting Otey v. CrowdFlower, Inc., No. 12-CV-05524-JST, 2014 WL 1477630, at *7 (N.D. Cal. Apr. 15, 2014)). Similarly, “[c]ourts in this district routinely reject proposed class action settlement agreements that try to release all claims in a wage-and-hour case relating to compensation as overbroad and improper.” Id. (quoting Kempen v. Matheson Tri-Gas, Inc., No. 15-CV-00660-HSG, 2016 WL 4073336, at *9 (N.D. Cal. Aug. 1, 2016) (citing cases)). The Court likewise finds that the release of FLSA claims that have never been a part of this litigation is overbroad and improper, precluding preliminary approval.

See Stokes v. Interline Brands, Inc., No. 12-CV-05527-JD, 2014 WL 5826335, at *4 (N.D. Cal. Nov. 10, 2014) (“The complaint says nothing at all about FLSA claims and yet the release purports to give away class members’ rights under the statute. That is wholly unacceptable.”).

The Court also notes that a number of district courts within this circuit have rejected attempts by plaintiffs moving for approval of a Rule 23 settlement to amend their complaints to add previously un-litigated FLSA claims. See, e.g., Maciel v. Bar 20 Dairy, LLC, No. 117CV00902DADSKO, 2018 WL 5291969, at *6 (E.D. Cal. Oct. 23, 2018); Gonzalez v. CoreCivic Tenn., LLC, No. 1:16-cv-01891-DAD-JLT, 2018 WL 4388425, at *4-5 (E.D. Cal. Sept. 13, 2018) (“In the court’s view, this approach raises red flags in large part because it appears plaintiff agreed to settle the FLSA claim before he even considering litigating it.”); Thompson v. Costco Wholesale Corp., No. 14-CV-2778-CAB-WVG, 2017 WL 697895, at *7-8 (S.D. Cal. Feb. 22, 2017). Should Plaintiff seek to amend his complaint to add an FLSA claim for settlement purposes, Plaintiff should be prepared to explain why those cases are wrongly decided or distinguishable.

Second, even assuming that the FLSA claims were properly included in the Settlement, Plaintiff's motion and supporting declaration do not inform the Court what potential FLSA claims might be subject to the release, let alone discuss the value of such claims. Cf. ECF No. 73 at 17 (describing risk-adjusted calculations for rest break and meal break violations only, and a separate maximum exposure calculation for the PAGA claim). The only reasonable inference the Court can draw is that the Settlement assigns those claims no value. A proposed settlement calling “for a release of the FLSA claim in exchange for no consideration does not appear to be a fair and reasonable resolution of a bona fide dispute over FLSA provisions.” Maciel, 2018 WL 5291969, at *6 (internal quotation marks omitted) (citing 29 U.S.C. § 216(b); see also Thompson, 2017 WL 697895, at *8 (“[T]he fact that the settlement calls for a release of an FLSA claim in exchange for no consideration does not appear to be a fair and reasonable resolution of a bona fide dispute over FLSA provisions.”). Rather, “courts that have approved settlements releasing both FLSA and Rule 23 claims generally do so only when the parties expressly allocate settlement payments to FLSA claims.” Thompson, 2017 WL 697895, at *8 (collecting cases); see also Millan v. Cascade Water Services, Inc., 310 F.R.D. 593, 602 (E.D. Cal. 2015) (noting that “creation of separate settlement funds for the FLSA class and the Rule 23 class ... would better protect absent class members”). Courts in this district have generally concluded that between 70 percent and 100 percent of a plaintiff’s FLSA damages constitutes a reasonable settlement. Slavkov v. Fast Water Heater Partners I, LP, Case No. 1477630, at *7 (N.D. Cal. Apr. 15, 2014)). Similarly, “[c]ourts in this district routinely reject proposed class action settlement agreements that try to release all claims in a wage-and-hour case relating to compensation as overbroad and improper.” Id.

Third, even assuming that the Settlement provided adequate value for released FLSA claims, Plaintiff has not addressed the Court's authority to approve a settlement that releases FLSA claims en masse without first certifying a collective action. Rule 23 class actions are “fundamentally different from collective actions under the FLSA.” Thompson, 2017 WL 697895 at *3 (quoting Genesis Healthcare Corp. v. Symczyk, 569 U.S. 66, 133 S. Ct. 1523, 1529, 185 L.Ed.2d 636 (2013)). Some courts have therefore rejected settlements that attempted to skip collective action certification. See id. at *7 (finding problematic the lack of collective certification where the Settlement “clearly contemplates the existence of a collective action insofar as the agreement and notice to the *969 class specify that by cashing their settlement checks, class members will have opted in to the FLSA claim”); Sharobiem v. CVS Pharmacy, Inc., No. CV139426GHKFFMX, 2015 WL 10791914, at *2 (C.D. Cal. Sept. 2, 2015) (requiring plaintiffs in hybrid Rule 23/FLSA settlement to “move for preliminary certification of both a class and collective action properly supported by the relevant declarations and an analysis of the factors we must consider in certifying both”).

Finally, even were the Court to preliminarily certify a collective action, Plaintiff would have to address how the Settlement's procedures comply with the FLSA's requirement that “[n]o employee shall be a party plaintiff to any [collective] action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.” § 216(b). Under Plaintiff's proposal, class members would agree to release any FLSA claims by signing and cashing a settlement check. ECF No. 74-1 at 46 (“[T]he Release shall not include the release of claims under the FLSA unless you actually cash your Individual Settlement Payment.”). Many courts, having consulted § 216(b)'s requirements, have rejected this opt-in by settlement check proposal. See, e.g., Smothers v. NorthStar Alarm Services, LLC, No. 2:17-cv-00548-KJM-KJN, 2019 WL 280294, at *11 (E.D. Cal. Jan. 22, 2019); Kempen, 2016 WL 4073336, at *9 (“The parties provide no support for their assertion that having class members sign, then cash, checks with purported opt-in language printed on the back ... complies with the plain-language requirements of § 216(b).”); Johnson v. Quantum Learning Network, Inc., No. 15-CV-05013-LHK, 2016 WL 8729941, at *1 (N.D. Cal. Aug. 12, 2016) (finding settlement provision allowing FLSA members to opt-in by cashing or depositing settlement checks “does not comply with the plain language of the FLSA” and constitutes an obvious deficiency that precludes preliminary approval of Rule 23 and FLSA settlement). At least one court has also “question[ed] the legality” of requiring individuals to opt in to an FLSA collective action in order to obtain their share of recovery on non-FLSA claims. Sharobiem, 2015 WL 10791914, at *3.

In short, the parties face a formidable series of obstacles to justifying the release of FLSA claims in the Settlement. Because Plaintiff's motion does not discuss these additional issues, the Court expresses no conclusive opinion on them. But the Court expects that any renewed motion, if it includes such a release, will thoroughly address the concerns raised by these other courts.

2. Release of Claims Against United Airlines

The Court notes an additional concern with the scope of the Settlement's release provision. Although United Airlines was originally a Defendant in this action, Plaintiff voluntarily dismissed United without prejudice. ECF No. 51. United is not a party either to this action or to the Settlement. The Settlement's release provision, however, applies equally to claims against United Airlines. ECF No. 74-1 at 20.

The Court requires further explanation as to the propriety of requiring class members to release claims against a non-party such as United Airlines.

3. Range of Recovery

This Court “has more than once denied motions for approval where the plaintiffs ‘provide[d] no information about the maximum amount that the putative class members could have recovered if they ultimately prevailed on the merits of their claims.’” K.H. v. Sec'y of Dep't of Homeland Sec., No. 15-CV-02740-JST, 2018 WL 3585142, at *5 (N.D. Cal. July
Here, Plaintiff provides minimal information as to the value of the class's claims. According to Plaintiff, a reasonably estimated exposure for rest break violations is $720,000. ECF No. 73 at 17. Plaintiff estimates that he faced a 33 percent likelihood of class certification and a 50 percent chance of proving liability, making the risk-adjusted value of the rest break claim $118,000. Id. According to Plaintiff, the risk-adjusted exposure for his meal break claim is $144,000. Id. The Court deduces that Plaintiff similarly considers the maximum value of the meal break claim to be $720,000, based on the risk adjustments set forth in Plaintiff's motion. Further, Plaintiff asserts, the total value of all claims is $5,500,000, which should be reduced to $800,000-1,000,000 due to those same risk factors. Id. Finally, Plaintiff states that “[t]he maximum PAGA exposure is separately calculated as potentially reaching $2,500,000.” Id. Plaintiff provides no information as to the basis for these numbers. See also ECF No. 74 ¶ 18 (repeating same numbers with no additional information).

Plaintiff's submission does not provide the Court with sufficient information to evaluate the reasonableness of the class's recovery. For the rest break and meal break claims, Plaintiff simply states that the maximum value of each is $720,000, with no explanation as to how he reached that number. ECF No. 73 at 17. As a result, the Court cannot assess whether these estimates have any basis in fact. Balancing the class's potential recovery against the amount offered in settlement is “perhaps the most important factor to consider" in preliminary approval, Cotter v. Lyft, Inc., 176 F. Supp. 3d 930, 935 (N.D. Cal. 2016), not a hollow exercise in which the Court blindly accepts the parties' unsupported assertions. As another court aptly put it: “Plaintiffs seeking preliminary approval should show their work by explaining the relative value of their claims in significant detail. For example, in a wage-and-hour case like this one, plaintiffs should show or estimate how many employees were allegedly shortchanged, calculate and explain to the Court the amount by which typical employees were allegedly shortchanged on an hourly or daily basis, and show or estimate the number of hours or days the employees were allegedly shortchanged.” Eddings v. DS Servs. of Am., Inc., No. 15-CV-02576-VC, 2016 WL 3390477, at *1 (N.D. Cal. May 20, 2016). The implicit assumption that Plaintiff's remaining claims are worth $4,060,000 likewise lacks any supporting detail.

Similarly, Plaintiff has failed to supply “enough information to evaluate the strengths and weaknesses of [his] case.” Eddings, 2016 WL 3390477, at *1. Instead, Plaintiff provides generic statements of various risks inherent to class action, namely, that the Court might deny class certification as to one or more claims or that Plaintiff might fail to prove a claim at trial. ECF No. 73 at 16. Courts, including this one, have required more. See K.H., 2018 WL 3585142, at *5 (denying preliminary approval of FLSA settlement where “[p]laintiffs have not even attempted to provide ‘hypothetical scenarios,’ that could produce various expected recoverable damages to measure against the proposed settlement amount” (quoting Stovall-Gusman v. W.W. Grainger, Inc., No. 13-CV-02540-JD, 2014 WL 5492729, at *2 (N.D. Cal. Oct. 30, 2014)); Hunt v. VEP Healthcare, Inc., No. 16-CV-04790-VC, 2017 WL 3608297, at *1 (N.D. Cal. Aug. 22, 2017) (“The motion for preliminary approval makes abstract gestures to the uncertainties of litigation, rather than offering a careful analysis of the claims and the strength or weakness of any potential defenses.”); Eddings, 2016 WL 3390477, at *1 (“The plaintiffs list legal issues that this case might present and positions that the defendants might take, but they don't analyze those issues or evaluate the strength or weakness of defendants' positions. A party moving for preliminary approval should cite case law and apply it to explain why each claim or defense in the case is more or less likely to prove meritorious.”).

In sum, any future motion should explain the basis for calculating the maximum value of Plaintiff's claims and articulate particularized reasons why the proposed discount is appropriate.

4. PAGA Penalties

The Court also requires additional information supporting the settlement of Plaintiff's representative PAGA claim.
“A PAGA representative action is ... a type of qui tam action” in which a private plaintiff pursues “a dispute between an employer and the state Labor and Workforce Development Agency” (“LWDA”) on behalf of the state. Iskanian v. CLS Transp. L.A., LLC, 59 Cal. 4th 348, 382, 384, 173 Cal.Rptr.3d 289, 327 P.3d 129 (2014). Accordingly, there are “fundamental differences between PAGA actions and class actions.” Sakka v. Luxottica Retail N. Am., Inc., 803 F.3d 425, 435 (9th Cir. 2015) (Baumann v. Chase Inv. Servs. Corp., 747 F.3d 1117, 1123 (9th Cir. 2014)). For one, class certification is not required to pursue a PAGA representative claim. See Arias v. Superior Court, 46 Cal. 4th 969, 975, 95 Cal.Rptr.3d 588, 209 P.3d 923 (2009).

“[B]ecause a settlement of PAGA claims compromises a claim that could otherwise be brought by the state,” however, the Act also requires that a court “review and approve any settlement of any civil action filed pursuant to [the Act].” Ramirez v. Benito Valley Farms, LLC, No. 16-CV-04708-LHK, 2017 WL 3670794, at *2 (N.D. Cal. Aug. 25, 2017) (second quoting Cal. Lab. Code § 2699(l)(2)). Moreover, “[a] party seeking approval of a PAGA settlement must simultaneously submit the proposed settlement to the [LWDA] to allow the LWDA to comment on the settlement if the LWDA so desires.” Id.; see also Cal. Lab. Code § 2699(l)(2) (The proposed settlement shall be submitted to the [LWDA] at the same time that it is submitted to the court.). But “neither the California legislature, nor the California Supreme Court, nor the California Courts of Appeal, nor the [LWDA] has provided any definitive answer as to what the appropriate standard is for approval of a PAGA settlement.” Jordan v. NCI Grp., Inc., No. EDCV161701JVSSPX, 2018 WL 1409590, at *2 (C.D. Cal. Jan. 5, 2018) (quoting Flores v. Starwood Hotels & Resorts Worldwide, Inc., 253 F. Supp. 3d 1074, 1075 (C.D. Cal. 2017)). In commenting on a proposed PAGA settlement, the LWDA has offered only this guidance:

It is thus important that when a PAGA claim is settled, the relief provided for under the PAGA be genuine and meaningful, consistent with the underlying purpose of the statute to benefit the public and, in the context of a class action, the court evaluate whether the settlement meets the standards of being ‘fundamentally fair, reasonable, and adequate’ with reference to the public policies underlying the PAGA.

O’Connor v. Uber Techs., Inc., 201 F. Supp. 3d 1110, 1133 (N.D. Cal. 2016) (quoting *972 LWDA Response). In line with these general principles, a number of district courts have applied a Rule 23-like standard, asking whether the settlement of the PAGA claims is “fundamentally fair, adequate, and reasonable in light of PAGA’s policies and purposes.” Jordan, 2018 WL 1409590, at *2 (collecting cases); see also Ramirez, 2017 WL 3670794, at *3; O’Connor, 201 F. Supp. 3d at 1134.

Where PAGA claims are settled in the same agreement with the underlying Labor Code claims, courts have also looked to the interplay of the two recoveries to determine whether PAGA’s purposes have been served. The O’Connor court, for instance, adopted a “sliding scale,” noting that “[b]y providing fair compensation to the class members as employees and substantial monetary relief, a settlement not only vindicates the rights of the class members as employees, but may have a deterrent effect upon the defendant employer and other employers, an objective of PAGA.” 201 F. Supp. 3d at 1134. Similarly, “if the settlement resolves the important question of the status of workers as employees entitled to the protection of the Labor Code or contained substantial injunctive relief, this would support PAGA’s interest in augmenting the state’s enforcement capabilities, encouraging compliance with Labor Code provisions, and deterring noncompliance.” Id. at 1134-35 (internal quotation marks and citation omitted). In other words, where the settlement of Labor Code claims under Rule 23 provides “robust” relief to the class, it supports a greater reduction in PAGA penalties. Viceral v. Mistras Grp., Inc., No. 15-cv-02198-EMC, 2016 WL 5907869, at *9 (N.D. Cal. Oct. 11, 2016).
At the same time, the O'Connor court identified countervailing considerations suggesting that courts should scrutinize even more closely the settlement of PAGA claims. Critically, “[w]here plaintiffs bring a PAGA representative claim, they take on a special responsibility to their fellow aggrieved workers who are effectively bound by any judgment” despite the absence of the protections afforded by “class action procedures, such as notice and opt-out rights.”

O'Connor, 201 F. Supp. 3d at 1134 (citing Iskanian, 59 Cal. 4th at 381, 173 Cal.Rptr.3d 289, 327 P.3d 129). A court must therefore be mindful of the “temptation to include a PAGA claim in a lawsuit to be used merely as a bargaining chip, wherein the rights of individuals who may not even be members of the class and the public may be waived for little additional consideration in order to induce the employer to agree to a settlement with the class.” Id.

Here, the Settlement allocates $25,000 to the PAGA claims. ECF No. 74-1 at 17. This represents one percent of the asserted maximum of $2,500,000 value of those claims. See ECF No. 73 at 17. As explained above, Plaintiff has provided no supporting detail for this calculation. Because Plaintiff has not demonstrated to any reasonable degree of certainty the denominator involved, the Court cannot yet draw definitive conclusions on whether the fractional recovery of the PAGA settlement is reasonable. The Court nonetheless offers some preliminary observations.

“In this district, courts have raised concerns about settlements of less than 1% of the total value of a PAGA claim.” *973 Jennings v. Open Door Mkts., LLC, No. 15-CV-04080-KAW, 2018 WL 4773057, at *9 (N.D. Cal. Oct. 3, 2018) (citing Viceral, 2016 WL 5907869, at *9); see also Cotter, 176 F. Supp. 3d at 940 (finding problematic, among other things, the “seemingly arbitrary reduction of [a] PAGA penalty to a miniscule portion of the settlement amount – $122,250, which is less than one percent of the total”); cf. McLeod v. Bank of Am., N.A., No. 16-CV-03294-EMC, 2018 WL 5982863, at *4 (N.D. Cal. Nov. 14, 2018) (finding $50,000 PAGA allocation for claims estimated at $4.7 million – approximately 1.1 percent – adequate). At least one court, however, has approved an approximately 0.2 percent PAGA recovery. See Ruch v. AM Retail Grp., Inc., No. 14-CV-05352-MEV, 2016 WL 5462451, at *2, 7 (N.D. Cal. Sept. 28, 2016) (settlement allocating $10,000 to PAGA penalties where potential value was over $5.2 million). Some other courts have looked instead to the proportion of the PAGA settlement to the overall settlement recovery. See Van Kempen v. Matheson Tri-Gas, Inc., No. 15-CV-00660-HSG, 2017 WL 3670787, at *10 (N.D. Cal. Aug. 25, 2017) (granting final approval of $5,000 PAGA penalty from $370,000 settlement, or 1.4 percent); Slavkov, 2017 WL 3834873, at *2 (finding that “$7,500 PAGA payment is reasonable when measured against the total overall settlement [of $345,000] and the possible weaknesses in Plaintiffs’ case,” or 2.2 percent). 8

In approving PAGA settlements accounting for less than one percent of the claims’ value, courts have identified a number of factors that might support a lesser recovery. First, courts have taken into account LWDA’s views, or lack thereof, on the settlement. See Jennings, 2018 WL 4773057, at *9 (approving 0.6 percent settlement where “[p]laintiffs [have] submitted the settlement agreement to the LWDA, and the LWDA has not objected to the settlement”); Jordan, 2018 WL 1409590, at *3 (“Additionally, the Court finds it persuasive that the LWDA was permitted to file a response to the proposed settlement and no comment or objection has been received.”);

O’Connor, 201 F. Supp. 3d at 1135 (“Plaintiffs propose settling PAGA for only 0.1% of the potential verdict value, a reduction that the LWDA has found has no rational basis.”). Here, Plaintiff’s counsel declares that Plaintiff provided notice through LWDA’s online submission portal on January 8, 2019. ECF No. 74 ¶ 42. The Court has received no response from LWDA.

Second, courts have considered whether they would be likely to exercise their discretion under California Labor Code § 2699(e)(2) to reduce the amount of PAGA penalties, 9 were those claims to be litigated through judgment. Cotter v. Lyft, Inc., 193 F. Supp. 3d 1030, 1037 (N.D. Cal. 2016) (concluding that “[a] significant reduction would be appropriate” because it was “not a case where a company has deliberately evaded a clear legal obligation to provide legally required pay and benefits to its employees” or “negligently failed *974 to learn about its obligations under the wage and hour laws”);

cf. Berstein v. Virgin America, Inc., 365 F.Supp.3d 980, 992-93 (N.D. Cal. 2019) (reducing PAGA penalties by 25 percent where “no court had previously resolved the issues” of liability, noting that “when the law is unclear, awarding the maximum [PAGA] penalties may be excessively punitive and
their deterrence function weakened”). In this case, the parties have identified no novel issues as to the scope of USAS's obligations under the California Labor Code. Rather, Plaintiff primarily alleges that USAS simply failed to provide legally required pay and benefits to its employees. Nor has Plaintiff otherwise argued that a reduction in PAGA penalties would be appropriate.

Third, courts have considered whether the settlement provides additional non-monetary relief. Cf. O’Connor, 201 F. Supp. 3d at 1135 (finding that this factor did not favor approval because “the non-monetary relief is of limited benefit to the class”). The Settlement here does not provide non-monetary relief, let alone significant relief that would offset a lower monetary recovery on the PAGA claims.

Finally, some courts have concluded that a lower PAGA settlement is permissible where the Rule 23 settlement is “relatively substantial” based on the circumstances of the case. Viceral, 2016 WL 5907869, at *9 (approving 0.15% percent recovery). Plaintiff relies exclusively on this factor, asserting that “the settlement of the underlying wage and hour claims is robust and that serves the deterrent purpose of the PAGA statute.” ECF No. 73 at 19 (citing O’Connor, 201 F. Supp. 3d at 1135). Because Plaintiff has not provided sufficient detail regarding the range of recovery on the Rule 23 claims, the Court cannot conclude that the size of the class's recovery justifies a lower PAGA allocation.

In sum, the Settlement's allocated PAGA recovery of one percent is on the border of percentages that raise heightened concerns. The Court defers resolution of its adequacy pending further information from the parties regarding the maximum value and reasons for discounted recovery of both the Rule 23 and PAGA claims.

5. Other Deficiencies

In addition to the above problems, there are a number of other omissions or deficiencies that should be addressed in any future motion for preliminary approval.

First, the parties should comply with this district's Procedural Guidance for Class Action Settlements, which instructs that “[t]he motion for preliminary approval should state,” among other things, “any differences between the settlement class and the class proposed in the operative complaint and an explanation as to why the differences are appropriate in the instant case.” Northern District of California, Procedural Guidance for Class Action Settlements § I(a) (“Northern District Guidance”), https://www.cand.uscourts.gov/ClassActionSettlementGuidance. Here, Plaintiff originally sought certification of numerous subclasses for individual claims, TAC ¶ 10; ECF No. 62 at 11, but now seeks to certify a single class for settlement purposes, ECF No. 73 at 5. Plaintiff has also narrowed the class definition from “all persons employed ... in hourly paid or non-exempt positions,” TAC ¶ 10, to “all current and former non-exempt airplane cabin cleaners,” ECF No. 73 at 5 (emphasis added).

Second, the parties should provide “an estimate of the number and/or percentage of class members who are expected to submit a claim in light of the experience of the selected claims administrator and/or counsel from other recent settlements of similar cases, the identity of the examples used for the estimate, and the reason for the selection of those examples.” Northern District Guidance § 1(g).

Third, in addition to the proposed Settlement Administrator, “the parties should identify ... the settlement administrator selection process, how many settlement administrators submitted proposals, what methods of notice and claims payment were proposed, and the lead class counsel's firms' history of engagements with the settlement administrator over the last two years.” Id. § 2.10

Fourth, Plaintiff states that counsel “will provide the Court with information for the purposes of calculating attorney's fees under the lodestar method should the Court so desire for ruling on Plaintiff's fee application at the final fairness hearing.” ECF No. 73 at 20. The Northern District Guidance instructs class counsel to “include information about ... their lodestar calculation in the motion for preliminary approval.” Northern District Guidance § 6. This information “should include the total number of hours billed to date and the requested multiplier, if any.” Id. 11
Fifth, “[t]he parties should address whether [Class Action Fairness Act of 2005 (“CAFA”) ] notice is required and, if so, when it will be given.” Northern District Guidance § 10; see also 28 U.S.C. § 1715(b). The parties have not addressed CAFA notice.

6. Notice Plan

Finally, the Court notes several defects with the proposed notice plan.

First and foremost, the notice plan does not provide a free means for class members to access the Settlement and related documents. See Northern District Guidance § 3 (“[T]he notice should include ... the address for a website, maintained by the claims administrator or class counsel, that has links to the notice, motions for approval and for attorneys' fees and any other important documents in the case.”). As it stands, class members will only be able to find this information by viewing the case file in person at the courthouse in San Francisco, California, or accessing the docket through PACER, which at the moment charges fees for access. ECF No. 74-1 at 42-43, 48. Class members should not have to travel to the Court or pay a fee to review the information necessary to make an informed choice as to whether to opt out of the class, absent some compelling explanation from Plaintiff why that is necessary in this case.

Second, for a class member to request exclusion from the Settlement, the only information the class member must provide in a letter to the Settlement Administrator is (1) the class member's name, (2) a statement that the class member wishes to be excluded from the settlement class in Haralson v. U.S. Aviation Servs. Corp., Case No. 3:16-cv-05207-JST, and (3) the class member's signature. Information regarding class members' telephone numbers, addresses, and Social Security numbers, is not required, contrary to what is currently indicated in the Proposed Notice. See ECF No. 74-1 at 47.

Finally, the Proposed Notice “should make clear that the court can only approve or deny the settlement and cannot change the terms of the settlement.” Northern District Guidance § 5. The Court invites the parties to consider this district's suggested language. See id.

V. CONCLUSION

For the foregoing reasons, the Court DENIES WITHOUT PREJUDICE the motion for preliminary settlement approval. The Court defers ruling on preliminary class certification until the parties present a settlement that merits preliminary approval.

The Court sets a further case management conference on July 17, 2019 at 2:00 p.m. An updated joint case management statement is due July 10, 2019. The Court will vacate the July 17, 2019, hearing if a renewed motion for preliminary approval has been filed on or before July 9, 2019.

IT IS SO ORDERED.

All Citations

383 F.Supp.3d 959, 103 Fed.R.Serv.3d 1217

Footnotes

1 Under the Settlement, the Class Period runs “from August 9, 2012 through the date of Preliminary Approval.” ECF No. 74-1 at 11.

2 The Court notes that the Settlement states that it limits attorneys' fees to “up to twenty-five percent (33 1/3% or $ 293,333.33),” ECF No. 74-1 at 17. It also states that counsel will seek “an award of attorneys' fees not to exceed $ 293,333.33 of the Gross Settlement Amount, which represents twenty-five percent.” Id. at 30. The Court presumes the more frequently used $ 293,333.33 number reflects the parties' intent, regardless of the percentage that figure actually represents. However, the parties may wish to clarify any ambiguity in revising the Settlement.
The Court notes that the TAC states Plaintiff's view that the amount-in-controversy is less than $5 million. TAC ¶ 2. But because Plaintiff never actually challenged USAS's assertion that the amount-in-controversy was met, USAS was required to "include only a plausible allegation that the amount in controversy exceeds the jurisdictional threshold." *Dart Cherokee Basin Operating Co., LLC v. Owens*, 574 U.S. 81, 135 S. Ct. 547, 554, 190 L.Ed.2d 495 (2014). Based on the current record, the Court concludes that this allegation is plausible, particularly given that Plaintiff's motion for preliminary approval calculates USAS's "unreduced estimated exposure [as] approximately $5,500,000." ECF No. 73 at 17.

These factors are substantially similar to those articulated in the 2018 amendments to *Rule 23(e)*, which were not intended "to displace any factor [developed under existing Circuit precedent], but rather to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal." *Helfer v. Wells Fargo & Co.*, No. 16-CV-05479-JST, 2018 WL 6619983, at *4 (N.D. Cal. Dec. 18, 2018) (quoting *Fed. R. Civ. P. 23(e)(2)* advisory committee's note to 2018 amendment).

Based on Plaintiff's motion, the Court does not foresee obstacles to preliminarily certifying the class for settlement purposes only. But the Court will defer ruling on preliminary class certification until the parties have corrected the deficiencies in the Settlement.

Under the FLSA, "[d]ouble damages are the norm; single damages are the exception." *Haro v. City of Los Angeles*, 745 F.3d 1249, 1259 (9th Cir. 2014).

The California Supreme Court has noted in passing only that "PAGA settlements are subject to trial court review and approval, ensuring that any negotiated resolution is fair to those affected." *Williams v. Superior Court*, 3 Cal. 5th 531, 549, 220 Cal.Rptr.3d 472, 398 P.3d 69 (2017) (citing *Cal. Lab. Code § 2699(l)(2)*).

Other cases that did not separately discuss the reasonable of the PAGA portion of the settlement involved similar ratios of PAGA recovery to overall settlement amount. *See Clemens v. Hair Club for Men, LLC*, No. C 15-01431 WHA, 2016 WL 3442774, at *1 (N.D. Cal. June 23, 2016) (granting preliminary approval to $500,000 settlement that allocated $5,000, or 1 percent, to PAGA claims); *Saechao v. Landrys, Inc.*, No. C 15-00815 WHA, 2016 WL 3227180, at *2 (N.D. Cal. June 11, 2016) (preliminarily approving $500,000 settlement that allocated $12,000, or 2.4 percent, to PAGA claims).

Section 2699(e)(2) provides that "a court may award a lesser amount than the maximum civil penalty amount specified by this part if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory." *Cal. Lab. Code § 2699(e)(2)*.

The Court also notes that while Plaintiff's motion requests approval of ILYM Group as the Settlement Administrator, ECF No. 73 at 5, the Settlement itself names CPT Group, Inc. as the Settlement Administrator, ECF No. 74-1 at 9, 15. The Court invites the parties to clarify this inconsistency in a future motion.

Neither Plaintiff's counsel's motion for fees nor the request for a service award to Haralson is currently before the Court. The Court observes, however, that both requests exceed their respective benchmark amounts. *See Rodman v. Safeway Inc.*, No. 11-CV-03003-JST, 2018 WL 4030558, at *3 (N.D. Cal. Aug. 23, 2018) ("For more than two decades, the Ninth Circuit has set the 'benchmark for an attorneys' fee award in a successful class action [at] twenty-five percent of the entire common fund." (quoting *Williams v. MGM-Pathe Commun's Co.*, 129 F.3d 1026, 1027 (9th Cir. 1997)); *Smith v. Am. Greetings Corp.*, No. 14-CV-02577-JST, 2016 WL 362395, at *10 (N.D. Cal. Jan. 29, 2016) (noting that $7,500 service awards "exceed typical incentive awards in the Ninth Circuit, where $5,000 is presumptively reasonable"). Accordingly, the Court
expects that Plaintiff's motion for attorneys' fees and a service award will provide appropriate detail and documentation supporting these requests.
Objector Crystal Echeverria and two other objectors appeal from a judgment approving the terms of a settlement agreement entered in this class action against defendant Foot Locker Retail, Inc. (Foot Locker). They contend the trial court erred in finding the terms of the settlement to be fair, reasonable and adequate without any evidence of the amount to which class members would be entitled if they prevailed in the litigation, and without any basis to evaluate the reasonableness of the agreed recovery. The settlement was reached in arms-length negotiations between competent counsel with the assistance of an experienced mediator and may well, in fact, be entirely reasonable in view of the strength of the claims and defenses and the cost and risks of further litigation. Nonetheless, we agree with objectors that the court bears the ultimate responsibility to ensure the reasonableness of the settlement terms. Although many factors must be considered in making this determination, and the court is not required to decide the ultimate merits of the class members' claims before approving a proposed settlement, an informed evaluation cannot be made without an understanding of the amount that is in controversy and the realistic range of outcomes of the litigation. It is possible that the data necessary to make such an evaluation in this case was given to the trial court during informal discussions with counsel, but no such information appears in the record. Therefore, we must vacate the order approving the settlement and remand the matter to permit the trial court to reconsider the fairness and adequacy of the settlement in light of such additional information as the parties may present concerning the value of the class members' claims should they prevail in the litigation and the likelihood of their so prevailing.

**BACKGROUND**

The initial class action complaint was filed in November 2005 by Jatinder Kullar on behalf of all persons employed at any of Foot Locker's California retail locations subsequent to November 23, 2001, who “were required to purchase and wear shoes of a distinctive design or color as a term and condition of their employment” (the uniform class). The

---

**Opinion**

POLLAK, J.

*120 Objector Crystal Echeverria and two other objectors appeal from a judgment approving the terms of a settlement agreement entered in this class action against defendant Foot Locker Retail, Inc. (Foot Locker). They contend the trial court erred in finding the terms of the settlement to be fair, reasonable and adequate without any evidence of the amount to which class members would be entitled if they prevailed in the litigation, and without any basis to evaluate the reasonableness of the agreed recovery. The settlement was reached in arms-length negotiations between competent counsel with the assistance of an experienced mediator and may well, in fact, be entirely reasonable in view of the strength of the claims and defenses and the cost and risks of further litigation. Nonetheless, we agree with objectors that the court bears the ultimate responsibility to ensure the reasonableness of the settlement terms. Although many factors must be considered in making this determination, and the court is not required to decide the ultimate merits of the class members' claims before approving a proposed settlement, an informed evaluation cannot be made without an understanding of the amount that is in controversy and the realistic range of outcomes of the litigation. It is possible that the data necessary to make such an evaluation in this case was given to the trial court during informal discussions with counsel, but no such information appears in the record. Therefore, we must vacate the order approving the settlement and remand the matter to permit the trial court to reconsider the fairness and adequacy of the settlement in light of such additional information as the parties may present concerning the value of the class members' claims should they prevail in the litigation and the likelihood of their so prevailing.

---

**Attorneys and Law Firms**

**23** Daniel Harvey Qualls, Robin G. Workman, Qualls & Workman, San Francisco, CA, for Plaintiff and Respondent.

Tracy Thompson, Kristina H. Shute, Cook, Roos, Wilbur & Thompson, San Francisco, CA, for Defendant and Appellant.

---

**BACKGROUND**

The initial class action complaint was filed in November 2005 by Jatinder Kullar on behalf of all persons employed at any of Foot Locker's California retail locations subsequent to November 23, 2001, who “were required to purchase and wear shoes of a distinctive design or color as a term and condition of their employment” (the uniform class). The
The amended complaint alleged that Foot Locker “requires all persons in its employment to purchase shoes of distinctive design or color (either from Foot Locker or other retailers) as a term and condition of their employment,” without reimbursement, in violation of various provisions of California law. Kullar alleged that “he was required to spend at least $200.00 on his mandatory work uniforms.” The complaint also alleged that “Foot Locker ... effectively withholds wages in exchange for Foot Locker's products to be worn as a work uniform,” in violation of other provisions of the Labor Code. The complaint sought the recovery of “all sums expended on the Foot Locker ‘uniform’ ” as a condition of employment, plus civil penalties and other relief.

In May 2006, Kullar filed a first amended complaint in which he enlarged the scope of his claims. In addition to the original claims, the amended complaint asserted claims on behalf of a “security check class” of employees, those “who were subject to security searches for which they were not compensated and who, as such, have been denied compensation for all hours worked, the legally-mandated minimum wage, and statutorily mandated meal and rest periods.” The amended complaint also alleged related violations of the Labor Code, including the failure to promptly pay wages due upon termination of employment and the failure to use and provide accurate time records and statements of the hours worked by each employee. The amended complaint sought the recovery of the security check class members’ “loss of earnings, in an amount to be established at trial,” “various penalties, in an amount to be established at trial,” and other relief.

Foot Locker’s answer denied all of the allegations and denied that any member of the putative class had been damaged “in any sum whatsoever,” and it asserted 23 affirmative defenses.

In January 2006, before the amended complaint had been filed, Kullar submitted to Foot Locker a set of special interrogatories and a request for the production of documents relating to the allegations in the original complaint. Foot Locker filed its responses, consisting in large part of objections, on April 21, 2006. None of the discovery requests were directed to the meal period claims or to any of the allegations that were included for the first time in the amended complaint, and Kullar submitted no discovery demands subsequent to filing the amended complaint. Foot Locker deposed Kullar, but plaintiffs apparently took no depositions of Foot Locker officers or employees.

On October 23, 2006, the parties participated in a successful mediation before an experienced mediator, Mark Rudy, Esq., and in the following weeks produced a “stipulation of settlement,” which they submitted to the court on January 12, 2007, seeking preliminary approval of the settlement agreement. The attorneys then met informally on several occasions with the equally experienced judge to whom the case had been assigned, Honorable Richard A. Kramer, and in response to comments and suggestions of the court made some changes in the settlement terms and in the proposed mechanics for giving notice to class members and obtaining final approval of the settlement.

As set forth in the amended final stipulation of settlement that was filed on June 5, 2007, which the court preliminarily approved on June 12, 2007, a settlement class was defined to include both the uniform class and the security check class but to exclude various managerial employees and employees who had worked less than 40 hours during the class period between November 23, 2001 and May 25, 2007. The document recited, among many other standard provisions, that class counsel had engaged in adequate discovery, investigation and research, and that class counsel had determined that the settlement was in the best interests of the class. The stipulation recited that according to Foot Locker’s records, there were approximately 16,900 persons in the settlement class, most of whom had been employed for relatively short periods of time, who in the aggregate had worked approximately 12,485,000 hours. Under the terms of the settlement, Foot Locker agreed to pay up to a maximum of $2,000,000, inclusive of all costs, attorney fees and settlement expenses, in settlement of all claims. From this amount, the court would be asked to approve attorney fees of $500,000 and an “incentive award” to Kullar of $5,000. After considering the costs of notice and administering the settlement, it was estimated that the net recovery available for class members would be $1,297,709. Class members submitting claim forms are to share this amount based on a
85 Cal.Rptr.3d 20, 14 Wage & Hour Cas.2d (BNA) 1719, 08 Cal. Daily Op. Serv. 13,969...

On August 22, the objector filed an application seeking leave to depose Foot Locker's most knowledgeable persons concerning Foot Locker's practices with respect to meal period breaks, record keeping for meal period breaks, and payment of compensation for missed meal period breaks. Objector also sought the production of Foot Locker records and discovery responses produced in this action, “all documents referring or relating to the final stipulation of settlement,” the briefs that the parties had submitted to the mediator, and certain documents identified in the settlement agreement, including an analysis of class-wide damage studies. Following a meet and confer session, the court ordered the parties to produce for the objector all materials that had been exchanged in discovery, as they had agreed to do, but denied all of the remaining discovery requests. The court concluded that the “mediation materials” were protected from discovery by the confidentiality provisions of the Evidence Code (see Evid.Code, § 1119), and that the information objector sought by taking depositions was irrelevant because it related either to liability, which “doesn't matter for the settlement,” or to the amount of damages. As to the latter, the court explained that if objector learned there were records reflecting meal period breaks, “you would want to see them, and you would want to see them to show the magnitude of the problem, and you would want to show that the settlement is not adequate because the practice as shown in their records is too big and they should be paying more money for having done this, and that's exactly what the 7–11 case says I should not be doing at a settlement final approval hearing.”

At the hearing on May 25, 2007, seeking preliminary approval of the settlement agreement, class counsel advised the court that under the terms of the settlement class members would recover 30 cents for every hour worked, as compared to less than one dollar for every hour worked if the litigation proceeded and the class prevailed on every issue. At the hearing on final approval, counsel for the objector pointed out that the record contains no evidence to support these numbers, and the trial court implicitly agreed. There was no dispute that no formal discovery had been conducted with respect to the value of the meal period claims, although class counsel argued that relevant

---

*27 Under the settlement formula, the stipulation recites, if class members representing 40 percent of the total hours worked submit claims, it is estimated that an employee who had worked for six months would receive approximately $202.50, an employee who had worked for one year would receive approximately $450, and an employee “with the greatest number of hours worked” would receive approximately $2,900. Assuming “an extraordinarily low participation rate,” these amounts would be $2,080, $4,160 and $30,024 respectively.

The stipulated agreement recites that for tax purposes, one third of the settlement payments to class members will be deemed wages (as to which required deductions will be taken and a form W–2 issued), one-third will be deemed penalties, and one-third will be deemed reimbursement for footwear purchases (as to which a form 1099 will be issued).

On March 22, 2007, objector Crystal Echeverria filed in the Alameda County Superior Court another class action against Foot Locker, alleging that Foot Locker failed to pay its California hourly employees compensation for work without meal breaks, and wages due to terminated employees, in violation of California law. At a hearing in the San Francisco court on May 25, 2007, seeking preliminary approval of the settlement we now review, Echeverria appeared and first voiced her objections to the proposed settlement. On August 6, following the court's preliminary approval of the settlement, Echeverria filed a written objection, contending, among other things, that the settlement is not fair, adequate and reasonable in that it does not provide compensation reasonably related to the actual loss sustained by class members, and that class counsel had not conducted sufficient discovery or investigation to determine the extent of the class loss.  

---

© 2021 Thomson Reuters. No claim to original U.S. Government Works.
information had been exchanged informally. The settling parties argued and the court concluded that the evidence that the settlement had been reached at arm's length by capable attorneys before an experienced mediator, that the attorneys represented that meaningful data had been exchanged during the mediation, and that few members of the large class had objected was sufficient to establish the fairness, adequacy and reasonableness of the settlement.

**29** In the words of the trial judge, “it's not a question so much of whether this [evidence] is sufficient to meet the burden here but rather is this evidence of something? I think it is. And then we get to whether or not as part of this we really have to try the case or something akin to it. I'll state for the record, yes, the moving parties have the burden of proof to show that the settlement is fair, adequate and reasonable.... [*] I agree with defense counsel that there is a presumption on a settlement. It's based on a social policy to resolve cases, that if all of the factors present exist there's a presumption that the settlement is fair, adequate and reasonable.... [*] The objector's point is that *127* the factor showing the court's evaluation and the lawyer's evaluation of the strength isn't present here. And we run right smack into Evidence Code section 1119. The fact is under that privilege I don't think I could compel the parties to disclose what was exchanged in a mediation, because there is a very strong policy articulated in California ... to encourage mediation and the ability to freely exchange information. So the question is can I essentially compel that by saying to the lawyers yes, I believe you, that information was exchanged, yes, I believe that it satisfied you, but I need to see it myself and do it independently. There's no case that says that, and I think what I have to do is keep my mind on the burden of proof here. Is there other evidence that this is in fact fair, adequate and reasonable, apart from taking, as I do, the lawyers at face value. [*] I think the votes of class members who certainly received actual notice is something I can consider. I can also just look at their numbers myself, and take a look at this, now that's a bit spurious, because the $658 is simply a factor of how many people ended up putting in a claim, *11* but I think I can consider that if the rest of the people don't want to put in a claim they don't want to put in a claim. So the result is those people who took the time to put in their claim are getting a decent amount of money, it's certainly fair, adequate and reasonable to them to get $638 on the average.... [*] I put all that together and my bottom line is I think the standards for applying the presumption are demonstrated here somewhat circumstantially, but nonetheless circumstantial evidence is good evidence and the missing piece, which in logic I agree with you, it would perhaps be easier to do this if I saw the actual numbers, but I don't think under Evidence Code section 1119 I can require it either directly by ordering the parties to do it, they could rightfully refuse, or indirectly by saying well, all right, then I won't approve your settlement if you don't waive your mediation privilege. I don't see how I can do that.”

The court overruled the objections to the settlement, found the terms to be fair, adequate and reasonable, and approved the settlement. The formal order granting final approval and the judgment were entered on October 11 and objectors filed a timely notice of appeal.

**DISCUSSION**

The settling parties rightly emphasize the limited scope of this court's review of the trial court's approval of a class action settlement. Our task is *128* not to make an independent determination whether the terms of the settlement are **30** fair, adequate and reasonable, but to determine “only whether the trial court acted within its discretion.” *(Wershba v. Apple Computer, Inc. (2001) 91 Cal.App.4th 224, 235, 110 Cal.Rptr.2d 145.)* As observed in *7–Eleven, supra, 85 Cal.App.4th at page 1145, 102 Cal.Rptr.2d 777, “[g]reat weight is accorded the trial court's views.” “[G]iven that ‘so many imponderables enter into the evaluation of a settlement’ [citation] an abuse of discretion standard of appellate review is singularly appropriate.” *(Id. at pp. 1166–1167, 102 Cal.Rptr.2d 777.)*

The well-recognized factors that the trial court should consider in evaluating the reasonableness of a class action settlement agreement include “the strength of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement.” *(Dunk v. Ford Motor Co. (1996) 48 Cal.App.4th 1794, 1801, 56 Cal.Rptr.2d 483 (Dunk );*
85 Cal.Rptr.3d 20, 14 Wage & Hour Cas.2d (BNA) 1719, 08 Cal. Daily Op. Serv. 13,969...

The trial court concluded that the four factors identified in Dunk as supporting a presumption of fairness are established here and are sufficient to support a finding that the settlement is fair, adequate and reasonable. Objectors do not dispute the presence of the first, third and fourth factors, but disagree that there was sufficient investigation and discovery to allow counsel or the court to act intelligently. Objectors focus their argument on the meal period claims. Under Labor Code section 226.7, subparagraph (b), an employer that fails to provide an employee a required meal period or rest period “shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each work day that the meal or rest period is not provided.” As objectors argued to the trial court and reassert before this court, absolutely no discovery was conducted with respect to the claim that class members were not provided meal periods to which they were entitled. No declarations were filed in support of the settlement indicating the nature of the investigation that had been conducted to determine the number of employees that had allegedly been denied meal breaks, the frequency with which the denials had occurred, or the circumstances surrounding those denials, and no analysis was provided of the factual or legal issues that required resolution to determine the extent of any one-hour-pay penalties to which class members may have been entitled. No time records were produced in discovery nor was the court presented any estimated quantification of the number of one-hour-pay penalties that might be due or any explanation of the factors that were considered in discounting the potential recovery for purposes of settlement.

Class counsel asserted that information had been exchanged informally and during the course of the mediation session, but their declarations provided no specificity. The only specific was the repeated reference in the moving papers to several employee manuals that had been produced stating company policy simply as follows: “Rest breaks and meal periods are scheduled based on business levels, hours worked and applicable state laws.” Whatever information may have been exchanged during the mediation, there was nothing before the court to establish the sufficiency of class counsel's investigation other than their assurance that they had seen what they needed to see. The record fails to establish in any meaningful way what investigation counsel conducted or what information they reviewed on which they based their assessment of the strength of the class members' claims, much less does the record contain information sufficient for the court to intelligently evaluate the adequacy of the settlement. Assuming that there is a “presumption” such as Dunk asserts, its invocation is not justified by the present record.

More fundamentally, neither Dunk, nor any other case suggests that the court may determine the adequacy of a class action settlement without independently satisfying itself that the consideration being received for the release of the class members' claims is reasonable in light of the strengths and weaknesses of the claims and the risks of the particular litigation. The court undoubtedly should give considerable weight to the competency and integrity of counsel and the involvement of a neutral mediator in assuring itself that a settlement agreement represents an arm's length transaction entered without self-dealing or other potential misconduct. While an agreement reached under these circumstances presumably will be fair to all concerned, particularly when few of the affected class members express objections, in the final analysis it is the court that bears the responsibility to ensure that the recovery represents a reasonable compromise, given the magnitude and apparent merit of the claims being released, discounted by the risks and expenses of attempting to establish and collect on those claims by pursuing the litigation. “The court has a fiduciary responsibility as guardians of the rights of the absent class members when deciding whether to approve a settlement agreement.” (4 Newberg on Class Actions, supra, § 11.41 at p. 118; 7-Eleven, supra, 85 Cal.App.4th at p. 1151, 102 Cal.Rptr.2d 777.) “The courts are supposed to be the guardians of the class.” (Dickerson, Class Actions: The Law of 50 States (2008 ed.) § 9.02[2], p. 9–6.)
*130 Although “[t]here is usually an initial presumption of fairness when a proposed class settlement ... was negotiated at arm’s length by counsel for the class, ... is it clear that the court should not give rubber-stamp approval. [Fn omitted.] Rather, to protect the interests of absent class members, the court must independently and objectively analyze the evidence and circumstances before it in order to determine whether the settlement is in the best interests of those whose claims will be extinguished.” (4 Newberg on Class Actions, supra, § 11.41 at p. 90; In re Matzo Food Products Litigation (D.N.J.1994) 156 F.R.D. 600, 604.) “To make this determination, the factual record before the ... court must be sufficiently developed.” (Matzo Food Products Litigation, p. 604.) Newberg lists the four factors recognized in Dunk to establish an initial presumption of fairness, but continues: “This initial presumption must then withstand the test of the plaintiffs’ likelihood of success.” (4 Newberg on Class Actions, supra, § 11.41 at pp. 92–93.) “The proposed settlement cannot be judged without reference to the strength of plaintiffs' claims. ‘The most important factor is the strength of the case for plaintiffs **32 on the merits, balanced against the amount offered in settlement.’ ” (City of Detroit v. Grinnell Corp. (2d Cir.1974) 495 F.2d 448, 455, overruled on other grounds, as recognized by Chambless v. Masters, Mates & Pilots Pension Plan (2d Cir.1989) 885 F.2d 1053, 1058.) The court “must stop short of the detailed and thorough investigation that it would undertake if it were actually trying the case,” but nonetheless it “must eschew any rubber stamp approval in favor of an independent evaluation.” (Id. at p. 462.)

The California decisions upholding settlements in class actions, including Dunk and 7–Eleven, are fully consonant with this recognition of the court's responsibility. In Dunk, the trial court was made aware of the maximum damages that each class member had sustained and the value of the coupons that each class member would receive under the settlement, as well as of the particular issues that plaintiffs needed to overcome in order to prevail in the litigation. (Dunk, supra, 48 Cal.App.4th at p. 1802, 56 Cal.Rptr.2d 483.) The voluminous record before the court was deemed “ideal for the trial court to make a rational and educated determination the settlement was fair, adequate and reasonable.” (Id. at p. 1803, 56 Cal.Rptr.2d 483.) In upholding the trial court's approval of the settlement, the appellate court “had reason to judge the trial court's scrutiny ..., particularly in light of the substantial questions raised and information presented, was adequate to support its conclusion.” (Id. at p. 1805, 56 Cal.Rptr.2d 483.)

The evidence of fairness and adequacy presented to the trial court before it approved the settlement in 7–Eleven was even more extensive. There the objecting parties acknowledged that the settlement was preceded by “vigorous, aggressive and exhaustive discovery” over four and a half years of litigation (7–Eleven, supra, 85 Cal.App.4th at p. 1149, 102 Cal.Rptr.2d 777). During the course of “three daylong evidentiary hearings” (id. at p. 1142, 102 Cal.Rptr.2d 777), the court was apprised of the details and maximum dollar value of the plaintiffs' various claims, the defenses to those claims, and the manner in which counsel evaluated the strengths of each of the claims. Although criticized by objectors, the court received sworn testimony as to the amounts in controversy and following tentative approval of the settlement the defendant paid $30,000 to defray the cost of hiring an accountant “to test the validity of [defendant’s] ... data by sampling the underlying records, interviewing [defendant’s] accounting personnel, and taking related ‘due diligence’ measures.” (Id. at p. 1154, 102 Cal.Rptr.2d 777.) The trial judge reviewed the contract provisions that were in dispute, as well as counsel's evaluation of the merits of plaintiffs' claims, and expressed “serious reservations about whether there have been breaches sufficient even to bring these damages issues into account” with one “singular” exception. (Id. at p. 1151, 102 Cal.Rptr.2d 777.) The appellate court was satisfied that the trial court had fulfilled its fiduciary duty “to have before it sufficient information to determine if the settlement was fair, adequate, and reasonable.” (Id. at pp. 1151, 1166–1167, 102 Cal.Rptr.2d 777; see also, e.g., Wershba v. Apple Computer, Inc., supra, 91 Cal.App.4th at p. 245, 110 Cal.Rptr.2d 145 [“The court must ... scrutinize the proposed settlement agreement to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned” ].)
Here, the trial court acknowledged that “in logic” it would have been preferable for it to have been presented with data permitting it to review class counsel’s evaluation of the sufficiency of the settlement, but felt that this was precluded because the supporting information was exchanged in the course of mediation. We disagree with this conclusion for two reasons. First, the fact that the settlement was reached during mediation to which Evidence Code section 1119 applies does not eliminate the court’s obligation to evaluate the terms of the settlement and to ensure that they are fair, adequate and reasonable. If some relevant information is subject to a privilege that the court must respect, other data must be provided that will enable the court to make an independent assessment of the adequacy of the settlement terms. Secondly, the fact that communications were made during the mediation and writings prepared for use in the mediation that are inadmissible and not subject to compulsory production does not mean that the underlying data, not otherwise privileged, is also immune from production. (Evid.Code, § 1120 (“Evidence otherwise admissible or subject to discovery outside of a mediation ... shall not be or become inadmissible or protected from disclosure solely by reason of its introduction or use in a mediation ...”); Rojas v. Superior Court (2004) 33 Cal.4th 407, 417, 15 Cal.Rptr.3d 643, 93 P.3d 260; Wimsatt v. Superior Court (2007) 152 Cal.App.4th 137, 157–158, 61 Cal.Rptr.3d 200.) Foot Locker’s payroll records, for example, if relevant to the quantification of the claims being settled, are subject to discovery and may be introduced in opposition to the settlement even if they were disclosed to class counsel during the mediation, and even if class counsel was shown only a summary or analysis of those records that is not itself subject to production because prepared for use in the mediation.

Thus, we conclude that the trial court’s approval of the settlement agreement must be vacated and the matter remanded for further proceedings. On remand, the settling parties should be given the opportunity to supplement their showing in support of the settlement. Objectors should then be permitted to renew their discovery requests, which should not be denied simply because the requested information was disclosed during the mediation leading to the proposed settlement. The trial court need not grant all requests that the objector sees fit to make. Discovery requests that seek particular materials that are properly within the scope of Evidence Code section 1119 should be denied. The court should exercise its normal discretion to weigh the relevance and need for particular materials against the cost and burdens of production. (Code Civ. Proc., § 2017.020; Greyhound Corp. v. Superior Court (1961) 56 Cal.2d 355, 378–380, 15 Cal.Rptr. 90, 364 P.2d 266.) Moreover, the trial court should limit discovery in view of the context in which it is being requested. Discovery is required not to prepare the case for trial, but simply to provide sufficient information to permit an intelligent evaluation of the terms on which the case is proposed to be settled. The objecting parties should not be permitted to frustrate the mutual interest of the class members and the defendant to resolve the litigation promptly by conducting extended or unnecessary discovery. The extent of discovery that is appropriate will depend in large part on the extent of the information that the settling parties provide the court to justify the terms of the settlement. If the settling parties have provided a meaningful and substantiated explanation of the manner in which the factual and legal issues have been evaluated, and there is no reason to believe that significant information has been overlooked, very little in the way of additional discovery may be justified. However, where, as here, the settling parties provide essentially no information to explain, much less to substantiate, their evaluation of the magnitude or potential merit of the claims being settled, objectors should not be denied access to data that reasonably may be expected to shed light on these issues.

Following the opportunity for limited discovery, the trial court should redetermine whether the proposed settlement is fair, adequate and reasonable. The court may and undoubtedly should continue to place reliance on the competence and integrity of counsel, the involvement of a qualified mediator, and the paucity of objectors to the settlement. But the court must also receive and consider enough information about the nature and magnitude of the claims being settled, as well as the impediments to recovery, to make an independent assessment of the reasonableness of the terms to which the parties have agreed. We do not suggest that the court should attempt to decide the merits of the case or to substitute its evaluation of the most appropriate settlement for that of the attorneys. However, as the court does when it approves a settlement as in good faith under Code of Civil Procedure section 877.6, the court must at least satisfy itself that the class settlement is within the “ballpark” of reasonableness.
By remanding we do not suggest that the proposed settlement ultimately may not pass muster. We hold only that the trial court may not finally approve the settlement agreement until provided with sufficient information to assure itself that the terms of the agreement are indeed fair, adequate and reasonable.

The judgment is reversed and the matter is remanded for further proceedings consistent with this opinion. The parties shall bear their respective costs on appeal.

We concur: McGuiness, P.J., and Jenkins, J.

FN* George, C.J., did not participate therein. Werdegar, J., is of the opinion that the petition should be granted.

All Citations

Footnotes

1 Objectors assert that Kullar failed to investigate the meal period claims and that this failure is evidenced by the responses he submitted to interrogatories on June 16, 2006. One interrogatory, for example, asked for all facts upon which he based his contention that Foot Locker failed to provide meal and/or rest breaks to him, and another asked for the names of persons with knowledge of those facts. Kullar responded: “Plaintiff lacks first-hand knowledge of what information may or may not be known to third party individuals. Plaintiff believes that the class members, their immediate supervisors, and other representatives of defendant have information responsive to this request. The identities and contact information of these individuals is currently under the exclusive control of defendants. Discovery is ongoing.” Objectors later were provided copies of the documents that had been exchanged in discovery between Kullar and Foot Locker. The only documents exchanged relating to the meal period claims appear to be a two-page handwritten record of Kullar's personal meal period breaks and an employee orientation brochure stating company policies and procedures which include the statement, “Rest breaks and meal periods are scheduled based on business levels, hours worked and applicable state laws.”

2 As in the original stipulation that had been filed on March 12, 2007, the amended final stipulation recited: “Class counsel has conducted discovery and investigation during the prosecution of the action. This discovery and investigation has included, among other things, (a) inspection and analysis of documents and data provided by defendant; (b) analysis of the legal positions taken by defendant; (c) interviews of material witnesses; (d) data and information provided by Foot Locker for purposes of the mediation; (e) analysis of class-wide damage studies; and (f) research of the applicable law with respect to the claims asserted in the action and the potential defenses thereto. The class representative has vigorously prosecuted this case, and defendant has vigorously contested it. The parties have engaged in sufficient discovery and
investigation, both formal and informal, to assess the relative merits of the claims of the class representative and of defendant's defenses to them."

The stipulation contained no further specificity in these regards and was not accompanied by a declaration or legal memorandum that provided any additional details. No "class-wide damage study" was included in the documents filed with the court, nor was there any specification of the materials that had been produced in discovery or of the witnesses who had been interviewed, nor was any discussion provided of the "legal positions" that had been analyzed or were considered to be problematic.

Much of the stipulation recited generalities that would apply in any case. For example: "The discussions between counsel, and the process leading to the mediation in this matter, have been adequate to give the class representative and class counsel a sound understanding of the merits of their position and to evaluate the worth of the claims of the settlement class. This final stipulation was reached after arm's-length bargaining by the parties, conducted with the assistance of a highly qualified and widely respected mediator, and after class counsel thoroughly reviewed all available evidence. The discovery conducted in this action, and the information exchanged through the parties' negotiations, are sufficient to assess reliably the merits of the respective parties' positions and to compromise the issues on a fair and equitable basis."

The class representative and class counsel believe that the claims, allegations and contentions asserted in the action have merit. However, the class representative and class counsel recognize and acknowledge the expense and delay of continued lengthy proceedings that would be necessary to prosecute the action against defendant through trial and appeals. Class counsel has taken into account the uncertain outcome and the risk of any litigation, especially in complex actions such as this action, as well as the difficulties and delays inherent in such litigation, and the potential difficulty in maintaining the Action as a class action. Class counsel is also mindful of the inherent problems of proof regarding, and possible defenses to, the claims alleged in the action. Class counsel believes that the class settlement set forth in this final stipulation confers substantial benefits upon the members of the settlement class, and that an independent review of this final stipulation by the court in the approval process will confirm this conclusion. Based on his own independent investigation and evaluation, class counsel has determined that the class settlement set forth in this final stipulation is in the best interests of the class representative and of the settlement class."

Subsequent to the court's preliminary approval of the settlement agreement, Foot Locker filed a declaration stating the class in fact contained 17,966 persons.

According to the stipulation, approximately 14.6 percent of the class members worked for Foot Locker fewer than 80 hours, approximately 33 percent worked fewer than 160 hours, or one month, approximately 52 percent worked fewer than 320 hours, approximately 62 percent worked fewer than 480 hours, approximately 80 percent worked fewer than 1040 hours, or six months, and approximately 91 percent worked fewer than 2080 hours, or one year.

Identified as "a nonprofit tax-exempt organization based in San Francisco, California, whose mission is to protect and secure equal rights and economic opportunities for women and girls."

The objection reads in part: "Provisional class counsel failed to conduct reasonable discovery or pre-settlement investigation to determine facts necessary to ascertain the extent of class loss or the reasonableness of the terms of settlement proposed, including facts regarding the extent and rate of Labor Code violations by defendant, the likely or probable range of damages sustained by Echeverria and class members arising from Labor Code violations by defendant, or the existence and nature of records maintained by defendant regarding claimed Labor Code violations."

On August 20, 2007, two additional objectors, represented by the same attorney, filed identical objections. A fourth objector filed and later withdrew an objection.

See footnote 2, ante. Objector requested the production of all documents referred to in categories (a), (d) and (e) of the discovery and investigation described in the stipulation of settlement.
Evidence Code section 1119 provides as follows: “Except as otherwise provided in this chapter: [¶] (a) No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given. [¶] (b) No writing, as defined in Section 250, that is prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation, is admissible or subject to discovery, and disclosure of the writing shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given. [¶] (c) All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential.”

According to the settlement agreement, the settlement class includes workers who worked a total of 12,485,000 hours within the class period. If each of these workers worked eight hours per day, and if each was denied a proper meal break as class counsel represented he had assumed, and if each earned an average of $8 per hour as class counsel also assumed without any evidentiary support, Foot Locker would be liable for one-hour-pay penalties of $12,485,000. At one point counsel explained, also without evidentiary support, that because of the large number of part-time employees, only 37 percent of the total hours were worked on shifts entitling the employee to a meal break, which on the same unsupported premises would result in a liability of $4,619,450. One-third of the settlement proceeds, or $666,666 gross, was allocated to the meal period claim. No data was presented with respect to the value of the claims to which the remaining two-thirds of the settlement were allocated.

The court was advised that direct notices had been mailed to 17,966 class members, and 2,938 were returned as undeliverable. There were only three objections and 55 class members had opted to exclude themselves from the settlement class. There were 1,763 claims filed, of which 1,462 were determined to be valid prior to the final settlement approval hearing. The average payment to those submitting valid claims would be $658.

The trial court noted the additional question of whether the confidentiality of communications with class counsel during the mediation extended to members of the class on whose behalf class counsel presumably was acting. The court expressed the view that Evidence Code section 1119 should be deemed to preclude compulsory disclosure of such communications to objecting class members because requiring such disclosure would discourage counsel from speaking candidly during the mediation, contrary to the purpose behind section 1119. We are aware of no reported decision on this point. In view of our other conclusions and because the parties have not addressed the issue in their briefs to this court, we see no need to address it here. For present purposes, we assume the correctness of the trial court’s conclusion that objectors are not entitled to demand production of communications and writings protected from compulsory disclosure by section 1119.
§ 437c. Grounds for and effect of summary judgment; procedure on motion

Effective: January 1, 2017
Currentness

(a)(1) A party may move for summary judgment in an action or proceeding if it is contended that the action has no merit or that there is no defense to the action or proceeding. The motion may be made at any time after 60 days have elapsed since the general appearance in the action or proceeding of each party against whom the motion is directed or at any earlier time after the general appearance that the court, with or without notice and upon good cause shown, may direct.

(2) Notice of the motion and supporting papers shall be served on all other parties to the action at least 75 days before the time appointed for hearing. If the notice is served by mail, the required 75-day period of notice shall be increased by 5 days if the place of address is within the State of California, 10 days if the place of address is outside the State of California but within the United States, and 20 days if the place of address is outside the United States. If the notice is served by facsimile transmission, express mail, or another method of delivery providing for overnight delivery, the required 75-day period of notice shall be increased by two court days.

(3) The motion shall be heard no later than 30 days before the date of trial, unless the court for good cause orders otherwise. The filing of the motion shall not extend the time within which a party must otherwise file a responsive pleading.

(b)(1) The motion shall be supported by affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice shall or may be taken. The supporting papers shall include a separate statement setting forth plainly and concisely all material facts that the moving party contends are undisputed. Each of the material facts stated shall be followed by a reference to the supporting evidence. The failure to comply with this requirement of a separate statement may in the court's discretion constitute a sufficient ground for denying the motion.

(2) An opposition to the motion shall be served and filed not less than 14 days preceding the noticed or continued date of hearing, unless the court for good cause orders otherwise. The opposition, where appropriate, shall consist of affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice shall or may be taken.

(3) The opposition papers shall include a separate statement that responds to each of the material facts contended by the moving party to be undisputed, indicating if the opposing party agrees or disagrees that those facts are undisputed. The statement also shall set forth plainly and concisely any other material facts the opposing party contends are disputed. Each material fact
§ 437c. Grounds for and effect of summary judgment;..., CA CIV PRO § 437c

contended by the opposing party to be disputed shall be followed by a reference to the supporting evidence. Failure to comply with this requirement of a separate statement may constitute a sufficient ground, in the court's discretion, for granting the motion.

(4) A reply to the opposition shall be served and filed by the moving party not less than five days preceding the noticed or continued date of hearing, unless the court for good cause orders otherwise.

(5) Evidentiary objections not made at the hearing shall be deemed waived.

(6) Except for subdivision (c) of Section 1005 relating to the method of service of opposition and reply papers, Sections 1005 and 1013, extending the time within which a right may be exercised or an act may be done, do not apply to this section.

(7) An incorporation by reference of a matter in the court's file shall set forth with specificity the exact matter to which reference is being made and shall not incorporate the entire file.

(c) The motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. In determining if the papers show that there is no triable issue as to any material fact, the court shall consider all of the evidence set forth in the papers, except the evidence to which objections have been made and sustained by the court, and all inferences reasonably deducible from the evidence, except summary judgment shall not be granted by the court based on inferences reasonably deducible from the evidence if contradicted by other inferences or evidence that raise a triable issue as to any material fact.

(d) Supporting and opposing affidavits or declarations shall be made by a person on personal knowledge, shall set forth admissible evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavits or declarations. An objection based on the failure to comply with the requirements of this subdivision, if not made at the hearing, shall be deemed waived.

(e) If a party is otherwise entitled to summary judgment pursuant to this section, summary judgment shall not be denied on grounds of credibility or for want of cross-examination of witnesses furnishing affidavits or declarations in support of the summary judgment, except that summary judgment may be denied in the discretion of the court if the only proof of a material fact offered in support of the summary judgment is an affidavit or declaration made by an individual who was the sole witness to that fact; or if a material fact is an individual's state of mind, or lack thereof, and that fact is sought to be established solely by the individual's affirmation thereof.

(f)(1) A party may move for summary adjudication as to one or more causes of action within an action, one or more affirmative defenses, one or more claims for damages, or one or more issues of duty, if the party contends that the cause of action has no merit, that there is no affirmative defense to the cause of action, that there is no merit to an affirmative defense as to any cause of action, that there is no merit to a claim for damages, as specified in Section 3294 of the Civil Code, or that one or more defendants either owed or did not owe a duty to the plaintiff or plaintiffs. A motion for summary adjudication shall be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty.
(2) A motion for summary adjudication may be made by itself or as an alternative to a motion for summary judgment and shall proceed in all procedural respects as a motion for summary judgment. A party shall not move for summary judgment based on issues asserted in a prior motion for summary adjudication and denied by the court unless that party establishes, to the satisfaction of the court, newly discovered facts or circumstances or a change of law supporting the issues reasserted in the summary judgment motion.

(g) Upon the denial of a motion for summary judgment on the ground that there is a triable issue as to one or more material facts, the court shall, by written or oral order, specify one or more material facts raised by the motion that the court has determined there exists a triable controversy. This determination shall specifically refer to the evidence proffered in support of and in opposition to the motion that indicates that a triable controversy exists. Upon the grant of a motion for summary judgment on the ground that there is no triable issue of material fact, the court shall, by written or oral order, specify the reasons for its determination. The order shall specifically refer to the evidence proffered in support of and, if applicable, in opposition to the motion that indicates no triable issue exists. The court shall also state its reasons for any other determination. The court shall record its determination by court reporter or written order.

(h) If it appears from the affidavits submitted in opposition to a motion for summary judgment or summary adjudication, or both, that facts essential to justify opposition may exist but cannot, for reasons stated, be presented, the court shall deny the motion, order a continuance to permit affidavits to be obtained or discovery to be had, or make any other order as may be just. The application to continue the motion to obtain necessary discovery may also be made by ex parte motion at any time on or before the date the opposition response to the motion is due.

(i) If, after granting a continuance to allow specified additional discovery, the court determines that the party seeking summary judgment has unreasonably failed to allow the discovery to be conducted, the court shall grant a continuance to permit the discovery to go forward or deny the motion for summary judgment or summary adjudication. This section does not affect or limit the ability of a party to compel discovery under the Civil Discovery Act (Title 4 (commencing with Section 2016.010) of Part 4).

(j) If the court determines at any time that an affidavit was presented in bad faith or solely for the purpose of delay, the court shall order the party who presented the affidavit to pay the other party the amount of the reasonable expenses the filing of the affidavit caused the other party to incur. Sanctions shall not be imposed pursuant to this subdivision except on notice contained in a party's papers or on the court's own noticed motion, and after an opportunity to be heard.

(k) Unless a separate judgment may properly be awarded in the action, a final judgment shall not be entered on a motion for summary judgment before the termination of the action, but the final judgment shall, in addition to any matters determined in the action, award judgment as established by the summary proceeding provided for in this section.

(l) In an action arising out of an injury to the person or to property, if a motion for summary judgment is granted on the basis that the defendant was without fault, no other defendant during trial, over plaintiff's objection, may attempt to attribute fault to, or comment on, the absence or involvement of the defendant who was granted the motion.

(m) A summary judgment entered under this section is an appealable judgment as in other cases. Upon entry of an order pursuant to this section, except the entry of summary judgment, a party may, within 20 days after service upon him or her of
§ 437c. Grounds for and effect of summary judgment; ..., CA CIV PRO § 437c

a written notice of entry of the order, petition an appropriate reviewing court for a peremptory writ. If the notice is served by mail, the initial period within which to file the petition shall be increased by five days if the place of address is within the State of California, 10 days if the place of address is outside the State of California but within the United States, and 20 days if the place of address is outside the United States. If the notice is served by facsimile transmission, express mail, or another method of delivery providing for overnight delivery, the initial period within which to file the petition shall be increased by two court days. The superior court may, for good cause, and before the expiration of the initial period, extend the time for one additional period not to exceed 10 days.

(2) Before a reviewing court affirms an order granting summary judgment or summary adjudication on a ground not relied upon by the trial court, the reviewing court shall afford the parties an opportunity to present their views on the issue by submitting supplemental briefs. The supplemental briefs may include an argument that additional evidence relating to that ground exists, but the party has not had an adequate opportunity to present the evidence or to conduct discovery on the issue. The court may reverse or remand based upon the supplemental briefs to allow the parties to present additional evidence or to conduct discovery on the issue. If the court fails to allow supplemental briefs, a rehearing shall be ordered upon timely petition of a party.

(n)(1) If a motion for summary adjudication is granted, at the trial of the action, the cause or causes of action within the action, affirmative defense or defenses, claim for damages, or issue or issues of duty as to the motion that has been granted shall be deemed to be established and the action shall proceed as to the cause or causes of action, affirmative defense or defenses, claim for damages, or issue or issues of duty remaining.

(2) In the trial of the action, the fact that a motion for summary adjudication is granted as to one or more causes of action, affirmative defenses, claims for damages, or issues of duty within the action shall not bar any cause of action, affirmative defense, claim for damages, or issue of duty as to which summary adjudication was either not sought or denied.

(3) In the trial of an action, neither a party, a witness, nor the court shall comment to a jury upon the grant or denial of a motion for summary adjudication.

(o) A cause of action has no merit if either of the following exists:

(1) One or more of the elements of the cause of action cannot be separately established, even if that element is separately pleaded.

(2) A defendant establishes an affirmative defense to that cause of action.

(p) For purposes of motions for summary judgment and summary adjudication:

(1) A plaintiff or cross-complainant has met his or her burden of showing that there is no defense to a cause of action if that party has proved each element of the cause of action entitling the party to judgment on the cause of action. Once the plaintiff or cross-complainant has met that burden, the burden shifts to the defendant or cross-defendant to show that a triable issue of one or more material facts exists as to the cause of action or a defense thereto. The defendant or cross-defendant shall not rely
§ 437c. Grounds for and effect of summary judgment;..., CA CIV PRO § 437c

upon the allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to the cause of action or a defense thereto.

(2) A defendant or cross-defendant has met his or her burden of showing that a cause of action has no merit if the party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to the cause of action. Once the defendant or cross-defendant has met that burden, the burden shifts to the plaintiff or cross-complainant to show that a triable issue of one or more material facts exists as to the cause of action or a defense thereto. The plaintiff or cross-complainant shall not rely upon the allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to the cause of action or a defense thereto.

(q) In granting or denying a motion for summary judgment or summary adjudication, the court need rule only on those objections to evidence that it deems material to its disposition of the motion. Objections to evidence that are not ruled on for purposes of the motion shall be preserved for appellate review.

(r) This section does not extend the period for trial provided by Section 1170.5.

(s) Subdivisions (a) and (b) do not apply to actions brought pursuant to Chapter 4 (commencing with Section 1159) of Title 3 of Part 3.

(t) Notwithstanding subdivision (f), a party may move for summary adjudication of a legal issue or a claim for damages other than punitive damages that does not completely dispose of a cause of action, affirmative defense, or issue of duty pursuant to this subdivision.

(1)(A) Before filing a motion pursuant to this subdivision, the parties whose claims or defenses are put at issue by the motion shall submit to the court both of the following:

(i) A joint stipulation stating the issue or issues to be adjudicated.

(ii) A declaration from each stipulating party that the motion will further the interest of judicial economy by decreasing trial time or significantly increasing the likelihood of settlement.

(B) The joint stipulation shall be served on any party to the civil action who is not also a party to the motion.

(2) Within 15 days of receipt of the stipulation and declarations, unless the court has good cause for extending the time, the court shall notify the stipulating parties if the motion may be filed. In making this determination, the court may consider objections by a nonstipulating party made within 10 days of the submission of the stipulation and declarations.
§ 437c. Grounds for and effect of summary judgment;..., CA CIV PRO § 437c

(3) If the court elects not to allow the filing of the motion, the stipulating parties may request, and upon request the court shall conduct, an informal conference with the stipulating parties to permit further evaluation of the proposed stipulation. The stipulating parties shall not file additional papers in support of the motion.

(4)(A) A motion for summary adjudication made pursuant to this subdivision shall contain a statement in the notice of motion that reads substantially similar to the following: “This motion is made pursuant to subdivision (t) of Section 437c of the Code of Civil Procedure. The parties to this motion stipulate that the court shall hear this motion and that the resolution of this motion will further the interest of judicial economy by decreasing trial time or significantly increasing the likelihood of settlement.”

(B) The notice of motion shall be signed by counsel for all parties, and by those parties in propria persona, to the motion.

(5) A motion filed pursuant to this subdivision may be made by itself or as an alternative to a motion for summary judgment and shall proceed in all procedural respects as a motion for summary judgment.

(u) For purposes of this section, a change in law does not include a later enacted statute without retroactive application.

Credits

Notes of Decisions (3744)
West's Ann. Cal. C.C.P. § 437c, CA CIV PRO § 437c
Current with urgency legislation through Ch. 3 of 2021 Reg.Sess
§ 599. Extension of deadlines; continuance or postponement of trial date; applicability

Effective: September 18, 2020

(a) Notwithstanding any other law and unless ordered otherwise by a court or otherwise agreed to by the parties, a continuance or postponement of a trial date extends any deadlines that have not already passed as of March 19, 2020, applicable to discovery, including the exchange of expert witness information, mandatory settlement conferences, and summary judgment motions in the same matter. The deadlines are extended for the same length of time as the continuance or postponement of the trial date.

(b) This section shall remain in effect only during the state of emergency proclaimed by the Governor on March 4, 2020, related to the COVID-19 pandemic and 180 days after the end, pursuant to Section 8629 of the Government Code, of that state of emergency and is repealed on that date.

Credits
(Added by Stats.2020, c. 112 (S.B.1146), § 1, eff. Sept. 18, 2020.)

Editors' Notes

REPEAL

<For repeal of this section, see its terms.>

West's Ann. Cal. C.C.P. § 599, CA CIV PRO § 599
Current with urgency legislation through Ch. 3 of 2021 Reg.Sess
§ 998. Withholding or augmenting costs following rejection or acceptance of offer to allow judgment

Effective: January 1, 2016
Currentness

(a) The costs allowed under Sections 1031 and 1032 shall be withheld or augmented as provided in this section.

(b) Not less than 10 days prior to commencement of trial or arbitration (as provided in Section 1281 or 1295) of a dispute to be resolved by arbitration, any party may serve an offer in writing upon any other party to the action to allow judgment to be taken or an award to be entered in accordance with the terms and conditions stated at that time. The written offer shall include a statement of the offer, containing the terms and conditions of the judgment or award, and a provision that allows the accepting party to indicate acceptance of the offer by signing a statement that the offer is accepted. Any acceptance of the offer, whether made on the document containing the offer or on a separate document of acceptance, shall be in writing and shall be signed by counsel for the accepting party or, if not represented by counsel, by the accepting party.

(1) If the offer is accepted, the offer with proof of acceptance shall be filed and the clerk or the judge shall enter judgment accordingly. In the case of an arbitration, the offer with proof of acceptance shall be filed with the arbitrator or arbitrators who shall promptly render an award accordingly.

(2) If the offer is not accepted prior to trial or arbitration or within 30 days after it is made, whichever occurs first, it shall be deemed withdrawn, and cannot be given in evidence upon the trial or arbitration.

(3) For purposes of this subdivision, a trial or arbitration shall be deemed to be actually commenced at the beginning of the opening statement of the plaintiff or counsel, or, if there is no opening statement, at the time of the administering of the oath or affirmation to the first witness, or the introduction of any evidence.

(c)(1) If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award, the plaintiff shall not recover his or her postoffer costs and shall pay the defendant's costs from the time of the offer. In addition, in any action or proceeding other than an eminent domain action, the court or arbitrator, in its discretion, may require the plaintiff to pay a reasonable sum to cover postoffer costs of the services of expert witnesses, who are not regular employees of any party, actually incurred and reasonably necessary in either, or both, preparation for trial or arbitration, or during trial or arbitration, of the case by the defendant.
(2)(A) In determining whether the plaintiff obtains a more favorable judgment, the court or arbitrator shall exclude the postoffer costs.

(B) It is the intent of the Legislature in enacting subparagraph (A) to supersede the holding in Encinitas Plaza Real v. Knight, 209 Cal.App.3d 996, that attorney's fees awarded to the prevailing party were not costs for purposes of this section but were part of the judgment.

(d) If an offer made by a plaintiff is not accepted and the defendant fails to obtain a more favorable judgment or award in any action or proceeding other than an eminent domain action, the court or arbitrator, in its discretion, may require the defendant to pay a reasonable sum to cover postoffer costs of the services of expert witnesses, who are not regular employees of any party, actually incurred and reasonably necessary in either, or both, preparation for trial or arbitration, or during trial or arbitration, of the case by the plaintiff, in addition to plaintiff's costs.

(e) If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award, the costs under this section, from the time of the offer, shall be deducted from any damages awarded in favor of the plaintiff. If the costs awarded under this section exceed the amount of the damages awarded to the plaintiff the net amount shall be awarded to the defendant and judgment or award shall be entered accordingly.

(f) Police officers shall be deemed to be expert witnesses for the purposes of this section. For purposes of this section, “plaintiff” includes a cross-complainant and “defendant” includes a cross-defendant. Any judgment or award entered pursuant to this section shall be deemed to be a compromise settlement.

(g) This chapter does not apply to either of the following:

(1) An offer that is made by a plaintiff in an eminent domain action.

(2) Any enforcement action brought in the name of the people of the State of California by the Attorney General, a district attorney, or a city attorney, acting as a public prosecutor.

(h) The costs for services of expert witnesses for trial under subdivisions (c) and (d) shall not exceed those specified in Section 68092.5 of the Government Code.

(i) This section shall not apply to labor arbitrations filed pursuant to memoranda of understanding under the Ralph C. Dills Act (Chapter 10.3 (commencing with Section 3512) of Division 4 of Title 1 of the Government Code).

Credits
Editors’ Notes

**OFFICIAL FORMS**

2009 Main Volume

<Mandatory and optional Forms adopted and approved by the Judicial Council are set out in West's California Judicial Council Forms Pamphlet.>

**LEADING CASES**

Probate Code §§ 550-555, which allow a plaintiff to sue a deceased insured’s estate without naming the insured’s personal representative but limit recoverable “damages” to the limits of the insured’s liability insurance policy, do not exempt the deceased’s insurer from liability under California Code of Civil Procedure § 998 for prevailing party “costs” following an offer of compromise in excess of the insurer’s policy limits. Although § 998 applies only to “parties” to a lawsuit and the deceased insured’s insurer is technically not a party to the Probate Code proceeding, the insurer controls the Probate Code proceeding and therefore is a *de facto* party to that proceeding for purposes of § 998 liability. *Meleski v. Estate of Hotlen*, 29 Cal.App.5th 616, 240 Cal.Rptr.3d 552 2018 WL 6241504 (3rd Dist. Nov. 29, 2018).

Notes of Decisions (822)

West's Ann. Cal. C.C.P. § 998, CA CIV PRO § 998
Current with urgency legislation through Ch. 3 of 2021 Reg.Sess
Rule 3.400. Definition

(a) Definition

A “complex case” is an action that requires exceptional judicial management to avoid placing unnecessary burdens on the court or the litigants and to expedite the case, keep costs reasonable, and promote effective decision making by the court, the parties, and counsel.

(b) Factors

In deciding whether an action is a complex case under (a), the court must consider, among other things, whether the action is likely to involve:

(1) Numerous pretrial motions raising difficult or novel legal issues that will be time-consuming to resolve;

(2) Management of a large number of witnesses or a substantial amount of documentary evidence;

(3) Management of a large number of separately represented parties;

(4) Coordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court; or

(5) Substantial postjudgment judicial supervision.

(c) Provisional designation

Except as provided in (d), an action is provisionally a complex case if it involves one or more of the following types of claims:

(1) Antitrust or trade regulation claims;
(2) Construction defect claims involving many parties or structures;

(3) Securities claims or investment losses involving many parties;

(4) Environmental or toxic tort claims involving many parties;

(5) Claims involving mass torts;

(6) Claims involving class actions; or

(7) Insurance coverage claims arising out of any of the claims listed in (c)(1) through (c)(6).

(d) Court's discretion

Notwithstanding (c), an action is not provisionally complex if the court has significant experience in resolving like claims involving similar facts and the management of those claims has become routine. A court may declare by local rule that certain types of cases are or are not provisionally complex under this subdivision.

Credits

Editors' Notes

OFFICIAL FORMS

2017 Main Volume

<Mandatory and optional Forms adopted and approved by the Judicial Council are set out in West's California Judicial Council Forms Pamphlet.>

Notes of Decisions (5)

Cal. Rules of Court, Rule 3.400, CA ST CIVIL RULES Rule 3.400
California Rules of Court, California Rules of Professional Conduct, and California Code of Judicial Ethics are current with amendments received through December 1, 2020. California Supreme Court, California Courts of Appeal, Guidelines for the Commission of Judicial Appointments, Commission on Judicial Performance, and all other Rules of the State Bar of California are current with amendments received through December 1, 2020.
Session 1, Panel 2:

What Else Happened in 2020? The Employment Law Developments You May Have Missed

Jennifer Baldocchi, Paul Hastings LLP

Christina Cheung, Allred, Maroko & Goldberg
Jennifer S. Baldocchi is Co-Vice Chair of the Paul Hastings Employment Department and the Chair of the International Employee Mobility and Trade Secrets practice. Her practice focuses on employee mobility and intellectual property, including trade secrets, covenants not to compete, unfair competition, and fiduciary duties. She is recognized by *Legal 500 US* for trade secrets litigation and non-contentious matters and as a Top Labor and Employment Lawyer by the Daily Journal. Ms. Baldocchi has significant trial experience. She litigates trade secret misappropriation claims, as well as disputes over restrictive covenants in employment-related agreements. She provides advice on best practices to protect and enforce intellectual property rights and restrictive covenants. On the transactional side, she prepares employee and executive contracts, focusing on the protection of trade secrets and the prevention of improper customer and employee solicitations.

Ms. Baldocchi’s practice also involves advising and defending employers in complex employment claims such as wrongful discharge, discrimination, retaliation, and harassment. She defends class actions and multi-district litigation, including disparate treatment, disparate impact, and wage and hour class actions. Ms. Baldocchi also counsels clients in wage and hour issues and investigations.

**Representative Experience**

- Represented AeroVironment, Inc., in multiple matters, including an executive mobility and intellectual property case. Led the trial team in Ventura County Superior Court in a seven week trial, resulting in a verdict in favor of the company. Handled additional litigation involving highly confidential information.
- Represented a technology company in litigation pending in multiple jurisdictions concerning covenants not to compete. Obtained temporary restraining order, preliminary injunction, and summary adjudication victories.
- Represented Epson America in an action involving breach of restrictive covenants by a former executive. Prevailed on contract claims on summary judgment.
- Represented LD Products Inc., in litigation involving noncompete agreements and trade secrets. Successfully convinced the court as to the unenforceability of various restrictive covenants.
- Represented American Airlines and its subsidiary, American Eagle in their claims to reject and renegotiate collective bargaining agreements as part of the Section 1113 process in bankruptcy. This resulted in new contracts for both companies, allowing them to successfully exit bankruptcy proceedings.
- Represented UPS in a wage and hour class action alleging misclassification and meal break violations with significant potential liability. Convinced the court on the eve of trial to decertify the class and continued to represent the company in multiple trials for the individual cases. After eight years of litigation, obtained 16 wins and 38 walkaways, and recovered defense fees in several cases.
- Represented a large financial institution in multiple actions involving alleged harassment, discrimination, and retaliation. After trial and appeals were completed, obtained a complete victory for the company on all claims.
- Defended a preeminent entertainment company against claims of copyright infringement in connection with a major motion picture. Prevailed against all claims on summary judgment.

**Community Involvement / Diversity & Inclusion**

- Vice-Chair Employment Law Subcommittee of the ABA Business and Corporate Litigation Committee
- Board Member, Public Counsel
- Member, American Employment Law Council
- Co-Chair, Paul Hastings Los Angeles Pro Bono And Community Committee and member of Paul Hastings Global Pro Bono Committee
- Former Co-Chair of Communications Committee For California State Bar Access To Justice Commission

**Awards & Accolades**

- Recognized as one of Lawdragon’s 500 Leading U.S. Corporate Employment Lawyers
- Recommended for U.S. Trade Secrets Litigation and Non-Contentious Matters, *Legal 500 US*
- Recognized as one of the Daily Journal’s Top Labor and Employment Lawyers in California.
Attorney Christina Cheung is a Partner with Allred, Maroko & Goldberg and actively practices in California and New York. Ms. Cheung specializes in the areas of sexual harassment, sexual assault, discrimination, retaliation, and wrongful termination on behalf of employees. Ms. Cheung also specializes in representing minors who are victims of sexual abuse by teachers, coaches, police officers, etc. Ms. Cheung joined Allred, Maroko & Goldberg in September of 2011. She also has worked for the U.S. Department of Justice’s Civil Rights Division- Employment Litigation Section. Ms. Cheung has successfully recovered millions of dollars on behalf of her clients across the United States. She cares deeply about her clients and will fight vigorously to protect her client’s privacy rights in litigation.

Ms. Cheung graduated from Georgetown University where she received her Bachelor of Science in Foreign Service. While at Georgetown, Ms. Cheung studied abroad at the Universidad Autónoma de Madrid. Ms. Cheung then graduated near the top of her class from the UCLA School of Law. While at UCLA Law, Ms. Cheung was mentored by Vicki Schultz, a renowned scholar in employment discrimination and sexual harassment law.

Ms. Cheung has been named a Super Lawyer Rising Star every year since 2017. Each year, no more than 2.5 percent of the lawyers in the state are selected by the research team at Super Lawyers to receive this honor. An avid yogini, Ms. Cheung is a certified 200-hour yoga instructor. She incorporates her yoga training and legal experience representing hundreds of sexual harassment/sexual assault victims over the years to approach her clients with a trauma-informed practice.
Los Angeles County Bar Association – Labor and Employment Law Section’s 41st Annual Symposium

March 4, 2021

What Else Happened in 2020?
The Employment Law Developments You May Have Missed

Jennifer Baldocchi
Paul Hastings LLP
JenniferBaldocchi@paulhastings.com

Christina Cheung
Allred Maroko Goldberg
ccheung@amglaw.com

- An arbitrator exceeded his power in issuing an award enforcing provisions of an employment agreement that illegally restricted an employee’s right to work.
- Broad confidentiality restriction in employment agreement was void as an illegal provision.
Dennison v. Rosland Cap. LLC,
47 Cal. App. 5th 204 (2020)

- Elderly plaintiff sued sales agent alleging he was misled into purchasing gold and silver coins.
- The arbitration agreement was “visually impenetrable” and “challenged the limits of legibility” with complex sentences “filled with statutory references and legal jargon.”
- The court found that its terms lacked mutuality, unfairly limited defendant’s liability, and limited the time in which plaintiff could bring claims.
In June 2017, employee filed a DLSE claim.

In August 2017, defendant requested that the DLSE dismiss the complaint because the parties had signed an arbitration agreement, which included a provision barring claims from being filed in court or "any other forum" aside from arbitration.

The DLSE set a hearing date for August 13, 2017; defendant participated.

Therefore, defendant waived its right to arbitration.
Garner v. Inter-State Oil Co.,
52 Cal. App. 5th 619 (2020)

• Employers, beware a poorly worded arbitration agreement!
• The Agreement provided, “To resolve employment disputes...you and Interstate Oil Co. agree that any and all claims...that could be filed in a court of law, including but not limited to...class action shall be submitted to final and binding arbitration, and not to any other forum.”
• When read as a whole, the Agreement functions as a waiver of class action lawsuits, and thus the Agreement provides for arbitration of class claims.
Employers, another reminder to watch the wording in your Arbitration Agreement.

This Agreement provided that the provision containing the class action and representative waiver is not modifiable or severable.

Another provision stated that if the representative waiver is found to be invalid, “the Agreement becomes null and void as to the employee(s) who are parties to that particular dispute”—a “blow up” provision.
Plaintiff could not persuade the court that the Arbitration Agreement he signed was *unconscionable*. He knew what he was signing. He had opportunity to negotiate its terms. The court determined that the Agreement was not unreasonably harsh.
ANTI-DISCRIMINATION FEHA AND FEDERAL CASES
**Bostock v. Clayton Cnty., Ga., 140 S. Ct. 1731 (2020)**

- The U.S. Supreme Court, in an opinion written by Justice Gorsuch, ruled 6-3 that discrimination against homosexual or transgender employees is barred by the prohibition against sex discrimination in Title VII.
The U.S. Supreme Court, in an opinion written by Justice Alito, ruled 7-2 that a teacher was barred from bringing an age discrimination suit against a religious school by the First Amendment’s “ministerial exception.”

"When a school with a religious mission entrusts a teacher with the responsibility of educating and forming students in the faith, judicial intervention into disputes between the school and the teacher threatens the school’s independence in a way that the First Amendment does not allow."
Anthony v. Trax Int'l Corp.,
955 F. 3d 1123 (9th Cir. 2020)

• Plaintiff sued for wrongful termination.

• Employer learned plaintiff had falsified her employment application; she did not have a bachelor's degree as she represented.

• The court ruled that the after-acquired evidence showed plaintiff was not a qualified individual under the ADA.

• Therefore, she could not establish a *prima facie* case of disability discrimination.
Rizo v Yovino,
950 F. 3d 1217 (9th Cir. 2020)

• Ninth Circuit again rules that prior pay can never be used to justify a sex-based pay differential.

• Co-workers’ comments about a worker’s age could not support a claim for age discrimination absent evidence that showed co-workers were materially involved in worker’s termination.

• The comments, made around plaintiff’s birthday, could not support a finding that a discriminatory animus inspired them – a birthday is a natural occasion for discussing a person’s age.
Pinter-Brown v. Regents of Univ. of California, 48 Cal. App. 5th 55 (2020)

- Reversal of $13 million verdict because the trial court committed a series of grave errors that prejudiced a university’s right to a fair trial on an employee’s gender discrimination claim:
  - E.g., the court told the jury their duty was to stand in the shoes of Dr. Martin Luther King.
- The court of appeal held that “errors...required reversal of verdict.”
Shirvanyan v. Los Angeles Cmty. Coll. Dist.,
59 Cal. App. 5th 82 (2020)

• Evidence supported jury’s finding that finite medical leave was a reasonable accommodation for kitchen worker’s wrist injury, but not her shoulder injury.

• The record was not clear whether jury’s verdict was based on employer’s handling of the first injury, second injury, or both.

• The court of appeal “vacated and remanded.”

- Transgender employee, serving as intervening plaintiff for DFEH, could not claim *attorney-client privilege* as a reason for refusing to produce an email she sent to DFEH attorneys.
- Employee had no attorney-client relationship with the DFEH attorneys.
- DFEH's client is the State of California.
HARASSMENT CASES
Judd v. Weinstein,
967 F. 3d 952 (9th Cir. 2020)

• The district court granted Weinstein’s motion to dismiss.
• The Ninth Circuit reversed, ruling that Weinstein and Judd’s relationship was “substantially similar” to the enumerated examples in Civil Code § 51.9 in that “one party is uniquely situated to exercise coercion or leverage over the other” by virtue of his or her “business, service, or professional” position.
The *continuing violation doctrine* provides a way for employees to reach back in time to base liability on earlier acts that may otherwise be barred by the statute of limitations.

Even if the conduct of prior management made a worker’s further complaints of harassment futile, the arrival of new management creates a new opportunity to seek help.

A worker can establish a continuing violation of FEHA with respect to all conduct that occurred after the change.
ATTORNEYS’ FEES CASE
Correctional officer alleged co-workers at his prison mocked his stutter.

The court of appeal affirmed the judgment in employee’s favor and held that employee should be allowed to recover *prevailing-party attorneys’ fees* based on his San Francisco counsel’s rates, because he had been unable to find an attorney in San Bernardino.
ADMINISTRATIVE REMEDIES CASES

- Nurses failed to exhaust administrative remedies against unit operator for FEHA claims and thus were precluded from bringing a civil action.
- Cumulative errors made it probable the jury would have reached a different result without the errors, and thus, hospital was entitled to a new trial.
Foroudi v. The Aerospace Corp.,
57 Cal. App. 5th 992 (2020)

- A plaintiff cannot exhaust his administrative remedies by adding new allegations to an administrative complaint after the administrative case has been closed and the plaintiff already has filed a civil complaint.
- Employer's decision to select employee for a “Reduction in Force” was not a pretext for age discrimination.
CASES RELATED TO JOB APPLICATION DISCLOSURES
Tilkey v. Allstate Ins. Co.,
56 Cal. App. 5th 521 (2020)

• For purposes of Labor Code § 432.7, a conviction does not require an entry of judgment of guilt – it merely requires the entry of a guilty plea.

• § 432.7's reference to diversion programs excludes out-of-state domestic violence programs.

• Compelled self-published defamation is a viable tort theory.
CASES RELATED TO EMPLOYMENT CONTRACTS
Ixchel Pharma, LLC v. Biogen, Inc.,
9 Cal. 5th 1130 (Cal. 2020)

• (1) Can Ixchel Pharma sue Biogen for tortiously interfering with an at-will contract existing between Ixchel and Forward Biotech, Inc. in the absence of an independently wrongful act?
• (2) Does Business & Professions Code § 16600 void a contract by which a business is restrained from engaging in a lawful trade with another business?
• The California Supreme Court ruled (1) a wrongful act must occur; and (2) "We express no view on the validity of the agreement at issue."
Midwest Motor Supply Co. v. Superior Court of Contra Costa Cnty., 56 Cal. App. 5th 702 (2020)

- Midwest asserted that its employee must litigate his claim in Ohio, pursuant to the *forum-selection clause* in his employment agreement.
- The court ruled that employee could void the forum-selection clause, because employer – after 1/1/17 – modified the agreement's compensation provision.
- Per Labor Code § 925: An employee primarily residing and working in California cannot be required to agree to a provision that would mandate he litigate outside of California a claim arising in California.
RETALIATION CASES

• In granting summary adjudication on plaintiff's CFRA interference claim, the trial court concluded that plaintiff “did not submit evidence which demonstrates that he requested additional time off due to his medical condition and was denied such leave.”

• Summary adjudication was properly granted because plaintiff failed to raise a triable issue of fact.
Willis v. City of Carlsbad,
48 Cal. App. 5th 1104 (2020)

- A peace officer sued Carlsbad Police Department, alleging it engaged in whistleblower retaliation against him in violation of Labor Code § 1102.5(b).
- Court held that doctrine of equitable tolling cannot be invoked to suspend Government Code § 911.2’s six-month deadline for filing a prerequisite government claim.
Moser v. Las Vegas Metro. Police Dep’t., 984 F.3d 900 (9th Cir. 2021)

- Defendant transferred Moser from the SWAT team after learning that of his social media post lamenting that “It’s a shame [captured suspect] didn’t have a few holes in him.”
- Moser sued for First Amendment retaliation; district court granted summary judgment for Defendant
- 9th Circuit reversed finding “genuine factual dispute” about the subjective and objective meaning of Moser’s words
WAGE & HOUR CASES
Whether workers are entitled to California-compliant wage statements depends on whether their principal place of work is in California.

For pilots, flight attendants, and other interstate transportation workers who do not perform the majority of their work in any one state, this test is satisfied when California serves as their base of operations, regardless of where they live or whether a collective bargaining agreement governs their pay.

• The “ABC test” (used to determine whether a worker is an independent contractor or employee) should apply retroactively.
Brady v. AutoZone Stores, Inc.,
960 F. 3d 1172 (9th Cir. 2020)

• The Ninth Circuit holds that class claims are moot when the class representative settles individual claims without retaining a financial stake in the outcome of the class claims.
Frlekin v. Apple, Inc., 973 F. 3d 947 (9th Cir. 2020), amended Oct. 29, 2020

- Time spent on employer’s premises waiting for – and undergoing – required exit searches of packages, bags, or personal devices, which employee brought to work purely for personal convenience, was compensable as **hours worked** within the meaning of California Industrial Welfare Commission Wage Order 7.
Herrera v. Zumiez, Inc.,
953 F. 3d 1063 (9th Cir. 2020)

• Employees required by an employer to call in prior to the beginning of their shift deserve reporting-time pay, even if the call-in does not result in the employees being provided work.
Betancourt v. OS Rest. Servs., LLC, 49 Cal. App. 5th 240 (2020)

- The Labor Code requires that an award of reasonable attorney fees be given to the prevailing party in any action brought for nonpayment of wages.
- An action brought for failure to provide meal periods or rest breaks does not involve nonpayment of wages.
- Therefore, attorney fees are not available for such claims.

- California court of appeal rules that Wage Order 16, § 5D provides no authority for union-represented employees and their employers to waive all compensation for employer-mandated travel time.

- Employer’s purported *unlimited vacation policy* had implied limit;
- Employer did not expressly convey the “unlimited” nature of its paid time off policy for managers;
- Non-resident employee did not have the right to payment of unused vacation time after termination.

- Employees' compulsory travel time is compensable since employees are foreclosed from numerous activities in which they might otherwise engage if they were permitted to travel to worksite by their own transportation.
FLSA CASES
Scalia v. Employer Sols. Staffing Grp., LLC, 951 F. 3d 1097 (9th Cir. 2020)

• The Ninth Circuit affirmed and held that:
  – The failure of ESSG’s employee, even if she was not a “manager,” to process payroll for overtime compensation was properly imputed to ESSG;
  – ESSG’s violation was “willful” and, therefore, the three-year statute of limitations applied; and
  – The FLSA did not allow the right of indemnification or contribution between employers for liability.
Private Attorneys General Act

- Employee's PAGA claim was not arbitrable;
- Harm that employee would suffer if forced to arbitrate a non-arbitrable PAGA claim outweighed any harm to employer.
Doe v. Google, Inc.,
54 Cal. App. 5th 948 (2020)

• A PAGA lawsuit challenging an employer’s confidentiality policies is not preempted by the National Labor Relations Act.
• Plaintiffs alleged violations of state statutes protecting competition, whistleblowing, and free speech.
• Such violations fit comfortably within the state’s historic police powers and address conduct affecting individual employees, as distinct from the NLRA’s focus on concerted activity.
WRONGFUL TERMINATION CASES

- Union leaders' alleged threat to terminate employee if he did not make requested $1,000 contribution to their political organization constituted a threat to inflict unlawful injury to employee's property, supporting claim against union for wrongful termination in violation of the public policy underlying extortion statutes.

- Substantial evidence supported jury's verdict that employer terminated employee to avoid paying employee his $260,000 annual bonus, as element of employee's wrongful termination claim.
LEGISLATIVE UPDATE - BILLS PASSED IN 2020
LAWS RELATED TO COVID-19
AB-685: Notice and Reporting Obligations for COVID-19 Workplace Exposure

• There are three key components of this new law:
  – Notice by Employer of Potential Exposure;
  – Report to Local Health Authorities of Outbreak;
  – Cal/OSHA Enforcement Changes.

• AB-685 remains in effect until January 1, 2023.
SB-1159: Presumption of Workers’ Compensation Liability for COVID-19 Illness Claims

- SB-1159 presumes that an employee’s COVID-19 is an occupational injury and therefore eligible for workers’ compensation if specified criteria are met.
AB-1867: Supplemental COVID-19 Paid Sick Leave

- Private employers with 500 or more U.S. employees must provide COVID-19 supplemental paid sick leave to their California employees.
LAWS RELATED TO LEAVES OF ABSENCE
SB-1383: Expansion of Family Care and Medical Leaves

- Under SB-1383, California Family Rights Act (CFRA) coverage is expanded to employers with **five or more** employees.
- SB-1383 makes other material changes to CFRA, such as eliminating the “key employee” exemption.
AB-2017:
Employee Designation of Reason for Use of Sick Leave

- Current law allows an employer to determine how to apply available sick leave to an employee’s absences.
- AB-2017 gives employees “sole discretion” to designate the reason for which they use their available sick leave.
AB-2992: Expansion of Crime Victim Leaves

- AB-2992 expands the leave protections provided under labor code §§ 230 and 230.1 to include victims of any violent crime, and to immediate family members of homicide victims.
- Employees are entitled to the leave “regardless of whether any person is arrested for, prosecuted for, or convicted of, committing the crime.”
AB-2399: Expansion of Paid Family Leave Benefits for Military Exigencies

- AB-2399 expands the Paid Family Leave disability insurance program’s definition of “military member.”
- Under AB-2399, a “military member” can be an offspring, spouse, domestic partner, or parent of an employee, where the military member is called to active duty in the U.S. Armed Forces.
LAWS RELATED TO SETTLEMENT AGREEMENTS
AB-2143: Expansion of Bases for No-Rehire Clause in Settlement Agreement

• Since 1/1/20, “no-rehire” clauses have been prohibited in settlement agreements resolving employment disputes, except where the employer has determined the former employee engaged in sexual harassment or assault.

• AB 2143 expands this exception to include a good-faith determination that the former employee engaged in criminal conduct (e.g., embezzlement).
LAWS RELATED TO WAGE & HOUR
AB-2257: Independent Contractors

• This law:
  – retains the “ABC test” for determining who can be classified as an independent contractor,
  – but introduces modifications to some of the current exceptions and adds new exceptions to the “ABC test.”
AB-1512: Limited Exemption from On-Duty Rest Periods for Union-Represented Security Guards

- Under AB-512, qualifying security officers may be required to remain on call during rest periods.
- If said security officer’s rest period is so interrupted, h/she must be permitted to restart the rest period as soon as practicable.
AB-2479: Rest Periods in Petroleum Facilities

• Labor Code § 226.75 provides a narrow exemption from the requirement that union employees with safety-sensitive positions at petroleum facilities must be relieved of all duties during rest periods.

• AB-2479 extends the exemption to 1/1/26.
AB-1947: Expanded Labor Code Retaliation Protections

• Labor Code § 1102.5 protects employees who, in good faith, have disclosed violations of law in the workplace.

• Employees who prevail on a § 1102.5 retaliation claim may obtain damages but not attorneys’ fees.

• AB-1947 authorizes a court to award to such employees reasonable attorneys’ fees.
AB-3075: *Enhanced Enforcement Mechanisms for Wage/Hour Judgments*

- Some employers have tried to avoid liability for unpaid wages by creating multiple subsidiaries or similar, making it difficult to enforce a judgment against them.

- AB-3075 tries to prevent such liability shields by requiring each party to the creation of a new corporation to attest they have no outstanding final judgments issued to them for violations of a wage order.
LAWS RELATED TO DISCRIMINATION AND HARASSMENT
SB-973: Pay Data Reporting

• SB-973 requires that, on or before March 31, 2021, and on or before March 31 each year thereafter, a large employer who is required to file a federal EEO-1 report must submit a pay data report to the Department of Fair Employment and Housing (DFEH) covering the prior calendar year.
AB-979: Corporate Boardroom Diversity

• AB-979 requires all publicly held companies whose principal executive offices are located in California to have a minimum number of directors from “underrepresented communities” on their board of directors.
• AB-979 defines “director from an underrepresented community” as “an individual who self-identifies as Black, African American, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian, or Alaska Native, or who self-identifies as gay, lesbian, bisexual, or transgender.”
AB-3175: Sexual Harassment Training for Minors in the Entertainment Industry

• In 2018, California enacted a law requiring sexual harassment prevention training for actors aged 14 to 17.
• AB-3175 clarifies that a parent must accompany the minor to training and certify the training has been completed.
• The law also modifies the foreign language translation requirement.
LAWS RELATED TO PRIVACY
AB-1281:  
Extension of Temporary Exemption Under CCPA for Human Resources Data

• In 2020, the CCPA was amended to create a one-year exemption from most protections of the CCPA regarding information an employer collects from employees.
• The purpose of the exemption was to allow further negotiations to determine how human resources data would be protected under the CCPA.
• This has not occurred due to the legislature’s focus on COVID-19.
• AB-1281 extends the exemption for another year – until 1/1/22.
LAWS RELATING TO CHILD AND SEX ABUSE REPORTING
AB-9163: Additional Mandated Reporters of Child Abuse

• AB-1963 makes the following employees “mandated reporters” (i.e., employees, who during their professional capacity, observe a child who the mandated reporter suspects is the victim of child abuse):
  - (1) a human resources employee of a business that employs minors and has five or more employees, and
  - (2) an adult whose duties require direct contact with minors in the workplace of a business with five or more employees.
Jennifer Baldocchi
Paul Hastings LLP
515 S. Flower St., 25th Floor
Los Angeles, CA 90071
(213) 683-6133
JenniferBaldocchi@paulhastings.com

Christina Cheung
Allred Maroko Goldberg
6300 Wilshire Blvd., Ste. 1500
Los Angeles, CA 90048
(323) 556-3446
ccheung@amglaw.com
41st LACBA Labor & Employment Law Symposium

What Else Happened In 2020? The Employment Law Developments You May Have Missed

Speakers:

Jennifer Baldocchi
Partner
Paul Hastings LLP

Christina Cheung
Partner
Allred, Maroko & Goldberg
Table of Contents

CASE LAW SYNOPSES ............................................................................................................... 1

CALIFORNIA FAIR EMPLOYMENT AND HOUSING ACT (“FEHA”) AND
FEDERAL EMPLOYMENT DISCRIMINATION STATUTES ............................................. 1

Arnold v. Dignity Health, 53 Cal. App. 5th 412 (2020) ................................................. 1
Anthony v. Trax Int’l Corp., 955 F. 3d 1123 (9th Cir. 2020) ..................................... 2
Babb v. Wilkie, 140 S.Ct. 1168 (2020) .................................................................... 2

Blue Fountain Pools and Spas Inc. v. Superior Court (of San Bernardino
County), 53 Cal. App. 5th 239 (Cal. Ct. App. 2020) ........................................... 3

Bostock v. Clayton Cty., 140 S. Ct. 1731 (2020) .................................................. 5

request granted, 2020 Cal. LEXIS 6748 (Sept. 30, 2020) .................................... 5

Natofsky v. City of New York, 140 S. Ct. 2668 (2020) ............................................... 6

Nuno v. California State University, Bakersfield,
47 Cal. App. 5th 799 (2020) .................................................................................... 7

Pinter-Brown v. Regents of the University of California,

Rizo v. Yovino, 950 F. 3d 1217 (9th Cir. 2020) ...................................................... 8

Shirvanyan v. Los Angeles Community College Dist.,
59 Cal. App. 5th 82 (2020) .................................................................................... 9

Talley v. County of Fresno, 51 Cal. App. 5th 1060 (2020) ................................... 10

Wood v. Superior Court of San Diego County,
46 Cal. App. 5th 562 (2020) .................................................................................. 10

ARBITRATION ............................................................................................................... 12

Alvarez v. Altamed Health Services Corporation, No. B305155 2021


Dennison v. Rosland Capital LLC, 47 Cal. App. 5th 204 (2020) ............................ 13


Garner v. Inter-State Oil Company, 52 Cal. App. 5th 619 (2020) ......................... 14


Kec v. Superior Court of Orange County, 51 Cal. App. 5th 972 (2020) ............... 16
## Table of Contents

ATTORNEYS’ FEES FOR OUT-OF-TOWN COUNSEL .............................................. 18  
*Caldera v. California Department of Corrections & Rehabilitation*,  
48 Cal. App. 5th 601 (2020) ..................................................................................... 18  
EMPLOYER LIABILITY FOR EMPLOYEE ACTIONS ............................................ 19  
EMPLOYMENT CONTRACTS .................................................................................... 21  
*Midwest Motor Supply Co. v. Superior Court of Contra Costa County*,  
56 Cal. App. 5th 702 (2020) ................................................................................... 21  
FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES ..................................... 22  
*Alexander v. Community Hospital of Long Beach*,  
46 Cal. App. 5th 238 (2020), review denied, 2020 Cal. LEXIS 4700  
(July 15, 2020) ........................................................................................................ 22  
FAIR CREDIT REPORTING ACT ("FCRA") .......................................................... 26  
*Luna v. Hansen & Adkins Auto Transp., Inc.*, 956 F.3d 1151  
(9th Cir. 2020) ........................................................................................................ 26  
FAMILY AND MEDICAL LEAVE ACT OF 1993 ("FMLA") .................................... 27  
*Olson v. United States (by & through Department of Energy)*,  
980 F.3d 1334 (9th Cir. 2020) .............................................................................. 27  
*Henry v. Adventist Health Castle Med. Ctr.*, 970 F.3d 1126 (9th Cir. 2020) ...... 28  
*People v. Superior Court of Los Angeles County*,  
57 Cal. App. 5th 619 (2020) .................................................................................. 29  
*Salter v. Quality Carriers, Inc.*, 974 F.3d 959 (9th Cir. 2020) ......................... 30  
JOB APPLICATION DISCLOSURES ...................................................................... 31  
*Garcia-Brower v. Premier Automotive Imports of CA, LLC*,  
55 Cal. App. 5th 961 (2020) .............................................................................. 31  
# Table of Contents

<table>
<thead>
<tr>
<th>NEGLIGENCE IN AN EMPLOYMENT IMMIGRATION</th>
<th>Page</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>OFFSHORE EMPLOYEES</th>
<th>34</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gulf Offshore Logistics, LLC v. Superior Court, 45 Cal. App. 5th 285 (2020)</td>
<td>34</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>PENSION AND RETIREMENT</th>
<th>35</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alameda County Deputy Sheriff’s Assn. v. Alameda County Employees’ Retirement Assn., 9 Cal. 5th 1032 (2020)</td>
<td>35</td>
</tr>
<tr>
<td>Castillo v. Metropolitan Life Insurance Company, 970 F.3d 1224 (9th Cir. 2020)</td>
<td>35</td>
</tr>
<tr>
<td>Deiro v. Los Angeles Civil Service Com., 56 Cal. App. 5th 925 (2020)</td>
<td>36</td>
</tr>
<tr>
<td>Guenther v. Lockheed Martin Corp., 972 F.3d 1043 (9th Cir. 2020)</td>
<td>36</td>
</tr>
<tr>
<td>Moreno v. California State Teachers’ Retirement System, 52 Cal. App. 5th 547 (2020)</td>
<td>37</td>
</tr>
<tr>
<td>Rutledge v. Pharmaceutical Care Management Association, 141 S.Ct. 474 (2020)</td>
<td>38</td>
</tr>
<tr>
<td>Salinas v. United States Railroad Retirement Board, 140 S.Ct. 813 (2021)</td>
<td>38</td>
</tr>
<tr>
<td>Stone v. UnitedHealthcare Insurance Company, 979 F.3d 770 (9th Cir. 2020)</td>
<td>39</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>PRIVATE ATTORNEYS GENERAL ACT OF 2004 (“PAGA”) ACTIONS</th>
<th>41</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bautista v. Fantasy Activewear, Inc., 52 Cal. App. 5th 650 (2020)</td>
<td>41</td>
</tr>
<tr>
<td>Canela v. Costco Wholesale Corp., 965 F.3d 694 (9th Cir. 2020)</td>
<td>42</td>
</tr>
<tr>
<td>Coughenour v. Del Taco, LLC, 57 Cal. App. 5th 740 (2020)</td>
<td>42</td>
</tr>
<tr>
<td>Kim v. Reins International California, Inc., 9 Cal.5th 73 (2020)</td>
<td>43</td>
</tr>
<tr>
<td>Olson v. Lyft, Inc., 56 Cal. App. 5th 862 (2020)</td>
<td>44</td>
</tr>
</tbody>
</table>

Los Angeles County Bar Association
Labor & Employment Law Symposium March 4, 2021
# Table of Contents

<table>
<thead>
<tr>
<th>Case</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sanchez v. Martinez, 54 Cal. App. 5th 535 (2020)</td>
<td>45</td>
</tr>
<tr>
<td>(depublished)</td>
<td></td>
</tr>
<tr>
<td>PUBLIC EMPLOYMENT RELATIONS BOARD (“PERB”)</td>
<td>47</td>
</tr>
<tr>
<td>Regents of the University of California v. Public Employment Relations Bd., 51 Cal. App. 5th 159 (2020)</td>
<td>47</td>
</tr>
<tr>
<td>RETALIATION</td>
<td>48</td>
</tr>
<tr>
<td>Moser v. Las Vegas Metro. Police Dep’t., 984 F.3d 900 (9th Cir. 2021)</td>
<td>49</td>
</tr>
<tr>
<td>Willis v. City of Carlsbad, 48 Cal. App. 5th 1104 (2020)</td>
<td>49</td>
</tr>
<tr>
<td>SEXUAL HARASSMENT UNDER CALIFORNIA CIVIL CODE</td>
<td>51</td>
</tr>
<tr>
<td>SECTION 51.9</td>
<td></td>
</tr>
<tr>
<td>Judd v. Weinstein, 967 F.3d 952 (9th Cir. 2020)</td>
<td>51</td>
</tr>
<tr>
<td>WAGE AND HOUR CASES</td>
<td>52</td>
</tr>
<tr>
<td>Adams v. West Marine Prods., Inc., 958 F.3d 1216 (9th Cir. 2020)</td>
<td>52</td>
</tr>
<tr>
<td>Barriga v. 99 Cents Only Stores LLC, 51 Cal. App. 5th 299 (2020)</td>
<td>53</td>
</tr>
<tr>
<td>Brady v. AutoZone Stores, Inc., 960 F.3d 1172 (9th Cir. 2020)</td>
<td>55</td>
</tr>
<tr>
<td>Castillo v. Bank of America, N.A, 980 F.3d 723 (9th Cir. 2020)</td>
<td>57</td>
</tr>
<tr>
<td>Clarke v. AMN Services, LLC, 2021 WL 419473 (9th Cir., Feb. 8, 2021)</td>
<td>58</td>
</tr>
<tr>
<td>David v. Queen of Valley Medical Center, 51 Cal. App. 5th 653 (2020), review denied, 2020 Cal. LEXIS 7102 (Oct. 21, 2020)</td>
<td>59</td>
</tr>
<tr>
<td>Davidson v. O’Reilly Auto Enterprises, LLC, 968 F.3d 955 (9th Cir. 2020)</td>
<td>60</td>
</tr>
</tbody>
</table>
Table of Contents

Frlekin v. Apple, Inc., 979 F.3d 639 (9th Cir. 2020), amended Oct. 29, 2020 ................................................................. 61


Herrera v. Zumiez, Inc., 953 F.3d 1063 (9th Cir. 2020) .............................................................. 63

Hildebrandt v. Staples the Office Superstore, LLC, 58 Cal. App. 5th 128 (2020) ................................................................. 64

Li v. Department of Industrial Relations, Division of Labor Standards Enforcement, 53 Cal. App. 5th 877 (2020) ................................................................. 64


Oman v. Delta Air Lines, Inc., 9 Cal.5th 762 (2020) ................................................................. 69

Scalia v. Employer Solutions Staffing Group, LLC, 951 F.3d 1097 (9th Cir. 2020) ................................................................. 71


Ward v. United Airlines, Inc., 9 Cal.5th 732 (2020) ................................................................. 72

Ward v. United Airlines, Inc., 986 F.3d 1234 (9th Cir. 2021) ................................................................. 73


STRATEGIC LAWSUITS AGAINST PUBLIC PARTICIPATION (“SLAPP”) ........ 76

Patel v. Chavez, 48 Cal. App. 5th 484 (2020) ................................................................. 76

TRADE SECRETS AND EMPLOYEE MOBILITY ................................................................. 77


Ixchel Pharma, LLC v. Biogen, Inc., 9 Cal.5th 1130 (2020) ................................................................. 77

UNEMPLOYMENT COMPENSATION ............................................................................... 79

<table>
<thead>
<tr>
<th>Table of Contents</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>TRADITIONAL LABOR</td>
<td>80</td>
</tr>
<tr>
<td>Association for Los Angeles Deputy Sheriffs v. County of Los Angeles, 60</td>
<td></td>
</tr>
<tr>
<td>Cal. App. 5th 327 (2021)</td>
<td>80</td>
</tr>
<tr>
<td>Campos v. Fresno Deputy Sheriff’s Ass’n., 441 F. Supp. 3d 945 (E.D. Cal. 2020)</td>
<td></td>
</tr>
<tr>
<td>Delta Sandblasting Company, Inc. v. NLRB, 969 F.3d 957 (9th Cir. 2020)</td>
<td>81</td>
</tr>
<tr>
<td>5th 141 (2020), review denied, 2020 Cal. LEXIS 7427 (Oct. 28, 2020)</td>
<td>82</td>
</tr>
<tr>
<td>International Alliance of Theatrical Stage Employees, Local 15 v.</td>
<td></td>
</tr>
<tr>
<td>National Labor Relations Board, 957 F.3d 1006 (9th Cir. 2020)</td>
<td>83</td>
</tr>
<tr>
<td>Int’l Longshore and Warehouse Union v. NLRB, 978 F.3d 625 (9th Cir. 2020)</td>
<td>84</td>
</tr>
<tr>
<td>WRONGFUL TERMINATION</td>
<td>85</td>
</tr>
<tr>
<td>Galeotti v. International Union of Operating Engineers Local No. 3,</td>
<td></td>
</tr>
<tr>
<td>48 Cal. App. 5th 850 (2020)</td>
<td>85</td>
</tr>
<tr>
<td>Feb. 10, 2021)</td>
<td>85</td>
</tr>
<tr>
<td>2021 LEGISLATIVE UPDATE – BILLS PASSED IN 2020</td>
<td>87</td>
</tr>
<tr>
<td>California Consumer Privacy Act</td>
<td>87</td>
</tr>
<tr>
<td>AB-1281 Extension of Temporary Exemption to California Consumer Privacy Act of 2018</td>
<td>87</td>
</tr>
<tr>
<td>Child Abuse or Neglect: Mandated Reporters</td>
<td>88</td>
</tr>
<tr>
<td>AB-1963 Child Abuse or Neglect: Mandated Reporters</td>
<td>88</td>
</tr>
<tr>
<td>Discrimination and Harassment</td>
<td>89</td>
</tr>
<tr>
<td>AB-979 – Requires Directors from Underrepresented Communities for California Public Corporations</td>
<td>89</td>
</tr>
<tr>
<td>AB-3175 – Sexual Harassment Training Requirements for Minors in the Entertainment Industry</td>
<td>89</td>
</tr>
<tr>
<td>Expansion of California Family Rights Act (“CFRA”)</td>
<td>90</td>
</tr>
<tr>
<td>SB-1383 Unlawful Employment Practice: Expansion of California Family Rights Act</td>
<td>90</td>
</tr>
<tr>
<td>Laws Related to COVID-19</td>
<td>91</td>
</tr>
</tbody>
</table>
# Table of Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>AB-685 – Notice and Reporting Obligations for COVID-19 Workplace Exposure</td>
<td>91</td>
</tr>
<tr>
<td>AB-1867 – Supplemental COVID-19 Paid Sick Leave</td>
<td>91</td>
</tr>
<tr>
<td>SB-1159 – Workers’ Compensation: COVID-19</td>
<td>92</td>
</tr>
<tr>
<td>Leave</td>
<td>93</td>
</tr>
<tr>
<td>AB-2017 Employee: Sick Leave: Kin Care</td>
<td>93</td>
</tr>
<tr>
<td>AB-2399 Paid Family Leave: Qualifying Exigency</td>
<td>93</td>
</tr>
<tr>
<td>AB-2992 California Expands Protections for Victims of Crime or Abuse</td>
<td>93</td>
</tr>
<tr>
<td>On-Call Unionized Security Officers</td>
<td>95</td>
</tr>
<tr>
<td>AB-1512 Employers Can Require Unionized Security Officers to Be on Call During Rest Periods</td>
<td>95</td>
</tr>
<tr>
<td>Pay Data Reporting</td>
<td>96</td>
</tr>
<tr>
<td>SB-973 – Guidance on New Pay Data Reporting Requirements</td>
<td>96</td>
</tr>
<tr>
<td>Rest Period Requirements</td>
<td>97</td>
</tr>
<tr>
<td>AB-2479 Rest Period Requirements for Safety-Sensitive Employees at Petroleum Facilities</td>
<td>97</td>
</tr>
<tr>
<td>Settlement Agreements</td>
<td>98</td>
</tr>
<tr>
<td>AB-2143 Settlement Agreements: Employment Disputes</td>
<td>98</td>
</tr>
<tr>
<td>Wage &amp; Hour</td>
<td>99</td>
</tr>
<tr>
<td>AB-2257 – Changes To AB 5 Independent Contractor Law</td>
<td>99</td>
</tr>
</tbody>
</table>
## Table of Authorities

<table>
<thead>
<tr>
<th>CASES</th>
<th>Page(s)</th>
</tr>
</thead>
</table>
| *Adams v. West Marine Prods., Inc.*  
958 F.3d 1216 (9th Cir. 2020)                                      | 52      |
| *Alameda County Deputy Sheriff’s Assn. v. Alameda County Employees’ Retirement Assn.*  
9 Cal. 5th 1032 (2020)                                      | passim  |
| *Alvarez v. Altamed Health Services Corporation,*  
| *American Pipe & Construction Co. v. Utah,*  
414 U.S. 538 (1974)                                      | 64      |
| *Anthony v. Trax Int’l Corp.*,  
955 F. 3d 1123 (9th Cir. 2020)                                      | 2       |
| *Armenta v. Osmose, Inc.*,  
135 Cal. App. 4th 314 (2005)                                      | 70      |
| *Arnold v. Dignity Health,*  
53 Cal. App. 5th 412 (2020)                                      | passim  |
| *Association for Los Angeles Deputy Sheriffs v. County of Los Angeles,*  
60 Cal. App. 5th 327 (2021)                                      | 80      |
| *Augustus v. ABM Security Services, Inc.*,  
2 Cal.5th 257 (2016)                                      | 56, 95  |
| *Babb v. Wilkie,*  
140 S.Ct. 1168 (2020)                                      | 2       |
| *Batze v. Safeway, Inc.*,  
10 Cal. App. 5th 440 (2017)                                      | 64      |
| *Betancourt v. Prudential Overall Supply,*  
9 Cal. App. 5th 439 (2017)                                      | 59      |
| *Bingener v. City of Los Angeles,*  
44 Cal. App. 5th 134 (2020)                                      | 19      |
| *Bostock v. Clayton Cty.*,  
140 S. Ct. 1731 (2020)                                      | 5       |
Table of Authorities

<table>
<thead>
<tr>
<th>Case</th>
<th>Page(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Brady v. AutoZone Stores, Inc.</td>
<td>55</td>
</tr>
<tr>
<td>[960 F.3d 1172 (9th Cir. 2020)]</td>
<td></td>
</tr>
<tr>
<td>Brown v. TGS Management Company,</td>
<td>passim</td>
</tr>
<tr>
<td>LLC, 57 Cal. App. 5th 303 (2020)</td>
<td></td>
</tr>
<tr>
<td>Caldera v. California Department of Corrections &amp; Rehabilitation,</td>
<td>passim</td>
</tr>
<tr>
<td>48 Cal. App. 5th 601 (2020)</td>
<td></td>
</tr>
<tr>
<td>Calleros v. Rural Metro of San Diego, Inc.</td>
<td>56, 64</td>
</tr>
<tr>
<td>58 Cal. App. 5th 660 (2020)</td>
<td></td>
</tr>
<tr>
<td>Campos v. Fresno Deputy Sheriff’s Ass’n,</td>
<td>80</td>
</tr>
<tr>
<td>441 F. Supp. 3d 945 (E.D. Cal. 2020)</td>
<td></td>
</tr>
<tr>
<td>Canela v. Costco Wholesale Corp.,</td>
<td>42</td>
</tr>
<tr>
<td>965 F.3d 694 (9th Cir. 2020)</td>
<td></td>
</tr>
<tr>
<td>Cann v. Carpenters’ Pension Trust Fund for Northern California</td>
<td>36</td>
</tr>
<tr>
<td>(9th Cir. 1993) 989 F.2d 313</td>
<td></td>
</tr>
<tr>
<td>Castillo v. Bank of America, NA,</td>
<td>57</td>
</tr>
<tr>
<td>980 F.3d 723 (9th Cir. 2020)</td>
<td></td>
</tr>
<tr>
<td>Castillo v. Metropolitan Life Insurance Company,</td>
<td>35</td>
</tr>
<tr>
<td>970 F.3d 1224 (9th Cir. 2020)</td>
<td></td>
</tr>
<tr>
<td>Clarke v. AMN Services, LLC, LLC,</td>
<td>58</td>
</tr>
<tr>
<td>2021 WL 419473 (9th Cir., Feb. 8, 2021)</td>
<td></td>
</tr>
<tr>
<td>Correia v. NB Baker Electric, Inc.,</td>
<td>59</td>
</tr>
<tr>
<td>32 Cal. App. 5th 602 (2019)</td>
<td></td>
</tr>
<tr>
<td>Davidson v. O’Reilly Auto Enterprises, LLC,</td>
<td>60</td>
</tr>
<tr>
<td>968 F.3d 955 (9th Cir. 2020)</td>
<td></td>
</tr>
<tr>
<td>Delta Sandblasting Company, Inc. v. NLRB,</td>
<td>81</td>
</tr>
<tr>
<td>969 F.3d 957 (9th Cir. 2020)</td>
<td></td>
</tr>
<tr>
<td>Doe v. Google, Inc.,</td>
<td>43, 45, 77, 79</td>
</tr>
<tr>
<td>54 Cal. App. 5th 948 (2020)</td>
<td></td>
</tr>
<tr>
<td>Duckworth v. Tri-Modal Distrib. Servs.,</td>
<td>passim</td>
</tr>
<tr>
<td>47 Cal. App. 5th 532 (2020), request granted, 2020 Cal. LEXIS 6748</td>
<td></td>
</tr>
<tr>
<td>(Sept. 30, 2020)</td>
<td></td>
</tr>
</tbody>
</table>

ix

Los Angeles County Bar Association
Labor & Employment Law Symposium March 4, 2021

LEGAL_US_W # 107047230.2
### Table of Authorities

<table>
<thead>
<tr>
<th>Case</th>
<th>Page(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Epic Systems Corp. v. Lewis,</td>
<td>44, 59</td>
</tr>
<tr>
<td>138 S. Ct. 1612 (2018)</td>
<td></td>
</tr>
<tr>
<td>Fleming Distribution Company v. Younan,</td>
<td>13, 54</td>
</tr>
<tr>
<td>49 Cal. App. 5th 73 (2020)</td>
<td></td>
</tr>
<tr>
<td>Frlekin v. Apple Inc.,</td>
<td>68</td>
</tr>
<tr>
<td>8 Cal. 5th 1038 (2020)</td>
<td></td>
</tr>
<tr>
<td>Frlekin v. Apple, Inc.,</td>
<td>61</td>
</tr>
<tr>
<td>979 F.3d 639 (9th Cir. 2020), amended</td>
<td></td>
</tr>
<tr>
<td>Garcia-Brower v. Premier Automotive Imports of CA, LLC,</td>
<td>31, 44</td>
</tr>
<tr>
<td>55 Cal. App. 5th 961 (2020)</td>
<td></td>
</tr>
<tr>
<td>Garner v. Inter-State Oil Company,</td>
<td>passim</td>
</tr>
<tr>
<td>52 Cal. App. 5th 619 (2020)</td>
<td></td>
</tr>
<tr>
<td>Gerawan Farming, Inc. v. Agricultural Labor Relations Bd.</td>
<td>82</td>
</tr>
<tr>
<td>(2017) 3 Cal.5th 1118, 1130</td>
<td></td>
</tr>
<tr>
<td>Gross v. FBL Financial Services, Inc.,</td>
<td>6</td>
</tr>
<tr>
<td>557 U.S. 167 (2009)</td>
<td></td>
</tr>
<tr>
<td>Guenther v. Lockheed Martin Corp.</td>
<td>36</td>
</tr>
<tr>
<td>972 F.3d 1043 (9th Cir. 2020)</td>
<td></td>
</tr>
<tr>
<td>(9th Cir. 2016) 646 F. App’x 567 (unpublished)</td>
<td>37</td>
</tr>
<tr>
<td>Gulf Offshore Logistics, LLC v. Superior Court,</td>
<td>34</td>
</tr>
<tr>
<td>45 Cal. App. 5th 285 (2020)</td>
<td></td>
</tr>
<tr>
<td>Gulf Oil Co. v. Bernard,</td>
<td>53</td>
</tr>
<tr>
<td>452 U.S. 89 (1981)</td>
<td></td>
</tr>
<tr>
<td>Gutierrez v. S. Counties Oil Co.,</td>
<td>45</td>
</tr>
<tr>
<td>People ex rel. Harris v. Pac Anchor Transport., Inc.,</td>
<td>29</td>
</tr>
<tr>
<td>59 Cal. 4th 772 (2014)</td>
<td></td>
</tr>
<tr>
<td>970 F.3d 1126 (9th Cir. 2020)</td>
<td></td>
</tr>
<tr>
<td>Hernandez v. State Personnel Board,</td>
<td>85</td>
</tr>
<tr>
<td>Authority</td>
<td>Citation</td>
</tr>
<tr>
<td>-----------</td>
<td>----------</td>
</tr>
<tr>
<td>Herrera v. Zumiez, Inc.</td>
<td>953 F.3d 1063 (9th Cir. 2020)</td>
</tr>
<tr>
<td>Hooker v. Dep’t Transp.</td>
<td>27 Cal. 4th 198 (2002)</td>
</tr>
<tr>
<td>Int’l Longshore and Warehouse Union v. NLRB</td>
<td>978 F.3d 625 (9th Cir. 2020)</td>
</tr>
<tr>
<td>International Alliance of Theatrical Stage Employees, Local 15 v. National Labor Relations Board</td>
<td>957 F.3d 1006 (9th Cir. 2020)</td>
</tr>
<tr>
<td>Iskanian v. CLS Transportation Los Angeles, LLC</td>
<td>59 Cal.4th 348 (2014)</td>
</tr>
<tr>
<td>Jolly v. Eli Lilly &amp; Co.</td>
<td>44 Cal.3d 1103 (1988)</td>
</tr>
<tr>
<td>Judd v. Weinstein</td>
<td>967 F.3d 952 (9th Cir. 2020)</td>
</tr>
<tr>
<td>Kirby v. Immoos Fire Protection, Inc.</td>
<td>53 Cal.4th 1244 (2012)</td>
</tr>
<tr>
<td>Kouba v. Allstate Insurance Co.</td>
<td>691 F.2d 873 (9th Cir. 1982)</td>
</tr>
<tr>
<td>Luna v. Hansen &amp; Adkins Auto Transp., Inc.</td>
<td>956 F.3d 1151 (9th Cir. 2020)</td>
</tr>
</tbody>
</table>
# Table of Authorities

<table>
<thead>
<tr>
<th>Case</th>
<th>Page(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td><em>Midwest Motor Supply Co. v. Superior Court of Contra Costa County,</em></td>
<td>56 Cal. App. 5th 702 (2020)</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td><em>Moser v. Las Vegas Metro. Police Dep’t.</em>,</td>
<td>984 F.3d 900 (9th Cir. 2021)</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td><em>Natofsky v. City of New York,</em></td>
<td>140 S. Ct. 2668 (2020)</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td><em>Olson v. United States (by &amp; through Department of Energy),</em></td>
<td>980 F.3d 1334 (9th Cir. 2020)</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td><em>Our Lady of Guadalupe School v. Morrissey-Berru,</em></td>
<td>140 S.Ct. 2049 (2020)</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td><em>Rizo v. Yovino,</em></td>
<td>950 F. 3d 1217 (9th Cir. 2020)</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td><em>Rutledge v. Pharmaceutical Care Management Association,</em></td>
<td>141 S.Ct. 474 (2020)</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td><em>Saavedra v. Orange County Consolidated Transportation etc. Agency,</em></td>
<td>11 Cal. App. 4th 824 (1992)</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td><em>Salinas v. United States Railroad Retirement Board,</em></td>
<td>140 S.Ct. 813 (2021)</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
</tbody>
</table>

xii

Los Angeles County Bar Association
Labor & Employment Law Symposium March 4, 2021
# Table of Authorities

<table>
<thead>
<tr>
<th>Citation</th>
<th>Page(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>Salter v. Quality Carriers, Inc.</em>, 974 F.3d 959 (9th Cir. 2020)</td>
<td>30</td>
</tr>
<tr>
<td><em>Scalia v. Employer Solutions Staffing Group, LLC</em>, 951 F.3d 1097 (9th Cir. 2020)</td>
<td>71</td>
</tr>
<tr>
<td><em>Shirvanyan v. Los Angeles Community College Dist.</em>, 59 Cal. App. 5th 82 (2020)</td>
<td>9, 14</td>
</tr>
<tr>
<td><em>Stone v. UnitedHealthcare Insurance Company</em>, 979 F.3d 770 (9th Cir. 2020)</td>
<td>39</td>
</tr>
<tr>
<td><em>Talley v. County of Fresno</em>, 51 Cal. App. 5th 1060 (2020)</td>
<td><em>passim</em></td>
</tr>
<tr>
<td><em>University of Texas Southwestern Medical Center v. Nassar</em>, 570 U.S. 338 (2013)</td>
<td>6</td>
</tr>
<tr>
<td><em>Ward v. Tilly's, Inc.</em>, 31 Cal. App. 5th 1167 (2019), review denied (May 15, 2019)</td>
<td>63, 72, 73, 74</td>
</tr>
<tr>
<td><em>Ward v. United Airlines, Inc.</em>, 986 F.3d 1234 (9th Cir. 2021)</td>
<td>73</td>
</tr>
<tr>
<td><em>Wood v. Superior Court of San Diego County</em>, 46 Cal. App. 5th 562 (2020)</td>
<td>10, 16, 22, 33</td>
</tr>
</tbody>
</table>

### LEGISLATIVE UPDATES

- AB-1281 Extension of Temporary Exemption to California Consumer Privacy Act of 2018 ................................................................. 87
- AB-2257 – Changes To AB 5 Independent Contractor Law .................................................. 99
- AB-1512 Employers Can Require Unionized Security Officers to Be on Call During Rest Periods ................................................... 95
# Table of Authorities

<table>
<thead>
<tr>
<th>Bill Number</th>
<th>Description</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>AB-1867</td>
<td>Supplemental COVID-19 Paid Sick Leave</td>
<td>91</td>
</tr>
<tr>
<td>AB-1963</td>
<td>Child Abuse or Neglect: Mandated Reporters</td>
<td>88</td>
</tr>
<tr>
<td>AB-2017</td>
<td>Employee: Sick Leave: Kin Care</td>
<td>93</td>
</tr>
<tr>
<td>AB-2143</td>
<td>Settlement Agreements: Employment Disputes</td>
<td>98</td>
</tr>
<tr>
<td>AB-2399</td>
<td>Paid Family Leave: Qualifying Exigency</td>
<td>93</td>
</tr>
<tr>
<td>AB-2479</td>
<td>Rest Period Requirements for Safety-Sensitive Employees at Petroleum Facilities</td>
<td>97</td>
</tr>
<tr>
<td>AB-2992</td>
<td>California Expands Protections for Victims of Crime or Abuse</td>
<td>93</td>
</tr>
<tr>
<td>AB-3175</td>
<td>Sexual Harassment Training Requirements for Minors in the Entertainment Industry</td>
<td>89</td>
</tr>
<tr>
<td>AB-685</td>
<td>Notice and Reporting Obligations for COVID-19 Workplace Exposure</td>
<td>91</td>
</tr>
<tr>
<td>AB-979</td>
<td>Requires Directors from Underrepresented Communities for California Public Corporations</td>
<td>89</td>
</tr>
<tr>
<td>SB-1159</td>
<td>Workers’ Compensation: COVID-19</td>
<td>92</td>
</tr>
<tr>
<td>SB-1383</td>
<td>Unlawful Employment Practice: Expansion of California Family Rights Act</td>
<td>90</td>
</tr>
<tr>
<td>SB-973</td>
<td>Guidance on New Pay Data Reporting Requirements</td>
<td>96</td>
</tr>
</tbody>
</table>
CASE LAW SYNOPSES

CALIFORNIA FAIR EMPLOYMENT AND HOUSING ACT (“FEHA”) AND FEDERAL EMPLOYMENT DISCRIMINATION STATUTES


Virginia M. Arnold, an African American woman, was employed as a medical assistant by Dignity Health in 2003 when she was 55 or 56 years old until her termination in 2013. In her lawsuit, Arnold alleged defendants engaged in discrimination, harassment, and retaliation against her based upon her age and her association with African Americans, including by terminating her, in violation of the FEHA. The trial court granted Dignity Health’s motion for summary judgment finding that defendants had provided evidence of legitimate reason for Arnold’s termination and that Arnold had failed to offer any evidence that defendants’ actions were discriminatory, harassing, or retaliatory. Defendants claimed Arnold was terminated for her (1) failure to safeguard personal health information, a HIPAA violation, (2) display of inappropriate materials in the workplace, (3) careless performance of duties, (4) failure to communicate honestly and be truthful during the course of the investigation, and (5) failure to take responsibility for her actions. Arnold also had a prior history of discipline prior to her termination.

Arnold contended that her age discrimination claim was supported by several age-related comments made by the director (Noyes) and her former supervisor (Slaugh). However, Arnold admitted that at the time of her termination, Slaugh was no longer her supervisor and was not part of the termination decision. Further, while the decisionmakers communicated with Noyes regarding the discipline imposed, Noyes was “not in the chain of command regarding [her] discipline” and “was not part of the group . . . evaluating [her].”

The court of appeal affirmed, holding that any alleged comments about her age from other employees who were not materially involved in Arnold’s termination did not raise a triable issue of fact. The court of appeal noted that there was insufficient evidence that Noyes’ comments (i.e., expressing surprise that Arnold was “that old”, asking Arnold why she was still working) were made with discriminatory animus. The court of appeal also found that Arnold’s evidence in support of her associational discrimination claim was insufficient to establish a triable issue of material fact. Arnold alleged that she had complained to Slaugh, her former supervisor, about alleged mistreatment of a Black coworker, but Slaugh was not involved in Arnold’s termination and there was no evidence that any decisionmaker or anyone involved in the termination process knew about the complaint. Finally, the court of appeal rejected Arnold’s argument that Dignity Health’s alleged failure to follow its own disciplinary process created a triable issue of fact because she had not presented any evidence supporting a rational inference that discrimination was the true reason for her termination.
Anthony v. Trax Int’l Corp., 955 F. 3d 1123 (9th Cir. 2020)

Plaintiff Sunny Anthony sued her employer, TRAX International Corporation, for disability discrimination under the American Disabilities Act (“ADA”). Anthony alleged TRAX terminated her because of her disability, post-traumatic stress disorder (“PTSD”), and failed to engage in the interactive process that the ADA requires in finding a reasonable accommodation.

Anthony worked as a “Technical Writer I” for TRAX beginning in April 2010. In 2012, Anthony’s PTSD worsened, causing her to miss work. She obtained FMLA leave. Upon the expiration of her leave, Anthony was given thirty days to obtain a full work release from her doctor. She was informed that if she failed to do so and did not return to work, she would be terminated. Anthony failed to submit the release and was terminated.

The district court granted summary judgment in favor of TRAX because of after-acquired evidence that TRAX presented, namely, that Anthony purported to have a college degree on her employment application, when she did not. Because Anthony’s position required a college degree, Anthony failed to show that she was a “qualified individual” as is required to prove a \textit{prima facie} case of disability discrimination.

The court of appeal affirmed the judgment. The Equal Employment Opportunity Commission (“EEOC”) established a two-part test to determine whether an individual is qualified for the purpose of a \textit{prima facie} case of disability discrimination. First, courts should determine whether the individual satisfies the prerequisites of a job, meaning the individual must have the requisite skill, experience, and education. Second, courts should determine whether the individual could perform the essential functions of a job with or without a reasonable accommodation. The court of appeal applied this test, consistent with their precedent, despite the EEOC’s argument (as \textit{amicus curiae}) that the court should disregard their regulation.

The court of appeal held that although after-acquired evidence cannot establish a superseding, non-discriminatory justification for termination, it can show that an individual is not qualified under the ADA. Because Anthony did not have a bachelor’s degree at the time she was terminated, she was not qualified. Thus, TRAX had no obligation to engage in the interactive process. The court of appeal affirmed the district court’s judgment.

Babb v. Wilkie, 140 S.Ct. 1168 (2020)

Noris Babb worked as a clinical pharmacist at a U.S. Department of Veterans Affairs (“VA”) Medical Center. He sued the Secretary of Veterans Affairs (Wilkie), asserting claims under Title VII and the Age Discrimination in Employment Act (“ADEA”) for discrimination based on gender and age, hostile work environment, and retaliation. The district court granted summary judgment for the VA after finding that Babb had established a \textit{prima facie} case, that the VA had proffered legitimate reasons for the challenged actions, and that no jury could reasonably conclude the VA’s reasons were pretextual.
On appeal, Babb argued that the district court’s requirement that age be a but-for causation was inappropriate under the federal-sector provision of the ADEA. (See 29 U.S.C. § 633a(a).)

The U.S. Supreme Court held that ADEA’s federal sector provision demands that personnel actions be untainted by any consideration of age and that Babb can establish that the VA violated § 633a(a) of the ADEA without proving that age was a but-for cause of the VA’s personnel actions. The Supreme Court noted that but-for causation is nevertheless important in determining the appropriate remedy. “Thus, § 633a(a) plaintiffs who demonstrate only that they were subjected to unequal consideration cannot obtain reinstatement, back pay, compensatory damages, or other forms of relief related to the end result of an employment decision. To obtain such remedies, these plaintiffs must show that age discrimination was a but-for cause of the employment outcome . . . Although unable to obtain such relief, plaintiffs are not without a remedy if they show that age was a but-for cause of differential treatment in an employment decision but not a but-for cause of the decision itself. In that situation, plaintiffs can seek injunctive or other forward-looking relief.”

Blue Fountain Pools and Spas Inc. v. Superior Court (of San Bernardino County), 53 Cal. App. 5th 239 (Cal. Ct. App. 2020)

Daisy Arias worked at Blue Fountain Pools and Spas Inc. (“Blue Fountain”) from around October 2006 to May 2017. Arias alleged that Sean Lagrave, a salesman at Blue Fountain and her supervisor, sexually harassed her throughout most of the time she worked for Blue Fountain. Lagrave grabbed Arias’s butt and frequently touched her waist and hair in passing. He compared himself to other men and told Arias, “I’m better” and repeatedly bragged about his own sexual prowess. Lagrave regularly talked about going to a nearby strip club and showed photographs of himself having anal sex with a woman and receiving oral sex to Arias. He also bragged about engaging in threesomes and showed Arias pictures of three people engaged in sex and photographs of nude women with semen on their faces or breasts. Arias regularly complained to owner Hubbell about Lagrave’s conduct. Hubbell at times promised to talk to Lagrave, but the harassment continued. She says on at least one occasion, Blue Fountain suspended Lagrave in connection with his conduct toward her, but Lagrave persisted in his sexual harassment of her.

In January 2015, Defendant Farhad Farhadian bought Blue Fountain and became the owner. Arias testified that when she first met Farhadian, she reported her problems with Lagrave and asked Farhadian to observe Lagrave closely. Farhadian claimed Blue Fountain had a “zero tolerance” harassment and discrimination policy and that it was their policy that any such conduct should be reported directly to him and that he would investigate the complaint personally. Instead of taking prompt remedial action as the law requires, Farhadian began to participate in the hostile work environment and sexual harassment. Arias repeatedly heard Farhadian and Lagrave discussing Lagrave’s girlfriend’s breast implants. Farhadian and Lagrave frequented the local strip club together and Lagrave began telling Arias details about their trips. In the year after Farhadian bought Blue Fountain, Lagrave showed Arias sexually explicit photographs of his girlfriend around five to eight times. Lagrave also talked about his
girlfriend’s breast implants and the fact she was “addicted to implants,” “wanted to go bigger,” and even wanted an “ass implant,” among other things. He also told Arias his girlfriend paid for lap dances at the strip club and had sexual encounters with the dancers.

On April 21, 2017, Lagrave physically assaulted Arias at work. When she objected to additional inappropriate comments, Lagrave called Arias a “dumb bitch” and yelled “fuck you bitch.” When Arias objected further, Lagrave got in her face and used his chest to bump her chest. Arias called the police, who came to the scene. The police interviewed witnesses, one of whom corroborated Arias’s account of the assault. Arias did not return to work and kept Farhadian notified of her status. She requested that Farhadian terminate Lagrave. Farhadian declined to do so and ultimately claimed that Arias had quit her job by not returning to work.

After Arias’ employment ended in 2017, she filed charges of sexual harassment, failure to prevent discrimination and harassment, discrimination, retaliation, assault and battery, and constructive wrongful termination against Lagrave, Farhadian, and Blue Fountain with the DFEH for Lagrave’s sexual harassment that had begun in 2006. Defendants moved for summary adjudication requesting that the trial court dismiss Arias’s sexual harassment and failure to prevent harassment causes of action as time-barred by the applicable statute of limitations. Defendants argued that Arias could not rely on the continuing violation doctrine to avoid the statute of limitations because a “reasonable employee would have long ago understood from Blue Fountain’s actions that any further efforts to resolve her complaints and end the harassment were futile,” thus commencing the running of her statute of limitations. The trial court denied defendant’s motion.

Blue Fountain filed a petition for writ of mandate seeking an order from the appellate court to compel the trial court to grant its motion. The court of appeal denied the petition and affirmed the trial court’s ruling. The Court noted that Blue Fountain’s argument “turns the continuing violation doctrine on its head and transforms the statute of limitations from a shield into a sword . . . [T]he continuing violation doctrine provides a way for employees to escape the effects of the statute of limitations and reach back in time to base liability on earlier acts. It doesn’t provide employers a way to expand the scope of the statute of limitations to reach forward to bar claims based on acts within the statutory period.” The court of appeal held that Arias’s claim was not barred by the statute of limitations on three grounds. First, there was evidence of sexual harassment occurring within the statutory period including the April 21, 2017 incident when Lagrave used gender slurs against Arias and physically assaulted her. Second, even if it had been futile for Arias to complain further about her working conditions under prior management, a new owner, Farhadian, took over the business in 2015. The arrival of new management created a new opportunity for her to seek help. Finally, there was a triable issue of fact as to whether a reasonable employee would have concluded that Blue Fountain’s prior management made clear that complaining more was futile and that Arias’s only recourse would be suing her employer.
**Bostock v. Clayton Cty., 140 S. Ct. 1731 (2020)**

Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against any individual “because of such individual’s…sex[.]” In *Bostock*, the United States Supreme Court considered whether this provision prohibits employers from discriminating against an individual because he or she is homosexual or transgender. The Supreme Court concluded that an employer who fires an individual for being homosexual or transgender does violate Title VII’s prohibition on discrimination “because of” sex.


Bonnie Ducksworth and Pamela Pollock were customer service representatives at Tri-Modal Distribution Services (“Tri-Modal”). They sued alleging that Tri-Modal failed to promote them based on their race in violation of the FEHA. Pollock also sued for sexual harassment alleging that after she ended her relationship with Tri-Modal’s executive vice president, Mike Kelso, he blocked her promotions. Ducksworth and Pollock also sued the two staffing agencies, Scotts Labor Leasing Company, Inc. (“Scott”) and Pacific Leasing, Inc. (“Pacific”), who had supplied Ducksworth and Pollock to Tri-Modal. The trial court granted summary judgment for Scotts and Pacific because the decision about whom to promote was made solely by Tri-Modal and they “did not provide any input, have any authority or make any decision regarding the promotion of any employee leased to Tri-Modal.” The trial court granted a separate summary judgment for Kelso agreeing that Pollock did not timely file her sexual harassment claim against him. The statute of limitations had commenced running as of the time Pollock had been told she was denied the promotion and not when the promoted employee assumed the position.

The Court of Appeal affirmed.

**Our Lady of Guadalupe School v. Morrissey-Berru, 140 S.Ct. 2049 (2020)**

*Our Lady of Guadalupe* was consolidated with another case, *St. James School v. Biel*. In the first case, Agnes Morrissey-Berru worked as an elementary school teacher at Our Lady of Guadalupe School (OLG), a Catholic school. She brought claims under the Age Discrimination in Employment Act (ADEA) alleging that she was demoted and her teaching contract was not renewed based on her age. The district court granted summary judgment in favor of OLG and Morrissey-Berru appealed. The Ninth Circuit reversed.

In the second case, Kristen Biel, a teacher at a different Catholic elementary school, St. James, sued under the Americans with Disabilities Act (ADA), alleging that St. James discharged her because she had requested a leave of absence to obtain treatment for breast cancer. The district court granted summary judgment to St. James, and Biel appealed. The Ninth Circuit reversed and remanded and denied rehearing and rehearing en banc. Following Biel’s death, her husband litigated her suit as representative of her estate. *Certiorari* was granted in both cases, and the cases were consolidated.
In a 7-2 opinion (with Justices Sotomayor and Ginsburg dissenting), the Supreme Court reversed the Ninth Circuit and held that the ministerial exception barred both teachers’ employment discrimination claims: “When a school with a religious mission entrusts a teacher with the responsibility of educating and forming students in the faith, judicial intervention into disputes between the school and the teacher threatens the school’s independence in a way that the First Amendment does not allow.” The Supreme Court in *Hosanna-Tabor* identified four relevant “circumstances” in determining that the plaintiff in that case was covered by the ministerial exception: (1) “the title of ‘minister;’” (2) her position “reflected a significant degree of religious training followed by a formal process of commissioning;” (3) she held “out as a minister of the Church;” and (4) her “job duties reflected a role in conveying the Church’s message and carrying out its mission.” The Supreme Court declined to “adopt a rigid formula for deciding when an employee qualifies as a minister,” and that the “ministerial exception” should apply to any employee who “leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or teacher of its faith.”

In the present case, the Supreme Court emphasized again that there was “no rigid formula” for when to apply the ministerial exception and that the Ninth Circuit “misunderstood” its holding in *Hosanna-Tabor* by treating the circumstances as “factors to be assessed and weighed in every case.” The Supreme Court found that the Ninth Circuit had “invested undue significance in the fact that Morrissey-Berru and Biel did not have clerical titles” and “assigned too much weight to the fact that they had less formal religious education than [the *Hosanna-Tabor* plaintiff].” Both Morrissey-Berru and Biel “performed vital religious duties,” and their positions qualified for the ministerial exception. The Supreme Court also rejected respondents’ argument that an employee can never come within the ministerial exception unless the employee is a “practicing” member of the religion with which the employer is associated.

**Natofsky v. City of New York, 140 S. Ct. 2668 (2020)**

Claimant Richard Natofsky sued his employer, the City of New York, alleging he faced discrimination on the basis of his disability in that his employer failed to accommodate his hearing impairment. The district court granted the City summary judgment, holding that Natofsky failed to show that his supervisor had given him a negative performance review solely because of his disability, and City Commissioner Mark Peters had demoted him for a discriminatory reason.

On appeal, Natofsky argued that the court erred by failing to apply the ADA’s causation standard to the claim that he had filed under the Rehabilitation Act. The court agreed, reasoning that when Congress amended the Rehabilitation Act to add a provision that the standards under Title I of the ADA apply, the Act’s existing provision with its general causation standard was displaced.

Natofsky then argued that the ADA’s causation standard is akin to the mixed-motive causation standard from Title VII of the Civil Rights Act of 1964. The court of appeal disagreed, applying the rationale articulated in United States Supreme Court decisions *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009) and *University of Texas Southwestern Medical*
Center v. Nassar, 570 U.S. 338 (2013). The ADA does not include a set of provisions like Title VII's § 2000e-2(m), allowing a plaintiff to prove his/her case by showing that discrimination was a motivating factor in the adverse decision. In fact, Congress amended Title VII and the ADA at the same time, and neglected to add a “motivating factor” standard to the ADA. As such, plaintiffs must prove discrimination was the “but-for” cause of any adverse action. Because there was no evidence of discriminatory intent in Natofsky’s performance review or demotion, the court affirmed the district court’s grant of summary judgment.

**Nuño v. California State University, Bakersfield, 47 Cal. App. 5th 799 (2020)**

Anthony Nuño, a college professor, representing himself, filed a lawsuit against his employer, California State University, Bakersfield (“CSU”) and the Vice President David Schecter for unlawful discrimination based on race and sexual orientation and retaliation in violation of the FEHA. CSU successfully demurred to the initial complaint, and Nuño was granted leave to amend. When Nuño failed to file an amended complaint within the time given, CSU submitted an ex parte application for dismissal with prejudice. The trial court heard the application and granted the dismissal with prejudice while Nuño was out of the country attending an education conference.

The Court of Appeal reversed holding that the trial court prejudicially abused its discretion in dismissing the action and entering judgment in favor of the Employer. The trial court’s communications with Nuño during the case management conference were not clear and understandable as to when he had to file an amended complaint. The minute order did not clarify the ambiguity either and did not inform Nuño that there was a deadline for filing the amended complaint before the next case management conference and that there was a possibility his lawsuit would be dismissed if it was not prepared by then.

**Pinter-Brown v. Regents of the University of California, 48 Cal. App. 55 (2020)**

On June 22, 2016, Dr. Lauren Pinter-Brown filed a complaint against the University of California-Los Angeles (“UCLA”), the Regents of the University of California, and Dr. Sven de Vos alleging, inter alia, gender discrimination, gender harassment, age discrimination, and retaliation in violation of the FEHA. The jury voted 10-2 and returned verdicts in favor of Dr. Pinter-Brown on the discrimination and retaliation claims and awarded her a little more than $13 million in damages ($635,612 for past economic loss, $2,376,059 in future economic loss, $7 million in past non-economic loss, and $3 million in future non-economic loss).

UCLA appealed, and the court of appeal reversed the $13 million verdict in Dr. Pinter-Brown’s favor concluding that the trial court committed “cumulative and highly prejudicial” errors that resulted in a “miscarriage of justice” and UCLA not receiving a “fair trial.” At the outset, the trial judge gave the appearance that the court was partial to Dr. Pinter-Brown’s claims by telling the prospective jurors, among other things, that her case was a “part of a centuries-long fight against discrimination and inequality.” The trial judge quoted one of the most well-known
lines from Dr. Martin Luther King’s “I Have a Dream” speech that the “arc of the moral universe bends towards justice” and that it was the jurors’ job to be Dr. King and to help bend that arc.

The court of appeal called the trial judge’s opening remarks “a resolute and stirring call to action which stacked the deck against UCLA.” The court of appeal also found the trial court erred by allowing evidence of unrelated racial discrimination and of the 198 DFEH complaints—89 of which related to gender discrimination—against the entire University of California system over the preceding five years. The court of appeal noted that “me too” evidence is admissible only to prove intent and motive, among other things, with respect to the plaintiff’s own protected class and that its admissibility hinges on how closely related the evidence is to plaintiff’s circumstances and theory of the case and that such evidence is never admissible to prove an employer’s propensity to harass as the trial court had permitted here. The court of appeal further held that the trial court committed “inexplicable error” when it allowed Dr. Pinter-Brown to submit her retaliation claim to the jury after summarily adjudicating it in UCLA’s favor months earlier.

*Rizo v. Yovino*, 950 F. 3d 1217 (9th Cir. 2020)

Plaintiff Aileen Rizo sued Jim Yovino, the Fresno County Superintendent of Schools, alleging discrimination under the Equal Pay Act (“EPA”), Title VII of the Civil Rights Act of 1964, and the Fair Employment and Housing Act (“FEHA”). In 2012, Rizo learned that she was the only female math consultant and earned less than her male colleagues. Fresno County argued that it had determined Rizo’s pay by applying its pay policy, which bases a new employee’s salary on the employee’s prior pay—a factor other than sex. The district court denied the County’s motion for summary judgment, because basing an employee’s salary solely on prior pay “perpetuates a discriminatory wage disparity.”

On appeal, the court of appeal considered whether prior pay qualifies as an affirmative defense under the EPA, as decided in *Kouba v. Allstate Insurance Co.*, 691 F.2d 873 (9th Cir. 1982). The court of appeal clarified that the EPA does not require discriminatory intent. Rather, it is the plaintiff’s burden to show there is a “sex-based wage differential,” and then it is the employer’s burden to show that an exception applies. The court defined the EPA’s fourth exception, allowing a wage disparity to be justified by “any other factor other than sex,” as limited to job-related factors. The court reached this conclusion by noting the first three exceptions to the EPA are job-related, and without such a limitation, the first “other” would be meaningless.

The court explained that prior pay for a different job is not necessarily related to the job a plaintiff currently holds. While the County is not required to disprove discrimination at Rizo’s prior employer, Rizo has made a *prima facie* showing, and it is the County’s burden to show sex played no role in Rizo’s pay level. While prior pay can be a proxy for job-related factors, allowing wages to be set on that basis runs the risk of perpetuating sex-based pay discrimination, in contravention of the EPA’s purpose. As a result, the court overruled *Kouba* and affirmed the denial of the County’s motion for summary judgment.
Plaintiff Anahit Shirvanyan was employed by Defendant Los Angeles Community College District (“LACCD”) for approximately eight years as a Kitchen Coordinator preparing breakfast and lunch. Her essential job functions included “repetitive use of her hands to cut foods, load[ing] and unload[ing] the dishwasher, and hand wash[ing] large and heavy pots and pans” and the ability to lift up to about 50 pounds. She was diagnosed with nerve damage and carpal tunnel in her wrist in 2014. She notified her supervisors of her carpal tunnel and wrist pain and frequently sought help from coworkers to perform more strenuous tasks. Her supervisors never discussed changing plaintiff’s kitchen duties or giving her time off to address her wrist injury. In December of 2015, Shirvanyan injured her shoulder opening the door of a heavy industrial dishwasher. Her doctor placed her on a medical leave of absence until March 2016. However, Shirvanyan did not return to work thereafter and did not provide any paperwork requesting an extension of her medical leave. According to Defendant’s interrogatory responses, Shirvanyan stopped being employed “approximately at the end of 2015” but did not indicate why her employment ended.

Plaintiff sued LACCD for disability discrimination, failure to engage in the interactive process, and failure to provide reasonable accommodation in violation of the FEHA. She alleged that as a result of these violations, she developed major depressive disorder, resulting in both emotional distress and economic loss in the form of lost wages beginning April 1, 2016. At the close of plaintiff’s case-in-chief, defendant moved for nonsuit arguing that she had failed to provide a key element of her claims—that there was an available and effective reasonable accommodation that could have been made at the times she alleged defendant failed to engage in the interactive process. The trial court rejected defendant’s motion based on its view that the availability of a reasonable accommodation was not an element of an interactive process claim and instructed the jury accordingly. The jury rejected plaintiff’s disability discrimination claim but found in her favor on the interactive process and reasonable accommodation claims and awarded her $124,670 in past and future economic damages and $2.775 million in noneconomic damages.

LACCD moved for a judgment notwithstanding the verdict arguing inter alia that the evidence presented did not support the availability of a reasonable accommodation during the relevant timeframe and that the damages arose from work injuries and were only recoverable through workers’ compensation. The court denied LACCD’s motion and judgment was entered on January 25, 2019. LACCD timely appealed the judgment and the post-judgment order awarding Shirvanyan approximately half a million dollars in attorneys’ fees.

The appellate court agreed with LACCD that section 12940, subdivision (n) requires plaintiff to prove that a reasonable accommodation was available. The appellate court concluded that while Shirvanyan had established that a reasonable accommodation for her wrist injury (finite medical leave) was available, she had not done so for her shoulder injury (rejecting that the record reflected a finite medical leave, restructuring of her job duties, or “preferential” reassignment would have enabled her to perform the essential functions of her job or was available at the time). Because the record was not clear whether the jury’s verdict was based on
LACCD’s handling of Shirvanyan’s wrist, shoulder injury, or both injuries, the appellate court reversed with instructions that the trial court conduct a limited retrial for a jury to determine whether LACCD’s handling of Shirvanyan’s wrist injury, standing alone, constituted a failure to accommodate and/or failure to engage in the interactive process, and access to what extent Shirvanyan is entitled to damages, if any, and attorneys’ fees if she prevailed in the limited retrial. The appellate court also concluded that the Workers’ Compensation Act (Lab. Code, § 3200 et seq.) does not bar such claims because Shirvanyan had properly alleged that her damages arose from her employer’s failure to provide reasonable accommodations or engage in the interactive process rather than from the underlying wrist injury.

_Talley v. County of Fresno, 51 Cal. App. 5th 1060 (2020)_

On October 2015, Ronald Talley pleaded _nolo contendere_ to driving without a license or insurance and was sentenced to 18 days of jail time, which was to be served in the Adult Offender Work Program (“AOWP”), a work release program that allows eligible participants to serve their sentence by performing work assignments for participating community and governmental agencies and is coordinated through the county’s probation department. Talley was injured while performing work in the AOWP, and filed suit against Fresno County (“County”) for failure to accommodate his preexisting physical disability and failure to engage in the interactive process under the Fair Employment and Housing Act (“FEHA”). Talley alleged that he had a physical disability (clubfoot) for which he wore a large 10-pound brace that enabled him to walk properly. The trial court granted summary judgment for the County as to Talley’s FEHA claims concluding that as a matter of law, he was not an employee of the County for FEHA purposes.

The court of appeal affirmed. After reviewing the statute and federal courts’ interpretation of similar terms within federal antidiscrimination statutes, the appellate court held that an individual sentenced to perform work activities in lieu of incarceration in the absence of any financial remuneration, is precluded, as a matter of law, from being an employee within the meaning of the FEHA. The court of appeal noted, “While [financial] remuneration alone is not a sufficient condition to establish an individual is an employee under the statute, it is an essential one.”

_Wood v. Superior Court of San Diego County, 46 Cal. App. 5th 562 (2020)_

Plaintiff Christynne Lili Wrene Wood contacted the California Department of Fair Employment and Housing (“DFEH”) to report alleged gender discrimination by her Crunch fitness club. After an investigation, the DFEH filed a lawsuit against Crunch in which Wood intervened as a plaintiff. During discovery, Crunch moved to compel the production of a pre-litigation email that Wood sent to DFEH lawyers regarding her DFEH complaint which she withheld on grounds of attorney-client privilege. The trial court granted Crunch’s motion to compel.
On appeal, the court of appeal held that Wood failed to show that the email was covered by the attorney-client privilege. The court noted that a *prima facie* showing of privilege requires that the communication at issue be made in the course of an attorney-client relationship. Although DFEH lawyers have an attorney-client relationship with the State of California, Wood failed to show that the DFEH lawyers formed an attorney-client relationship with her. Accordingly, any communications between Wood and the DFEH lawyers were not made in the course of an attorney-client relationship and were not privileged.
**ARBITRATION**


Plaintiff Erendira Cisneros Alvarez sued Altamed Health Services Corp. on claims related to her employment with Altamed. The trial court denied Altamed’s motion to compel arbitration, and the appellate court reversed.

The court pointed out that in ruling on a motion to compel arbitration, a trial court must first determine whether there is a valid agreement to arbitration. If so, the trial court must grant the order unless a ground for revocation exists. Plaintiff claimed that the agreement was procedurally unconscionable based on the lack of a Spanish translation, a failure to provide the rules, and a lengthy and complex agreement. She further claimed substantive unconscionability based on a provision providing for review of the arbitration order by a second arbitrator.

The court rejected the first argument based on the plaintiff’s level of English fluency. Simply preferring to read a document in Spanish does not demonstrate the reader was unable to understand it in English. With respect to the failure to provide rules, courts will more closely scrutinize the unconscionability of terms that were artfully hidden by the simple expedient of incorporating them by reference rather than including or attaching them to the arbitration agreement. A failure to attach rules, alone, is not sufficient to demonstrate unconscionability. Finally, the court found no unconscionability on the grounds that the agreement was long or complex because the plaintiff had at least a day to review the agreement, which used a minimal amount of legal terms, most of which were commonly understood.

The only challenge of substantive unconscionability related to the review by a second arbitrator. The plaintiff argued the appellate arbitral review benefits the employer in employee/employer arbitrations, because the employer could unilaterally add costs and time to the proceeding, which favors the employer’s status as the better resourced party. The court agreed, but ordered the provision severed and found that arbitration should commence.


Plaintiff Richard Hale Brown was an employee of TGS Management Company. As a condition of employment, Brown signed an employment agreement that contained an arbitration clause, a non-competition clause, and a confidentiality provision.

After ten years, TGS terminated Brown’s employment. Brown filed a complaint against TGS, asserting claims for declaratory relief, injunctive relief, and reformation of the arbitrator-selection process in the employment agreement. The trial court referred the matter to arbitration, at which point Brown significantly expanded his claims.
Ultimately, the arbitrator denied all of Brown’s claims and granted TGS’ two counterclaims. After the arbitration proceedings had concluded, Brown filed a petition to vacate the arbitrator’s award. Brown argued that the arbitrator exceeded his powers in issuing the award, because it violated fundamental public policy and various California statutes. Brown specifically took issue with the anticompetitive provisions of the agreement. The trial court denied Brown’s petition.

On appeal, the court of appeal reversed the trial court’s ruling and set aside the arbitration award. The court held that the arbitrator’s refusal to decide Brown’s challenge to the legality of the confidentiality provisions violated Brown’s statutory rights and exceeded the arbitrator’s authority. In setting aside the award, the court also held that the confidentiality provision was void because the definition of “confidential information” in the agreement was overbroad and violated California Business and Professions Code section 16600.

**Dennison v. Rosland Capital LLC, 47 Cal. App. 5th 204 (2020)**

Plaintiff William Dennison made four purchases of precious metals from defendants and later filed suit, alleging that defendants misled him. Dennison, as trustee for the Dennison Family Trust, purchased the precious metals after seeing television commercials promoting the precious metals as investments. When Dennison first placed his order for the precious metals, he signed a customer agreement that contained an arbitration provision and a delegation clause.

On appeal, the court of appeal considered whether the delegation clause was valid insofar as it delegated authority to the arbitrator to determine whether the agreement was unconscionable. The court of appeal answered this question in the negative, holding that where a contract includes a severability clause stating a court of competent jurisdiction may excise an unconscionable provision, there is no clear and unmistakable delegation to the arbitrator to decide if the arbitration agreement is unconscionable. The court of appeal went on to conclude that the arbitration agreement was unconscionable based on lack of mutuality, the contract’s limitations on defendants’ liability, and the contract’s provision shortening the applicable statute of limitations. Finally, the court of appeal held that it could not save the arbitration agreement by severing a single offending clause because the agreement was permeated with unconscionability.

**Fleming Distribution Company v. Younan, 49 Cal. App. 5th 73 (2020)**

In this case, the court of appeal held that an employer waived its right to compel arbitration of a dispute over unpaid wages by waiting twenty months from the filing of the complaint to file its motion to compel arbitration and by participating in an administrative proceeding before the Labor Commissioner.
Defendant Haralambos Beverage Co., a beverage distributor, employed plaintiffs Paul Garcia and Pierre Atme as truck drivers. Since 2003, defendant’s employee handbooks recited a policy that “any and all claims, disputes or controversies between employees and [defendant] shall be resolved by binding arbitration pursuant to the provisions of this policy, except as otherwise specifically prohibited by law . . .” In 2009, Atme and Garcia each executed defendant’s arbitration agreement. On November 11, 2016, Garcia served his original complaint on defendant. On January 31, 2017, plaintiffs filed the operative amended putative class action complaint alleging various violations of wage and hour laws. On March 15, 2017, defendant filed its answer and asserted as one of its defenses that plaintiffs’ claims were subject to an executed arbitration agreement.

However, defendant did not actually move to compel arbitration until nearly two years after Garcia’s original complaint—in November 2018. By the time defendant did so, defendant had repeatedly represented to the court that it had no intention of raising arbitration as a defense to the court’s jurisdiction and had merely stated that it “reserved the right to do so” at a later time. Prior to moving to compel arbitration, defendant also participated in plaintiffs’ class action discovery and agreed to a protective order to facilitate the production of classwide information, engaged in classwide mediation, responded to plaintiffs’ discovery requests, including requests for classwide information, met and conferred with plaintiffs on classwide discovery disputes, participated in the classwide Belaire-West notice process, and participated in an informal discovery conference regarding documents relevant to this notice process. Although the case was filed in November of 2016, defendant claimed it did not locate plaintiffs’ signed arbitration agreements until June of 2018, when it was preparing its responses to plaintiffs’ discovery requests after the failed mediation.

Because of the twenty-four-month delay, the court denied defendant’s motion to compel arbitration finding that defendant knew from the time it filed its answer that it had an arbitration policy and failed to demonstrate it conducted a diligent search for the signed arbitration agreements. The court also found that even after locating the signed agreements, defendant continued to act in a manner inconsistent with the right to arbitrate. Finally, the court found that plaintiffs had been prejudiced by the delay by expending time and money engaging in classwide discovery and related disputes, preparing and serving the Belaire-West notices to putative class members, and filing a discovery motion. The appellate court affirmed and held that defendant had waived its right to enforce the arbitration agreement finding the twenty-four-month delay unreasonable, defendant had acted in a manner inconsistent with its right to arbitrate, and its delay impaired plaintiffs’ ability to realize the benefits and efficiencies of arbitration.

Plaintiff Chris Garner filed a class action complaint against his employer, Inter-State Oil, alleging a variety of wage-and-hour claims. Inter-State Oil moved to compel arbitration of the individual claims and refused to stipulate to arbitration of the class claims. Garner opposed the
motion to compel arbitration on the basis that Inter-State Oil breached the arbitration agreement by refusing to arbitrate the class claims.

The trial court granted Inter-State Oil’s motion to compel arbitration as to Garner’s individual claims, relying on language in the arbitration agreement stating that Garner waived his right to participate in a class action. Garner appealed.

The court of appeal reversed in part. The court focused on the plain language of two particular sentences of the agreement. The first sentence provided that the parties agreed to arbitrate “any and all claims arising out of or related to your employment that could be filed in a court of law, including but not limited to… class action[s].” The second sentence stated that the arbitration agreement constituted a waiver of all rights to participate in a civil class action lawsuit.

Ultimately, the court held that the plain meaning of the first sentence was that the parties agreed to arbitrate class actions. The court also held that the second sentence operated only as a waiver of Garner’s right to pursue a class action in court; Garner could still pursue his class claims in arbitration.

*Jarboe v. Hanlees Auto Group, 53 Cal. App. 5th 539 (2020)*

Plaintiff Thomas Jarboe worked briefly for an auto dealership called DKD of Davis before being transferred to a different location that was part of a larger group of affiliated dealerships. Following his termination, Jarboe filed a class action complaint against this automobile dealership group, its twelve affiliated dealerships, and three individuals who owned the group, asserting various wage-and-hour claims and seeking penalties under PAGA. The defendants moved to compel arbitration based on an employment agreement that Jarboe entered into with DKD of Davis, and moved to stay the PAGA proceeding. The trial court granted the motion as to eleven of the twelve causes of action against DKD of Davis, but denied the motion as to the other defendants. The trial court allowed Jarboe’s PAGA claim to proceed in court against all defendants.

On appeal, the fifteen defendants who were not able to enforce the arbitration agreement argued that they could do so as third-party beneficiaries to the arbitration agreement between Jarboe and DKD of Davis or under the doctrine of equitable estoppel. The court disagreed, holding that these defendants lacked standing to enforce the arbitration agreement. The court also affirmed the trial court’s refusal to stay the PAGA proceeding. The court explained that a stay was not appropriate because a PAGA claim is a dispute between an employer and the state, and requiring an employee to litigate a portion of a PAGA claim in a forum selected by the employer interferes with the state’s interests in enforcing the California Labor Code.
**Kec v. Superior Court of Orange County, 51 Cal. App. 5th 972 (2020)**

Plaintiff Nichole Kec entered into an arbitration agreement with her employer which purported to waive class actions and any “other representative action.” There was no dispute that because this representative waiver was broad enough to cover a claim under PAGA, it was invalid. Usually, where a single contract provision is invalid, but the balance of the contract is lawful, the invalid provision is severed, and the balance of the contract is enforced. However, this agreement went on to provide that the provision containing the representative waiver was not modifiable or severable. The arbitration agreement also included a provision that if the representative waiver was found to be invalid, “the Agreement becomes null and void as to the employee(s) who are parties to that particular dispute—a so-called ‘blow-up provision.’”

The trial court granted the defendants’ motion to compel arbitration, reasoning that (1) because defendants had not asked the court to rule on the enforceability of the representative waiver, it had not found the representative waiver invalid, and thus the blow-up provision had not been triggered; and (2) the blow-up provision may apply only to the attempted waiver of the PAGA claim, not to the arbitrability of plaintiff’s claims under the California Labor Code.

On appeal, the court found that defendants could not selectively enforce the arbitration agreement in a manner that defeated its goals. Had the parties intended to permit defendants to proceed with arbitration notwithstanding an invalid waiver of representative claims, they would have simply made that provision severable, like every other term in the agreement. Instead, by specifically making the representative waiver not severable, the agreement evinced an intent not to allow defendants to selectively enforce the arbitration agreement. The court of appeal thus ordered the trial court to vacate its order granting arbitration, and to enter a new order denying the motion.


Plaintiff Gerald Lange entered into an arbitration agreement with his employer, Monster Energy Company. After Monster terminated Lange, Lange filed suit alleging various claims including disability discrimination and wrongful termination. Monster moved to compel arbitration, but the trial court denied the motion. The trial court concluded that the arbitration agreement had elements of procedural and substantive unconscionability. In addition, the trial court held that the unconscionable provisions could not be severed from the contract because any more than a single unconscionable provision in an arbitration agreement precludes severance. Monster appealed.

The court of appeal largely agreed that the arbitration agreement had elements of procedural and substantive unconscionability. However, the court of appeal disagreed that any more than a single unconscionable provision in an arbitration agreement precludes severance. It explained that an arbitration agreement can be considered permeated by unconscionability if it contains more than one unlawful provision, but the presence of multiple unconscionable clauses is merely one factor in the trial court’s inquiry; it is not dispositive.

Plaintiff Joseph Martinez filed an employment-related lawsuit against his employer, BaronHR. The employer moved to compel arbitration, arguing that Martinez was bound by an arbitration agreement he signed during his employment. The trial court denied the motion on the basis that there was ambiguity as to whether Martinez in fact agreed to arbitrate—in other words, whether there was mutual assent. This ambiguity stemmed from the fact that neither party to the agreement placed their initials next to the jury waiver provision, even though the drafter included lines for their initials.

The court of appeal concluded that the language of the arbitration agreement established mutual assent to arbitrate and that the failure to initial did not invalidate this assent. The court also observed that the trial court should not have considered Martinez’s previously undisclosed assertions that he did not want to arbitrate, because such evidence is irrelevant to the issue of mutuality.


Plaintiff Yassin Olabi sued Neutron Holdings, Inc, doing business as Lime, for Labor Code violations under the Private Attorney General Act of 2004 and for unfair competition. Lime filed a petition to compel arbitration. Prior to the hearing, Olabi dismissed the unfair competition claim and clarified that he was only seeking civil penalties (not victim-specific relief). The trial court denied the petition to compel arbitration. Because the language of the arbitration agreement broadly excluded PAGA actions, the court of appeal affirmed.


Plaintiff Jose Torrecillas entered into an arbitration agreement with his employer, Fitness International, LLC. In an ensuing lawsuit, Torrecillas argued that the arbitration agreement he signed was procedurally and substantively unconscionable. The trial court agreed, finding that the agreement was a procedurally unconscionable contract of adhesion. The trial court also took issue with the agreement’s limitation on the number of depositions that could be taken without court approval.

The court of appeal reversed. The court found that there was little procedural unconscionability and disagreed that the agreement was a contract of adhesion. The court noted that the parties customized the agreement specifically to Torrecillas, and Torrecillas had an opportunity to negotiate its terms. The court also emphasized that there was no element of surprise and little oppression. As for substantive unconscionability, the court held that none of the contract’s terms shocked the conscience. Indeed, the deposition limit referenced by the trial court was “standard” and “not shocking.”
ATTORNEYS’ FEES FOR OUT-OF-TOWN COUNSEL


Augustine Caldera is a prison correctional officer who sometimes stutters when he speaks. In 2010, Caldera filed a lawsuit against the California Department of Corrections and Rehabilitation (“CDCR”) and his supervisor alleging disability discrimination. Caldera could not find a local attorney to take his discrimination lawsuit, so he hired an out-of-town firm from San Francisco to litigate his case. A jury found in Caldera’s favor and awarded him $500,000 in noneconomic damages. After nearly a decade of litigation (including two prior successful appeals by Caldera), Caldera sought about $2.4 million in statutory attorneys’ fees (a $1.2 million “lodestar” and a 2.0 “multiplier”). The trial court awarded a little over $800,000.

Caldera appealed and the Court of Appeal reversed. The Court of Appeal held that the trial court should have allowed Caldera’s attorneys to recover at their higher “home market rate” of $750/hour rather than the lower local market rate of $550/hour because Caldera had been unable to find a local attorney in San Bernardino County to prosecute his case.
EMPLOYER LIABILITY FOR EMPLOYEE ACTIONS

*Bingener v. City of Los Angeles, 44 Cal. App. 5th 134 (2020)*

Deceased pedestrian’s survivors brought action against the City of Los Angeles (“City”) after a pedestrian was struck and killed by Kim Rushton, a City employee. When the accident occurred, Rushton was commuting in his personal vehicle to the water quality lab where he worked as a chemist. Rushton suffered from neuropathy in his feet, a tremor, and seizures, but testified these conditions were under control and did not affect his ability to drive. He further testified that he felt great the day of the accident and had not taken any medication. His job did not require traveling or use of a personal vehicle.

The trial court granted the City’s motion for summary judgment because the “going and coming rule” applied and prevented the employer from incurring liability under *respondeat superior*. Under the “going and coming rule,” an employee is not acting within the scope of his or her employment when traveling to or from work. An exception to this rule is triggered where the employee endangers another due to a foreseeable risk, and it is not otherwise unfair to hold the employer liable. Plaintiffs contended this exception applied since the City knew about Rushton’s health conditions and medications because Rushton utilized the worker compensation program for a back injury he suffered. Plaintiffs argued that allowing Rushton to drive to work created a foreseeable risk that he would hit a pedestrian.

The court of appeal affirmed the trial court’s judgment, reasoning that there was nothing about Rushton’s job that rendered the accident a foreseeable event. There was no evidence the City knew, or should have known, Rushton’s back injury or medications would make him a dangerous driver. In fact, Rushton’s testimony indicated the injury and medications did not affect his driving. Thus, the court of appeal held that the “going and coming rule” applied and affirmed the trial court’s grant of summary judgment.


Motorists brought action against ride-sharing service operator, Lyft, alleging that operator was liable under doctrine of *respondeat superior* for an accident caused by a ride-sharing service driver. Jonathan Gaurano drove for Lyft by utilizing Lyft’s Express Drive program, which allows drivers to rent a preapproved vehicle from Hertz. This program provides incentives to drivers and imposes restrictions upon them. For example, the program enables drivers to have Auto Liability coverage when logged into Lyft, but prohibits drivers from using the rental vehicle while working for other ride share companies. When Gaurano drove the rental vehicle home from a work conference that bore no relation to his work with Lyft, he collided with vehicles belonging to individual plaintiffs Sabrina Marez and Marissa Cruz.

On appeal, Marez contended that the trial court erred in granting Lyft summary judgment, because Gaurano was within the scope of his employment with Lyft at the time of the accident. Marez argued that because Lyft paid certain expenses associated with personal use of

Los Angeles County Bar Association
Labor & Employment Law Symposium March 4, 2021
the rental vehicle and forbade drivers to use the rental vehicle for other ride-share companies but allowed use for personal activities, Guarano’s conduct was foreseeable.

The court of appeal disagreed, holding that Gaurano had substantially deviated from any duties he performed for Lyft at the time of the accident. On the day of the accident, Gaurano had not worked for Lyft; therefore, Lyft had no ability to control the manner in which Gaurano commuted to his work for another employer. Because Gaurano was engaging in a personal activity at the time of the accident, his conduct was not foreseeable. Moreover, the court of appeal noted the exclusivity requirement is more akin to terms of employment affecting employment status, not a benefit affecting the scope of employment. Accordingly, the court affirmed trial court’s grant of Lyft’s motion for summary judgment.
EMPLOYMENT CONTRACTS

Midwest Motor Supply Co. v. Superior Court of Contra Costa County, 56 Cal. App. 5th 702 (2020)

Midwest Motor Supply hired Patrick Finch in 2014 pursuant to an employment agreement that contained a forum-selection clause requiring that all claims be venued in Ohio. The compensation provision of the employment agreement was modified several times through 2018, but the forum-selection clause was not altered. In 2019, Finch instigated a lawsuit against Midwest in California for various California Labor Code violations. Midwest filed a motion to dismiss or, alternatively, stay the action on the basis of the Ohio forum-selection clause. The trial court denied Midwest’s motion, concluding that California Labor Code Section 925 rendered the forum-selection clause voidable by Finch.

Midwest appealed. The court of appeal concluded that Section 925 allows an employee to void a provision of an employment contract which would require the employee to adjudicate outside of California a claim arising in California. Section 925 became effective January 1, 2017 and applies “to a contract entered into, modified, or extended on or after January 1, 2017.” Cal. Lab. Code § 925(f). The issue before the court was whether Section 925 applies to any modification to a contract or whether it is limited to the modification of a forum-selection clause specifically. The court held that under Section 925, a forum-selection clause is voidable by an employee if it is contained in a contract that is modified in any way on or after January 1, 2017.

In reaching its decision, the court first engaged in a plain reading of the statute: a prohibited provision of an employment agreement is voidable by an employee when a “contract” is “modified . . . after January 1, 2017.” Reading into the statute a limitation that the forum-selection clause portion of the contract must be modified would violate the rule that courts may not add provisions to statutes. It would also prevent the statute from fulfilling its purpose, which is to provide a California-based employee with a California forum to litigate employment-related claims, if the terms of his/her employment change on or after January 1, 2017.

The court rejected each of Midwest’s arguments, finding: (1) Section 925 is not ambiguous with respect to its scope because the terms “modified” and “extended” have different meanings; (2) ordinary principles of contract (which dictate that a modification to one provision of a contract does not affect provisions that are not modified) do not require a different conclusion, because the Legislature enacted the statute as an exception to ordinary principles of contract; (3) federal courts that have addressed the issue have not reached alternative conclusions; (4) the contract clauses of the state and federal constitutions are not violated because the statute does not operate retroactively; and (5) Section 925 is not an unconstitutional, ex post facto law because the statute does not penalize conduct that occurred prior to its enactment, rather, it prohibits the inclusion of forum-selection clauses in contracts entered into, modified, or extended after the statute’s effective date.
FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES


Plaintiffs Judy Alexander, Johann Hellmannsberger, and Lisa Harris worked as nurses in the Behavioral Health Unit of Community Hospital of Long Beach (“Hospital”). The Hospital contracted with Memorial Psychiatric Health Services (“MPHS”) to provide administrative services and with Memorial Counseling Associates Medical Group (“MCA”) to provide physicians for the unit. MPHS employed the unit’s director, Keith Kohl.

Plaintiffs alleged that Kohl discriminated in favor of gay male staff with respect to scheduling, assignments and promotions, and regularly used sexually explicit language that favored homosexuality and denigrated heterosexuality. Alexander felt demeaned and humiliated by Kohl and complained to Adrian Taves, the Hospital’s Director of Education, four or five times that Kohl was “flamboyantly gay.” A few weeks before Alexander’s termination, she complained to Taves that Kohl had berated her in his office and was told to complain to Valerie Martin, the Hospital’s Human Resources Director.

After an incident with an aggressive patient named “Hailey,” two nurses reported that plaintiffs had placed Hailey in physical restraints without a physician’s order. Although another witness and the plaintiffs denied that they had done so, Kohl, Martin, and the Hospital’s Chief Nursing Officer suspended the three plaintiffs and subsequently terminated them.

Each plaintiff subsequently found employment at College Hospital in Brea within approximately two months of their terminations. The Hospital reported the Hailey incident to licensing authorities, who notified the Department of Justice. In June 2010, the Department arrested and prosecuted the three plaintiffs for the illegal restraint of Hailey. Plaintiffs’ new employer suspended and ultimately terminated the three plaintiffs’ employment even though they were later acquitted of the criminal charges.

Plaintiffs filed administrative complaints alleging gender and sexual orientation discrimination and retaliation in violation of the FEHA with the DFEH naming the Hospital, Keith Kohl, and Anthony Pace as defendants and later filed amended complaints adding MCA as a defendant. They then filed a civil lawsuit against the Hospital and MCA for (1) sexual harassment, (2) sexual orientation discrimination, (3) failure to investigate and prevent harassment and discrimination, (4) retaliation, (5) wrongful termination in violation of public policy, (6) intentional infliction of emotional distress, (7) defamation, and (8) negligent supervision. On May 21, 2010, plaintiffs amended their complaint to add MPHS even though they never filed any administrative complaint against MPHS.

At trial on August 19, 2016, the jury found for MCA on all causes of action but found against the Hospital on all causes of action and against MPHS on plaintiffs’ FEHA causes of action and negligent supervision cause of action and Alexander’s claim of retaliation. The jury awarded damages totaling $4,734,973, comprising awards for past economic damages through...
January 2016; awards to Alexander and Hellmannsberger of $800,000 each in past noneconomic damages; $250,000 each for injury to their reputations; $250,000 to Alexander and $300,000 to Hellmannsberger in future noneconomic damages; and a total of $1.7 million in punitive damages. MPHS, the Hospital, and plaintiffs each filed appeals. The lengthy appellate opinion addressed a myriad of issues.

With respect to MPHS’ appeal, the court of appeal held that the plaintiffs failed to exhaust their administrative remedies against MPHS by failing to name or mention MPHS in their FEHA complaints. The court rejected plaintiffs’ argument that an equitable exception to the exhaustion requirement should apply because MPHS had received notice of their complaints and had an opportunity to participate in the administrative process. The Court noted that the present facts were distinguishable from Martin v. Fisher (1992) 11 Cal. App. 4th 118, 122 and Saavedra v. Orange County Consolidated Transportation etc. Agency (1992) 11 Cal. App. 4th 824, 826-827, because in Martin and in Saavedra, the plaintiffs had identified the respondent in the body of a DFEH complaint. The Court of Appeal also rejected plaintiffs’ alternative argument that they satisfied the exhaustion requirement because MPHS was neither known to them nor reasonably discoverable within a year after their terminations. Plaintiffs attempted to rely on the fact that there was widespread confusion amongst the employees that they were employed by MCA—not MPHS. The court of appeal noted that plaintiffs, through timely, reasonable efforts, could have cleared up the misconception and ascertained the true identity of Kohl’s employer.

The court of appeal also held that substantial evidence did not support MPHS’ liability for negligently supervising Kohl because there was no evidence that suggested MPHS was aware that Kohl had created a hostile work environment before plaintiffs’ terminations. Because MPHS was found liable only for FEHA violations and negligent supervision, the court held that the judgment against MPHS must be reversed and a new judgment must be entered in its favor.

Plaintiffs had cross-appealed arguing that MCA was liable as MPHS’ alter ego and that the trial court erred in denying their JNOV motion and their motion to amend the complaint on this issue. Plaintiffs also sought leave to amend the judgment to add MCA as a judgment debtor as MPHS’ alter ego. Plaintiffs contended that they had shown the requisite “unity of interest and ownership” and that there would be an “inequitable result.” However, the court held that because the jury did not find MCA liable, MPHS cannot be liable either. The court of appeal concluded that the trial court properly denied plaintiffs’ requests to amend the complaint or judgment to name MCA as MPHS’ alter ego.

With respect to the Hospital’s appeal, the court of appeal also found that the trial court erroneously permitted the plaintiffs to testify and argue that they had “cleared their names” in violation of the trial court’s in limine rulings to exclude all references to the criminal proceedings. Although the plaintiffs were permitted to prove the Hospital’s justification for their terminations was pretextual, evidence that they were subsequently acquitted in a criminal case was not admissible for this purpose.

The court of appeal also agreed with the Hospital’s contention that the trial court erred in admitting as evidence the three written complaints the Hospital had received after plaintiffs’
termination alleging that Kohl had created a hostile work environment by favoring male employees, particularly gay males, etc. The Court concluded the letters were inadmissible hearsay and were not admissible under subdivision (b) of Evidence Code Section 1101 to prove Kohl’s discriminatory intent. The Court found that there was insufficient evidence (“One instance of referring to Filipina nurses outside their hearing as “mafia,” another of hiring and spending time with an unqualified male employee (who was not identified in the record as homosexual), and an indeterminate number of instances where female employees were replaced by male employees- “some gay, some not”) to establish widespread sexual favoritism so severe or pervasive as to alter Hellmannsberger’s working conditions or to create a hostile work environment in violation of the FEHA. Thus, it concluded that no substantial evidence supported Hellmannsberger’s FEHA or wrongful termination claims.

The court of appeal agreed with the Hospital that damages stemming from the plaintiffs’ termination by the Hospital ceased once they found comparable reemployment and retained that new job for a year even if they were terminated from the subsequent job because the state had prosecuted them for patient abuse.

Accordingly, the court of appeal affirmed the judgment as to MCA and reversed the judgment as to MPHS and the Hospital. The court of appeal directed the trial court to enter judgment in favor of MPHS entirely and in favor of the Hospital on all of Hellmannsberger’s claims and on Alexander’s and Harris’ claims for defamation and negligent supervision. The court directed the trial court to order a new trial as to Alexander’s and/or Harris’ remaining claims.


David Foroudi was hired by The Aerospace Corporation (“Aerospace”) in 2007 when he was 55 years old. In 2009, the program Foroudi had been hired to work on was cancelled and he was transferred to another division. In 2010 and 2011, Foroudi’s supervisors counseled him on alleged performance deficiencies and ranked him as one of the worst performing employees. In late 2011, Aerospace learned that its funding would be significantly impacted by Department of Defense budget cuts, and it began implementing a company-wide reduction in force (RIF). The Company notified Foroudi in March of 2012 that it would lay him off as part of the RIF. Aerospace laid off 306 of its 4,000 employees in connection with the RIF. Aerospace did not hire anyone to replace Foroudi. Instead, Aerospace eliminated his position and gave his remaining duties to an existing employee in the Navigation division, who was 14 years younger than Foroudi.

In January 2013, Foroudi filed a complaint with the DFEH alleging, without stating any specific facts, that he experienced discrimination, harassment, and retaliation because of his age, association with a member of a protected class, family care or medical leave, national origin, and religion. More than a year later, Foroudi filed an amended DFEH complaint alleging that he was “laid off” because of his religion, age, and ancestry/national origin. He also filed a charge of discrimination with the EEOC in January of 2013. In August of 2014, Foroudi filed a civil complaint against Aerospace alleging, inter alia, he was selected for a company-wide reduction
in force because of his age. The complaint further alleged that the RIF had a disparate impact on employees over the age of 50. In January of 2015, Foroudi and others filed a First Amended Complaint (FAC) to add a cause of action under the ADEA and class allegations. Aerospace removed the case to federal court and moved to strike the disparate impact and class allegations from the FAC. The federal district court granted Aerospace’s motion finding that Foroudi failed to exhaust his administrative remedies with respect to such claims. After the case was remanded to the superior court, Foroudi amended his original administrative charges with the EEOC and DFEH to include the class and disparate impact allegations. Foroudi then sought leave to amend his complaint in order to reallege the class and disparate impact claims. The trial court denied Foroudi’s request finding that the administrative amendments were untimely and unauthorized. The trial court subsequently granted Aerospace’s motion for summary judgment on the remaining age discrimination claim.

The court of appeal found that the trial court did not abuse its discretion in denying Foroudi leave to amend his complaint. The court of appeal noted that Foroudi’s arguments that he had exhausted his administrative remedies by amending his EEOC charge to add the class and disparate impact claims all suffered the same fatal flaw: “the exhaustion of EEOC remedies does not satisfy the exhaustion requirements for state law claims.” (Martin v. Lockheed Missiles & Space Co., 29 Cal. App. 4th 1718, 1726 (1994).) The court of appeal further noted that Foroudi’s second amended DFEH complaint was untimely since he made it three years after the DFEH permanently closed his case and nearly two years after he filed his civil complaint. Foroudi argued that the second amended DFEH complaint was “timely and effective because it related back to his earlier DFEH complaints.” The court disagreed finding that Foroudi’s factual allegations in his earlier DFEH complaints did not support claims for class and disparate impact theories of liability. The court of appeal also affirmed the trial court’s decision to grant Aerospace’s motion for summary judgment.
FAIR CREDIT REPORTING ACT (“FCRA”)

Luna v. Hansen & Adkins Auto Transp., Inc., 956 F.3d 1151 (9th Cir. 2020)

Plaintiff Leonard Luna contended his employer, Hansen & Adkins Auto Transport, Inc., violated the Fair Credit Reporting Act (“FCRA”) by providing other materials along with the FCRA disclosure and by including the FCRA authorization at the end of a multi-page employment application. The district court granted summary adjudication in favor of defendant.

A FCRA disclosure must be a standalone document. Here, the disclosure was a standalone document, but was distributed to employees along with an employment application. The court held that the requirement is only that the disclosure form contain no extraneous information. The FCRA does not prohibit the presentation of other documents at the same time as the disclosure. Conversely, the FCRA authorization is not required to be a standalone document. The court reached this conclusion simply because the language requiring the disclosure be a standalone document is absent from the subsection regarding authorization.

A FCRA disclosure also must be clear and conspicuous, which the court has interpreted to mean a “reasonably understandable form that is readily notifiable to the consumer.” Here, the disclosure explained in plain language that the employer may obtain reports verifying employee information, and the document contained only a bolded, underlined, capital-lettered heading, the disclosure itself, the employer’s logo, and a signature line.

The court of appeal affirmed the grant of summary adjudication on the grounds that the disclosure was clear and conspicuous, and was a standalone document as is required under the FCRA.
FAMILY MEDICAL LEAVE ACT (“FMLA”)

Olson v. United States (by & through Department of Energy), 980 F.3d 1334 (9th Cir. 2020)

Plaintiff Andrea Olson contracted to work with Bonneville Power Administration (“BPA”) as a reasonable accommodation coordinator. Olson began experiencing anxiety at work and eventually invoked FMLA leave. Olson alleges various FMLA violations, the last of which occurred more than two years but less than three years before she instigated the instant lawsuit. The relevant statute of limitations is two years, but three years for a willful violation. The district court found Olson did not prove that BPA willfully interfered with her FMLA rights, and therefore, her claims were barred by the relevant statute of limitations.

On appeal, the court of appeal addressed the standard for willfulness in actions pursuant to the FMLA. The FMLA does not define willful, but the court of appeal adopted the standard for willfulness identified by the Supreme Court in McLaughlin v. Richland Shoe Company, 486 U.S. 128 (1988) for Fair Labor Standards Act (“FLSA”) claims. In order for the three-year limitations period for “willful” violations to apply, the employer must know, or show reckless disregard for whether, its conduct was prohibited by the statute. The court of appeal reasoned that the United States Supreme Court used this same criterion under the Age Discrimination in Employment Act (“ADEA”), thus signaling that the standard is not limited to the FLSA. Further, the standard comports with a common understanding of the term “willful” in similar contexts. Moreover, other circuits that have addressed the issue unanimously adopted the standard to the FMLA context.

Pursuant to the McLaughlin willfulness standard, the evidence in the record failed to establish that BPA either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the FMLA. Accordingly, the two-year statute of limitations applied, and Olson’s claims were time-barred.
INDEPENDENT CONTRACTORS

Henry v. Adventist Health Castle Med. Ctr., 970 F.3d 1126 (9th Cir. 2020)

Plaintiff David Henry, M.D., a white male, is a surgeon who joined the staff of Adventist Health Castle Medical Center and performed surgeries at Castle Medical Center’s facility. Henry complained of discrimination at Castle Medical Center, which initiated a review of his past surgeries, ultimately leading to his suspension. Thereafter, Henry instigated a lawsuit for alleged violations of Title VII of the Civil Rights Act of 1964 for racial discrimination and retaliation. Castle Medical Center moved for summary judgment, arguing that because Henry was an independent contractor and not an employee, he did not enjoy Title VII’s protections. The district court granted Castle Medical Center’s motion.

Looking at the extent to which Castle Medical Center had the right to control the manner and means by which Henry performed his job, the court of appeal concluded that Henry was an independent contractor and thus not entitled to Title VII protections. First, the court looked to Henry’s compensation arrangement and found that it weighed in favor of a finding that he was an independent contractor. Henry was compensated per shift, and his compensation accounted for 10 percent of his earnings. Henry did not receive typical employee benefits. Castle Medical Center issued Henry a 1099 tax form. Finally, Henry reported his Castle Medical Center earnings on a Form 1040 (for self-employed individuals). Next, the court observed that Henry’s obligations to Castle Medical Center were limited. Henry only was required to be on call in the emergency department five days per month. Henry was free to be elsewhere during on-call shifts unless there was an emergency. Henry could perform elective surgeries during his shifts if he coordinated backup coverage. And finally, Henry leased Castle Medical Center space for elective surgeries on his own patients. Moreover, the court noted that Henry’s contractual agreements with Castle Medical Center expressly stated that he was an independent contractor.

The court rejected Henry’s argument that he should be deemed an employee based on the level of skill required for his job, the location of his work, and the source of equipment and staff, finding that these factors are not indicative of employee status in the physician-hospital context because all hospital medical staff are skilled and must work inside the hospital using its equipment. Further, the court found that since hospitals are responsible for maintaining a certain standard of care and safety for their patients, the fact that Castle Medical Center subjected Henry to regulations did not establish that he was an employee.


Ahern Rentals, Inc., a company that leases forklifts, was sued for the wrongful death of Ruben Dickerson by his family. Dickerson had been employed by 24-Hour Tire Service, Inc., which defendant had hired as an independent contractor to replace tires on one of defendant’s forklifts. The forklift had been parked on uneven ground with the boom in an elevated position in contravention of the unit manufacturer’s guidelines for servicing the lift. In the process of replacing the tires on the forklift, Dickerson placed himself fully under the lift, which collapsed.
because the jacks were on an uneven surface with the boom extended. Plaintiffs sued, alleging that defendant negligently failed to provide a stable and level surface for the tire change, allowed the tire change to proceed with the forklift’s boom raised, and failed to properly train its employees and independent contractors to whom defendant assigned the maintenance and storage of the forklift.

Plaintiffs’ lawsuit normally would be barred by the Privette rule, pursuant to which an independent contractor’s hirer presumptively delegates to the contractor its tort law duty to provide a safe workplace for the contractor’s employees. Privette v. Super. Ct., 5 Cal. 4th 689 (1993). However, plaintiffs alleged that the Hooker exception applied. Under the Hooker exception, the hirer of an independent contractor may be liable if the hirer exercised control over safety conditions at the worksite in a way that affirmatively contributed to the employee’s injuries. Hooker v. Dep’t Transp., 27 Cal. 4th 198, 202 (2002).

Defendant moved for summary judgment, arguing that plaintiffs failed to provide evidence that defendant controlled the job site’s safety conditions such that it affirmatively contributed to Dickerson’s death. The trial court agreed with defendant and granted the motion.

The court of appeal affirmed. The court of appeal distinguished between passively permitting an unsafe condition to occur and actively directing an unsafe condition to be created. Here, the evidence presented at most constituted a passive allowance of an unsafe condition. Defendant did not train Dickerson, supervise his work, or instruct him how to complete the work safely. Instead, defendant merely failed to correct the unsafe condition, which also was apparent to Dickerson and his employer. Defendant’s failure to correct the unsafe condition, by itself, did not establish affirmative contribution.

People v. Superior Court of Los Angeles County, 57 Cal. App. 5th 619 (2020)

Defendants are federally licensed motor carriers that operate or have operated trucking and drayage companies in and around the Ports of Los Angeles and Long Beach. Defendants utilize the services of independent owner-operator truck drivers— independent truck drivers who lease their services to licensed motor carriers. The Los Angeles City Attorney, acting for the People of the State of California, sued defendants in three related cases, alleging in relevant part a violation of the Unfair Competition Law (“UCL”), predicated on defendants’ alleged misclassification of truck drivers as independent contractors. The parties disagreed over whether California’s ABC test, as codified by AB 2257, should apply to the plaintiffs’ misclassification-based UCL claims. The trial court ruled that it should not, concluding that the Federal Aviation Administration Authorization Act (“FAAAAA”) preempted the ABC test for worker classification for claims brought under California’s Wage Orders.

The court of appeal disagreed, holding that as a matter of first impression, the ABC test is not preempted by the FAAAA. The court found the California Supreme Court’s decision in People ex rel. Harris v. Pac Anchor Transport., Inc. dispositive. 59 Cal. 4th 772 (2014). There, the Supreme Court held that the FAAAA did not preempt a claim under the UCL premised on truck drivers being misclassified as independent contractors. The Pac Anchor court reasoned
that a UCL action that is based on an alleged general violation of labor and employment laws does not implicate Congress’s concerns about regulation of motor carriers with respect to the transportation of property. Analogizing *Pac Anchor* to the instant case, the court of appeal found that the ABC test is a law of general application; it does not mandate the use of employees for any business or hiring entity. That truck drivers may be incorrectly classified does not mean the ABC test prohibits motor carriers from using independent contractors. This is further highlighted by the business-to-business exemption in California Labor Code Section 2776, pursuant to which some truck drivers that satisfy the criteria may be exempted from the ABC test.

Because the ABC test for classification of workers is a generally applicable employment law that does not prohibit the use of independent contractors, it does not have an impermissible effect on prices, routes, or services. As such, it is not preempted by the FAAAA.

*Salter v. Quality Carriers, Inc.*, 974 F.3d 959 (9th Cir. 2020)

Plaintiff Clayton Salter, a truck driver, instigated a putative class action lawsuit against his employer, Quality Carriers, Inc. and Quality Distribution, Inc. in Los Angeles Superior Court, alleging that employer misclassified its truck drivers as independent contractors rather than employees. Employer filed a notice of removal with the district court, invoking federal court jurisdiction pursuant to 28 U.S.C. § 1332(d), the Class Action Fairness Act of 2005 (“CAFA”), which provides that a district court shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5 million. Salter moved to remand the case on the grounds that employer’s notice of removal failed to demonstrate that at least $5 million was in controversy. Employer responded by submitting a declaration by its Chief Information Officer (“CIO”) to support employer’s assertion that the amount in controversy exceeded $5 million.

The district court agreed with Salter that the CIO’s declaration was deficient because it was based on "unsupported and conclusory statements," noting that the declaration failed to attach any business records or spreadsheets of calculations or any attestation that the CIO had relied on such records in his declaration. The district court therefore remanded the matter back to state court.

The Ninth Circuit reversed, finding that Salter had attacked the form, not the substance, of the declaration. Salter failed to challenge either the rationality or the factual basis of the essential assumptions underlying the "plausible allegations" of the CIO’s declaration. Instead, Salter argued only that employer must support its assertion with competent proof. However, such a challenge is foreclosed by the court’s decision in *Arias v. Residence Inn by Marriott*, which held that a removing defendant need only show "plausible allegations of the jurisdictional elements" rather than evidentiary submissions. 936 F.3d 920 (9th Cir. 2019). Because an employer need only include a plausible allegation that the amount in controversy exceeds CAFA’s jurisdictional threshold, the CIO’s declaration sufficed to establish that the district court had CAFA jurisdiction.

Premier Automotive Imports of CA hired Tracey Molina in 2014. Molina did not disclose a previously dismissed criminal conviction on her job application. In failing to disclose the conviction, Molina was exercising her right pursuant to California Labor Code Section 432.7, which prohibits an employer from asking a job applicant to disclose any conviction that has been judicially dismissed and bans an employer from using any record of a dismissed conviction as a factor in terminating employment. Several weeks after hiring Molina, Premier received a mistaken notice from the DMV stating that Molina had an active criminal conviction. Premier failed to investigate to see whether the DMV was correct, though its own background check revealed no conviction. Molina, when confronted, told Premier that her conviction had been dismissed. Thereafter, Premier fired Molina for lying on her job application. The DMV later corrected its mistake, but Premier took no steps to rehire Molina.

Molina filed a retaliation complaint with the Labor Commissioner, who found in Molina’s favor. Thereafter, the Commissioner filed an enforcement action against Premier for violating California Labor Code Sections 432.7 and 98.6, alleging that Premier unlawfully retaliated against Molina for exercising her right to omit disclosure of the dismissed conviction on her job application, and that Premier relied on a dismissed conviction as a factor in terminating her employment. The trial court granted Premier’s motion for nonsuit, finding the Commissioner’s evidence insufficient as a matter of law to prove a prima facie case for retaliation, because there was no proof that Premier knew that Molina’s conviction had been dismissed at the time of her termination.

The court of appeal reversed. To establish a violation of Labor Code Section 432.7, the Commissioner was required to show that Premier utilized a record concerning a conviction that had been judicially dismissed as a factor in terminating Molina’s employment. The court of appeal found the evidence, including Premier’s first passed criminal background check and Molina’s own statements regarding the dismissed conviction, sufficient to establish that Premier knew about Molina’s dismissed conviction and misused that information to terminate her.

Moreover, the court of appeal found that the Commissioner produced sufficient evidence to establish a prima facie violation of Labor Code Section 98.6. It was undisputed that Molina engaged in protected activity when she exercised her right to not disclose a dismissed conviction on her job application. It also was undisputed that Premier subjected Molina to an adverse employment action when it terminated her. The only question was whether the Commissioner produced sufficient evidence to establish that Molina’s protected activity substantially motivated the termination. The court of appeal found that it did. Premier rushed to fire Molina without investigating the accuracy of the DMV report, despite the conflicting evidence suggesting that the conviction had been dismissed. Further, Premier failed to take any steps to rehire Molina after the DMV corrected its mistake three weeks later. These factors supported an inference that Molina’s failure to disclose the dismissed conviction was a substantial motivating factor in Premier’s decision to terminate Molina’s employment.
Allstate Insurance Company terminated plaintiff Michael Tilkey, an employee who sold life insurance, after Tilkey was arrested in Arizona following a domestic dispute with his girlfriend. Charges against Tilkey included criminal damage deface, possession or use of drug paraphernalia, and disorderly conduct, disruptive behavior. Domestic violence charges were attached to the criminal damage and disorderly conduct charges. Tilkey appeared before a court in Arizona and entered a guilty plea to the disorderly conduct charge only; the other charges were dropped. Tilkey completed a domestic nonviolence diversion program, and the disorderly conduct charge was dismissed. Before the disorderly conduct charge was dismissed, Allstate terminated Tilkey’s for threatening behavior and/or acts of physical harm or violence to another person. Allstate also reported its reason for the termination with the Financial Industry Regulatory Authority (“FINRA”), a report accessible to any firm that hired licensed broker-dealers like Tilkey. Tilkey sued Allstate for wrongful termination based on noncompliance with California Labor Code Section 432.7 and compelled self-published defamation to prospective employers. A jury returned a verdict in favor of Tilkey.

Allstate appealed, and the court of appeal agreed that Allstate was not in violation of Section 432.7 which prohibits an employer from considering as a factor in employment decisions “any record of arrest . . . that did not result in a conviction.” In turn, the relevant issue was whether Tilkey’s guilty plea, rather than an entry of judgment of guilt, constitutes a “conviction” for purposes of Section 432.7. The court concluded that it does. Specifically, the court looked to the plain text of the statute, which defines a conviction as including “a plea, verdict, or finding of guilt regardless of whether sentence is imposed by the court.” Cal. Lab. Code § 432.7(a)(3)(A). Because a conviction can exist without respect to sentencing, it is clear that a judgment is not required. This interpretation is supported by the legislative history of Section 432.7. Thus, Tilkey’s guilty plea was a conviction under Section 432.7, and Allstate did not violate Section 432.7 by using Tilkey’s arrest as a factor in its decision to terminate his employment.

Section 432.7 also prohibits an employer from considering as a factor in an employment decision records of referral to or participation in a diversion program. Looking to the legislative intent, the court determined that Section 432.7’s reference to a diversion program excludes out-of-state domestic violence programs, which California views as contrary to public policy. As such, Allstate’s consideration of Tilkey’s participation in one did not violate the law.

As to Tilkey’s allegation of compelled self-published defamation, the court concluded that compelled self-published defamation is a viable tort theory. Because substantial evidence supported the verdict that the statement was not substantially true, the court affirmed that portion of the judgment but deemed the punitive damages awarded not proportionate to the compensatory damages for defamation and remanded the matter to the trial court to recalculate punitive damages.
NEGLIGENCE IN AN EMPLOYMENT IMMIGRATION


Michael Reynaud, a British citizen, moved to Los Angeles to attend business school at the University of Southern California in 2005. After he obtained his MBA degree, he began working for Technicolor Creative Services USA, Inc. (“Technicolor”), who sponsored a series of temporary work visas for him, allowing him to remain in Los Angeles. In 2010, Reynaud began a long-distanced relationship with Fiona, a British citizen based in England. They had a child in 2011 and married in 2015. Fiona moved to Los Angeles with their daughter and their second daughter was born in Los Angeles. To the Reynauds’ joy, Technicolor promised to sponsor Michael for a green card so that he and his family could reside in Los Angeles permanently. After an unreasonable delay of over a year, Technicolor informed Michael in March of 2016 that his green card application had not been filed yet and that it would no longer employ Michael after the expiration of his temporary work visa in May of that year. The Reynauds were devastated by the news that Michael would no longer be employed and they had no choice but to uproot their young family, sell their condominium, and return to England. The Reynauds sued Technicolor for negligence, alleging that Technicolor breached its assumed duty of care by failing to initiate the green card process. In March of 2018, the jury found in the Reynauds’ favor and the trial court entered a judgment of nearly $3 million against Technicolor.

Technicolor appealed, arguing that the verdict is unsupported by substantial evidence and that the damages awarded for emotional distress are, at least in part, barred by workers’ compensation exclusivity. The court of appeal disagreed with each of Technicolor’s arguments and affirmed the trial court’s judgment against Technicolor.
OFFSHORE EMPLOYEES

_Gulf Offshore Logistics, LLC v. Superior Court, 45 Cal. App. 5th 285 (2020)_

The defendants in this case were limited liability companies (LLCs) formed under Louisiana law and headquartered in Louisiana. The members of the LLCs were exclusively Louisiana residents. Defendants owned and operated a vessel providing services to oil platforms located off the California coast in the Santa Barbara channel. The crew members on that vessel brought a lawsuit against the defendants alleging a variety of wage-and-hour claims. The vessel itself was registered in Louisiana.

Defendants moved for summary judgment on the basis that Louisiana law, not California law, governed the employment relationship with the crew members. The trial court denied the motion, and the court of appeal reversed.

The court of appeal explained that California employment laws implicitly extend to employment occurring within California’s state-law boundaries, including the Santa Barbara Channel, unless the operation of federal law is at issue, as for example, if federal law conflicts with state law. To determine whether California law conflicted with Louisiana law, the court of appeal applied the governmental interest analysis, concluding that Louisiana’s interest in the application of its laws was stronger than California’s under the circumstances.
PENSION AND RETIREMENT

*Alameda County Deputy Sheriff’s Assn. v. Alameda County Employees’ Retirement Assn., 9 Cal. 5th 1032 (2020)*

The California Public Employees’ Pension Reform Act of 2013 (“PEPRA”) substantially revised the laws governing the pension plan of the state’s public employees. The County Employees Retirement Law (“CERL”) governs the pension systems maintained by many of the state’s counties. Each county system is administered by its own retirement board, which implements CERL’s provisions. This case concerned a PEPRA provision that amended CERL’s definition of compensation earnable to exclude or limit the inclusion of additional types of compensation in an effort to prevent perceived abuses of the pension system.

The plaintiffs raised two issues. First, they contended that employees had a contractual right to receive pension benefits calculated without regard to PEPRA’s changes based either on (1) agreements in effect when PEPRA was enacted or (2) application of the doctrine of equitable estoppel. Second, they argued that county employees who began their work prior to PEPRA’s enactment have a constitutional right to receive pension benefits calculated according to the law as it existed prior to PEPRA.

The court held that county employees have no express contractual right to the calculation of their pension benefits in a manner inconsistent with the terms of an amendment to PEPRA. With respect to the merits of plaintiffs’ constitutional claim, the court held that the challenged provisions added by PEPRA met contract clause requirements. They were enacted for the permissible purpose of closing loopholes and preventing abuse of the pension system in a manner consistent with CERL’s preexisting structure.

*Castillo v. Metropolitan Life Insurance Company, 970 F.3d 1224 (9th Cir. 2020)*

Plaintiff Juan Castillo was a participant in an employee benefit group welfare plan governed by ERISA, administered by Defendant Metropolitan Life Insurance Company (“MetLife”), and sponsored by his employer, Verizon Communications (“Verizon”). In 2013, after Castillo became disabled, he began collecting long-term disability (“LTD”) benefits under the plan, retired from Verizon, and rolled his pension benefits into an individual retirement account (“IRA”). In December 2017, MetLife abruptly informed Castillo that it would reduce his LTD benefits, effective November 1, 2013, to account for the pension rollover. MetLife withheld future benefits and sought to recover over $50,000 in benefits it had paid to Castillo over the past four years. Castillo retained counsel and appealed MetLife’s decision administratively.

other things, failing repeatedly to inform him over the past four years of the effect his pension rollover could have and that he may be required to repay a significant portion of the benefits he had received. He sought reimbursement for the attorneys’ fees he was forced to incur to appeal Metlife’s decision administratively. MetLife moved to dismiss the complaint.

The district court granted the motion to dismiss agreeing with MetLife’s argument that attorneys’ fees are not “other appropriate equitable relief” under § 1132(a)(3). The Ninth Circuit affirmed based, in part, on its prior ruling, Cann v. Carpenters’ Pension Trust Fund for Northern California (9th Cir. 1993) 989 F.2d 313, interpreting attorneys’ fees pursuant to § 1132(g) and the fact that § 1132(a)(3) does not explicitly authorize attorneys’ fees.

Deiro v. Los Angeles Civil Service Com., 56 Cal. App. 5th 925 (2020)

This decision addressed whether the Civil Service Commission retained jurisdiction to decide the appeal of the plaintiff, a retired deputy sheriff, regarding his discharge. The court held that the commission properly dismissed plaintiff’s appeal because it has no jurisdiction to order reinstatement or any form of wage relief to a retired person whose future status as an employee by definition is no longer at issue. Several cases have held, under varying circumstances, that an employee who properly appealed his or her discharge, but then resigned, retired, or died, no longer had jurisdiction to continue to adjudicate his or her appeal.

Guenther v. Lockheed Martin Corp., 972 F.3d 1043 (9th Cir. 2020)

Charles Guenther worked for Lockheed Martin Corp. (“LMC”) and was an active participant in LMC’s defined benefit pension plan (“Plan”). Guenther worked for LMC from 1983-1991 and again from 1997 to 2001. Under the Plan’s rules in effect at that time, LMC “bridged” his accrued service credit so that he received credit for 11.5 years of service. In 2005, the Plan was amended and any returning employees hired after January 1, 2006 could participate in a different retirement plan (“CAP”) but could not participate in or resume accruing additional credited service under the Plan. Guenther rejoined LMC in 2006 after being promised by LMC that they would “bridge” his prior service periods with his new service period. He believed that he would be accruing ongoing credited service under the Plan. Several months after he joined, in November of 2006, he received a letter from LMC Pension Plan Operations advising him that he was not entitled to a pension benefit from LMC for his current period of service because he was not currently participating in a LMC defined benefit pension plan. Guenther followed up but let the matter slide for the next several years. He never received additional credited service for his third period of employment with LMC, leaving his years of accredited service at 11.5.

On November 8, 2010, Guenther filed a lawsuit against LMC alleging breach of contract and Employee Retirement Income Security Act of 1974 (“ERISA”) claims to recover benefits under the plan. The district court dismissed his breach of contract claim and granted summary judgment on the ERISA claim in favor of LMC.
The Ninth Circuit affirmed but remanded to permit Guenther to assert an ERISA breach of fiduciary duty claim. (See Guenther v. Lockheed Martin Corp. (9th Cir. 2016) 646 F. App’x 567, 570 (unpublished).) The district court granted LMC’s motion for summary judgment finding that Guenther’s breach of fiduciary duty claim was time barred because he had actual knowledge of the alleged breach but failed to timely bring a claim within the three-year statute of limitations. On appeal, the Ninth Circuit affirmed and held that (1) LMC did not waive its statute of limitations defense, (2) the limitations period for Guenther’s breach of fiduciary duty claim began running on the earliest date upon which he became aware of the alleged breach, arising out of LMC’s misrepresentation; (3) Guenther had actual notice of the alleged breach no later than the date he received the letter indicating that his prior periods of service would not be credited under the plan in November of 2006; and (4) Guenther failed to produce any evidence that showed LMC made “knowingly false misrepresentations with the intent to defraud,” and, thus, the three-year, rather than six-year, limitations period applied.


Plaintiff’s mother worked at the University of California at San Diego before she died. Plaintiff claimed her rights as the designated beneficiary of a pension shortly after her mother’s death. The Regents of the University of California (“Regents”) denied her claim, finding the mother did not properly designate her daughter as a contingent beneficiary before her death. The court disagreed, finding that the Regents abused its discretion under the substantial compliance doctrine. The courts have long held that the substantial compliance doctrine applies to excuse strict compliance with requirements pertaining to beneficiary designations for public employee pensions.

Moreno v. California State Teachers’ Retirement System, 52 Cal. App. 5th 547 (2020)

The California State Teachers’ Retirement System (“CalSTRS”) determined that plaintiff Ernest Moreno’s retirement benefits had been incorrectly calculated, and they initiated proceedings to adjust Moreno’s retirement benefits and collect the overpayment. The trial court denied Moreno’s petition for writ of administrative mandamus challenging the CalSTRS actions.

Moreno appealed. On appeal, Moreno raised two primary arguments. First, Moreno argued that CalSTRS’s adjustment of his retirement benefits and collection of the overpayment were barred by the applicable statute of limitations because CalSTRS was on inquiry notice of the problem as early as 2008. Second, Moreno argued that CalSTRS should have been equitably estopped from adjusting his retirement benefits and collecting the overpayments.

The court of appeal rejected Moreno’s statute-of-limitations argument, concluding that CalSTRS was not on inquiry notice of the reporting error that led to overpayment until December 2014 when it began an audit of Moreno’s retirement benefits, and, therefore, CalSTRS’s adjustments to Moreno’s retirement benefits and collection of overpayments were not barred by the statute of limitations. The court of appeal also rejected Moreno’s second
argument, holding that CalSTRS was not equitably estopped because CalSTRS was not apprised of the overpayments until December 2014.

**Rutledge v. Pharmaceutical Care Management Association, 141 S.Ct. 474 (2020)**

Leslie Rutledge is the Attorney General of Arkansas and respondent, Pharmaceutical Care Management Association (“PCMA”), is a national trade association representing eleven of the largest pharmacy benefit managers (“PBMs”) in the United States. When a beneficiary of a prescription-drug plan goes to a pharmacy to fill a prescription, the pharmacy checks with a PBM to determine that person’s coverage and co-payment information. After the beneficiary leaves with their prescription, the PBM reimburses the pharmacy for the prescription less the amount of the beneficiary’s co-pay. The prescription drug-plan, in turn, reimburses the PBM. To determine the reimbursement rate for each drug, PBMs develop and administer maximum allowable cost (“MAC”) lists.

In 2015, Arkansas passed Act 900, in response to concerns that the reimbursement rates set by PBMs were often too low to cover pharmacies’ costs, and that many pharmacies were at risk of losing money and closing. In effect, Act 900 requires PBMs to reimburse Arkansas pharmacies at a price equal to or higher than that which the pharmacy paid to buy the drug from a wholesaler by requiring PBMs to timely update their MAC lists when drug wholesale prices increase (Ark. Code Ann. § 17–92–507(c)(2)), and to provide pharmacies an administrative appeal procedure to challenge MAC reimbursement rates (§ 17–92–507(c)(4)(A)(i)(b)). Act 900 also permits Arkansas’ pharmacies to refuse to sell a drug if the reimbursement rate is lower than its acquisition cost. § 17–92–507(e).

PCMA sued the state of Arkansas alleging, in part, that Act 900 is pre-empted by the Employee Retirement Income Security Act of 1974 (“ERISA”). Following Circuit precedent in a case involving a similar Iowa statute, the district court held that ERISA preempts Act 900. The Eighth Circuit affirmed. The U.S. Supreme Court reversed and held that because Arkansas’ Act 900 did not have an “impermissible relationship” with an ERISA plan, and merely is a form of cost regulation, the law is not preempted by ERISA.

**Salinas v. United States Railroad Retirement Board, 140 S.Ct. 813 (2021)**

Petitioner Manfredo M. Salinas worked for the Union Pacific Railroad for fifteen years. After suffering serious injuries on the job, Salinas applied for disability benefits under the Railroad Retirement Act of 1974 (“RRA”). Salinas’ first three applications were denied, but he was granted benefits after he filed his fourth application in 2013. Salinas timely sought reconsideration of the amount and start date of his benefits. After reconsideration was denied, he filed an administrative appeal, arguing that his third application in 2006 should be reopened because the U. S. Railroad Retirement Board (“Board”) had not considered certain medical records. An intermediary of the Board denied the request to reopen because it was not made “[w]ithin four years” of the 2006 decision, and the Board affirmed.
Salinas sought review with the Fifth Circuit, but the court dismissed the petition for lack of jurisdiction, holding that federal courts cannot review the Board’s refusal to reopen a prior benefits determination. In a 5-4 decision by Justice Sonia Sotomayor, the U.S. Supreme Court held that the Board’s denial of a request to reopen a prior benefits determination under the RRA and the Railroad Unemployment Insurance Act is subject to judicial review. The Supreme Court noted that the Board’s refusal to reopen Salinas’s 2006 application was a “final decision” because it was the “terminal event” in the Board’s administrative review process and the Board’s denial of Salinas’ appeal substantively affected his benefits and the Board’s obligations under the RRA.

**Stone v. UnitedHealthcare Insurance Company, 979 F.3d 770 (9th Cir. 2020)**

Plaintiff Suzanne Stone had an employer-provided health care plan (the “Plan”) governed by the Employee Retirement Income Security Act of 1974 (“ERISA”) and administered by Defendant U.S. Behavioral Health Plan, California, dba OptumHealth Behavioral Solutions of California (“Optum”). G.S., Stone’s minor daughter, began receiving treatment for anorexia nervosa in June of 2014 at a California facility. Optum approved the coverage. The California facility discharged G.S., stating that she needed family-based treatment, and referred her to a treatment facility in Colorado because no California facility offered that specific treatment. Stone called Optum to check if the Plan covered the out-of-state Colorado facility and was told that the Plan excluded coverage for any out-of-state treatment other than for an emergency. Stone nonetheless sent her daughter to the Colorado residential treatment program.

After Optum and UnitedHealthcare Insurance Company (“UnitedHealthcare”) denied coverage, Stone filed a lawsuit pursuant to the ERISA in August of 2017 against Optum and UnitedHealthcare, claiming that the denial of coverage violated the Mental Health Parity and Addiction Equity Act of 2008 (“Federal Parity Act”) and the California Mental Health Parity Act, codified in Cal. Health & Safety Code § 1374.72. The Federal Parity Act requires that “benefits and treatment limitations for mental health problems shall be ‘no more restrictive’ than those for medical and surgical problems.” The California Parity Act similarly was enacted to “combat [the] disparity” between the coverage provided by private health insurance policies for mental illness and that provided for physical illness.

The district court granted summary judgment in favor of defendants holding that the denial of coverage was based solely on the Plan’s exclusion of coverage for out-of-state treatment, which applied equally to mental and physical illnesses. The Ninth Circuit affirmed.


Plaintiffs James Thole and Sherry Smith are retired participants in U. S. Bank’s defined-benefit retirement plan. Under plaintiffs’ retirement plan, they are legally and contractually guaranteed a fixed monthly payment for the rest of their lives regardless of the plan’s value. Both have been paid all of their monthly pension benefits. Even though they did not sustain any monetary injury, they filed a putative class-action suit against U. S. Bank and others under the
Employee Retirement Income Security Act of 1974 ("ERISA"), alleging that defendants had violated ERISA’s duties of loyalty and prudence by poorly investing the plan’s assets. Thole and Smith requested repayment of approximately $750 million to the plan in losses suffered due to mismanagement; injunctive relief, including replacement of the plan’s fiduciaries; and $31 million in attorneys’ fees. The district court dismissed the case.

The Eighth Circuit affirmed on the ground that the plaintiffs lack statutory standing. In a 5-4 decision, the U.S. Supreme Court affirmed and held that the plaintiffs lacked Article III standing because they had not sustained any monetary injury and were entitled to receive the exact same monthly benefit regardless of the fiduciaries’ poor investment decisions. Thus, the outcome of the lawsuit would not affect their future benefit payments. The four liberal Supreme Court justices (the case was decided before Ginsburg passed away in September of 2020) dissented, arguing that plaintiffs had standing because: (1) they have an interest in their retirement plans’ financial integrity, “exactly like private trust beneficiaries have in protecting their trust,” and had properly alleged a $750 million injury to that interest; (2) a “breach of fiduciary duty is a cognizable injury” regardless of whether the breach had caused financial harm or increased a risk of nonpayment; and (3) they could sue on behalf of the retirement plan.


Under the California Public Employees’ Pension Reform Act of 2013 ("PEPRA"), a public employee forfeits pension benefits if he or she is convicted of a felony arising out of or in the performance of his or her official duties. A veteran county employee was indicted and pled guilty to stealing company property through embezzlement over a thirteen-year period. The employee challenged the forfeiture provision on the ground that he had retired. The court held that the provision did apply because the employee had merely initiated the process of retiring, but that even if he had retired, there would be no violation of the California Constitution’s provision against the undue impairment of the employee’s contract with his governmental employer, nor would that application constitute an ex post facto law.
PRIVATE ATTORNEYS GENERAL ACT OF 2004 (“PAGA”) ACTIONS


In 2013, an employee filed a wage-and-hour class action complaint against employer Fantasy Activewear, alleging various causes of action under the California Labor Code. In January 2014, the employer entered into settlement agreements and arbitration agreements with putative class members. The arbitration agreements read, in part, “the Arbitrator has the authority to determine jurisdiction and arbitrability issues as a preliminary matter.”

On June 1, 2018, the plaintiffs filed class action complaints alleging causes of action substantially similar to those alleged in the previous actions. The complaints were later amended to proceed only as PAGA actions. The plaintiffs were covered by the previous settlement, including the arbitration agreements. The employer moved to compel the claims into arbitration. After the trial court denied the motions, the employer argued that the question of arbitrability was not properly before the court because it had been delegated to the arbitrator. This argument was based on recent United States Supreme Court precedent that held “[w]hen the parties’ contract delegates the arbitrability question to an arbitrator, a court may not override the contract.” For this reason, the employer argued that the question of whether PAGA actions were arbitrable is properly reserved for the arbitrator.

The court rejected this argument. Relying on the same reasoning from cases like Iskanian v. CLS Transportation Los Angeles, LLC, the court concluded that the State was not a party to the agreement, and so could not be compelled into arbitration. 59 Cal. 4th 348, 173 (2014). “The question here is not whether claims are arbitrable under an agreement among the parties, but rather whether there exists an agreement among the parties to arbitrate.” The court noted, “[A]n arbitration agreement executed before an employee meets the statutory requirements for commencing a PAGA action does not encompass that action.” As a result, the court concluded that the question of arbitrability was properly before the trial court.


In January 2019, plaintiff Anthony Brooks filed a written notice of wage violation claims with the California Labor and Workforce Development Agency (“LWDA”). Defendant AmeriHome Mortgage Company, LLC filed a demand for arbitration with the American Arbitration Association. In response, Brooks filed a first amended complaint, alleging a single cause of action under PAGA. AmeriHome filed a motion to compel arbitration, and Brooks filed a motion for a preliminary injunction to enjoin the arbitration. The trial court ruled in favor of Brooks and enjoined the arbitration.

In order to prevail on a motion for preliminary injunction, a plaintiff must show (1) a likelihood of prevailing on the merits and (2) the relative interim harm the parties would suffer from the issuance or nonissuance of the injunction. As to the first point, the court held that Brooks showed a likelihood of prevailing on the merits (regarding the arbitrability of the PAGA
action), because PAGA claims cannot be compelled into arbitration. Because Brooks filed a “PAGA only” claim, it was unlikely AmeriHome would prevail on the issue of whether the claim should be arbitrated. Second, the court held that Brooks showed the balance of harm would tip in his favor. Specifically, the court held that Brooks showed that the arbitration of a nonarbitrable claim would be futile.

*Canela v. Costco Wholesale Corp.*, 965 F.3d 694 (9th Cir. 2020)

Plaintiff Liliana Canela sued employer Costco in a state trial court in California, alleging that Costco had violated sections of the California Labor Code. Shortly thereafter, relying on both the federal diversity statute and Class Action Fairness Act of 2005 (“CAFA”), Costco removed the action to federal court. About a year later, Canela notified the court that she no longer planned to seek class certification, and an issue was raised over whether the district court still had jurisdiction over the case.

First, the court of appeal addressed the question of whether diversity jurisdiction existed. The court of appeal held that diversity jurisdiction did not exist because the case did not meet the amount in controversy requirement of $75,000. Specifically, the court of appeal held that Canela could not aggregate the potential exposure of absent non-party employees in order to meet this requirement. Because Canela’s potential recovery was less than $75,000, diversity jurisdiction did not exist.

The court of appeal then addressed whether jurisdiction existed under CAFA. In order for jurisdiction to exist under CAFA, a plaintiff must show that he/she has filed a “class action.” CAFA defines class action as (among other things) a case that proceeds under a “rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action.” The court of appeal held that a “PAGA only” claim is not a class action, because it lacks many of the same procedural protections or markers of a class action (such as requirements of numerosity, commonality, or typicality, as well as adequacy of representative and counsel). As a result, the court of appeal found that jurisdiction did not exist under CAFA, and that the district court erred by not remanding the case to state court.

*Coughenour v. Del Taco, LLC*, 57 Cal. App. 5th 740 (2020)

Plaintiff Sarah Coughenour began working for Del Taco when she was sixteen years old. When she first began working, she signed an arbitration agreement. Coughenour worked with Del Taco until four months after she turned eighteen years old. Coughenour quit and filed a lawsuit against Del Taco for sexual harassment committed by one of their employees and for wage and hour claims brought pursuant to the California Labor Code. Del Taco filed a motion to compel arbitration. The trial court denied the motion, finding that Coughenour had disaffirmed the arbitration agreement pursuant to California Family Code section 6700.

On appeal, the court of appeal affirmed the trial court’s holding. Specifically, the court of appeal held that Coughenour had not affirmed the contract by simply working for four months
after turning eighteen years old. “[A]ssent cannot be implied from ‘mere silence or inaction, no matter how protracted.’” As a result, “[i]t could not be said [that Coughenour], by continuing to work for Del Taco after she reached the age of majority, did so with the awareness that she still would be subject to the [Arbitration] Agreement.” Moreover, the court of appeal found that Coughenour disaffirmed the contract within a “reasonable time.” While the statute does not define “reasonable time,” and no case has yet to define the term, the court of appeal found that Coughenour worked at Del Taco for two years (as a minor) and then quit and brought suit within four months of turning eighteen years old. This, the court of appeal found, was reasonable.


Google requires its employees to sign various confidentiality policies. Current and former employees of Google brought a lawsuit challenging these policies on the basis that they restricted their speech in violation of California law. Specifically, the employees alleged seventeen claims that fell into three subcategories based on Google’s confidentiality policies: restraints of competition, whistleblowing, and freedom of speech. The claims were brought under PAGA. Google demurred to the entire complaint, and the trial court sustained the demurrer on the basis that they were preempted by the National Labor Relations Act (“NLRA”).

The court of appeal reversed. The first step in the preemption analysis is to determine whether the conduct at issue is arguably protected or prohibited by the NLRA. The court of appeal found that several of the statutes underlying the employees’ claims did not involve actions for “mutual benefit” that are the foundation of the NLRA, but instead protected the employees’ activities as individuals. Notwithstanding these differences, the court of appeal held that the local interest exception applied. This exception applies when (1) there is a “significant state interest” in protecting the citizen from the challenged conduct and (2) the exercise of state jurisdiction entails “little risk of interference” with the National Labor Relations Board’s (“NLRB”) regulatory function. The court of appeal found that there was a significant state interest in labor regulation (especially regulating wages, hours, and other terms of employment). Finally, the court of appeal found that the claims underlying this lawsuit were peripheral to the NLRA. “Nothing about the NLRA manifests a purpose to displace state labor laws regulating wages, hours, and other terms of employment, as the NLRA is aimed at safeguard[ing], first and foremost, workers’ rights to join unions and to engage in collective bargaining.”

**Kim v. Reins International California, Inc., 9 Cal.5th 73 (2020)**

Plaintiff Justin Kim, a training manager, brought suit against his employer, Reins International California, Inc., a company that operates restaurants in California. Kim alleged that he was misclassified as exempt and filed his complaint as a class action lawsuit, also including a cause of action under PAGA. Reins successfully moved to compel the action (all but the PAGA cause of action) into arbitration. Once in arbitration, the parties resolved/settled all of Kim’s individual claims. However, the settlement explicitly carved out Kim’s pending PAGA action. At the conclusion of the arbitration, Reins filed a motion for summary judgment, arguing that Kim no longer was an “aggrieved employee” and could not serve as a PAGA representative.
The Supreme Court of California disagreed. Based on (1) PAGA’s statutory language and (2) the statutory purpose of protecting employees, the Supreme Court concluded that an employee does not need to have an unresolved injury in order to serve as a PAGA representative.


Plaintiff Brandon Olson sued his employer, Lyft, Inc., alleging that he was misclassified as exempt. On starting his employment with Lyft, Olson had signed an agreement that contained a waiver, among other things, waiving an employee’s ability to bring a PAGA representative action. Lyft filed a motion to compel Olson’s individual claims (an argument that assumed that the PAGA waiver was valid). Under Iskanian v. CLS Transportation Los Angeles, LLC, 59 Cal.4th 348 (2014), PAGA waivers are unenforceable, but Lyft argued that after the United States Supreme Court’s opinion in Epic Systems Corp. v. Lewis, 138 S. Ct. 1612 (2018), Iskanian was no longer good law. Specifically, Lyft argued that a PAGA waiver is enforceable if a class action waiver (a type of representative action) also is enforceable.

The court of appeal rejected this argument. The court noted that “[o]n federal questions, intermediate appellate courts in California must follow the decisions of the California Supreme Court, unless the United States Supreme Court has decided the same question differently.” The court of appeal then held that Epic Systems did not involve a PAGA action. “Epic held that an employee who agrees to individualized arbitration cannot avoid this agreement by asserting claims on behalf of other employees under the FLSA or federal class action procedures.” However, in the context of a PAGA action, the action is brought on behalf of the state, not on behalf of other employees. As such, the two cases involved different questions.


Plaintiff Jonathan Provost’s action alleged that employer YourMechanic, Inc. violated various California Labor Code sections and that Provost and other “aggrieved employees” were misclassified as independent contractors. Upon starting work for YourMechanic, each employee signed an arbitration agreement. The agreement also contained a provision that the arbitration must proceed on an individual basis. YourMechanic moved to compel arbitration for the sole purpose of determining whether Provost was an “aggrieved employee.” The trial court denied the motion.

On appeal, the court of appeal agreed. The court of appeal concluded that accepting YourMechanic’s arguments would amount to impermissible claim splitting. In line with previous cases, the court of appeal held that allowing an arbitration for the sole purpose of determining whether Provost was an “aggrieved employee” would split the case into individual arbitrable and representative nonarbitrable components. The California Supreme Court already had held that this is impermissible in Williams v. Superior Court, 237 Cal. App. 4th 642 (2015). The court also noted that YourMechanic’s position was inconsistent with the court’s holding in Kim v. Reins International California, Inc., 9 Cal.5th 73 (2020). The court reaffirmed its
holding that “standing . . . cannot be dependent on the maintenance of an individual claim because there is no claim for individual relief.”


In August 2018, Plaintiff Richard Robinson filed a PAGA action against employer Southern Counties Oil Company. Robinson’s complaint alleged that Southern Counties denied Robinson and other aggrieved employees meal and rest breaks. In February 2019, the San Diego County Superior Court approved a settlement in a class action that sought individual damages as well as civil penalties under PAGA for the same alleged California Labor Code violations (Gutierrez v. S. Counties Oil Co., No. 37-2017-00040850-CU-OE-CTL (2019)). The settlement covered all persons employed by Southern Counties in certain job classifications between March 17, 2013 and January 26, 2018. Robinson and three other employees opted out of the class settlement. Thereafter, Robinson amended the allegations of his complaint to represent employees of Southern Counties who opted out of the settlement in Gutierrez and persons who were employed by Southern Counties from January 27, 2018 to the present. Southern Counties demurred, arguing that the matter was barred under claim preclusion. The trial court ruled in favor of Southern Counties and dismissed the case.

On appeal, the court of appeal agreed. The court of appeal noted that there is no mechanism for opting out of a judgment entered on a PAGA claim, since the action is brought on behalf of the state. As a result, “a judgment in that action binds all those, including nonparty aggrieved employees, who would be bound by a judgment in an action brought by the government.” Moreover, the court of appeal also held that Robinson could not represent other employees for any violations that occurred after his termination date. The court of appeal reasoned that Robinson was no longer employed by Southern Counties, and thus was not affected by any of the alleged violations (and thereby no longer aggrieved).

Sanchez v. Martinez, 54 Cal. App. 5th 535 (2020)

Plaintiffs Alfredo Sanchez, Delfino Sanchez Gatica, Calixtro Miliano, Francisco Pantoja, and Rafael Villa Reyna, all farm laborers who pruned grape leaves at piece rate, filed suit against employer Miguel A. Martinez, alleging various violations of California labor laws. The trial court found in favor of the employer on all causes of action.

Plaintiffs appealed, and the court of appeal reversed the trial court’s decision on rest periods and derivative cause of action under PAGA. On remand, the trial court entered judgment in favor of plaintiffs on their rest-break claim and PAGA claim and awarded unpaid minimum wages for actual time worked during rest breaks and civil penalties.

Plaintiffs again appealed, claiming they were entitled to be paid the minimum wage for time worked during what should have been their 10-minute rest break (the “Bluford theory of recovery”) and a premium pursuant to California Labor Code section 226.7 (the “226.7 theory of
recovery”). The employer cross-appealed, claiming there was insufficient evidence to support the trial court’s damages calculation.

While the employees were authorized to take their rest breaks, the court of appeal found that they were not compensated for them because of the employer’s piece rate compensation system. First, the court of appeal held that both of the employees’ claims were legitimate. That is, the court of appeal held that the employees in this case could feasibly recover both unpaid wages and rest break premiums. This was possible, according to the court, because the employees had not been compensated for rest breaks. Any cases holding to the contrary did not involve employees who were authorized rest breaks but were not compensated for them. Instead, such cases involved situations where people were required to work during their rest breaks. Second, the court of appeal affirmed the trial court’s holding. Although the court of appeal held that both theories of recovery were legitimate, it also held that the employees were not entitled to be compensated twice for the same harm. The court of appeal based this conclusion on the fact that California Labor Code section 226.7 premiums are wages, and not a penalty. As a result, employees cannot seek payment for unpaid wages and premiums. They must choose one or the other.


Two employees filed separate PAGA suits against employer Vortex Industries, Inc. Vortex settled with the first plaintiff (Chad Starks), and the California Labor and Workforce Development Agency accepted its share of the settlement. Unhappy with the terms of the settlement, Adolfo Herrera, the second plaintiff, filed a motion to intervene. Herrera argued the first settlement was inadequate because a disproportionate amount of the settlement went to the named plaintiff and his counsel. The motion to vacate was denied.

On appeal, the court of appeal affirmed the trial court’s ruling. First, the court of appeal held that the motion was untimely because Herrera waited until after the judgment had been entered and the settlement fund distributed (many of the employees had already received their checks as well). Additionally, the court of appeal held that Herrera could not move to vacate the judgment because the California Labor & Workforce Development Agency (LWDA) had already accepted the settlement (and did not object). The court of appeal noted that a PAGA action is one brought on behalf of the state (the plaintiff is a proxy/agent of the state). Once the state accepts the settlement, it cannot object. By extension, once the state no longer can object, their representative/agent similarly cannot object. As a result, the court of appeal held that the trial court did not err in denying the motion to vacate.
PUBLIC EMPLOYMENT RELATIONS BOARD ("PERB")

Regents of the University of California v. Public Employment Relations Bd., 51 Cal. App. 5th 159 (2020)

University Professional and Technical Employees, CWA Local 9119 ("UPTE") filed a petition for unit modification with the Public Employee Relations Board ("PERB") to add a newly created classification, Systems Administrators I, II, and III, into a preexisting bargaining unit. PERB granted the petition, and the Regents of the University of California refused to bargain over the terms and conditions of employment for the Systems Administrators. UPTE then filed an unfair practice charge against the University, which was also granted by PERB. The University filed a petition for writ of extraordinary relief, arguing that the Systems Administrator classification did not share a community of interest with the existing bargaining unit, as required under the Higher Education Employer-Employee Relations Act ("HEERA").

The Court of Appeal disagreed, and denied the petition.
RETALIATION


Plaintiff Stephen Colucci filed a complaint against former corporate employer, T-Mobile, for workplace retaliation, stemming from Colucci’s termination from employment by district manager, Brian Robson, following complaints about his behavior. When Colucci found out that Robson planned to transfer him to a new store located in a crowded mall, he successfully requested Robson not transfer him to the proposed location due to his anxiety disorder. Subsequently, Colucci heard that other employees were spreading defamatory statements about him, and Colucci asked Robson to address this. Robson agreed to address the problem, but told Colucci to quit complaining. Around this time, Robson heard that Colucci had utilized T-Mobile resources to benefit his outside business, which was called the Auto Compound. Robson and a loss prevention manager initiated an investigation and travelled to the store where Colucci worked to interview him.

Colucci complained to Robson that he was distressed about Robson’s failure to address the defamation problem and his belief that Robson was treating him unfairly due to his anxiety disorder and his request not to be transferred. Colucci requested, and obtained, permission to go on medical leave. Two days later, Robson terminated Colucci, citing as the reason a “conflict of interest.” The loss prevention manager told colleagues that Colucci was terminated because of his complaining. At trial, the jury awarded Colucci $1 million in compensatory damages and $4 million in punitive damages.

On appeal, the court of appeal affirmed that T-Mobile was liable for Robson’s conduct as a managing agent, even though Robson did not set company policies. The court of appeal reasoned that Robson did not need such authority because he had final authority to hire or fire employees, and Robson had discretionary authority over daily store operations, such as whether to transfer employees, administer discipline, and investigate concerns. Moreover, Robson possessed discretionary authority to override general policies as shown by his decision to terminate Colucci without adhering to the progressive discipline policy. As such, Robson “formulated operational policies through his discretionary decisions.”

The court of appeal then reversed the award of $4 million in punitive damages, because T-Mobile’s actions were in the low to moderate range of reprehensibility. The court of appeal decided on this range because the harm to Colucci represented an isolated incident, and the target (Colucci) lacked financial vulnerability. A 1.5-to-one ratio between punitive and compensatory damages is the federal constitutional maximum in workplace retaliation cases involving a low to moderate range of reprehensibility. Accordingly, the court of appeal directed the trial court to modify the punitive damages award to $1,530,063.
Moser v. Las Vegas Metro. Police Dep’t., 984 F.3d 900 (9th Cir. 2021)

Charles Moser is a Las Vegas Metropolitan Police Department (“Metro”) police officer who was a sniper on the department’s SWAT team. In 2015, he learned that Metro police peacefully arrested someone who was suspected of shooting a police officer. While off duty, Moser posted a comment about the capture on Facebook and stated, “It’s a shame he didn’t have a few holes in him.” Metro’s Internal Affairs unit was informed about the comment and began investigation. When questioned, Moser admitted that the posting was “completely inappropriate” and removed it. Moser’s supervisors, Captain Devin Ballard and Deputy Chief Patrick Neville, decided to transfer Moser from the SWAT team and put him back on patrol, finding that Moser’s comment showed he had become “a little callous to killing.” Internal Affairs noted that Moser had violated a department policy on public posting on social media and that his Facebook page had information identifying him as a Metro sniper.

Moser sued Metro, Captain Ballard, and Deputy Chief Neville for First Amendment retaliation, seeking damages under 42 U.S.C. § 1983 and injunctive relief. He alleged that his disciplinary transfer was unconstitutional retaliation for his protected speech. Metro and Moser both moved for partial summary judgment. Metro did not dispute that Moser made that comment as a private citizen and that it addressed an issue of public concern, but it argued that Moser's comment eroded public trust and exposed Metro to legal liability. The district court held that Metro’s disciplinary action was justified under the Pickering balancing test for speech by government employees. The district court reasoned that if more members of the public read Moser’s post, they might question his fitness as a SWAT member and any future use of deadly force by Moser would have more likely subject to Metro to legal liability. The district court granted summary judgment for Metro and denied summary judgment for Moser.

On appeal, Trump-appointed Ninth Circuit judge, Kenneth Lee wrote the 2-1 decision reversing and remanding the case, finding that the district court erred in granting summary judgment when there was a “genuine factual dispute” about the subjective and “objective meaning” of Moser’s comment and about the effect of that comment.

Willis v. City of Carlsbad, 48 Cal. App. 5th 1104 (2020)

Plaintiff James Willis, a City of Carlsbad police officer, brought action against the City of Carlsbad, alleging whistleblower retaliation. In 2013, after Willis reported that another officer committed timecard fraud, the City of Carlsbad transferred Willis to another department. In July 2015, Willis complained about an unlawful quota system, and Willis was passed over for a promotion five months later. Willis filed a complaint with the Department of Fair Employment and Housing (DFEH), as well as a government tort claim against the City of Carlsbad, alleging that he had suffered retaliation, evidenced by his 2013 transfer; an October 2013 written reprimand; denials of requests for transfer he made in 2013, 2014, and 2015; and the July 2015 denial of his promotion. The City of Carlsbad deemed all acts prior to July 2015 untimely in light of the six-month period to present a claim under the Government Claims Act, and the City of Carlsbad denied his claim.
This lawsuit followed. Before trial, the City of Carlsbad successfully moved to strike allegations of retaliatory acts on grounds that Willis had not timely presented a government tort claim. The jury returned a special verdict finding in Willis's favor, determining that his report was a contributing factor in the denial of the promotion, but the City of Carlsbad would have denied Willis promotion for other reasons. As such, the court entered judgment in the City of Carlsbad’s favor.

Willis contended that the trial court erred as a matter of law by striking those portions of his California Labor Code section 1102.5 cause of action because the Government Claims Act's six-month statute of limitations was either equitably tolled or his cause of action had not accrued by reason of the continuing tort/continuing violation doctrine.

The court of appeal held that doctrine of equitable tolling cannot be invoked to suspend California Government Code section 911.2’s six-month deadline for filing a prerequisite government claim because the six-month period is not a statute of limitations to which tolling rules might apply. Whereas the purpose of a statute of limitations is to prevent surprise, the purpose of the claims statutes is to provide the public entity with prompt notice of a claim for early investigation to avoid the expense of litigation. The court of appeal explained that this purpose would not be served by tolling the litigation deadline.

Similarly, the court of appeal held that the continuing violation doctrine does not revive Willis’ claims relating to the City of Carlsbad’s decisions that were made prior to their failing to promote Willis in July 2015. The court of appeal explained that each promotion for which Willis applied was final when another applicant received each position. As a result, the trial court’s judgment was affirmed.
SEXUAL HARASSMENT UNDER CALIFORNIA CIVIL CODE SECTION 51.9

Judd v. Weinstein, 967 F.3d 952 (9th Cir. 2020)

Ashley Judd alleged that when she was a young, aspiring actress in the late 1990s, Harvey Weinstein, the disgraced and formerly well-connected and influential Hollywood producer, sexually harassed her during a general business meeting. Judd learned in a 2017 media interview that after she rebuffed his sexual advances, Weinstein told The Lord of Rings trilogy director Peter Jackson and producer Fran Walsh, who intended to cast Judd in the films, that he had a “bad experience” with Judd and that she was “a nightmare to work with.” Jackson believed Weinstein and did not cast Judd in The Lord of the Rings films or any of their other films as a direct result of Weinstein’s statements.

In April 2018, Judd sued Weinstein for (1) defamation; (2) sexual harassment in professional relationships under section 51.9 of the California Civil Code; (3) intentional interference with prospective economic advantage; and (4) violations of California’s Unfair Competition Law. After Weinstein removed to federal court based on diversity jurisdiction, he moved to dismiss the complaint. The district court granted Weinstein’s motion to dismiss for failure to state a claim with respect to Judd’s section 51.9 claim.

The Ninth Circuit reversed and concluded that Weinstein’s and Judd’s relationship was “substantially similar” to the enumerated examples in the statute in that “one party is uniquely situated to exercise coercion or leverage over the other” by virtue of his or her “business, service, or professional” position.

NOTE: Readers should be aware that the California legislature passed SB 224, which went into effect January 1, 2019, amending section 51.9 by, inter alia, expanding the list of individuals who could be liable to expressly include directors and producers.
WAGE AND HOUR CASES

Adams v. West Marine Prods., Inc., 958 F.3d 1216 (9th Cir. 2020)

Plaintiff Adrianne Adams filed a putative wage and hour class action under California law in state court against her former employer, West Marine Products, Inc. (“West Marine”) on behalf of herself and “all current and former non-exempt employees of Defendants within the State of California at any time commencing four (4) years preceding the filing of Plaintiff’s complaint up until the time that notice of the class action is provided to the class.” Defendant removed to federal court based on the Class Action Fairness Act (“CAFA”).

CAFA provides, in relevant part, that federal district courts shall have original jurisdiction over civil class actions where the matter in controversy exceeds five million dollars and “any member of a class of plaintiffs is a citizen of a State different from any defendant[.]” There are exceptions to CAFA jurisdiction, however, including the local controversy exception and the home state exception. Under the local controversy exception, a district court “shall” decline to exercise jurisdiction when more than two-thirds of the putative class members are citizens of the state where the action was filed, the principal injuries occurred in that same state, and at least one significant defendant is a citizen of that state. There are two bases (one mandatory and the other discretionary) for remand pursuant to the home state exception. Under the former, the district court “shall” decline to exercise jurisdiction where “two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed.” Under the second “discretionary” basis, a district court, after considering six factors, “may, in the interests of justice and looking at the totality of the circumstances, decline to exercise jurisdiction” when more than one-third of the putative class, and the primary defendants, are citizens of the state where the action was originally filed.

Adams moved to remand the action to state court, and the district court subsequently ordered the parties to file supplemental briefs addressing the applicability of the home state exception to CAFA jurisdiction. After receiving the parties’ briefing, the district court granted Adam’s request for leave to take jurisdictional discovery to establish the applicability of this exception. In response to Adams’ discovery, West Marine produced a list of contact information for 1,810 putative class members. The list revealed 1,714 putative class members with a last known address in California. Thereafter, Adams renewed her motion to remand the case to state court under the home state and local controversy exceptions to CAFA jurisdiction, which the district court granted finding that Adams met her burden of showing by a preponderance of the evidence that more than one-third of the class members were California citizens.

On appeal, defendant argued that the district court erred because Adams did not meet her burden of showing that greater than one-third of the putative class members were California citizens at the time of removal. Defendant also argued that the district court erred when it sua sponte invoked the discretionary home state exception to CAFA jurisdiction because exceptions to CAFA jurisdiction are not a jurisdictional issue. The Ninth Circuit affirmed the district court’s order remanding the action to state court and held that the district court was permitted to
infer that more than one-third of the putative class members were California citizens because the last known addresses of over 90% of the putative class members were in California and that district courts may raise abstention sua sponte (i.e., an exception to CAFA jurisdiction).

**Barriga v. 99 Cents Only Stores LLC, 51 Cal. App. 5th 299 (2020)**

Plaintiff Sofia Wilton Barriga sued her employer, 99 Cents Only Stores LLC (“99 Cents”), on her own behalf and on behalf of a class of similarly situated employees alleging that 99 Cents’ “zero-tolerance” policy requiring its stores to lock their doors at closing time forced nonexempt, nonmanagerial employees to wait for as long as 15 minutes for a manager with a key to let them out. Plaintiff further alleged, *inter alia*, that 99 Cents’ zero-tolerance policy denies employees pay for the time they have to wait be let out of the store and their full half-hour meal break because they were locked in. 99 Cents opposed plaintiff’s motion for class certification and submitted 174 declarations from current and former nonexempt employees to establish that employees could leave the store immediately without waiting to be let out and those who did have to wait were let out promptly and paid for any time they waited. Only 53 of the declarants were members of the proposed classes. All 174 declarations included identical/near identical paragraphs stating that declarants knew their statements could be used by 99 Cents to defend itself against a class action lawsuit about its wage policies and practices and that declarants had not been coerced into signing their declaration and knew what they were signing.

Plaintiff deposed 12 declarants, some of whom testified they had no idea what the lawsuit was about or even why they had been called to testify. Most testified that Human Resources had summoned them to an office during working hours and presented with the declaration to sign. Plaintiff moved to strike all 174 declarations contending that 99 Cents obtained the declarations by the “systematic use of coercive and deceptive meetings with declarants that exerted improper influence.” The trial court denied plaintiff’s motion to strike, concluding it lacked statutory authority to do so. The trial court then relied on these declarations to conclude there was no commonality of issues among the putative class members and denied plaintiff’s class certification motion.

In a 2-1 decision, the appellate court reversed the trial court’s orders denying plaintiff’s motions to strike the declarations and motion for class certification, holding that the trial court failed to apply the correct legal standard. Citing the standards articulated in *Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981), the appellate court concluded that the trial court has both the duty to “carefully scrutinize” the declarations “for actual or threatened abuse” and the authority to strike those statements or discount the evidentiary weight given to them. The court analyzed a line of California cases since *Gulf Oil* discussing how the potential for “coercion and abuse” exist when there is “an ongoing business relationship between the class opponent and putative class members—especially a current employer-employee relationship.”

Raquel Betancourt sued her former employer, OS Restaurant Services, LLC and Bloomin’ Brands, Inc., alleging defendants retaliated against her and wrongfully terminated her for making internal complaints that defendants violated wage and hour and food safety laws. Betancourt also alleged she was entitled to recover unpaid premium wages for rest break violations under Labor Code § 226.7, and derivative claims for violations of Labor Code § 226 for failing to list and include the rest break premiums on her itemized wage statements, as well as waiting time penalties under Labor Code §§ 201 through 203 for failing to pay all wages owed to her at the time of her termination, including the unpaid rest period premiums. Betancourt’s requested attorneys’ fees pursuant to Labor Code §§ 218.5 and 226, Code of Civil Procedure section 1021.5, “and any other applicable provisions of law.”

The parties settled the case before trial. The claims settled were for failure to provide meal and rest periods under section 226.7, accurate itemized wage statements under section 226, and for waiting time penalties under section 201 through 203 as well as all other wage and hour claims that were or could have been alleged. Plaintiff dismissed her retaliation and wrongful termination claims with prejudice and without payment.

The parties disagreed as to attorneys’ fees and agreed that plaintiff could subsequently file a motion for attorney’s fees. Plaintiff did so and requested $580,794 in attorneys’ fees based on Labor Code §§ 218.5 and 226. Defendant opposed, arguing that Kirby and its progeny dictate that a party cannot recover attorneys’ fees when she prevails only on a claim for meal or rest break premium pay. The trial court granted the plaintiff’s fee motion and awarded attorneys’ fees in the amount of $280,794 (and costs of close to $9,000), ruling that although “some aspect” of plaintiff’s wage statement and waiting penalty claims “are seemingly derivative of the Section 226.7 claim, Plaintiff proffered evidence that establishes those claims were also premised on timekeeping and payroll schemes … and plaintiff is thus entitled to attorneys’ fees under Labor Code Section 218.5” (for nonpayment of wages).

The Second Appellate District reversed and remanded, finding that there was no basis to award Betancourt her attorneys’ fees. The appellate court primarily based its decision on the California Supreme Court case, Kirby v. Immoos Fire Protection, Inc., 53 Cal.4th 1244, 1255 (2012), and its progeny (Naranjo v. Spectrum Security Services, Inc. 40 Cal. App. 5th 444 (2019), review granted & depublication denied, Jan. 2, 2020; Ling v. P.F. Chang’s China Bistro, Inc. 245 Cal. App. 4th 1242 (2016.).) Kirby held that a plaintiff cannot obtain attorneys’ fees in an action for failure to provide rest breaks or meal periods because it is not an action for nonpayment of wages, even if the remedy for failing to provide a meal or rest break is an additional hour of pay (often described as “premium wages”). The Second Appellate District agreed with the appellate courts’ holdings in Naranjo and Ling that a plaintiff is not entitled to recover penalties for waiting time (section 203) and wage statement (section 226) violations based on claims for violations of rest or meal periods. Because a plaintiff is not entitled to wage statement penalties under Labor Code § 226, they are not entitled to recovery of attorneys’ fees under Labor Code § 226(e). The appellate court rejected Betancourt’s other arguments that
defendants presented an inadequate record for judicial review and that her wage and hour claims were based on “failure to pay earned wages,” noting that the record did not support that assertion.

**Brady v. AutoZone Stores, Inc., 960 F.3d 1172 (9th Cir. 2020)**

Michael Brady sued AutoZone Stores, Inc. and Autozoners LLC (“Autozone”) and sought damages individually and on behalf of a putative class for alleged violations of Washington State’s meal break laws. After several years of litigation, the district court denied Brady’s motion for class certification and later declined to modify its ruling. Brady then settled his individual claims with AutoZone. Although the settlement agreement was “not intended to settle or resolve Brady’s Class Claims,” it did not provide that Brady would be entitled to any financial award if the unresolved class claims were ultimately successful. The parties then filed a stipulation in the district court of the settlement agreement and the district court entered final judgment.

The Ninth Circuit dismissed Brady’s appeal of the district court’s denial of class certification as moot since he no longer retained a financial stake in the outcome of the class claims.

**California Disability Services Assn. v. Bargmann, 52 Cal. App. 5th 911 (2020)**

The Welfare and Institutions Code requires the California Department of Developmental Services (“Department”) to contract with regional centers to provide services to individuals with developmental disabilities. The regional centers contract for needed services through approved service providers. The petitioners were a group of approved service providers of community-based day programs as well as their trade association, California Disability Services Association (“Petitioners”). The Department initially sets a provider’s “permanent payment rate” and adjustments cannot be made until a new rate-setting procedure is completed by the Department absent “unanticipated program changes.” Petitioners requested rate adjustments from the Department on the grounds that the increase in minimum wage resulted in an increase in their program directors’ salaries, who were classified as exempt employees and whose salaries needed to be at least twice minimum wage. The Department denied their request.

Petitioners filed a petition for writ of mandamus and damages and a complaint for declaratory relief against the Department and its director, Nancy Bargmann, challenging the Department’s denial. The trial court upheld the Department’s denial, finding that providers were not required by law to classify program directors as exempt employees and it was providers who elected this option to avoid paying overtime wages. Thus, the court concluded that “there is no ministerial duty imposed on the Department to grant a wage increase request in order to accommodate continued entitlement to the exemption.” The Court of Appeal affirmed, finding no reversible error by the trial court.

In February 2017, plaintiffs Reuben Calleros and Ralph Rubio, ambulance drivers, filed a class action complaint against several ambulance entities, including Rural Metro of San Diego, Inc., Rural Metro Corporation, and American Medical Response, Inc. (collectively “Defendants”). Plaintiffs alleged Defendants violated section 226.7 and Industrial Welfare Commission (IWC) Wage Order No. 9-2001 by requiring employees to carry pagers, cell phones, or other communication devices during their rest periods and thus failed to provide them with required uninterrupted rest breaks. Plaintiffs relied on the recent California Supreme Court decision, Augustus v. ABM Security Services, Inc., 2 Cal.5th 257 (2016), which held that section 226.7 and Wage Order No. 4-2001 (containing identical rest-period language as Wage Order No. 9) require employers to relieve security guard employees of all work-related duties and employer control during rest breaks, including an obligation to remain on call.

In March 2018, the California Supreme Court granted a request from the Ninth Circuit in a different pending case brought by ambulance workers to decide whether Augustus applicability to Wage Order No. 9 and ambulance employees working 24-hour shifts. The trial court denied plaintiffs’ motion for class certification on November 5, 2018 while this question was pending before the California Supreme Court. The following day, on November 6, 2018, California voters passed Proposition 11, codified in Labor Code Section 880 et seq., effective December 19, 2018, providing that ambulance employees must remain reachable by a communications device during their work shifts, including rest breaks. One of the newly enacted provisions, Labor Code Section 889, expressly made the new law applicable to any and all actions pending on or commenced after October 25, 2017. The appellate court concluded that the new law mooted plaintiffs' appeal from the denial of class certification. The appellate court also rejected plaintiffs’ argument that the retroactivity provision is unconstitutional and violated their due process rights. Thus, the court concluded that California’s strong interest in promoting public health and safety outweighed plaintiffs’ attenuated rights. Further, the court noted that plaintiffs’ expectations of “vested rights” was not reasonable because Augustus had never been extended to ambulance workers before the voters passed Proposition 11.


Seven employees each filed claims with the Labor Commissioner’s office seeking unpaid overtime wages, liquidated damages (Section 1194.2), and waiting time penalties (Section 203) against their employers, Cardinal Care Management LLC and Welcome Home Senior Residence LLC (collectively “Companies”). The Companies had a sole member, Steve Chou. The Companies operated several licensed residential care facilities for the elderly. The hearing officer awarded the seven employees over $2.5 million in overtime wages, liquidated damages, interest, and waiting time penalties. The Companies were found liable for all of this amount, and Chou was individually liable for more than $2.2 million of this amount.

The Companies and Chou appealed the Commissioner’s decision to the trial court. The trial court clerk refused to file the notices of appeal but permitted the Companies and Chou to
file petitions for relief from the requirement that they first post an undertaking in the amount of the award.

The trial court later consolidated their actions and allowed them to file their appeals conditionally, subject to being stricken if their petition to waive the bond requirement was denied. In support of the motion to waive the undertaking requirement, Chou submitted evidence claiming that he and the Companies lacked the financial ability to pay the awards due to Chou’s bankruptcy and divorce and that Chou did not own any property to use as collateral to secure a bond. The employees provided evidence that Chou was not indigent and had transferred title to four residential care facilities worth over $5 million and to another property, whose 2015 purchase price was over $1 million, from his own name to that of certain trusts and limited liability companies. Chou did not appear at the hearing, and his counsel did not explain his absence. The trial court did not find Chou’s “estate-planning” explanation for these transfers persuasive and concluded that the transfers were “an effort to avoid a judgment.” Chou’s attorney offered to arrange for Chou to come to court to testify about his tax returns and profit-and-loss statements, but the court found the offer untimely. The trial court denied the waiver request and dismissed the appeals.

The Companies and Chou appealed claiming that the trial court had abused its discretion by failing to provide an adequate hearing on their financial ability and that the administrative hearing and the undertaking requirement deprived them of procedural and substantive due process. The appellate court rejected these arguments and affirmed the trial court’s judgment of dismissal as well as the trial court’s award of attorneys’ fees to the employees pursuant to Cal. Labor Code Section 98.2(c), which provides for a “one-way fee-shifting scheme to penalize an unsuccessful party who appeals the Commissioner’s decision.”

**Castillo v. Bank of America, NA, 980 F.3d 723 (9th Cir. 2020)**

Plaintiff Cindy Castillo worked as an hourly employee at a Bank of America, National Association (“BOA”) call center until September 2016. BOA operates thirteen call centers in California and employed over 5,000 employees to handle calls from March 2013 to September 2018. During this period, employees could receive a flat-sum, nondiscretionary incentive bonus ranging from $350 to $2,100 per month. If the employees worked overtime and received a bonus during the same period, BOA would apply the bonus to the employee’s straight pay to calculate the employee’s regular rate of pay for purposes of overtime premiums. BOA also used two different methods to calculate overtime pay over different periods of time between 2013 and 2018.

In March of 2017, Castillo filed a class action lawsuit against BOA on behalf of the 5,000 or so nonmanagerial, hourly call center employees in California for numerous wage and hour violations. After numerous amendments, she alleged three claims for (1) failure to pay minimum wages; (2) failure to accurately pay overtime wages, and (3) failure to provide second meal periods. Castillo sought to certify a class regarding her claims. The district court denied class certification. It found no commonality, typicality, and predominance as to the first and third claims and although it did find that Castillo had established commonality and typicality for the
overtime claim under FRCP 23(a)(2)–(3), she had not established predominance under FRCP 23(b)(3). Castillo appealed only the denial of class certification as to the overtime-wage claim.

The Ninth Circuit affirmed the district court’s ruling and held that (1) Castillo has established commonality—although there were differences between the methods used over different time periods, there was a common issue whether BOA’s policy of calculating overtime wages by using total hours worked in the divisor was unlawful; (2) Castillo has established the typicality of her claim in that Castillo’s claims arose from the same allegedly unlawful policy of using total hours worked in the divisor and “are reasonably coextensive” with the putative class members; but (3) Castillo has not established predominance, because many members were never exposed to the challenged BOA formulas or, if they were, were never injured by them. The Ninth Circuit noted that Castillo failed to provide a common method of proof to determine liability and did not rebut evidence that many of the class members were unaffected by BOA’s overtime policies.

Clarke v. AMN Services, LLC, 2021 WL 419473 (9th Cir., Feb. 8, 2021)

Plaintiffs Verna Clarke and Laura Wittman worked as traveling clinicians for AMN Services, LLC (“AMN”), and were paid both a designated hourly wage and an amount denominated a weekly per diem benefit. According to AMN, the per diems paid to traveling clinicians are provided to reimburse them for the cost of meals, incidentals, and housing while traveling more than 50 miles away from their residences on assignment. AMN treats traveling clinicians’ per diem payments as nontaxable income and excludes them from the regular rate of pay. Plaintiffs assert that AMN presents the combined value of a traveling clinician’s hourly wages and per diem benefits as “weekly pay” when recruiting clinicians. Plaintiffs filed a collective and class action against AMN alleging that their weekly per diem benefits were improperly excluded from their regular rate of pay under Fair Labor Standards Act (“FLSA”) and state law, thereby decreasing their wage rate for overtime hours.

The district court entered summary judgment in AMN’s favor. On appeal, the Ninth Circuit reversed and remanded, holding that AMN’s per diem payments to traveling clinicians could not be excluded from calculation of regular rate of pay for FLSA overtime purposes. The Ninth Circuit noted that the structure of the per diem payments were more akin to wages. Although AMN tried to argue that the per diems were reimbursement for costs of travel-related expenses, local clinicians who did not travel also received per diems. For local clinicians, per diems were included as part of their wages for both tax purposes and the calculation of their regular pay for overtime purposes.


Plaintiff Taraun Collie alleged that he worked for The Icee Co. from November 2014 to August 2015. He signed an arbitration agreement, which stated in pertinent part: “The Company and I mutually consent to the resolution by arbitration of all claims or controversies (‘claims’),
past, present or future . . . The claims covered by this Agreement include, but are not limited to, claims for wages or other compensation due . . . and claims for violation of any federal, state, or other governmental law, statute, regulation, or ordinance, except claims excluded elsewhere in this Agreement.” In July 2016, Collie filed a complaint on behalf of himself and other aggrieved employees under the Private Attorneys General Act of 2004 (“PAGA”). Citing the arbitration agreement, Icee moved to compel arbitration of Collie’s “individual claim” in August 2018. Icee also argued that Collie had effectively waived his right to bring a PAGA action on behalf of other employees in any forum because the parties had agreed to bilateral arbitration only and Collie had agreed to arbitrate “all claims and controversies” with Icee.


David v. Queen of Valley Medical Center, 51 Cal. App. 5th 653 (2020), review denied, 2020 Cal. LEXIS 7102 (Oct. 21, 2020)

Plaintiff Joana David worked as a registered nurse at the Queen of the Valley Medical Center (“QVMC”) from 2005 to 2015 as an hourly employee. From September 2011 to May 2015, David clocked in and out of work using an electronic timekeeping system that automatically rounded entries up or down to the nearest quarter-hour. After her employment ended, David filed a complaint against QVMC alleging seven causes of action, including claims for failure to provide meal and rest breaks and failure to pay minimum wages. David alleged she was not paid for hours worked off-the-clock, such as when she performed “charting” work, and when her meal and rest periods were interrupted by co-workers and “charge nurses” who asked her work-related questions. She also claimed that she was not paid all of her wages because of the hospital’s time-rounding policy. QVMC moved for summary judgment and argued that whenever David had reported a missed break, she had received an extra hour of pay, that QVMC prohibited “off-the-clock” work and David had been paid all the hours she worked, and that its rounding policy was legal.

The trial court granted QVMC’s motion for summary judgment. With respect to David’s meal and rest period claims, the court relied on QVMC’s extensive evidence that David’s supervisor did not urge her to work during meal or rest periods and that she did not report missing a meal or rest break to her supervisors. The court considered plaintiff’s declaration that charge nurses (David testified in her deposition that she was not sure if charge nurses were even supervisors) would look at the clock while she was on her breaks when they interrupted her breaks with work-related questions and concluded that “glancing at a clock” without something
more did not support a reasonable inference that she was pressured to end her breaks early. The trial court gave “every reasonable inference” to David’s declaration stating that she “performed charting work after clocking out because managers instructed hospital employees to avoid overtime,” but determined an “instruction to avoid overtime, without more, cannot reasonably be understood as an affirmative direction to perform work off-the-clock” and cited to David’s deposition where she denied performing off-the-clock work. Finally, the trial court determined that QVMC made a \textit{prima facie} case that its rounding policy was neutral and that David had not rebutted this fact. The appellate court agreed with the trial court’s analysis and affirmed, concluding that QVMC provided meal periods (one meal period for every five hours of work and a second meal period for those who worked more than ten hours) and rest breaks (employees received a 15-minute rest period for every four hours of work) as required by law, and that the rounding policy was “fair and neutral” on its face and is used in such a manner that it will not result in failure to compensate employees properly for all the time they actually worked over a period of time. The appellate court noted that David mistakenly assumed that the trial court had applied the FLSA’s \textit{de minimis} doctrine, which does not apply to wage and hour claims brought under California law, when deciding her rounding policy claim.

\textbf{Davidson v. O’Reilly Auto Enterprises, LLC, 968 F.3d 955 (9th Cir. 2020)}

O’Reilly Auto Enterprises, LLC (“O’Reilly”), an auto-parts retailer, employed Kia Davidson as a delivery specialist at one of its stores between June 2016 and July 2017. Davidson also sought civil penalties under PAGA.

Davidson’s motion for class certification was due on September 21, 2017. On August 2, the parties filed a stipulation and proposed order seeking to extend the September 21 deadline to November 28. One of the reasons for the extension was that Davidson claimed she needed more time to gather evidence to support her class-certification motion. The district court denied the stipulation. On September 21, Davidson filed her motion for class certification and a class-action trial plan. Davidson also filed a stipulated motion and proposed order that would allow her to file a supplemental brief on October 20 with any newly discovered evidence. The district court granted the stipulated motion and issued an order providing Davidson an additional month to gather evidence.

While Davidson was gathering evidence the district court granted O’Reilly’s motion to dismiss Davidson’s wage statement claim, finding that O’Reilly’s use of a P.O. Box address fulfilled the requirements of California Labor Code Section 226(a)(8).

On October 20, Davidson filed her supplemental brief, which did not mention a need for further discovery. On December 15, the district court denied Davidson’s motion for class certification noting that although O’Reilly’s rest break policy was inconsistent with California law, Davidson had not shown that the written policy was “consistently applied to all 21,000 proposed class members.” The court noted that Davidson’s own declaration did not state that she was ever denied proper rest breaks, and that O’Reilly had provided declarations from over 300 employees stating that they had received all rest breaks mandated by California law.
Davidson continued to litigate her remaining claims until the district court granted summary judgment in favor of O’Reilly on her PAGA claim. Shortly thereafter, the parties entered into a stipulation where Davidson agreed that the district court would dismiss with prejudice and enter judgment on each of her claims, including (1) her PAGA claim (on which O’Reilly had been granted summary judgment), (2) her wage statement claim (previously dismissed for failure to state a claim); (3) her rest break claim (for which class certification had been denied). The parties agreed that Davidson would preserve the right to appeal two rulings: the district court’s denial of class certification and the ruling on motion for summary judgment.

Davidson appealed, arguing that the district court abused its discretion by declining to extend the September 21 deadline for her motion for class certification, and that this impeded her ability to obtain pre-certification discovery of information. The Ninth Circuit concluded that the district court did not abuse its discretion by requiring Davidson to meet the September 21 deadline for filing her motion for class certification while at the same time granting her an additional month to develop evidence and submit a supplemental brief. Further, Davidson waived the argument that she needed more time for discovery because she did not raise it in her supplemental brief.

The Ninth Circuit also rejected Davidson’s argument that the district court erred in refusing to certify a “rest break” class and held that Davidson had failed to show that “there are questions of law or fact common to the class.” Davidson could not show that the class of employees “suffered the same injury,” because she provided no evidence that O’Reilly’s rest break policy was applied to employees in a way that violated the law.

Finally, the Ninth Circuit held that Davidson waived her right to appeal the dismissal of her wage-statement claim because she had failed to reserve the right to do so in the stipulation the parties filed with the district court.

**Frlekin v. Apple, Inc., 979 F.3d 639 (9th Cir. 2020), amended Oct. 29, 2020**

Employees filed a putative wage-and-hour class action against Apple, Inc. (“Apple”), seeking compensation for time spent waiting for and undergoing exit searches pursuant to Apple’s “Employee Package and Bag Searches” policy. Employees estimated that the searches typically took five to twenty minutes and sometimes up to forty-five minutes depending on the manager or security guard’s availability. The parties filed cross-motions for summary judgment on the issue of liability. The district court entered summary judgment in favor of Apple and denied plaintiffs’ motion, reasoning that the time spent by class members waiting for and undergoing exit searches pursuant to Apple's policy is not compensable as “hours worked” because such time was neither “subject to the control” of the employer nor time during which class members were “suffered or permitted to work.”

On appeal, the court of appeals certified the following question for the California Supreme Court to answer: “Is time spent on the employer’s premises waiting for, and undergoing, required exit searches of packages, bags, or personal technology devices voluntarily brought to work purely for personal convenience by employees compensable as ‘hours worked’
within the meaning of California Industrial Welfare Commission Wage Order No. 7?” The California Supreme Court answered, “Yes.”

Following the California Supreme Court’s decision, the parties filed supplemental briefs addressing whether there were factual disputes that would preclude summary judgment for Plaintiffs on remand. Apple argued that because some class members “did not bring bags or devices to work,” “were never required to participate in checks,” or “worked in stores with remote break rooms where they stored their belongings,” plaintiffs were not entitled to summary judgment on this issue. The Ninth Circuit did not find these facts dispositive on the issue of liability and reversed the district court’s order and remanded with instructions to (1) grant plaintiffs’ motion for summary judgment that the time spent waiting for and undergoing exist searches is compensable and (2) determine the remedy to be afforded to individual class members.


Plaintiff Carlos Gutierrez worked as a journeyman scaffold worker between 2010 and November 2015 for Brand Energy Services of California, Inc. (“Brand”). Scaffold workers, including Gutierrez, were not paid for the approximately thirty to forty minutes of time they spent each workday before their shift badging in at the electronic gate, walking to the shuttle bus stop, waiting for the Brand shuttle bus, traveling by bus to the mandatory safety meeting site, and donning mandatory safety gear before the start of the meeting (‘Pre-Shift Employer-Mandated Travel Time”). Gutierrez sued Brand on his own behalf and on behalf of a proposed class for Brand’s nonpayment of the Pre-Shift Employer-Mandated Travel Time, alleging violations of several Labor Code and Business and Professions Code provisions.

Brand moved for summary judgment, asserting there were no triable issues of fact because a complete defense existed with respect to each of Gutierrez’s causes of action under California Industrial Welfare Commission Wage Order No. 16–2001, section 5(D), which provides: “This section shall apply to any employees covered by a valid collective bargaining agreement unless the collective bargaining agreement expressly provides otherwise.” Section 5(A) provides: “All employer-mandated travel that occurs after the first location where the employee’s presence is required by the employer shall be compensated at the employee’s regular rate of pay or, if applicable, the premium rate that may be required by the provisions of Labor Code § 510 and Section 3, Hours and Days of Work, above.”

Brand argued that section 5(D) permitted union-represented employees and their employers to enter into collective bargaining agreements that waived the right to compensation for employer-mandated travel time. Brand contended that one of the applicable collective bargaining agreements (“CBAs”) permitted Brand to compensate its employees for post-shift mandatory travel time but not pre-shift mandatory travel time. The trial court agreed and granted Brand’s summary judgment motion.
The appellate court reversed and remanded finding that the trial court’s order was based on an erroneous interpretation of the Wage Order 16. The appellate court analyzed the relevant legal framework and rules of statutory interpretation and noted that Brand’s interpretation would undermine the public policy embodied in California Labor Code Section 1194(a) (right to minimum wage) and Wage Order 16 section 4 which requires “[e]very employer” to pay a specified minimum wage to its employees “per hour for all hours work…” All “hours worked” means “the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so.” The appellate court concluded that section 5(D) provides no authority for employers and employees to waive all compensation for employer-mandated travel time and that section 5(D) did not override section 4’s or the Labor Code’s directive that employees be paid at a rate no less than minimum wage for all hours worked.

Herrera v. Zumiez, Inc., 953 F.3d 1063 (9th Cir. 2020)

Alexia Herrera worked as a Sales Associate at a Zumiez, Inc. (“Zumiez”) retail store in Chico, California. Zumiez scheduled Herrera and other employees according to “Show-Up” shifts, requiring employees to report for a scheduled work shift by physically showing up at a Zumiez store, and “Call-In” shifts. If the employee was not scheduled to work a Show-Up shift immediately before a scheduled Call-In shift, the employee was required to be available to work and had to call his or her manager 30 minutes to an hour before the scheduled shift to determine if they would be required to work that shift. If the employee was not required to work, Zumiez would not pay the employee. Herrera filed a class action alleging that Zumiez failed to pay employees at its California retail stores reporting time pay for “Call-In” shifts. Herrera also alleged related claims for failure to pay minimum wages for the time employees spent calling their managers (each call was approximately five to fifteen minutes long and took place three to four times a week) and failure to indemnify expenses employees incurred to make these calls.

The district court denied Zumiez’s motion for judgment on the pleadings. Zumiez appealed. While Zumiez’s appeal was pending, the California Court of Appeal decided Ward v. Tilly’s, Inc., 31 Cal. App. 5th 1167 (2019), review denied (May 15, 2019). Ward held that reporting time pay must be paid in an analogous case where the employee was required to call in several hours before their shift and was not required to physically report to work. The Ward court noted that this was “precisely the kind of abuse that reporting time pay was designed to discourage.”

Thus, the Ninth Circuit followed Ward’s holding and affirmed the trial court’s denial of the motion with respect to the reporting time pay claim. The Ninth Circuit also affirmed the denial as to the failure to pay for the time employees spent calling in but reversed the trial court’s denial of the motion regarding the indemnification for the phone call expenses. The Ninth Circuit left open the possibility of Herrera amending the complaint to add more specific allegations such as whether employees had to make these calls on phones that were not provided by Zumiez and the costs she had incurred.
**Hildebrandt v. Staples the Office Superstore, LLC, 58 Cal. App. 5th 128 (2020)**

In June 2017, Plaintiff Von Hildebrandt, who worked as a salaried general manager from 2000 to 2013, filed a putative class action against Staples the Office Superstore, LLC (“Staples”), asserting the same causes of action as two prior class action lawsuits by other Staples general managers, Diane Hatgis and Fred Wesson, for (1) failure to pay overtime compensation; (2) failure to authorize and permit rest periods; (3) failure to provide meal periods; (4) failure to furnish accurate itemized wage statements; and (5) violation of the UCL. The court in the Hatgis action granted Staples’ motion to limit the putative class to Staples Copy and Print Shop general managers only and the court in the Wesson action denied Wesson’s motion to certify the class of all current and former general managers who worked at Staples in California on or after May 10, 2016.

The trial court granted summary judgment in favor of Staples, concluding that all of Hildebrandt’s claims were barred by the applicable statutes of limitations and the pendency of Hatgis’ and Wesson’s related class actions did not toll the limitations periods. The trial court relied on Batze v. Safeway, Inc., 10 Cal. App. 5th 440 (2017), reasoning that the court determined the denial of class certification in Wesson due to a “lack of commonality” giving rise to a presumption against tolling. The trial court concluded Hildebrandt could not overcome this presumption because tolling would be “prejudicial” to Staples, and the denial of the class certification was not “unforeseeable.”

On appeal, the appellate court concluded that the trial court erred in applying the class action tolling rules and held that, due to the pendency of the related class certification proceedings, Hildebrandt was entitled to claim the benefit of the class action tolling rule established by the United States Supreme Court in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), as adopted by California Supreme Court in *Jolly v. Eli Lilly & Co.*, 44 Cal.3d 1103 (1988). The appellate court reasoned that Staples had adequate notice of Hildebrandt’s claims from the related class certification proceedings and could gather and preserve evidence in preparing its defense. The court noted that without this tolling rule, class members would be forced to file protective motions to intervene or their own individual claims out of fear that their claims might be time barred, thus depriving class actions of the “efficiency and economy of litigation which is a principal purpose of the procedure.” Because Hildebrandt concedes his claim for failure to furnish accurate itemized wage statements is time barred, the court affirmed the summary adjudication of that claim and reversed summary judgment on all other claims.

**Li v. Department of Industrial Relations, Division of Labor Standards Enforcement, 53 Cal. App. 5th 877 (2020)**

Fushan Li, the owner/operator of four massage parlors in Lawndale, received three citations in January 2016 from the Department of Industrial Relations, Division of Labor Standards Enforcement (“Department”) for violations of California wage-and-hour laws. The citations ordered Li to pay a total of $198,576 in unpaid wages and liquidated damages. After filing a petition for writ of mandate in the trial court to challenge the Labor Commissioner’s
decision, Li filed a motion for relief from the bond requirement, contending that he was not subject to the retroactive application of Labor Code § 1197.1, and that even if he were subject to this bond requirement, it should be waived based upon his alleged indigency. Section 1197.1, which went into effect on January 1, 2017, requires “a person seeking a writ of mandate contesting the Labor Commissioner’s ruling to post a bond with the Labor Commissioner, as specified, in an amount equal to the unpaid wages assessed under the citation, excluding penalties . . . the bond be issued in favor of the unpaid employees . . . the proceeds of the bond, sufficient to cover the amount owed, would be forfeited to the employee if the employer fails to pay the amounts owed within 10 days from the conclusion of the proceedings.”

In opposition to Li’s motion for relief, the Labor Commissioner submitted evidence that Li and his wife transferred real property valued in excess of $370,000 to their children and that the children then quitclaimed the property back to Li’s wife. The Labor Commissioner also provided evidence that a massage parlor (owned by Li’s daughter) was still operating at one of the four locations where Li had previously conducted business. The trial court denied Li’s motion for relief (twice), concluding that he was not indigent. The appellate court affirmed the trial court’s ruling finding that the trial court did not abuse its discretion in denying Li’s request to waive the bond requirement and that there was no retroactive application of Section 1197.1 since the Commissioner’s findings and order confirming the amount due were issued in April 2017, and Li filed his petition for writ of mandate in May 2017 after the effective date of Section 1197.1.


Alyosha Mattei and three other lighting technicians, all members of the International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts (“IATSE”), sued Corporate Management Solutions, Inc. (“CMS”), its owner and president, Anthony Low, and two other companies for wage-and-hour violations incurred in the 2016 production of a television commercial for Ulta Beauty, Inc.

The Ulta Beauty commercial was developed by an advertising agency, which hired Diktator US LLC (“Diktator”) to produce the commercial. Because Diktator was not a signatory to the agreement that governed the production of the commercial (“CPA”), Diktator paid CMS to borrow CMS’s signatory status to enable it to hire union crewmembers for the commercial. In providing signatory services, CMS did not hire or fire employees, set wages, hours, or working conditions for the employees, nor did CMS issue them payroll. Instead, the non-signatory production company remitted payment to CMS who then notified the payroll company, which withdrew the wages from CMS’s account and paid the employees.

Because the advertising company did not pay Diktator on time for production costs and Diktator, in turn, could not deposit funds with CMS, the employees who worked on the 2016 commercial were forced to wait several weeks past the due date prescribed by Labor Code sections 201.5 and 204 for their wages. Plaintiffs sought to hold CMS liable, arguing that CMS was their employer bound by the CPA and was obligated to pay its employees on a timely basis.
even if Diktator had not provided it with the necessary funds. The trial court granted signatory’s motion for summary judgment, finding it was not plaintiffs’ employer.

The appellate court reversed and remanded, finding that plaintiffs had shown that CMS is an “employer” as defined in Wage Order No. 12-2001. Each wage order defines the term “employ” as “to engage, suffer, or permit to work,” and the term “employer” as any person “who directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, hours, or working conditions of any person.” The appellate court noted that what matters is not “how much control a hirer exercises, but how much control the hirer retains the right to exercise.” The appellate court found that CMS had failed to establish that the CPA relieves a signatory who lends its signatory status to a non-signatory producer of its responsibilities as an “employer” to ensure timely compliance with the payment of minimum wages and the other obligations under the CPA, (2) a triable issue existed as to whether CMS shared control of work with Diktator, and (3) a triable issue existed as to whether CMS suffered or permitted union members to work.


On April 1, 2020, the California Court of Appeal issued the first published California decision addressing unlimited vacation policies under California law. On February 1, 2016, three former exempt employees, Teresa McPherson, Donna Heimann, and Linda Brenden sued EF Intercultural Foundation, Inc. (“EF”) alleging that EF failed to pay them their accrued, unused vacation time at the time of their terminations in violation of Labor Code Section 227.3. California Labor Code section 227.3 states: “Unless a collective bargaining agreement provides otherwise, whenever a contract of employment or employer policy provides for paid vacation, and an employee is terminated without having taken off his vested vacation time, all vested vacation shall be paid to him as wages at his final rate . . . .” EF claimed that plaintiffs had not accrued vacation days during their employment per its “unlimited” vacation policy and were not owed any vacation pay. EF’s employee handbook had a written policy that provides salaried employees with a fixed amount of vacation days per month based on their length of service. Employees could carry over 10 accrued, unused vacation days from one year to the next. However, this accrued vacation policy allegedly did not apply to area managers or the west coast manager positions—positions held by the plaintiffs. Area managers were told informally that they had to notify their supervisor before taking time off, and they did not need to track their days off in the online system because they did not accrue vacation.

Following a bench trial, the trial court entered judgment for the former employees and concluded EF had a policy that provided for paid vacation under section 227.3. The trial court noted, “[p]laintiffs testified that, through about forty work-years in total for the three of them, they actually were approved to take between one and twenty vacation days per year.” Based on that testimony, the court concluded that “[s]ince twenty days’ annual vacation was approved at least once ... at least that much vacation was actually available to plaintiffs under the EF policy
In other words, twenty days of vacation vested annually for each plaintiff, and any unused portion is payable at termination.

The appellate court agreed with the trial court’s reasoning and concluded that plaintiffs were entitled to receive vacation pay under Labor Code section 227.3 based on the “unusual facts” of the present case. The court examined a line of cases interpreting section 227.3 and when an employer can limit an employee’s ability to earn vacation. Notably, the company did not have a written policy that expressly conveyed the “unlimited” nature of its paid time off policy and plaintiffs’ rights or EF’s obligations under such a policy. There was substantial evidence that supervisors had “side conversations” with new employees or wrote an email informing area managers about what they had to do to take time off, but plaintiffs alleged that no one told them about an “unlimited” vacation policy. Plaintiffs were unaware that they did not accrue vacation days because they could take as much vacation as they wanted.

The appellate court expressly limited its holdings to the facts of the present case and carefully noted that other employees subject to a different policy and practice might not be entitled to vacation pay under section 227.3. The appellate court provided the following non-exhaustive list of guiding principles of a written policy that may constitute an unlimited time off policy that does not trigger the protections of section 227.3:

1. clearly provides that employees’ ability to take paid time off is not a form of additional wages for services performed, but perhaps part of the employer’s promise to provide a flexible work schedule—including employees’ ability to decide when and how much time to take off;

2. spells out the rights and obligations of both employee and employer and the consequences of failing to schedule time off;

3. in practice allows sufficient opportunity for employees to take time off, or work fewer hours in lieu of taking time off; and

4. is administered fairly so that it neither becomes a de facto “use it or lose it policy” nor results in inequities, such as where one employee works many hours, taking minimal time off, and another works fewer hours and takes more time off.

The appellate court reversed in part as to the damages the trial court awarded to one of the plaintiffs and remanded with instructions relating to that plaintiff’s award and affirmed the trial court’s judgment in all other respects.


Plaintiffs Wrenis Miles, Patricia Gonzales, and James Edwards worked as wastewater collection workers in the Wastewater Collection Systems Division of the City of Los Angeles’ Bureau of Sanitation. Plaintiffs filed a class action lawsuit against the City of Los Angeles (“City”) alleging that the City had improperly denied them meal and rest breaks pursuant to Industrial Welfare Commission Wage Order No. 9. Wage Order No. 9 obligates the City to
provide meal and rest breaks to persons it employs in the transportation industry. Plaintiffs argued that they worked in the “transportation” industry because they had to drive commercial vehicles (needed to clean and pump out sewers), sometimes more than 100 miles a day, and transport refuse to collection locations. The City moved for summary judgment arguing that its wastewater collection workers did not work in the transportation industry, but in the sanitation industry servicing, cleaning, and maintaining the City’s sewer and storm drain systems. The City alternatively argued that Wage Order No. 9 only applied to commercial drivers, and did not apply to employees such as Edwards, who was not permitted to drive the City’s commercial vehicles.

The trial court granted summary judgment in the City’s favor and held that Wage Order No. 9 applied only to workers in the transportation industry and that there was undisputed evidence that any driving performed by the Wastewater’s Division’s employees was incidental to the Division’s primary goal of maintaining the City’s sanitary and storm sewer systems. The court of appeal affirmed and held that a sanitation worker does not become part of the transportation industry simply because the waste collected must be transported to collection sites. It also rejected the plaintiffs’ argument that the trial court abused its discretion in denying them leave to amend their complaint to assert a federal claim after waiting four and half years into the litigation and after the trial court had indicated its intent to grant summary judgment.


Plaintiffs Michael Oliver and Norris Cagonot, service technicians employed by Defendant Konica Minolta Business Solutions, U.S.A., Inc. (“Konica”), were required to drive their personal vehicles containing Konica’s tools and parts to customer sites to make repairs to copiers and other machines. Plaintiffs filed a wage and hour class action against Konica seeking payment of wages for time spent commuting to the first work location of the day and commuting home at the end of the day from the last work location and mileage reimbursement for mileage incurred during those commutes.

The trial court granted employer summary judgment/adjudication holding that plaintiffs’ commute time was not compensable as “hours worked” under Wage Order No. 4 and that plaintiffs were not entitled to mileage reimbursement under Labor Code section 2802. Wage Order No. 4 defines hours worked as “the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so.” Labor Code section 2802 requires an employer to indemnify an employee “for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties.”

In determining whether the trial court properly found in favor of defendant on the issue of compensability of commute time, the appellate court considered the legal principles set forth in several California cases such as *Morillion v. Royal Packing Co.*, 22 Cal.4th 575 (2000) and *Frlekin v. Apple Inc.*, 8 Cal.5th 1038 (2020). *Morillion* held that commute time to and from work is generally not compensable, but “compulsory travel time” is. The key issue is the “level of the employer’s control over its employees.” The appellate court noted that “if carrying tools
and parts in a service technician’s personal vehicle during his commute was optional, then the service technician was not subject to the control of his employer” for purposes of determining whether that commute time constituted “hours worked.” However, even if carrying tools and parts was not optional, the service technician “would not be subject to the control of [defendant]” if they were able to use the commute time for their own purposes. Here, the parties disputed whether service technicians were required to carry tools and parts in their personal vehicles and the volume of the tools and parts Konica required service technicians to carry.

The appellate court reversed, finding that triable issues of material fact existed. Because Konica conceded that service technicians also should be reimbursed for commute mileage under section 2802 if they are owed wages for their commute time, the appellate court did not decide whether an employer’s requirement of a personal vehicle by itself triggered mileage reimbursement under section 2802.


Plaintiffs Dev Anand Oman, Todd Eichmann, Michael Lehr, and Albert Flores are current or former flight attendants for Delta Air Lines, Inc. (“Delta”). In 2015, plaintiffs filed a putative class action against Delta alleging that Delta violated several California labor laws by failing to pay its flight attendants at least the minimum wage for all hours worked, failing to pay all wages on a semimonthly basis in accordance with Labor Code section 204, and failing to provide comprehensive wage statements pursuant to Labor Code section 226. Oman and Lehr lived outside of California; all four plaintiffs served on flights in and out of California airports and performed the majority of their work in airspace outside of California.

The district court granted summary judgment for Delta, concluding that Delta’s pay scheme did not violate California’s minimum wage requirement and that sections 204 and 226 did not apply to plaintiffs. On appeal, the Ninth Circuit asked the California Supreme Court to resolve three questions:

1. Do sections 204 and 226 apply to wage payments and wage statements provided by an out-of-state employer to an employee who, in the relevant pay period, works in California only episodically and for less than a day at a time?

2. Does California minimum wage law apply to all work performed in California for an out-of-state employer by an employee who works in California only episodically and for less than a day at a time?

3. Does the Armenta/Gonzalez bar on averaging wages apply to a pay formula that generally awards credit for all hours on duty, but which, in certain situations resulting in higher pay, does not award credit for all hours on duty?

In answering the first question, the California Supreme Court relied on its decision in the companion case **Ward v. United Airlines, Inc., 9 Cal. 5th 732 (2020)** and unanimously held that Labor Code sections 204 and 206 apply only to employees whose principal place of work is California during the relevant pay period. The Court clarified that this test would be met if the
employee either works primarily in California during the pay period or does not spend the majority of their working time in any state and California serves as their base of work operations. This means that “some short periods of work in California will not be covered by section 226’s documentation [and section 204’s timing] requirements. Conversely, some periods of work outside California will be covered, if they occur as part of an overall period in which most work occurs inside California or are performed by an employee who primarily works in no state but is based here.” Oman had not sought comprehensive wage statements documenting all hours worked and wages earned during a pay period. Oman had argued that section 226 and section 204’s requirements applied only to those hours he spent working on the ground in California. The Court rejected this approach and noted that Oman’s interpretation of sections 226 and 204 would be either too burdensome (effectively requiring employers to provide employees with separate wage statements under the laws of California and of every other state in which an employee worked during that pay period) or raise conflict-of-law issues (California law would dictate the frequency and how employers document work predominantly performed outside of California).

In determining whether Delta violated California’s minimum wage requirement, the Court examined whether Delta’s method of calculating wages complies with California law. The Court noted that Delta does not promise to pay flight attendants by the hour or for certain hours and not others. Instead, Delta’s Work Rules compensate flight attendants by “rotation.” Each month, Delta circulates a bid packet to its flight attendants listing rotations (the number of duty periods, length of each duty period within each rotation; report times and total scheduled flight times for the flights within each rotation; and the amount of time the flight attendant can expect to be away from base). Delta calculated compensation for each rotation according to four formulas and flight attendants are paid according to whichever formula yields the largest amount for the complete rotation. Delta also disclosed to flight attendants the formula that will apply and the minimum amount flight attendants would be paid for the rotation at their particular contractually established “flight pay” rate.

The parties did not dispute that under Delta’s complicated compensation scheme, Delta’s flight attendants are always paid, on an hourly average, above the minimum wage. However, plaintiffs argued that one of Delta’s formulas (“flight-time formula”) violated California’s rule prohibiting “wage borrowing,” established in Armenta v. Osmose, Inc., 135 Cal. App. 4th 314 (2005), because payment was based solely on flight time and did not factor in the hours spent on the ground before and after flights. “Wage borrowing,” sometimes called “wage averaging,” is the practice of taking pay owed under contract for one set of hours and spreading it over other, otherwise uncompensated or undercompensated, hours to satisfy the minimum wage requirement. This issue with “wage borrowing” is that even if it theoretically satisfies the minimum wage requirement for each hour worked, “it does so only at the expense of reneging the employer’s contractual commitments” to the employee. The Court distinguished Delta’s compensation scheme from Armenta reasoning that Delta’s compensation scheme did not promise any particular compensation for any particular hour of work, and instead, offered a guaranteed level of compensation for each rotation. Thus, although the Court agreed that Delta’s compensation plan was “unusual,” the Court held that Delta did not violate California’s minimum wage laws because the compensation it pays to its flight attendants for each rotation is
always above the state minimum wage per hours worked without borrowing compensation promised for other rotations.

**Scalia v. Employer Solutions Staffing Group, LLC, 951 F.3d 1097 (9th Cir. 2020)**

Employer Solutions Staffing Group (“ESSG”), a staffing company, contracted with Sync Staffing (“Sync”), which placed recruited employees at a jobsite run by TBG Logistics (“TBG”), where the employees unloaded groceries for a delivery store. TBG maintained a spreadsheet of the employees’ hours. TBG sent the spreadsheet to Sync, who then forwarded it to ESSG. One of ESSG’s employees was responsible for processing TBG’s payroll, and followed a Sync employee’s direction to pay all hours at “regular” pay even if the employee was entitled to overtime pay for certain hours. More than 1,000 violations occurred in which employees did not receive their earned overtime pay.

Eugene Scalia, the Secretary of the Department of Labor (the “Secretary”), sued ESSG, TBG, Sync, and another company for failure to pay overtime in violation of the Fair Labor Standards Act (“FLSA”). ESSG filed crossclaims for contribution and indemnification against the other defendants. The district court dismissed ESSG’s crossclaims and denied its motion to file a third-party complaint seeking contribution from the grocery store where some of recruited employees worked. The Secretary reached consent judgments with the other defendants and only ESSG remained when the Secretary moved for summary judgment. The district court granted the summary judgment motion and held that ESSG violated the FLSA willfully and ordered ESSG to pay approximately $78,500 in unpaid overtime wages plus an equal amount in liquidated damages. ESSG appealed.

The Ninth Circuit affirmed and held that the failure of ESSG’s employee/agent, even if she was not a “supervisor” or “manager,” to process payroll to pay overtime compensation was properly imputed to ESSG, that ESSG’s violation was “willful” and, therefore, the three-year statute of limitations applied, and that the FLSA did not implicitly allow the right of indemnification or contribution among employers for liability nor is this right recognized under federal common law.


Defendant Wedbush Securities, Inc. (“Wedbush”) is a securities broker-dealer firm that provides financial planning and investment products through its financial advisors. Wedbush classifies its California financial advisors as exempt under the administrative exemption, which only applies if an employee earns a monthly “salary” equivalent to at least twice the state minimum wage (“salary-basis test”). Wedbush pays its financial advisors on a commission-only basis. The higher the employee’s total monthly gross product sales, the higher the percentage used to calculate the employee’s monthly commission payment. If the amount of commission a financial advisor earns in a month is not at least double the California minimum wage, Wedbush pays the financial advisor the commission due plus a “draw,” an advance on future commissions, in an amount making up the difference. Financial advisors are expected to repay the draw.
Joseph Semprini, a former employee, and Bradley Swain, a current employee, filed a putative class action against Wedbush asserting various wage and hour claims based on the employer’s alleged misclassification of its financial advisor employees as exempt from overtime and other Labor Code requirements under the administrative exemption. Following class certification, bifurcation of trial, and bench trial, the trial court entered judgment in Wedbush’s favor.

The appellate court reversed and concluded that Wedbush’s compensation plan did not satisfy the “salary basis” test, and thus, the administrative exemption did not apply to its financial advisors. Because Wage Order No. 4 and Labor Code Section 515 did not define what constitutes a “salary” for purposes of applying the administrative exemption, California courts look to the federal regulations implementing the Fair Labor Standards Act (“FLSA”) for guidance. The regulations state that an employee is paid on a salary basis if the employee “regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee’s compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed.” The regulations add: “An employee is not paid on a salary basis if deductions from the employee’s predetermined compensation are made for absences occasioned by the employer or by the operating requirements of the business.” Further, the regulation was amended effective January 1, 2020 to add that up to 10 percent of the salary amount required may be satisfied by the payment of nondiscretionary bonuses, incentives and commissions, that are paid annually or more frequently.

The appellate court concluded that Wedbush’s plan did not meet the “salary-basis” test for purposes of the administrative exemption because the salary amount of its financial advisors was 100% based on commissions (far exceeding the permitted application of up to 10% of the salary amount) and that financial advisors’ pay fluctuated each month based on their performance and the quantity of their sales. The appellate court rejected Wedbush’s claim its financial advisors’ compensation was fixed and predetermined because of its draw payments noting that under California law, although earned commissions are wages, advances on not-yet-earned commissions are not. Thus, Wedbush cannot rely on its advances to satisfy the salary basis test: “The salary basis test requires employers to pay their employees at least double the minimum wage, not loan them that amount.”


Plaintiff Charles Ward filed an action in state court on behalf of pilots while plaintiffs Felicia Vidrio and Paul Bradley filed separate actions on behalf of flight attendants against United Airlines, Inc. (“United”). All three are California residents and alleged that United’s wage statements failed to provide them with all the information required by Labor Code section 226. Specifically, United only provided a post office box address and did not include all the hours worked and all applicable hourly rates that made up employee pay for the pay period. United is based outside of California. In the Ward case, the district court certified a class consisting of pilots who reside in California and pay California income taxes. A different district
judge consolidated the Bradley and Vidrio cases and certified a similar class of California-based flight attendants. The district court in each case granted summary judgment to United. The Ward court concluded that the geographic reach of California wage-and-hour law was governed by the “job situs” test, which considers where the employee “principally” worked. The Vidrio court examined other federal court cases on this issue and concluded that United would prevail under both the “job situs” test and the wider-ranging multifactor approach since the class members did not principally work in California and United’s ties to California are “minimal” relative to its overall business. Both sets of plaintiffs sought review, and the Ninth Circuit consolidated their appeals for purposes of oral argument. The Ninth Circuit requested the California Supreme Court to answer the following questions:

(1) Wage Order No. 9 exempts from its wage statement requirements an employee who has entered into a collective bargaining agreement in accordance with the Railway Labor Act. (See Cal. Code Regs., tit. 8, § 11090, subd. 1(E).) Does the Railway Labor Act exemption in Wage Order No. 9 bar a wage statement claim brought under section 226 by an employee who is covered by a collective bargaining agreement?

(2) Does section 226 apply to wage statements provided by an out-of-state employer to an employee who resides in California, receives pay in California, and pays California income tax on his or her wages, but who does not work principally in California or any other state?

The California Supreme Court concluded “no” to the first question, noting that the exemption applies only to the requirements of Wage Order No. 9, § 1(E) and that section 226 itself did not contain a similar exemption. With respect to the second question, the California Supreme Court concluded that section 226 applies to wage statements provided by an employer if the employee’s principal place of work is in California. For employees who do not perform a majority of their work in any one state, such as the plaintiffs here, the “principal place of work” test is satisfied if California serves as their “base of work operations,” regardless of their place of residence or whether a collective bargaining agreement governs their pay.

Ward v. United Airlines, Inc., 986 F.3d 1234 (9th Cir. 2021)

After the California Supreme Court held that Labor Code section 226 applies to these employees because they are based in California for work purposes, the Ninth Circuit requested the parties to submit supplemental briefs assessing the California Supreme Court’s decision’s impact on the outcome of the appeal regarding the district courts’ entry of summary judgment in favor of United. While both parties agreed that most of the class members satisfied the Ward test because they do not perform a majority of their work in any one State and they have their “base of operations” in California, United argued that federal law (specifically the Dormant Commerce Clause, the Airline Deregulation Act, and the Railway Labor Act) precludes California from applying its wage-statement law to pilots and flight attendants who spend most of their time working outside of California. The Ninth Circuit rejected United’s argument and reversed and remanded with further instructions to the district courts holding that (1) California
Labor Code Section 226 applies to the class members in both cases provided they meet the requirements of the *Ward* test; and that (2) applying section 226 in accordance with the *Ward* test does not violate the dormant Commerce Clause, the Airline Deregulation Act, and the Railway Labor Act.


In 2005, employees of U.S. Bancorp Investments, Inc. ("Bancorp") filed a putative class action seeking restitution of overtime wages and wage deductions, waiting time penalties, and meal and rest breaks ("Burakoff Action"). In the *Burakoff* Action, Subclass A consisted of those employees who “worked more than 40 hours in a week or 8 hours in a day, but did not receive overtime pay,” and Subclass B were those employees who were illegally required to bear the cost of their business expenses. The trial court certified the *Burakoff* Action as a class action in 2008.

Plaintiff Scott Williams joined Bancorp as a financial consultant in 2007 and became a member of the putative class in the *Burakoff* Action. In 2010, he filed his own putative class action against Bancorp alleging similar causes of action. The trial court stayed Williams’ case pending the outcome of the *Burakoff* Action because the cases were founded on the same primary rights, stated substantially similar causes of action, and involved substantially the same parties. After the parties engaged in discovery in the *Burakoff* Action, Bancorp moved to decertify the class. The trial court granted Bancorp’s motion as to Subclass A finding that the alleged members lacked sufficient commonality. The following year, the parties settled *Burakoff*. Williams participated in the *Burakoff* settlement and received compensation as a member of Subclass B. He and the other absent members of alleged Subclass A did not release their wage and hour claims.

Bancorp brought a motion to compel to arbitration of Williams’ individual claims and sought to dismiss Williams’ first amended complaint arguing that the *Burakoff* decertification order collaterally estopped Williams from relitigating the appropriateness of class certification. Bancorp argued that Williams had been a member of the *Burakoff* class and that case involved substantially similar claims and identical class certification issues. The trial court initially denied Bancorp’s motion to compel arbitration and to dismiss the remaining class claim, concluding that *Burakoff’s* Subclass A and the putative class in Williams were not identical. On appeal, the appellate court affirmed and concluded that Bancorp had not met its burden to show the job duties of the members of the *Burakoff* class were identical to those of current putative class.

On remand, Bancorp renewed its motion to compel arbitration of Williams’ individual claims after conducting discovery relevant to class certification. The trial court granted the motion in October of 2018, concluding that a class decertification order may have collateral estoppel effect and that the decertification order in *Burakoff* barred Williams’ claims because the facts developed during discovery showed the employees’ job duties and time spent performing those duties were materially the same during both class periods. On appeal, the appellate court reversed holding that an order decertifying a class has no preclusive effect on absent class members. The appellate court rejected the view that absent class members in *Burakoff* were
“parties” for purposes of assessing the case’s preclusive effect. The appellate court also rejected Bancorp’s argument that Williams was adequately represented by class counsel in litigating whether Burakoff’s Subclass A was properly certified.
STRATEGIC LAWSUITS AGAINST PUBLIC PARTICIPATION ("SLAPP")


Plaintiffs Balubhai Patel and various entities owned and operated a residential hotel. Defendant Manuel Chavez was the former on-site property manager of the hotel. Chavez testified against the employers in a California Labor Commissioner hearing and was awarded a significant sum. The employers claimed that Chavez’ testimony at the hearing was false, and on that basis they sued Chavez and two California Labor Commissioner Officials for a federal civil rights violation (42 U.S.C § 1983). Chavez moved to strike the complaint under the anti-SLAPP statute, and the trial court granted the motion. The employers appealed.

The employers argued, in part, that the trial court erred because the anti-SLAPP statute should not have been applied to their federal civil rights claim brought in state court. The court of appeal disagreed, holding that the employers’ Section 1983 claim did not preempt application of the anti-SLAPP statute. The anti-SLAPP statute is a procedural law, rather than a substantive immunity, and a forum generally applies its own procedural law to the cases before it unless: (1) the federal statute provides otherwise, or (2) the statute affects a plaintiff’s substantive federal rights. The court of appeal found neither exception applicable.

First, Section 1983 does not impose a federal procedural law requirement upon state courts trying civil rights actions.

Second, the anti-SLAPP statute does not affect a plaintiff’s substantive federal rights. In reaching this conclusion, the court of appeal first observed that the anti-SLAPP statute applies neutrally to all types of cases and does not target government conduct. Further, the court of appeal found that the expedited summary judgment-like procedure created by the anti-SLAPP statute is not an impediment to a plaintiff’s Section 1983 claim. Even though an anti-SLAPP motion automatically stays discovery, a court can override the discovery stay by ordering specified discovery where warranted. Also, the discovery stay is not fatal to a plaintiff’s Section 1983 claim because a plaintiff need only make a minimal showing of success on the merits of the claim in order to survive an anti-SLAPP motion. Moreover, the court of appeal highlighted that unlike other laws that courts have found preempted, the anti-SLAPP statute does not condition a plaintiff’s right of recovery under Section 1983 upon compliance with the statute, but rather, on whether plaintiff has established some probability that he has a right to recovery at all under Section 1983. Accordingly, the enforcement of the anti-SLAPP discovery restrictions in Section 1983 actions will not frequently and predictably produce different outcomes based solely on whether the claim is asserted in federal court. In short, the anti-SLAPP statute does not prevent a plaintiff from vindicating a federal right in state court, even if it imposes a slight additional burden on a plaintiff for attempting to do so.
TRADE SECRETS AND EMPLOYEE MOBILITY


California’s Uniform Trade Secrets Act (“CUTSA”) allows courts to award reasonable attorney fees and costs to the “prevailing party” in certain cases involving bad faith claims. Civ. Code § 3426.4. This decision addressed whether the prevailing litigant (The Johnson Group Staffing Company, Inc.) or the prevailing litigant’s attorney (Porter Scott, P.C.) was entitled to the fees awarded to the “prevailing party.” The court of appeal held that, absent an enforceable agreement to the contrary, these fees belong to the attorney to the extent they exceed the fees the litigant already paid.

Porter Scott had defended the Johnson Group through two rounds of litigation with its chief competitor Aerotek. In the first case, the Johnson Group settled with Aerotek. Shortly thereafter, Aerotek sued again in connection with the Johnson Group’s hiring of an employee, alleging that the Johnson Group and the employee had misappropriated trade secrets by soliciting customers. This case dragged on, and Porter Scott eventually moved to withdraw over nonpayment of fees, but then agreed to continue on a modified pro bono basis. Eventually, the Johnson Group prevailed at trial and Porter Scott successfully moved for fees awarded under Civil Code 3426.4. A dispute then arose between Porter Scott and their client, the Johnson Group, as to who should receive the fees. The trial court decided the law firm was entitled to the fees. On appeal, the court concluded that attorney fee awards under section 3426.4 (excluding fees already paid) belong, absent an enforceable agreement to the contrary, to the attorneys who labored to earn them.

Ixchel Pharma, LLC v. Biogen, Inc., 9 Cal.5th 1130 (2020)

Plaintiff Ixchel Pharma entered into an agreement with Forward Pharma to jointly develop a drug for the treatment of a disorder called Friedreich’s ataxia. Forward subsequently decided to withdraw from the agreement with Ixchel as a result of a settlement into which Forward had entered with defendant Biogen, Inc., pursuant to which Forward agreed to avoid all new partnerships with companies dealing in similar products. Ixchel sued Biogen alleging that the settlement agreement was an unenforceable, non-compete agreement under Business and Professions Code Section 16600, as it restrained Forward from engaging in future business with Ixchel. Ixchel further alleged that Biogen tortuously interfered with its at-will contract with Forward. After losing in district court, Biogen appealed to the Ninth Circuit, which certified two questions to the California Supreme Court.

The first question was whether Ixchel could sue Biogen for tortiously interfering with the at-will contract that existed between Ixchel and Forward absent an independently wrongful act. The court of appeal held that tortious interference with at-will contracts requires independent wrongfulness. In so holding, the court of appeal analogized the tort of interference with a prospective economic relationship to interference with an at-will relationship, reasoning that “[t]he purpose of the independent wrongfulness requirement in economic interference torts is to
balance between providing a remedy for predatory economic behavior and keeping legitimate
business competition outside litigative bounds.” To allow claims to proceed for interference
with at-will contract claims without requiring independent wrongfulness “risks chilling
legitimate business competition.”

The second question was whether Business & Professions Code Section 16600 voids a
contract by which a business is restrained from engaging in a lawful trade or business with
another business. The court of appeal found (and the parties did not dispute) that Section 16600
applies to contracts between businesses. However, unlike the approach to non-compete
agreements in an employer/employee context, non-compete agreements between businesses are
analyzed under a reasonableness standard. Looking to the California Civil Code predecessor to
Section 16600, the court of appeal reasoned that it had always declined to categorically
invalidate all agreements limiting the freedom to engage in trade. Moreover, the court of appeal
harmonized the state Cartwright Act and Section 16600, finding that they share a statutory
purpose and doctrinal heritage in common law prohibitions on restraints of trade.

Key to the court of appeal’s decision with respect to the second question was the
potential of invalidating all trade agreements between businesses. The court of appeal
recognized the pro-competitive advantages of using reasonable trade limitations to build
predictable partnerships between complimentary businesses. Thus, the court of appeal held that
agreements limiting commercial dealings and business operations are invalid only if they are
unreasonable under the common law test. Under that test, “courts will not hold to be in restraint
of trade a contract . . . the main purpose and effect of which are to promote and increase business
in the line affected, merely because its operations might possibly in some theoretical way
incidentally and indirectly restrict trade in such line.”
UNEMPLOYMENT COMPENSATION


An unemployment compensation claimant filed a petition for writ of mandamus to challenge the denial of unemployment insurance benefits. On appeal, the court of appeal reversed the decision and held that the California Unemployment Insurance Appeals Board (“CUIAB”) abused its discretion in refusing to consider claimant’s additional evidence in the form of a customer’s declaration as to the date of service incident which led to termination. The court of appeal recognized that it is very unusual to find the Appeals Board abused its discretion in failing to consider new evidence, but the court so concluded because the information was pivotal to the reason for upholding the denial.
TRADITIONAL LABOR

Association for Los Angeles Deputy Sheriffs v. County of Los Angeles, 60 Cal. App. 5th 327 (2021)

The Association for Los Angeles Deputy Sheriffs (“ALADS”), a union representing nonmanagement deputy sheriffs and peace officers employed in the County District Attorney’s office, sued the County of Los Angeles (“County”) alleging that the County failed to comply with two compensation provisions in the memorandum of understanding (“MOU”) between the parties. Each of those provisions required the County to match compensation increases given to other County employee groups. The County demurred on a number of grounds including claiming that ALADS failed to exhaust its remedies under the MOU, that those remedies were adequate, and that ALADS had failed to state valid claims. The trial court sustained the County’s demurrer to ALADS’ complaint without leave to amend.

On appeal, the appellate court reversed the trial court’s decision and held that although ALADS was not exempt from the exhaustion requirement merely because it filed the lawsuit in its own name, it was nonetheless exempt under the inadequacy exception to the exhaustion doctrine because the individual remedies under the MOU were not adequate by not providing for classwide relief. The appellate court further held the following: if ALADS elected to pursue its fourth, fifth, and eighth causes of action, it must first pursue those claims with the Los Angeles County Employee Relations Commission (“ERCOM”); ALADS’ claims for declaratory relief in its seventh, ninth, and tenth causes of action were moot; ALADS may amend its third cause of action to join parties necessary to seek a writ of mandate; and ALADS’ second cause of action for breach of contract stated a claim and its eleventh cause of action or breach of covenant of good faith and fair dealing each properly asserted a claim.

Campos v. Fresno Deputy Sheriff’s Ass’n., 441 F. Supp. 3d 945 (E.D. Cal. 2020)

Plaintiffs Caesar Campos and Latana Chandavong are Deputy Sheriffs in the Fresno County Sheriff’s Department, Plaintiff Neng Her is a Community Service Officer in the Fresno County Sheriff’s Department, and Plaintiff Hugh Yang is a retired Bailiff Deputy Sheriff from the Fresno County Sheriff’s Department. Plaintiffs sued their union, Defendant Fresno Deputy Sheriff’s Association (“FDSA”) and Defendant Fresno County (“the County”) alleging that defendants have unconstitutionally collected dues or service fees from their paychecks and unconstitutionally refused to accept their resignation from the FDSA. Plaintiffs brought six claims under 42 U.S.C. § 1983, the Declaratory Judgment Act, and various state law theories. The first cause of action, based on an “unconstitutional agency shop,” complains that Campos, Chandavong, and Yang were unconstitutionally required to subsidize the FDSA. The second cause of action is on behalf of the same three plaintiffs and is based on an “unconstitutional refusal to accept resignations from union membership.” The third cause of action is based on “unlawful confiscation of hours.” The fourth cause of action, brought only by Campos, alleges that Cal. Gov. Code § 1157.12(b) is unconstitutional in light of the U.S. Supreme Court’s ruling in Janus v. American Federation of State, County, and Mun. Employees, Council 31 (2018) 138
S.Ct. 2448. The fifth cause of action, brought by Chandavong, is based on the FDSA collecting fair-share service fees for two pay periods after Janus. The sixth and final cause of action, Chandavong complains that the FDSA and the County compelled him to purchase health and dental insurance through the union, even though he is no longer a member.

FSDA brought Rule 12(b)(1) and Rule 12(b)(6) motions to dismiss all of plaintiffs’ causes of actions except the third cause of action. The California Attorney General brought a separate motion to dismiss Campos’ fourth cause of action. The trial court granted defendants’ motions dismissing the first and second causes of action with leave to amend and the fourth, fifth, and sixth causes of action without leave to amend. Regarding Chandavong’s fifth cause of action, because Chandavong obtained the relief he requested (a refund with interest) after he filed his lawsuit, the district court dismissed the claim for lack of subject matter jurisdiction (but noted that Chandavong could still pursue a claim for attorneys’ fees related to the fifth cause of action). Chandavong did not oppose the motion to dismiss his sixth cause of action.

The district court found that dismissal was proper as to plaintiffs’ first and second causes of action because Janus did not “speak to the ability or right of a union member, who voluntarily elected union membership, to unilaterally drop his membership despite limitations on the right to resign from the union” and that the court was aware of “no cases that have held that Janus permits union members to unilaterally and at any time drop their memberships and/or stop paying their agreed upon dues.” Here, FSDA and plaintiffs had entered into an agreement that imposed limitations on a union member’s ability to withdraw membership. Because the trial court rejected plaintiffs’ argument that the taking of funds was wrongful based on Janus and the First Amendment, it concluded that there was no basis for relief under the Declaratory Judgement Act or plaintiffs’ state law torts for conversion, trespass to chattels, etc. As for Campos’ third cause of action, the trial court concluded that plaintiffs’ complaint failed to allege sufficient grounds for the Court to declare Section 1157.12(b) unconstitutional because it simply “does not compel union membership or subsidization of a union.”

**Delta Sandblasting Company, Inc. v. NLRB, 969 F.3d 957 (9th Cir. 2020)**

Delta Sandblasting Company, Inc. (“Delta”) is a California-based subcontractor that provides marine vessel painting and sandblasting services. In March 2016, Delta, without prior notice to the union, ceased paying pension contributions to the pension fund in accordance with Schedule A of the operative collective bargaining agreement (“CBA”), and reduced its monthly contribution rate claiming that it did “not have the money at this time to pay the mandatory (critical status) amount due.” In response, District Council filed a charge against Delta with the National Labor Relations Board (“NLRB”) in May of 2016, and the NLRB’s General Counsel filed a complaint soon after. On September 15, 2017, the Administrative Law Judge (“ALJ”) concluded that Delta’s unilateral pension rate reduction, made without giving the union notice or an opportunity to bargain, constituted an unfair labor practice pursuant to Section 8(a)(1) and (5) of the National Labor Relations Act (“NLRA”). The ALJ did not rule whether Delta’s pension contributions before March 2016 violated Section 302(c)(5)(B) (Section 302) of the Labor Management Relations Act’s “written agreement” requirement. The union and Delta each filed
exceptions to the ALJ’s ruling. A three-member panel of the NLRB agreed with the ALJ’s conclusion that Delta’s unilateral pension contribution rate reduction was an unfair labor practice. The NLRB considered and rejected Delta’s defense that payment of pension contributions according to Schedule A was unlawful pursuant to Section 302.

Delta appealed. The Ninth Circuit denied Delta’s petition for review and granted NLRB’s cross-application for enforcement of its order. The Ninth Circuit held that “substantial evidence” supported the NLRB’s finding that Schedule A was incorporated into the CBA in December of 2014, that the NLRB properly ruled that Section 302’s requirement of a “written agreement” was satisfied here, and that Delta’s failure to notify or bargain with its union over the pension contribution rate decrease was an unfair labor practice under Sections 8(a)(1) and 8(a)(5) of the NLRA.


Gerawan Farming, Inc. (“Gerawan”) is a family-owned farming business and is the largest tree fruit grower in California. Its extensive farming operations are conducted on thousands of acres of farmland in two main locations. In 1992, the Agricultural Labor Relations Board (“ALRB” or “Board”) certified the United Farm Workers of America (“UFW”) as the exclusive bargaining representative of Gerawan’s agricultural employees. Twenty years later, in 2012, UFW commenced negotiations with Gerawan to enter into a collective bargaining agreement on behalf of its employees (“CBA”). In March of 2013, the UFW asked the ALRB to direct the parties to a “mandatory mediation and conciliation” (“MMC”) before a mediator. UFW and Gerawan engaged in negotiations over the next year outside of and during the MMC proceeding.

Because the parties could not agree on the terms of the CBA, the mediator issued a report to the ALRB. After Gerawan petitioned review, which the ALRB granted, the parties met with the mediator and negotiated an agreement incorporating the remanded terms. The mediator issued a second report on November 6, 2013, which the ALRB ordered to take effect as the final order. Gerawan petitioned review of the ALRB’s order, contending, among other things, that the MMC statutory scheme was unconstitutional. While the Fifth Appellate District agreed that the MMC statute was unconstitutional, the California Supreme Court disagreed. (See Gerawan Farming, Inc. v. Agricultural Labor Relations Bd. (2017) 3 Cal.5th 1118, 1130 (Gerawan Farming I.).) Further, in Gerawan Farming I, the California Supreme Court held that an employer may not refuse to bargain with a union on the basis that it abandoned its representative status.

Separately, the UFW filed a number of Unfair Labor Practices (“ULP”) charges against Gerawan for violating California Labor Code Section 1153(e) during the course of negotiations by (1) engaging in bad faith surface bargaining (i.e., without any real intent to reach an agreement), and (2) “proposing and insisting” on the exclusion of farm labor contractor workers from the terms of any CBA reached between the UFW and Gerawan. The Administrative Law Judge (“ALJ”) issued a decision on April 14, 2017, sustaining both allegations and ordering,
among other things, make-whole relief from January 18, 2013 to June 6, 2013, the date of the first MMC session. The ALRB affirmed the ALJ’s factual findings and legal conclusions and extended the make-whole relief to June 30, 2013, the day before the effective date of the MMC contract.

Gerawan appealed contending that (1) the MMC statute does not authorize the ALRB to impose unfair labor practice liability for its bargaining conduct within the MMC process, (2) the ALRB lacks the power to impose make-whole relief when a party is engaged in MMC, and (3) the ALRB’s unfair labor practice findings are erroneous, arbitrary, and unsupported by substantial evidence. Gerawan also argued that the ALRB erred when it denied its prehearing motion to disqualify one of the ALRB members who participated in this proceeding. Specifically, Gerawan alleged that on October 22, 2014, when this Board member was a California State Assemblyman, he participated in a Los Angeles labor rally in support of a UFW-sponsored resolution before the Los Angeles City Council, which concerned some of the same unfair labor practice charges involved in the present case. The court of appeal denied Gerawan’s petition and affirmed the ALRB’s decision holding, *inter alia*, that an employer’s duty to bargain in good faith extends, at a minimum, to negotiation sessions held outside the mediator’s presence during the MMC process.

**International Alliance of Theatrical Stage Employees, Local 15 v. National Labor Relations Board, 957 F.3d 1006 (9th Cir. 2020)**

Audio Visual Services Group d/b/a PSAV Presentation Services ("PSAV") provides event technology services to hotel and conference centers nationwide. In December 2015, Local 15 was certified as the exclusive collective-bargaining representative for certain employees in Washington state. The National Labor Relations Board ("NLRB") denied PSAV’s request for review challenging this certification in May 2016. Thereafter, from mid-2016 through early 2017, PSAV and Local 15 held multiple bargaining sessions, but could not reach an agreement on key terms relating to wages, benefits, and discipline. PSAV initially claimed that accepting Local 15’s proposed wage increases would be “suicide” and would put it “underwater.” Local 15 then sought four categories of financial documents to evaluate PSAV’s inability-to-pay claim. PSAV rebuffed the request claiming its objection was not based on “an inability to pay for lack of revenue,” but rather, “a refusal to pay an hourly rate that would be detrimental to the business.”

When PSAV failed to provide the requested financial documents, Local 15 filed an NLRB charge in early October 2016 asserting that PSAV’s failure to do so violated the National Labor Relations Act ("Act"). In response, PSAV sent a letter to the union stating: “We heard your proposal for a nearly 100% pay increase for some positions. We just don’t agree with it, and we don’t accept it.” After engaging in several other bargaining sessions, Local 15 filed a second NLRB charge at the end of January of 2017 alleging that PSAV was bargaining in bad faith.

The NLRB General Counsel issued a complaint against PSAV in May 2017 based on these two charges. The Administrative Law Judge ("ALJ") determined that PSAV violated
Sections 8(a)(5) and (1) of the Act by not giving Local 15 the financial information it requested and by not bargaining in good faith during negotiations. On appeal, the NLRB agreed in part with the ALJ that PSAV needed to provide the requested, relevant financial information, but reversed the ALJ’s finding that PSAV had failed to bargain in good faith. The Ninth Circuit affirmed the NLRB’s findings. The Ninth Circuit noted that “an employer asserting only an unwillingness to pay does not have a duty to produce information about its financial viability upon request from the union.” The Ninth Circuit also agreed that PSAV was not obligated to bargain with Local 15 while it was awaiting NLRB’s certification decision and that substantial evidence supported that PSAV’s conduct at and away from the bargaining table did not constitute bad faith bargaining.

Int’l Longshore and Warehouse Union v. NLRB, 978 F.3d 625 (9th Cir. 2020)

In 2008, Local 4 of the International Longshore and Warehouse Union (“Longshoreman”) and the Pacific Maritime Association (“PMA”), an association of West Coast port operators, negotiated a collective bargaining agreement (“CBA”) in which they agreed to offset anticipated future losses of longshore jobs to automation by promising additional work at facilities. One PMA member, Kinder Morgan, continued to subcontract the electrical work to a company that employed electricians represented by another union (“Electrical Workers”) even though the Longshoremen argued that work was covered under their 2008 CBA. The Longshoremen filed several grievances to enforce the CBA by arbitration. As tensions grew, Kinder Morgan asked the National Labor Relations Board (“NLRB”) to intervene.

Following a hearing under section 10(k) of the National Labor Relations Act (“NLRA”), 29 U.S.C § 160(k), the NLRB awarded the disputed work to the Electrical Workers. Meanwhile, the arbitrator assigned to decide the grievances found that the CBA did cover the disputed work. When the Longshoremen took steps to enforce their arbitral victory, the Electrical Workers filed unfair labor practices (“ULP”) charges, and the NLRB filed a complaint alleging that the Longshoremen’s continued pursuit of the disputed work violated section 8(b)(4) of the NLRA, 29 U.S.C. § 158(b)(4). In 2014, an Administrative Law Judge (“ALJ”) found the Longshoremen’s actions were aimed at “preserving bargained-for work” and dismissed the NLRB’s complaint. Five years later, the NLRB reversed and found that the Longshoremen were in violation of the NLRA and ordered them to cease all attempts to obtain the disputed work, to withdraw its grievances, and to request vacatur of the arbitral award.

On appeal, the Ninth Circuit vacated the NLRB’s order and remanded for further proceedings. The Ninth Circuit reaffirmed the well-settled rule that 10(k) decisions are not res judicata in subsequent ULP proceedings and held that the NLRB erred in deeming its 10(k) decision “dispositive” of the Longshoremen’s work preservation defense. The Ninth Circuit also rejected the NLRB’s construction of the Longshoremen’s work preservation defense and found that the NLRB’s narrow focus on past performance of the disputed work—whether the Longshoremen had historically performed electrical M&R work at Kinder Morgan’s facility—was “ill-suited to a holistic, circumstantial inquiry required where the parties have agreements aimed at preserving union jobs in the face of technological threats to traditional union work.”
WRONGFUL TERMINATION


Plaintiff John Galeotti, a former business agent for the union, alleged he was wrongfully terminated for refusing to contribute money toward the campaigns of union officials. Galeotti alleged his employment was terminated after he failed to contribute $1,000 to the campaigns, which constituted extortion under the California Penal Code, among other things. The trial court sustained the union’s demurrer.

On appeal, the question for the court of appeal was whether Galeotti properly alleged a “threat” to “injure his property” within the meaning of the extortion statute. First, the court of appeal noted that Galeotti failed to attribute the threat to terminate him to a particular union official. In fact, Galeotti did not specify who threatened him, when the threat occurred, or how it was made. However, construing Galeotti’s allegations broadly, the court of appeal concluded that Galeotti’s allegation in his complaint that “they” threatened to take property from Galeotti in the form of his employment if he did not pay money was sufficient to infer a threat from the union.

Second, the union contended that, as an at-will employee, Galeotti had no property right in his continued employment. The court of appeal disagreed, reasoning it is not always the threat itself that makes extortion unlawful, but rather the coupling of the threat and a demand for money. Thus, while it was not unlawful for the union to terminate Galeotti, it was unlawful to threaten to terminate him unless he paid $1,000. Accordingly, the court of appeal held that the trial court erred in sustaining the union’s demurrer.


Anthony Hernandez was convicted of misdemeanor domestic violence after choking his girlfriend. The California Department of Correction and Rehabilitation (“Department”) terminated his employment as a correctional officer and stated that, because of his domestic violence conviction, federal law prohibited him from carrying a firearm, which he needed for the job. More specifically, federal law makes it a felony to possess a firearm after being convicted of domestic violence, defined in part as the use of physical force by a person “similarly situated to a spouse” of the victim. Hernandez challenged his termination on the grounds that he had only been dating his girlfriend for five or six months and did not share a residence with her. The court held that the evidence was sufficient to support the Department’s determination that Hernandez was “similarly situated to a spouse” of his victim.

Plaintiff Timothy King sued his former employer, U.S. Bank, for wrongful termination in violation of public policy, among other things, after he was terminated following an investigation into claims of gender discrimination and harassment that were made against him. A jury awarded King $24.3 million in compensatory and punitive damages. The trial court conditionally granted U.S. Bank’s new trial motion subject to King accepting a remittitur, which would reduce the judgment to $5.4 million. King accepted. Both parties appealed.

On appeal, the court of appeal determined that substantial evidence supported the jury’s verdict that U.S. Bank’s desire to deprive King of his bonus contributed to the decision to terminate King. One witness testified that King would have received a bonus of around $260,000 had he not been terminated. In addition, the jury heard evidence that the Bank failed to follow its normal termination protocols in a rush to terminate King before the year’s end. The jury also heard evidence that the investigation into King’s alleged inappropriate conduct was inadequate. The investigator allegedly relied on information from sources known to be biased, and the investigator refused to interview King.

The court of appeal then analyzed whether California law supported the award of punitive damages. The court of appeal held that King was entitled to punitive damages at a one-to-one ratio, because U.S. Bank engaged in wrongful conduct at the low end of the range. The court of appeal reasoned that the harm to King was foreseeable and physical, and King was financially vulnerable; however, the wrongful conduct was isolated to one employment investigation. Accordingly, the court of appeal reversed the trial court’s new trial orders and concluded that King was entitled to a one-to-one ratio of punitive to compensatory damages, resulting in the judgment being increased to $17.2 million.
AB-1281 Extension of Temporary Exemption to California Consumer Privacy Act of 2018

The California Consumer Privacy Act of 2018 ("CCPA") currently grants a comprehensive set of rights to consumers with regard to their personal information, including enhanced notice and disclosure rights regarding information collection and use practices, access to the information collected, the right to delete certain information, the right to restrict the sale of information, and protection from discrimination for exercising these rights. Last year, the CCPA was amended to create a temporary exemption from most of CCPA’s protections for information an employer collects from individuals in the employment context such as job applications or business-to-business communications. This exemption was for a one-year period until January 1, 2021. AB 1281 extends the temporary exemption for another year until January 1, 2022.
**Child Abuse or Neglect: Mandated Reporters**

**AB-1963 Child Abuse or Neglect: Mandated Reporters**

Under the Child Abuse and Neglect Reporting Act, whenever a mandated reporter, in their professional capacity or within the scope of their employment, has knowledge of or observes a child who the mandated reporter knows or reasonably suspects has been the victim of child abuse or neglect, they must report the incident to certain public authorities. A mandated reporter who fails to report an incident of known or reasonably suspected child abuse or neglect is guilty of a misdemeanor that is punishable by imprisonment in a county jail for up to six months and/or a maximum fine of $1,000. If a person fails in their child abuse reporting duties, and an instance of abuse or neglect leads to death or great bodily harm, the person can be punished with imprisonment for up to one year in a county jail and/or a maximum fine of $5,000. AB 1963 adds the following employees as “mandated reporters”: (1) a human resources employee of a business with five or more employees that employs minors, and (2) an adult whose duties require direct contact with and supervision of minors in the performance of the minors’ duties in the workplace of a business with five or more employees.
Discrimination and Harassment

AB-979 – Requires Directors from Underrepresented Communities for California Public Corporations

AB 979 requires NYSE- and Nasdaq-listed corporations incorporated in California as well as foreign corporations headquartered in California to have a certain number of directors from an underrepresented community on their board by the end of 2021. If the board of directors has more than nine members, there must be at least three directors from an underrepresented community. If the board of directors has fewer than nine directors, but more than four, there must be at least two directors from an underrepresented community. If there are fewer than four directors, the board of directors must have one director from an underrepresented community. For this purpose, a “director from an underrepresented community” means a director who self-identifies as Black, African American, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian, or Alaska Native, or who self-identifies as gay, lesbian, bisexual, or transgender.

AB-3175 – Sexual Harassment Training Requirements for Minors in the Entertainment Industry

AB 3175 amends California Labor Code Section 1700.52 regarding the mandatory sexual harassment training for minors seeking entertainment work permits. Prior to the enactment of AB 3175, Section 1700.52 provided that such training must be in a language that the minor and parent/legal guardian understand and that the training be conducted by a third party either onsite or electronically. Under AB 3175, the Department of Fair Employment and Housing (DFEH) must provide sexual harassment prevention training through its website in a language understood by the minor and a parent/legal guardian “whenever reasonably possible.” In addition, a parent/legal guardian must attend the training with the minor and certify its completion.
Expansion of California Family Rights Act ("CFRA")

SB-1383 Unlawful Employment Practice: Expansion of California Family Rights Act

Under current law, California Family Rights Act ("CFRA") requires employers with 50 or more employees to permit employees to take up to 12 workweeks of unpaid, job-protected leave during a 12-month period for specified family care and personal medical reasons, including time to bond with a new child. The New Parent Leave Act ("NPLA") permitted eligible workers at companies with 20 or more employees within a 75-mile radius, to take up to 12 weeks of unpaid leave for the purpose of caring for and bonding with a new child. Employees who take CFRA or NPLA covered leave must be reinstated to the same or comparable position upon the employee’s exhaustion of the covered leave. Under both the CFRA and NPLA, if both parents of the child are employed by the same employer, the employer is only required to grant both employees a combined total of 12 workweeks of unpaid protected leave during the 12-month period. Further, CFRA authorizes an employer to refuse to grant a leave request if the employer employs fewer than 50 employees within a 75-mile radius of the worksite where the employee is employed OR if the employee is a salaried employee who is among the highest paid 10% of the employer’s employees ("key employee" exemption).

SB-1383 significantly expands the scope of the CFRA and repeals the NPLA codified in California Government Code section 12945.6. Specifically, SB-1383 amends California Government Code § 12945.2 to expand the definition of “employer” to include those who employ only five or more employees. SB-1383 also eliminates the 75-mile radius requirement for purposes of counting employees but keeps the requirement that to be eligible for leave, the employee must have at least 1,250 hours of service with the employer during the previous 12-month period. SB-1383 also amends California Government Code § 12945.2 to expand the permissible reasons for taking leave. Family medical leave now includes not only caring for a child, spouse, or parent with a serious health condition, but also a grandparent, grandchild, sibling, or domestic partner. SB-1383 adds California Government Code § 12945.2(D) to include leave because of qualifying exigency related to the covered active duty of the employee or that of the employee’s spouse, domestic partner, child, or parent in the U.S. Armed Forces. As a result, where both parents are entitled to leave from the same employer, each parent must be granted full leave, for a combined total of up to 24 weeks, rather than dividing the twelve weeks between the two. Finally, SB-1383 eliminates the so-called “key employee” exemption and requires an employer to reinstate all employees who return from a covered leave within 12 weeks.
AB-685 – Notice and Reporting Obligations for COVID-19 Workplace Exposure

This new law requires employers who receive a notice of potential workplace exposure to COVID-19 to provide a written notice to other employees within one day of notice of potential workplace exposure. Employers must provide a written notice to all employees and employers of subcontracted employees who were on the premises at the same time as the infected individual within the “infectious period” that they may have been exposed to COVID-19. The notice must be in a form that is usually used to communicate with employees, and can be by personal delivery, email, or text message as long as the notice is reasonably believed to be received by the employee within one business day of delivery. Employers must also provide employees who may have been exposed with information regarding COVID-19 related benefits available under federal, state, and local laws.

If an employer has an “outbreak” in its workforce, within 48 hours it must notify the local public health agency in the jurisdiction of the worksite of the names, number, occupation, and worksite of “qualifying individuals.” An outbreak is defined as three or more cases in a two-week period.

AB 685 amends Labor Code section 6325 to permit Cal-OSHA to close workplaces that “constitute an imminent hazard to employees” due to COVID-19.

AB-1867 – Supplemental COVID-19 Paid Sick Leave

On September 9, 2020, California Governor Gavin Newsom signed Assembly Bill 1867, which requires private employers that employ 500 or more employees in the United States to provide California employees with paid sick time for COVID-19-related absences. For purposes of calculating the number of employees, the Act incorporates a recent federal Department of Labor regulation implementing the Families First Coronavirus Response Act (FFCRA) (29 CFR § 826.40), which provides that “employees” includes: (i) all employees currently working, (ii) employees on leaves of any kind, (iii) employees of temporary placement agencies who are jointly employed under the Fair Labor Standards Act, and (iv) day laborers.

A covered employer must provide an employee supplemental paid sick leave under the Act for any of the following reasons:

- The employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19;
- The employee is advised by a healthcare provider to self-quarantine or self-isolate due to concerns related to COVID-19; or
• The employee is prohibited from working by the employer due to health concerns related to the potential transmission of COVID-19.

Full time employees are entitled to 80 hours of COVID-19 supplemental paid sick leave. Part time employees (with a normal weekly schedule) are entitled to the total number of hours the employee usually is scheduled to work for the employer over two weeks.

Employees using COVID-19 supplemental paid sick leave shall be compensated at the highest of (i) their regular rate of pay for their last pay period, (ii) the state minimum wage, or (iii) the local minimum wage to which the employee is entitled. However, an employee’s pay for COVID-19-related sick leave is capped at $511 per day and $5,110 total.

SB-1159 – Workers’ Compensation: COVID-19

In May, California Governor Gavin Newsom signed Executive Order N-62-20. The executive order creates a rebuttable presumption that employees who test positive for COVID-19 contracted the virus at work. This is important for the purposes of an employee collecting under a Workers’ Compensation policy. SB-1159 codifies this presumption.

The presumption only applies if the following conditions are met:

• The employee tests positive for COVID-19 within 14 days after a day that the employee performed labor or services at the employee’s place of employment at the employer’s direction.

• The day on which the employee performed labor or services at the employee’s place of employment at the employer’s direction was on or after July 6, 2020. This must be the last date the employee performed labor or services at the employee’s place of employment at the employer’s direction before the positive test.

• The employee’s positive test occurred during a period of an outbreak at the employee’s specific place of employment.
Leave

AB-2017 Employee: Sick Leave: Kin Care

California’s “Kin Care” law (Labor Code section 233) currently gives employees the right to use up to half of their annually accrued and available employer-provided sick leave to care for any of the reasons specified in California’s Paid Sick Leave law (Labor Code section 246.5(a)) such as the diagnosis, care, or treatment of an existing health condition of, or preventative care for, the employee or the employee’s family member, and for an employee seeking relief from domestic violence, sexual assault, or stalking. Sick leave available for these reasons must be not less than the sick leave that would accrue during six months at the employee’s rate of entitlement. AB-2017 simply amends California Labor Code § 233 to provide that it is up to the “sole discretion” of the employee to designate the enumerated reason for using the sick leave for family healthcare, personal healthcare, or seeking safety from domestic violence, sexual assault, or stalking.

AB-2399 Paid Family Leave: Qualifying Exigency

California’s state-funded family temporary disability insurance program known as Paid Family Leave (“PFL”) provides up to six weeks of partial wage replacement benefits to individuals who take time off work to care for a seriously ill child, spouse, parent, or domestic partner, or to bond with a newborn, newly adopted or newly placed foster child. In 2018, the PFL program was expanded to provide benefits to include time off to be with a family member who was being deployed on active duty in connection with a military exigency. AB 2399 expands the definitions under sections 3302 and 3307 of the Unemployment Insurance Code to include additional coverage for active military members and their families. Effective January 1, 2021, PFL will expand to include time off for participation in a qualifying exigency related to the active duty or call to active duty of the employee’s child, spouse, domestic partner, or parent in the Armed Forces of the United States.

AB-2992 California Expands Protections for Victims of Crime or Abuse

Under California Labor Code section 230, employers are prohibited from discharging an employee for taking time off to serve on a jury or appear in court pursuant to a subpoena or court order. Labor Code section 230.1 prohibits employers of 25 or more employees from discharging, retaliating against, or otherwise taking any adverse action against an employee who is a victim of domestic violence, sexual assault, or stalking for taking time off from work to obtain relief or to seek medical attention or related services. AB 2992 expands the leave protections provided under sections 230 and 230.1 to victims of any “crime or abuse” and for those “whose immediate family member is deceased as a direct result of a crime.” “Crime” is construed broadly and includes a crime or public offense, wherever it may have taken place, that “would constitute a misdemeanor or a felony if the crime had been committed in California by a competent adult.” Employees are entitled to the leave “regardless of whether any person is
arrested for, prosecuted for, or convicted of, committing the crime.” AB 2992 expands existing law providing protected leave for employees who are victims of domestic violence, sexual assault, or stalking, to include leave for victims of other crimes or offenses “that caused physical injury or that caused mental injury and a threat of physical injury.”

Employees must provide “reasonable advance notice” of the need for time off unless advance notice is not feasible. The employee can provide any of the following for certification purposes: (1) police report indicating the employee was a victim; (2) a court order protecting or separating the employee from the perpetrator of the crime or abuse or other evidence from the court or prosecuting attorney that the employee has appeared in court; (3) documentation from a licensed medical professional, domestic violence counselor, sexual assault counselor, victim advocate, etc. that the employee was undergoing treatment or receiving services for physical or mental injuries or abuse as a result of victimization from a crime or abuse; (4) any other form of documentation that reasonably verifies the abuse or crime occurred including a written statement signed by the employee certifying that the absence is for a purpose authorized under Section 230 or Section 230.1.
On-Call Unionized Security Officers

AB-1512 Employers Can Require Unionized Security Officers to Be on Call During Rest Periods

California Labor Code section 226.7 provides that employees are entitled to receive premium wages in the form of one additional hour of pay at the employee's regular rate of pay for a missed meal or rest break. AB 1512 applies only to a security officer who is registered pursuant to the Private Security Services Act, whose employer is a registered private patrol operator, and who is covered by a collective bargaining agreement (CBA) that expressly provides for the wages, hours of work, and working conditions of employees. The CBA also must “expressly provide[] for rest periods for those employees, final and binding arbitration of disputes concerning application of its rest period provisions, premium wage rates for all overtime hours worked, and a regular hourly rate of pay of not less than one dollar more than the state minimum wage rate.” Employers that meet these conditions may require security officers to remain on the premises and on call during rest periods, including by carrying and monitoring communication devices. If the security officer’s rest period is interrupted by being “called upon to return to performing the active duties of the security officer’s post prior to completing the rest period,” the security officer must be permitted to restart his or her rest period as soon as practicable. If the security officer is not able to take a compliant rest period, the security officer must receive a premium of one hour of pay at the security officer’s regular hourly rate of pay.

The amended statute specifically states that it abrogates the California Supreme Court decision in Augustus v. ABM Security Services, Inc. (2016) 2 Cal.5th 257 to the extent it conflicts with the new law. Although `AB 1512 went into effect on September 25, 2020, it does not provide a defense to rest period violation cases filed before January 1, 2021. The law is effective until January 1, 2027, unless it is extended before then.
Pay Data Reporting

SB-973 – Guidance on New Pay Data Reporting Requirements

SB-973 requires private employers with 100 or more employees to submit an annual report with two sets of information to the Department of Fair Employment and Housing (DFEH). First, employers must report the number of employees by race, ethnicity, and sex who fall into each of the job categories used in reporting demographic information on the United States Equal Employment Opportunity Employer Information Report EEO-1 (EEO-1 form). Second, employers must report the number of employees by race, ethnicity, and sex whose annual earnings fall within each of the pay bands used by the United States Bureau of Labor Statistics in the Occupational Employment Statistics survey. If the DFEH does not receive the required report from an employer, it may seek an order requiring the employer to comply, and it may recover the costs associated with seeking the order for compliance.
Rest Period Requirements

AB-2479 Rest Period Requirements for Safety-Sensitive Employees at Petroleum Facilities

AB 2479 extends the exemption from general rest period rules until January 1, 2026 for specified employees who hold safety-sensitive positions at petroleum facilities to emergencies, to the extent they must stay on the premises and carry and monitor a communication device, and respond to emergencies, during rest periods. AB 2479 amends Labor Code section 226.75 requiring employers to authorize another rest period reasonably promptly if covered employees’ rest period is interrupted to address an emergency. If this is not possible, the employer must pay the employee one hour of pay at the employee’s regular rate of pay for the missed rest period. Employers must also furnish an itemized statement of the total premium owed to an employee for this missed rest period.
Settlement Agreements

AB-2143 Settlement Agreements: Employment Disputes

Code of Civil Procedure section 1002.5 prohibited the use of “no-rehire” clauses in settlement agreements regarding disputes in which an employee had filed a complaint against their employer, except where the employer has made a good-faith determination that the former employee-complainant engaged in sexual harassment or assault. AB 2143 amends this section to allow a no-hire provision if the former employee-complainant engaged in “any criminal conduct.” For this exception to apply, the employer must have documented its good faith determination of criminal conduct before the former employer-complainant filed the claim against the employer. AB 2143 also amends the statute to clarify that, to be eligible for the prohibition against a no-rehire clause, the former employee’s complaint must have been made in “good faith.”
Wage & Hour


AB 1947 extends the period of time within which people who believe that they have been discharged or otherwise discriminated against in violation of any law enforced by the California Labor Commissioner can file a complaint with the Division of Labor Standards Enforcement (DLSE). Specifically, AB 1947 lengthens the filing period for these Labor Commissioner complaints to one year after the occurrence of the violations.

AB 1947 also authorizes a court to award reasonable attorney’s fees to a plaintiff who prevails in a “whistleblower” action under California Labor Code § 1102.5.

AB-2257 – Changes To AB 5 Independent Contractor Law

AB 2257 clarifies existing exemptions and expands the occupations exempted from California’s “ABC” test for determining whether a worker constitutes an independent contractor.

AB 2257 expands and clarifies the business-to-business exemption in the following ways: individuals acting as sole proprietors may engage as independent contractors under the exemption; individuals who contract with one another for purposes of providing services at the location of a single-engagement event can be exempted provided that certain conditions are met; the exemption applies to a public agency or quasi-public corporation that has retained a contractor; and businesses contracting to provide services to another business’s customers can do so under the exemption when the services are being performed by the business service provider’s employees under the employer’s name, and the business service provider regularly contracts with other businesses.

AB 2257 also clarifies and expands the referral agency exemption. Specifically, it applies the exemption to additional services, including consulting, youth sports coaching, caddying, wedding or event planning, services provided by wedding and event vendors, and interpreting services. AB 2257 further provides that the ABC test governs the determination of whether an individual worker is an employee of the contractor referred to provide services, or an employee of the client to which the contractor was referred.

AB 2257 adds to the list of occupations that may qualify under the professional services exemption, including: content contributors, advisors, producers, narrators or cartographers for certain publications, specialized performers hired to teach a class for no more than one week, appraisers, registered professional foresters, and home inspectors. Further, AB 2257 removes the limitation on the number of submissions that independent contractors of various types can publish in a single forum without sacrificing their contractor status.

Several new exemptions are created under AB 2257 for the entertainment industry, including for occupations involved in creating, marketing, promoting, or distributing sound
recordings or musical compositions: recording artists, songwriters, lyricists, composers, proofers, managers of recording artists, record producers and directors, musical engineers and mixers, musicians who receive royalties from a sound recording or musical composition, vocalists who receive royalties from a sound recording or musical composition, photographers who take album cover photos or publicity photos, independent radio promoters, and certain types of publicists. Further, musicians and musical groups engaged for a single-engagement live performance are exempted from the ABC test unless they: rehearse or perform as a symphony orchestra, rehearse or perform in a musical theater production, rehearse or perform at a theme park or amusement park, rehearse or perform as an event headliner in a venue with more than 1,500 attendees, or rehearse or perform at a festival that sells more than 18,000 tickets per day of performance. Finally, individual performance artists including comedians, improvisers, magicians and illusionists, mimes, spoken word performers, storytellers, and puppeteers who perform original work they created will qualify for an exemption so long as certain conditions are satisfied.

AB 2257 also adds exemptions for manufactured housing salespersons; certain individuals engaged by international exchange visitor programs; and competition judges (including amateur umpires and referees).

AB 2257 provides district attorneys the ability to file an injunctive relief action against businesses suspected of misclassifying independent contractors.
41st Annual Labor & Employment Law Symposium

Session 2, Panel 1:


Jonathan Metzl, Ph.D., Professor of Sociology and Psychiatry and Director of the Center for Medicine, Health, and Society at Vanderbilt University
Jonathan Metzl, MD, PhD: Jonathan Metzl is the Frederick B. Rentschler II Professor of Sociology and Psychiatry, and the director of the Department of Medicine, Health, and Society, at Vanderbilt University in Nashville, Tennessee. He received his MD from the University of Missouri, MA in humanities/poetics and psychiatric internship/residency from Stanford University, and PhD in American culture from University of Michigan. Winner of the 2020 Robert F. Kennedy Human Rights Award, the 2020 APA Benjamin Rush Award for Scholarship, and a 2008 Guggenheim fellowship, Dr. Metzl has written extensively for medical, psychiatric, and popular publications about some of the most urgent hot-button issues facing America and the world. His books include The Protest Psychosis, Prozac on the Couch, Against Health: How Health Became the New Morality, and Dying of Whiteness: How the Politics of Racial Resentment is Killing America’s Heartland.

BOOKS

ABOUT DYING OF WHITENESS: HOW THE POLITICS OF RACIAL RESENTMENT IS KILLING AMERICA’S HEARTLAND

With the rise of the Tea Party and the election of Donald Trump, many middle- and lower-income white Americans threw their support behind conservative politicians who pledged to make life great again for people like them. But as *Dying of Whiteness* shows, the right-wing policies that resulted from this white backlash put these voters’ very health at risk—and in the end, threaten everyone’s well-being.

Physician and sociologist Jonathan M. Metzl travels across America’s heartland seeking to better understand the politics of racial resentment and its impact on public health. Interviewing a range of Americans, he uncovers how racial anxieties led to the repeal of gun control laws in Missouri, stymied the Affordable Care Act in Tennessee, and fueled massive cuts to schools and social services in Kansas. Although such measures promised to restore greatness to white America, Metzl’s systematic analysis of health data dramatically reveals they did just the opposite: these policies made life sicker, harder, and shorter in the very populations they purported to aid. Thus, white gun suicides soared, life expectancies fell, and school dropout rates rose.

Powerful, searing, and sobering, *Dying of Whiteness* ultimately demonstrates just how much white America would benefit by emphasizing cooperation, rather than by chasing false promises of supremacy.

ABOUT THE PROTEST PSYCHOSIS

In *The Protest Psychosis*, psychiatrist and cultural critic Jonathan Metzl tells the shocking story of how schizophrenia became the diagnostic term overwhelmingly applied to African American men at the Ionia State Hospital, and how events at Ionia mirrored national conversations that increasingly linked blackness, madness, and civil rights. Expertly sifting through a vast array of cultural documents from scientific literature, to music lyrics, to riveting, tragic hospital charts Metzl shows how associations between schizophrenia and blackness emerged during the 1960s and 1970s in ways that directly reflected national political events. As he demonstrates, far from resulting from the racist intentions of individual doctors or the symptoms of specific patients, racialized schizophrenia grew from a much wider set of cultural shifts that defined the thoughts, actions, and even the politics of black men as being inherently insane.
41st Annual
Labor & Employment Law
Symposium

Session 2, Panel 2:

Racial Injustice and Political Speech, In and Out of
the Workplace

Mika Hilaire, Equal Rights Law Group
Holly R. Lake, DLA Piper LLP (US)
Pilar Morin, Liebert Cassidy Whitmore (Moderator)
Mika M. Hilaire is a Civil Rights and Employment Lawyer and founder of Equal Rights Law Group. She practices in all areas of employment law and litigation.

She is well-known for her trial advocacy skills and specifically for obtaining a $47 million dollar verdict in a case she was co-lead trial counsel on and has been selected as a Southern California Super Lawyer – Rising Star and Super Lawyer since 2007, an honor bestowed on only 2.5% of the lawyers in Southern California.

Mika was appointed to the State Bar of California Labor and Employment Executive Committee and served on this committee until 2012. She was also appointed to the Los Angeles County Bar Association Executive Committee in the employment law section for 2015-2019. Mika has also been a member of the Los Angeles County Bar Association Symposium Committee, and is a member with the Black Women Lawyers Association of Los Angeles and the John M. Langston Bar Association. Mika frequently lectures on all areas of employment law.
HOLLY R. LAKE
DLA PIPER

• Holly R. Lake is an employment litigator, recently recognized by the Los Angeles Business Journal as one of 2020's "Top Minority Attorneys" and the Century City Bar Association as 2020 "Labor and Employment Lawyer of the Year."

• She has a breadth of experience defending clients across industries not only in single/multiple plaintiff cases but also defending employers in wage-and-hour class, collective and private attorney general representative actions under California laws and the Fair Labor Standards Act (FLSA), Title VII and the Fair Employment and Housing Act. She also advises clients on all matters related to employment, including OFCCP compliance and affirmative action program development. She acts as a partner to her clients, making it her business to understand their needs and goals, and then developing a legal strategy that's unique to the case at hand. Her approach has resulted in success before the Court of Appeal, trial victories and summary judgment wins.

• Holly Lake, DLA Piper LLP (US), 310.595.3080 holly.lake@us.dlapiper.com
Pilar provides legal advice related to general education law including employee and student misconduct, speech, disability issues and the interactive process, privacy laws, and civil rights. She regularly advises educational institutions about sexual misconduct policies, changes in the law, and investigations. She assists the firm's clients in complying with the Education Code, Campus SaVE Act, Clery, and privacy including FERPA. Pilar has trained boards, Title IX Coordinators, faculty and students at various colleges and schools concerning the prevention of and response to sexual harassment and assaults in compliance with federal and state laws and regulations. Pilar regularly works with the firm's education clients in assisting them in complying with federal and state law and responding to misconduct, including employee and student discipline.

An experienced trial attorney who has obtained defense verdicts and won summary judgments in favor of educational institutions involving disability discrimination, harassment, race discrimination, retaliation and other employment claims, Pilar is an expert in all phases of trial practice in state and federal courts and administrative bodies.
RACIAL INJUSTICE AND POLITICAL SPEECH, IN AND OUT OF THE WORKPLACE

LOS ANGELES COUNTY BAR ASSOCIATION (LACBA)
41ST ANNUAL LABOR & EMPLOYMENT LAW SYMPOSIUM
MARCH 4, 2021

Presented By:
Mika Hilaire & Holly R. Lake

Moderated By:
Pilar Morin
Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.
First Amendment protection attaches to speech if:

1) it is on a matter of “public concern,”
2) By an individual acting as a private citizen (i.e., not pursuant to “official duties”), and
3) Employee’s speech interest outweighs the public agency’s interest in efficiency and effectiveness.

All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.
FREE SPEECH IN THE WORKPLACE

• The right to “free speech” does not extend to libel, slander, obscenity, true threats or speech that incites imminent violence or law-breaking

• Free speech is for everyone, including speech we may not like, that which society rejects and despises, policies must be neutrally applied in the workplace

• In the workplace, the right of “free speech” applies only to government employees with few exceptions, there is no general right of “free speech” in a private employer workplace

• The First Amendment does not limit the right of private employers to regulate employees’ communications nor provide any constitutional right for workers to express thoughts or opinions at work
(a) A person shall not discharge an employee or in any manner discriminate, retaliate, or take any adverse action against any employee or applicant for employment because the employee or applicant engaged in any conduct delineated in this chapter, including the conduct described in subdivision (k) of section 96, and Chapter 5 (commencing with section 1101) of Part 3 of Division 2, or because the employee or applicant for employment has filed a bona fide complaint or claim or instituted or caused to be instituted any proceeding under or relating to his or her rights that are under the jurisdiction of the Labor Commissioner, made a written or oral complaint that he or she is owed unpaid wages, or because the employee has initiated any action or notice pursuant to section 2699, or has testified or is about to testify in a proceeding pursuant to that section, or because of the exercise by the employee or applicant for employment on behalf of himself, herself, or others of any rights afforded him or her.
The Labor Commissioner and his or her deputies and representatives authorized by him or her in writing shall, upon the filing of a claim therefor by an employee, or an employee representative authorized in writing by an employee, with the Labor Commissioner, take assignments of:

(k) Claims for loss of wages as the result of demotion, suspension, or discharge from employment for lawful conduct occurring during nonworking hours away from the employer’s premises.
No employer shall make, adopt, or enforce any rule, regulation, or policy:

a) Forbidding or preventing employees from engaging or participating in politics or from becoming candidates for public office.

b) Controlling or directing or tending to control or direct the political activities or affiliations of employees.
No employer shall coerce or influence or attempt to coerce or influence his employees through or by means of threat of discharge or loss of employment to adopt or follow or refrain from adopting or following any particular course or line of political action or political activity.

Any employer who violates Cal Labor Code 1102 is guilty of a misdemeanor. The violation is punishable, in the case of an individual, by imprisonment in the county jail not to exceed one year or a fine not to exceed $1,000, or both. If the employer is a corporation, the violation is punishable by a fine not to exceed $5,000.

Individuals may also bring a private right of action for violation of their rights under this section.
Pursuant to California Labor Code 432.7, an employer is not allowed to use one’s arrest pending trial as the sole determining factor in making a negative employment decision against them, otherwise, there would be no presumption of “innocent until proven guilty”.

Employees can expect their employer to ask about the circumstances of their arrest pending trial to determine whether the arrest could have an impact on the employer’s business.

Exception - if the arrest could reasonably have an impact on the employer’s business, then the employer may take action against the employee while the arrest is pending, example: police officer arrested while off-duty for engaging in violence during a protest.

If arrest is resolved without conviction, the arrest cannot be used against the employee in the workplace.

If wrongfully terminated, employee can sue for actual damages under the applicable labor code.
POLITICS & SOCIAL MEDIA – WHERE ARE WE TODAY
The global digital landscape is still evolving rapidly in the second half of 2020, with the ongoing Coronavirus pandemic continuing to influence and reshape various aspects of people’s daily lives, including internet usage and the workplace.

Global internet traffic has grown by as much as 30% this year, to 3.96 billion by start of July 2020.

More than half the world’s population now uses social media.

More than 1 million people started using social media for the first time ever over the past 12 months, equating to almost 12 new users every 12 seconds.
Future historians, will discuss what developed into, at times, daily protests throughout the coronavirus pandemic. Even before COVID-19 fully gripped the world, 2020 was shaping up to be a year of activism and the following are just a few of the protests which gripped the nation:

Anti-Lockdown Protests, conservative activist gathered, mostly in April to May, objecting to social distancing measures (though with notable differences in how treated by civil servants)

#IRunWIthMaud, on May 8th runners demonstrated in honor of Ahmaud Arbery who was murdered while running

Black Lives Matter, the murder of George Floyd in Minneapolis on May 25th spurred a nationwide ongoing protest

Black Trans Lives Matter, culminated in a massive march on June 14th in Brooklyn, New York, in response to the epidemic of Black trans women being killed in the U.S. such as Dominique Rem’mie Fells and Riah Milton

Juneteenth protests, an annual holiday marking the day in 1865 when news that slavery had been abolished finally reached enslaved people in Galveston, Texas

Portland, Oregon ongoing protests
Four recent polls suggest that 15 million to 26 million people in the United States participated in demonstrations over the death of George Floyd and others over a several week period.

Across the U.S., as of July 3rd, there have been more than 4,700 demonstrations or an average of 140 per day, since the first protest began in Minneapolis on May 26th.

Participation has ranged from dozens to tens of thousands across 2,500 locations.

Said numbers would mark the BLM movement as the largest movement in the country’s history.

In contrast, the Women’s March in 2017 had a turnout of 3 to 5 million on a single day.
THE IMPACT OF THE 2016 PRESIDENTIAL ELECTION ON THE WORKPLACE

Following the last presidential election, in May 2017, an American Psychological Association survey found American workers are more likely to say they are feeling stressed and cynical because of political discussions at work now than before the 2016 presidential election:

26% of full-time and part-time employed adults said they felt tense or stressed out as a result of political discussions at work since the election, an increase from 17% in September 2016 when they were asked about political discussions at work during the election season.

21% said they have felt more cynical and negative during the workday because of political talk at work. 54% said they have discussed politics at work since the election.

40% of American workers say it has caused at least one negative outcome, such as reduced productivity, poorer work quality, difficulty getting work done, a more negative view of coworkers, feeling tense or stressed out, or increased workplace hostility.

This is a significant increase from the pre-election survey data, when 27% reported at least one negative outcome.
A February 2020 survey of 500 employees found that politics and the 2020 U.S. presidential election are negatively affecting productivity, collaboration and employee morale in the workplace. Some notable findings:

- 78% of employees report discussing politics at work
- 47% report that the 2020 presidential election has impacted their ability to get work done
- 33% of employees report that the topic of the 2020 presidential election has led them to spend more time getting political news while at work
- 36% of employees report that the topic of the 2020 presidential election has led them to avoid talking to or working with a coworker because of their political views
- 31% of employees who talk politics at work report these conversations to be stressful and/or frustrating
- 29% of employees witnessed at least one instance of unacceptable treatment of a coworker because of their political beliefs, including being called offensive names, being avoided by colleagues or being treated unfairly

Organizations that have political expression policies, over 97% of their employees agree with the policies.
WHEN POLITICAL ACTIVITY, SOCIAL MEDIA & THE REMOTE WORKPLACE COLLIDE
Wireless technology company, Flyby, founded in 2012, is located in San Jose, California with approximately 110 employees. When shelter-in-place began, employees were ordered to work from home, which has been extended through January 15, 2021. Employees were permitted to use their own technology or the employer’s while working remotely.

Meet Matt the Marketing Manager, Caucasian cis-gender male, employee number 10 of employer and, childhood friend of the founders. Meet Sara, a Sales Associate, Latinx cis-gender female, who has worked for Flyby for just over 2 years. Sara reports to Matt and is an outspoken immigration rights advocate who has openly criticized the Trump administration’s handling of the pandemic.

As the company has grown, they have tried to mature from a social club to a reputable business.
Sara posted numerous comments on social media during election week which were anti-Trump and attacked Republicans (calling them racist and the like). Sara also went to a protest against Trump as well to a street party celebration the evening of November 7th. Sara posted pictures of these activities on social media. Several Flyby employees and customers are “friends” with Sara on social media and liked her posts and also made supportive comments.

An employee questioned Sara as to how Matt the Manager felt about her activities to which Sara responded – “Matt does not get it at all! I think he is a Republican and probably voted for Trump along with several others at work! Ugh, that is so racist! Makes sense since he treats me different as an outspoken Latinx womxn!” Several employees and customers like Sara’s comment.

Within hours, several employees and a customer notify Matt about the post. Matt immediately complains to his friends, the founders, who instruct human resources to immediately terminate Sara.

WHAT DO YOU DO?
In June 2020, employees walked out of a Cambridge, Mass. Whole Foods store, after employees were told they were violating Whole Food’s dress code with their Black Lives Matter masks.

In July 2020, protestors throughout the country, including Berkeley, CA gathered to speak against the company’s dress code, as employees claimed Whole Foods had not previously enforced its dress code policy.

14 Employees filed a class action lawsuit in July 2020, asserting Whole Foods' policy and actions violated their rights under the Title VII of the Civil Rights Act of 1964. By August 2020, 28 named plaintiffs over 9 states had joined the lawsuit. Whole Foods argued the policy was neutrally enforced.

At the same time Trader Joe’s and Costco have come under attack for similar policies concerning BLM accessories.

WHAT IS A NEUTRAL DRESS CODE POLICY?
HOW DO YOU ENFORCE IT?
Triple Play Sports Bar & Grill, 361 NLRB 31 (2014)

Former employee posted on Facebook, “Maybe someone should do the owners of Triple Play a favor and buy it from them. They can’t even do tax paperwork correctly!!! Now I OWE money ... Wtf!!!!” Current employee “liked” post and one comment on it calling employer an “a...hole.” Employees were discharged.

National Labor Relations Act (“NLRA”) restrictions on employer’s right to limit workers’ communications about wages, hours and the terms or conditions of employment during non-work time in non-work areas. Many NLRA provisions apply to non-union employers. No bright line between protected and unprotected communications.

Board found that the discharges were unlawful because the employees engaged in protected concerted activities.
Employee with disability reported co-worker’s misconduct. In retaliation, co-worker started a personal blog where employees posted derogatory comments about the “rat” with a disability. Employee with disability reported the blog to supervisor, however company took little action to stop off-duty conduct.
Woman flipped off President Trump’s motorcade while riding her bicycle, photo widely spread on news and social media.

Briskman’s employment was terminated by Akima, LLC.
• **Rodriguez v. Maricopa County Community College District** (9th Cir. 2010)
  
  - Facts: Mathematics instructor sent racially charged e-mails to all employees concerning “Columbus Day.”
  - Faculty members sued alleging District should have disciplined instructor.
  - Court held that District was not liable:
    - No student or employee’s rights actually violated.
    - “The First Amendment . . . demands substantial deference to the college's decision not to take action . . . .”
QUESTIONS
§ 98.6. Discharge or discrimination, retaliation, or adverse action... CA LABOR § 98.6

West's Annotated California Codes
Labor Code (Refs & Annos)
Division 1. Department of Industrial Relations (Refs & Annos)
Chapter 4. Division of Labor Standards Enforcement (Refs & Annos)

West's Ann.Cal.Labor Code § 98.6

§ 98.6. Discharge or discrimination, retaliation, or adverse action against employee or applicant for conduct delineated in this chapter or because employee or applicant has filed complaint or claim, instituted or caused to be instituted any proceeding under or relating to his or her rights or testified relating to the same on behalf of that person or another; reinstatement and reimbursement; penalties; employment entitlement for applicant; applicability; family members

Effective: January 1, 2016
Currentness

(a) A person shall not discharge an employee or in any manner discriminate, retaliate, or take any adverse action against any employee or applicant for employment because the employee or applicant engaged in any conduct delineated in this chapter, including the conduct described in subdivision (k) of Section 96, and Chapter 5 (commencing with Section 1101) of Part 3 of Division 2, or because the employee or applicant for employment has filed a bona fide complaint or claim or instituted or caused to be instituted any proceeding under or relating to his or her rights that are under the jurisdiction of the Labor Commissioner, made a written or oral complaint that he or she is owed unpaid wages, or because the employee has initiated any action or notice pursuant to Section 2699, or has testified or is about to testify in a proceeding pursuant to that section, or because of the exercise by the employee or applicant for employment on behalf of himself, herself, or others of any rights afforded him or her.

(b)(1) Any employee who is discharged, threatened with discharge, demoted, suspended, retaliated against, subjected to an adverse action, or in any other manner discriminated against in the terms and conditions of his or her employment because the employee engaged in any conduct delineated in this chapter, including the conduct described in subdivision (k) of Section 96, and Chapter 5 (commencing with Section 1101) of Part 3 of Division 2, or because the employee has made a bona fide complaint or claim to the division pursuant to this part, or because the employee has initiated any action or notice pursuant to Section 2699 shall be entitled to reinstatement and reimbursement for lost wages and work benefits caused by those acts of the employer.

(2) An employer who willfully refuses to hire, promote, or otherwise restore an employee or former employee who has been determined to be eligible for rehiring or promotion by a grievance procedure, arbitration, or hearing authorized by law, is guilty of a misdemeanor.

(3) In addition to other remedies available, an employer who violates this section is liable for a civil penalty not exceeding ten thousand dollars ($10,000) per employee for each violation of this section, to be awarded to the employee or employees who suffered the violation.
§ 98.6. Discharge or discrimination, retaliation, or adverse action..., CA LABOR § 98.6

(e)(1) Any applicant for employment who is refused employment, who is not selected for a training program leading to employment, or who in any other manner is discriminated against in the terms and conditions of any offer of employment because the applicant engaged in any conduct delineated in this chapter, including the conduct described in subdivision (k) of Section 96, and Chapter 5 (commencing with Section 1101) of Part 3 of Division 2, or because the applicant has made a bona fide complaint or claim to the division pursuant to this part, or because the employee has initiated any action or notice pursuant to Section 2699 shall be entitled to employment and reimbursement for lost wages and work benefits caused by the acts of the prospective employer.

(2) This subdivision shall not be construed to invalidate any collective bargaining agreement that requires an applicant for a position that is subject to the collective bargaining agreement to sign a contract that protects either or both of the following as specified in subparagraphs (A) and (B), nor shall this subdivision be construed to invalidate any employer requirement of an applicant for a position that is not subject to a collective bargaining agreement to sign an employment contract that protects either or both of the following:

(A) An employer against any conduct that is actually in direct conflict with the essential enterprise-related interests of the employer and where breach of that contract would actually constitute a material and substantial disruption of the employer's operation.

(B) A firefighter against any disease that is presumed to arise in the course and scope of employment, by limiting his or her consumption of tobacco products on and off the job.

(d) The provisions of this section creating new actions or remedies that are effective on January 1, 2002, to employees or applicants for employment do not apply to any state or local law enforcement agency, any religious association or corporation specified in subdivision (d) of Section 12926 of the Government Code, except as provided in Section 12926.2 of the Government Code, or any person described in Section 1070 of the Evidence Code.

(e) An employer, or a person acting on behalf of the employer, shall not retaliate against an employee because the employee is a family member of a person who has, or is perceived to have, engaged in any conduct delineated in this chapter.

(f) For purposes of this section, "employer" or "a person acting on behalf of the employer" includes, but is not limited to, a client employer as defined in paragraph (1) of subdivision (a) of Section 2810.3 and an employer listed in subdivision (b) of Section 6400.

(g) Subdivisions (e) and (f) shall not apply to claims arising under subdivision (k) of Section 96 unless the lawful conduct occurring during nonwork hours away from the employer's premises involves the exercise of employee rights otherwise covered under subdivision (e).
§ 96. Assignment of claims, CA LABOR § 96

(k) Claims for loss of wages as the result of demotion, suspension, or discharge from employment for lawful conduct occurring during nonworking hours away from the employer's premises.

Credits
(Stats.1937, c. 90, p. 191, § 96. Amended by Stats.1939, c. 468, p. 1816, § 1; Stats.1945, c. 1336, p. 2506, § 1; Stats.1951, c. 478, p. 1616, § 1; Stats.1953, c. 555, p. 1813, § 1; Stats.1965, c. 1513, p. 3556, § 3.5, operative Jan. 15, 1966; Stats.1969, c. 1529, p. 3122, § 1; Stats.1970, c. 243, p. 503, § 1; Stats.1971, c. 1607, p. 3459, § 1; Stats.1972, c. 1421, p. 3103, § 1; Stats.1978, c. 1253, p. 4070, § 1; Stats.1982, c. 454, p. 1874, § 127; Stats.1999, c. 692 (A.B.1689), § 2.)

Editors' Notes

LAW REVISION COMMISSION COMMENTS

1971 Amendment

See the Comment to Labor Code § 2929.

Notes of Decisions (18)

West's Ann. Cal. Labor Code § 96, CA LABOR § 96
Current with urgency legislation through Ch. 2 of 2021 Reg.Sess

§ 1101. Political activities of employees; prohibition of prevention or control by employer

Currentness

No employer shall make, adopt, or enforce any rule, regulation, or policy:

(a) forbidding or preventing employees from engaging or participating in politics or from becoming candidates for public office.

(b) controlling or directing, or tending to control or direct the political activities or affiliations of employees.

Credits
(Stats.1937, c. 90, p. 212, § 1101.)

West's Ann. Cal. Labor Code § 1101, CA LABOR § 1101
Current with urgency legislation through Ch. 2 of 2021 Reg.Sess
§ 1102. Coercion or influence of political activities of employees, CA LABOR § 1102

West's Annotated California Codes
Labor Code (Refs & Annos)
Division 2. Employment Regulation and Supervision (Refs & Annos)
Part 3. Privileges and Immunities
Chapter 5. Political Affiliations (Refs & Annos)

West's Ann.Cal.Labor Code § 1102

§ 1102. Coercion or influence of political activities of employees

Currentness

No employer shall coerce or influence or attempt to coerce or influence his employees through or by means of threat of discharge or loss of employment to adopt or follow or refrain from adopting or following any particular course or line of political action or political activity.

Credits
(Stats.1937, c. 90, p. 212, § 1102.)

West's Ann. Cal. Labor Code § 1102, CA LABOR § 1102
Current with urgency legislation through Ch. 2 of 2021 Reg.Sess

§ 432.7. Disclosure of arrest or detention not resulting in conviction, or information concerning referral or participation in diversion programs, or conviction judicially dismissed or sealed; disclosure of information related to arrest, detention, processing, diversion, supervision, adjudication, or court disposition while subject to juvenile court law; violations; remedies; exception; health facility applicants; prospective concessionaires

Effective: January 1, 2020
Currentness

(a)(1) An employer, whether a public agency or private individual or corporation, shall not ask an applicant for employment to disclose, through any written form or verbally, information concerning an arrest or detention that did not result in conviction, or information concerning a referral to, and participation in, any pretrial or posttrial diversion program, or concerning a conviction that has been judicially dismissed or ordered sealed pursuant to law, including, but not limited to, Sections 1203.4, 1203.4a, 1203.425, 1203.45, and 1210.1 of the Penal Code. An employer also shall not seek from any source whatsoever, or utilize, as a factor in determining any condition of employment including hiring, promotion, termination, or any apprenticeship training program or any other training program leading to employment, any record of arrest or detention that did not result in conviction, or any record regarding a referral to, and participation in, any pretrial or posttrial diversion program, or concerning a conviction that has been judicially dismissed or ordered sealed pursuant to law, including, but not limited to, Sections 1203.4, 1203.4a, 1203.425, 1203.45, and 1210.1 of the Penal Code. This section shall not prevent an employer from asking an employee or applicant for employment about an arrest for which the employee or applicant is out on bail or on their own recognizance pending trial.

(2) An employer, whether a public agency or private individual or corporation, shall not ask an applicant for employment to disclose, through any written form or verbally, information concerning or related to an arrest, detention, processing, diversion, supervision, adjudication, or court disposition that occurred while the person was subject to the process and jurisdiction of the juvenile court. An employer also shall not seek from any source whatsoever, or utilize, as a factor in determining any condition of employment including hiring, promotion, termination, or any apprenticeship training program or any other training program leading to employment, any record concerning or related to an arrest, detention, processing, diversion, supervision, adjudication, or court disposition that occurred while a person was subject to the process and jurisdiction of the juvenile court.

(3) For purposes of this section:
§ 432.7. Disclosure of arrest or detention not resulting in..., CA LABOR § 432.7

(A) "Conviction" includes a plea, verdict, or finding of guilt, regardless of whether a sentence is imposed by the court.

(B) "Conviction" does not include, and shall not be construed to include, any adjudication by a juvenile court or any other court order or action taken with respect to a person who is under the process and jurisdiction of the juvenile court.

(b) This section shall not prohibit the disclosure of the information authorized for release under Sections 13203 and 13300 of the Penal Code, to a government agency employing a peace officer. However, the employer shall not determine any condition of employment other than paid administrative leave based solely on an arrest report. The information contained in an arrest report may be used as the starting point for an independent, internal investigation of a peace officer in accordance with Chapter 9.7 (commencing with Section 3300) of Division 4 of Title 1 of the Government Code.

(c) If a person violates this section, or Article 6 (commencing with Section 11140) of Chapter 1 of Title 1 of Part 4 of the Penal Code, the applicant may bring an action to recover from that person actual damages or two hundred dollars ($200), whichever is greater, plus costs, and reasonable attorney's fees. An intentional violation of this section shall entitle the applicant to treble actual damages, or five hundred dollars ($500), whichever is greater, plus costs, and reasonable attorney's fees. An intentional violation of this section is a misdemeanor punishable by a fine not to exceed five hundred dollars ($500).

(d) The remedies under this section shall be in addition to and not in derogation of all other rights and remedies that an applicant may have under any other law.

(e) Persons seeking employment or persons already employed as peace officers or persons seeking employment for positions in the Department of Justice or other criminal justice agencies as defined in Section 13101 of the Penal Code are not covered by this section.

(f)(1) Except as provided in paragraph (2), this section does not prohibit an employer at a health facility, as defined in Section 1250 of the Health and Safety Code, from asking an applicant for employment either of the following:

(A) With regard to an applicant for a position with regular access to patients, to disclose an arrest under any section specified in Section 290 of the Penal Code.

(B) With regard to an applicant for a position with access to drugs and medication, to disclose an arrest under any section specified in Section 11590 of the Health and Safety Code.

(2)(A) An employer specified in paragraph (1) shall not inquire into information concerning or related to an applicant's arrest, detention, processing, diversion, supervision, adjudication, or court disposition that occurred
§ 432.7. Disclosure of arrest or detention not resulting in... CA LABOR § 432.7

while the person was subject to the process and jurisdiction of juvenile court law, unless the information concerns an adjudication by the juvenile court in which the applicant has been found by the court to have committed a felony or misdemeanor offense specified in paragraph (1) that occurred within five years preceding the application for employment.

(B) Notwithstanding any other provision of this subdivision, an employer specified in paragraph (1) shall not inquire into information concerning or related to an applicant's juvenile offense history that has been sealed by the juvenile court.

(3) An employer seeking disclosure of offense history under paragraph (2) shall provide the applicant with a list describing the specific offenses under Section 11590 of the Health and Safety Code or Section 290 of the Penal Code for which disclosure is sought.

(g)(1) A peace officer or employee of a law enforcement agency with access to criminal or juvenile offender record information maintained by a local law enforcement criminal or juvenile justice agency shall not knowingly disclose, with intent to affect a person's employment, any information pertaining to an arrest or detention or proceeding that did not result in a conviction, including information pertaining to a referral to, and participation in, any pretrial or posttrial diversion program, to any person not authorized by law to receive that information.

(2) Any other person authorized by law to receive criminal or juvenile offender record information maintained by a local law enforcement criminal or juvenile justice agency shall not knowingly disclose any information received pertaining to an arrest or detention or proceeding that did not result in a conviction, including information pertaining to a referral to, and participation in, any pretrial or posttrial diversion program, to any person not authorized by law to receive that information.

(3) Except for those specifically referred to in Section 1070 of the Evidence Code, a person who is not authorized by law to receive or possess criminal or juvenile justice records information maintained by a local law enforcement criminal or juvenile justice agency, pertaining to an arrest or other proceeding that did not result in a conviction, including information pertaining to a referral to, and participation in, any pretrial or posttrial diversion program, shall not knowingly receive or possess that information.

(h) "A person authorized by law to receive that information," for purposes of this section, means any person or public agency authorized by a court, statute, or decisional law to receive information contained in criminal or juvenile offender records maintained by a local law enforcement criminal or juvenile justice agency, and includes, but is not limited to, those persons set forth in Section 11105 of the Penal Code, and any person employed by a law enforcement criminal or juvenile justice agency who is required by that employment to receive, analyze, or process criminal or juvenile offender record information.

(i) This section does not require the Department of Justice to remove entries relating to an arrest or detention not resulting in conviction from summary criminal history records forwarded to an employer pursuant to law.
§ 432.7. Disclosure of arrest or detention not resulting in..., CA LABOR § 432.7

(j) As used in this section, "pretrial or posttrial diversion program" means any program under Chapter 2.5 (commencing with Section 1000) or Chapter 2.7 (commencing with Section 1001) of Title 6 of Part 2 of the Penal Code, Section 13201 or 13552.5 of the Vehicle Code, Sections 626, 626.5, 654, or 725 of, or Article 20.5 (commencing with Section 790) of Chapter 2 of Part 1 of Division 2 of, the Welfare and Institutions Code, or any other program expressly authorized and described by statute as a diversion program.

(k)(1) Subdivision (a) shall not apply to any city, city and county, county, or district, or any officer or official thereof, in screening a prospective concessionaire, or the affiliates and associates of a prospective concessionaire for purposes of consenting to, or approving of, the prospective concessionaire's application for, or acquisition of, any beneficial interest in a concession, lease, or other property interest.

(2) For purposes of this subdivision the following terms apply:

(A) "Screening" means a written request for criminal or juvenile history information made to a local law enforcement agency.

(B) "Prospective concessionaire" means any individual, general or limited partnership, corporation, trust, association, or other entity that is applying for, or seeking to obtain, a public agency's consent to, or approval of, the acquisition by that individual or entity of any beneficial ownership interest in any public agency's concession, lease, or other property right whether directly or indirectly held. However, "prospective concessionaire" does not include any of the following:

(i) A lender acquiring an interest solely as security for a bona fide loan made in the ordinary course of the lender's business and not made for the purpose of acquisition.

(ii) A lender upon foreclosure or assignment in lieu of foreclosure of the lender's security.

(C) "Affiliate" means any individual or entity that controls, or is controlled by, the prospective concessionaire, or who is under common control with the prospective concessionaire.

(D) "Associate" means any individual or entity that shares a common business purpose with the prospective concessionaire with respect to the beneficial ownership interest that is subject to the consent or approval of the city, county, city and county, or district.

(E) "Control" means the possession, direct or indirect, of the power to direct, or cause the direction of, the management or policies of the controlled individual or entity.

(j)(1) Subdivision (a) does not prohibit a public agency, or any officer or official thereof, from denying consent to, or approval of, a prospective concessionaire's application for, or acquisition of, any beneficial interest in
§ 432.7. Disclosure of arrest or detention not resulting in..., CA LABOR § 432.7

a concession, lease, or other property interest based on the criminal history information of the prospective concessionaire or the affiliates or associates of the prospective concessionaire that show any criminal conviction for offenses involving moral turpitude. Criminal history information for purposes of this subdivision includes any criminal history information obtained pursuant to Section 11105 or 13300 of the Penal Code.

(2) In considering criminal history information, a public agency shall consider the crime for which the prospective concessionaire or the affiliates or associates of the prospective concessionaire was convicted only if that crime relates to the specific business that is proposed to be conducted by the prospective concessionaire.

(3) Any prospective concessionaire whose application for consent or approval to acquire a beneficial interest in a concession, lease, or other property interest is denied based on criminal history information shall be provided a written statement of the reason for the denial.

(4)(A) If the prospective concessionaire submits a written request to the public agency within 10 days of the date of the notice of denial, the public agency shall review its decision with regard to any corrected record or other evidence presented by the prospective concessionaire as to the accuracy or incompleteness of the criminal history information utilized by the public agency in making its original decision.

(B) The prospective concessionaire shall submit the copy or the corrected record of any other evidence to the public agency within 90 days of a request for review. The public agency shall render its decision within 20 days of the submission of evidence by the prospective concessionaire.

(m)(1) Paragraph (1) of subdivision (a) does not prohibit an employer, whether a public agency or private individual or corporation, from asking an applicant about, or seeking from any source information regarding, a particular conviction of the applicant if, pursuant to Section 1829 of Title 12 of the United States Code or any other federal law, federal regulation, or state law, any of the following apply:

(A) The employer is required by law to obtain information regarding the particular conviction of the applicant, regardless of whether that conviction has been expunged, judicially ordered sealed, statutorily eradicated, or judicially dismissed following probation.

(B) The applicant would be required to possess or use a firearm in the course of their employment.

(C) An individual with that particular conviction is prohibited by law from holding the position sought by the applicant, regardless of whether that conviction has been expunged, judicially ordered sealed, statutorily eradicated, or judicially dismissed following probation.

(D) The employer is prohibited by law from hiring an applicant who has that particular conviction, regardless of whether that conviction has been expunged, judicially ordered sealed, statutorily eradicated, or judicially dismissed following probation.
§ 432.7. Disclosure of arrest or detention not resulting in..., CA LABOR § 432.7

(2) For purposes of this subdivision, "particular conviction" means a conviction for specific criminal conduct or a category of criminal offenses prescribed by any federal law, federal regulation, or state law that contains requirements, exclusions, or both, expressly based on that specific criminal conduct or category of criminal offenses.

(n) Nothing in this section shall prohibit an employer, whether a public agency or private individual or corporation, required by state, federal, or local law to conduct criminal background checks for employment purposes or to restrict employment based on criminal history from complying with those requirements, or to prohibit the employer from seeking or receiving an applicant's criminal history report that has been obtained pursuant to procedures otherwise provided for under federal, state, or local law. For purposes of this subdivision, federal law shall include rules or regulations promulgated by a self-regulatory organization, as defined in Section 3(a)(26) of the Securities Exchange Act of 1934, pursuant to the authority in Section 19(b) of the Securities Exchange Act of 1934, as amended by 124 Stat. 1652 (Public Law 11-203).\(^1\)

Credits


Footnotes

1 For public law sections classified to the U.S.C.A., see USCA-Tables.
West's Ann. Cal. Labor Code § 432.7, CA LABOR § 432.7
Current with urgency legislation through Ch. 2 of 2021 Reg.Sess
88 S.Ct. 1731, 20 L.Ed.2d 811, 1 IER Cases 8

KeyCite Yellow Flag - Negative Treatment
Not Followed on State Law Grounds  Appeal of Booker, N.H., January 25, 1995

88 S.Ct. 1731
Supreme Court of the United States
Marvin L. PICKERING, Appellant,
v.
BOARD OF EDUCATION OF TOWNSHIP HIGH SCHOOL DISTRICT 205, WILL COUNTY, ILLINOIS.

No. 510.
Argued March 27, 1968.
Decided June 3, 1968.

Synopsis
Action by dismissed teacher against board of education seeking reinstatement. The Circuit Court of Will County, Illinois, affirmed decision of school board, and the teacher appealed. The Illinois Supreme Court, 36 Ill.2d 568, 225 N.E.2d 1, affirmed, and the teacher appealed. The United States Supreme Court, Mr. Justice Marshall, held that question whether school system requires additional funds is matter of legitimate public concern on which judgment of school administration, including school board, cannot be taken as conclusive and it is thus essential that teachers, who, as a class, are members of community most likely to have informed and definite opinions as to how funds allotted to operation of schools should be spent, be able to speak out freely on such questions without fear of retaliatory dismissal. The court further held that act of school teacher, in writing and sending letter to local newspaper, in connection with proposed tax increase, that was critical of manner in which board of education had handled past proposals to raise new revenue for schools did not, in absence of proof of false statements knowingly or recklessly made, afford basis for teacher's dismissal.

Judgment reversed and case remanded with directions.

Mr. Justice White dissented in part.

West Headnotes (10)

[1] Constitutional Law ⇨ Employees
Teachers may not constitutionally be compelled to relinquish First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with operation of public schools in which they work. U.S.C.A.Const. Amend. 1.

3702 Cases that cite this headnote

Supreme Court, on appeal by dismissed teacher from state court decision affirming determination of school board dismissing teacher for sending letter to local newspaper in connection with proposed tax increase, declined to treat teacher's claim that procedure followed deprived him of due process in that he was not afforded impartial tribunal as independent ground for decision, where teacher failed to raise such claim at any point in state proceedings and made contention for first time in Supreme Court.

75 Cases that cite this headnote

Public Employment ⇨ Scope of further judicial review
Where state courts, in action by dismissed teacher against board of education seeking reinstatement, at no time gave de novo consideration to statements contained in teacher's letter, which constituted basis for teacher's dismissal, Supreme Court was free to examine evidence in case completely independently and to afford little weight to factual determinations made by board of education.

71 Cases that cite this headnote
Education ⇐ Protected activities in general
Public Employment ⇐ Protected activities

Comments by teachers on matters of public concern that are substantially correct may not furnish grounds for dismissal even though they are critical in tone. U.S.C.A.Const. Amends. 1, 14.

166 Cases that cite this headnote

Education ⇐ Grounds for Adverse Action
Public Employment ⇐ Conduct or Misconduct in General

Accusation by school teacher that too much money is being spent on athletics by administrators of school system cannot reasonably be regarded as per se detrimental to district's schools.

4 Cases that cite this headnote

Education ⇐ Protected activities in general
Public Employment ⇐ Protected activities

Question whether school system requires additional funds is matter of legitimate public concern on which judgment of school administration, including school board, cannot be taken as conclusive and it is thus essential that teachers, who, as a class, are members of community most likely to have informed and definite opinions as to how funds allotted to operation of schools should be spent, be able to speak out freely on such questions without fear of retaliatory dismissal. U.S.C.A.Const. Amends. 1, 14.

229 Cases that cite this headnote

Education ⇐ Protected activities in general
Public Employment ⇐ Protected activities

Where teacher has made erroneous public statements on issues currently subject of public attention that are critical of ultimate employer but that are neither shown nor can be presumed to have in any way either impeded teacher's proper performance of his daily duties in classroom or to have interfered with regular operation of schools generally, interest to school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting similar contribution by any member of general public.

528 Cases that cite this headnote

Constitutional Law ⇐ Public or private concern; speaking as "citizen"

Statements by public officials on matters of public concern must be accorded First Amendment protection despite fact that statements are directed at their nominal superiors. U.S.C.A.Const. Amend. 1.

2943 Cases that cite this headnote

Education ⇐ Protected activities in general
Public Employment ⇐ Protected activities

Absent proof of false statements knowingly or recklessly made by him, teacher's exercise of his right to speak on issues of public importance may not furnish basis for his dismissal from public employment.

200 Cases that cite this headnote

Education ⇐ Other particular grounds
Public Employment ⇐ Conduct or Misconduct in General

Act of school teacher, in writing and sending letter to local newspaper, in connection with proposed tax increase, that was critical of manner in which board of education had handled past proposals to raise new revenue for schools did not, in absence of proof of false statements knowingly or recklessly made, afford basis for teacher's dismissal. S.H.A.III ch. 122, § 10–22.4; U.S.C.A.Const. Amends. 1, 14.

127 Cases that cite this headnote
In February of 1961 the appellee Board of Education asked the voters of the school district to approve a bond issue to raise $4,875,000 to erect two new schools. The proposal was defeated. Then, in December of 1961, the Board submitted another bond proposal to the voters which called for the raising of $5,500,000 to build two new schools. This second proposal passed and the schools were built with the money raised by the bond *566 sales. In May of 1964 a proposed increase in the tax rate to be used for educational purposes was submitted to the voters by the Board and was defeated. Finally, on September 19, 1964, a second proposal to increase the tax rate was submitted by the Board and was likewise defeated. It was in connection with this last proposal of the School Board that appellant wrote the letter to the editor (which we reproduce in an Appendix to this opinion) that resulted in his dismissal.

Prior to the vote on the second tax increase proposal a variety of articles attributed to the District 205 Teachers' Organization appeared in the local paper. These articles urged passage of the tax increase and stated that failure to pass the increase would result in a decline in the quality of education afforded children in the district's schools. A letter from the superintendent of schools making the same point was published in the paper two days before the election and submitted to the voters in mimeographed form the following day. It was in response to the foregoing material, together with the failure of the tax increase to pass, that appellant submitted the letter in question to the editor of the local paper.

The letter constituted, basically, an attack on the School Board's handling of the 1961 bond issue proposals and its subsequent allocation of financial resources **1734 between the schools' educational and athletic programs. It also charged the superintendent of schools with attempting to prevent teachers in the district from opposing or criticizing the proposed bond issue.

The Board dismissed Pickering for writing and publishing the letter. Pursuant to Illinois law, the Board was then required to hold a hearing on the dismissal. At the hearing the Board charged that numerous statements in the letter were false and that the publication *567 of the statements unjustifiably impugned the 'motives, honesty, integrity, truthfulness, responsibility and competence' of both the Board and the school administration. The Board also charged that the false statements damaged the professional reputations...

88 S.Ct. 1731, 20 L.Ed.2d 811, 1 IER Cases 8

of its members and of the school administrators, would be disruptive of faculty discipline, and would tend to foment 'controversy, conflict and dissension' among teachers, administrators, the Board of Education, and the residents of the district. Testimony was introduced from a variety of witnesses on the truth or falsity of the particular statements in the letter with which the Board took issue. The Board found the statements to be false as charged. No evidence was introduced at any point in the proceedings as to the effect of the publication of the letter on the community as a whole or on the administration of the school system in particular, and no specific findings along these lines were made.

The Illinois courts reviewed the proceedings solely to determine whether the Board's findings were supported by substantial evidence and whether, on the facts as found, the Board could reasonably conclude that appellant's publication of the letter was 'detrimental to the best interests of the schools.' Pickering's claim that his letter was protected by the First Amendment was rejected on the ground that his acceptance of a teaching position in the public schools obliged him to refrain from making statements about the operation of the schools 'which in the absence of such position he would have an undoubted right to engage in.' It is not altogether clear whether the Illinois Supreme Court held that the First Amendment had no applicability to appellant's dismissal for writing the letter in question or whether it determined that the particular statements made in the letter were not entitled to First Amendment protection.

*568 In any event, it clearly rejected Pickering's claim that, on the facts of this case, he could not constitutionally be dismissed from his teaching position.

II.

[1] To the extent that the Illinois Supreme Court's opinion may be read to suggest that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work, it proceeds on a premise that has been unequivocally rejected in numerous prior decisions of this Court. E.g., Wieman v. Updegraff, 344 U.S. 183, 73 S.Ct. 215, 97 L.Ed. 216 (1952); Shelton v. Tucker, 364 U.S. 479, 81 S.Ct. 247 (1960); Keyishian v. Board of Regents, 385 U.S. 589, 87 S.Ct. 675 (1967). 'The theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected.' Keyishian v. Board of Regents, supra, 385 U.S. at 605—606, 87 S.Ct. at 685. At the same time it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest **1735 of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

III.

The Board contends that 'the teacher by virtue of his public employment has a duty of loyalty to support his superiors in attaining the generally accepted goals of education and that, if he must speak out publicly, he should do so factually and accurately, commensurate with *569 his education and experience.' Appellant, on the other hand, argues that the test applicable to defamatory statements directed against public officials by persons having no occupational relationship with them, namely, that statements to be legally actionable must be made 'with knowledge that (they were) * * * false or with reckless disregard of whether (they were) * * * false or not,' New York Times Co. v. Sullivan, 376 U.S. 254, 280, 84 S.Ct. 710, 726, 11 L.Ed.2d 686 (1964), should also be applied to public statements made by teachers. Because of the enormous variety of fact situations in which critical statements by teachers and other public employees may be thought by their superiors, against whom the statements are directed to furnish grounds for dismissal, we do not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged. However, in the course of evaluating the conflicting claims of First Amendment protection and the need for orderly school administration in the context of this case, we shall indicate some of the general lines along which an analysis of the controlling interests should run.

[2] [3] [4] An examination of the statements in appellant's letter objected to by the Board reveals that they, like
89 S.Ct. 1731, 20 L.Ed.2d 811, 1 E.R. Cases 8
the letter as a whole, consist essentially of criticism of the Board's allocation of school funds between educational and athletic programs, and of both the Board's and the superintendent's methods of informing, or preventing the informing of, the district's taxpayers of the real reasons why additional tax revenues were being sought for the schools. The statements are in no way directed towards any person with whom appellant would normally be in *570 contact in the course of his daily work as a teacher. Thus no question of maintaining either discipline or harmony among coworkers is presented here. Appellant's employment relationships with the Board and, to a somewhat lesser extent, with the superintendent are not the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning. Accordingly, to the extent that the Board's position here can be taken to suggest that even comments on matters of public concern that are substantially correct, such as statements (1) -- (4) of appellant's letter, see Appendix, infra, may furnish grounds for dismissal if they are sufficiently critical in tone, we unequivocally reject it. 3

**1736 We next consider the statements in appellant's letter which we agree to be false. The Board's original charges included allegations that the publication of the letter damaged the professional reputations of the Board and the superintendent and would foment controversy and conflict among the Board, teachers, administrators, and the residents of the district. However, no evidence to support these allegations was introduced at the hearing. So far as the record reveals, Pickering's letter was greeted by everyone but its main target, the Board, with massive apathy and total disbelief. The Board must, therefore, *571 have decided, perhaps by analogy with the law of libel, that the statements were per se harmful to the operation of the schools.
[5] However, the only way in which the Board could conclude, absent any evidence of the actual effect of the letter, that the statements contained therein were per se detrimental to the interest of the schools was to equate the Board members' own interests with that of the schools. Certainly an accusation that too much money is being spent on athletics by the administrators of the school system (which is precisely the import of that portion of appellant's letter containing the statements that we have found to be false, see Appendix, infra) cannot reasonably be regarded as per se detrimental to the district's schools. Such an accusation reflects rather a difference of opinion between Pickering and the Board as to the preferable manner of operating the school system, a difference of opinion that clearly concerns an issue of general public interest.

In addition, the fact that particular illustrations of the Board's claimed undesirable emphasis on athletic programs are false would not normally have any necessary impact on the actual operation of the schools, beyond its tendency to anger the Board. For example, Pickering's letter was written after the defeat at the polls of the second proposed tax increase. It could, therefore, have had no effect on the ability of the school district to raise necessary revenue, since there was no showing that there was any proposal to increase taxes pending when the letter was written.

[6] More importantly, the question whether a school system requires additional funds is a matter of legitimate public concern on which the judgment of the school administration, including the School Board, cannot, in a society that leaves such questions to popular vote, be taken as conclusive. On such a question free and open *572 debate is vital to informed decision-making by the electorate. Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operations of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.

In addition, the amounts expended on athletics which Pickering reported erroneously were matters of public record on which his position as a teacher in the district did not qualify him to speak with any greater authority than any other taxpayer. The Board could easily have rebutted appellant's errors by publishing the correct figures itself, either via a letter to the same newspaper or otherwise. We are thus not presented with a situation in which a teacher has carelessly made false statements about matters so closely related to the day-to-day operations of the schools that any harmful impact on the public would be difficult to counter because of the teacher's presumed greater access to the real facts. Accordingly, we have no occasion to consider at this time whether under such circumstances a school board could reasonably require that a teacher make substantial **1737 efforts to verify the accuracy of his charges before publishing them. 4

88 S.Ct. 1731, 20 L.Ed.2d 811, 1 IER Cases 8

[7] What we do have before us is a case in which a teacher has made erroneous public statements upon issues then currently the subject of public attention, which are critical of his ultimate employer but which are neither shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in *573 the classroom or to have interfered with the regular operation of the schools generally. In these circumstances we conclude that the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public.

IV.

The public interest in having free and unhindered debate on matters of public importance—the core value of the Free Speech Clause of the First Amendment—is so great that it has been held that a State cannot authorize the recovery of damages by a public official for defamatory statements directed at him except when such statements are shown to have been made either with knowledge of their falsity or with reckless disregard for their truth or falsity. New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710 (1964); St. Amant v. Thompson, 390 U.S. 727, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968). Compare Linn v. United Plant Guard Workers, 333 U.S. 53, 86 S.Ct. 657, 15 L.Ed.2d 582 (1966). The same test has been applied to suits for invasion of privacy based on false statements where a 'matter of public interest' is involved. Time, Inc. v. Hill, 385 U.S. 374, 87 S.Ct. 534, 17 L.Ed.2d 456 (1967). It is therefore perfectly clear that, were appellant a member of the general public, the State's power to afford the appellee Board of Education or its members any legal right to sue him for writing the letter at issue here would be limited by the requirement that the letter be judged by the standard laid down in New York Times.

*574 [8] This Court has also indicated, in more general terms, that statements by public officials on matters of public concern must be accorded First Amendment protection despite the fact that the statements are directed at their nominal superiors. Garrison v. State of Louisiana, 379 U.S. 64, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964); Wood v. Georgia, 370 U.S. 375, 82 S.Ct. 1364, 8 L.Ed.2d 569 (1962). In Garrison, the New York Times test was specifically applied to a case involving a criminal defamation conviction stemming from statements made by a district attorney about the judges before whom he regularly appeared.

While criminal sanctions and damage awards have a somewhat different impact on the exercise of the right to freedom of speech from dismissal from employment, it is apparent that the threat of dismissal from public employment is nonetheless a potent means of inhibiting speech. We have already noted our disinclination to make an across-the-board equation of dismissal from public employment for remarks critical of superiors with awarding damages in a libel suit by a public official for similar criticism. However, in a case such as the present one, in which the fact of employment is only tangentially and insubstantially involved in the subject matter of the public communication made by a teacher, we conclude that it is necessary to regard the teacher as the member of the general public he seeks to be.

[9] [10] In sum, we hold that, in a case such as this, absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment. Since no showing has been made in this case regarding appellant's letter, see Appendix, infra, his dismissal for writing it cannot be upheld and the judgment of the Illinois Supreme Court must, accordingly, be reversed and the case remanded for further proceedings not inconsistent with this opinion. It is so ordered.

Judgment reversed and case remanded with directions.


APPENDIX TO OPINION OF THE COURT

A. Appellant's letter.

LETTERS TO THE EDITOR

* * * Graphic Newspapers, Inc. Thursday, September 24, 1964, Page 4

Dear Editor:

I enjoyed reading the back issues of your paper which you loaned to me. Perhaps others would enjoy reading them in order to see just how far the two new high schools have deviated from the original promises by the Board of Education. First, let me state that I am referring to the February thru November, 1961 issues of your paper, so that it can be checked.

One statement in your paper declared that swimming pools, athletic fields, and auditoriums had been left out of the program. They may have been left out but they got put back in very quickly because Lockport West has both an auditorium and athletic field. In fact, Lockport West has a better athletic field than Lockport Central. It has a track that isn't quite regulation distance even though the board spent a few thousand dollars on it. Whose fault is that? Oh, I forgot, it wasn't supposed to be there in the first place. It must have fallen out of the sky. Such responsibility has been touched on in other letters but it seems one just can't help noticing it. I am not saying the school shouldn't have these facilities, because I think they should, but promises are promises, or are they?

Since there seems to be a problem getting all the facts to the voter on the twice defeated bond issue, many letters have been written to this paper and probably more will follow. I feel I must say something about the letters and their writers. Many of these letters did not give the whole story. Letters by your Board and Administration have stated that teachers' salaries total $1,297,746 for one year. Now that must have been the total payroll, otherwise the teachers would be getting $10,000 a year. I teach at the high school and I know this just isn't the case. However, this shows their 'stop at nothing' attitude. To illustrate further, do you know that the superintendent told the teachers, and I quote, 'Any teacher that opposes the referendum should be prepared for the consequences.' I think this gets at the reason we have problems passing bond issues. Threats take something away; these are insults to voters in a free society. We should try to sell a program on its merits, if it has any.

Remember those letters entitled 'District 205 Teachers Speak,' I think the voters should know that those letters have been written and agreed to by only five or six teachers, not 98% of the teachers in the high school. In fact, many teachers didn't even know who was writing them. Did you know that those letters had to have the approval of the superintendent before they could be put in the paper? That's the kind of totalitarianism teachers *577* live in at the high school, and your children go to school in.

In last week's paper, the letter written by a few uninformed teachers threatened to close the school cafeteria and fire its personnel. This is ridiculous and insults the intelligence of the voter because properly managed school cafeterias do not cost the school district any money. If the cafeteria is losing money, then the board should not be packing free lunches for athletes on days of athletic contests. Whatever the case, the taxpayer's child should only have to pay about 30¢ for his lunch instead of 25¢ to pay for free lunches for the athletes.

In a reply to this letter your Board of Administration will probably state that these lunches are paid for from receipts from the games. But $20,000 in receipts doesn't pay for the $200,000 a year they have been spending on varsity sports while neglecting the wants of teachers.

You see we don't need an increase in the transportation tax unless the voters want to keep paying $50,000 or more a year to transport athletes home after practice and to away games, etc. Rest of the $200,000 is made up in coaches' salaries, athletic directors' salaries, baseball pitching machines, sodded football fields, and thousands of dollars for other sports equipment.

These things are all right, provided we have enough money for them. To sod football fields on borrowed money and then not be able to pay teachers' salaries is getting the cart before the horse.
If these things aren't enough for you, look at East High. No doors on many of the classrooms, a plant room without any sunlight, no water in a first aid treatment room, are just a few of many things. The taxpayers were really taken to the cleaners. A part of the sidewalk in front of the building has already collapsed. Maybe Mr. Hess would be interested to know that we need blinds on the windows in that building also.

*578 Once again, the board must have forgotten they were going to spend $3,200,000 on the West building and $2,300,000 on the East building.

As I see it, the bond issue is a fight between the Board of Education that is trying to push tax-supported athletics down our throats with education, and a public that has mixed emotions about both of these items because they feel they are already paying enough taxes, and simply don't know whom to trust with any more tax money.

I must sign this letter as a citizen, taxpayer and voter, not as a teacher, *5740 since that freedom has been taken from the teachers by the administration. Do you really know what goes on behind those stone walls at the high school?

Respectfully,

Marvin L. Pickering.

B. Analysis.

The foregoing letter contains eight principal statements which the Board found to be false. 1 Our independent review of the record 2 convinces us that Justice Schaefer was correct in his dissenting opinion in this case when he concluded that many of appellant's statements which were found by the Board to be false were in fact substantially correct. We shall deal with each of the statements found to be false in turn. (1) Appellant asserted in his letter that the two new high schools when constructed deviated substantially from the original promises made by the Board during the campaign on the bond issue about the facilities they would contain. The Board based its conclusion that this statement was false on its determination that the promises referred to were those made in the campaign to pass the second bond issue in December of 1961. In the campaign on the first bond issue the Board stated that the plans for the two schools did not include such items as swimming pools, auditoriums, and athletic fields. The publicity put out by the Board on the second bond issue mentioned nothing about the addition of an auditorium to the plans and also mentioned nothing specific about athletic fields, although a general reference to 'state required physical education' facilities was included that was similar to a reference made in the material issued by the Board during the first campaign.

In sum, the Board first stated that certain facilities were not to be included in the new high schools as an economy measure, changed its mind after the defeat of the first bond issue and decided to include some of the facilities previously omitted, and never specifically or even generally indicated to the taxpayers the change. Appellant's claim that the original plans, as disclosed to the public, deviated from the buildings actually constructed is thus substantially correct and his characterization of the Board's prior statement as a 'promise' is fair as a matter of opinion. The Board's conclusion to the contrary based on its determination that appellant's statement referred only to the literature distributed during the second bond issue campaign is unreasonable in that it ignores the word 'original' that modifies 'promises' in appellant's letter.

(2) Appellant stated that the Board incorrectly informed the public that 'teachers' salaries' total $1,297,746 per year. The Board found that statement false. However, the superintendent of schools admitted that the only way the Board's figure could be regarded as accurate was to change the word 'teachers' to 'instructional' whereby the salaries of deans, principals, librarians, counselors, and four secretaries at each of the district's three high schools would be included in the total. Appellant's characterization of the Board's figure as incorrect is thus clearly accurate.

(3) Pickering claimed that the superintendent had said that any teacher who did not support the 1961 bond issue referendum should be prepared for the consequences. The Board found this claim false. However, the statement was corroborated by the testimony of two other teachers, although the superintendent denied making the remark attributed to him. The Illinois Supreme Court appears to have agreed that something along the lines stated by appellant was said, since it relied, in upholding the Board's finding that appellant's version of the remark was false, on testimony by one of the two teachers that he interpreted the remark to be a

prediction about the adverse consequences for the schools should the referendum not pass rather than a threat against noncooperation by teachers. However, the other teacher testified that he didn't know how to interpret the remark. Accordingly, while appellant may have misinterpreted the meaning of the remark, he did not misreport it.

(4) Appellant's letter stated that letters from teachers to newspapers had to have the approval of the superintendent before they could be submitted for publication. The Board relied in finding this statement false on the testimony by the superintendent that no approval was required by him. However, the Handbook for Teachers of the district specifically stated at that time that material submitted to local papers should be checked with the building principal and submitted in triplicate to the publicity coordinator. In particular, the teachers' letters to which appellant was specifically referring in his own letter had in fact been submitted to the superintendent prior to their publication. Thus this statement is substantially correct.

The other four statements challenged by the Board, are factually incorrect in varying degrees. (5) Appellant's letter implied that providing athletes in the schools with free lunches meant that other students must pay 35¢ instead of 30¢ for their lunches. This statement is erroneous in that while discontinuing free lunches for athletes would have permitted some small decrease in the 35¢ charge for lunch to other students, the decrease would not have brought the price down to 30¢. (6) Appellant claimed that the Board had been spending $200,000 a year on athletics while neglecting the wants of teachers. This claim is incorrect in that the $200,000 per year figure included over $130,000 of nonrecurring capital expenditures. (7) Appellant also claimed that the Board had been spending $50,000 a year on transportation for athletes. This claim is completely false in that the expenditures on travel for athletes per year were about $10,000. (8) Finally, appellant stated that football fields had been sodded on borrowed money, while the Board had been unable to pay teachers' salaries. This statement is substantially correct as to the football fields being sodded with borrowed money because the money spent was the proceeds of part of the bond issue, which can fairly be characterized as borrowed. It is incorrect insofar as it suggests that the district's teachers had actually not been paid upon occasion, but correct if taken to mean that the Board had at times some difficulty in obtaining the funds with which to pay teachers. The manner in which the last four statements are false is perfectly consistent with good-faith error, and there is no evidence in the record to show that anything other than carelessness or insufficient information was responsible for their being made.

Mr. Justice WHITE, concurring in part and dissenting in part.

The Court holds that truthful statements by a school teacher critical of the school board are within the ambit of the First Amendment. So also are false statements innocently or negligently made. The State may not fire the teacher for making either unless, as I gather it, there are special circumstances, not present in this case, demonstrating an overriding state interest, such as the need for confidentiality or the special obligations which a teacher in a particular position may owe to his superiors. The core of today's decision is the holding that Pickering's discharge must be tested by the standard of New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710 (1964). To this extent I am in agreement.

The Court goes on, however, to reopen a question I had thought settled by New York Times and the cases that followed it, particularly Garrison v. Louisiana, 379 U.S. 64, 85 S.Ct. 209 (1964). The Court devotes several pages to reexamining the facts in order to reject the determination below that Pickering's statements harmed the school system, ante, at 1735—1737, when the question of harm is clearly irrelevant given the Court's determination that Pickering's statements were neither knowingly nor recklessly false and its ruling that in such circumstances a teacher may not be fired even if the statements are injurious. The Court then gratuitously suggests that when statements are found to be knowingly or recklessly false, it is an open question whether the First Amendment still protects them unless they are shown or can be presumed to have caused harm. Ante, at 1738, n. 6. Deliberate or reckless falsehoods serve no First Amendment ends and deserve no protection under that Amendment. The Court unequivocally recognized this in Garrison, where after reargument the Court said that 'the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.' 379 U.S., at 75, 85 S.Ct., at 216. The Court today neither explains nor justifies its withdrawal from the firm stand taken in Garrison. As I see it, a teacher may be fired without

88 S.Ct. 1731, 20 L.Ed.2d 811, 1 IER Cases 8

Violation of the First Amendment for knowingly or recklessly making false statements regardless of their harmful impact on the schools. As the Court holds, however, in the absence of special circumstances he may not be fired if his statements were true or only negligently false, even if there is some harm to the school system. I therefore see no basis or necessity for the Court's foray into fact-finding with respect to whether the record supports a finding as to injury. If Pickering's false statements were either knowingly or recklessly made, injury to the school system becomes irrelevant, and the First Amendment would not prevent his discharge. For the State to be constitutionally precluded from terminating his employment, reliance on some other constitutional provision would be required.

Nor can I join the Court in its findings with regard to whether Pickering knowingly or recklessly published false statements.

Neither the State in presenting its evidence nor the state tribunals in arriving at their findings and conclusions of law addressed themselves to the elements of the new standard which the Court holds the First Amendment to require in the circumstances of this case. Indeed, the state courts expressly rejected the applicability of both New York Times and Garrison. I find it wholly unsatisfactory for this Court to make the initial determination of knowing or reckless falsehood from the cold record now before us. It would be far more appropriate to remand this case to the state courts for further proceedings in light of the constitutional standard which the Court deems applicable to this case, once the relevant facts have been ascertained in appropriate proceedings.

All Citations

391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811, 1 IER Cases 8

Footnotes

1 Appellant also challenged that statutory standard on which the Board based his dismissal as vague and overbroad. See Keyishian v. Board of Regents, 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967); NAACP v. Button, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963); Shelton v. Tucker, 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960). Because of our disposition of this case we do not reach appellant's challenge to the statute on its face.

2 We have set out in the Appendix our detailed analysis of the specific statements in appellant's letter which the Board found to be false, together with our reasons for concluding that several of the statements were, contrary to the findings of the Board, substantially correct.

3 It is possible to conceive of some positions in public employment in which the need for confidentiality is so great that even completely correct public statements might furnish a permissible ground for dismissal. Likewise, positions in public employment in which the relationship between superior and subordinate is of such a personal and intimate nature that certain forms of public criticism of the superior by the subordinate would seriously undermine the effectiveness of the working relationship between them can also be imagined. We intimate no views as to how we would resolve any specific instances of such situations, but merely note that significantly different considerations would be involved in such cases.

4 There is likewise no occasion furnished by this case for consideration of the extent to which teachers can be required by narrowly drawn grievance procedures to submit complaints about the operation of the schools to their superiors for action thereon prior to bringing the complaints before the public.

5 We also note that this case does not present a situation in which a teacher's public statements are so without foundation as to call into question his fitness to perform his duties in the classroom. In such a case, of course, the statements would merely be evidence of the teacher's general competence, or lack thereof, and not an independent basis for dismissal.
Because we conclude that appellant's statements were not knowingly or recklessly false, we have no occasion to pass upon the additional question whether a statement that was knowingly or recklessly false would, if it were neither shown nor could reasonably be presumed to have had any harmful effects, still be protected by the First Amendment. See also n. 5, supra.

We shall not bother to enumerate some of the statements which the Board found to be false because their triviality is so readily apparent that the Board could not rationally have considered them as detrimental to the interests of the schools regardless of their truth or falsity.

This Court has regularly held that where constitutional rights are in issue an independent examination of the record will be made in order that the controlling legal principles may be applied to the actual facts of the case. E.g., Norris v. State of Alabama, 294 U.S. 587, 55 S.Ct. 579, 79 L.Ed. 1074 (1935); Pennekamp v. State of Florida, 328 U.S. 331, 66 S.Ct. 1029, 90 L.Ed. 1295 (1946); New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 728 (1964). However, even in cases where the upholding or rejection of a constitutional claim turns on the resolution of factual questions, we also consistently give great, if not controlling, weight to the findings of the state courts. In the present case the trier of fact was the same body that was also both the victim of appellant's statements and the prosecutor that brought the charges aimed at securing his dismissal. The state courts made no independent review of the record but simply contented themselves with ascertaining, in accordance with statute, whether there was substantial evidence to support the Board's findings.

Appellant requests us to reverse the state courts' decisions upholding his dismissal on the independent ground that the procedure followed above deprived him of due process in that he was not afforded an impartial tribunal. However, appellant makes this contention for the first time in this Court, not having raised it at any point in the state proceedings. Because of this, we decline to treat appellant's claim as an independent ground for our decision in this case. On the other hand, we do not propose to blind ourselves to the obvious defects in the fact-finding process occasioned by the board's multiple functioning vis-a-vis appellant. Compare

Tumey v. State of Ohio, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927); In re Murchison, 349 U.S. 133, 75 S.Ct. 823, 99 L.Ed. 942 (1955). Accordingly, since the state courts have at no time given de novo consideration to the statements in the letter, we feel free to examine the evidence in this case completely independently and to afford little weight to the factual determinations made by the Board.

See ante, at 1735, 1736 and nn. 3, 4. The Court does not elaborate upon its suggestion that there may be situations in which, with reference to certain areas of public comment, a teacher may have special obligations to his superiors. It simply holds that in this case, with respect to the particular public comment made by Pickering, he is more like a member of the general public and, apparently, too remote from the school board to require placing him into any special category. Further, as I read the Court's opinion, it does not foreclose the possibility that under the First Amendment a school system may have an enforceable rule, applicable to teachers, that public statements about school business must first be submitted to the authorities to check for accuracy.

Even if consideration of harm were necessary in this case, I could not join the Court in concluding on this record that harm to the school administration was not proved and could not be presumed.

End of Document

26 A.D. Cases 31

2012 WL 4201499
Not Officially Published
(Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)

California Rules of Court, rule 8.1115, restricts citation of unpublished opinions in California courts.

Court of Appeal, Fourth District, Division 3, California.

Ralph ESPINOZA, Plaintiff and Appellant,
v.
COUNTY OF ORANGE, Defendant and Appellant.

Go43067 (consol. with Go43345)

Filed February 9, 2012

As Modified on Denial of Rehearing March 22, 2012

Appellate Court and Law Firms

Law Offices of Timothy B. McCaffrey, Jr., Timothy B. McCaffrey, Jr., Natasha R. Chesler, Pine & Pine and Norman Pine for Plaintiff and Appellant.

Lewis Brisbois Bisgaard & Smith, Nancy E. Zeltzer, Gary M. Lape and Stephanie K. Vaudreuil for Defendant and Appellant.

OPINION

RYLAARSDAM, ACTING P. J.

*1 Defendant County of Orange appeals from a judgment in favor of its employee, plaintiff Ralph Espinoza, in his action for harassment based on disability and failure to prevent harassment under the California Fair Employment and Housing Act (FEHA; Gov.Code, § 12900 et seq.; all further statutory references are to this code unless otherwise specified). In addition to defendant County, plaintiff also sued four employees of the probation department, Rodney Phillips, Minh Pham, Juan Chavez, and Rick Sosa. The jury found in their favor and they are not parties to this appeal.

Some of the harassment underlying the judgment was conducted on blog postings. Defendant claims the postings were improperly considered for a variety of reasons: (1) they were anonymous, (2) defendant did not create or approve the blog, and (3) liability is proscribed under the First Amendment to the United States Constitution and the federal Communications Decency Act of 1996, 47 U.S.C. section 230 et seq., which preempts any state law in this field.

Defendant further asserts the judgment is not supported by substantial evidence of harassment so severe or pervasive as to satisfy FEHA requirements or that it failed to take reasonable action to prevent any harassment.

Finally, defendant challenges the amount of damages, claiming insufficient evidence, juror misconduct, and instructional error.

Plaintiff filed a cross-appeal from a postjudgment order on the ground attorney fees awarded to him were insufficient because the court incorrectly applied the lodestar formula. He also appeals denial of expert witness fees.

We conclude there was no error and affirm.

FACTS

1. Plaintiff's Disability and Employment by Defendant

When plaintiff was born his right hand had no fingers or thumb but contained only two small stubs. He was generally able to function although he could not perform some tasks such as holding a knife or fork with that hand. He was self-conscious about people seeing it and often kept his hand in his pocket.

Plaintiff began working for the Orange County Probation Department (department) in July 1996 when he was in his 30's. At the time of the incidents he was a level two deputy juvenile corrections officer at juvenile hall. He worked in the Institutional Security Unit, which provided security for

28 A.D. Casos 31

the juvenile hall. In addition he was assigned to the vocation work crew program, in which he supervised the residents on construction projects. One project was a memorial honoring dead officers.

When a corrections officer needs to report an incident at juvenile hall procedure calls for completion of a “Special Incident Report” (SIR). On August 24, 2006 plaintiff completed one, entitled “Abusive Power,” after an incident that involved “combatant minors” in a housing area called “unit Tango” or “Unit T.” Unit T housed many violent juveniles, the large majority of its population being gang members, and many of the inhabitants had committed serious offenses. According to the SIR, once the incident was over and plaintiff was leaving, his supervisor, Mike Lopez, told him to stay. Plaintiff felt Lopez was “unprofessional” because he shouted at him and was disrespectful.

2. Blogs and Blog Postings

*2 On August 27, 2006, a blog entitled “Keeping the Peace” (capitalization omitted) at ocprob.blogspot.com was begun by a person using the name “keepdapeace.” This was not defendant’s blog; a corrections officer named Jeffrey Gallagher ultimately admitted to creating it. It ran until January 19, 2008 when Gallagher “shut it down.” He did not use one of defendant’s computers to start it. On August 31 he posted a message stating, “This blog ain’t run by the government. It also ain’t run by O.C.E.A.,” the last presumably referring to the Orange County Employees Association. On that same date another blog, ocprobation.blogspot.com, was started.

On August 30, 2006, “Anonymous” posted, “I will give anyone 100 bucks if you get a picture of the claw. Just take your hand out of your pocket already!” The same poster wrote later that night, “Has anyone seen the one handed bandit’s hand[?] First one to get a picture gets a 100 dollars.” And approximately 15 minutes later Anonymous wrote, “Do I still get the $100 if I get a picture of the claw with a blue glove dangling off it?” The next day the same poster again made reference to the $100 for a picture of “the one handed bandit.” On September 1 “USS Abraham Lincoln” posted, “When do I get my $100, since I get to see the claw up close and personal in my office 4X a week.” A few minutes later the poster wrote, “Shyt [sic] where’s my 100 bucks ... ?] I want my 100 bucks!

Damm [sic] it! I knew having picture of Ralphie boy fishing in Rangel[']s ass would pay off some day.”

On August 31 “No Human Contact” wrote, “Now that we know who the rats are we need to put them on, No Human Contact.” (Capitalization omitted.) Anonymous later wrote, “To the Rats ‘fuck off & die.’ (Capitalization omitted.) And 45 minutes later Anonymous posted, “Fuck you one hand bandit! You can shave that claw of yours up your ass! Once a rat always a rat[.]” A few minutes later a poster named “remery” wrote, “[H]ey rat claw, [I] wrote a poem 4 you: [°] Roses are red [°] Violets are blue [°] I fucked your mother in the ass [°] And she had you!”

“Stickin It To the Man” wrote on August 31, “[H]ey will the memorial include the claw[?] [I] mean that hand is dead right? Another poster wrote on August 31, “Here’s a few daytime rants.” (Capitalization omitted.) Defendant’s name topped a list of four.

On September 1 a blogger identified as “rat claw boy” wrote “hey, [I’m] rat claw, and [I] have a position which allows me to appear to be working, when in reality, [I’m] just jerking off with my good hand, while some kids with dangerous tools act like they care about gardening the walkway. [... ] [I’m] a jerk off, it’s plain to see, so if you have a minor ... please let me take them out on a work crew so [I can] indirectly endanger the lives of other staff who have all their [b]ody parts functional[...] why should they have all their limbs, meanwhile [I] gotta walk around with my hand in my pocket all day!”

On the same day Anonymous posted: “Do you ever notice that the one arm bandit picks the worst kids[ ] for work crew[?] ... Why is it that ... we still have the one arm bandit out there painting doors[?]” Again on September 1 another person posted, “I heard the claw just wrote up Mike Lopez[.] not that he doesn’t deserve it but when is this guy going to learn? What is he trying to prove?”

The same day Law Dog wrote, “We want the following staff to go to YLA.” Plaintiff was one of five names listed with a reason for each. As to plaintiff the poster stated: “Espinoza is useless even with his good hand. Can we have staff that at least have two hands[?] [I] would love to see him do a figure four.”

26 A.D. Cases 31

*3 On September 2 Law Dog wrote: "Props to the one who started the web site.... [T]he old web site was being censored [sic ]. [The creator] did not like the fact that names were being put out there. So someone created a new one, one where everyone can vent and get the word out about pussy ass snitches like ... Espinoza..." Later that day Law Dog posted, "Espinoza just show everyone the claw. It's not that bad, is it. We all know that you have writ[ten] up several staff.”

On September 3 Anonymous posted a list of the "most incompetent staff," which was comprised of 11 specific names, including plaintiff's.

A coworker told plaintiff about the blogs and the first time he viewed one was September 7, 2006. He read it at home after work and from that day forward read it every night at home until about October 20 or 21, 2006. He viewed the blog to see if it mentioned him and "what they were talking about now...." Although plaintiff testified he looked at the blogs for approximately one month, beginning September 7, the 220 blog pages introduced into evidence showed postings beginning August 27 and ending September 4. There was also evidence the blog continued through October 20.

The blogs contained postings with similar comments about many other people. The blog was accessed from computers located in the probation department.

3. Other Acts of Harassment
Plaintiff complained of other acts of harassment. On September 22 he filed an SIR with more than a page of a single-spaced explanation, alleging harassment from five coworkers. He stated that when he greeted them they did not respond. He then began reading "behavior notice[s]." When he was asked if he was checking on them and said he was, a coworker asked "well did you find anything wrong with them, were they signed ... or do you need to sign them[?]

Plaintiff replied "if you want to know if they were signed, then get up and look at them yourself." The coworker then said "your [sic ] fucken right there[,] you check them." Plaintiff responded "look I do not understand why it bothers you so much that I am reading a piece of paper in here.[]" The coworker said, "Ralph, I don't know who you think you are but you can't come in here and just start checking our work to see if it's done right and then cuss at me." Plaintiff stated, "[W]hat are you talking about, when I came in here, the only thing I said was how's it going[.] And then I began to read a piece of paper that upset[ ] you, why? If anyone should be upset it should be me because you chose to harass me." Plaintiff then told two supervisors about the event. In his report he described the blog, stating he was "targeted by some probation staff members as being a RAT.... [S]everal bloggers state that I will get what[ ] is coming to me and go as far as to threaten me with bodily harm. [I] ... believe that the above incident ... has much to do with the slander and harassment ... that are ... in this web page." Plaintiff believed the lack of response to his initial greeting was due to the "no human contact" comment on the blog.

Subsequently, plaintiff testified, coworkers would "isolate" him, "mock[ ]" him by "intentionally putting their hand[s] in their right-front pocket and smirking as [he] passed" by, and fail to let him pass through locked security doors or open the visitor trailer door for him. In October plaintiff completed another SIR detailing these incidents. Three of the people involved worked Unit T with plaintiff and he depended on them to be able to do his job and for his own safety. The four individual defendants put their hands in their pockets.

*4 During this time plaintiff found the word "claw" written in several places in the workplace, including an electric utility cart he used at work. This happened "[m]any, many, many times." His car was keyed. He also found the cord to the cart was intentionally cut. A coworker submitted an SIR about this incident but was never contacted about it. The coworker also verbally told supervisors about the activity on several occasions but was never interviewed.

On October 11 plaintiff filed an SIR stating he saw the "form of a claw smudged on the windshield" of his cart. He claimed the claw mark was intentional, intended to harass him. He again referred to the blog, noting he was called "claw hand." Plaintiff testified he was harassed between late September/early October 2006 through April 2007.

4. Defendant's Knowledge and Response
Greg Ronald, a Deputy Chief Probation officer, first learned of the blog in late August 2006, at which time he printed a copy that was ultimately introduced at trial. He asked Dan Burt, the chief deputy IT manager, to investigate to determine which of defendant's computers were used to access the blog, the user ID's, and the time of access, which Burt did. The
information gathered showed many employees were accessing the blog from defendant's computers using generic login passwords; others were using identifiable names.

On September 7 Ronald sent an e-mail to all employees informing them the blog postings violated defendant's policy and directed them to the specific provisions of the policy manual. About the same time defendant blocked access through use of a generic password but employees could still logon using specific login names. Although defendant's software gave it the ability to completely block access to the Web site, it did not do so until late October. In mid-September Ronald also gave the names of those who might be posting, including the individual defendants, to the HR department. Ronald himself did not talk to any possible bloggers.

When plaintiff reported the harassment to his supervisor, Richard Zamorano, on several occasions, Zamorano told him he was forwarding the information to "upper management" and specifically to assistant deputy director Bryan Prieto, Zamorano reported he had been told the complaints were being investigated by the HR department. Although Zamorano saw the cart marked with the claw, he did not investigate. In early October Zamorano sent a memo to Prieto detailing conversations with plaintiff about the blog, "The Claw" written on the cart, and keying plaintiff's truck. Prieto told Todd Graham, the Assistant Division Director of the HR department, about it but did not forward the memo to HR. Graham did not interview plaintiff or direct anyone to do so.

Prieto also identified three possible bloggers and reported the information to management. Although most of these people worked in one unit, which had only 15 people, none were interviewed and the unit was not investigated. Nor were security tapes reviewed.

On October 6, 2006 Coleene Preciado, the Chief Probation Officer, sent an e-mail to all employees asking for "help to stop the nonsense" and "let the blog be put to rest," describing it as "hurtful, destructive and highly unprofessional."

Several times beginning in September 2006 and continuing until April 2007 plaintiff gave Zamorano and Kelly McCleary, another supervisor, the names of the individual defendants as those engaging in the conduct. He was told human resources was aware of what was occurring and looking into it.

In mid to late October 2007 Prieto and division director Steve Sentman held a meeting with plaintiff to discuss the blog. They advised an investigation was being conducted and had resulted in a list of about 15 "suspects." Neither human resources or upper management ever contacted plaintiff about any of his complaints. None of the individual defendants were ever interviewed.

Plaintiff's Reaction

On April 25, 2007 a doctor employed by defendant told plaintiff he had high blood pressure. The next day plaintiff left his job. He testified he was "angry, upset[,] ... and ... felt betrayed." He "couldn't trust anybody" and "couldn't take it anymore." Even though he had been told defendant was investigating his complaints he did not believe it was happening. His position was terminated and he was given other duties, escorting construction workers from job to job. He felt "belittle[ed]" because he had been "in one of the highest prestige units, and then they put [him] down to the lowest unit...."

Plaintiff testified that as a result of the conduct he had difficulty sleeping, having nightmares three or four times a week, and woke up with severe pain in his arm. He was tired, making him ill tempered and leading to arguments with his wife, putting pressure on their marriage and causing him to distance himself from his family and holiday gatherings. He became afraid, embarrassed, ashamed, and paranoid, reluctant to shake hands. He had irritable bowel syndrome that troubled him two or three times a week.

Plaintiff was diagnosed with insomnia and depression, prescribed medication, and put on disability. The treating physician testified plaintiff could not work due to the hostile work environment. At the time of trial plaintiff was still under a doctor's care and not released to return to work.

In June 2007 when plaintiff tried to return to work he discovered defendant Pham had been promoted and that a minor in Pham's unit had committed suicide. He left about two hours after he had arrived. He did not "think the place [was] going to change" did not know of "any steps or discipline that [defendant] imposed on any of the individual defendants."
6. The Complaint, Trial, and Judgment

Plaintiff filed a complaint against defendant for discrimination based on disability, harassment based on disability (§ 12940, subd. (j)(1)), retaliation, and failing to prevent harassment (§ 12940, subd. (k)), all under FEHA, wrongful termination, and intentional infliction of emotional distress. The causes of action against the individual defendants were for disability harassment and emotional distress. The court granted a motion for nonsuit as to the wrongful termination and intentional infliction causes of action against defendant.

On trial of the bifurcated liability issue, the jury returned a verdict against defendant, finding it liable for harassment based on plaintiff's disability and failure to prevent the harassment. It found in favor of defendant on the retaliation and wrongful discharge causes of action and in favor of the individual defendants on all claims. In the damages phase, plaintiff was awarded over $820,000, consisting of $700 for medical expenses, $320,000 in lost earnings, and $500,000 for mental distress.

Defendant filed motions for a new trial and judgment notwithstanding the verdict on the ground the evidence was insufficient to show that plaintiff was harassed due to his disability or that defendant failed to prevent the harassment, or to support the damages. Defendant's motion to vacate the judgment or, alternatively, to correct the judgment, was based on the argument it did not state the verdict was in favor of the individual defendants, the grant of defendant's nonsuit on two causes of action, and the judgment in favor of defendant on two other causes of action. The court denied all motions.

Under section 12940, subdivision (j)(1) an employer is liable for harassment based on a disability if it "knows or should have known of the harassing conduct and fails to take immediate and appropriate corrective action." In Bradley v. California Department of Corrections and Rehabilitation (2008) 158 Cal.App.4th 1612 plaintiff prison employee was sexually harassed by a chaplain working for the defendant; the harassment occurred both in the workplace and outside it. The court affirmed the plaintiff's judgment on the ground that, although the defendant knew of the harassment, it failed to take proper responsive action. (Id. at p. 1617.)

Although the court held the defendant was not liable for the chaplain's conduct outside of work, it held that "when harassment is by a non-supervisory employee, an employer's liability is predicated not on the conduct itself, but on the employer's response once it learns of the conduct. [Citation.]" (Bradley v. California Department of Corrections and Rehabilitation, supra, 158 Cal.App.4th at p. 1631.) This is the same conduct about which plaintiff complains.

The parties' protracted argument about whether respondeat superior applies is not helpful in deciding the issue. Under section 12940, subdivision (j)(1), an employer can be "indirectly liable" for "the actions of its ... nonsupervisory employees if it was or should have been aware of them and did not take remedial measures. [Citations.]" (Rieger v. Arnold (2002) 104 Cal.App.4th 451, 464.)

Defendant relies on Blakey v. Continental Airlines, Inc. (2000) 164 N.J. 38 [751 A.2d 538] to support its claim the blog postings were insufficient to support the judgment. There, a female pilot sued the defendant employer for sexual harassment after several male pilots posted alleged defamatory comments on the defendant's electronic bulletin board. The trial court granted summary judgment in favor of the employer, apparently because the bulletin board was not physically located where the employer controlled it.

In reversing and remanding, the New Jersey Supreme Court instructed the trial court to consider whether the bulletin board may "have been so closely related to the workplace environment and beneficial to [the employer] that

26 A.D. Cases 31

a continuation of harassment on the forum should be regarded
as part of the workplace.” (Blakey v. Continental Airlines,
Inc., supra, 751 A.2d at p. 543.) Defendant suggests that
because it did not benefit from the blog Blakey must lead to
the conclusion it is not liable.

But although Blakey does provide “employers do not have a
duty to monitor private communications of their employees,”
it also instructs “employers do have a duty to take effective
measures to stop co-employee harassment when the employer
knows or has reason to know that such harassment is part of
a pattern of harassment that is taking place in the workplace
and in settings that are related to the workplace” (Blakey
v. Continental Airlines, Inc., supra, 751 A.2d at p. 552) as
happened here.

* This argument defies logic. First, Blakey is not binding
Cal.App.4th 887, 905.) Defendant seems to be taking the
position all of the complained of conduct occurred outside
the workplace and summarily claims there was no evidence
“a current employee” posted any of the comments. We could
consider this argument waived due to failure to present
adequate authority and reasoned legal argument. (Benach
But even on the merits the argument fails.

It is true plaintiff is in error when he argues defendant can be
liable for harassment by employees and nonemployees alike
if the other provisions of the statute are met. Section 12940,
subdivision (j)(1) subjects employers to liability for the acts
of nonemployees only in the context of sexual harassment, not
the case here. Therefore, the harassment for which defendant
could be liable had to have been committed by its employees.

And there is evidence of that. Employees accessed the
blog on workplace computers as revealed by defendant’s
own investigation. The postings referred both directly and
indirectly to plaintiff, who was specifically named in at least
some of them, and the postings discussed work-related issues.
It was reasonable for the jury to infer the derogatory blogs
were made by coworkers. Management sent two e-mails to
employees directing they discontinue posting the improper
comments on the blog. This suggests the administrators
believed employees were posting. That none of the individual
defendants was found liable for harassment does not
overcome the other evidence of employee harassment. And
that some of the blog postings were directed against the
probation department and its management does not somehow
offset the comments made about plaintiff.

Further, defendant completely ignores the other conduct at
the workplace, i.e., the incidents where employees put their
right hands in their pockets, the scrawling of “the claw” on
plaintiff’s cart and elsewhere, the occasions when plaintiff
was ignored, and the like.

Defendant also complains that plaintiff voluntarily viewed
the blog and failed to show the content constituted bias. It
cites Roby v. McKesson Corp. (2009) 47 Cal.4th 686,
707 for the proposition that harassment is “bias that is
expressed or communicated through interpersonal relations
in the workplace,” which plaintiff did not prove. This argument
fails.

First, in making this statement the court was distinguishing
between discrimination in the workplace as opposed to
harassment, a different basis for liability under FEHA.
Roby v. McKesson Corp., supra, 47 Cal.4th at p. 707.)
Further, Roby stated “...” “H[arassment consists of conduct
outside the scope of necessary job performance, conduct
presumably engage in for personal gratification, because of
meanness or bigotry, of for other personal motives.” (Id.)
There was ample evidence of this.

Defendant also maintains plaintiff did not show the
“social environment of the workplace” (italics omitted) was
“intolerable.” (Id. at p. 706.) Plaintiff’s testimony belies
this claim. It was for the jury to decide whether or not to
believe him.

2) Motions in Limine

Alternatively, defendant argues the court’s denial of its
motions in limine to exclude all or part of the blog was error.

Defendant filed four motions in limine to exclude the blog
entries contained in Exhibit 1, a portion of the blog entries
that had been printed, and a second proposed exhibit, the
part of the postings that plaintiff had printed, that included
entries extending for another month. It sought to have all

26 A.D. Cases 31

evidence about off-duty blogging by defendant’s employees excluded, or, alternatively, to preclude introduction of any postings except those relating to plaintiff’s disability or to plaintiff himself, and to exclude any postings without proof they were made by defendant’s employees, relying in part on Evidence Code section 352.

*8 Initially, the court ruled that, in opening statement, plaintiff could refer generally to the blog but could not point to specific postings. When plaintiff attempted to introduce Exhibit 1 into evidence, although noting its relevance, the court refused to “admit it wholesale” and asked defendant’s lawyer to provide a redacted version of the blog, pointing out the difficulty in reviewing almost 160 pages of postings to rule on the motions. Both parties proposed competing redacted versions.

After reading both versions of the blog, the court admitted Exhibit 1, but not, over plaintiff’s objection, the lengthier Exhibit 2. The court described the blog as “hugely vulgar,” “unimaginative,” “immature,” and “illiterate,” a description clearly supported by substantial evidence. The court required only a “minimal” redaction of nine postings within it, “eliminating people whose first and last name appears opposite some sort of defamatory remark about that particular person.”

Defendant asserts the court’s ruling was both a failure to exercise and an abuse of discretion. Not so. It is clear the court reviewed and weighed the content of the blogs and their relevance and potential prejudice. (1) Rufo v. Simpson (2001) 86 Cal.App.4th 573, 599.)

Nor did the court abuse its discretion under Evidence Code section 352, which allows exclusion of evidence that is substantially more prejudicial than probative. Defendant claims access to the essentially unredacted blog caused the jury to focus on all the “‘vile’” comments rather than only those pertaining to plaintiff and this was highlighted in his lawyer’s closing statement. It argues the jury could be tempted to find in plaintiff’s favor merely because it “was disgusted and inflated” by the postings.

As the trial court noted, it is true the postings were vulgar and disgusting. But there is no evidence the jury relied on the general nature of the postings rather than those relating solely to plaintiff. And, in fact, admission of Exhibit 1 just as likely blunted the effect of the postings as to plaintiff as viewers become desensitized. Moreover, it tends to show plaintiff was not single out, as many others were unflatteringly written about. Defendant has not met its burden to show admission of Exhibit 1 was “so prejudicial as to render the ... trial fundamentally unfair.” [Citation.] (2) People v. Jablonski (2006) 37 Cal.4th 774, 805.)

3) Communications Decency Act

Defendant claims the Communications Decency Act (CDA) bars liability based on federal preemption of FEHA. That act, enacted in part to promote use and development of the Internet (1) 47 U.S.C. § 230(b)), declares that a “provider or user of an interactive computer service shall [not] be treated as the publisher or speaker of any information provided by another information content provider” (2) 47 U.S.C. § 230(c)(1)) and limits actions under state law “that [are] inconsistent with this section” (3) 47 U.S.C. § 230(e)(3)). An “‘information content provider’” is “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet...” (4) 47 U.S.C. § 230(f)(3)).

To fall within the protection of the CDA a defendant must show “(1) [it is] a provider or user of an interactive computer service; (2) the cause of action treat[s] the defendant as a publisher or speaker of information; and (3) the information at issue [is] provided by another information content provider.” [Citation.] (5) Delfino v. Agilent Technologies, Inc. (2006) 145 Cal.App.4th 790, 804-805.)

*9 Here, plaintiff is not arguing defendant is the publisher of the blog postings. In his brief he unequivocally asserts he is relying solely on defendant’s knowledge of the harassment and failure to take appropriate action to correct it; respondent superior is not the basis of the claim. Thus, defendant’s breach was not based on its employees’ use of their work computers but on its own failure to investigate and resolve the problem.

In Delfino the plaintiffs sued the defendant for intentional and negligent infliction of emotional distress based on threatening e-mails and postings on Internet bulletin boards by Moore,

26 A.D. Cases 31

the defendant's former employee, who used the defendant's computers. The court held the defendant was immune from liability under the CDA.

In addition to the lack of one of the required elements to satisfy the statute, the facts in Delfino are distinguishable. Importantly, the plaintiffs were strangers, never employees of the defendant, and did not sue under FEHA, which imposes additional duties on an employer to protect an employee. Although one of the plaintiffs' theories was failure to supervise its employee, the court held there were insufficient facts to show the defendant owed any duty to the plaintiffs. (Delfino v. Agilent Technologies, Inc., supra, 145 Cal.App.4th at p. 815.)

As to the other basis for the complaint, vicarious liability based on Moore's conduct, the court found the defendants had not ratified his acts and had no respondeat superior liability. (Delfino v. Agilent Technologies, Inc., supra, 145 Cal.App.4th at pp. 811, 812–813.) In our case, as noted, plaintiff does not seek to hold defendant liable for the actual blog postings, either directly or vicariously.

4) First Amendment

Defendant contends plaintiff's reliance on the blog postings to impose liability violates the First Amendment of the United States Constitution. But it offers no creditable support for its claim. This case does not deal with enjoining speech or prior restraint, and postings criticizing management at the probation department were not the issue at trial. Further, general comments about free access to the Internet have no bearing on the decision. Finally, harassing speech is not protected by the First Amendment. (See Aguilar v. Avis Rent A Car System, Inc. (1999) 21 Cal.4th 121, 136.)

b. Severe and Pervasive Conduct

For there to be liability for harassment, the "conduct . . . must be severe or pervasive enough to create an objectively hostile or abusive work environment." (Lyle v. Warner Brothers Television Productions (2006) 38 Cal.4th 264, 283.) "[T]he objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances.'" (Citation.)" (Ibid.)

"[A]n employee generally cannot recover for harassment that is occasional, isolated, sporadic, or trivial; rather, the employee must show a concerted pattern of harassment of a repeated, routine, or a generalized nature. [Citations.]" (Id. at pp. 283–284.) Whether the conduct meets the severe or pervasive test is a question of fact. (Nazir v. United Airlines, Inc. (2009) 178 Cal.App.4th 243, 264.)

Defendant first argues there was no pervasive conduct in the workplace because plaintiff voluntarily viewed the postings on a blog not created or supervised by defendant. But plaintiff testified he looked at it every day to preserve evidence to pass on to supervisors. Once he was told they were investigating he stopped looking.

*10 Moreover, the blog was not the only form of harassment. Coworkers scrawled "claw" "many, many, many times" in the workplace. They mocked plaintiff by imitating his habit of hiding his hand in his pocket. Other acts, including cutting the cord on his cart and keying his car, also occurred.

Defendant further argues plaintiff was not harassed due to his disability but was labeled a rat or a snitch. It also points to diatribes against management posted on the blogs. But defendant ignores the harassment based on plaintiff's disability. And while it is true there were many postings unrelated to plaintiff, rants against others do not diminish what was posted about him. The fact the first SIR concerned the accusation plaintiff was a rat does to change the result. A subsequent report discussed the claw moniker.

Nor do the two cases defendant cites help its cause. In Haberman v. County of Orange (2007) 157 Cal.App.4th 121 we held the alleged sexual harassment of plaintiff was not sufficiently pervasive or severe to sustain a judgment under FEHA. (Id. at p. 145.) But there were only three incidents during five weeks (id. at p. 144), far different than what occurred here as detailed above. And in Haberman v. Congaree Learning, Inc. (2009) 180 Cal.App.4th 365 we affirmed a summary judgment in favor of the defendant employer against the plaintiff claiming sexual harassment based on insufficient evidence the acts were sexual. (Id. at pp. 383, 385.)

26 A.D. Cases 31

Under the totality of circumstances in our case, however, the same is not true. Evaluating the blog postings and the acts in the workplace as would a reasonable person in plaintiff’s position, the evidence established sufficient harassing and threatening comments and conduct to satisfy the severe or pervasive test.

c. Reasonable Action in Response to Harassment

Section 12940, subdivision (k) makes an employer liable for “failing to take all reasonable steps necessary to prevent discrimination and harassment from occurring.” Defendant argues there is insufficient evidence to support a finding it failed to do so or failed to properly respond to plaintiff’s claim of being harassed.

“Once an employer is informed of the ... harassment, the employer must take adequate remedial measures. The measures need to include immediate corrective action that is reasonably calculated to 1) end the current harassment and 2) to deter future harassment. [Citation.] The employer’s obligation to take prompt corrective action requires 1) that temporary steps be taken to deal with the situation while the employer determines whether the complaint is justified and 2) that permanent remedial steps be implemented by the employer to prevent future harassment once the investigation is completed. [Citation.] An employer has wide discretion in choosing how to minimize contact between the two employees, so long as it acts to stop the harassment. [Citation.] “[t]he reasonableness of an employer’s remedy will depend on its ability to stop harassment by the person who engaged in harassment.” [Citation.]” ( Bradley v. California Department of Corrections and Rehabilitation, supra, 158 Cal.App.4th at p. 1630.)

Defendant asserts there is insufficient evidence to support a finding it failed to take reasonable steps to prevent harassment. It claims it initiated “a prompt investigation” ( California Fair Employment & Housing Com. v. Gemini Aluminum Corp. (2004) 122 Cal.App.4th 1004, 1024) ( Gemini ) and “establish[ed] and promulgate[d] ... *11 antidiscrimination policies and the implementation of effective procedures” ( id. at p. 1025), thereby satisfying its duties. It emphasizes that “[a] remedial action that effectively stops the harassment will be deemed adequate as a matter of law.” ( Knabe v. Bourney Corp. (3rd Cir.1997) 114 F.3d 407, 411, fn. 8.)

It then goes on to detail that it had enacted policies to prevent harassment, including regular training for employees, and points to undisputed evidence that it began an investigation once it learned of the blog. And defendant claims it blocked access through use of the generic login and passwords. It also highlights the two e-mails sent to employees criticizing the blogs.

But there is contrary evidence. The blog continued for eight weeks after defendant began investigating. And, although it did block the generic logins, defendant did not block access of those using personal passwords, which it had the ability to do. Further, despite plaintiff and another employee telling several management personnel of potential violators, management interviewed none of the potential violators, including the individual defendants. And none of management’s request to cease conduct was directed toward the non-blogging harassment conduct. This is sufficient evidence to support a determination defendant failed to respond sufficiently. And the well-established rule of appellate review prohibits our reweighing evidence or evaluating credibility. ( Reichardt v. Hoffman (1997) 52 Cal.App.4th 754, 766.)

d. Expert Testimony

Over defendant’s objections and after an Evidence Code section 402 hearing, the court allowed plaintiff to put on expert testimony from Michael A. Robbins, a lawyer and president of a company that conducts training and investigations for private firms and governmental agencies on workplace harassment and discrimination. Robbins testified that as to plaintiff, “defendant did not take the steps that employers normally take to prevent harassment and discrimination from occurring and ... didn’t follow [its] own policies ... to prevent harassment and discrimination from occurring as to [plaintiff].” He laid out four “standard steps employers usually take”: to establish and promulgate good policies, train managers, properly investigate when a claim is made, and take appropriate action.

It was Robbins’s opinion that, as concerned plaintiff’s complaints, defendant failed to follow any of these steps.

26 A.D. Cases 31

For example, when defendant learned its computers were being used to post on the blog during working hours it did not investigate which employees were working where the computers were located. It also failed to view surveillance footage from cameras set up in the unit containing those computers. Defendant did not interview plaintiff, contrary to its own policy, or any witnesses, including supervisors. It had names of suspects plaintiff had provided and it did not interview any of them. Although defendant took some remedial action, i.e., sending e-mails and attempting to block usage, by failing to investigate it did not have sufficient information to determine what else should be done.

Defendant argues Robbins' testimony as to the proper steps was contrary to law and his conclusions about defendant's proper conduct was speculative, which should thereby void the finding of liability under section 12940, subdivision (k).

But its reliance on Gemini, supra, 122 Cal.App.4th 1004 is not well founded. In the context of a religious discrimination case the court held, in part, the employer failed to "take all reasonable steps necessary to prevent discrimination" as required by section 12940, subdivision (k). (Gemini, supra, 122 Cal.App.4th at p. 1024.) It went on to list "some such reasonable step, and one that is required ... is a prompt investigation of the ... claim. [Citation.]" (Ibid.) But the court also listed other possible reasonable steps, including adoption and dissemination of policies to prevent harassment and establishment of procedures to deal with complaints. (Id. at p. 1025.) This is essentially the same as Robbins's testimony, and Gemini certainly did not limit what are reasonable steps for an employer to take in any given situation.

*12 Nor are we persuaded by the claim Robbins speculated. Defendant's failure to investigate was the reason he could not be more specific as to what it would have learned. That was his point.

e. Damages

Defendant asserts the damages were excessive as a matter of law, for several reasons. First, it claims there was insufficient evidence to support damages for lost income and emotional distress, maintaining the only evidence was plaintiff's testimony of a detainee's recent suicide, promotion of Pham, whom plaintiff believed was not following certain policies, and that plaintiff did not "feel safe returning to work" when the individual defendants were "still there."

But plaintiff also testified that the first day he left he felt "angry, upset" and "betrayed" due to the harassment. He was unable to trust anyone because defendant's management had not conducted the investigation it had promised. On the one day he returned, he was disturbed about Pham's promotion because he, plaintiff believed, was one of the primary employees involved in the harassment and "nothing ha[d] changed," leaving him "in fear, embarrassed and ashamed of what" had been done to him.

Moreover, plaintiff's treating physician, Herbert P. Scherl, M.D., diagnosed him with "major depression" based on plaintiff's history. Scherl testified plaintiff told him he felt guilty, sad, and fatigued, experiencing insomnia, and lacked a sex drive. This was consistent with plaintiff's own testimony. Scherl prescribed an anti-depressant and medication for the insomnia. Scherl put plaintiff "off ... work," concluding his condition "was related to his environment at work." Although plaintiff returned to work two months later for part of one day, he left and there is no evidence he had returned to work.

This is sufficient evidence of emotional distress. (Gov.Code, § 12970, subd. (a)(3) [in FEHA action employee may recover damages for "emotional pain, suffering, inconvenience, mental anguish, [and] loss of enjoyment of life"]; See SASCO Electric v. California Fair Employment & Housing Com. (2009) 176 Cal.App.4th 532, 544 [in administrative hearing sufficient evidence where the plaintiff was depressed, "cried every day for over a month," experienced insomnia, headaches, and nausea every day, could not leave her home, felt "betrayed and embarrassed," and was either angry or doubted herself].)

Plaintiff testified his salary was about $60,000 per year, plus sick pay, holidays, and four weeks' vacation. At age 44 he planned to work another 21 years to receive full retirement, i.e., his current salary at the time of retirement. He also had received no compensation from defendant for more than two and a half years. Further, plaintiff had not yet been released to return to work. This suffices to show lost earnings.

26 A.D. Cases 31

In *Hope v. California Youth Authority* (2005) 134 Cal.App.4th 577 the plaintiff testified he took the job with the plan to stay until retirement. In affirming the amount of the front pay award through the plaintiff's planned retirement age, the court iterated in FEHA cases the proper measure of damages is the amount of salary less any sums earned, which the employer has the burden to prove. (Id. at p. 595.)

*13* We disregard defendant's argument that plaintiff testified to improper reasons for leaving his job and failure to mitigate damages for lack of record references and sufficient argument. (*Evans v. CenterStone Development Co.* (2005) 134 Cal.App.4th 151, 166; *City of Lincoln v. Barringer* (2002) 102 Cal.App.4th 1211, 1239, fn. 16 [record references in statement of facts do not cure lack of same in argument].) We also disregard defendant's one paragraph argument damages were erroneous based on jury misconduct, i.e., an agreement that jurors would disobey the jury instruction to reduce future loss of income to present day value since it fails to present reasoned legal analysis.

Alternatively defendant argues the $500,000 emotional distress damages were excessive because, although not compelled to do so, plaintiff reviewed the blogs daily for a period of weeks and this was the cause of his distress. But this was a factor for the jury to consider.

Finally, defendant claims the court erred by giving CACI No. 3928, which deals with an “[u]nusual [s]usceptible [p]laintiff.” That instruction states the jury must award all sums to “reasonably and fairly compensate” plaintiff “even if [he] was more susceptible to injury than a normally healthy person would have been, and even if a normally healthy person would not have suffered similar injury.” Relying on *Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, defendant maintains FEHA protects a “work environment ... from the perspective of a reasonable person in the plaintiff’s position.” (Id. at p. 519.) But, as plaintiff notes, the quote from *Beyda* was directed toward liability, not damages. CACI No. 3928 was given to the jury during the damages portion of the trial. As plaintiff further points out, defendant cites no authority for the position that damages for a FEHA violation are any different than common law tort damages. Moreover, case law demonstrates a plaintiff is entitled to recover emotional distress damages. (*Sasco Electric v. California Fair Employment & Housing Com.*, supra, 176 Cal.App.4th at pp. 544–545.)

Defendant also challenges use of CACI No. 3905A, instructing the jury that plaintiff could “recover damages for mental suffering caused by [defendant],” including those he was “reasonably certain to suffer in the future.” It claims the instruction failed to include a provision that plaintiff had the burden of proof. But it is implicit in the instruction's language. There was nothing to suggest defendant had some burden or that plaintiff had no burden of proof. Further, other instructions given stated plaintiff had the burden of proof. (See CACI No. 3901 – tort damages; CACI No. 3903A – medical expenses; CACI No. 3903C – past and future earnings.) And the instructions regarding mitigation of damages stated defendant had the burden. (CACI Nos. 3961, 3962.) Finally, in closing argument, defendant's lawyer told the jury plaintiff had the burden of proof.

*f. Individual Defendants*

The judgment reflects plaintiff prevailed against defendant but makes no mention of the individual defendants. Defendants brought a motion in the trial court to correct the judgment to reflect the individual defendants prevailed, which the court denied, noting the minute orders contained that information and there was no need for the judgment to state it. Defendant again argues here the judgment should be modified to show “the individual defendants prevailed.” It is quite clear from the judgment that such is the case, and there is no need to modify it.

*g. Appellant’s Briefs*

*14* On a closing note, we discourage the manner in which defendant presented its claims on appeal. Although it obtained an order to file an oversize brief in many instances it raised only cursory, conclusory arguments, to which plaintiff responded. Then defendant presented lengthy arguments in its reply brief that should have been included in the opening brief. Not only was it unfair to plaintiff, denying it the ability to reply to specific assertions, it was not helpful to our disposition of the case.

2. Plaintiff’s Appeal

26 A.D. Cases 31

a. Attorney Fees

Plaintiff claims the $194,581 attorney fees awarded to him, instead of the $628,083.75 requested are too low because the court failed to properly calculate the amount.

Section 12965, subdivision (b) empowers the court to award “reasonable attorney’s fees and costs, including expert witness fees” to a prevailing party. Fees should be based on hours “reasonably spent” unless “circumstances render...” the award unjust...” (Horsford v. Board of Trustees of California State University (2005) 132 Cal.App.4th 359, 394.) “[T]he exercise of the trial court’s discretion must be based on a proper utilization of the lodestar adjustment method, both to determine the lodestar figure and to analyze the factors that might justify application of a multiplier.” [Citation.] (Nichols v. City of Taft (2007) 155 Cal.App.4th 1239, 1240-1240.)

A lodestar award is calculated by “the reasonable hours spent multiplied by the hourly prevailing rate for private attorneys in the community conducting noncontingent litigation of the same type.” (Ketchum v. Moses (2001) 24 Cal.4th 1122, 1133, italics omitted.) The court may then use any of several factors to adjust the amount upwards or downwards. (Nichols v. City of Taft, supra, 155 Cal.App.4th at p. 1240.) These factors include “(1) the novelty and difficulty of the questions involved, (2) the skill displayed in presenting them, (3) the extent to which the nature of the litigation precluded other employment by the attorneys, (4) the contingent nature of the fee award. [Citation.] The purpose of such adjustment is to fix a fee at the fair market value for the particular action. In effect, the court determines, retrospectively, whether the litigation involved a contingent risk or required extraordinary legal skill justifying augmentation of the unadjusted lodestar in order to approximate the fair market rate for such services. The “experienced trial judge is the best judge of the value of professional services rendered in his court, and while his judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong.” [Citation.] (Ketchum v. Moses, supra, 24 Cal.4th at p. 1132.)

Plaintiff proposed a lodestar amount of $418,722.50 based on the number of hours with a 1.5 multiplier. Defendant objected to the number of hours and argued a proper lodestar amount was $33,612.50 with a .5 multiplier applied as a reduction because plaintiff prevailed only on two of its causes of action, did not prevail against the individual defendants, and received an award less than that he sought, resulting in a suggested attorney fee award of $167,741.25.

During argument on the motion the court noted its “astonished[ment]” that the amount requested was 75 percent of the damages, beyond its experience with even “complex business cases” because the issues were not “exceptionally complex” or “intellectually demanding.” The events leading up to the action were not “particularly challenging.” Further, plaintiff’s primary piece of evidence, the blog, was not difficult to understand. Discovery and law motion were “routine,” there was no evidence of “abusive defense tactics,” the law did not change during the pendency of the action, and the duration of the matter was only 13 months.

*15 It did not quarrel with the requested hourly rates, but was not convinced the fee should be enhanced because plaintiff's lawyer had taken the case on a contingency basis, stating that was “rarely the basis for an add-on...” It did give credence to the claim counsel “obtained an exceptional result,” since, in the court’s view, it would not have been surprising had defendant prevailed, and agreed to an enhancement for the outcome. But the case did not revolve around “an issue of vast public importance,” nor had counsel given up two or three years of life; rather this was his basic practice.

Plaintiff argues that, in reducing the amount of fees by more than half of the amount conceded by defendant, the “court must have deviated from the lodestar” (italics omitted). We disagree. During argument on the motion the court made clear its belief the case was routine. It is reasonable to infer the court did not believe plaintiff should have spent the number of hours it did in litigating the case. The court was not required to specify the time it found unreasonable. (Gorman v. Tassajara Development Corp. (2009) 178 Cal.App.4th 44, 101.)

That plaintiff cannot determine a “rational relationship between” his suggested lodestar and the amount awarded does not change the result. We understand “[a] trial court’s award of attorney fees must be able to be rationalized to be affirmed on
26 A.D. Cases 31

appeal" (Gorman v. Tassajara Development Corp., supra, 178 Cal.App.4th at p. 101), but except for an enhancement based on the favorable result, the court plainly did not believe any of the other enhancement factors applied. And, as defendant suggests, plaintiff did not prevail on all claims. "[A] reduced fee award is appropriate when a claimant achieves only limited success' [citations].” (Chavez v. City of Los Angeles (2010) 47 Cal.4th 970, 989–990.) Although, as plaintiff claims, “FEHA serves an important public policy,” in keeping with the court's finding, he does not show how this case “had any broad public impact or resulted in significant benefit to anyone other than himself.” (Id. at p. 990.)

We may reverse only if there has been “a prejudicial abuse of discretion. [Citation.]” (Horsford v. Board of Trustees of California State University, supra, 132 Cal.App.4th at p. 393.) The court is the best judge of the amount that should be awarded. We find no basis to reverse.

b. Expert Witness Costs
Plaintiff claims the court abused its discretion when it denied his request for slightly more than $45,000 as expert witness fees for Robbins pursuant to section 12965, subdivision (b). In rejecting the request the court noted the testimony was “not particularly illuminating” or helpful and was merely a restatement of jury instructions limited to a ""commonly-expected response of a defendant to FEHA charges” (italics omitted), similar to those here.

Relying on Horsford v. Board of Trustees of California State University, supra, 132 Cal.App.4th 359, 394 plaintiff claims the court's lack of enthusiasm for Robbins's testimony does not make an award of costs unjust because Robbins did testify and plaintiff had to pay him. But if the testimony had virtually no value, a factual finding to which we must give deference, an award of costs would not be just. As with the attorney fees, that defendant suggested fees should be half of the request does not control. The court did not err in denying these costs.

DISPOSITION

The judgment and postjudgment order are affirmed. The parties shall bear their own respective costs on appeal.

WE CONCUR:

O'LEARY, J.

IKOLA, J.

All Citations
Not Reported in Cal.Rptr., 2012 WL 420149, 26 A.D. Cases 31
Rodriguez v. Maricopa County Community College Dist., 605 F.3d 703 (2010)

Procedural Posture(s): Motion for Summary Judgment.

West Headnotes (17)

[1] Federal Courts As to immunity
On an interlocutory appeal from a summary judgment denial of qualified immunity, jurisdiction is limited to the purely legal question of immunity.

4 Cases that cite this headnote

[2] Federal Courts As to immunity
Where the district court denies qualified immunity on summary judgment on the basis that material facts are in dispute, Court of Appeals generally lacks jurisdiction.

6 Cases that cite this headnote

[3] Federal Courts As to immunity
District court's summary judgment denial of qualified immunity in favor of community college administrators in civil rights action, on grounds that fact issue existed as to whether acts or omissions were objectively reasonable, was subject to interlocutory appeal, since contours of right at issue, and reasonableness of administrators' actions, was not a question of fact, but a question of law.

1 Cases that cite this headnote

[4] Constitutional Law Public Employees and Officials

1 Cases that cite this headnote

Synopsis
Background: Class of Hispanic employees brought action against community college district, its governing board, and two district administrators, claiming that their failure to properly respond to a professor's racially-charged e-mails created a hostile work environment in violation of Title VII and the Equal Protection Clause. The United States District Court for the District of Arizona, Earl H. Carroll, J., denied summary judgment in part in favor of administrators on equal protection claim. Administrators filed interlocutory appeal.

[ Holding:] The Court of Appeals, Kozinski, Chief Judge, held that professor's racially-charged speech was pure speech and not unlawful harassment.

Reversed.
Constitutional Law ⇐ Public Employees and Officials
When an employer is made aware of unlawful harassment, public employees are entitled, under Equal Protection Clause, to have the employer take reasonable and appropriate steps to investigate and make it stop; a warning or other discipline, even dismissal, may be the appropriate action in some circumstances, but the proper object of an employer's response is to deter and stop further harassment, not to punish the harassor. U.S.C.A. Const.Amend. 14.

Constitutional Law ⇐ Public Employees and Officials

Constitutional Law ⇐ Offensive, vulgar, abusive, or insulting speech
Government may not silence speech because the ideas it promotes are thought to be offensive. U.S.C.A. Const.Amend. 1.

Constitutional Law ⇐ Harassment
There is no categorical harassment exception to the First Amendment's free speech clause. U.S.C.A. Const.Amend. 1.

Constitutional Law ⇐ Particular Issues and Applications in General
Constitutional Law ⇐ Offensive, vulgar, abusive, or insulting speech

Civil Rights ⇐ Threats, intimidation, and harassment
Constitutional Law ⇐ Harassment
Harassment law generally targets conduct, and it sweeps in speech as public workplace harassment only when consistent with the First Amendment. U.S.C.A. Const.Amend. 1.
Racial insults or sexual advances directed at particular individuals in public workplace may be prohibited on the basis of their non-expressive qualities, as they do not seek to disseminate a message to the general public, but to intrude upon the targeted listener, and to do so in an especially offensive way. U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

[14] Constitutional Law ⇨ Employees
Education ⇨ Employees
Community college district's provision of web servers and e-mail list on a content-neutral basis to facilitate campus discussion did not suggest official endorsement of professor's racially-charged website and e-mails, as would connote an implicit threat of discriminatory treatment and therefore intentional discrimination in violation of Hispanic employees' equal protection rights to be free from unlawful harassment. U.S.C.A. Const.Amends. 1, 14.

3 Cases that cite this headnote

[15] Constitutional Law ⇨ Employees
Education ⇨ Exercise of rights; retaliation
Public Employment ⇨ Protected activities
Even assuming that community college professor's racially-charged speech occurred in a limited or nonpublic forum, application of district's anti-harassment policy to professor's speech would have suppressed his speech because of its point of view, in violation of the First Amendment, since others could speak about race and culture without violating the policy and professor's speech would be singled out for suppression because of his disfavored opinions on those issues. U.S.C.A. Const.Amend. 1.

5 Cases that cite this headnote

[16] Constitutional Law ⇨ Justification for exclusion or limitation

Even in a nonpublic forum, state actors may not suppress speech because of its point of view. U.S.C.A. Const.Amend. 1.

[17] Constitutional Law ⇨ Employees
Education ⇨ Employees
Community college professor's racially-charged website and e-mails sent over a distribution list maintained by community college district did not obligate community college district to limit discussion on entire forum to official school business in order to silence professor and protect Hispanic employees' equal protection rights to be free from unlawful harassment. U.S.C.A. Const.Amends. 1, 14.

Attorneys and Law Firms

*705 Richard S. Cohen, Troy P. Foster and Justin S. Pierce, Ford & Harrison LLP, Phoenix, AZ, for the defendants-appellants.

David G. Hinojosa, Nina Perales, Diego Bernal and Thomas A. Saenz, Mexican American Legal Defense and Educational Fund (MALDEF), San Antonio, TX; and David G. Gomez and Michael J. Petitti, Gomez & Petitti, Phoenix, AZ, for the plaintiffs-appellees.

Appeal from the United States District Court for the District of Arizona, Earl H. Carroll, District Judge, Presiding. D.C. No. 2:04-cv-02510-EHC.

Before: SANDRA DAY O'CONNOR, Associate Justice, †ALEX KOZINSKI, Chief Judge, and SANDRA S. IKUTA, Circuit Judge.

Opinion

KOZINSKI, Chief Judge:

We consider the interplay between the First Amendment and the right to be free of workplace harassment on the basis of protected status.
Facts

Professor Walter Kehowski sent three racially-charged emails over a distribution list maintained by the Maricopa County Community College District, where he teaches math. Every district employee with an email address received a copy. Plaintiffs, a certified class of the district's Hispanic employees, sued the district, its governing board and two district administrators (the chancellor and the president) claiming that their failure to properly respond to Kehowski's emails created a hostile work environment in violation of Title VII and the Equal Protection Clause.

Kehowski's first email had "Dia de la raza" as its subject line and asked, "Why is the district endorsing an explicitly racist event?" (Citations and emphasis omitted.) Dia de la Raza translates as "Day of the Race" and is celebrated by some Hispanics instead of Columbus Day. 1

Kehowski's next email, sent almost a week later, began, "YES! Today's Columbus Day! It's time to acknowledge and celebrate the superiority of Western Civilization." Kehowski then offered excerpts from a variety of articles. One article quoted Arthur Schlesinger, Jr. as saying that "democracy, human rights and cultural freedom" are "European ideas." Another promoted a theory that "Native Americans actually committed genocide against the original white-skinned inhabitants of +706 North America." (Emphasis omitted.) Yet another argued that "America did not become the mightiest nation on earth without distinct values and discrimination" and asserted that "[o]ur survival depends on discrimination."

Two days later, Kehowski sent a third email that began, "Ad hominem attacks are the easiest to launch and the most difficult to defend against." Kehowski quoted an email calling his messages "racist" and said: "Boogie-boogie-boo to you too! Racist? Hardly. Realistic is more like it." He quoted an email claiming that "[m]ost thinking people believe that the European, Christian victory over the Moorish, Islamic (and African) culture in Spain is an example of a victory of a 'backward' culture over one that was more civilized." He responded: "[H]istory has answered quite convincingly which cultures were backward." And he warned: "[I]f we don't pull ourselves out of the multicultural stupor, another culture with some pretty unsavory characteristics (here, here, and here) will dominate (here, here, and here) [and not without a little help from the treasonous scum Bill Clinton]." (Bracketed words in original.)

This third email linked to a website maintained by Kehowski on the district's web server. The school's technology policy encouraged faculty to develop district-hosted websites for use "as a learning tool," although faculty also maintained sites of a personal nature. Kehowski's site declared that "[t]he only immigration reform imperative is preservation of White majority" and urged visitors to "[r]eport illegal aliens to the INS." (Emphasis omitted.) Like his emails, Kehowski's website quoted and linked to articles. One critiqued a "shallow and self-contradictory" ideology in which "[r]ace must be held meaningless only by whites." Another expressed concern that "[t]he persistent inflow of Hispanic immigrants threatens to divide the United States into two peoples."

Prominent figures in the community condemned Kehowski's ideas. The president of the college circulated an email:

[T]he openness of our [email] system ... allows individuals to express opinions on almost any subject.... However, when an e-mail hurts people, hurts the college, and is counter to our beliefs about inclusiveness and respect, I cannot be silent. In that context, I want everyone in the [college] community to know that personally and administratively, I support the District's values and philosophy about diversity.

The chancellor of the district issued a press release stating that Kehowski's "message is not aligned with the vision of our district" but explaining that disciplinary action against Kehowski "could seriously undermine our ability to promote true academic freedom." Although Kehowski's emails were not sent to any students, many obviously found out about them, and the student body president circulated an email to the faculty declaring that Kehowski "did not do anything illegal,
Rodriguez v. Maricopa County Community College Dist., 605 F.3d 703 (2010)


...but none of us believe [his] actions were ethical or in good taste." Contemporary press accounts describe vocal student protests against Kehowski.

A number of district employees also complained to the administration that Kehowski's statements had created a hostile work environment. No disciplinary action was taken against Kehowski, and no steps were taken to enforce the district's existing anti-harassment policy.

Plaintiffs now seek damages and other relief on the ground that defendants "failed to take immediate or appropriate steps to prevent Mr. Kehowski from sending Plaintiffs harassing emails" and from disseminating harassing speech via his district-hosted website. The district court *707 granted summary judgment to the president and chancellor on plaintiffs' Title VII claim on the ground that Title VII liability does not extend to agents of the employer. But it denied summary judgment to the president and chancellor on plaintiffs' constitutional claim, including on the issue of qualified immunity, and to the remaining defendants on both the constitutional and Title VII claims. The president and chancellor brought this interlocutory appeal, challenging the district court's ruling that they are not entitled to qualified immunity as to the alleged Equal Protection violation.

Jurisdiction

[1] [2] On an interlocutory appeal from a denial of qualified immunity, jurisdiction is limited to the purely legal question of immunity. See *1 Cunningham v. Gates, 229 F.3d 1271, 1286 (9th Cir.2000). "[W]here the district court denies immunity on the basis that material facts are in dispute, we generally lack jurisdiction." Id.

[3] The district court characterized the central question of our qualified immunity analysis—whether defendants violated a clearly established right of which a reasonable person would have known—as a factual inquiry, and denied immunity on the grounds that "[a] genuine issue of material fact exists as to whether the acts or omissions of Defendants ... were objectively reasonable." Plaintiffs claim that we lack jurisdiction to review this determination, and that the question of qualified immunity must therefore go to a jury. But the contours of the right at issue, and the reasonableness of defendants' actions, is not a question of fact—it's a question of law. See, e.g., *1 Knox v. Southwest Airlines, 124 F.3d 1103, 1107 (9th Cir.1997). In answering that question, we may not disregard material factual disputes identified by the district court. *1 Gates, 229 F.3d at 1286. But we undoubtedly have jurisdiction to determine whether, taking the facts in the light most favorable to plaintiffs, defendants would have violated a constitutional right of which a reasonable government official would have been aware.

Qualified Immunity

[4] It's clearly established in our circuit that public employees are entitled under the Equal Protection Clause to be free of purposeful workplace harassment on the basis of protected status. See *1 Alaska v. EEOC, 564 F.3d 1062, 1069 (9th Cir.2009) (en banc); *1 Bator v. Hawaii, 39 F.3d 1021, 1029 (9th Cir.1994). Defendants therefore do not dispute that employers who become aware of workplace harassment are required to take reasonable steps to make it stop. But they claim they are entitled to summary judgment based on qualified immunity because they were required to do no more than they did in the circumstances presented here, and if they were required to do more, such a duty was not clearly established. See *1 Pearson v. Callahan, 555 U.S. 223, 129 S.Ct. 808, 815–16, 172 L.Ed.2d 565 (2009). We begin by addressing the precise scope of the district's constitutional obligation.

[5] Plaintiffs may wish that the district had disciplined or dismissed Kehowski, but the district wasn't required to do so. When an employer is made aware of unlawful harassment, employees are entitled to have the employer take reasonable and appropriate steps to investigate and make it stop. *3 Andrews v. City of Philadelphia, 895 F.2d 1469, 1479–80 (3d Cir.1990). A warning or other discipline, even dismissal, may be the appropriate action in some circumstances, but the proper object of an employer's response is to deter and stop further harassment, not to punish the harasser. See, e.g., *1 Bator, 39 F.3d at 1029.
[7] [8] Plaintiffs no doubt feel demeaned by Kehowski's speech, as his very thesis can be understood to be that they are less than equal. But that highlights the problem with plaintiffs' suit. Their objection to Kehowski's speech is based entirely on his point of view, and it is axiomatic that the government may not silence speech because the ideas it promotes are thought to be offensive. See Brandenburg v. Ohio, 395 U.S. 444, 448–49, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969); Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 204 (3d Cir.2001); DeAngelis v. El Paso Mun. Police Officers Ass'n, 51 F.3d 591, 596–97 (5th Cir.1995). "There is no categorical 'harassment exception' to the First Amendment's free speech clause." Saxe, 240 F.3d at 204; see also United States v. Stevens, 559 U.S. 505, 130 S.Ct. 1577, 176 L.Ed.2d 435 (2010) ("The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits.").

[9] Indeed, precisely because Kehowski's ideas fall outside the mainstream, his words sparked intense debate: Colleagues emailed responses, and Kehowski replied; some voiced opinions in the editorial pages of the local paper; the administration issued a press release; and, in the best tradition of higher learning, students protested. The Constitution embraces such a heated exchange of views, even (perhaps especially) when they concern sensitive topics like race, where the risk of conflict and insult is high. See RAV v. City of St. Paul, 505 U.S. 377, 391, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992). Without the right to stand against society's most strongly-held convictions, the marketplace of ideas would decline into a boutique of the banal, as the urge to censor is greatest where debate is most disquieting and orthodoxy most entrenched. See, e.g., Gitlow v. New York, 268 U.S. 652, 667, 45 S.Ct. 625, 69 L.Ed. 1138 (1925); id. at 673, 45 S.Ct. 625 (Holmes, J., dissenting). The right to provoke, offend and shock lies at the core of the First Amendment.

This is particularly so on college campuses. Intellectual advancement has traditionally progressed through discord and dissent, as a diversity of views ensures that ideas survive because they are correct, not because they are popular. Colleges and universities—sheltered from the currents of popular opinion by tradition, geography, tenure and monetary endowments—have historically fostered that exchange. But that role in our society will not survive if certain points of view may be declared beyond the pale. "Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." Keyishian v. Bd. of Regents of the Univ. of the State of N.Y., 385 U.S. 589, 603, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967) (quoting Sweezy v. New Hampshire, 354 U.S. 234, 250, 77 S.Ct. 1203, 1 L.Ed.2d 1311 (1957)). We have therefore said that "the desire to maintain a sedate academic environment ... does not justify limitations on a teacher's freedom to express himself on '709 political issues in vigorous, argumentative, unmeasured, and even distinctly unpleasant terms." Adamian v. Jacobson, 523 F.2d 929, 934 (9th Cir.1975).

[10] The First Amendment also demands substantial deference to the college's decision not to take action against Kehowski. The academy's freedom to make such decisions without excessive judicial oversight is an "essential" part of academic liberty and a "special concern of the First Amendment." Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 312, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978) (citation omitted) (internal quotation marks omitted); see also Brown v. Li, 308 F.3d 939, 952 (9th Cir.2002); Edwards v. Cal. Univ. of Penn., 156 F.3d 488, 492 (3d Cir.1998) (Alito, J.). If colleges are forced to act as the hall monitors of academia, subject to constant threats of litigation both from professors who wish to speak and listeners who wish to have them silenced, "[m]any school districts would undoubtedly prefer 'to steer far' from any controversial [professor] and instead substitute 'safe' ones in order to reduce the possibility of civil liability and the expensive and
timeto consuming burdens of a lawsuit.  

Monteiro v. Tempe Union High Sch. Dist., 158 F.3d 1022, 1030 (9th Cir.1998). To allow academic speech the breathing room that it requires, courts must defer to colleges’ decisions to err on the side of academic freedom. Otherwise, schools will inevitably reassess whether hiring a lightning rod like Kehowski—or, for that matter, Larry Summers or Cornel West—is worth the trouble.

These First Amendment principles must guide our interpretation of the right to be free of purposeful workplace harassment under the Equal Protection Clause. When Congress enacted the Fourteenth Amendment, it enshrined a concept of liberty that has been understood to include the “general principle of free speech.” Gitlow, 268 U.S. at 672, 45 S.Ct. 625 (Holmes, J., dissenting); see also Meyer v. Nebraska, 262 U.S. 390, 400, 43 S.Ct. 625, 67 L.Ed. 1042 (1923). And, in Meyer, the Supreme Court relied on the fact that the “American people have always regarded education and acquisition of knowledge as matters of supreme importance” to find that the Fourteenth Amendment protected a teacher’s right “to teach and the right of parents to engage him so to instruct their children.” Id. Since then, the First Amendment has consistently been held to incorporate the First Amendment’s protection of free speech and academic freedom against the states. See, e.g., Sweezy, 354 U.S. at 255, 77 S.Ct. 1203; Keyishian, 385 U.S. at 604, 87 S.Ct. 675.

History likewise suggests that the Fourteenth Amendment was intended to extend, and not retract, the freedoms enshrined in the First. In the run up to the Civil War, professors and colleges played a key role in the spread of abolitionist ideas. See Robert Bruce Slater, The American Colleges That Led the Abolition Movement, J. Blacks in Higher Educ., Sept. 1995, at 95-97. The South moved to harshly suppress abolitionism as dangerous and incendiary, and Republicans responded by making “demands for free speech a centerpiece of their political program.” Michael Kent Curtis, The 1850 Crisis Over Hinton Helper’s Book, The Impending Crisis: Free Speech, Slavery, and Some Light on the Meaning of the First Section of the Fourteenth Amendment, 68 Chi.-Kent L. Rev. 1113, 1151 (1993); see also id. at 1131, 1134-38. It can hardly be surprising, then, that the Reconstruction Congress sought to protect freedom of speech along with other fundamental liberties when it enacted the Fourteenth Amendment. See, e.g., id. at 1172-74. Free speech has been a powerful force for the spread of equality under the law; we must not squelch that freedom because it may also be harnessed by those who promote retrograde or unattractive ways of thought.

We therefore doubt that a college professor’s expression on a matter of public concern, directed to the college community, could ever constitute unlawful harassment and justify the judicial intervention that plaintiffs seek. See Eugene Volokh, Comment, Freedom of Speech and Workplace Harassment, 39 UCLA L. Rev. 1791, 1849-55 (1992). Harassment law generally targets conduct, and it sweeps in speech as harassment only when consistent with the First Amendment. See R.A.V., 505 U.S. at 389-90, 112 S.Ct. 2538. For instance, racial insults or sexual advances directed at particular individuals in the workplace may be prohibited on the basis of their non-expressive qualities, Saxe, 240 F.3d at 208, as they do not “seek to disseminate a message to the general public, but to intrude upon the targeted [listener], and to do so in an especially offensive way,” Frisby v. Schultz, 487 U.S. 474, 486, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988). See, e.g., Flores, 324 F.3d at 1133, 1135; Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 60, 73, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986). But Kehowski’s website and emails were pure speech; they were the effective equivalent of standing on a soap box in a campus quadrangle and speaking to all within earshot. Their offensive quality was based entirely on their meaning, and not on any conduct or implicit threat of conduct that they contained.

In the context of a supervisory relationship, advocacy of discriminatory ideas can constitute an implicit threat of discriminatory treatment and could therefore amount to intentional discrimination. But plaintiffs have not alleged that Kehowski’s speech was made in such a context, or that he has any control over their employment. Nor did the administration in any way endorse Kehowski’s views or adopt them as the district’s official position. Although Kehowski disseminated his views using the district’s web servers and email list, providing such resources on a content-neutral basis to facilitate campus discussion does not suggest official
Plaintiffs assert that the district could have applied its harassment policy to suppress Kehowski's speech because he spoke in a limited or nonpublic forum. For the purpose of this appeal, we assume plaintiffs are correct that the email list and servers were limited or nonpublic forums.

See Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 4, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983). But even in a nonpublic forum, state actors may not suppress speech because of its point of view, id. at 46, 103 S.Ct. 948, and that is exactly what application of the harassment policy to Kehowski's emails and website would have done. Others could speak about race and culture without violating the policy; Kehowski's speech would be singled out for suppression because of his disfavored opinions on those issues.

Nor are we impressed by plaintiffs' suggestion that the district could have suppressed Kehowski's speech by limiting discussion on its mailing list and web servers to official school business. We assume the First Amendment would not prevent the district from restricting use in that manner. See id. at 49, 103 S.Ct. 948; Desylias v. Bernatina, 351 F.3d 934, 943-44 (9th Cir.2003). We also assume plaintiffs are correct that the district already had such a written policy, although it was not enforced. Plaintiffs don't allege that defendants selectively applied this policy in favor of Kehowski's speech; their claim is that once Kehowski began to speak, defendants were obliged to apply the policy to silence Kehowski, even if that meant they had to also silence everybody else.

The power to limit or close a forum does not entail any such obligation. If speech is harassment, the proper response is to silence the harasser, not shut down the forum. And if speech is not harassment, listeners who are offended by the ideas being discussed certainly are not entitled to shut down an entire forum simply because they object to what some people are saying. Such a rule would contravene the First Amendment's hostility towards laws that "confer broad powers of censorship, in the form of a 'heckler's veto,' upon any opponent of" certain points of view. Reno v. ACLU, 521 U.S. 844, 880, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997). Because some people take umbrage at a great many ideas, very soon no one would be able to say much of anything at all.

We therefore conclude that defendants did not violate plaintiffs' right to be free of workplace harassment. See Pearson, 129 S.Ct. at 818. The district court's finding that defendants' failure to respond to the emails created a jury question as to discriminatory purpose does not bar a grant of immunity, as defendants may not be liable unless plaintiffs show both conduct constituting harassment and a discriminatory purpose behind the employer's failure to respond. See Bator, 39 F.3d at 1029. Because we find as a matter of law that plaintiffs have not met the first of those requirements, and therefore cannot show a constitutional violation, we reverse the district court's denial of qualified immunity and do not reach plaintiffs' additional argument that the scope of the right was not clearly established. On remand, the district court shall reconsider its rulings on the remaining defendants' summary judgment motions to ensure that they are consistent with our ruling today.

It's easy enough to assert that Kehowski's ideas contribute nothing to academic debate, and that the expression of his point of view does more harm than good. But the First Amendment doesn't allow us to weigh the pros and cons of certain types of speech. Those offended by Kehowski's ideas should engage him in debate or hit the "delete" button when they receive his emails. They may not invoke the power of the government to shut him up.

REVERSED.

All Citations

Rodriguez v. Maricopa County Community College Dist., 605 F.3d 703 (2010)

Footnotes

* The Honorable Sandra Day O'Connor, Associate Justice of the United States Supreme Court (Ret.), sitting by designation pursuant to 28 U.S.C. § 294(a).


2 Because this is not such a case, we cannot hold what standard should be applied to determine whether advocacy of discriminatory ideas by a supervisor contains an implicit threat and constitutes harassment. Suffice to say that supervisors retain First Amendment rights and their speech is entitled to significant breathing space before it will be deemed harassment. Cf. Lovell v. Poway Unified Sch. Dist., 90 F.3d 367, 372 (9th Cir.1996) (speech can only be prohibited as a threat if a reasonable person would foresee that it would be interpreted as a serious expression of intent to act in the threatened manner).
41st Annual
Labor & Employment Law
Symposium

Session 2, Panel 3:

Is Somebody Watching You? Emerging Trends in the Use of Technology and Monitoring in the COVID and Post-COVID Workplace

Barbara Figari Cowan, Workplace Advocates

Adam Wergeles, Executive VP and General Counsel, Leaf Group

Stacey McKee Knight, Katten Muchin Rosenman LLP (Moderator)
Barbara Figari Cowan exclusively represents employees in individual, multi-plaintiff, and class action employment and civil rights cases. Barbara is a member of the Executive Board for the California Employment Lawyers Association, and serves on the Ethics and Sanctions Committee of the National Employment Lawyers Association. Barbara advocates for workers in wrongful termination, harassment (including sexual harassment and racial harassment), sexual assault, retaliation, wage and hour violations, and whistleblower disputes in all stages of litigation, including the appellate level up to the United States Supreme Court, with an emphasis on trial work. Barbara is also a certified yoga instructor and has been a concert violinist for over 25 years.
When sophisticated employers are looking for a creative, business minded approach to a wide-range of workplace issues that minimizes legal exposure and resolves complex litigation, they rely on Stacey McKee Knight to solve their most pressing and important issues. For over two decades, Stacey has been helping employers resolve virtually every possible issue they face in navigating the ever-changing and often counter-intuitive regulations and employment laws that govern their workplace. She uses this experience to work with clients to develop solutions that are tailored to their specific needs and mesh with their business operations.

**Wide-ranging litigation experience**

Stacey's extensive experience at the state and federal levels includes wage-and-hour class actions and collective actions under California wage and hour laws and the Federal Fair Labor Standards Act, including meal-and-rest-period, donning-and-doffing, vacation and misclassification claims. She has also served as lead counsel for dozens of claims of discrimination, harassment, retaliation, wrongful termination and reasonable accommodation under state and federal law.

**A pragmatic approach to employment issues**

Stacey knows that not every solution works for every client and a successful strategy for litigation or restructuring operations to mitigate against risk requires a deep understanding of both the client's objectives and operations. There are many avenues to achieving legal compliance or resolution of litigation and Stacey relies on her knowledge of a client's industry, business and workforce to craft the best result. By listening to what the client wants, providing a realistic risk-assessment and understanding the full-range of options, Stacey is able to advise the client on the most appropriate and cost-effective way to achieve the desired outcome.

Because of the ever-increasing cost and disruption associated with employee
claims and administrative audits and investigations, preventive measures and a prompt response to any issues that arise are critical. Stacey routinely counsels executive management teams and boards on risk management and new developments so they are prepared for the next trend in employment issues. She also partners with these same clients to conduct internal investigations into a wide variety of matters ranging from sexual harassment to embezzlement to advise them on the most appropriate remedial measures designed to address matters before they develop into litigation.

**Recognitions**

- *Best Lawyers in America*
  - Labor Law - Management, 2021
- *Daily Journal*
- *The Legal 500 United States*
  - Recommended Attorney, 2019–2020
- *National Law Journal*
  - Litigation Trailblazers, 2015
- *Super Lawyers*
- *Working Mother*
  - Mother of the Year, 2015

**News**

- Coronavirus (COVID-19) Resource Center (February 5, 2021)
Katten Attorneys Selected to 2021 Southern California Super Lawyers List (January 21, 2021)

Katten Attorneys Distinguished as Top Legal Talent in the 2021 Best Lawyers in America and Best Lawyers: Ones to Watch Lists (August 20, 2020)

Katten Named Top-Tier Firm in Structured Finance and Securitization by The Legal 500 United States 2020 Guide (June 16, 2020)

Katten Attorneys Named to 2020 Southern California Super Lawyers List (January 16, 2020)

Katten Praised in The Legal 500 United States 2019 Guide (June 11, 2019)

Super Lawyers List Recognized 13 Katten Attorneys in Southern California (January 30, 2019)

Katten Attorneys in Southern California Honored on Super Lawyers List (February 16, 2018)

Katten California Attorneys and Staff Pull for Special Olympics (August 25, 2017)

Katten Selected as the "Go-To" Firm for Sports Law in Chicago (July 27, 2017)

Katten Attorneys Recognized in 2017 Southern California Super Lawyers List (March 9, 2017)

Nineteen Katten Attorneys Recognized in 2016 Southern California Super Lawyers List (January 20, 2016)

Katten Named to "Working Mother 100 Best Companies" List for Ninth Consecutive Year (September 22, 2015)

Stacey McKee Knight Quoted in Detroit Free Press on UAW Quest to Eliminate Two-Tier Wage System (July 20, 2015)

Twenty-One Katten Attorneys Recognized as Top Attorneys in Southern California (January 21, 2015)

Partner Stacey McKee Knight Quoted in Daily Journal on Short-Haul Truckers' Win (January 14, 2015)
Stacey McKee Knight
Partner and Co-Chair, Litigation Department

- Partner Stacey McKee Knight Named to *Daily Journal*’s Top Labor and Employment List (July 18, 2014)
- Twenty-One Katten Attorneys Recognized on Southern California *Super Lawyers* List (February 10, 2014)
- Partner Stacey McKee Knight Comments on Activist Use of Storefront Property in *Daily Journal* (January 29, 2014)
- Partner Stacey McKee Knight Speaks with *Daily Journal* on Misclassification Suits in Trucking Industry (July 29, 2013)
- *Daily Journal* Names Partner Stacey McKee Knight to Top Labor and Employment List for 2013 (July 17, 2013)
- Twenty-Two Katten Attorneys Included on 2013 Southern California *Super Lawyers* List (January 21, 2013)

Publications

- California’s New COVID-19 Exposure and Notification Law (December 18, 2020)
- COVID-19 Considerations for Employers (March 23, 2020)
- COVID-19: Families First Coronavirus Response Act (March 20, 2020)
- New York City Ban on Salary History Inquiries Set to Take Effect October 31 (October 17, 2017)

Presentations and Events

- ICSC Annual Conference (October 25, 2018) | Presenter | *I Missed What? The Ongoing Saga of ADA Challenges and Claims*
- ICSC Annual Conference (October 2017) | Presenter | *Making the ADA Accessible for Landlords and Tenants*
Adam Wergeles is a seasoned technology and corporate lawyer and executive, having served as an executive and general counsel for multiple public and venture backed technology and media companies. Adam is currently Executive Vice President and General Counsel for Leaf Group, a diversified consumer internet company. Prior to Leaf Group, Adam served as Executive Vice President, Business and Legal Affairs, and General Counsel for Serviz, Inc., a technology start-up that connects consumers with home service professionals. Previously, he spent seven years as the Chief Legal Officer at ReachLocal, where he was instrumental in ReachLocal’s IPO and its rapid domestic and international expansion. Adam holds a Juris Doctor degree from the University of Southern California Law School and a Bachelor of Arts from Hamilton College.
IS SOMEBODY WATCHING YOU?
EMERGING TRENDS IN THE USE OF TECHNOLOGY AND MONITORING IN THE COVID AND POST-COVID WORKPLACE

March 4, 2021

PANELISTS

Barbara Figari Cowen
Workplace Advocates
barbara@figarilaw.com

Stacey Mckee Knight, Partner,
National Co-Chair, Litigation Department
Katten
Stacey.knight@katten.com

Adam Wergeles
Executive VP and General Counsel,
Leaf Group
adam@wergeles.com
Potential Ways to Monitor Employees in Our Current Remote Working and Covid-19 Landscape

• Available technology:
  — Time-keeping apps;
  — GPS;
  — Employee tracking (wearables);
  — Computer monitoring.
Available Technology

• Wearables:
  — Bracelets, lanyards and cards for screening, contact tracing and social distancing.
  — Flash, vibrate, emit sound if social distancing breached.
  — Sensors in high traffic areas to alert management when overcrowded.
  — Some track employee whereabouts and associations.

• Apps:
  — Daily health screening prior to arriving to work.
  — Peer to peer contact tracing and vaccination tracking
Available Technology (continued)

- Devices:
  - Time tracking for out-of-office employees, such as tracking deliveries;
  - Desktop trackers that track the work the employee performs while their computer is on, such as keystroke logging and screenshot monitoring/video recording;
  - Cloud-based trackers which allow employees to sign in and log time anywhere there is internet access and supervisors can approve in the same manner.
Available Technology (continued)

• Kiosks:
  — Temperature detectors for close range and hands-free temperature taking;
  — Thermal cameras that can take temperatures from a longer range for employees and visitors.

• AI:
  — Facial recognition & location data tracking;
  — Machine learning software to assess individual employee’s working style and assign individual productivity scores.
Reasons to Use Technology

- Reasons employers may want to use these types of technology?
- Safety;
  - Maintain “zones” or Covid-protocol.
  - Contact tracing.
- Productivity;
- Performance evaluation and improvement;
- Trouble-shooting;
- Improve customer service.
Employer Perspective (continued)

• Considerations: Will the burden outweigh the harm?
  — Increased privacy obligations;
  — Issues associated with obtaining and retaining medical testing/information;
  — Record retention and associated cross-border issues;
  — How messaged:
    • What is the employer trying to accomplish and what benefits are expected?
  — Employer must develop policies and training to educate employees about how the technology will be used and any increased obligations.
Employee’s Perspective

• Employee concerns or issues that may arise from increased monitoring.
• Why employees might not like monitoring?
• New issues created by remote working and new reliance on technology:
  — Increased risk of sexual harassment issues arising with new forms of technology being routinely used?
    • Zoom and similar platforms;
    • Cocktail hours, informal meetings;
    • Instant messaging;
  — Employees are communicating via personal devices that are not typically monitored by employers.
Competing Legal Issues

• Use of technology can create conflict among current policies:
  — Privacy;
  — Employee notice and consent;
  — Obligation to record hours;
  — New supervision obligations;
  — Health and safety obligations related to contact tracing and notice of exposure;
  — Donning and Doffing requirements.
Competing Legal Issues (continued)

• Notice and consent;
  — unclear if required in all cases, but certainly best practice.
• How are hours being recorded;
  — Are meal and rest periods being taken?
  — How are schedules being set when everyone is working flexible schedules, which many employees prefer because of other obligations, such as homeschooling and caring for sick household members.
• Document retention issues;
  — If recorded/collected, then will likely need to retain and store.
• Employee’s personal devices become discoverable.
Emerging Legal Trends

• Laws implicated:
  — ADA;
  — HIPPA
  — GINA;
  — CCPA;
  — FEHA;
  — OSHA.
Non-Legal Considerations

• Employee morale;
• Productivity;
• Preparing for return to work post-Covid.
• Reasonable accommodation issues related to reluctance to return to work:
  — Concerns about safety;
  — Argument that being in the office is no longer an essential function of the job because they have worked remotely for extended periods of time and use of technology gives employers assurances that work is being completed.
  — High-risk employees require interactive process.
  — Use of technology to monitor may make it difficult for employers to insist on in-person work.
Return to Work (continued)

- Emerging litigation trends: Same causes of actions, but different iterations.
  - Sexual harassment arising from different mediums;
  - Disability claims related to returning to work:
    - Importance of being flexible and working with employees to make comfortable that workplace will be as safe as possible.
    - address employee general nervousness about returning to work unrelated to high-risk factors.
- Explore concept of setting objective thresholds for when employees will return that are not tied to individual employees.
Return to Work (continued)

• Wage and hour claim stemming from off-the-clock work and failure to take meal and rest periods, expense reimbursement for costs associated with working from home (cell phone, internet, office supplies and furniture).

• Discovery issues:
  — Employee’s personal devices subject to discovery by plaintiffs, which increases expense.
  — Employers need to develop policies about employee use of personal devices such as who pays for what, security for employer confidential and proprietary information, obligation to monitor.
• Questions.
PROPOUNDING PARTY: JANE DOE
RESPONDING PARTY: EMPLOYER ENTITY, INC.
SET NUMBER: ONE (1)
TO DEFENDANT EMPLOYER ENTITY, INC. AND ITS ATTORNEYS OF RECORD HEREIN:

Plaintiff hereby demands, pursuant to Code of Civil Procedure sections 2030.260-2030.270, that the Defendant named above, upon thirty days (30) from the service of the inspection demand, respond in writing to Plaintiff and produce each and every document which is either specifically described or reasonably particularized in a category of documents listed below and which are within Defendant's possession, custody or control. Plaintiff further demands that Defendant produce the documents, identified in response to this request for production of documents, for inspection and copying within thirty (30) days from the date of service at Workplace Advocates, 9431 Haven Avenue, Suite 100, Rancho Cucamonga, CA 91730, and electronically to barbara@theworkplaceadvocates.com.

DEFINITIONS

1. The terms “YOU”, “YOUR”, “DEFENDANT” refers to EMPLOYER ENTITY, INC., and to its representatives and attorneys, as well as any owner, officer, director, shareholder, manager, employee, managing agent, franchisee, fictitious name it uses, agent, or any individual or entity acting with actual or apparent authority of EMPLOYER ENTITY, INC.

2. The terms “DOE” and/or “PLAINTIFF” shall refer to Plaintiff Jane Doe.

3. The term “DOCUMENT” means and includes any type of “writing” (as that term is defined in Federal Rule of Evidence 1001) and includes, without limitation, all written materials such as letters, memoranda, reports, Studies, minutes, diary entries (including calendar entries indicating dates and participants to any meetings), all drafts; two writings of any kind; tapes, computer discs, CD Rom, CD-R, CD-RW, DVD, microfilm, microfiche, raster bitmaps, magnet optical (MO) disks, electronic images and associated indexing data, Write Once Read Many (WORM) laser disks; or any other form of photographically or electronically, digitally, magnetically impulsed, or otherwise recorded or represented information, image or document storage, including, but not
limited to word processor document resource information (e.g. MS Word, Corel
WordPerfect “properties” tabs) drafts and redlined versions of documents, compound
documents (e.g. documents where the image is one file and the text is in another); e-mail
and voice-mail archives; e-mail and voice-mail messages and backups; text messages,
messages sent or received using social networking websites, including but not limited to
LinkedIn, Facebook, Snapchat, TikTok, Instagram, MySpace, and Twitter databases;
postings made about Defendant on those same social networking websites; document
management databases; Internet service provider’s records, including user account
information and identification of firewalls, caches and cookies; network router traffic
indicia; world wide web pages, including HTML, XML, SGML, XGML, VRML, Adobe
Acrobat, Corel Envoy, MIF, RTF, EPS, prepress formats. Additionally, “document” or
“documents” shall include all COMMUNICATIONS (verbal, written and/or visual) sent
or received over any instant messaging and/or communication application which include,
but are not limited, to Google Chat, Slack, Telegram, WhatsApp, Hangouts, Viber,
Microsoft Teams, Signal, and/or Zoom, including any recordings of calls and/or
meetings. The term “document” or “documents” also includes all COMMUNICATIONS
sent or received on any employee’s personal computer, phone, tablet or other devices.
Additionally, “document” or “documents” shall specifically include transcripts of
testimony, depositions, or otherwise distinguished evidentiary testimony, in any recorded
form; notes or records of telephone conversations, conferences or other oral
communications and appointment records, time records, ledgers, journals, financial or
accounting records, personnel records, annual reports, trial balances, work papers,
schedules, photographs, videos, recordings, charts, graphs, transcriptions, tapes, discs,
printouts, and other electronic data processing Materials. It also includes any
COMMUNICATION and any ELECTRONICALLY STORED INFORMATION. It also
includes each copy of a DOCUMENT that is not identical in all respects with or that
contains any notation not appearing on any other copy of such DOCUMENT.

4. The term “COMMUNICATION” shall mean the giving, receiving,
transmitting or exchanging of information including, but not limited to, any and all telephone, virtual, written (including but not limited to instant messaging, chats, and/or texts) and in-person conversations by or with any person, talk, gestures, or DOCUMENTS as defined in Paragraph 4 above which memorialize or refer to any COMMUNICATIONS.

5. The terms “RELATE TO” or “RELATING TO” or “RELATES TO” mean refers or pertains to, reflects upon, is in any way logically or factually connected with, or may afford any information regarding matters discussed.

6. The terms “ELECTRONICALLY STORED INFORMATION” is defined as it is under Federal Rule 34 and comments thereto or “information that is stored in an electronic medium” with “Electronic” relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

7. The terms “COMMUNICATION” and “COMMUNICATIONS” mean, unless otherwise specified, any transfer of information, ideas, opinions or thoughts by any means at any time or place under any circumstances and is not limited to transfers between persons but includes other transfers, such as records and memoranda to file. The terms “COMMUNICATION” and “COMMUNICATIONS” include the following:

   a) Any written COMMUNICATION and/or DOCUMENT which was sent by one or more person or persons to another,

   b) Any telephone call, chat, written communication, and/or virtual or in person meetings between one or more persons and another person, whether or not such contact was by change or prearranged, formal or informal.

   c) Any conversation (whether in writing, oral, visual and/or any other method included in the definition of DOCUMENT above) or meeting between one or more persons and another person, whether or not such contact was by chance or prearranged, formal or informal.
8. If a request calls for the production of a DOCUMENT that has already been produced, it will be sufficient to describe the responsive DOCUMENT which has already been produced.

9. If, after exercising due diligence to obtain the items requested, YOU cannot or will not produce all of the DOCUMENTS requested herein, whether because of privilege or otherwise, YOUR response should include the following:
   a) A statement that YOUR production is or will be incomplete;
   b) A specification of which request or subpart thereof for which YOU will be unable or unwilling to produce; and
   c) A statement of the facts and/or grounds upon which YOU rely to support YOUR contention that YOU are not able and/or should not be compelled to produce completely.

10. If YOU or YOUR Representative asserts that any DOCUMENT required to be produced is privileged or otherwise protected from discovery, YOUR response should include the following:
   a) The place, approximate date, and manner of recording or otherwise preparing the DOCUMENT;
   b) The name and organizational position, if any, of each sender of the DOCUMENT;
   c) The name and organizational position, if any, of each recipient of the DOCUMENT;
   d) The name and organizational position, if any, of each PERSON (other than stenographic or clerical assistants) participating in the preparation of the DOCUMENT;
   e) The name and organizational position, if any, of each PERSON to whom the contents of the DOCUMENT or any portion thereof have heretofore been communicated by copy, exhibition, reading or substantial summarization;
f) A statement of the basis on which the privilege is claimed with respect to each DOCUMENT and whether or not the contents of each DOCUMENT are limited solely to legal advice or information provided for the purpose of securing legal advice;

g) The number of the demand to which the DOCUMENT is responsive; and

h) The identity and organizational position, if any, of each person supplying the author of YOUR response hereto with the information requested in subsections (a) through (h) above.

Dated: February 19, 2021

WORKPLACE ADVOCATES

By: BARBARA E. COWAN
Attorneys for Plaintiff JANE DOE
COVID-19 Employee Self-Screening Questionnaire

Screen #1:
To help prevent the spread of COVID-19 and reduce the potential risk of exposure to [ENTITY] employees, we are conducting a self-screening questionnaire. Your compliance is required to enable us to take appropriate precautionary measures to protect you and everyone in the building. You will not be allowed to access our offices if you have not completed this questionnaire.

Log-in □

Screen #2:
Log-In: Employees can log-in with prompted identifying information (e.g., name, work email, work phone number and/or employee ID#).

[If you do not have records of employees’ cell phones, you may want to have employees include this information in the log-in as well so the employer can contact them if there are any issues.]

Screen #3:
If the answer to any question that follows is “Yes”, you cannot come into work. If you have any questions, please contact [Name] at [Phone Number].

Next □

Screen #4:
1. Based on your self-administered temperature test, do you have a temperature of 100.0°F (37.8°C) or higher?*

   Yes □   No □

*If you have a medical condition that results in an average temperature of 100.0°F (37.8°C) or higher, please contact [Name] at [phone number] to address whether a reasonable accommodation is available.

Screen #5:
2. Are you experiencing one or more of the following symptoms: cough, shortness of breath or difficulty breathing, chills, fatigue, muscle or body aches, headache, sore throat, new loss of smell or taste, congestion or runny nose, nausea or vomiting, and/or diarrhea?

   Yes □   No □

Screen #6:
3. Have you traveled out of the country in the last 10 days?

   Yes □   No □
Please indicate to where you traveled.

_______________________________

Screen #7:

4. Is anyone in your household experiencing one or more symptoms of COVID-19 (i.e., fever, cough, shortness of breath or difficulty breathing, chills, fatigue, muscle or body aches, headache, sore throat, new loss of smell or taste, congestion or runny nose, nausea or vomiting, and/or diarrhea)?

Yes ☐ No ☐

Screen #8:

5. Have you been in contact with anyone that has experienced or is experiencing one or more symptoms of COVID-19 in the past 10 days?

Yes ☐ No ☐

Screen #9:

5. Have you been in contact with anyone that has tested positive for COVID-19 or has been diagnosed presumed positive for COVID-19 in the past 7 days?

Yes ☐ No ☐

Screen #10:

6. Has anyone in your household traveled to a country with a Level 3 Travel Health Notice from the CDC in the past 10 days?


Yes ☐ No ☐

[If you can include a link to travel notices in the app for employee convenience, you should do so]

Screen #11:

☐ I attest that the information provided in this questionnaire is true and correct to the best of my knowledge.

[Checking this box completes the questionnaire; the last screen is just information that appears for employee convenience]
If you answered “Yes” to any of the questions, you cannot come into work. If you have any questions, please contact [Name] at [Phone Number].
REMOTE WORKING POLICY

Because of the COVID pandemic and as a result of the federal, state and/or local stay-at-home orders, [INSERT] (the “Company”) has had to limit in-person operations and move to a remote working environment for the foreseeable future. The Company’s goal is to continue to provide high quality service and support for its employees and to clients during this period. To aid employees to ensure a successful remote working environment, the Company has instituted this Remote Working Policy.

Employment Policies Remain in Effect

Employees working from home must continue to abide by [INSERT]’s (the “Company”) Employee Handbook and all employee policies, including Anti-Discrimination and Anti-Harassment, Technology Policy, and Confidentiality Policies. Failure to follow the Company’s policies may result in discipline, up to and including termination of employment.

Employees are prohibited from engaging in unauthorized work during their remote work hours.

Timekeeping and Work Day Expectations

Nonexempt employees who are permitted to work remotely must comply with the Company’s timekeeping and payroll policies. Employees must accurately record all working time, including any time spent off the computer related to work.

During this period while you are working remotely, please remember that the Company is still expected to meet client and productivity needs and expectations. Accordingly, you are generally expected to work a full day to complete necessary work and assignments, as if you were working in the office. It is expected that you will be available for any calls or virtual meetings that may be scheduled throughout the workday as well as to promptly respond to work-related inquiries. Do your best to ensure that your phone calls have a clear connection and be mindful of cell-phone challenges. It is recommended that you work in a quiet place with minimal background noise. You should avoid multi-tasking on conference calls.

We understand that due to various school closures, many of you have to address child care issues during the day. To the extent you are having any trouble with, or any concerns about, timely responding to clients or timely delivering work product, please communicate with your supervisor or office administrator so that these issues can be addressed.

Security

During this period, you are also expected to conform to privacy/cybersecurity best practices. You should take precautions to maintain company and client confidentiality information. You should be using a secure workspace. Accordingly, work in a public space, such as a coffee shop or other public space, is discouraged. You should also ensure that you are appropriately disposing of any documents that may contain company or client information, as you would in the office. You are expected to abide by the Company’s data security policies.

You agree to use secure remote access procedures.

You agree to maintain confidentiality by using passwords, locked file cabinets, and maintaining regular anti-virus protection and computer backup. You will not download company confidential information or trade secrets onto a non-secure device.
You agree not to share your password with anyone outside of the Company. No employee shall share user names, pass codes, or passwords with any other person. An employee shall immediately inform the IT Department if he or she knows or suspects that any user name, pass code, or password has been improperly shared or used, or that IT security has been violated in any way. Moreover, if you experience any technical difficulties while working remotely, please contact the IT department and/or your office administrator immediately so they can be addressed.

**Confidentiality and Proprietary Rights**

The Company’s confidential information and intellectual property (including trade secrets) are extremely valuable to the Company. Treat them accordingly and do not jeopardize them through your business or personal use of electronic communications systems, including email, text messaging, internet access, social media, and telephone conversations and voice mail while working remotely. Disclosure of the company’s confidential information to anyone of the Company and use of the company’s intellectual property is subject to the Company’s Confidentiality and Proprietary Rights Policy.

You should also be mindful of any other individuals and/or family members in your work space and proceed with work obligations so as not to inadvertently disclose any confidential or proprietary information.

Ask your manager if you are unsure whether to disclose confidential information to particular individuals or how to safeguard the company's proprietary rights.

Do not use the Company’s name, brand names, logos, taglines, slogans, or other trademarks without written permission from the Company’s Legal Department.

This policy also prohibits use of the Company's IT resources and communications systems in any manner that would infringe on or violate the proprietary rights of third parties. Electronic communications systems provide easy access to vast amounts of information, including material that is protected by copyright, trademark, patent, and/or trade secret law. You should not knowingly use or distribute any such material downloaded from the internet or received by email without the prior written permission of the Company’s Legal Department.
**Equipment and Technology Support**

The Company has been and will continue to provide the following equipment to employees as needed to carry out their work duties remotely:

- Computer/laptop.
- Cellphone/teleconferencing equipment.
- Printer/scanner.
- Anti-virus software.
- Office supplies such as paper or printer cartridges.

Any equipment supplied by the Company is to be used solely by you and for business purposes only.

The Company will be responsible for repairing any company-issued equipment. However, you are responsible for any intentional damage.

You must return all of the Company’s equipment when the telecommuting arrangement ends.

The Company’s IT department is available to assist employees who are working remotely. Additionally, you agree that your access and connection to the Company’s network(s) may be monitored for any reason, including to record dates, times, and duration of access.

**Expenses**

**At-Home Orders**

To enhance the Company’s remote work program, the Company also provides employees with an option to purchase office supplies directly. Remote employees will have the opportunity to order select supplies directly from [INSERT] and have them shipped to their home address [VIA INSERT].

The list of approved supplies for direct purchase is as follows:

- Binder clips
- Document flags
- Highlighters
- Legal pads
- Manilla folders
- Mouse pads
- Paper clips
- Pens/pencils
- Post-Its
- Print cartridges
- Printer paper
- Redwelds
- Stapler/staples

Once your order has been placed, it must be approved by [INSERT]. Please note that these orders are charged directly to the Company’s master account at [INSERT]; no reimbursement required.
If you require any other supplies or additional equipment in order to perform your remote work duties except as stated herein, please contact [INSERT] at [INSERT]. You are responsible for advising [INSERT] of any additional supplies or equipment you need prior to incurring any expenses.

Reimbursement Policy

Except as stated herein, employees must continue to abide by the Company’s expense reimbursement policy. Any business expense requires appropriate receipts demonstrating the amount spent and will need to accompany the business expense form to be submitted within 30 days after the expense was incurred.

Employees must obtain prior approval as specific in the Company’s expense reimbursement policy. If it was impossible to obtain prior approval, the employee must contact his or her manager immediately to obtain reimbursement approval.

Employees are expected to exercise restraint and good judgment when incurring expenses. Employees should contact their manager in advance if they have any question about whether an expense will be reimbursed.

Smartphone and Internet

The Company will provide you with a monthly stipend of $[INSERT REASONABLE PERCENTAGE/AMOUNT] for the utilization of your smartphone or tablet for work-related purposes. The Company will also provide employees with a monthly stipend of $[INSERT REASONABLE PERCENTAGE/AMOUNT] for your home internet plan when you are required to work from home and/or required to use your home internet for work-related purposes.

Stipends for smartphones and tablets will be for one device only. Stipends will be processed on a weekly basis through payroll.

No paperwork is required for these stipends. The Company will automatically reimburse you when you begin working (for the smartphone/tablet stipend) and/or when you are required to begin working from home (for the home internet stipend).

If you obtain or currently have a device and/or internet plan that exceeds the stated monthly stipend amounts, the Company will not be liable for the cost difference.

International and data plans and roaming charges are not included in this program. Ownership of any device and service thereof are your sole responsibility. The Company will not reimburse the activation fee associated with any device nor the costs associated with the loss or damage of any device.

You are required to comply with the Company’s policies when using any device for work-related purposes, including all anti-discrimination, harassment and retaliation; privacy; and confidentiality policies, as if you were at work and/or using a Company-issued computer.

Administration of the Policy

If you have any questions regarding this policy or if you have questions about expenses that are not addressed in this policy, please contact [INSERT] at [INSERT].
This policy is not intended to restrict communications or actions protected or required by state or federal law.
Acknowledgment of Receipt

I, ________________________ (employee name), acknowledge that on ________________________ (date), I received and read a copy of [INSERT]’s Remote Working Policy, dated [INSERT], 20[INSERT], and understand that it is my responsibility to be familiar with and abide by its terms. This policy is not promissory and does not set terms or conditions of employment or create an employment contract.

________________________________________
Signature

________________________________________
Printed Name

________________________________________
Date
COVID-19 Testing Consent Form

I understand that, in order to safeguard employee well-being, [EMPLOYER] requires all employees who are physically present in [EMPLOYER]’s offices to be tested for COVID-19, and that [EMPLOYER] may require employees to be tested multiple times. The tests shall include:

- a test that will be performed by a laboratory, [INSERT LAB], and is intended for the detection of SARS-Cov-2 (COVID-19) by reverse transcriptase real-time PCR using an appropriate collection method which may include nasopharyngeal swabs, sputum samples, bronchial alveolar lavages, or an anterior nares collection (“Live Virus Test”).

I authorize [EMPLOYER] as follows:

I authorize [EMPLOYER] to obtain samples from me as needed or to arrange for my arrival to a laboratory to collect samples from me for the Live Virus Test including sputum (saliva) samples and blood samples; and

I authorize [EMPLOYER] to send my samples in connection with the Live Virus Test to or have my samples collected from me directly by [INSERT LAB] and for [INSERT LAB] to conduct the Live Virus Test on my samples; and

I authorize [INSERT LAB] to release my Live Virus Test results or other related information to limited designated personnel at [EMPLOYER]; and

I authorize [INSERT LAB] to release the results of the Live Virus Test to me (whether negative or positive), and if the results of the Live Virus Test are positive, to share those test results with [EMPLOYER] or designated personnel only on a “need-to-know” basis, including to my direct manager.

I authorize [EMPLOYER] to release any negative results of the Live Virus Test to me via my designated [EMPLOYER] email address [or my preferred email address provided below] or any other designated means.

I acknowledge that these authorizations are in place only for the specific test outlined above and required by [EMPLOYER] until and unless I explicitly withdraw them in writing. I further acknowledge that I have read, understand, agree, certify, and/or authorize the information above. I acknowledge that I have a right to receive a copy of this executed form.

________________________   _________________________   __________________________
Print Name                                               Department                                                Position

__________________________   __________________
Signature     Date
41st Annual
Labor & Employment Law
Symposium

Session 3, Panel 1:

An Interview with the
California Secretary of Labor

Julie A. Su, California Secretary of Labor
Comelia Dai, Hadsell Stomer Renick & Dai LLP
(Interviewer)
Julie Su
Secretary

Julie Su, appointed by Governor Gavin Newsom, is the Secretary for the California Labor and Workforce Development Agency (LWDA). The LWDA enforces workplace laws, combats wage theft, ensures health and safety on the job, connects Californians to quality jobs and career pathways, and administers unemployment insurance, workers compensation and paid family leave. LWDA oversees seven major departments, boards, and panels that serve California workers and businesses by improving access to training, promoting high road jobs, eliminating barriers to employment, and creating a level playing field for employers.

Su is a nationally recognized expert on workers’ rights and civil rights who has dedicated her distinguished legal career to advancing justice on behalf of poor and disenfranchised communities and is a past recipient of a MacArthur Foundation “genius” grant.

As California Labor Commissioner from 2011 through 2018, Su enforced the State’s labor laws to ensure a fair and just workplace for both employees and employers. A report on her tenure released in May 2013 found that her leadership has resulted in a renaissance in enforcement activity and record-setting results. In 2014, she launched the first “Wage Theft Is a Crime” multimedia, multilingual statewide campaign to reach out to low-wage workers and their employers to help them understand their rights and feel safe speaking up about labor law abuses.

Prior to her appointment as California Labor Commissioner, Su was the Litigation Director at Asian Americans Advancing Justice-Los Angeles, the nation’s largest non-profit civil rights organization devoted to issues affecting the Asian American community. Su is known for pioneering a multi-strategy approach that combines successful impact litigation with multiracial organizing, community education, policy reform, coalition building, and media work.

Frequently named to top-lawyer lists such as the Daily Journal’s “Top 75 Women Litigators” in California and California Lawyer’s “Super Lawyers,” she was the first Labor Commissioner to be included among the Daily Journal’s “Top 75 Labor and Employment Lawyers.” She has also been named one of the 50 most noteworthy women alumni of Harvard Law School and one of the 100 most influential people in Los Angeles in Los Angeles Magazine.

Su has taught at UCLA Law School and Northeastern Law School. She is a graduate of Stanford University and Harvard Law School and began her career with a Skadden Fellowship. Su speaks Mandarin and Spanish.
Cornelia Dai is a partner at Hadsell Stormer Renick & Dai LLP, a private plaintiff-side law firm in Southern California. She specializes in employment, wage and hour, and civil rights law, with a focus on class actions and complex litigation. Ms. Dai has successfully litigated a wide range of matters on behalf of workers, involving wage and hour violations, workplace harassment and discrimination, whistleblowing/retribution, and wrongful termination. Notable cases include *Wang v. Chinese Daily News*, a class action involving violations of overtime and meal and rest break laws by a Chinese-language newspaper company. There, she and her co-counsel obtained a judgment of more than $5.1 million in one of the first class actions to go to trial before a jury in California.

Ms. Dai has been named to the Southern California Super Lawyers® list as a Rising Star or Super Lawyer each year since 2005, and she has been listed in Best Lawyers in America every year since 2012. In 2017 and 2019, she was selected as a Lawyer of the Year in Southern California by Best Lawyers for Litigation - Labor and Employment (Pasadena). In 2018, she was selected as a Lawyer of the Year in Southern California by Best Lawyers for Employment Law – Individuals (Pasadena).

In addition, Ms. Dai oversees the Employment Rights Clinic at Loyola Law School, a joint retaliation complaint investigation program with the State of California Labor Commissioner’s Office.

She serves on the Board of the California Employment Lawyers Association, the Executive Committee of the Los Angeles County Bar Association’s Labor and Employment Law Section, the Board of the Impact Fund, and the Board of the Foundation for Advocacy, Inclusion and Resources.

She is a graduate of UC Berkeley, and she received her law degree from USC Gould School of Law.
California Workforce Development Board High Road Framework

Equity
Building economic opportunity and mobility for those who have been marginalized, disadvantaged, and/or denied opportunity.

Climate
Mitigating and supporting adaptation to climate change; increasing environmental sustainability; building community and economic resilience.

Jobs
Engaging with the state’s high road employers to increase quality jobs and design skills answers to their shared needs.

The ECJ initiatives work where these three come together. Opportunity and mobility, a stronger economy for high road employers, a more sustainable and resilient environment and community.
Equity, Job Quality for Workers

On the supply side of the labor market are workers.

The ECJ approach prioritizes supply side work that focuses explicitly on creating greater equity for the people of California. The economy generates inequality on multiple axes – race, gender, ethnicity, and ability, to name just a few. The California Workforce Development Board supports and invests in partnerships that help workers who have been disadvantaged close the gap. Equity means systematically generating greater opportunity for those who have been too long excluded. What does equity look like? Systems and organizations that support under-served or justice-involved or low-income Californians with training and mentoring to secure family supporting jobs; pre-apprenticeship or contextualized training that reaches out to immigrants and supports learning English alongside vocational skills; training and education programs for incumbent workers at the entry level to move to more skilled positions, and much more.

Skills for High Road Employers

On the demand side of the labor market are employers.

The ECJ approach prioritizes demand side work that focuses explicitly on high road employers in the state. High road employers pay family supporting wages, compete based on the quality of their services and products, and engage workers and their representatives in the project of building skills and competitiveness. In this, we
consistently seek to engage industry leaders — employers and, wherever possible, unions — in the project of developing skill solutions to shared industry problems. Our work selectively and strategically supports the state’s leading industries by building the skills of the existing workforce and bringing new workers to the sector. The most successful workforce strategies start here, with the jobs; training delivers equity only insofar as it is an answer to documented industry demand, and connected to quality jobs.

**Supply and Demand Come Together**

*Our work is focused on both the supply and demand sides of the labor market.*

And the simultaneous focus further refines our approach. On the supply (workers) side, we are focused on equity — on partnerships that generate greater access, wages, and mobility for excluded or disadvantaged workers. On the demand (employers) side, we are focused on high road employers with good jobs. The sweet spot? Where projects simultaneously build equity in the state by working with high road employers. This is the portal to shared prosperity.

The ECJ approach supports workforce practice in general — and training partnerships in particular — that delivers equity on the high road by building the skills of workers to respond to needs identified by industry leaders.

**Resilient Communities & Environmental Sustainability**

Cutting across labor market supply and demand is the challenge of climate change.

The planet’s climate crisis is real and growing, with serious implications for the state’s economy, and profound impacts borne most heavily by its low-income communities. ECJ projects build climate and economic resilience through systems and partnerships that a) address the critical skill issues emerging as every industry faces challenges of climate change and environmental sustainability; b) increase the capacity of firms and workers to adapt and compete in a carbon-constrained economy; and c) help California communities prosper by creating accessible local pathways into safer, healthier, and more highly skilled jobs. Outside of its own initiatives, the State Board works to ensure
that California’s groundbreaking climate investments align with its labor and workforce agenda, prioritizing quality job creation and promoting equity in access and training. This unites California’s climate and workforce agendas in service to an ambitious economic vision: shared, sustainable prosperity.

One way to do this is through sector strategies. The Board’s Model High Road Training Partnerships (HRTP) demonstrate eight versions of the sector approach championed by the State Board — industry partnerships that deliver equity, sustainability, and job quality. The work is premised on the idea that we can’t deliver equity without paying attention to job quality, that we can’t build economically resilient communities without paying attention to environmental concerns, and that to effectively calibrate supply and demand in the labor market, we must always start, in principle, with the jobs. Each partnership looks different on the ground, but all are convened by intermediaries that engage both employer and worker representatives.
CA High Road Training Partnerships

Building Skills Partnerships (BSP) – Green Jobs, Good Jobs Project
BSP convenes industry leaders — including SEIU-United Service Workers West, the Building Owners and Managers Association of Los Angeles, the National Green Building Council, and California’s leading janitorial service companies — to standardize the credentials, training, and professionalized career paths for property service workers. Spanning the state of California, the Green Janitor Program will increase upward mobility for hundreds of immigrant workers with limited English proficiency. Workers gain marketable skills, contextualized English language learning, decent work, and professional advancement; Commercial building owners and property management companies gain the skilled workforce necessary to meet the energy and water efficiency goals of high-performance buildings.

Shirley Ware Education Center (SWEC) – Multi-Occupation Pre-Apprenticeship
Working with Kaiser Permanente, Dignity and Alameda Health Systems, and SEIU United Healthcare Workers West, SWEC will design and implement a multi-employer, multi-occupation pre-apprenticeship that prepares lower-skilled workers to advance into any number of rapidly evolving, higher-skilled jobs. The project provides critical workforce upskilling and diversification for healthcare providers. More importantly, it builds an industry-wide infrastructure through which entry-level health care workers — the majority of whom are members of disadvantaged communities — will obtain the key common skills necessary to advance in any health career: English proficiency; digital fluency; math, reading, and presentation skills. The pre-apprenticeship will also include an industry-recognized green-skills credential designed to meet the waste, water, and energy efficiency goals established as competitive benchmarks by California’s major health systems.

Worker Education and Resource Center (WERC) – La County Frontline Healthcare Workforce Training Institute
WERC, bringing together a host of LA county health services and SEIU, along with Los Angeles Trade Technical College, will create a critical new Institute focused on jobs essential to improving health care in marginalized communities: health navigator, case manager, care coordinator, and community health worker. The Institute includes a pre-employment preparation program that connects community residents — representatives who have lived experience with poverty, homelessness, incarceration, mental illness, addiction, and ethnic/racial discrimination — to high quality jobs. Providing ongoing
training, support, and advocacy around environmental challenges that impact community health, the WERC Institute will recruit and develop the culturally competent workforce demanded by high-road employers following the expansion of covered communities under the ACA.

**California Labor Federation & Balancepoint Strategies – California Transit Works!**

California Transit Works! builds on the impressive Santa Clara Valley Transportation Authority (VTA) apprenticeship lattice to establish the state’s transit training infrastructure. Beyond developing a new light rail apprenticeship, California Transit Works! has two key goals: 1) institutionalize a coherent model training partnership; and 2) incubate similar partnerships across Northern California. Exporting its emphasis on job quality — through expertise, professionalism, and path-breaking peer mentoring — the project aims to train a new generation of workers to replace an aging workforce and run California’s clean energy buses and trains. As an employer and as a service provider, public transit is an industry essential to meeting the state’s broader job growth, housing, and climate equity needs.

**Hospitality Training Academy – The High Road to Hospitality**

California’s nationally-recognized Hospitality Training Academy (HTA) — already itself a model high-road training partnership — creates critical pathways for underserved workers to advance in quality careers with good wages and benefits. This is an industry where water and electricity efficiencies matter, as well as safe handling of chemicals and cleaning materials. Key innovations at HTA include a “Roll-Call” system for under-employed room attendants. This novel dispatch structure creates stable, family-supporting employment for workers with intermittent and unpredictable hours. HTA will also work to better connect AJCCs and one of the region’s best industries for the advancement and self-sufficiency of low-income job seekers. Partnering with Unite Here and 160 signatory employers, the LA City board, and numerous CBOs, HTA deploy an intensive English immersion program with contextualized language learning, a critical service to help immigrants enter and advance in this prosperous, customer-centered industry.

**Port of Los Angeles – Workforce Training Center**

The Port of Los Angeles is launching a new labor-management partnership focused on upskilling incumbent workers, professionalizing casual labor, and, eventually, designing local pathways into quality jobs. As California’s freight sector moves toward a zero-emissions future, the Port will rely on human capital — skills and efficiency — to maintain its position in a fiercely competitive global industry. To do so, the Port brings to the table key partners: The International Longshore and Warehouse Union (ILWU), the Pacific Maritime Association (PMA), the City of Los Angeles Economic Workforce Development Department (EWDD), and the Office of the Mayor. The project will convene the partnership and, working with the local community college district, design a new workforce training center at the Port.
West Oakland Job Resource Center – Transportation, Distribution & Logistics Apprenticeship
The West Oakland Job Resource Center, working with the Northern California Teamsters Apprentice Training and Education Trust Fund, is launching an industry training partnership designing its apprenticeship pipeline, and establishing an alternative staffing organization (ASO) to help under-represented and low-income individuals secure decent commercial transportation jobs. An ASO is a socially responsible temporary placement agency that can respond to the contingent hiring needs of TDL employers, while improving the quality and professionalization of TDL jobs. Because freight movement is a critical environmental concern in West Oakland, the project will need to work with environmental justice partners to address local concerns about greenhouse gas and particulate emissions.

Jewish Vocational and Career Counseling Service (JCS) – Water Utilities Career Pathway Project
Jewish Vocational and Career Counseling Service (JVS), in partnership with Baywork, a 29-member consortium of Bay Area water and wastewater utilities, is designing a nationally significant Training Partnership for the water sector. Responding to credible estimates that nearly half of the Bay Area’s water utility workforce is eligible to retire in the next five years, JVS has begun to identify pathways into the sector’s mission-critical occupations. To address both the anticipated labor shortage in a critical green industry, and the ruinous economic inequality of the Bay Area economy, the Baywork HRTP will build a regional outreach, recruitment, referral, training and support infrastructure that connects disadvantaged Californians to high quality jobs in the water sector.

Acknowledgements
The concepts central to high road workforce development have been forged across decades by many thinkers, practitioners, and policy makers. The HRTP builds on the best experience and thinking in California and across the nation. In developing the HRTP vision — and sharing its more broadly applicable approach, as outlined in these briefs — CWDB partnered with COWS, a research center at the University of Wisconsin Madison and national leader in high road policy and practice. We gratefully acknowledge the contributions of COWS principles Joel Rogers and Laura Dresser; many of the ideas in these briefs, developed in partnership with Sarah L White, draw directly from their work.
Target Populations

- **Youth who are disconnected from the education system or employment**: an individual between the ages of 18 and 24 who are neither working nor in school.

- **Women seeking training or education to move into nontraditional fields of employment**: any occupations where women make up 25 percent or less of the workers.

- **Displaced workers and long-term unemployed**: Displaced worker - participant received services under WIOA sec. 133(b)(2)(B) as a person who— (A)(i) has been terminated or laid off, or who has received a notice of termination or layoff, from employment; (ii)(I) is eligible for or has exhausted entitlement to unemployment compensation; or (ii) has been employed for a duration sufficient to demonstrate, to the appropriate entity at a one-stop center referred to in section 121(e), attachment to the workforce, but is not eligible for unemployment compensation due to insufficient earnings or having performed services for an employer that were not covered under a State unemployment compensation law; and (iii) is unlikely to return to a previous industry or occupation; (B)(i) has been terminated or laid off, or has received a notice of termination or layoff, from employment as a result of any permanent closure of, or any substantial layoff at, a plant, facility, or enterprise; (ii) is employed at a facility at which the employer has made a general announcement that such facility will close within 180 days; or (iii) for purposes of eligibility to receive services other than training services described in WIOA sec. 134(c)(3), career services described in WIOA sec. 134(c)(2)(A)(xii), or supportive services, is employed at a facility

---

1 This is the “Local Formula”. The “Statewide formula” = participant received services under WIOA sec. 133(a). The “Local AND Statewide formula” = participant received under WIOA secs. 133(b)(2)(B) and 133(a). WIOA Participant Individual Record Layout (PIRL).
at which the employer has made a general announcement that such facility will close; (C) was self-employed (including employment as a farmer, a rancher, or a fisherman) but is unemployed as a result of general economic conditions in the community in which the participant resides or because of natural disasters; (D) is a displaced homemaker; or (E)(i) is the spouse of a member of the Armed Forces on active duty (as defined in 10 U.S.C. section 101(d)(1) of title 10 of the United States Code), and who has experienced a loss of employment as a direct result of relocation to accommodate a permanent change in duty station of such member; or (ii) is the spouse of a member of the Armed Forces on active duty and who meets the criteria described in WIOA sec. 3(16)(B).

*Long term unemployed* - participant, at program entry, has been unemployed for 27 or more consecutive weeks.

- **Unskilled or under-skilled, low-wage workers**
- **Persons for whom English is not their primary language**
- **Economically disadvantaged persons:**
  Determined by the system CalJOBS, based on the public assistance and barriers questions. If the system is unable to determine low income then it is entered in the WIOA application, Household and Income, and Income Information. Low income will be based on family size and income, both are required entries.
- **CalWORKs participants**
- **Persons who are incarcerated and soon to be released or formerly incarcerated**
- **Armed services veterans**
- **Native Americans**
- **Migrants or seasonal farmworkers:**
  *Migrant farmworkers* - participant, at program entry, is a seasonal farmworker and whose agricultural labor requires travel to a job site such that the farmworker is unable to return to a permanent place of residence within the same day.

  *Seasonal farmworkers* - participant, at program entry, is a low-income individual (i) who for the 12 consecutive months out of the 24 months prior to application for the program involved, has been primarily employed
in agriculture or fish farming labor that is characterized by chronic unemployment or underemployment; and (ii) faces multiple barriers to economic self-sufficiency.

• **Persons with developmental or other disabilities**

• **Any other population with barriers to employment identified in subdivision (j) of section 14005 of the Unemployment Insurance Code –**
  
a) Displaced homemakers.
  
b) Indian, Alaska Natives, and Native Hawaiians, as those terms are defined in title 29 United States Code section 3221.
  
c) Homeless individuals, as defined in title 42 United States Code section 14043e-2(6), or homeless children and youths, as defined in section 11434a(2) of title 42 of the United States Code.
  
d) Youth who are in, or have aged out of, the foster care system.
  
e) Individuals within two years of exhausting lifetime eligibility under part A of title IV of the Social Security Act (42 U.S.C. § 601 et seq.).
  
f) Single parents, including single, pregnant women.
  
g) Transgender and gender nonconforming individuals.
  
h) Any other groups as the Governor determines to have barriers to employment.

• **Immigrants:**
  
  Determined by combining two already captured items, English Language Learner and cultural barriers in the CalJOBS system.

• **Persons over 50 years of age who need retaining for in-demand skills**
Cal/OSHA COVID-19 Emergency Temporary Standards –
What Employers Need to Know
December 18, 2020

California approved emergency temporary Cal/OSHA standards on COVID-19 infection prevention on November 30, 2020. These new temporary standards apply to most workers in California not covered by Cal/OSHA’s Aerosol Transmissible Diseases standard.

Requirements for employers covered by the COVID-19 Prevention standard

- Establish, implement, and maintain an effective written COVID-19 Prevention Program that includes:
  - Identifying and evaluating employee exposures to COVID-19 health hazards.
  - Implementing effective policies and procedures to correct unsafe and unhealthy conditions (such as safe physical distancing, modifying the workplace and staggering work schedules).
  - Providing and ensuring workers wear face coverings to prevent exposure in the workplace.
- Provide effective training and instruction to employees on how COVID-19 is spread, infection prevention techniques, and information regarding COVID-19-related benefits that affected employees may be entitled to under applicable federal, state, or local laws.

Cal/OSHA has developed a COVID-19 Model Prevention Program to assist employers with developing their own written program

When there are multiple COVID-19 infections and COVID-19 outbreaks

Employers must follow the requirements for testing and notifying public health departments of workplace outbreaks (three or more cases in a workplace in a 14-day period) and major outbreaks (20 or more cases within a 30-day period).

- **COVID-19 testing for employees who might have been exposed**
  Requires employers to offer COVID-19 testing at no cost to their employees during their working hours who had potential COVID-19 exposure in the workplace and provide them with the information on benefits.

- **Notification requirements to the local health department**
  A new requirement that obligates employers to contact the local health department immediately but no longer than 48 hours after learning of three or more COVID-19 cases to obtain guidance on preventing the further spread of COVID-19 within their workplace.

Recordkeeping and reporting COVID-19 cases

Employers must maintain a record of and track all COVID-19 cases, while ensuring medical information remains confidential. These records must be made available to employees, authorized employee representatives, or as otherwise required by law, with personal identifying information removed. When a COVID-19-related serious illness (e.g., COVID-19 illness requiring inpatient hospitalization) or death occurs, the employer must report this immediately to the nearest Cal/OSHA enforcement district office.

This guidance document is an overview. For the full requirements, see title 8 sections 3205, 3205.1, 3205.2, 3205.3, 3205.4

For assistance with developing a COVID-19 Prevention Program, employers may contact Cal/OSHA Consultation Services at 1-800-963-9424 or at InfoCons@dir.ca.gov
For Consultation information, publications, access the following link or copy the site address: DOSHConsultation www.dir.ca.gov/dosh/consultation.html
41st Annual
Labor & Employment Law
Symposium

Session 3, Panel 2:

California Wage & Hour Update:
A Look Back, a Look Ahead,
and a Little COVID-19

Nina Huerta, Los Angeles Office, Locke Lord LLP
Kelly Knight, Judicate West (Moderator)
Jennifer Kramer, Hennig Kramer Ruiz & Singh
Nina Huerta

Partner

Los Angeles
213-687-6707
nhuerta@lockelord.com

Nina Huerta serves as Co-Chair of the Firm’s Board of Directors and is Managing Partner of the Firm’s Los Angeles office where she focuses on defending companies in complex and class action litigation, typically involving labor and employment claims. She has defended employers in litigation involving:

• Wage and hour claims brought under the Fair Labor Standards Act
• The California Labor Code and the Industrial Welfare Commission (“IWC”) Wage Orders
• Alleged worker misclassification
• Claims of discrimination and harassment
• Alleged violations of family and medical leave laws

In addition, Nina assists companies with employment due diligence and proactive risk management in relation to mergers and acquisitions. Finally, she provides counseling and advice to employers on a number of issues, including hiring and discipline, wage and hour compliance and leave policies and procedures.

Nina also has represented mortgage lenders, servicers and other financial institutions in defending against individual and class action claims for violations of various state and federal laws governing lending and servicing of residential mortgage loans.

Nina is well versed in the numerous issues stemming from the COVID-19 outbreak, such as the Families First Coronavirus Response Act (FFCRA), Coronavirus Aid, Relief, and Economic Security Act (CARES Act), stay-at-home and related orders, and all of their impacts on employers, employees and independent contractors, including critical infrastructure and essential services determinations, paid and unpaid leave, layoffs, pay reductions, reduced hours, furloughs, downsizings, expanded unemployment, and their interaction with numerous local, state and federal laws and regulations. Many of these issues have significant interactions with employee benefits, tax, Small Business Administration, and other issues, where we collaborate closely with our colleagues experienced in those practice areas.

REPRESENTATIVE EXPERIENCE

Nina’s experience includes:

• Represented insurance company against claims of race discrimination under Title VII, and obtained summary judgment dismissal
Represented insurance company in a case brought by a former independent contractor alleging misclassification and age discrimination, and obtained summary judgment.

Represented insurance company in a case brought by a former independent contractor alleging misclassification, age discrimination and unpaid wages. Plaintiff sought over $8 million in compensatory damages and punitive damages. After a 7-week jury trial involving approximately 30 witnesses, the Locke Lord trial team obtained a defense verdict.

Represented insurance company in a case brought by a former independent contractor for fraud and other claims. Obtained a defense verdict after a one-week jury trial.

Represented energy company against claims by former employee for wrongful termination and breach of contract, and obtained summary judgment dismissal on all claims.

Defense of a long-term nursing care facility against claims of sex and pregnancy discrimination, and obtained a defense verdict at arbitration.

Represented energy company in defense of a suit involving enforcement of restrictive covenants.

Defense of a financial institution against an employee’s claims of employment discrimination, failure to provide reasonable accommodation and violation of wage and hour laws.

Represented entertainment industry client in Labor Commissioner proceedings brought by executives for unpaid wages, and obtained a defense judgment on all claims.

Represented financial institution in residential mortgage claim brought by homeowner, and obtained judgment on all claims.


Los Angeles County Bar Association, Labor and Employment Section.

Latina Lawyers Bar Association, Member.

National Employment Law Council, Speaker and Member.

Just the Beginning, Los Angeles SLI Steering Committee.

COURT ADMISSIONS

U.S. District Court for the Southern District of California.

U.S. District Court for the Northern District of California.

U.S. District Court for the Central District of California.


U.S. District Court for the Eastern District of California.

PUBLICATIONS AND PRESENTATIONS


PROFESSIONAL AFFILIATIONS

President and Trustee, Mexican American Bar Foundation (MABF).


Los Angeles County Bar Association, Labor and Employment Section.

Latina Lawyers Bar Association, Member.

National Employment Law Council, Speaker and Member.

Just the Beginning, Los Angeles SLI Steering Committee.

COURT ADMISSIONS

U.S. District Court for the Southern District of California.

U.S. District Court for the Northern District of California.

U.S. District Court for the Central District of California.


U.S. District Court for the Eastern District of California.

PUBLICATIONS AND PRESENTATIONS

Locke Lord QuickStudy: UPDATE: Cal-WARN Act Obligations Amended Per Governor’s Executive Order, April 27, 2020.

Locke Lord QuickStudy: San Jose and San Francisco Pass COVID-19 Supplemental Paid Sick Leave Ordinances, April 21, 2020.


What Massachusetts Employers Need to Know About California Employment Law, March 9, 2016.

Use of Technology and Innovations in Wage and Hour Class and Collective Action Litigation, September 8, 2016.

Employment and Severance Agreements at Home and Abroad - Part 2: Employment Agreements (Two Part Series), December 7, 2016.

Restrictive Covenants at Home and Abroad, April 6, 2016.

Global Due Diligence for Employment Lawyers during Mergers and Acquisitions, April 22, 2016.

PROFESSIONAL AFFILIATIONS

President and Trustee, Mexican American Bar Foundation (MABF).


Los Angeles County Bar Association, Labor and Employment Section.

Latina Lawyers Bar Association, Member.

National Employment Law Council, Speaker and Member.

Just the Beginning, Los Angeles SLI Steering Committee.

COURT ADMISSIONS

U.S. District Court for the Southern District of California.

U.S. District Court for the Northern District of California.

U.S. District Court for the Central District of California.


U.S. District Court for the Eastern District of California.

PUBLICATIONS AND PRESENTATIONS

Locke Lord QuickStudy: UPDATE: Cal-WARN Act Obligations Amended Per Governor’s Executive Order, April 27, 2020.

Locke Lord QuickStudy: San Jose and San Francisco Pass COVID-19 Supplemental Paid Sick Leave Ordinances, April 21, 2020.


What Massachusetts Employers Need to Know About California Employment Law, March 9, 2016.

Use of Technology and Innovations in Wage and Hour Class and Collective Action Litigation, September 8, 2016.

Employment and Severance Agreements at Home and Abroad - Part 2: Employment Agreements (Two Part Series), December 7, 2016.

Restrictive Covenants at Home and Abroad, April 6, 2016.

Global Due Diligence for Employment Lawyers during Mergers and Acquisitions, April 22, 2016.
Kelly A. Knight has in-depth experience in matters involving employment law, including wrongful termination, discrimination, harassment, wage-and-hour, class actions, and Private Attorney General Act (PAGA) claims; all types of personal injury; professional malpractice; and business/contractual matters. He started his litigation career in a high-profile law firm representing both plaintiffs and defendants in complex business and employment matters. Kelly also gained valuable insights as a claims professional for a national carrier.

While in private practice, he successfully resolved a high-profile, complex dispute after he was sought out by community leaders to mediate based on his proven people skills and legal acumen. This kindled his passion for mediation, and he went on to join the L.A. Superior Court PI CRASH program and U.S. District court mediation panel and began privately mediating matters, gaining invaluable experience and continuing to fuel his growing enthusiasm for resolving disputes as a neutral. With an expanding record for success and growing reputation, Kelly decided to make the transition to full-time mediator.

Heralded for his quick study habits and calm demeanor, Kelly has a knack for mastering cutting-edge legal issues and utilizing a multitude of strategies and approaches to help bring closure for all parties. One attorney commented, "I've never seen a mediator as well-prepared as Kelly. He conducted a pre-mediation call and knew the facts (and the law) like the back of his hand. He arrived at the mediation with a multi-page outline, which included his own research, and that included both sides' strengths, weaknesses and pressure points. Kelly effectively used those pressure points on both sides all day long and was aggressive and tenacious."

This neutral is available only for cases involving Mediation.

Legal Career & Prior Experience

- Full-time Mediator at Judicate West (2018-Present)
- MSC Settlement Officer, L.A. County Superior Court CRASH Settlement Program (2017-Present)
- Panel Mediator, U.S. District Court, Central District of California (2018-Present)
- Sole Practitioner, Law Offices of Kelly A. Knight, practicing employment, personal injury, medical malpractice, business litigation, class action, and more (2009-2014; 2016-2018)
- Shareholder/Partner, The deRubertis Law Firm, APC, practicing complex employment, personal injury, class action, and more (2014-2016)
- Litigation Associate, Miller Barondess, LLP, practicing complex business litigation (2006-2009)

Education & Professional Affiliations

- J.D., University of Southern California (2006)
- Pepperdine's Straus Institute for Dispute Resolution, Mediating the Litigated Case (2018)
- Member, Southern California Mediation Association
- Member, Los Angeles County Bar Association, Labor & Employment Section (Current)
- Member, Korean American Bar Association of Southern California (2004-Current), Board of Governors (2006-2014)
- Member, Japanese American Bar Association

ADR Experience & Specialties

All types of employment matters including class action and PAGA, wrongful termination, discrimination, harassment, retaliation, whistleblower, disability accommodations, and more; personal injury; business/contractual; real property.

Hobbies & Interests

Kelly is a fan of NBA basketball, jazz music, and strategy board gaming.

Locations

All of California
Jennifer Kramer is the co-managing partner at Hennig Kramer Ruiz & Singh, LLP. Her practice focuses on complex employment litigation in state and federal courts. She has served as lead counsel on class and multiple plaintiff actions, as well as regularly representing individual employees. Jen has prosecuted class actions on behalf of retail salespeople, security guards, hotel and restaurant employees, valets, chauffeur drivers, laborers, airline service employees, cable company employees, produce workers, garment workers, drug and alcohol rehabilitation center staff, and newspaper employees. She also has significant exposure in the areas of wage and hour violations; harassment, discrimination, and retaliation in the workplace; workplace privacy; unfair competition; and whistleblowing.

Jen is a member of the State Bar of California, licensed to practice in all state courts and the Central and Northern District federal courts as well as the Ninth Circuit Court of Appeal. She is also a member of the National Employment Lawyers Association, California Employment Lawyers Association (serving as the co-chair of the CELA Wage & Hour Committee from 2017-2019 and as a member of the Executive Board from 2019 to the present), Los Angeles County Bar Association, Desert Bar Association, Legal Eagles for Truth Justice and the American Way, Trial Lawyers Charities of Los Angeles, Consumer Attorney Association of Los Angeles, Women Lawyers Association of Los Angeles, and the National Lawyers Guild. She has been selected as a “Super Lawyer” by Thomson Reuters in the area of Plaintiff’s Employment Litigation. Jen also frequently speaks on topics related to employment law at bar events, know your rights events, on podcasts, and in response to journalists’ inquiries. Most recently, she has served as an advocate for the #PUH (Pay Up Hollywood) movement.

When she is not advocating on behalf of California’s employees, Jen will be found in her garden, prized for its collection of California native plants.
CALIFORNIA WAGE & HOUR UPDATE:
A LOOK BACK, A LOOK AHEAD, AND
A LITTLE COVID-19

Nina Huerta
Kelly A. Knight
Jennifer Kramer
A Look Back

Jennifer Kramer
Cal. Legislative Developments

- **Labor Code § 200.3 - added** *(successor liability)*
  - Codifies successor liability test in wage theft cases

- **Labor Code § 2750.3 - amended** *(newspapers-independent contractors)*
  - Expands the exemption from AB5 applicable to newspaper carriers by deleting the condition that a newspaper carrier work under contract either with a newspaper publisher or newspaper distributor. Extends the exemption period to January 1, 2022.

- **Labor Code § 2775 et seq. - added; Labor Code § 2750.3 - repealed** *(Dynamex)*
  - More exemptions for: musicians, insurance inspectors, competition judges, master class teachers, freelancers, and referral agencies.
Cal. Legislative Developments

- **Government Code § 12930 - amended; Government Code § 12999 et seq. - added** (pay data reporting)
  - Requires employers with 100+ employees to submit annual pay data report to the state

- **Labor Code § 98.4 - amended** (labor commissioner)
  - Allows the Labor Commissioner’s office to represent workers in appeals that are compelled to arbitration.

- **Labor Code § 226.7 - amended** (security officer rest periods)
  - Certain security officers may be required to remain on the premises during rest period and remain on call and carry and monitor a communication device.

- **Labor Code § 1102.5 - amended** (retaliation)
  - Extends filing deadline for retaliation complaints filed with labor commissioner from 6 months to 1 year.
  - Provides attorney’s fees for whistleblowing.
Prop 22

- Creates new employment category for gig workers.
- No pay for time logged in, ready to work, but without a passenger or package.
- Cancels local laws that regulate gig workers.
Case updates

Arbitration

- **Ali v. Daylight Transport, LLC** (2020) __ Cal. App.5th __
  - Truck driver treated as an independent contractor not compelled to arbitration

- **Fleming Distribution Company v. Younan** (2020) 49 Cal.App.5th 73
  - Delay following labor commissioner hearing caused employer to waive right to compel arbitration

- **Garcia v. Haralambos Beverage Co.** (2021) __ Cal.App.5th __
  - Finding sufficient evidence employer waived contractual right to arbitration

- **Garner v. Inter-State Oil Co.** (2020) 52 Cal.App.5th 619
  - Mandatory arbitration provision did not waive right to submit class claims to arbitration

- **Lange v. Monster Energy Co.** (2020) 46 Cal.App.5th 436
  - Unconscionability found where provision contained punitive damages waiver and one-sided carve out for equitable remedies

- **OTO, LLC v. Kho** (2019) 8 CAL.5th 111
  - Document itself and manner of presentation did not promote voluntary or informed agreement

- **Rittman v. Amazon.com, Inc.** (2020) 971 F.3d 904
  - Once again holding drivers engaged in interstate commerce are exempt from FAA
Case Updates

Breaks
- David v. Queen of the Valley Medical Center (2020) 51 Cal.App.5th 653
  - Judgment upheld in favor of employer on break claims
- Ridgeway v. Walmart (9th Cir. 2020) 946 F.3d 1066
  - Judgment affirmed in favor of long-haul truckers for unpaid lay overtime and rest breaks
- Sanchez v. Martinez (2020) 54 Cal.App.5th 535
  - Discussing remedies available in break cases
- International Brotherhood of Teamsters v. FMCA (9th Cir. 2021) ___ F.3d ___
  - Holding federal agency permissibly determined that California’s break laws were preempted for truck drivers engaged in interstate commerce

Class Certification
- Brady v. Autozone Stores, Inc. (9th Cir. 2020) 960 F.3d 1172
  - Settlement by lead plaintiff of individual claims mooted class certification rulings
- Grande v. Eisenhower Medical Center (2020) 44 Cal.App.5th 1147
  - Holding res judicata did not apply to joint employer who did not previously settle claims
  - Order striking allegations was appealable under the death knell doctrine

Commission Exemption
  - Compensation based solely on commissions with draw against commissions did not satisfy salary basis test for administrative exemption
Case Updates

Default Judgment
  - Defendants' efforts to set aside or vacate judgment denied

Fees
- Caldera v. Dept. of Corrections & Rehabilitation (2020) 48 Cal.App.5th 601
  - FEHA case holding out-of-town firm entitled to higher rates where client unable to find local counsel
- Cruz v. Fusion Buffet, Inc. (2020) 57 Cal.App.5th 221
  - Meal and rest break claims were intrinsically intertwined with fee-statute claims
  - Attorney fee dispute between lead counsel, co-counsel, and referring counsel
- Zhang v. Chu (2020) 46 Cal.App.5th 46
  - Anti-SLAPP motion granted in favor of attorney in malicious prosecution action

Hours Worked
  - Wage order did not allow CBAs to waive minimum wage payment for employer-mandated travel
- Herrera v. Zumiez (9th Cir. 2020) 953 F.3d 1063
  - Expands holding of Ward v. Tilly in a case where employees were required to call in 30 minutes before scheduled shift
- Frlekin v. Apple (2020) 8 Cal.5th 1038
  - Time spent waiting for exit search is compensable
Case updates

Independent Contractors

- The People v. Superior Court (2020) 57 Cal.App.5th 619
  - ABC test is not preempted by FAAAA
- The People v. Uber Technologies, Inc. (2020) 56 Cal.App.5th 266
  - Affirms granting of preliminary injunction against ride sharing companies misclassifying drivers as independent contractors
- Vazquez v. Jan-pro Franchising International (2021) __ Cal.5th __
  - The holding in Dynamex was meant to be applied retroactively

Joint Employer

  - CEO and president were held to be alter egos of closely-held corporation and liable for employee’s unpaid wages
  - Triable issues existed regarding whether signatory to CBA was liable for wage violations
Case updates

PAGA

- **Collie v. The Icee Co.** (2020) 52 Cal.App.5th 477
  - Employees cannot be compelled to arbitrate PAGA claims

- **Doe v. Google, Inc.** (2020) 54 Cal.App.5th 948
  - NRLA did not preempt PAGA claims because they fall within local interest exception

- **Kec v. Superior Court** (2020) 51 Cal.App.5th 972
  - Employees cannot be compelled to arbitrate PAGA claims and PAGA waiver unenforceable

  - An employee bringing an action under the PAGA does not lose standing to pursue representative claims as an “aggrieved employee” by dismissing individual claims

  - Employees cannot be compelled to arbitrate PAGA claims

- **Olson v. Lyft, Inc.** (2020) 56 Cal.App.5th 862
  - Employees cannot be compelled to arbitrate PAGA claims and PAGA waiver unenforceable

- **Provost v. Yourmechanic, Inc.** (2020) 55 Cal.App.5th 982
  - Employees cannot be compelled to arbitrate PAGA claim

  - Claim preclusion bars claims resolved in class action employee opted out of
Case Updates

- **Occasional Cal. Employees**
  - Oman v. Delta Air Lines (2020) 9 Cal.5th 762
    - Discussing application of California wage laws to flight attendants working primarily in California for less than a day at a time
  - Ward v. United Airlines (2020) 9 Cal.5th 732
    - RLA exemption does not bar wage statement claims and employees are covered if based in California
    - California wage laws apply to crew members of vessel docked in California

- **Rounding**
  - David v. Queen of the Valley Medical Center (2020) 51 Cal.App.5th 653
    - Affirming summary judgment on rounding claim

- **Undertaking**
  - Cardinal Care Management v. Afable (2020) 47 Cal.App.5th 1011
    - Trial court provided an adequate hearing on employer’s financial ability to post an undertaking in order to appeal a Labor Commissioner award of $2.5 million

- **Vacation**
    - “Unlimited” vacation policy still subject to Labor Code § 227.3 based on the facts of this case where employees were not told they had unlimited paid vacation
COVID-19 Wage and Hour Issues

Nina Huerta
COVID-19 Wage and Hour Issues

- Common issues
  - Off-the-Clock Work
  - Meal and Rest Breaks
  - Expense Reimbursement
  - Furloughs
Off-the-Clock Work

- **Compensable work**
  - California Law = suffer or permit to work (if known/should have known) or subject to employer control.
    - Distinct from FLSA concerning de minimis work.
  - Federal Law: Employ = suffer or permit to work
    - Does not include activities that are “preliminary” or “postliminary” to the workday.
    - Is the activity integral or indispensable to principal activities?

- **Common issues in pandemic times:**
  - Identifying all hours worked.
  - Tracking and recording hours worked.
Challenges in a COVID-19 Era Workplace

- Difficulty supervising remote worker schedule/breaks.
- Time tracking systems may not operate fluidly in remote work setting.
- Remote work may be slower and necessitate overtime.
- Job insecurity may influence employees to feel like they must always be available.
- Disrupted workflow may lead to atypical work schedules.
- New scenarios that may lead to additional compensable work.
What Are Hours Worked?

- Temperature checks and health screenings
- Donning & doffing of masks and PPE
- Safety meetings, training
- Extra log in/log out time for remote work
- Required check-ins while on unpaid furlough
- Additional sanitation procedures at home?
- Vaccine time, depending on employer policy?
- Remote parties or other voluntary social events?
Mitigating Off-the-Clock Work

- Periodically assess what constitutes compensable work
- Establish work schedules, including breaks
- Draft clear policies
  - Requiring accurate reporting of time worked
  - Designating overtime procedures (but pay for it regardless)
  - Establishing meal and rest break procedures (including recordkeeping)
  - Establishing variance procedures
- Require employees to verify time on a pay period basis
- Require employees to acknowledge policies
- Anticipate and set expectations regarding foreseeable scenarios
  - Emails sent to employee at night?
  - Interruptions to deal with school or childcare?
- Train managers and hold them accountable
Remote Employees: Meal and Rest Break Issues

- Employees may be less likely to take and/or record their breaks if they are working from home.
- Employees may prefer atypical work schedules to allow for childcare, school or other obligations.
  - What are the employer’s obligations when employees log on and off throughout the day?
  - Balancing flexibility with obligations to provide breaks.
- Employees may also feel pressure to “multitask” instead of being relieved of all duty.
Meal and Rest Breaks: Mitigating Risk

- Clearly communicate and enforce meal and rest break policy.
  - Only clock out for duty-free meal break.
  - Require employees to log out of programs/computers while on meal breaks to ensure they are disengaged with work.
- Meal breaks must be paid if they are interrupted by work for any reason. Cannot break up the meal break into small increments.
- Discipline if policy is not followed.
Modifying Duties for Exempt Personnel

- Companies are scaling down workforce and reallocating work during COVID-19 shutdowns.
- Certain jobs impacted by inability to travel (outside sales)
- May impact duties of exempt staff.
  - Exempt workers “pitching in” on non-exempt tasks
  - Exempt executives with direct reports on furlough
  - Outside sales employees stuck at home
- 29 C.F.R. § 541.706 allows for emergency work.
- California approach may differ.
Reducing Compensation for Exempt Employees

- Reductions of weekly compensation
  - Full weekly salary generally due regardless of changed circumstances.
  - Reductions in salary must be for an allowed reason and must meet salary test.

- Reclassifications to non-exempt status may raise additional issues.
  - Prospective basis only.
  - May raise questions as to whether position was exempt.
Expense Reimbursement

- Reimbursements for reasonable and necessary business expenses incurred by remote employees while conducting Company business, including:
  - the cost of a computer if the computer needs to meet certain technical and security requirements
  - associated equipment costs for a home office such as a printer/scanner/fax/shredder
  - recurring charges such as internet and/or cell phone costs
  - locking file cabinets
  - possibly ergonomic equipment such as a chair, keyboard and desk
  - PPE (masks? gloves?)
Expense Reimbursement and the Regular Rate

- Reimbursement for the actual or reasonably approximate amount spent by an employee purchasing tools or equipment on an employer’s behalf is not considered part of an employee’s regular rate.
- However, if the reimbursement amount is disproportionately large, the excess amount is included in the regular rate.
- Additionally, if an employee is reimbursed for expenses normally incurred by an employee that primarily benefit the employee, the reimbursement must be included in the employee’s regular rate. 29 C.F.R. § 778.217(c)(d).
Partial Furlough: Exempt Employees

- General Rule: Because of the salary pay requirements, exempt employees must be furloughed in week-long increments and those weeks must coincide with the employers’ defined workweek.
  - Exempt employees must be paid their full salary for any workweek in which they perform any work, even if only a few hours.
  - California Labor Code § 515(a) (monthly minimum).
Partial Furlough: Exempt Employees

- Can also consider transitioning to an hourly/non-exempt payment plan.
- A one week on/one week off schedule could work, but practically difficult to manage.
  - Would likely qualify for unemployment benefits during the off weeks.
  - Ensure that employees are strictly instructed not to do any work during weeks they are furloughed (including, making business phone calls, checking voicemail, reading/writing/deleting emails, drafting documents, stopping by the business to "check on things" or engage in business-related communications with other employees who may or may not be on furlough).
Partial Furlough: Non-Exempt Employees

- Does the Company have any existing Collective Bargaining Agreements?
  - Any prohibitions to furloughs or procedures that must be followed?
  - May still have an obligation to advise the union and negotiate
  - Ensure furlough does not adversely impact union organizers or participants
  - Consider whether furlough might lead to union efforts
Partial Furloughs: PTO Considerations

- Consider whether employees will be prohibited from using PTO during furlough.
- Consider whether employees will be forced to use PTO during furlough.
- Whether such modifications are possible will depend on state law.
- Complete furlough may trigger obligations to pay out accrued/unused PTO.
Looking Forward

Jennifer Kramer
Pending Cal. Supreme Court Cases

- **Ferra v. Lowes Hollywood Hotel, LLC (S259172)**
  - Petition for review after the Court of Appeal affirmed the judgment in a civil action. The court limited review to the following issue: Did the Legislature intend the term “regular rate of compensation” in Labor Code section 226.7, which requires employers to pay a wage premium if they fail to provide a legally compliant meal period or rest break, to have the same meaning and require the same calculations as the term “regular rate of pay” in Labor Code section 510(a), which requires employers to pay a wage premium for each overtime hour?
  - Fully briefed
Pending Cal. Supreme Court Cases

- **Grande v. Eisenhower Medical Center (S261247)**
  - Petition for review after the Court of Appeal affirmed the judgment in a civil action. The court limited review to the following issue: May a class of workers bring a wage and hour class action against a staffing agency, settle that lawsuit with a stipulated judgment that releases all of the staffing agency’s agents, and then bring a second class action premised on the same alleged wage and hour violations against the staffing agency’s client?
  - Fully briefed
Pending Cal. Supreme Court Cases

- Naranjo v. Spectrum Security Services, Inc. (S258966)
  - Petition for review after the Court of Appeal affirmed in part and reversed in part the judgment in a civil action. This case presents the following issues: (1) Does a violation of Labor Code section 226.7, which requires payment of premium wages for meal and rest period violations, give rise to claims under Labor Code sections 203 and 226 when the employer does not include the premium wages in the employee’s wage statements but does include the wages earned for meal breaks? (2) What is the applicable prejudgment interest rate for unpaid premium wages owed under Labor Code section 226.7?
  - Fully briefed
PAGA

- Issues making their way up through the courts:
  - Stacking
  - Initial vs. subsequent violations
  - Scope of releases
  - Impact of prior releases
  - What to make of de-publication of Starks v. Vortex?
  - 9th Circuit: Apply Rule 23 requirements?
  - 9th Circuit: Removal and remand standards
California Legislation

- Worker privacy legislation
- PAGA bills
- AB 5/Dynamex bills
- Equal Pay Act regulations (FEHC)
Challenges to and Impact of Prop 22

- Hector Castellanos v. State of California and Lilia Garcia-Brower (S266551)
  - Emergency Petition for Writ of Mandate denied by Cal. Supreme Court
- Reshaping California workplaces
  - California supermarkets fire union delivery drivers to replace with gig workers
  - Instacart fires every worker who voted to unionize
Pending USSC Cases

- **Schein Inc. v. Archer and White Sales Inc. (No. 19-963) – argued**
  - Issue(s): Whether a provision in an arbitration agreement that exempts certain claims from arbitration negates an otherwise clear and unmistakable delegation of questions of arbitrability to an arbitrator.

- **TransUnion LLC v. Ramirez (No. 20-297) – oral argument pending**
  - Issue(s): Whether either Article III or FRCP 23 permits a damages class action when the vast majority of the class suffered no actual injury, let alone an injury anything like what the class representative suffered.
The Biden Administration Plan

- Increased liability for executives for wage theft and interference with organizing efforts
- Increased efforts to crack down on misclassification of employees as independent contractors
  - Includes adopting the ABC Test at the federal level
- Expand rights to farmworkers and domestic workers
- Extend right to organize and bargain collectively to independent contractors
- Increase federal minimum wage to $15/hour
- Ending mandatory arbitration
41st Annual Labor & Employment Law Symposium

Session 3, Panel 3:

Legacy of the Trump Board and the Upcoming Transition

Hector De Haro, Bush Gottlieb, A Law Corporation
Lauren McFerran, NLRB, Washington D.C.
Irma Rodríguez Moisa, Atkinson, Andelson, Loya, Ruud, & Romo, APLC
Joanna Silverman, NLRB Region 31 (Moderator)
Lauren McFerran

Lauren McFerran served as a Member of the NLRB from December 17, 2014 until December 16, 2019. On July 29, 2020, the Senate confirmed her renomination as a Board Member for a term expiring on December 16, 2024.

On January 20, 2021, President Joseph R. Biden named Ms. McFerran Chairman of the National Labor Relations Board.

Previous to her appointment to the NLRB, Ms. McFerran served as Chief Labor Counsel for the Senate Committee on Health, Education, Labor, and Pensions (HELP Committee) and had also served the Committee as Deputy Staff Director under Senator Tom Harkin. She began on the HELP Committee as Senior Labor Counsel for Senator Ted Kennedy. Before her work in the United States Senate, Ms. McFerran was an associate at Bredhoff & Kaiser, P.L.L.C. and served as a law clerk for Chief Judge Carolyn Dineen King on the United States Court of Appeals for the Fifth Circuit. Ms. McFerran received a B.A. from Rice University and a J.D. from Yale Law School.
Hector De Haro joined Bush Gottlieb in August 2014 after clerking for the firm his second and third year of law school.

After receiving his Bachelor’s Degree in American Studies from Yale University, Mr. De Haro attended the University of Illinois College of Law. He graduated magna cum laude and was inducted into the Order of the Coif – an honor reserved for the top ten percent of a graduating class. During law school, he was awarded the CALI Excellence for the Future Award for receiving the highest grade in multiple classes, most notably Labor Law. He served as an associate editor of the Illinois Journal of Law, Technology, and Policy. He was also recognized as the Best Oralist in the honorary round of the Frederick Green Moot Court competition.

Before law school, Mr. De Haro was an organizer and campaign coordinator with the Service Employees International Union for nearly five years. During that time, he worked on new organizing campaigns in both the public and private sector. He was also involved in legislative advocacy campaigns and in representational matters concerning current union members.

Mr. De Haro is fluent in Spanish and has extensive experience working with monolingual Spanish-speaking union members.
Irma Rodríguez Moisa is an experienced litigator, labor negotiator, and trial attorney representing public and private entities in labor and employment matters at Atkinson, Andelson, Loya, Ruud & Romo. She is recognized as one of the top Labor and Employment lawyers in the state for her outstanding results for her clients in their most complex and sensitive matters. She has handled matters ranging from discrimination, sexual harassment, retaliation, FMLA/CFRA, disability discrimination, wrongful termination, and the First Amendment.

Ms. Rodríguez Moisa serves as the Partner In Charge of the Firm's Headquarters office in Cerritos and is a member of the Firm's Executive Committee. She also served as the Practice Group Leader for the Public Entity Labor and Employment Practice Group.

**Honors and Recognitions**

Ms. Rodríguez Moisa was named to the *Daily Journal*'s Top Women Lawyers list in 2015 and its Top Labor & Employment Attorney list in 2015 and 2017. In 2011, Ms. Rodríguez Moisa was named to the *Daily Journal*'s top municipal lawyers in California. In 2009, Ms. Rodríguez Moisa was named to the *Daily Journal*'s annual list of the “Top Women Litigators” in California. Every year since 2004, she has been recognized as a Super Lawyer by *Southern California Super Lawyers* magazine.

Upon graduating from law school Ms. Rodríguez Moisa earned a Skadden Arps Public Interest Law Fellowship, awarded to only twenty-five law students from around the country. The Fellowship allowed Ms. Rodríguez Moisa to spend the first four years of her career at the Mexican American Legal Defense and Educational Fund (MALDEF), working on issues related to language-based discrimination and voting rights.

**Education**

J.D., University of California, Berkeley School of Law  
M.P.P., Harvard University  
B.S., University of California, Berkeley
Joanna Silverman

Joanna Silverman is a Supervisory Attorney with Region 31 of the National Labor Relations Board. The Regional office is responsible for enforcing the nation’s primary labor law covering private sector employees in the jurisdiction of Region 31, which serves portions of Los Angeles and six other counties in Southern California.

Ms. Silverman graduated with honors from Haverford College, earning a BA in Anthropology and a minor in Spanish. She received her J.D. from the University of California, Davis School of Law, Order of the Coif. Ms. Silverman started her career with the NLRB in 2005 as a Field Attorney in Region 31 and became a Supervisory Attorney in 2012.
LEGACY OF THE TRUMP BOARD AND THE UPCOMING TRANSITION
PRESENTERS

- Lauren McFerran, Chairman, NLRB
- Hector De Haro, Bush Gottlieb
- Irma Rodriguez Moisa, AALRR

- Moderator: Joanna Silverman, NLRB Region 31
Limitations on “WHO” is covered by the National Labor Relations Act

Limitations on “WHERE” employees are protected by the National Labor Relations Act

Limitations on “WHAT” is covered by the National Labor Relations Act
THE WHO

LIMITATIONS ON WHO IS PROTECTED BY THE NATIONAL LABOR RELATIONS ACT
Who is considered an independent contractor under the National Labor Relations Act (NLRA) and thus outside of the protection of the NLRA?

The Board held that SuperShuttle’s franchisees are excluded from the NLRA’s coverage as independent contractors applying the common-law agency test. The Board noted that “an important animating principle by which to evaluate those factors . . . is whether the position presents the opportunities and risks inherent in entrepreneurialism.” Id., slip op. at 8.

This holding overruled FedEx Home Delivery, 361 NLRB 610 (2014), which had limited the significance of entrepreneurial opportunity in the independent-contractor analysis.
GRADUATE STUDENT RULEMAKING

• The NLRB is currently engaged in rulemaking to establish the standard for determining whether students who perform services at a private college or university in connection with their studies are “employees” within the meaning of Section 2(3) of the National Labor Relations Act.
What standard applies in determining whether to exert jurisdiction over a religious educational institution?

The Board overruled the test in *Pacific Lutheran University*, 361 NLRB 1404 (2014), in favor of the D.C. Circuit’s three-pronged test announced in *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002). Applying the *Great Falls* test in *Bethany College*, the Board found that the Employer was exempt from the NLRA’s jurisdiction.

Under *Great Falls*, the Board must decline to exercise jurisdiction over an institution that (a) holds itself out to students, faculty, and the community as providing a religious educational environment; (b) is organized as a nonprofit; and (c) is affiliated with, or owned, operated, or controlled, directly or indirectly, by a recognized religious organization, or with an entity, membership of which is determined, at least in part, with reference to religion.
• Does an employer’s misclassification of its employees as independent contractors, standing alone, violate the NLRA?

• Although the Board found that the individuals at issue were employees rather than independent contractors, the Board majority reversed the Administrative Law Judge’s finding that that the Employer independently violated Section 8(a)(1) of the NLRA by misclassifying its drivers as independent contractors. The Board explained that an employer’s communication to its workers of its legal opinion that they are independent contractors is protected by Section 8(c) of the NLRA even if the Employer is incorrect.
THE HOW

LIMITATIONS ON HOW EMPLOYEES ENGAGE IN PROTECTED ACTIVITY ON EMPLOYER PROPERTY
• When can non-employee union agents access an employer’s property to engage in protests, boycotts, and other organizing activity?
• The Board held that the employer did not violate the Act by removing nonemployee union agents who were encouraging customers to boycott the retail store from its parking lot.
• The Board overturned a long line of cases holding that such conduct was unlawful disparate treatment as Kroger allowed civic and charitable organizations to solicit and distribute in its parking lot.
When can a property owner lawfully prohibit the off-duty employees of its on-site contractors (or licensees) from accessing its private property?

The Board announced new access standard for off-duty employees of an on-site contractor.

The Board held that a property owner may exclude off-duty contractor employees unless (i) those employees work both regularly and exclusively on the property and (ii) the property owner fails to show that they have one or more reasonable non-trespassory alternative means to communicate their message.
Can union access to “public spaces” of employers be limited?

The Board held that an employer may bar nonemployee union representatives/organizers from soliciting employees or promoting union membership in public areas within an employer’s facilities.

The Board’s decision returned the Babcock & Wilcox exceptions: (i) inaccessibility (when a union has no other reasonable means of communicating its message to employees); and (ii) discrimination (preventing an employer from prohibiting nonemployee union access, but allowing other third parties to distribute literature or access in public spaces).
THE HOW

LIMITATIONS ON CHANNELS OF COMMUNICATION
Do employees have a right to use work email for Section 7 protected activity (e.g., union organizing)?

The Board held that employees do not have a statutory right to use employer email for protected activity, overruling *Purple Communications*, 361 NLRB No. 126 (2014).

The Board held that employers’ property rights over communication systems trump employee Section 7 rights because most employees have adequate alternate avenues to communicate with each other.

The Board recognized an exception: employees may have a right to use their employer’s email for Section 7 activity if it is “the only reasonable means for employees to communicate with one another.”
Can employers place restrictions on the wearing of union insignia?

The Board held that employers are permitted to restrict union insignia based on any legitimate justification, relying on the standards it set out in *Boeing Co.*, 365 NLRB No. 154 (2017).

This decision departs from 75 years of precedent and the Supreme Court’s decision in *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945), which held that employers could not restrict union insignia at work without proving that special circumstances existed.

Now, the burden is on the General Counsel to prove that the impact on employee rights outweighs the justifications proffered by employers.
THE WHAT

LIMITATIONS ON WHAT ACTIVITIES ARE PROTECTED BY THE NLRA
ALSTATE MAINTENANCE, LLC
367 NLRB NO. 68 (2019)

• Does an individual's comment to a supervisor in a group setting regarding tips constitute protected concerted activity?
• The Board narrowed the circumstances under which individual complaints is considered concerted activity.
• The question of whether an employee has engaged in concerted activity is a factual one based on the totality of the record evidence.
• The Board overruled Worldmark by Wyndham and enumerated a five-factor test for determining whether there is a reasonable inference that in making a statement at a meeting, in a group setting, or with other employees present, the employee was seeking to initiate, induce, or prepare for group action.
Can an employer discipline employees for abusive, profane or offensive workplace conduct?

The Board adopted the Wright Line framework to apply when analyzing whether discipline or discharge based on abusive, profane, and harassing employee actions and statements is lawful.

The General Counsel must prove (1) the employee engaged in protected concerted activity; (2) the employer had knowledge of that activity; and (3) the employer had animus against the protected activity.
CONCLUDING REMARKS
Legacy of the Trump Board and the Upcoming Transition: NLRB Summaries of Decisions Discussed During the Panel

**Alstate Maintenance, LLC, 367 NLRB No. 68 (2019)**

The Board (Chairman Ring and Members Kaplan and Emanuel; Member McFerran, dissenting) adopted the Administrative Law Judge’s conclusion that the Respondent did not violate Section 8(a)(1) by discharging an employee for engaging in alleged protected concerted activity where an airport skycap remarked about previously not receiving a tip for a similar baggage-handling job, and dismissed the complaint in its entirety. In dismissing the complaint, the majority reversed *WorldMark by Wyndham*, 356 NLRB 765 (2011), finding that *WorldMark* had deviated from longstanding precedent on protected concerted activity by blurring the distinction between protected group action and unprotected individual action. The Board further held that even if the activity was concerted, it was not protected as it was not aimed at improving a term or condition of employment within the Respondent’s control. Dissenting, Member McFerran would find the Respondent violated Section 8(a)(1) by discharging the employee for his protected concerted activity, and would not have overruled *WorldMark*. She would find that the employee’s complaint constituted an attempt to initiate a group objection over tips, and thus the employee was engaged in concerted activity for the mutual aid and protection of fellow employees.

Charge filed by an individual. Administrative Law Judge Raymond P. Green issued his decision on June 24, 2016. Chairman Ring and Members McFerran, Kaplan, and Emanuel participated.

**Bethany College, 369 NLRB No. 98 (2020)**

The Board, reversing the Administrative Law Judge, found that the Respondent was not subject to the Board’s jurisdiction. In addressing whether it could exercise jurisdiction over the faculty of the Respondent, a self-identified religious institution of higher education, the Board reconsidered and overruled the governing jurisdictional standard set forth in *Pacific Lutheran University*, 361 NLRB 1404 (2014), and, in its place, adopted the jurisdictional test announced by the D.C. Circuit Court in *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002). Under the *Great Falls* test, the Board “must decline to exercise jurisdiction” over an institution that (a) “holds itself out to students, faculty, and community as providing a religious educational environment”; (b) is “organized as a nonprofit”; and (c) is “affiliated with, or owned, operated, or controlled, directly or indirectly, by a recognized religious organization, or with an entity, membership of which is determined, at least in part, with reference to religion.”

Specifically, the Board concluded that the *Great Falls* decision correctly interpreted controlling Supreme Court precedent and properly concluded that the “exercise of Board jurisdiction over religious schools in matters involving faculty members will inevitably involve inquiry into the religious tenets of these institutions.” The Board agreed that
such inquiry “would impermissibly present a significant risk that the protections set forth in the Religion Clauses of the First Amendment of the Constitution would be infringed.” Accordingly, the Board concluded that the two-part *Pacific Lutheran* test was “fatally flawed” inasmuch as it required consideration of “whether faculty members at religiously affiliated institutions of higher learning are held out as performing a specific religious function,” which necessarily entailed “an impermissible inquiry into what does and what does not constitute a religious function.” As the Board observed, this flaw led the D.C. Circuit Court itself to specifically reject the *Pacific Lutheran* test. By adopting the bright-line *Great Falls* test, the Board “will leave the determination of what constitutes religious activity versus secular activity precisely where it has always belonged: with the religiously affiliated institutions themselves, as well as their affiliated churches and, where applicable, the relevant religious community.” Applying the *Great Falls* test to this case, the Board found that the Respondent was not subject to the Board’s jurisdiction and therefore dismissed the unfair labor practice complaint.

Charges filed by individual employees. Administrative Law Judge Christine E. Dibble issued her decision on October 31, 2018. Chairman Ring and Members Kaplan and Emanuel participated.

*The Boeing Company, 365 NLRB No. 154 (2017)*

The Administrative Law Judge found, among other things, that the Respondent violated the Act by maintaining a work rule that restricted the use of camera-enabled devices such as cell phones. Under current Board law, a work rule is unlawful if an employee “would reasonably construe” the rule to restrict protected concerted activity, and the judge so found. The full Board reviewed the judge’s decision, and the majority (Chairman Miscimarra and Members Kaplan and Emanuel) decided to overrule existing precedent and to create a new test for evaluating employers’ work rules. Under the new test, the Board will find a rule unlawful if it explicitly restricts employees’ protected concerted activity. If the rule is not explicitly unlawful, the Board will evaluate two things: (1) the rule’s potential impact on protected concerted activity; and (2) the employer’s legitimate business justifications for maintaining the rule. If the justifications for the rule outweigh the potential impact on employees’ rights, the rule is lawful. Conversely, if the potential impact on employees’ rights outweighs the justifications for the rule, it is unlawful. Applying the new test retroactively to Boeing’s no-camera rule, the majority found that the Respondent’s justifications for the rule, including the protection of information implicating national security, proprietary trade secrets, and employees’ personal information, outweighed any potential impact on employees’ protected concerted activity.

Writing separately, Members Pearce and McFerran dissented from the majority’s decision to overrule precedent and adopt a new test for evaluating employer work rules. The dissenters viewed the new test as more complicated and unpredictable than the test it replaced and as failing to protect employees from the chilling effect of rules that might punish protected concerted activity. The dissents noted that the new test was adopted without notice or public participation, and that no appellate court has rejected the
current test in the 13 years since it was established. The dissents criticized the majority for essentially engaging in rulemaking without public input, by declaring all “civility” rules lawful, even though no civility rule was at issue in the case.

The dissents disagreed with the majority’s assertions that the current test “does not permit any consideration” of the business justifications associated with a challenged rule and that the current test has not been well-received by the courts. Member Pearce noted that the Board has routinely considered business justifications associated with a challenged rule; however, in order to protect the rights of employees guaranteed by the Act, the Board and courts have required employers to show that a challenged rule is narrowly tailored to serve legitimate interests. Member Pearce argued that by casting aside this requirement, the majority’s new test allows employers to maintain overly broad rules that unnecessarily chill employees in the exercise of their Section 7 rights, even when it does not serve a legitimate employer interest. In her dissent, Member McFerran explained how the Board could have revised and refined its approach to work rules, with public participation, in a way that was consistent with both the National Labor Relations Act and the Administrative Procedure Act.


*Caesars Entertainment d/b/a Rio All-Suites Hotel and Casino, 368 NLRB No. 143 (2019)*

A full Board majority (Chairman Ring and Members Kaplan and Emanuel; Member McFerran dissenting in part) reversed the Administrative Law Judge’s conclusion that the Respondent violated Section 8(a)(1) by maintaining a rule prohibiting employees from using the Respondent’s information-technology (IT) resources to send “non-business information.” The majority overruled *Purple Communications, Inc.*, 361 NLRB 1050 (2014), and determined that employers generally have the right to impose nondiscriminatory restrictions (including outright bans) on the use of employer-owned IT systems for nonwork purposes, essentially reinstating the Board’s decision in *Register Guard*, 351 NLRB 1110 (2007).

The majority explained that *Purple Communications* was inconsistent with Board and court precedent holding non-discriminatory restrictions on the use of employer equipment to be lawful. It further explained that the Supreme Court’s decision in *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945)—which held that workplace restrictions on Section 7 communications that applied during nonwork time were presumptively unlawful—stands for the twin propositions that employees must have “adequate avenues of communication” in order to meaningfully exercise their Section 7 rights and that employer property rights must yield to employees’ Section 7 rights when necessary to avoid creating an “unreasonable impediment to the exercise of the right to self-organization.” Thus, the majority’s new standard respects both employees’ Section 7 right to engage in union or other protected concerted communications during the workday
and employers’ property rights in their equipment by allowing employers to generally prohibit non-work use of their equipment, while creating an exception where the use of such equipment is the only reasonable means for employees to communicate with one another during the workday.

Additionally, the majority: (1) adopted, for different reasons than the judge, her conclusion that several additional restrictions on the use of the Respondent’s IT resources were lawful to maintain; and (2) remanded a computer confidentiality rule and several rules found unlawful in an earlier Board decision in this case, 362 NLRB 1690 (2015), which were remanded, on the Board’s request, by the Ninth Circuit, for reconsideration in light of the Board’s decision in The Boeing Company, 365 NLRB No. 154 (2017).

Dissenting in part, Member McFerran would have applied Purple Communications to find the Respondent’s prohibitions on using its IT resources to send non-business information or “solicit for personal gain or advancement of personal views” unlawful because the Respondent did not argue or present any “special circumstances” to justify its total ban on the nonwork use of email to maintain production or discipline.

Charge filed by International Union of Painters and Allied Trades, District Council 16, Local 159, AFL-CIO. Administrative Law Judge Mara-Louise Anzalone issued her decision on May 3, 2016. Chairman Ring and Members McFerran, Kaplan, and Emanuel participated.

**General Motors LLC, 369 NLRB No. 127 (2020)**

The Board announced it will apply its Wright Line burden-shifting framework to cases involving abusive conduct in connection with activity protected by Section 7 of the Act. Under prior precedent, the Board would apply different setting-specific standards to determine whether abusive conduct during Section 7 activity, such as profane ad hominem attacks or sexually or racially offensive speech, was severe enough to lose the Act’s protection. The Board had applied the four-factor Atlantic Steel test to workplace conversations with management, a totality of the circumstances approach to social media posts and workplace discussions among coworkers, and the reasonably tend to coerce or intimidate standard of Clear Pine Mouldings to picket-line conduct. The Board concluded these standards produced inequitable, unreliable results that were in tension with antidiscrimination laws and departed from the Board’s mission.

Instead, the Board newly recognized that abusive conduct is separable from the connected Section 7 activity. The Board reasoned that, where it is in dispute whether discipline was motivated by Section 7 activity or by the abusive conduct, causation is at issue and Wright Line is the proper causation test. Under Wright Line, the General Counsel has the initial burden to show that the Section 7 activity was a motivating factor for the discipline, and, if he does, the burden shifts to the employer to prove it would have issued the same discipline even in the absence of Section 7 activity. Consequently, as was not always true under the prior setting-specific standards, an employer may lawfully discipline an employee for abusive conduct if it is unmotivated by Section 7
activity or if it would have issued the same discipline even in the absence of Section 7 activity.

The Board determined that it will retroactively apply *Wright Line* to cases presenting these issues, and the Board remanded this case to the Administrative Law Judge for consideration under *Wright Line*.

Charges filed by an individual. Administrative Law Judge Donna N. Dawson issued her decision on September 18, 2018. Chairman Ring and Members Kaplan and Emanuel participated.

*Kroger Limited Partnership I Mid-Atlantic*, 368 NLRB No. 64 (2019)

The Board (Chairman Ring and Members Kaplan and Emanuel; Member McFerran, dissenting) overruled *Sandusky Mall Co.*, 329 NLRB 618 (1999), enf. denied in relevant part 242 F.3d 682 (6th Cir. 2001), and similar cases based on the majority's view that these cases improperly stretched the *NLRB v. Babcock & Wilcox, Inc.*, 351 U.S. 105 (1956) discrimination exception well beyond its accepted meaning in a manner that finds no support in Supreme Court precedent or the policies of the Act. The majority observed that *Sandusky Mall* and its progeny have been roundly rejected by the federal courts of appeals, and that courts have consistently limited the *Babcock* discrimination exception to situations where an employer ejects union agents seeking to engage in activities similar in nature to activities the employer permitted other nonemployees to engage in on its property. The majority further stated that in a pre-*Sandusky Mall* case, *Jean Country*, 291 NLRB 11, 12 fn. 3 (1988), which was never relevantly overruled, the Board itself limited Babcock’s discrimination exception the same way. The majority also pointed to other factors that, in its view, warranted reconsideration of the Board’s approach to the discrimination exception, as embodied in *Sandusky Mall* and related cases.

The majority stated that, under the standard it was adopting, to establish that a denial of access to nonemployee union agents was unlawful under the *Babcock* discrimination exception, the General Counsel must prove that an employer denied access to other nonemployee union agents while allowing access to other nonemployees for activities similar in nature to those in which the union agents sought to engage. The majority further stated that, consistent with this standard, an employer may deny access to nonemployees seeking to engage in protest activities on its property while allowing nonemployee access for a wide range of charitable, civic, and commercial activities that are not similar in nature to protest activities. Also, the majority observed that an employer may ban nonemployee access for union organization activities if it also bans comparable organizational activities by groups other than unions. The majority stated that its approach is consistent with the policies of the Act, while at the same time giving due recognition to an employer’s property right to exclude nonemployees.

The majority, applying the above-described standard to the allegation before it, reversed the Administrative Law Judge’s finding of a violation (which was based on her application of *Sandusky Mall* and related cases) and dismissed the complaint. The
majority explained that the General Counsel did not show that the Respondent has ever permitted any nonemployees, whether affiliated with a union or not, to engage in protest activities on its premises comparable to the boycott solicitation at issue in this case.

Dissenting, Member McFerran argued that the judge properly found a violation based on precedent that spanned decades. She argued that the majority, repeating errors the majority made in UPMC, 368 NLRB No. 2 (2019), incorrectly reached out to decide an issue that was not required to resolve the case. In this regard, she asserted that the judge made a motive-based determination that easily supports finding a violation here, making it unnecessary to reach the disparate-treatment issue. She also argued that the majority again reversed precedent on a major labor-law issue without providing notice to the public and inviting briefing. Regarding the merits of the majority’s decision, she asserted that the majority’s decision to reverse precedent was wrong and impermissible under Supreme Court law. She asserted that the majority’s approach contradicted the understanding of discrimination reflected in NLRB v. Stowe Spinning Co., 336 U.S. 226 (1949), and more than 70-years of Board decisions; misconstrued the meaning of discrimination within the framework of Section 8(a)(1); and radically narrowed the scope of the discrimination exception. Member McFerran additionally argued that, although the federal courts of appeals are divided about the Board’s interpretation of the Babcock discrimination exception, a majority of the Circuits that have addressed the issue have approved the Board’s approach. In Member McFerran’s view, the majority’s decision to change the Board’s approach is flawed because it permits employers to treat union representatives as distinct based on their supposed “boycott and protest activities” as opposed to their actual conduct: solicitation of customers. She stated that the majority’s approach, which cannot be squared with Supreme Court precedent or statutory policy, creates a license for an employer to permit almost any third-party activity on its property but union solicitation and distribution.

Charge filed by United Food and Commercial Workers Union Local 400. Administrative Law Judge Donna N. Dawson issued her decision on September 9, 2016. Chairman Ring and Members McFerran, Kaplan, and Emanuel participated.

**MV Transportation, Inc., 368 NLRB No. 66 (2019)**

On a stipulated record, the full Board considered whether the Respondent violated Section 8(a)(5) and (1) by implementing five work policies without first bargaining with the Union, including the Respondent’s argument that this unilateral action was permitted by the parties’ collective-bargaining agreement. In doing so, the majority (Chairman Ring and Members Kaplan and Emanuel) abandoned the “clear and unmistakable waiver” standard, which the Board had applied when considering arguments like the Respondent’s. Under the clear and unmistakable standard, an employer’s unilateral action violated the Act unless a contractual provision, granting an employer the right to act unilaterally, unequivocally and specifically referred to the type of employer action at issue. See Provena St. Joseph Medical Center, 350 NLRB 808 (2007). In agreement with the D.C. Circuit, see NLRB v. U.S. Postal Service, 8 F.3d 832 (D.C. Cir. 1993), and other courts of appeals, the majority adopted the “contract coverage” standard. Under
that standard, the Board will examine the plain language of the collective-bargaining agreement, applying ordinary principles of contract law, to determine whether action taken by an employer is within the compass or scope of contractual language granting the employer the right to act unilaterally. Accordingly, where contract language covers the act in question, the agreement will have authorized the employer to make the disputed change unilaterally, and the employer will not have violated Section 8(a)(5). If the contract coverage standard is not met, the Board will continue to apply its traditional waiver analysis to determine whether some combination of contractual language, bargaining history, and past practice establishes that the union waived its right to bargain regarding a challenged unilateral change.

Among other reasons, the majority held that the contract coverage standard is more consistent with the purposes of the Act than is the waiver standard because contract coverage: (i) encourages parties to foresee and resolve potential labor-management issues through comprehensive collective bargaining; (ii) will end the Board’s practice of selectively applying exacting scrutiny to contractual provisions that vest in employers the right to act unilaterally; (iii) will end the Board’s practice of sitting in judgment on the substantive terms of a collective-bargaining agreement, a practice contrary to Supreme Court law; (iv) ensures the Board’s interpretation of contractual language remains within its limited authority to do so; and (v) discourages forum shopping by applying the same standard that arbitrators apply, thus channeling unilateral-change disputes into grievance arbitration, as Congress intended. The majority noted that its decision resolves a conflict with several courts of appeals, in particular, the D.C. Circuit, where the waiver standard has become indefensible and unenforceable. The majority explained that, while the Supreme Court has stated that it does not disapprove of the waiver standard, the Court did so in deference to the Board’s expertise and experience. The Board’s subsequent experience and subsequent court decisions, the majority argued, now support adopting the contract coverage standard.

Applying the contract coverage standard retroactively, the majority found that each of the Respondent’s work policies (concerning the addition of light duty work assignments and the setting of disciplinary standards for safety, schedule adherence, security sweeps/breaches, and driving) falls within the compass or scope of language in the collective-bargaining agreement that granted the Respondent the right to assign employees, to discipline employees, and to issue reasonable rules and policies related to employee discipline. Accordingly, the majority found that the Respondent did not violate the Act by unilaterally implementing these work policies.

Dissenting, Member McFerran disagreed with the majority’s decision to abandon the clear and unmistakable waiver standard. Member McFerran faulted the majority for overruling the Board’s many-decades-long adherence to the waiver standard without notice or public participation. She argued that the waiver standard is consistent with the Act because it favors collective bargaining concerning changes in working conditions that might precipitate labor disputes while the contract coverage standard will destabilize labor relations by making it easier for employers to unilaterally change employees’ terms and conditions of employment. She further argued that the contract coverage standard
cannot be squared with Supreme Court law endorsing the Board’s waiver standard, faulted the majority for deferring to the current view of the D.C. Circuit in an area where it is the court that should have deferred to the Board, and noted that multiple courts of appeals have applied the waiver standard. Member McFerran argued that the contract coverage standard will diminish the likelihood of parties reaching collective-bargaining agreements because employers will seek broadly-worded provisions granting them the right to unilaterally act and unions will decide that they are better off resting entirely on the statutory right to bargain created by the Act. She added that this outcome will be amplified by the Board’s decision in *Raytheon Network Centric Systems*, 365 NLRB No. 161 (2017), which permits employers to continue a past practice of making unilateral changes authorized by contractual provisions, even after the collective-bargaining agreement expires. Finally, Member McFerran disagreed with the majority’s retroactive application of the contract coverage standard because, among other reasons, it would be unjust to unions that previously thought they were assured the right to bargain over matters not explicitly waived. Applying the waiver standard, contrary to her colleagues, Member McFerran would find that the Respondent violated the Act by unilaterally implementing its policies concerning safety, schedule adherence, and security sweeps/breaches. Member McFerran agreed with her colleagues the Respondent did not violate the Act by implementing its light duty work assignments and driving policies.

The full Board also considered whether the Respondent, within the meaning of Section 8(d) of the Act, violated Section 8(a)(5) and (1) by implementing five additional work policies on the basis that those policies modified the parties’ collective-bargaining agreement without the Union’s consent. Applying the “sound arguable basis” standard, see *Bath Iron Works Corp.*, 345 NLRB 499 (2005), the Board found that the Respondent unlawfully implemented bereavement pay, licensing reimbursement, and required extra assignments policies. The Board found that the Respondent did not violate the Act by implementing operator log-in and customer service policies.

Charge filed by Amalgamated Transit Union Local #1637, AFL-CIO, CLC. Chairman Ring and Members McFerran, Kaplan, and Emanuel participated.

*SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019)

A full Board majority, consisting of Chairman Ring and Members Kaplan and Emanuel, affirmed the Acting Regional Director’s finding that SuperShuttle’s franchisees, who operate shared-ride vans for SuperShuttle, are excluded from the Act’s coverage as independent contractors, and, accordingly, dismissed the representation petition at issue. In doing so, the majority overruled *FedEx Home Delivery*, 361 NLRB 610 (2014), to the extent that it revised or altered the Board’s independent-contractor test by holding that entrepreneurial opportunity represents merely “one aspect of a relevant factor that asks whether the evidence tends to show that the putative contractor is, in fact, rendering services as part of an independent business.” Id. at 620 (emphasis in original). The majority here found that the FedEx majority impermissibly diminished the significance of entrepreneurial opportunity in the Board’s independent-contractor analysis and revived an “economic dependency” standard that Congress explicitly rejected with the Taft-
Hartley amendments of 1947. The majority returned to the common-law agency test, as required by the United States Supreme Court. See *NLRB v. United Insurance Co. of America*, 390 U.S. 254 (1968).

In agreement with the D.C. Circuit, see *FedEx Home Delivery v. NLRB*, 563 F.3d 492 (D.C. Cir. 2009), the majority recognized that the Board has over time subtly shifted the emphasis of its independent-contractor analysis from control to entrepreneurial opportunity as a principal to qualitatively evaluate the significance of the common-law agency factors that form the test. The majority explained that this subtle shift in emphasis did not fundamentally alter the Board’s independent-contractor analysis; control and entrepreneurial opportunity are two sides of the same coin, as more of one means less of the other. The majority further explained that, properly understood, entrepreneurial opportunity is not a separate factor or an aspect of a separate factor, but instead is “a principle by which to evaluate the overall effect of the common-law factors on a putative contractor’s independence to pursue economic gain.” The majority specified that the Board is not required to mechanically apply the entrepreneurial opportunity principle to each common-law factor in every case, but that the Board will likely find independent-contractor status when, in light of the particular factual circumstances of the case, the common-law factors demonstrate that the workers are afforded significant entrepreneurial opportunity. Finally, consistent with the Supreme Court’s decision in *United Insurance*, the majority reiterated that when making independent-contractor determinations, the Board will consider all of the common-law factors in the total factual context of each case and treat no one factor (or the principle of entrepreneurial opportunity) as decisive.

Applying the common-law test to the specific facts here, the majority found that the franchisees’ ownership of the principal instrumentality of their work, the method of their compensation, and their significant control over their daily work schedules and working conditions provide the franchisees with significant entrepreneurial opportunity. The majority further found that because those factors, along with the absence of supervision and the parties’ understanding that the franchisees are independent contractors, outweigh the factors supporting employee status, the franchisees are independent contractors.

Dissenting, Member McFerran disagreed with the majority’s decision to overrule *FedEx*, supra, 361 NLRB 610, and asserted that the *FedEx* Board did no more than permissibly refine the way that the Board would apply the common-law agency test, as the Board may consider factors beyond the non-exhaustive list of common-law factors. Further, Member McFerran argued that the majority’s treatment of entrepreneurial opportunity as a “sort of super-factor” is contrary to the common-law agency test and the Supreme Court’s decision in *United Insurance* because, if the common-law agency test has a core concept, it is demonstrably not entrepreneurial opportunity but rather control. Additionally, she argued that the majority’s treatment of entrepreneurial opportunity cannot be reconciled with the Board’s pre-*FedEx* precedent because the Board had not shifted its emphasis to entrepreneurial opportunity until the majority’s decision in the present case. Thus, even under the Board’s pre-*FedEx* precedent, Member
McFerran would find that SuperShuttle failed to establish that the franchisees are independent contractors.

Petitioner—Amalgamated Transit Union Local 1338. Chairman Ring and Members McFerran, Kaplan, and Emanuel participated.

Tobin Center for the Performing Arts, 368 NLRB No. 46 (2019)

A Board majority (Chairman Ring and Members Kaplan and Emanuel; Member McFerran, dissenting) reversed the Administrative Law Judge’s conclusion that the Respondent violated Section 8(a)(1) by barring the off-duty employees of an onsite contractor from leafleting on its property. The majority overruled New York New York Hotel & Casino, 356 NLRB 907 (2011), and determined that contractor employees are not generally entitled to the same Section 7 access rights as the property owner’s own employees. The majority adopted a new standard, which it will apply retroactively to all pending cases, holding that a property owner may exclude from its property off-duty employees of an onsite contractor seeking access to the property to engage in Section 7 activity unless (i) those employees work both regularly and exclusively on the property, and (ii) the property owner fails to show that they have one or more reasonable nontrespassory alternative means to communicate their message, which could include the use of adjacent public property, newspapers, radio, television, billboards, and social media.

The majority relied on the principles articulated in the Supreme Court’s opinion in Lechmere, Inc. v. NLRB, 502 U.S. 527 (1992). The Court held that, when Section 7 rights conflict with a property owner’s property rights, an accommodation between the two “must be obtained with as little destruction of one as is consistent with the maintenance of the other” and that the “nature and strength” of the respective Section 7 rights must be balanced against the private property rights of the property owner. Most importantly to this case, the Court also labeled the distinction between the union activities of employees versus those of nonemployees as one “of substance.” The majority held that this distinction “of substance” necessitates that, although off-duty employees of an onsite contractor enjoy some Section 7 access rights, they are weaker than those of the property owner’s own employees and the extent to which their Section 7 rights permit infringing upon private property rights is inherently more restricted. Thus, the majority’s new standard properly accommodates the competing rights at issue: off-duty, onsite contractor employees may access a property owner’s property to engage in Section 7 activity where they have a sufficient connection to the property owner by working regularly and exclusively on the property, and the contractor employees do not have access to reasonable alternative nontrespassory means of communicating their message.

Dissenting, Member McFerran would have applied New York New York Hotel & Casino and found that the Respondent violated Section 8(a)(1) by barring access to employees whose leafleting occurred in a public area and caused no interference with patrons. She asserted that the majority’s new access standard failed to heed the D.C. Circuit’s admonition to determine access rights by weighing the concrete interests of
contractor employees, which include their core right to leaflet at their own workplace, and those of property owners, which are preserved via their ability to control the conduct of leafleting employees and prevent disruption. Instead, she argued, the majority wrongly applied a distinction between the rights of employees and nonemployees that arose in a context involving nonemployee organizers rather than employees asserting their own rights at their own workplace. She also pointed out that the majority’s new standard, despite the claim that contractor employees have some rights, places a property owner’s right to exclude above employees’ rights in all but the rarest circumstances, arbitrarily excluding employees who do not work exclusively on a property – even when the property is their primary workplace – and requiring most employees to have to resort to infeasible methods to communicate their message rather than leaflet at their workplace.

Charge filed by Local 23, American Federation of Musicians. Administrative Law Judge Arthur J. Amchan issued his decision on December 5, 2017. Chairman Ring and Members McFerran, Kaplan, and Emanuel participated.

**UPMC and its subsidiary, UPMC Presbyterian Shadyside, single employer d/b/a UPMC Presbyterian Hospital and d/b/a UPMC Shadyside Hospital, 368 NLRB No. 2 (2019)**

The Board unanimously adopted the Administrative Law Judge’s conclusion that the Respondent, UPMC, violated Section 8(a)(1) by requiring employees who were meeting with Union organizers in the public cafeteria to produce their identification. The Board also unanimously adopted the judge’s conclusion that the Respondent did not engage in unlawful surveillance of the employees who were meeting with the organizers in the cafeteria.

Regarding the issue of union access to the cafeteria, a Board majority (Chairman Ring and Members Kaplan and Emanuel) overruled *Ameron Automotive Centers*, 265 NLRB 511 (1982), *Montgomery Ward & Co., Inc.*, 256 NLRB 800 (1981), enfd. 692 F.2d 1115 (7th Cir. 1982), and their progeny to the extent those cases held that nonemployee union organizers could not be denied access to cafeterias that are open to the public if the organizers used the facility in a manner consistent with its intended use and are not disruptive. Instead, the majority found that, absent discrimination, an employer does not have a duty to permit the use of its public cafeteria by nonemployees for promotional or organizational activity. Applying the new standard, the majority found that UPMC did not discriminate by removing from the cafeteria the Union organizers, who were engaged in blatant promotional activity, because the evidence showed that UPMC had previously prohibited nonemployee third party organizations from soliciting and distributing in its cafeteria. Thus, the majority found that the Employer did not violate the Act by requiring the organizers to leave the cafeteria.

Dissenting, Member McFerran argued that the Board threw its judicially-approved longstanding precedent against discrimination into doubt by permitting the Employer to expel union representatives from a hospital cafeteria that is open to the public based entirely on their union affiliation. Member McFerran argued that such action is discrimination in its clearest form. She also argued that the Board’s holding cannot be
reconciled with the understanding of discrimination reflected by Supreme Court precedent. Finally, Member McFerran argued that, because the Employer did not apply a no-solicitation/no-distribution policy in expelling the union organizers from the cafeteria, the Board erred by using this case to overturn Montgomery Ward, above.

Charges filed by SEIU Healthcare Pennsylvania C TW, CLC. Administrative Law Judge Mark Carissimi issued his decision on November 14, 2014. Chairman Ring and Members McFerran, Kaplan, and Emanuel participated.

*Velox Express, Inc., 368 NLRB No. 61 (2019)*

The full Board unanimously adopted the Administrative Law Judge’s conclusion that the Respondent failed to establish that its drivers are independent contractors. In adopting the judge’s conclusion, the Board applied SuperShuttle DFW, Inc., 367 NLRB No. 75 (2019), which issued subsequent to the judge’s decision. Additionally, the Board unanimously adopted the judge’s conclusion that the Respondent violated Section 8(a)(1) by discharging an individual driver for raising protected group complaints about the Respondent’s treatment of the drivers as employees instead of independent contractors.

A full Board majority (Chairman Ring and Members Kaplan and Emanuel) reversed the judge and dismissed the allegation that the Respondent independently violated Section 8(a)(1) by misclassifying its drivers as independent contractors. The majority held that an employer’s misclassification of its employees as independent contractors, standing alone, does not violate the Act. The majority explained that an employer’s communication to its workers of its legal opinion that they are independent contractors does not, in and of itself, inherently threaten that those employees are subject to termination or other adverse action if they exercise their Section 7 rights or that it would be futile for them to engage in union or other protected activities. The majority found that communication of that legal opinion is therefore privileged by Section 8(c) even if the employer is ultimately mistaken. Additionally, the majority rejected the argument that, even if a misclassification, standing alone, does not violate the Act, the Respondent’s misclassification became coercive when the Respondent unlawfully discharged a misclassified driver for engaging in protected activity. The majority acknowledged that the unlawful discharge may chill the other drivers from engaging in protected activity, but did not believe that the creation of a new misclassification violation was necessary because the Board has long used its notice-posting remedy to dispel the chilling effect of unfair labor practices. The majority did not accept that in any circumstances, an employer’s misclassification itself will become unlawful because of other related conduct by the employer, stating that if the General Counsel determines that related conduct is unlawful, then he should allege it as a violation of the Act, and the Board will remedy it accordingly if it agrees. Finally, the majority declined to order the Respondent to reclassify its drivers as part of the remedy for its unlawful discharge. The majority noted that the extraordinary remedy of reclassification is not routinely ordered in cases involving misclassified employees and found, once again, that the Board’s traditional notice-posting remedy would be sufficient to dissipate fully the coercive effects of the unlawful discharge.
Dissenting in part, Member McFerran would have adopted the judge’s conclusion that the Respondent independently violated Section 8(a)(1) by misclassifying its drivers as independent contractors. She argued that it was unnecessary for the Board to decide whether an employer’s misclassification of its employees as independent contractors, standing alone, violated the Act for two reasons. First, by discharging a misclassified driver for engaging in protected activity, the Respondent applied the misclassification to interfere with Section 7 activity, rendering the misclassification itself unlawful. Second, to fully remedy the unlawful discharge, the Board needed to order the Respondent to reclassify all of its misclassified drivers. If it had been necessary to decide the stand-alone misclassification issue, Member McFerran would have held that a misclassification, standing alone, violates Section 8(a)(1) because when an employer communicates to its employees that it has classified them as independent contractors, the employees would reasonably believe that exercising their Section 7 rights would be futile or would lead to adverse employer action.

Charge filed by an individual. Administrative Law Judge Arthur J. Amchan issued his decision on September 25, 2017. Chairman Ring and Members McFerran, Kaplan, and Emanuel participated.

Wal-Mart Stores, 368 NLRB No. 146 (2019)

The full Board adopted the Administrative Law Judge’s conclusion that the Respondent’s maintenance of its dress codes requiring logos to be “small” and “non-distracting” violated Section 8(a)(1) as it applied to areas away from the selling floor; however, a Board majority (Chairman Ring and Members Kaplan and Emanuel; Member McFerran, dissenting) reversed the judge’s conclusion that the Respondent’s maintenance of its dress codes was unlawful as it applied to the selling floor. In doing so, the majority applied its test for examining facially neutral employer policies set forth in The Boeing Company, 365 NLRB No. 154 (2017). The majority explained that limitations on the display of union insignia short of outright prohibitions will vary in the extent to which they serve legitimate employer interests and the degree to which they interfere with Section 7 rights; thus, they will “warrant individualized scrutiny in each case” as Boeing Category 2 rules.

Applying Boeing to the maintenance of the rules on the selling floor, the majority found that the policies—when reasonably interpreted—would potentially interfere with employees’ Section 7 right to display some union insignia; nonetheless, the adverse effect is relatively minor and outweighed by the Respondent’s legitimate justifications for maintaining the policies—to enhance the customer shopping experience and protect its merchandise from theft or vandalism.

Dissenting and citing Republic Aviation, 324 U.S. 793 (1945), Member McFerran argued that the majority impermissibly applied The Boeing Company instead of the Board’s longstanding “special circumstances” test. By applying Boeing, the dissent argued that the majority upends the Board’s traditional framework by abandoning the presumption that any limitation on the display of union insignia is presumptively unlawful, and,
instead, requiring the General Counsel to first prove that Section 7 rights have been adversely affected. The dissent further argued that, as a result, the majority effectively treats the display of union insignia more as a privilege to be granted by the employer on the terms it chooses, rather than as an essential Section 7 right that—pursuant to federal labor law—requires accommodation. Noting that the judge reached the only permissible conclusion on the facts presented, the dissent would have affirmed the judge’s conclusions that the Respondent’s maintenance of its policies violated Section 8(a)(1).

Charges filed by Organization United for Respect at Walmart (OUR Walmart). Administrative Law Judge Geoffrey Carter issued his decisions on December 9, 2014 and June 4, 2015. Chairman Ring and Members McFerran, Kaplan, and Emanuel participated.
41st Annual
Labor & Employment Law
Symposium

Session 4, Panel 1:

Inside the Courtroom of a
Wrongful Termination Trial

David Ammons, LTL Attomeys
David deRubertis, The deRubertis Law Firm
David W. Ammons is the Managing Partner of LTL Attorneys, one of California’s largest, minority-owned firms. David heads the firm’s Employment and Commercial litigation practice groups. The first spin-off from trial powerhouse Quinn, Emanuel, Urquhart & Sullivan, LTL focuses solely on trials and arbitrations. David, a graduate of the University of Michigan Law School, has first-chaired more than 25 jury trials over more than two decades of practice with LTL, the San Francisco City Attorney’s Office, Manatt, Phelps & Phillips and Baker & Hostetler. LTL maintains offices in Los Angeles, San Francisco, and New York City.
David M. deRubertis, the principal in The deRubertis Law Firm, APC, handles employment, catastrophic personal injury/wrongful death, and contingency business-litigation matters statewide – including as last-minute, “eve of trial” lead trial counsel.

Mr. deRubertis’ honors include: “Trial Lawyer of the Year” by the Consumer Attorneys Association of Los Angeles (CAALA) (2014); “Best Lawyers - Lawyer of the Year - Employment Law - Individuals” (Los Angeles) (2014 and 2018); California Lawyer of the Year (CLAY Award) in Employment Law (2014); Joseph Posner Award from the California Employment Lawyers Association (CELA) (2011) (youngest-ever recipient); Top 100 Southern California Super Lawyer (2011 – 2021); Top Labor & Employment Lawyer by Los Angeles and San Francisco Daily Journal (2009 – 2020); and two-time Finalist for “Street Fighter of the Year” by Consumer Attorneys of California (CAOC) (2014 and 2015).

A member of the American Board of Trial Advocates (ABOTA), deRubertis regularly participates in its annual “Masters in Trial” program and has secured multiple record-setting employment jury verdicts as lead trial counsel. In both 2014 and 2016, the Daily Journal recognized deRubertis’ jury verdicts as among the “Top Plaintiff Verdicts” in California for those years and in 2017 another jury verdict deRubertis secured was recognized by Courtroom View Network (www.cvn.com) as among its nationwide “Top 10 Most Impressive Plaintiffs’ Verdicts of 2017.”

Mr. deRubertis is a member of the Board of Governors of CAALA and previously served on the Executive Board of the CELA and CAOC, and he was a Founding Director of the Los Angeles Trial Lawyers’ Charities.
Nature of Case: Wrongful termination claim under FEHA’s “associational disability discrimination” theory – i.e., Kaiser terminated Maria Gonzalez’s employment because of her association with a disabled person, her son Pedro Moreno.

Basic Facts/Timeline:

Maria Gonzalez worked as a medical assistant in SCPMG/Kaiser’s pain management department in San Diego from 2012 until Kaiser fired Maria in October 2014.

Through her work for Kaiser, Maria received health insurance benefits for herself and her children, which provided her family with medical care at Kaiser.

In 2012, Maria’s then 21-year-old son Pedro began suffering from a chronic pain condition for which he received care and treatment within the Kaiser system, as well as costly treatment outside of Kaiser when Kaiser was unable to provide the necessary care.

Over the next approximately two years, Pedro’s condition fluctuated but generally got progressively worse. In 2013, Pedro became a patient of Kaiser’s pain management department where Maria was the only regular medical assistant. So Maria became Pedro’s medical assistant at that time and Dr. Watson (Maria’s boss) became Pedro’s doctor. In August 2013, Kaiser granted Pedro an outside referral (at Kaiser’s expense) to have a complicated auto-renal transplantation surgery – a surgery to remove one of his kidneys and then re-implant the kidney into Pedro’s body on the opposite side.

Following the auto-renal transplantation surgery, Pedro’s pain improved at first but with time he developed recurrent pain on the side the transplanted his kidney to. With time, Pedro began to exhibit signs of potential over-use of pain medication according to nurses and doctors in the pain management department.

In the spring/summer of 2014, Maria’s coworkers reported concerns both that Pedro was overusing pain medication and that Maria was interfering with Pedro’s care, enabling Pedro’s medication over-use, and giving Pedro preferential treatment in the department.

On July 7, 2014, Dr. Watson told Pedro and Maria during one of Pedro’s doctor’s appointments that there was a “conflict of interest” in Maria continuing to be Pedro’s medical assistant so Dr. Watson was discharging Pedro from the pain management department and sending him back to be treated and managed by the primary care department. Following this July 7, 2014 discharge of Pedro back to primary care and out of the pain management department, Maria and Pedro both began to push to have Pedro transferred back to primary care or even referred to an outside pain management department. At this same time, Pedro also pushed to have a second auto-renal transplant surgery performed also outside of the Kaiser system at Kaiser’s expense. These efforts culminated in late August 2014 when Dr. Watson and his boss (Dr. Jaffe) agreed that Pedro should be referred to an outside referral for continued pain
management care. Then, within days of this decision to authorize the outside referral, Kaiser’s “financial gatekeeper” on outside referrals Dr. Capon denied the outside referral. Soon after this, Kaiser began to investigate Maria for allegations that she had improperly accessed Pedro’s medical records (violating HIPPA and Kaiser’s policies) and conducting a “pill count” that was beyond the scope of her license as an MA. Kaiser then terminated Maria on the basis of these two allegations – i.e., improperly accessing Pedro’s medical records and performing the unauthorized pill count.
Witness 1: Dr. Watson (adverse witness - Cal EC 776 or FRE 611)

- Dr. Watson was the physician in the pain management department for whom Maria Gonzalez worked as Dr. Watson’s primary medical assistant

- Dr. Watson directly supervised Maria on a daily basis and, in that role, he was very positive about Maria’s general work history and work record

- Dr. Watson as the pain management physician for Kaiser in San Diego was also Pedro’s doctor when Pedro became a patient in the Pain Management Department.

- However, Dr. Watson also field various coworker complaints regarding Maria’s role in Pedro’s care in the spring/summer of 2014 leading to the key July 7, 2014 “conflict of interest” discharge of Pedro from the Pain Management Department back to primary care.

- Dr. Watson would be used to set the scene of the case, explain how Kaiser operated including the outside referral costs, show that before spring/summer 2014 Maria was nothing but a great employee, to walk through Pedro’s medical problems as much as we could (given the evidentiary limitations we were under), to show that the July 7, 2014 “blindsided” event by the discharge to primary was indefensible medically, to start teasing Dr. Capon’s role in the case, to show that Dr. Watson ultimately wanted Pedro referred outside but that Dr. Capon eventually blocked the outside referral and to try to start to show the pretext behind Kaiser’s stated termination reasons.

Witness 2: Dr. Jaffe (adverse witness - Cal EC 776 or FRE 611)

- Physician-in-Charge/Chief of Staff of Pain Management Department

- Attended key August 26, 2014 meeting with Pedro and Traci Trask. Result of this meeting was an agreement among Dr. Watson, Dr. Jaffe and Traci Trask that Pedro should be given an outside referral for continued pain management care. This agreement for outside referral is then blocked by Dr. Capon.

- Able to use this wit to get the key emails (Exhibits 137, 146 and 147) early in case and show the key conflict between the shift from the August 26, 2014 agreement to refer Pedro for pain management care outside of Kaiser to the new plan (endorsed by Dr. Capon) of no outside referral and instead launch an investigation into Maria’s employment conduct.

- Through starting with Dr. Watson and then moving to Dr. Jaffe, we were able to
contrast the care providers who were most involved in Pedro’s care (Dr. Watson primarily and secondarily Dr. Jaffe) who believed Pedro had real medical issues and wanted him cared for by a pain management doctor with the “financial gatekeeper” Dr. Capon’s perspective of shutting down the continued outside referrals. Also, though both Dr. Watson and Dr. Jaffe were adverse witnesses who were current partners at SCPMG, they were less hostile to Maria than other Kaiser wits so they also offered less attacking testimony at Maria than others would.

**Witness 3: Dr. Capon (adverse witness - Cal EC 776 or FRE 611)**

- Dr. Capon was to us the “financial gatekeeper” – that is, the doctor at Kaiser who had the administrative role of denying or approving outside referrals.

- Dr. Capon had no role in supervising or overseeing Maria’s employment and he had no direct role in providing care to Pedro when Pedro was in the Pain Management Department. Instead, Dr. Capon was an hospital-based internal medicine doctor who also had the administrative role as the “financial gatekeeper.” Dr. Capon did encounter Pedro and Maria a couple of times when Pedro was admitted to the hospital and, in that role, Dr. Capon provided some care to Pedro so he was generally familiar with Pedro’s situation.

- By calling Dr. Capon after Dr. Watson and Dr. Jaffe, we had the benefit that we had already been attacking Dr. Capon hard through these two other wits (including walking through Dr. Capon’s email shutting down the outside referral with Dr. Jaffe).

- Dr. Capon was used to show as much as we could that decisions at SCPMG were made based on cost/financial considerations and this lead to Dr. Capon’s ultimate decision to block the outside referral in August 2014 and then began an investigation into Maria’s conduct as an employee.

**Witness 4: Traci Trask, PT (adverse witness - Cal EC 776 or FRE 611)**

- Traci Task, PT was the Assistant Director of Physical Medicine & Pain Management, a managerial employee in the Pain Management Department who oversaw Maria’s work.

- Trask was heavily involved in the investigation into the complaints lodged against Maria in the spring/summer 2014. Trask, with the Compliance Department, conducted the investigation that lead to Maria’s termination. Trask was also involved in the August 2014 events such as Pedro pushing to get referred to outside care, etc.

- Having set the seen with Drs. Watson, Jaffe and Capon – walking through motive, showing the suspicious circumstances involving the start of this investigation – we know attacked the investigation process and result head-on with Trask after indirectly undermining it with the other wits.
Witness 1 (out-of-order): Dr. Watson Continued (see Witness 1 above) (adverse witness - Cal EC 776 or FRE 611)

- Completion of exam of Dr. Watson out-of-order

Witness 5: Stacy Smith (adverse witness - Cal EC 776 or FRE 611)

- Current Kaiser employee - Master Scheduler and Department Clerk in Pain Management Department

- Kaiser claimed Maria was not authorized to conduct “pill counts” and that one reason for her termination was that she conducted a “pill count” for Pedro. Stacy Smith confirmed that at Traci Trask’s request Smith previously ordered a “pill counter” for Maria to use.

- Kaiser also claimed Maria abused her position by manipulating Dr. Watson’s schedule so that she could give Pedro priority scheduling through Dr. Watson’s “overbook” appointments, which are reserved slots not filled intentionally so that there is space in Dr. Watson’s schedule for more urgent appointments. Smith’s testimony confirmed that it was up to Dr. Watson whether a patient got an “overbook” appointment, and also that while Maria did make “overbook” appointments for Pedro she also did so for other patients.

- Kaiser also said Maria gave priority treatment to Pedro by letting Pedro call her directly. Smith confirmed that Maria had a dedicated phone line and she regularly had all her patients (not just Pedro) call her line directly.

Witness 6: April Moon Waara (adverse witness - Cal EC 776 or FRE 611)

- Assistant Medical Group Administrator - a high-ranking manager who reported directly to the Chief Administrative Officer in San Diego and was a member of Kaiser’s Executive Leadership Team.

- Approved termination and was a possible managing agent candidate for punitives.

- Used to discuss “access” problems at Kaiser, cost issues such as “at risk compensation” etc.

- Also, was a recipient of some of the key emails (Exhibit 147) and had some involvement in the August 2014 issues. Used her to show that Dr. Capon brought the Director of Risk Management into the email exchanges in August 2014.

Witness 7: Maria Gonzalez - Plaintiff Direct
Witness 8: Dr. Mutuc-Worst (adverse witness - Cal EC 776 or FRE 611)

- Kaiser medical doctor who had a high-ranking administrative role: Assistant Medical Director for Outpatient Services

- Was present during the key August 15-18, 2014 hospitalization where Maria and Pedro demanded to get access to a pain management doctor but were lied to Maria and said could not get a pain management consult in the hospital and Maria disputed this saying she worked in the Pain Management Department. Kaiser then twists this into Maria “misrepresenting herself” as a care provider in Pain Management.

- August 15-18, 2014: Had key telephone call with Maria during this hospitalization. Chart notes show that Dr. Mutuc-Worst then “spoke with UM physician Dr. Hayes, and also updated Dr. Capon.” So, this tied Dr. Capon into this hospitalization info right before Dr. Capon shut down the outside referral. Also, came out that Dr. Mutuc-Worst, Dr. Capon and Dr. Bernstein (highest-ranking SCPMG employee in San Diego) had Friday and Monday morning conference calls, which meant the issues of this hospitalization would be discussed with Dr. Bernstein and Dr. Capon on Monday August 18th likely.

- Developed distinction between Maria being a Mom (“off-duty-behavior”) while in hospital versus Maria’s conduct as an employee. Ultimately, Dr. Mutuc-Worst was forced to concede that disciplining for conduct in hospital as a Mom was not permitted under Kaiser’s policies. This allowed the argument that Kaiser knew they couldn’t legally discipline for hospital-related conduct as a Mom and, therefore, they made up the pretextual, bogus excuses of workplace conduct as the basis for termination.

- Also walked through key emails now that jury had greater context (Exhibits 137, 146 & 147)

Witness 9: Ellen Stein, Ph.D.

- Plaintiff’s forensic psychologist

Witness 10: Heather Xitco, MBA, CPA

- Plaintiff’s forensic economist on wage and benefit loss

Witness 8 (out-of-order) Dr. Mutuc-Worst Continued (adverse witness - Cal EC 776 or FRE 611)

Witness 11: Jason Nienberg, J.D.
- Compliance Investigator who lead the investigation into Maria’s termination with Traci Trask

- Attacked the process and result of investigation through him to show Kaiser’s stated reasons for the termination were bogus and the investigation was a sham process not designed to find the truth

Witness 12: Terrance O’Toole (pharmacist): Defense Witness

- Pharmacist O’Toole was called by the defense to slam Maria. Among other things, O’Toole painted the picture of Pedro taking too much pain medication and Maria enabling Pedro’s over-use of pain meds.

- Pharmacist O’Toole testified to repeated conversations he had with Pedro about Pedro’s over-use of pain meds including Pedro admitted to taking too much. Testified to red or yellow flags of abuse seen in Pedro’s case.

- Pharmacist O’Toole testified he began to monitor Pedro’s case more closely (restricting meds where appropriate) and soon after he did that, Maria got him fired from Pedro’s case and put a different pharmacist on Pedro’s case.

Witness 13: Nadine Manzano: Defense Witness

- Coworker of Maria’s. Defense called her because she was nice and credible and she directly contradicted Maria’s testimony on a specific point – i.e., whether Maria checked-in Pedro for a particular appointment. Maria said she did, Manzano claimed Maria did not but rather Manzano did.

Witness 14: RN Lynch: Defense Witness

- RN Lynch was one of Maria’s coworkers, a nurse in the Pain Management Department.

- RN Lynch was called by the defense to trash Maria.

- First, Lynch offered a lot of testimony contradicting specifics of Maria’s testimony.

- Second, Lynch testified that Maria asked RN Lynch to take over Pedro’s case as his nurse replacing RN Laskin. RN Lynch’s testimony helped Kaiser advance the narrative that whenever a care provider was putting the breaks on Pedro’s pain med access, Maria pulled strings to switch Pedro’s care to someone else (in hopes, according to Kaiser, that Maria could get the next person to continue to supply pain meds to Pedro). RN Lynch testified she reported to Dr. Watson that Maria
was doing this.

- Third, RN Lynch supplied more testimony about Pedro’s behavior that Kaiser argued was drug-seeking behavior.

- Fourth, RN Lynch testified (corroborated by a realtime email) that Maria did the “pill count” that was alleged as part of the basis for her termination and that the practice was for the RN (not the MA) to do pill counts.

- Fifth, RN Lynch testified to her realtime written report that “Maria stated that she knew it was one of the nurses [who told Dr. Watson it was a conflict of interest for Maria to continue being involved in Pedro’s care] and that if she found out who it was she was going to wish the worst pain on their children.” RN Lynch testified she, too, has a daughter in chronic pain and that she took this very seriously as a threat of harm against her children. RN Lynch testified that this was not just an isolated statement by Maria and she was very afraid. RN Lynch testified that after these threats by Maria, RN Lynch was so afraid of her family’s safety that she deactivated her Facebook account and began parking in a different parking lot so Maria would not know where she parked.

- Sixth, we had a painted a clear picture that Maria cared about all of her patients. RN Lynch tried to undermine this by testifying that Maria told him she only went above and beyond for her patients just because “if any of the patients ever came in angry with a gun, she would be able to tell them ‘I was only ever nice to you. I will show you where all of their offices are.”

**Witness 15: Jacques Harris, R.N.: Defense Witness**

- Director of Physical Medicine & Pain Management and direct supervisor of Traci Trask

- Client rep for Kaiser at trial. Kaiser called him to testified to some parts of the investigation and some basic background. Most important, they tried to use him to show that if Maria did not document in the chart a call from Pedro on a particular date, this means she did not get a call from him on that date. From this, Kaiser would argue that Maria’s claim that she got calls from Pedro on certain dates and this explains why she accessed his records on those dates was false.

**Witness 16: Pedro Moreno: Defense Witness**

- Defense called Pedro in their case-in-chief including to:

  - Drive home the point that after Maria’s termination, Pedro continued to get care through Kaiser. In other words, our entire point that Kaiser term’d Maria to get
rid of Pedro didn’t actually happen.

- Raise more questions about whether he was drug-abusing/seeking.

- Challenge Maria’s claims that she accessed Pedro’s chart for only patient care reasons or because of Pedro’s requests. This included attacking Pedro/Maria for not supplying phone records to confirm their testimony that Pedro called Maria on certain dates asking for certain medical info (thereby explaining why Maria accessed his chart on those dates)

**Witness 17: Adriana Avalos**

- Compliance Department investigator and boss of Jason Neinberg

- Kaiser called to try to buttress some parts of the investigation evidence, including to respond to our claim questioning the timing of when the investigation began
DEFENDANT’S TRIAL BRIEF

LTL ATTORNEYS LLP
Steven C. Gonzalez (SBN 191756)
David W. Ammons (SBN 187168)
Caleb H. Liang (SBN 261920)
300 S. Grand Ave., 14th Floor
Los Angeles, CA 90071
Tel: (213) 612-8900
Fax: (213) 612-3773

Attorneys for Defendant
Southern California Permanente Medical Group

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO

MARIA T. GONZALEZ, an individual,

Plaintiff,

v.

SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUP, INC. d/b/a SOCAL PERMANENTE MEDICAL GROUP,

Defendant.

CASE NO.: 37-2015-00019384

[Assigned for All Purposes to Hon. Honorable Katherine A. Bacal, Dept. C-69]

IMAGED FILE

DEFENDANT’S TRIAL BRIEF

Date: February 10, 2017
Time: 8:30 a.m.
Dept.: C-69
I. INTRODUCTION

Plaintiff Maria Gonzalez brings this lawsuit following the termination of her employment with Defendant Southern California Permanente Medical Group (“SCPMG”). SCPMG terminated Plaintiff’s employment after an investigation found that she had accessed her son’s (a Kaiser patient) private electronic medical record on at least 16 occasions without medical justification for doing so, and had conducted a pill count on his prescribed medication without a physician’s direction or authorization.

Plaintiff’s amended complaint asserts causes of action for: 1) violation of Government Code section 12940(a) “associational discrimination;” 2) violation of Government Code section 12940(k) “failure to prevent discrimination;” 3) wrongful termination in violation of public policy; 4) intentional infliction of emotional distress; 5) negligent infliction of emotional distress; 6) violation of Business and Professions Code section 17200 “unfair competition law.” Plaintiff had also asserted causes of action for violation of Labor Code section 233, and Health & Safety Code section 1278.5 (whistleblower retaliation), alleging that SCPMG had retaliated against her for taking kin care leave and for complaining about patient safety, respectively. Both causes of action were summarily adjudicated against her and are therefore no longer a part of the action.

Plaintiff also attempted, on two occasions, to augment her expert designation to include a pain management expert to offer testimony regarding the standard of care. Her first attempt occurred before she was allowed to amend her Complaint to add the whistleblower cause of action just weeks before the November 4, 2016 trial date. The Court denied Plaintiff’s request to augment her expert designation in this manner finding that standard of care was not relevant to the issues in this litigation, but did so without prejudice. Then, after Plaintiff was allowed to add her whistleblower claim, Plaintiff renewed her motion to augment her expert list. The Court again denied her request. Nevertheless, Defendant anticipates that Plaintiff will attempt to inject medical standard of care issues into this trial notwithstanding the absence of any witness qualified to offer such testimony or its relevance to her remaining causes of action.
Plaintiff’s remaining claims lack evidentiary support. As to her associational discrimination cause of action, she cannot establish that the cost or expense of her son’s health care – the only version of associational discrimination claim that Plaintiff has actually plead -- was in any way related to the decision to terminate her employment. There is no evidence whatsoever that her son’s health care was costly, or that anyone connected with the decision to end the employment relationship knew of, or considered the cost of her son’s healthcare, whatever it was, at any time. Defendant anticipates that Plaintiff will attempt to avoid the court’s rulings on its retaliation causes of action by importing additional bases for finding associational discrimination, specifically “inconvenience” or “nuisance,” neither of which are actual recognized elements for such cause of action.

Because Plaintiff cannot establish her associational discrimination claim, her remaining causes of action, which are all dependent upon a finding of discrimination, fail as well. Specifically, there is no failure to prevent discrimination that has not occurred. Nor is there any violation of any public policy where the termination does not violate a policy embodied in a constitutional or statutory provision—and none is identified other than that for associational discrimination. Similarly, there is no basis for a claim of negligent or intentional emotional distress where no statutory provision (i.e., anti-discrimination or retaliation) has been violated. Finally, since Plaintiff’s section 17200 claim is dependent upon establishing the violation of a federal or state employment law, and she cannot establish such, this cause of action fails as well.

II. STATEMENT OF FACTS
Plaintiff was employed as a Medical Assistant in SCPMG’s Garfield Pain Management Clinic from 2002 to 2014. Her primary job duties were to greet and check-in patients, escort them to examination rooms, taking vital signs and checking out such patients at the completion of their appointments.

Plaintiff’s adult son, Pedro Moreno, began to treat at Garfield in 2012 for kidney-related issues, with his symptoms becoming more acute in 2014. Over this period of time, he also made several emergency room visits to Kaiser’s Zion Hospital. Plaintiff accompanied her son on all of the emergency room visits and, on more than one occasion, confrontationally demanded increased pain
medications (i.e., opioids) to address his symptoms. One emergency room physician wrote that Plaintiff had approached her and put her finger in the physician’s face during one encounter. Subsequently, her co-workers and superiors began to note and complain about her behavior, including an episode in which her son, who had repeatedly asked for early refills on his medication, came in for a pill count. Rather than inform the nurse case manager who was on duty that her son had arrived so that the nurse could conduct the pill count, Plaintiff took it upon herself to conduct a pill count on his medication. Plaintiff’s supervisor Tracy Trask learned of this conduct during interviews with Pain Clinic staff in response to complaints about Plaintiff’s behavior.

Plaintiff also accessed her son’s electronic medical record without a business reason on more than 16 occasions in 2014. All Kaiser employees whom have access to patients’ private health information are required to limit their access to such information to that which is “minimally necessary.” Trask learned that Plaintiff had accessed her son’s electronic medical record when he was not present at her facility for an appointment, or responding to a message, or addressing a physician’s request to contact him. Indeed, she had even accessed his electronic records from a facility at which he had never sought treatment while she was temporarily assigned there.

III. LIABILITY ISSUES

A. PLAINTIFF HAS NOT PLEAD A CLAIM FOR “DISTRACTION” ASSOCIATIONAL DISCRIMINATION.

It is apparent from Plaintiff’s pre-trial filings that she will attempt to persuade the jury that she was fired for reasons other than cost. Specifically, pursuant to her associational discrimination cause of action, Plaintiff asserts that Kaiser sought to get rid of her and her son because her son was “challenging, a distraction causing an inconvenience and pursuing legal action.” (Plaintiff’s Memo. Opposing Summary Judgment, p. 14). But even assuming that Plaintiff was fired for these reasons, no case has recognized such as disability discrimination.

Purporting to rely on Castro-Ramirez v. Dependable Highway Express, Inc. (2016) 2 Cal. App. 5th 1028, Plaintiff states:
Relevant examples “of the kind of circumstances which might trigger a claim of associational discrimination” include “expense” where the relative has a disability that is costly to the employer . . . “distraction,” where the employee is somewhat less attentive at work because of attention required by the relative with a disability and “inconvenience,” where the employer wishes to avoid a perceived nuisance (such as providing the employee with earlier shifts to get home earlier to care for a relative).

(Plaintiff’s Memo. Opposing Summary Judgment, p. 13.) In other words, Plaintiff intends to present evidence and argue that she was fired because of her and her son’s complaints about his medical care, because such complaints constituted a nuisance and inconvenience to SCPMG. This is a misstatement of the law. Neither Castro-Ramirez nor any other case recognizes as unlawful disability discrimination the termination of employment because the plaintiff was a “challenge,” “inconvenience” or pursuing legal action.

Castro-Ramirez was a distraction case. There, the plaintiff had requested an accommodation to work a particular shift so that he could administer daily dialysis to his son, a request that plaintiff’s initial supervisor accommodated at the commencement of his employment with Defendant. However, a new supervisor refused to accommodate plaintiff’s preferred work shift, and when plaintiff refused to work the new shift, his employment was terminated. Plaintiff’s lawsuit included a claim for associational discrimination, alleging that defendant had fired him because of his association with his disabled son.

In reversing summary judgment for the defendant, the Second District found a triable issue of fact as to defendant supervisor’s discriminatory motive for termination of plaintiff’s employment. In doing so, it reaffirmed the holding in Rope v. Auto-Chlor Sys. Of Washington, Inc. (2013) 220 Cal. App. 4th 635, that there are three categories of associational discrimination: 1) expense; 2) disability by association (an employee’s blood relative has a disabling ailment that has a genetic component to which the employee is predisposed; and, 3) distraction “the employee is somewhat inattentive at work because his spouse or child has a disability that requires his attention, yet no so inattentive to perform to his employer’s satisfaction he would need an accommodation, perhaps by being allowed to work shorter hours.” Id. at 1041. Rope, in turn, relied upon the Seventh Circuit’s seminal associational

---

2 Rope is cited in Plaintiff’s Amended Complaint for the proposition that it is unlawful to discriminate against a person based on “a perception . . . that the person is associated with a person who has, or is perceived to have’ a physical disability.” (Amended Complaint, ¶ 30)
discrimination decision in *Larimer v. International Business Machines Corp.* (7th Cir. 2004) 370 F.3d 698, which first identified these three categories.

The *Castro-Ramirez* court held that a reasonable juror could find “distraction” discrimination based on the supervisor’s refusal to accommodate plaintiff’s need to care for his son. “One reasonable inference from these facts is that Junior, as the person responsible for scheduling the drivers, wanted to avoid the inconvenience and distraction plaintiff’s need to care for his disabled son posed to Junior.” (*Castro-Ramirez*, *supra*, at p. 133.)

Here, Plaintiff makes no claim that her employment was terminated because she was distracted. Rather, she asserts that she had “favorable performance evaluations” and her accomplishments were “lauded” throughout her employment. (Amended Complaint, ¶ 15) The *Rope-Chlor* court rejected that plaintiff’s similar attempt to convert his “expense” case into one for distraction.

[W]hile Rope argues his claim falls within the “distraction” category, any assertion that Rope was inattentive at work is belied by his allegations of exemplary workplace performance, outstanding performance reviews, and that he attended doctor’s appointments only during lunch breaks.

*Rope, supra*, 220 Cal. App. 4th at 657, fn. 13. Plaintiff’s contention in this regard is also contrary to the CACI instructions. CACI 2547 recognizes the three *Rope-Chlor* and *Larimer* categories, expense, disability by association and distraction based on a plaintiff’s inattentiveness. Defendant will request this standard instruction.

Accordingly, Plaintiff should not be allowed to suggest in opening statement, or imply through direct or cross-examination of witnesses that the termination of Plaintiff’s employment because she was inconvenient or a nuisance is disability discrimination.²

**B. IF THE JURY FINDS THAT THERE WAS NO DISCRIMINATION, THEN PLAINTIFF’S REMAINING CAUSES OF ACTION FAIL AS A MATTER OF LAW.**

All of Plaintiff’s remaining causes of action are premised on the existence of a finding of associational discrimination. Her second cause of action for failure to prevent discrimination

---

² This issue is the subject of Defendant’s motion in *limine*, number 10.
necessarily depends on a finding of discrimination.  (*See e.g., Trujillo v. N. County Transit* (1998) 63 Cal. App. 4th 280, 286-89 (failure to prevent claim is contingent on plaintiff proving the underlying unlawful discrimination). Her fourth cause of action for wrongful termination in violation of public policy rests on the identification of public policy tethered to a specific constitutional or statutory provision.  (*Gantt v. Sentry Ins.* (1992) 1 Cal. 4th 1083, 1095) The only statute Plaintiff identifies is for associational discrimination, *i.e.*, Government Code section 12940(a). Plaintiff’s fifth and sixth causes of action for intentional and negligent infliction of emotional distress, respectively, rest on the establishment of the violation of a fundamental public policy because they are otherwise barred by the Worker’s Compensation exclusivity provisions.  (*See City of Moorpark v. Superior Ct.* (1998) 18 Cal. 4th 1143, 1154-55.) Finally, her Business & Professions Code section 17200 claim is not a stand-alone cause of action, requiring a showing of employment discrimination.

DATED: February 3, 2017  
By:  
DAVID AMMONS  
CALEB H. LIANG  
TIFFANY S. HANSEN  

LTL Attorneys, LLP  
Attorneys for Defendant  
Southern California Permanente Medical Group
SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO

MARIA T. GONZALEZ, an individual,

v.

SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUP, INC. d/b/a SOCAL PERMANENTE MEDICAL GROUP, a California Corporation,

Defendant.

CASE NO.: 37-2015-00019384

[Assigned for All Purposes to Hon. Honorable Katherine A. Bacal, Dept. C-69]

DEFENDANT'S MOTION IN LIMINE NO. 10 TO PRECLUDE ANY EVIDENCE OR ARGUMENT OF DISCRIMINATION OUTSIDE THE THREE CATEGORIES OF ASSOCIATIONAL DISCRIMINATION

IMAGED FILE

[Declaration of Caleb H. Liang in Support]

Date: February 10, 2017
Time: 8:40 a.m.
Dept: C-69

Complaint Filed: June 10, 2015
Trial Date: February 10, 2017
TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

YOU ARE HEREBY NOTIFIED THAT Defendant Southern California Permanente Medical Group, Inc. (“Kaiser”), by and through its attorneys of record, before trial and before selection of the jury, hereby moves this Court for an order precluding any evidence or argument of discrimination outside the three categories of associational discrimination. Specifically, Kaiser seeks to exclude suggestions or implications, in opening statement and in questions to witnesses, that firing an employee because they are inconvenient or a nuisance constitutes disability discrimination. This motion is made pursuant to California Evidence Code section 350 and 352.

Alternatively, should the Court decide to defer ruling hereon until such time as evidentiary matters have been presented, Defendant seeks an interim order prohibiting Plaintiff, her attorneys, and all witnesses whom she intends to call to testify from implying or arguing the above described evidence.

This motion is based on this notice of motion, the memorandum of points and authorities, the Declaration of Caleb H. Liang in support, the pleadings and papers on file, and on such evidence and argument as may be presented at the hearing on this motion.

DATED: February 3, 2017

By: ________________________________

STEVEN C. GONZALEZ
DAVID AMMONS
CALEB H. LIANG
Attorneys for Defendant
Southern California Permanente Medical Group
MEMORANDUM OF POINTS AND AUTHORITIES

Defendant Southern California Permanente Medical Group (“Kaiser”) respectfully moves this Court for an order precluding any evidence or argument of discrimination outside the three categories of associational discrimination. Specifically, Kaiser seeks to exclude suggestions or implications, in opening statement and in questions to witnesses, that firing an employee because they are inconvenient or a nuisance constitutes disability discrimination.

I. INTRODUCTION

Plaintiff was a medical assistant at Kaiser from 2002 to 2014. This case arises out of Plaintiff’s claims of purported associational discrimination based upon Plaintiff’s allegation that Kaiser terminated her employment in 2014 because her son, Moreno, who was on her health care plan, underwent treatment that was costly to Kaiser. Kaiser asserts that it terminated Plaintiff’s employment because she violated Kaiser’s policies when she (1) inappropriately accessed Moreno’s private electronic medical records when she had no medical reason to do so, and (2) conducted an unauthorized pill count on Moreno’s medication. It is undisputed that Plaintiff repeatedly abused her position to give Moreno special treatment and access, knowingly violated Kaiser’s policies and procedures to improperly meddle in Moreno’s care, and aggressively confronted her coworkers and other Kaiser employees about Moreno’s care. When these issues came to light, Kaiser placed Plaintiff on paid investigatory suspension, thoroughly investigated her misconduct, and then terminated her employment on October 28, 2014.

Plaintiff’s amended complaint asserts causes of action for: 1) violation of Government Code section 12940(a) “associational discrimination”; 2) violation of Government Code section 12940(k) “failure to prevent discrimination”; 3) wrongful termination in violation of public policy; 4) intentional infliction of emotional distress; 5) negligent infliction of emotional distress; 6) violation of Business and Professions Code section 17200 “unfair competition law.” She had also asserted causes of action for violation of Labor Code section 233, and Health & Safety Code section 1278.5, alleging that SCPMG had retaliated against her for taking kin care leave and for complaining about patient safety (i.e., “whistleblower retaliation”), respectively. Both causes of action were summarily adjudicated against her and are therefore no longer a part of the case.
Because it’s unlikely that Plaintiff will be able to establish her associational discrimination claim, Kaiser anticipates that she will attempt to avoid the court’s rulings on its retaliation causes of action by importing additional bases for finding associational discrimination, specifically “inconvenience” or “nuisance,” neither of which are actual recognized elements for such cause of action.

II. PLAINTIFF’S HAS NOT PLED A CLAIM FOR “DISTRACTION” ASSOCIATIONAL DISCRIMINATION

It is apparent from Plaintiff’s pre-trial filings that she will attempt to persuade the jury that she was fired for reasons other than cost. Specifically, pursuant to her associational discrimination cause of action, Plaintiff asserts that Kaiser sought to get rid of her and her son because her son was “challenging, a distraction causing an inconvenience and pursuing legal action.” (Plaintiff’s Memo. Opposing Summary Judgment, p. 14). But even if true that Plaintiff was fired for these reasons, no case has recognized such as unlawful disability discrimination.

Purporting to rely on Castro-Ramirez v. Dependable Highway Express, Inc. (2016) 2 Cal. App. 5th 1028, Plaintiff states:

Relevant examples “of the kind of circumstances which might trigger a claim of associational discrimination” include “expense” where the relative has a disability that is costly to the employer . . . “distraction,” where the employee is somewhat less attentive at work because of attention required by the relative with a disability and “inconvenience,” where the employer wishes to avoid a perceived nuisance (such as providing the employee with earlier shifts to get home earlier to care for a relative).

(Plaintiff’s Memo. Opposing Summary Judgment, p. 13.) In other words, Plaintiff intends to present evidence and argue that she was fired because of her and her son’s complaints about his medical care, because such complaints constituted a nuisance and inconvenience to SCPMG. This is a mis-statement of the law. Neither Castro-Ramirez nor any other case recognizes as unlawful disability discrimination the termination of employment because the plaintiff was a “challenge,” “inconvenience” or pursuing legal action.
In *Castro-Ramirez*, the Second District reaffirmed the holding in *Rope v. Auto-Chlor Sys. Of Washington, Inc.* (2013) 220 Cal. App. 4th 635, that there are three categories of associational discrimination: 1) expense; 2) disability by association (an employee’s blood relative has a disabling ailment that has a genetic component to which the employee is predisposed; and, 3) distraction “the employee is somewhat inattentive at work because his spouse or child has a disability that requires his attention, yet not so inattentive to perform to his employer’s satisfaction he would need an accommodation, perhaps by being allowed to work shorter hours.” *Id* at 656. *Rope*, in turn, relied upon the Seventh Circuit’s seminal associational discrimination decision in *Larimer v. International Business Machines Corp.* (7th Cir. 2004) 370 F.3d 698, which first identified these three categories.

The *Castro-Ramirez* court held that a reasonable juror could find “distraction” discrimination based on the supervisor’s refusal to accommodate plaintiff’s need to care for his son. “One reasonable inference from these facts is that Junior, as the person responsible for scheduling the drivers, wanted to avoid the inconvenience and distraction plaintiff’s need to care for his disabled son posed to Junior.” (*Castro-Ramirez, supra*, at p. 133.)

Here, Plaintiff makes no claim that her employment was terminated because she was distracted. Rather, she asserts that she had “favorable performance evaluations” and her accomplishments were “lauded” throughout her employment. (Amended Complaint, ¶ 15) The *Rope-Chlor* court rejected that plaintiff’s similar attempt to convert his “expense” case into one for distraction.

> [W]hile Rope argues his claim falls within the “distraction” category, any assertion that Rope was inattentive at work is belied by his allegations of exemplary workplace performance, outstanding performance reviews, and that he attended doctor’s appointments only during lunch breaks.

*Rope, supra*, 220 Cal. App. 4th at 657, fn. 13. Plaintiff’s contention in this regard is also contrary to the CACI instructions. CACI 2547 recognizes the three *Rope-Chlor* and *Larimer* categories, expense, disability by association and distraction based on a plaintiff’s inattentiveness. Defendant will request this standard instruction at trial.

---

2 *Rope* is cited in Plaintiff’s Amended Complaint for the proposition that it is unlawful to discriminate against a person based on “‘a perception . . . that the person is associated with a person who has, or is perceived to have’ a physical disability.” (Amended Complaint, ¶ 30)
Accordingly, Plaintiff should not be allowed to argue or suggest that it was unlawful for Defendant to terminate her employment because his case was difficult or because her son was pursuing legal action against Defendant. Specifically, Plaintiff should be precluded from making suggestions or implications, in opening statement and in questions to witnesses, that firing an employee because they are inconvenient or a nuisance constitutes disability discrimination.

III. EVIDENCE OR ARGUMENT UNRELATED TO THE THREE TYPES OF ASSOCIATIONAL DISCRIMINATION IS IRRELEVANT AND UNDULY PREJUDICIAL

As stated above, both Rope-Chlor and CACI set out three categories for associational discrimination: 1) expense; 2) disability by association; and 3) distraction. Rope, 220 Cal. App. 4th at 656. See also CACI 2547. Any evidence of discrimination that does not fall into one of the three categories is both irrelevant and prejudicial.

A. Evidence or Argument Regarding Alleged Retaliation by Kaiser is Irrelevant

Evidence Code Section 350 instructs that no evidence is admissible, except relevant evidence. “Relevant evidence” is defined by Evidence Code Section 210 as “evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.”

Evidence or argument of retaliation outside of three categories set out in Rope and CACI has no tendency to prove or disprove a disputed fact of consequence to the determination of this action because relief under Plaintiff’s associational discrimination claims is limited to three Rope categories. Such evidence and argument must be excluded as irrelevant.

B. Evidence or Argument Regarding Alleged Retaliation by Kaiser is Unduly Prejudicial

Evidence Code Section 352 provides as follows:

The Court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.
As set forth above, the evidence and argument Kaiser seeks to exclude is irrelevant to any issue of consequence in this matter. Therefore, the evidence has little to no probative value. To the extent there is any probative value, it is substantially outweighed by (1) the likelihood of the jury’s confusion as to the elements Plaintiff must prove and they must decide, and (2) the undue consumption of time that would need to be allotted to arguments and evidence that do not go to the elements at issue in the case.

IV. CONCLUSION

Based on the foregoing, Defendant respectfully requests that the Court issue an order precluding any evidence or argument of discrimination outside the three categories of associational discrimination. Specifically, Kaiser requests the Court exclude suggestions or implications, in opening statement and in questions to witnesses, that firing an employee because they are inconvenient or a nuisance constitutes disability discrimination.

DATED: February 3, 2017

By: ____________________________

STEVEN C. GONZALEZ
DAVID AMMONS
CALEB H. LIANG
Attorneys for Defendant
Southern California Permanente Medical Group
MARIA T. GONZALEZ, an individual,

Plaintiff,

v.

KAISER FOUNDATION HEALTH PLAN, INC., a California Corporation; THE PERMANENTE MEDICAL GROUP, INC., a California Corporation; SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUP, INC. d/b/a SOCAL PERMANENTE MEDICAL GROUP, a California Corporation; and DOES 1 through 50, Inclusive,

Defendants.
PROOF OF SERVICE

STATE OF CALIFORNIA -- COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles State of California. I am over the age of 18 and not a party to the within action; my business address is: 300 South Grand Avenue, 14th Floor, Los Angeles, CA 90071.

On February 3, 2017, I served the foregoing document(s) described as

- DEFENDANT’S TRIAL BRIEF
- DEFENDANT’S MOTION IN LIMINE NO. 1 TO EXCLUDE EVIDENCE OR TESTIMONY RELATING TO TRACI TRASK’S CONFIDENTIAL PERSONNEL FILES AND EMPLOYMENT INFORMATION OR “SEPARATION FROM KAISER”
- DEFENDANT’S MOTIONS IN LIMINE NO. 2 TO EXCLUDE EVIDENCE NOT PRODUCED DURING DISCOVERY
- DEFENDANT’S MOTIONS IN LIMINE NO. 4 TO EXCLUDE EVIDENCE NOT PRODUCED DURING DISCOVERY
- DEFENDANT’S MOTION IN LIMINE NO. 5 TO PRECLUDE ANY EVIDENCE OR ARGUMENT THAT MORENO’S CARE WAS COSTLY TO KAISER
- DEFENDANT’S MOTION IN LIMINE NO. 6 TO PRECLUDE ANY ARGUMENT REFERRING OR RELATING TO ALLEGED RETALIATION BY KAISER BASED ON PATIENT ADVOCACY
- DEFENDANT’S MOTIONS IN LIMINE NO. 7 TO EXCLUDE EVIDENCE RELATED TO THE NUMBER OF PLAINTIFF’S CHILDREN
- DEFENDANT’S MOTION IN LIMINE NO. 8 TO EXCLUDE ALL EVIDENCE OF THE CUIAB’S DECISIONS
- DEFENDANT’S MOTION IN LIMINE NO. 9 TO PRECLUDE PEDRO MORENO FROM TESTIFYING THAT HE RECEIVED OVERBOOK APPOINTMENTS AFTER PLAINTIFF’S TERMINATION
- DEFENDANT’S MOTION IN LIMINE NO. 10 TO PRECLUDE ANY EVIDENCE OR ARGUMENT OF DISCRIMINATION OUTSIDE THE THREE CATEGORIES OF ASSOCIATIONAL DISCRIMINATION
- DEFENDANT’S MOTION IN LIMINE NO. 11 TO EXCLUDE EVIDENCE RELATED TO KAISER’S OPTION OF REFERRING PATIENT COMPLAINTS TO MEMBER SERVICES
• DECLARATION OF CALEB H. LIANG IN SUPPORT OF DEFENDANT SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUP’S MOTIONS IN LIMINE

• NOTICE OF LODGMENT OF UNREDACTED DOCUMENTS IN SUPPORT OF DEFENDANT’S MOTIONS IN LIMINE

• [PROPOSED] ORDER RE: DEFENDANT’S MOTION IN LIMINE NO. 1 TO EXCLUDE EVIDENCE OR TESTIMONY RELATED TO TRACI TRASK’S CONFIDENTIAL PERSONNEL FILES AND EMPLOYMENT INFORMATION OR “SEPARATION FROM KAISER”

• [PROPOSED] ORDER RE: DEFENDANT’S MOTION IN LIMINE NO. 2 TO EXCLUDE MEDICAL DIAGNOSES TESTIMONY

• [PROPOSED] ORDER RE: DEFENDANT’S MOTION IN LIMINE NO. 4 TO EXCLUDE EVIDENCE NOT PRODUCED DURING DISCOVERY

• [PROPOSED] ORDER RE: DEFENDANT’S MOTION IN LIMINE NO. 5 TO PRECLUDE ANY EVIDENCE OR ARGUMENT THAT MORENO’S CARE WAS COSTLY TO KAISER

• [PROPOSED] ORDER RE: DEFENDANT’S MOTION IN LIMINE NO. 6 TO PRECLUDE ANY ARGUMENT REFERRING OR RELATING TO ALLEGED RETALIATION BY KAISER

• [PROPOSED] ORDER RE: DEFENDANT’S MOTION IN LIMINE NO. 7 TO EXCLUDE EVIDENCE RELATED TO THE NUMBER OF PLAINTIFF’S CHILDREN

• [PROPOSED] ORDER RE: DEFENDANT’S MOTION IN LIMINE NO. 8 TO EXCLUDE ALL EVIDENCE RELATING TO THE CUIAB’S DECISIONS

• [PROPOSED] ORDER RE: DEFENDANT’S MOTION IN LIMINE NO. 9 TO PRECLUDE PEDRO MORENO FROM TESTIFYING THAT HE RECEIVED OVERBOOK APPOINTMENTS AFTER PLAINTIFF’S TERMINATION

• [PROPOSED] ORDER RE: DEFENDANT’S MOTION IN LIMINE NO. 10 TO PRECLUDE ANY EVIDENCE OR ARGUMENT OF DISCRIMINATION OUTSIDE THE THREE CATEGORIES OF ASSOCIATIONAL DISCRIMINATION

• [PROPOSED] ORDER RE: DEFENDANT’S MOTION IN LIMINE NO. 11 TO EXCLUDE EVIDENCE RELATED TO KAISER’S OPTION OF REFERRING PATIENT COMPLAINTS TO MEMBER SERVICES

• PROOF OF SERVICE

on all other parties and/or their attorney(s) of record as follows:
Attorneys for Plaintiff Maria T. Gonzalez

BY OVERNIGHT COURIER I caused each envelope with fees prepaid to be shipped by Federal Express.

BY ELECTRONIC MAIL I transmitted the above listed document(s) to the e-mail address set forth above on this date.

BY MAIL I placed such envelope in the mail at Los Angeles, California. The envelope was mailed with postage thereon fully prepaid.

As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Executed on **February 3, 2017**, at Los Angeles, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Lynette W. Suksnguan
Print Name

[Signature]
SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN DIEGO
HALL OF JUSTICE

MARIA T. GONZALEZ, an Individual,

Plaintiff,

v.

KAISER FOUNDATION HEALTH PLAN, INC., a California Corporation;
THE PERMANENTE MEDICAL GROUP, INC., a California Corporation;
SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUP, INC.
d/b/a SOCAL PERMANENTE MEDICAL GROUP, a California Corporation; and
DOES 1 through 50, Inclusive,

Defendants.

Case No.: 37-2015-00019384-CU-WT-CTL

PLAINTIFF’S OPPOSITION TO DEFENDANT KAISER’S MOTION IN LIMINE NO. 10 TO PRECLUDE ANY EVIDENCE OR ARGUMENT OF DISCRIMINATION OUTSIDE THE THREE CATEGORIES OF ASSOCIATIONAL DISCRIMINATION

IMAGED FILE

Date: February 10, 2017
Time: 8:40 a.m.
Judge: Honorable Katherine Bacal
Dept.: C-69

Complaint Filed: June 10, 2015
Trial Date: February 10, 2017
Plaintiff Maria T. Gonzalez (“Plaintiff”) submits this Opposition to Defendant Southern California Permanente Medical Group, Inc.’s (“Kaiser”) Motion in Limine No. 10 to Preclude Any Evidence or Argument of Discrimination Outside the Three Categories of Associational Discrimination.

I. SUMMARY OF ARGUMENT

Like Kaiser’s Trial Brief and many of its other motions in limine, this motion is entirely based on a fundamental misstatement of law – i.e., Kaiser’s assertion that an associational discrimination claim under California’s Fair Employment and Housing Act (“FEHA”), Gov. Code §12940, et seq., must fit neatly into one of three categories of (“cost,” “disability by association” or “distraction”), which some courts have said limit the reach of the much narrower associational discrimination provision under the federal Americans with Disabilities Act (“ADA”). But this underlying legal premise is wrong. The two published California appellate decisions specifically interpreting the FEHA’s prohibition against associational disability discrimination both hold that the three categories of associational disability discrimination some courts use to limit the reach of the narrower federal ADA’s associational discrimination prohibition are not exhaustive or exclusive for FEHA purposes and do not define the reach of the FEHA’s associational discrimination provisions. Castro-Ramirez v. Dependable Highway Express, Inc., 2 Cal. App. 5th 1028, 1041 (2016) (federal ADA case law “provided an ‘illustrat[ive],’ rather than an exhaustive, list of the kind of circumstances which might trigger a claim of associational discrimination.”); see also Rope v. Auto-Chlor System of Washington, Inc, 220 Cal. App. 4th 635, 657 (2013). Rather, applied to the FEHA, these three categories are non-exhaustive illustrations of different ways to prove the ultimate question of whether the employee’s association with a disabled person was a substantial motivating reason for the termination decision. Id.

Once this threshold legal flaw of Kaiser’s motion is exposed and corrected, this motion fails. The ultimate question the jury must answer is whether Ms. Gonzalez’s “association with a disabled person was a substantial motivating factor for the employer’s adverse employment action.” Castro-Ramirez, 2 Cal. App. 5th at 1042. There is no support in California law for the
narrow and artificial restrictions on proving this ultimate question that Kaiser seeks to achieve by this motion. Instead, the very authority Kaiser cites purportedly in support of its improper attempt to restrict our proof to the three categories discussed under the federal ADA directly holds that FEHA associational discrimination claims are not limited by these three categories discussed in the ADA context.

For example, and entirely contrary to Kaiser’s motion, Castro-Ramirez upheld an associational disability discrimination claim based on the fact that the employer’s management was inconvenienced or burdened by, or considered continued dealing with the employee’s association with a disabled person to be a nuisance or inconvenience to the employer. Castro-Ramirez, 5 Cal. App. 5th at 1043 (“...these facts may give rise to the inference that [supervisor] Junior acted proactively [to terminate employee] to avoid the nuisance plaintiff’s association with his disabled son would cause Junior in the future.”). Yet Kaiser would have this Court believe no such claim exists under the FEHA. MIL No. 10 at 2:20-25 (“... Plaintiff intends to present evidence and argue that she was fired because of her and her son’s complaints about his medical care, because such complaints constituted a nuisance and inconvenience to SCPGM. This is a mis-statement of the law. Neither Castro-Ramirez nor any other case recognizes as unlawful disability discrimination the termination of an employee because the plaintiff was a ‘challenge,’ ‘inconvenience’ or pursuing legal action.”).

Bottom line: the very core point of this motion – i.e., that the FEHA restricts proof of associational discrimination claims to the three categories discussed in some ADA cases – is a fundamental distortion and misstatement of California law. Every published FEHA decision analyzing California’s associational disability discrimination cause of action holds the opposite – the three categories are merely non-exhaustive illustrations of ways to prove the ultimate question of whether the termination was substantially motivated by the employee’s association with a disabled person. Kaiser’s attempt to convince this Court to ignore binding California

---

1 Considering this holding in Castro-Ramirez, it is remarkable that Kaiser asserts that the distraction or nuisance brought about by the disability must focus only on whether the plaintiff-employee was distracted, rather than whether management viewed the continued association with a disabled person to be nuisance or burden on management or the employer itself.
precedent and rely instead on federal ADA decisions construing the narrower federal statute is improper. Any restrictions found in some federal ADA cases on this point have been uniformly rejected when applied to the FEHA’s intentionally broader statutory scheme.

II. THE FEHA PROVIDES A NON-EXHAUSTIVE LIST OF CIRCUMSTANCES WHICH MIGHT TRIGGER A CLAIM OF ASSOCIATIONAL DISCRIMINATION

Ms. Gonzalez’s claims arise under the FEHA, Government Code §12940, et seq. Kaiser does not dispute that it is unlawful for an employer to discriminate against an employee based on the “person’s association with another who has a disability.” Castro-Ramirez, 2 Cal. App. 5th at 1036; Gov. Code §§12296(o); 12940(a).

However, relying on (and misconstruing) out of circuit federal authority interpreting the Americans with Disabilities Act of 1990 (“ADA”), namely, Larimer v. Int’l Business Machines Corp., 370 F.3d 698 (7th Cir. 2004), Kaiser artificially attempts to limit circumstances in which a jury may find unlawful motive in the associational disability context. See Def’s Mtn. at 2-3 (wrongly stating such a claim “must” fit within a limited set of circumstances). In doing so, Kaiser misreads the authority it cites because that very authority holds precisely the opposite – i.e., FEHA associational discrimination claims need not fit directly into one of the three Larimer categories.

Preliminarily, “[p]roving intentional discrimination can be difficult because ‘[t]here will seldom be “eyewitness” testimony as to the employer’s mental processes.’” Heard v. Lockheed Missiles & Space Co., 44 Cal. App. 4th 1735, 1748 (1996). “It is rare for a plaintiff to be able to produce direct evidence or a ‘smoking gun’ evidence of discrimination.” Id. In fact, “[i]n most cases of disparate treatment, the plaintiff will not have direct evidence of the employer’s discriminatory intent.” Id. “An employer’s action may be the result of a sensible and innocent motive--or an invidious one; everything depends on finding out what that motive really was, and that task is often a difficult one.” O’Mary v. Mitsubishi Electronics America, Inc., 59 Cal. App. 4th 563, 574 (1997).
As such, even though some federal courts have suggested that an associational
discrimination claim under the narrower ADA may be limited by the three categories, there is
not an exhaustive list prescribing proof of prohibited motive for associational discrimination
under the FEHA. Castro-Ramirez, 2 Cal. App. 5th at 1041-1042. The court in Castro-Ramirez
extensively reviewed the law regarding evidence of discriminatory motive and pretext in
associational disability cases, including Rope. “Rope relied substantially on Larimer, which the
Rope court described as ‘the seminal authority on disability-based associational discrimination
under the ADA.’” Castro-Ramirez, 2 Cal. App. 5th at 1041 (quoting Rope, 220 Cal. App. 4th at
656). In Larimer, the court found three types of situations that fall within the scope of the rarely
litigated association section of the ADA: “‘expense,’ ‘disability by association,’ and
‘distraction.’” Larimer, 370 F.3d at 700. The court continued:

They can be illustrated as follows: an employee is fired (or suffers some other adverse personnel action) because (1) (‘expense’) his spouse has a disability that is costly to the employer because the spouse is covered by the company’s health plan; (2a) (‘disability by association’) the employee’s homosexual companion is infected with HIV and the employer fears that the employee may also have become infected, through sexual contact with the companion; (2b) (another example of disability by association) one of the employee’s blood relatives has a disabling ailment that has a genetic component and the employee is likely to develop the disability as well (maybe the relative is an identical twin); (3) (‘distraction’) the employee is somewhat inattentive at work because his spouse or child has a disability that requires his attention, yet not so inattentive that to perform to his employer’s satisfaction he would need an accommodation, perhaps by being allowed to work shorter hours.

Larimer, 370 F.3d at 700.

Critically important here, and contrary to the core legal assertion of Kaiser’s motion,
both Rope and Castro-Ramirez observed that Larimer “‘provided an ‘illustrat[ive],’ rather than
an exhaustive, list of the kind of circumstances which might trigger a claim of associational
discrimination.’” Castro-Ramirez, 2 Cal. App. 5th at 1041 (quoting Rope, 220 Cal. App. 4th at
657). “[A]nd more importantly, Larimer was decided under the ADA; the provisions of FEHA
are broadly construed and afford employees more protections than the ADA.” Id.

Indeed, Kaiser’s attempt to restrict the FEHA’s associational discrimination claim to the
three categories set forth in Larimer ignores the fact that both Rope and Castro-Ramirez
recognized associational discrimination claims under the FEHA based on facts that did not fit neatly into any of the three Larimer categories. “So while the Rope plaintiff’s facts did not ‘fit neatly within’ one of Larimer’s three categories, the court concluded the plaintiff had sufficiently pleaded a prima facie “expense” claim for associational disability discrimination.”

Castro-Ramirez, 2 Cal. App. 5th at 1042 (citing Rope, 220 Cal. App. 4th at 657 (finding the plaintiff pled sufficient facts to state a prima facie “expense” association claim under FEHA, where the employer terminated the plaintiff prior to having to be liable for a paid leave of absence so plaintiff could donate a kidney to his sister)). The court in Rope rejected the defendant’s contention that an “expense” associational claim must fit within the narrow example provided in Larimer, et al. See Rope, 220 Cal. App. 4th at 657 (“we reject [defendant’s] assertion that the narrow example of a claim of ‘expense’ associational discrimination provided in Larimer should govern the scope of such claims that can be brought under FEHA rather than the ADA.”).

Bottom line: Rope found an “expense” circumstance outside of that identified by Larimer, et al., from which the jury could reasonably find unlawful associational discrimination. Likewise, Castro-Ramirez held those opinions merely provide an “illustrative, rather than exhaustive, list of the kinds of the circumstances in which we might find associational disability discrimination.” Castro-Ramirez, 2 Cal. App. 5th at 1042. “The common thread among the Larimer categories is simply that they are instances in which the ‘employer has a motive to discriminate against a nondisabled employee who is merely associated with a disabled person.’” Id. There is not an exhaustive set of firm circumstances a plaintiff must demonstrate to fit within the “expense” or “distraction” category, or any other category.

Not only did Rope recognize an associational discrimination claim under the FEHA based on facts that did not neatly fit into one of the Larimer categories, so too did Castro-Ramirez. Indeed, Castro-Ramirez directly contradicts Kaiser’s key point that any burden, inconvenience, or distraction must be viewed only from the perspective of whether the employee-plaintiff was burdened, inconvenienced, or distracted by the association with the disabled person. In Castro-Ramirez, the appellate court found triable issues on whether the employer’s management being burdened by the nuisance of the employee plaintiff’s
association with a disabled person was a substantial motivating reason for the termination. There, 
going outside those categories, in Catsro-Ramirez, the court found an inference of associational 
disability discrimination where the employee’s disabled child made management’s job “harder,” 
a “nuisance,” and “inconvenient” because of scheduling issues. Id. at 1042-1043. The court 
found that “one reasonable inference” the jury could make is that the employer “wanted to avoid 
the inconvenience and distraction plaintiff’s need to care for his disabled son posed to [the 
employer].” Id. at 1043. “Just as the facts in Rope gave rise to an inference that the employer 
acted preemptively to avoid the expense of paid leave, these facts may give rise to the inference 
that [the employer] acted proactively to avoid the nuisance plaintiff’s association with his 
disabled son would cause [the] employer in the future.” Id. (internal citations omitted).

Thus, Castro-Ramirez directly holds that proof of a burden, inconvenience, or nuisance 
imposed on the employer by the employee’s association with a disabled person itself is a way to 
establish associational disability discrimination under the FEHA even though such evidence 
does not fit neatly into one of the three Larimer categories. Id. Because the California Supreme 
Court denied review of Castro-Ramirez, 2016 Cal. LEXIS 9493, this Court is bound by its 
decision. Sarusad v. Porter, 503 F.3d 822, 825 (9th Cir. 2007) (holding, absent a ruling from 
the state’s Supreme Court, a determination of state law by a state appellate court is “binding,” 
particularly “where the highest court in the state has denied review of the lower court’s 
decision.”).

The advisory committee to the Judicial Council of California, the entity responsible for 
publishing the Judicial Council civil jury instructions (“CACI”), has posted proposed revisions 
to the CACI jury instructions related to disability-based associational discrimination based on 
Castro-Ramirez. See Ex. 6 (CACI 17-01) at 76. In light of Castro-Ramirez and Rope, the
advisory committee has proposed revising CACI 2547 to accurately reflect the current state of the law by adding an “other” category to the already existing categories:

Ex. 5 (CACI 17-01) at 76. The Directions for Use of the jury instruction makes clear that the three versions of disability-based associational discrimination (e.g., “expense,” “disability by association,” and “distraction”) “are illustrative rather than exhaustive; therefore, an ‘other’ option is provided.” Id. at pg. 77. Indeed, the FEHA was “meant to supplement, not supplant or be supplanted by, existing antidiscrimination remedies, in order to give employees the maximum opportunity to vindicate their civil rights against discrimination ….” Stevenson v. Super. Ct., 16 Cal. 4th 880, 891 (1997). “FEHA must be liberally construed to promote and accomplish its purposes.” Rope v. Auto-Chlor System of Washington, Inc., 220 Cal. App. 4th 635, 656 (2013) (superseded by statute on another ground).
As Castro-Ramirez makes clear, disability-related circumstances, such as “inconvenience,” making the job “harder” and a “nuisance” for the employer, is evidence the jury may rightly consider (these would fitly neatly into the “other” prong of the proposed jury instruction). There are also other motivating circumstances that may be related to a disability, e.g., advocacy and other conduct resulting from the disability. See, e.g., Wilfong v. Tharco Packaging, Inc., 2016 U.S. App. LEXIS 22314, *3 (9th Cir. Dec. 15, 2016) (employee’s complaints regarding attendance discipline relating to disability “constitute protected activity under FEHA” (citing Castro-Ramirez)); Gambini v. Total Renal Care, Inc., 486 F.3d 1087, 1093 (9th Cir. 2007) (holding, “‘conduct resulting from a disability is considered part of the disability, rather than a separate basis for termination.’”); Thompson v. City of Monrovia, 186 Cal. App. 4th 860, 876-877 (2010) (in discrimination and harassment claims, “[a] plaintiff … who is not within the protected class, may satisfy the ‘protected class’ requirement ‘based on [his/her] association with or advocacy on behalf of protected employees.’”).

The jury may consider “other” categories, as long as they can reasonably be inferred to provide an employer with “a motive to discriminate against a nondisabled employee who is merely associated with a disabled person.” Castro-Ramirez, 2 Cal. App. 5th at 1042. Even within the already identified categories such as “distraction” and “expense or cost” the scope of the types of expense or distraction are not limited to the examples provided; they may vary. See, e.g., Rope, 220 Cal. App. 4th at 657 (“we reject [defendant’s] assertion that the narrow example of a claim of ‘expense’ associational discrimination provided in Larimer should govern the scope of such claims that can be brought under FEHA rather than the ADA.”); Castro-Ramirez, 2 Cal. App. 5th at 1043 (finding “distraction” where plaintiff needed to scheduling to care for disabled child). Indeed, such is evidenced using “e.g.” versus “i.e.,” in the CACI instructions.4

Moreover, Kaiser should not be the ultimate arbiter of what inferences the jury will draw from any piece of evidence, all of which is to be considered cumulatively. The jury must consider whether Kaiser’s stated reason for firing Ms. Gonzalez was pretextual and whether Kaiser acted

---

4 Demonstrating these circumstances are mere “examples” versus “in other words.”
with a discriminatory animus. The evidence on these issues, “when taken together,” may constitute sufficient evidence to demonstrate a triable issue of fact with respect to Ms. Gonzalez’s contention that her son’s disability was the true cause of Kaiser’s decision to fire her. Cf. Johnson v. United Cerebral Palsy/Spastic Children’s Found. Of Los Angeles & Ventura Ctys., 173 Cal. App. 4th 750, 758 (2009) (finding even though several matters considered by themselves was not sufficient, “when taken together,” they constituted “sufficient evidence” in a pregnancy/disability discrimination matter).

Here, Moreno’s disability is the disability at issue, including the procedures, surgeries, outside referrals, hospitalizations, diagnoses, complaints, and Ms. Gonzalez’ association with the same. The jury may draw any number of reasonable inferences from the same pieces of evidence (or the evidence cumulatively), including that Moreno’s disability was a distraction for Kaiser; an inconvenience to Kaiser; a nuisance to Kaiser; an irritation to Kaiser; costly to Kaiser; made managements job with respect to Ms. Gonzalez’ position harder, etc. Kaiser wishes to exclude the mention of any evidence that may be, for example, related to “nuisance,” but not “expense,” even though any given piece of evidence may relate to both. This is entirely improper. Accordingly, based on a plain reading of binding precedent, namely Rope and Castro-Ramirez, requiring the jury to only consider a narrowly circumscribed exhaustive list of circumstances as Kaiser proposed, would be a clear error of law.

III. CONCLUSION

For all of the foregoing reasons, Kaiser’s Motion in Limine No. 10 should be denied in its entirety.

Respectfully submitted,

Dated: February 8, 2017

ZELDES HAEGGQUIST & ECK, LLP
ALREEN HAEGGQUIST (221858)
AARON M. OLSEN (259923)

By:

AARON M. OLSEN
PLTFF’S OPP TO DEF’S MIL NO. 10 TO PRECLUDE ANY EVIDENCE OR ARGUMENT OF DISCRIMINATION OUTSIDE THE THREE CATEGORIES OF ASSOCIATIONAL DISCRIMINATION
SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN DIEGO
HALL OF JUSTICE

MARIA T. GONZALEZ, an Individual,
Plaintiff,
v.
KAISER FOUNDATION HEALTH PLAN, INC., a California Corporation; THE PERMANENTE MEDICAL GROUP, INC., a California Corporation; SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUP, INC. d/b/a SOCAL PERMANENTE MEDICAL GROUP, a California Corporation; and DOES 1 through 50, Inclusive,
Defendants.

Case No.: 37-2015-00019384-CU-WT-CTL

PROOF OF SERVICE OF PLAINTIFF’S OPPOSITIONS TO DEFENDANT KAISER’S MOTIONS IN LIMINE

IMAGED FILE

Date: February 10, 2017
Time: 8:40 a.m.
Judge: Honorable Katherine Bacal
Dept.: C-69

Complaint Filed: June 10, 2015
Trial Date: February 10, 2017
PROOF OF SERVICE
Gonzalez v. Kaiser Foundation Health Plan, Inc.,
Case No. 37-2015-00019384-CU-WT-CTL
STATE OF CALIFORNIA, COUNTY OF SAN DIEGO

1. I am employed in the County of San Diego, State of California. I am over the age of 18 and not a party to the within action. My business address is 225 Broadway, Suite 2050, San Diego, CA 92101.

2. On February 8, 2017, I caused to be served the documents described below on the parties in this action by email and addressed as stated below:

<table>
<thead>
<tr>
<th>Counsel for Defendant</th>
<th>Counsel for Plaintiff</th>
</tr>
</thead>
<tbody>
<tr>
<td>David W. Ammons</td>
<td>David M. deRubertis</td>
</tr>
<tr>
<td>(<a href="mailto:david.ammons@ltlattorneys.com">david.ammons@ltlattorneys.com</a>)</td>
<td>(<a href="mailto:David@deRubertisLaw.com">David@deRubertisLaw.com</a>)</td>
</tr>
<tr>
<td>Steven C. Gonzalez</td>
<td>THE deRUBERTIS LAW FIRM, APC</td>
</tr>
<tr>
<td>(<a href="mailto:steven.gonzalez@ltlattorneys.com">steven.gonzalez@ltlattorneys.com</a>)</td>
<td>4219 Coldwater Canyon Avenue</td>
</tr>
<tr>
<td>Caleb H. Liang</td>
<td>Studio City, California 91604</td>
</tr>
<tr>
<td>(<a href="mailto:caleb.liang@ltlattorneys.com">caleb.liang@ltlattorneys.com</a>)</td>
<td>Telephone: 818-761-2322</td>
</tr>
<tr>
<td>LTL ATTORNEYS LLP</td>
<td>Facsimile: 818-761-2323</td>
</tr>
<tr>
<td>300 South Grand Avenue, 14th Floor</td>
<td></td>
</tr>
<tr>
<td>Los Angeles, CA 90071</td>
<td>Telephone: 213-612-8900</td>
</tr>
<tr>
<td>Telephone: 213-612-3773</td>
<td>Facsimile: 213-612-3773</td>
</tr>
</tbody>
</table>

X BY E-MAIL OR ELECTRONIC TRANSMISSION pursuant to C.C.P. §1010.6(B) and C.R.C. Rule 2.250(b)(3). Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I attached the document(s) to the email address(es) listed. I did not receive, within a reasonable time after transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct. Executed this 8th day of February, 2017, at San Diego, California.

RUTH A. CAMERON

DOCUMENTS SERVED

1. PLAINTIFF’S OPPOSITION TO DEFENDANT KAISER’S MOTION IN LIMINE NO. 2 TO EXCLUDE EVIDENCE NOT PRODUCED DURING DISCOVERY [REGARDING STANDARD OF CARE FOR PEDRO MORENO] [redacted and un-redacted versions]
2. PLAINTIFF’S OPPOSITION TO DEFENDANT KAISER’S MOTION IN LIMINE NO. 4 TO EXCLUDE EVIDENCE NOT PRODUCED DURING DISCOVERY

3. PLAINTIFF’S OPPOSITION TO DEFENDANT KAISER’S MOTION IN LIMINE NO. 5 TO PRECLUDE ANY EVIDENCE OR ARGUMENT THAT MORENO’S CARE WAS COSTLY TO KAISER [redacted and un-redacted versions]

4. PLAINTIFF’S OPPOSITION TO DEFENDANT KAISER’S MOTION IN LIMINE NO. 6 TO PRECLUDE ANY ARGUMENT REFERRING OR RELATING TO ALLEGED RETALIATION BY KAISER

5. PLAINTIFF’S OPPOSITION TO DEFENDANT KAISER’S MOTION IN LIMINE NO. 7 TO EXCLUDE EVIDENCE NOT PRODUCED DURING DISCOVERY [REGARDING PLAINTIFF BEING A SINGLE MOTHER OF SEVEN CHILDREN]

6. PLAINTIFF’S OPPOSITION TO DEFENDANT KAISER’S MOTION IN LIMINE NO. 9 TO PRECLUDE PEDRO MORENO FROM TESTIFYING THAT HE RECEIVED OVERBOOK APPOINTMENTS AFTER PLAINTIFF’S TERMINATION

7. PLAINTIFF’S OPPOSITION TO DEFENDANT KAISER’S MOTION IN LIMINE NO. 10 TO PRECLUDE ANY EVIDENCE OR ARGUMENT OF DISCRIMINATION OUTSIDE THE THREE CATEGORIES OF ASSOCIATIONAL DISCRIMINATION

8. PLAINTIFF’S OPPOSITION TO DEFENDANT KAISER’S MOTION IN LIMINE NO. 11 TO EXCLUDE EVIDENCE RELATED TO KAISER’S OPTION OF REFERRING PATIENT COMPLAINTS TO MEMBER SERVICES

9. DECLARATION OF AARON M. OLSEN IN SUPPORT OF PLAINTIFF’S OPPOSITIONS TO DEFENDANT KAISER’S MOTIONS IN LIMINE

10. NOTICE OF LODGMENT OF CERTAIN EVIDENCE AND PORTIONS OF PLAINTIFF’S OPPOSITIONS TO DEFENDANT KAISER’S MOTIONS IN LIMINE [redacted and un-redacted versions]

11. PROOF OF SERVICE OF PLAINTIFF’S OPPOSITIONS TO DEFENDANTS MOTIONS IN LIMINE
We the People

insure domestic Tranquility provide for the common defence;

and our Posterity, We ordain and establish this Constitution for

rule 1.

Section 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

The House of Representatives shall consist of Members chosen every second Year by the People of the several States, and the Number of Representatives shall be proportioned to the State, which shall have the most Population. . . .

The Congress shall assemble at such place, and on such Time, as they may determine; which shall be within the District of Columbia.

The Congress shall keep a Journals of all their Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Members thereof shall, in all Cases, beiable to being prosecuted in any other Court for, any overt Act of Treason or Libel committed, on the High Seas in Time of War, or the contiguous Boundary waters thereof.
200: “more likely true than not true”
202: Direct and Indirect Evidence
“...a witness ... saw only the white trail that jet planes often leave. This *indirect* evidence is sometimes referred to as ‘circumstantial evidence’ ... The witness’s testimony is evidence that a jet plane flew across the sky.”
“... it makes no difference whether evidence is direct or indirect.”
2 key questions for you...

### Associational Disability Discrimination

1. Was Maria Gonzalez’s association with Pedro Moreno a substantial motivating reason for Kaiser’s decision to discharge Maria Gonzalez because Pedro Moreno’s disability was costly to Kaiser since he was covered under Maria Gonzalez’s employer-provided health care plan?

   Answer: _____ Yes   _____ No

2. Was Maria Gonzalez’s association with Pedro Moreno a substantial motivating reason for Kaiser’s decision to discharge Maria Gonzalez because Kaiser wanted to avoid the nuisance that Maria Gonzalez’s association with her disabled son Pedro Moreno caused Kaiser?

   Answer: _____ Yes   _____ No
9 of 12 for each question and does not need to be same 9 for each question

At least nine jurors must agree on a verdict. When you have finished filling out the form, your presiding juror must write the date and sign it at the bottom and then notify the bailiff that you are ready to present your verdict in the courtroom.
A “substantial motivating reason” is a reason that actually contributed to the discharge. It must be more than a remote or trivial reason. It does not have to be the only reason motivating the discharge.
2 key questions for you...

**Associational Disability Discrimination**

1. Was Maria Gonzalez’s association with Pedro Moreno a substantial motivating reason for Kaiser’s decision to discharge Maria Gonzalez because Pedro Moreno’s disability was costly to Kaiser since he was covered under Maria Gonzalez’s employer-provided health care plan?

   Answer: ____ Yes       ____ No

2. Was Maria Gonzalez’s association with Pedro Moreno a substantial motivating reason for Kaiser’s decision to discharge Maria Gonzalez because Kaiser wanted to avoid the nuisance that Maria Gonzalez’s association with her disabled son Pedro Moreno caused Kaiser?

   Answer: ____ Yes       ____ No
2002 – June 2014: 12+ years of positive performance
2002 – June 2014: 12 years of positive performance

Q. In your experience, she was a hard worker, correct?
A. Correct.
Q. In your experience and based on your observations, she was dedicated to the job and did what she was supposed to do.
A. Dedicated to the job, yes.
Q. In your own experience, your views, Maria really cared about her patients.
A. Yes, definitely.
Q. She went -- she was very I'd call it patient-focused; is that fair?
A. Yeah, she had a very patient center focus.
Q. What does that mean? What's a very patient center focus?
A. That means that the patient is number one, right? And that's what our job is. So she took that to heart. And, you know, she would go the extra mile for patients.
Q. And would you agree with me the most important thing in being a care provider is caring about and going the extra mile for the patients?
A. Definitely.
Q. Okay. And she had that to a T.
A. Yes.
2002 – June 2014: 12 years no evidence of discipline
2002-2014: 12 years of respecting HIPPA rules
why
are
we
here?
Nov. 2011 – August 2013: Delay and deny
July 7, 2014: Dr. Watson

Blindsided
Kaiser created and should have anticipated ...
Kaiser had choices...
Only choice that is NOT ok is the one that compromises...
Was Pedro stable as of July 7, 2014?
Was Pedro stable as of July 7, 2014?

Course: Patient notes he is having the second opinion on the 16th of July for possible transplant. He states that he is still not doing well with his pain at this time. Patient notes he is still having lower blood glucose. He is going to see Dr Franke with patient noting blood in urine is of concern for him again. He notes that when he has increased in pain he notes that is when he notices redness in his urine.

CHRONIC PAIN SYNDROME
Note: Patient notes pain increased and increase in "blood" in urine at this time. Suggest going back to one SAO at this time with patient to stop Morphine IR and will transition to Oxycodone IR 30mg 1/2 tab four times a day when refill is needed. Concern still for amount of pain medications patient is needing but will defer any drastic changes until patient is evaluated by outside transplant team.
Plan: METHADONE 10 MG ORAL TAB

Current Medications:
Methadone 10mg 1 tab three times a daily
Percocet 10/325mg 8-10 tabs a day
Morphine IR 15mg 4 tabs a day
Lyrica 50mg 2-2-3 tabs a day
Lidocaine ointment PRN
Zanaflex 2mg 2 tabs at night
Cymbalta 30mg 2 caps a day
Naproxen 2 tabs a week

Exh. 132
Q. This is from July 7, 2014 when Mr. Moreno was discharged to primary care. "Patient notes pain increase and increase in blood in urine at this time."

The two symptoms of loin pain hematuria syndrome are pain and blood in urine, right?

A. Yes.

Q. So he had increased symptoms at this date, correct?

A. Yes.
Kaiser failed Maria & Pedro in...
Kaiser then chose the one solution that compromises...
4 key actions by Maria & Pedro after July 7, 2014
On July 7th, Dr. Watson discharged Pedro to Dr. Ortuno. Maria was at the appointment and everyone agreed on the treatment plan in the room. Maria subsequently approached Dr. Watson complaining about primary care managing Pedro’s condition. After Pedro went to urgent care to refill medication, Maria approached Dr. Watson very upset. She said it was ridiculous that Pedro was not being seen in Pain. Maria told Watson that she could not believe that he was doing this to us. She did not understand why it was a conflict of interest for the patient to be seen in the department. She also brought up a time that Dr. Jaffe treated a member of our department stating that situation was a conflict of interests as well in her opinion.
July 7-8, 2014: Maria voices complaints re: Pedro being discharged to primary care

7 Now, you later learned that Ms. Gonzalez was
8 not happy that her son had been discharged from the
9 pain management department to primary care, correct?
10 A. Correct.
July 16, 2014: Pedro Scripps Green consult for possible 2nd auto-renal transplant surgery

Course: Patient notes he is having the second opinion on the 16th of July for possible transplant. He states that he is still not doing well with his pain at this time. Patient notes he is still having lower blood glucose. He is going to see Dr Franke with patient noting blood in urine is of concern for him again. He notes that when he has increased in pain he notes that is when he notices redness in his urine.
Q. Is it fair to say that is a very -- just forget about the actual raw number, what it is and what it isn't. That's an expensive procedure. It's a major hospitalization. It's a transplant procedure. Big deal, right? Not like getting a mole removed. This is a transplanting procedure. Costly, right?

A. There probably was a significant cost associated with it, but I'm not involved in cost considerations.

Q. July 16, 2014, a month or so before you get involved with Mr. Moreno, do you recall that he saw Scripps Green -- a surgeon at Scripps Green for a second auto renal transplant procedure?

A. For consideration of whether that should be performed.
MEDICAL DECISION MAKING:
24-year-old male with history of opiate dependence and chronic pain extensive urology and pain management issues return to emergency department for recurrent RIGHT flank pain which is not controlled despite his copious amounts of oral pain medication at home. His labs show hematuria and are negative for infection labs are otherwise unremarkable. Patient requires multiple doses of IV narcotics in the emergency department. The patient and mother insisted on admission for pain control IV pain medication and pain management consult. Case discussed with MOD patient admitted to inpatient.
August 15-18, 2014 hospitalization

8/18/14: called on call pain specialist who referred me to Dr. Watson (as Dr. Watson knows very well) who was kind enough to return a call on his off day. Discussed in details, recommends to Increase Methadone 10 mg every 6 hours, restart on Oxycodone 30 mg Q4 hourly, and d/c Morphine IR, also add Klonopin 1 mg TID PRN anxiety.

Had a long discussion with Pt and his mother (a pain clinic RN at KP), agreeable with Dr. Watson's recommendation and will Follow up with out patient pain management, Later on, I was called by the pt and his mother, family now insisting on seeing by pain physician on call. I explained that I already spoke with the pain physician Interventional Anesthesiologist today morning who referred me to Dr. Charles Watson as this is a chronic pain case, need adjustment of oral pain meds which already done.

I spoke with UM physician Dr. Hayes, and also updated Dr. Copon.
Friday & Monday conferences: Dr. Bernstein, Dr. Capon & Dr. Mutuc-Wurst
After August 15-18, 2014 hospitalization

CHRONIC PAIN SYNDROME
Continue current regimen. Will monitor with patient going to be seen outside for Pain consult.
Plan: MORPHINE 30 MG ORAL TAB

August 20, 2014 Dr. Watson chart entry
Exh. 345-1691
August 26, 2014: Pedro at Orcutt

Hello to all-

Dr. Jaffe and I were able to meet with Mr. Moreno today.

His issues are as follows:

- He feels as though he has been “abandoned” as he has been discharged from pain and he does not feel his primary care physician can handle his condition.
- He wants to be seen in an outside pain department.

As there have been many challenges with this patient having his mother as an employee in our department, Dr. Jaffe and Dr. Watson both agree that this patient should be referred to an outside pain department for a second option. I support this decision.

The next steps will be:

- Dr. Jaffe will enter the e-referral.
- I will contact Joanne Goldenberg.

This patient still has many issues with multiple other departments. He is requesting a scheduled meeting with upper administration and Kaiser’s legal team. I do not believe this is necessary but feel that the patient will continue to be persistent with his requests. We were informed that the patient and his mother were complained continually to the CEO at UCSD (referred there for a transplant) to the extent that the hospital will no longer work with him because of the family’s behavior. Drs Watson, Jaffe, and April are available for a 12:30 pm phone conference on Thursday April 28th. I am hoping this time works for Dr. Mutuc-Wurst and Adriana as well.
Turning point for Kaiser
Kaiser had a choice...

DO WHAT IS RIGHT,
NOT WHAT IS EASY
Enter Dr. Capon ...
Dr. Capon immediately blocks outside referral
Dr. Capon immediately blocks outside referral

From:     Stephen M Capon/CA/KAIPERM
To:       Ethan I Franke/CA/KAIPERM@KAIPERM, David W Rosenthal/CA/KAIPERM@KAIPERM, Marie G Mutuc-Wurst/CA/KAIPERM@Kaiperm, Patrick C Watson/CA/KAIPERM@KAIPERM, Michael S Jaffe/CA/KAIPERM@Kaiperm, Arturo X Ortuno/CA/KAIPERM@KAIPERM
Cc:       Traci Trask/CA/KAIPERM@KAIPERM, Joanne L Goldenberg/CA/KAIPERM@KAIPERM, Rich J Raynes/CA/KAIPERM@Kaiperm
Date:     08/28/2014 12:17 PM
Subject:  complex patient issue (confidential)

Dear Colleagues:

Pedro Moreno is becoming an increasing challenge, as many of you know. **He has presented several times to Orcutt demanding to speak with Dr. Bernstein.** His mother is an employee and issues are arising related to her role in his care. **He (they) feel his pain needs are not being addressed.**

As of last night, he is now in the hospital with urinary tract sepsis, one predicted possible outcome of the recent right ureteral stent placement done last month virtually at patient request, (BUT stated as part of the plan per 2nd opinion by renal transplant team at Scripps Green)

Several of us will be having a phone conference in 20 minutes regarding pain management issues
I do not feel he should be referred for outside care at this time simply because his mother works in the pain department. **I have spoken with Traci Trask about this issue. Please refrain from submitting ANY outside referrals at this time.**

All: We will likely need to convene a multidisciplinary discussion about his care so all individuals and departments involved in his care can agree upon a plan of care
I will be in touch with you to set that up
Only reason to block outside referral
<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>13</td>
<td>You did have a conversation with Dr. Capon on</td>
</tr>
<tr>
<td>14</td>
<td>either August 26th, -7th, or -8th, 2014 before he</td>
</tr>
<tr>
<td>15</td>
<td>sent this e-mail, correct?</td>
</tr>
<tr>
<td>16</td>
<td>A. Yes.</td>
</tr>
</tbody>
</table>
Dr. Capon had *no role* in PMD employee issues

23 Q. Dr. Capon has absolutely zero responsibility for like employee management or human resource issues over the pain department, fair?
24 A. I believe that's a correct statement, yes.

22 Q. Are you -- you'd never seen a situation in the pain department before August 28th, 2014 where Dr. Capon had any role in an investigation of an employee, correct?
23 A. That's correct.
Dr. Mutuc-Wurst gave a patient summary identifying primary issues as follows:

1. Outside opinion requested from Pain Management as Physicians and staff feel employee conduct (mother is Pain MA) is inhibiting treatment capabilities.
2. Patient has been showing up at Orcutt demanding a meeting with the Legal Team and Dr. Bernstein.
3. Patient and mother escalating with regards to dissatisfaction with the care the patient is receiving from Kaiser Permanente.

- Dr. Cotrell is available to give a second opinion in pain. Dr. Jaffe will rescind the outside referral as we are able to provide care for the patient inhouse.
- Compliance and the Pain Department are conducting an investigation of Maria Gonzalez's behavior.

---

Phone Call Meeting from 12:30 pm to 1:00 pm
Re: Pedro Moreno MR#

ACTION ITEM LIST:
1. Dr. Jaffe to rescind the outside referral.
2. Dr. Capon to schedule a multi disciplinary meeting.
3. Compliance and the Pain Department Administrators will conduct an investigation of the employees conduct.
Knew couldn’t investigate Maria because of complaints about Pedro’s care

21 Q. In fact, it's the opposite, right? The Kaiser policies are employees are not supposed to be disciplined or investigated for raising quality of care concerns, right?
22
23 A. No one can be disciplined for raising quality of care concerns.
24
25 Q. Okay. And that's whether they're an employee, right?
26
27
28

1 A. Correct.
2
3 Q. Or whether they're an employee who has a child that is getting care within the Kaiser system, correct?
4
5 A. Correct.
Dr. Capon accuses Maria of improper access on Aug. 28th call

| Q. August 27th or August 28th, 2014, you get information that Maria Gonzalez, a medical assistant in the pain management department, had information about her son's medical conditions, correct? | A. Correct. |
| Q. And you then brought that up on the August 28th, 2014 call, correct? | A. Okay. Correct. |
Dr. Capon accuses Maria of improper access on Aug. 28th call

<table>
<thead>
<tr>
<th>Line</th>
<th>Text</th>
</tr>
</thead>
<tbody>
<tr>
<td>8</td>
<td>&quot;Question: During this one conversation,</td>
</tr>
<tr>
<td>9</td>
<td>Dr. Capon brought up that there was concern about</td>
</tr>
<tr>
<td>10</td>
<td>Maria knowing stuff about her son's care that she</td>
</tr>
<tr>
<td>11</td>
<td>shouldn't know.</td>
</tr>
<tr>
<td>12</td>
<td>&quot;Answer: That's correct.</td>
</tr>
<tr>
<td>13</td>
<td>&quot;Question: And where did that concern come</td>
</tr>
<tr>
<td>14</td>
<td>from? Did he state it?</td>
</tr>
<tr>
<td>15</td>
<td>&quot;Answer: I believe it was in the hospital or</td>
</tr>
<tr>
<td>16</td>
<td>the ER. I'm not sure.</td>
</tr>
<tr>
<td>17</td>
<td>&quot;Question: The hospital at Kaiser?</td>
</tr>
<tr>
<td>18</td>
<td>&quot;Answer: Zion Hospital, yes.</td>
</tr>
<tr>
<td>19</td>
<td>&quot;Question: Zion Hospital.</td>
</tr>
<tr>
<td>20</td>
<td>&quot;Answer: That's correct. That's Kaiser's</td>
</tr>
<tr>
<td>21</td>
<td>hospital.</td>
</tr>
</tbody>
</table>
Dr. Capon and/or Dr. Mutuc-Wurst created medical record accessions accusation

According to you, a consistent theme of the reports you were receiving on August 26th when you came back was that Maria had information about Pedro that she could only have from accessing his medical record, correct?

A. There was a consistent theme that she had information that we didn't know how she got.
Q. Dr. Watson did not ever tell you any concern about Ms. Gonzalez accessing her son's medical record, though, correct?
A. Correct.

Q. Nurse Lynch never raised a concern to you about Ms. Gonzalez accessing Pedro's medical record, correct?
A. Correct.

Q. Nurse Laskin never raised a concern to you about Pedro -- about Maria accessing Pedro's medical record, correct?
A. Correct.
Q. So if Dr. Capon or Dr. Mutuc-Wurst brought a concern to you about Maria having information that they thought might have come from Pedro's medical records and they said "Hey, would you look into this?" you would do it.

A. It depends on what the concern was.

Q. How about if the concern was what I said: "We think she knows things that must have come from his medical record"?

A. Yeah, we would look into it.
Knew wasn’t a legitimate basis to investigate or discipline

7   Q. I'm a mom. I'm in the hospital. I'm
8   arguing with a doctor about the quality of the care.
9   I'm off the clock, but I happen to work in pain
10  management.
11  Your understanding of Kaiser policies, is
12  Kaiser allowed to investigate me if somebody thinks I
13  was too aggressive?
14  A. No.
Trask admits Mutuc-Wurst was part of trigger of investigation...

11  Q. Was the phone call from Dr. Mutuc-Wurst what triggered you starting an investigation of Ms. Gonzalez?
14  A. Yes.

20  Q. The real reason you began this investigation was because of Maria Gonzalez's conduct in the hospital as a mother that was reported to you by Dr. Mutuc-Wurst, right?
24  A. The investigation was initiated in part because of her conduct in the hospital, but it was because she represented herself in the hospital as a pain management employee, not as a mother.
October 6, 2014: Didn’t ask any questions about it...

<table>
<thead>
<tr>
<th></th>
<th>Q. You didn't ask her a single question about the hospital issue from the middle of August 2014 in that fact-finding interview, did you?</th>
</tr>
</thead>
<tbody>
<tr>
<td>22</td>
<td>A. No, I don't believe we did.</td>
</tr>
</tbody>
</table>

Traci Trask
Feb. 28, 2017 @ 503:19-22
June – Sept. 2014 – Kaiser’s issues with Maria are *inseparable* from her association with Pedro
All roads lead back to Pedro...
2 key questions for you...

**Associational Disability Discrimination**

1. Was Maria Gonzalez’s association with Pedro Moreno a substantial motivating reason for Kaiser’s decision to discharge Maria Gonzalez because Pedro Moreno’s disability was costly to Kaiser since he was covered under Maria Gonzalez’s employer-provided health care plan?

   Answer: [ ] Yes  [ ] No

2. Was Maria Gonzalez’s association with Pedro Moreno a substantial motivating reason for Kaiser’s decision to discharge Maria Gonzalez because Kaiser wanted to avoid the nuisance that Maria Gonzalez’s association with her disabled son Pedro Moreno caused Kaiser?

   Answer: [ ] Yes  [ ] No
Tried to pull the wool over your eyes
Tried to avoid responsibility through false testimony
Began investigation on August 25, 2014 = FALSE!

Incident Date: 08/25/2014
Opened: 08/28/2014
Closed: 11/07/2014
Days Open: 71
Priority: C
Case Type: Allegation

Region: Southern California
Area: San Diego
Facility: Garfield Specialty Center - Copley Drive
Address: CD: Care-Ambulatory
City/State: Pain Management-Chronic Pain

Events

<table>
<thead>
<tr>
<th>#</th>
<th>Date</th>
<th>Event Type</th>
<th>Description</th>
<th>Submitted By</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>8/25/14</td>
<td>Incident Discovery Date</td>
<td>Per Adriana Avalos - IDD is 8/25/14.</td>
<td>Karen Rascon</td>
</tr>
</tbody>
</table>
Hi Adriana-

I hope this email finds you well. I am reaching out to see if we can discuss some concerns that have come up regarding the mother of Pedro Moreno, MR#: 0277062 NUID #631582. Would you be able to look at the patient's medical record to see if Maria has been entering her son's electronic medical record?

We also found the following documentation in the medical record. It appears that Maria had contacted Urology and identified herself as a pain management staff member last week. There is no documentation that she was instructed to do so and this is out of her scope of practice.

A few “hearsay” pieces of information have also come up. I would love to speak with you about the need to pursue them further from a compliance standpoint. I have also CC'd Lynne Rosengard who I will be speaking with as well.

Exh. 138
Q. Is the way this e-mail is phrased the way you would write an e-mail to somebody you've already spoken to about the topic?

A. Is the question for me?

Q. I'm sorry?

A. Yes. No.

Q. You agree this e-mail is written as if you had never spoken to Ms. Avalos before about the topic, correct?

A. I think it can -- in reading it back, it sounds like that, yeah.
Began investigation on August 26, 2014 because of multiple employee written complaints = FALSE!

19 Q. Now, you claimed that on August 26th, 2014, you received multiple employee complaints about Maria Gonzalez, correct?
20 A. Yes.

11 Q. You testified under oath you got these --
12 in January of 2015, you got these multiple employee complaints and you were able to read all of them on the 26th, correct?
13 A. Yes. I --
14 Q. There is not a single written employee complaint at all as of August 26th, 2014. It doesn't exist, right?
15 A. Correct.
Q. How long did you spend in your forensics and medical record investigation? How long did you spend?
A. Quite a long time.
Q. Could you give us an estimate? Dozens of hours?
A. Oh, yes.

Q. 30, 40 hours?
A. My best guess would be probably around the 40-hour mark.
Q. So you spent about 40 hours, a normal 8:00 to 5:00 or 9:00 to 5:00 workweek, with all documentation, with the access to the medical records, with access to the forensics, correct?
A. At different times broken up, but probably total time.
7. You were working at Garfield on February 5, 2014. Can you explain why you were in Pedro Moreno's medical record on February 5, 2014 even though there was no visit, no message, no physician order? Maria: No.

8. You were working at Garfield on February 7, 2014. Can you explain why you were in Pedro Moreno’s medical record on February 7, 2014? Maria: No.
Bogus, sham investigation
Q. Let's do it again. February 7, 2014, you're asking -- you tell her she's at Garfield and you're asking her why she's in the chart.

Do you agree you should have given her access to the chart to be fair to her in answering that question?

A. Giving her access to the chart would not have made it any more fair.

Q. It could have helped her answer Question on Exhibit 182-3 to see the chart? It could have helped, right?

THE WITNESS: That's not the purpose of that question.

BY MR. DERUBERTIS:

Q. I thought the question was to understand why she was in the medical record on that day.

Isn't that the purpose of the question?

A. It's part of the purpose. It's one of multiple purposes.

Q. What's the other part?

A. It's to see if she's going to lie.
Bogus, sham investigation

18      Q. Did you expect that on October 6th, 2014, she would from memory know why on February 4, 2014 she was in the chart?
20
21      MR. LIANG: Objection; speculation.
22      THE COURT: Overruled.
23      THE WITNESS: We just wanted to know what she thought at the time and what she knew at the time, what she remembered at the time and what she felt at the time.
Accusation of improperly accessing chart was totally illogical ...
Maria’s accessions were based on a ...
Traci Trask discussed the following question with all of the PM&R MAs:

**MA question:** “What would you do if a Physician asked you to do a pill count?”

1. Darlene: I have never been asked to do a pill count and I have never done one before.
2. Jorge: I have never done a pill count before and I have never been asked.
3. Tim: **Has done a pill count before.** Was trained by the previous RN Debra Rusth.  
   - Has done twice. Counts pills, crushes them, disposes of them in coffee grounds in a pharmacy waste container. Always documents in health connect. **Was not supervised at the time of the pill count.** Instructed to not do any more pill counts.
4. Carmen: never asked to do a pill count and has never done a pill count
5. Cristina: never asked to do a pill count and has never done one.
6. Rosa: Never asked to do a pill count and has never done one.
7. Nahelly: Never asked to do a pill count and has never done one.
<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>22</td>
<td>Q. You ordered a pill counter for Maria to take to use at the Rancho San Diego location.</td>
</tr>
<tr>
<td>23</td>
<td>A. Yes.</td>
</tr>
<tr>
<td>24</td>
<td>Q. Traci Trask requested that you order that pill counter.</td>
</tr>
<tr>
<td>25</td>
<td>A. Yes.</td>
</tr>
<tr>
<td>26</td>
<td>Q. And you ordered that pill counter and you personally handed it to Ms. Gonzalez.</td>
</tr>
<tr>
<td>27</td>
<td>A. Correct.</td>
</tr>
<tr>
<td>28</td>
<td></td>
</tr>
</tbody>
</table>
YES to first four questions = Kaiser Liable

Associational Disability Discrimination

1. Was Maria Gonzalez’s association with Pedro Moreno a substantial motivating reason for Kaiser’s decision to discharge Maria Gonzalez because Pedro Moreno’s disability was costly to Kaiser since he was covered under Maria Gonzalez’s employer-provided health care plan?

   Answer:  Yes  No

2. Was Maria Gonzalez’s association with Pedro Moreno a substantial motivating reason for Kaiser’s decision to discharge Maria Gonzalez because Kaiser wanted to avoid the nuisance that Maria Gonzalez’s association with her disabled son Pedro Moreno caused Kaiser?

   Answer:  Yes  No
YES to first four questions = Kaiser Liable

3. Was Maria Gonzalez harmed?
   Answer: _____ Yes   _____ No

4. Was Kaiser’s discharge of Maria Gonzalez a substantial factor in causing harm to Maria Gonzalez?
   Answer: _____ Yes   _____ No
A substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It must be more than a remote or trivial factor. It does not have to be the only cause of the harm.

Conduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct.
time for JUSTICE
Only you can tell to stop ...

BREAKING THE LAW
Punitive damages = fine or penalty
YES to question 5 = punishment damages

5. Has Maria Gonzalez proven by clear and convincing evidence that a managing agent of Kaiser was guilty of malice, fraud, or oppression in engaging in the conduct upon which you base your liability verdict(s) against Kaiser?

Answer: ❌ Yes  ❌ No
Malice = “conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another.”

Fraud = “intentionally misrepresented or concealed a material fact and did so intending to harm Maria Gonzalez”

Oppression = “conduct was despicable and subjected Maria Gonzalez to cruel and unjust hardship in knowing disregard of her rights”
"An employee is a ‘managing agent’ if he or she exercises substantial independent authority and judgment in his or her corporate decision making such that his or her decisions ultimately determine corporate policy."
Q. And your executive leadership team ultimately is who decides the policies of the company.

A. Yes.

Q. Much of the policies and procedures -- or much of the policies and strategic policies and stuff of the organization comes out of recommendations of the executive leadership team as far as decisions presented by the executive leadership team to the top three, fair?

A. I'll accept that.
Q. And can you describe what the compliance department is responsible for.
A. Sure. At its highest 10,000-foot level, we try to make the right thing as easy to do as possible, which means we try to keep people out of trouble. And so one of the things that we do as part of the compliance department is we do education or we're in charge of education if we don't do the educating ourselves. We formulate and draft policies either at my level or at the regional level.
Only you can hold them accountable
FULL DAMAGES = FULL JUSTICE
CACI 200: “more likely true than not true”
Damages

1. Past and Future Lost Wages, Earnings & Benefits

2. Past and Future Human Damages
“The amount of damages must include an award for each item of harm that was caused by Kaiser’s wrongful conduct...”
6. What are Maria Gonzalez’s damages?

A. Past economic damages $192,114.00

B. Future economic damages $591,505.00

C. Past loss of enjoyment of life, mental suffering, anxiety, humiliation, grief, inconvenience, physical pain or impairment, and emotional distress:

$_______________________________

D. Future loss of enjoyment of life, mental suffering, anxiety, humiliation, grief, inconvenience, physical pain or impairment, and emotional distress:

$_______________________________
CACI 3905A – “Human Losses”

Past and future:

1. Loss of Enjoyment of Life $________________
2. Mental Suffering $________________
3. Inconvenience $________________
4. Grief $________________
5. Anxiety $________________
6. Humiliation $________________
7. Physical pain and impairment $________________
8. Emotional Distress $________________

TOTAL “Human Losses”$________________
Human losses are greatest losses
6. What are Maria Gonzalez’s damages?

A. Past economic damages $ 192,114.00
B. Future economic damages $ 591,505.00

C. Past loss of enjoyment of life, mental suffering, anxiety, humiliation, grief, inconvenience, physical pain or impairment, and emotional distress:

$ 3,500,000.00

D. Future loss of enjoyment of life, mental suffering, anxiety, humiliation, grief, inconvenience, physical pain or impairment, and emotional distress:

$ 3,500,000.00
FULL DAMAGES = FULL JUSTICE

Harms and losses

compensation
FULL DAMAGES = FULL JUSTICE
In deciding whether the employment was substantially similar, you should consider ... whether:

(a) The nature of the work was different from Ms. Hernandez’s employment with Pacific Bell/AT&T;
(b) The new position was substantially inferior to Ms. Hernandez’s former position;
(c) The salary, benefits, and hours of the job were similar to Ms. Hernandez’s former job;
(d) The new position required similar skills, background, and experience;
(e) The job responsibilities were similar; and
(f) The job was in the same locality.
Frivolous Defense #2: “Mitigation” (Instr. 2407)

To succeed, AT&T must prove all of the following:

1. That employment *substantially similar* to Ms. Hernandez’s former job was available to her;
2. That Ms. Hernandez failed to make reasonable efforts to seek and retain this employment; and
3. The amount that Ms. Hernandez could have earned from this employment.
Maria T. Gonzalez claims that Southern California Permanente Medical Group wrongfully discriminated against her based on her association with a disabled person. To establish this claim, Maria T. Gonzalez must prove all of the following:

1. That Maria T. Gonzalez's association with her disabled son Pedro was a substantial motivating reason for Southern California Permanente Medical Group's decision to discharge Maria T. Gonzalez either because:
   a. Pedro Moreno’s disability was costly to Kaiser because Pedro Moreno was covered under Maria Gonzalez’s employer-provided health care plan; or
   b. Maria Gonzalez was a nuisance to Kaiser through her association with Pedro Moreno, who has a disability;

2. That Maria T. Gonzalez was harmed; and

3. That Southern California Permanente Medical Group's conduct was a substantial factor in causing Maria T. Gonzalez's harm.
SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN DIEGO
HALL OF JUSTICE

MARIA T. GONZALEZ, an Individual,
Plaintiff,

v.

KAISER FOUNDATION HEALTH PLAN, INC., a California Corporation;
THE PERMANENTE MEDICAL GROUP, INC., a California Corporation;
SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUP, INC. d/b/a SOCAL PERMANENTE MEDICAL GROUP, a California Corporation; and DOES 1 through 50, Inclusive,

Defendants.

Case No.: 37-2015-00019384-CU-WT-CTL
JUDGMENT ON JURY VERDICT

IMAGED FILE

Judge: Honorable Katherine Bacal
Dept.: C-69

Complaint Filed: June 10, 2015
Trial Date: February 10, 2017
This action came on regularly for trial on February 10, 2017, in Department C-69 of the Superior Court, the Honorable Katherine Bacal Judge presiding. The Plaintiff, Maria T. Gonzalez, appeared by attorneys Alreen Haeggquist and Aaron Olsen of Zeldes Haeggquist & Eck, LLP and David deRubertis of The deRubertis Law Firm, APC and the Defendant, Southern California Permanente Medical Group, Inc. (aka "Kaiser"), appeared by attorneys David Ammons, Caleb Liang, and Tiffany Hansen of LTL Attorneys LLP.

A jury of twelve persons was regularly impaneled and sworn. Witnesses were sworn and testified. After hearing the evidence and arguments of counsel, the jury was duly instructed by the Court and the cause was submitted to the jury to return a verdict on special issues. During jury deliberations, the parties stipulated to a jury of eleven persons. The jury deliberated and thereafter returned into Court with its verdict as set forth in the signed Special Verdict Form, filed March 16, 2017, attached hereto as Exhibit A.

It appearing by reason of said verdict that Plaintiff Maria T. Gonzalez is entitled to judgment against Defendant Southern California Permanente Medical Group, Inc.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that Plaintiff Maria T. Gonzalez have and recover from Defendant Southern California Permanente Medical Group, Inc. the sum of $492,114 with interest thereon at the rate of ten percent (10%) per annum from the date of the entry of this judgment until paid, together with costs in the amount of $__________, pursuant to the filing a memorandum of costs, and attorneys’ fees in the amount of $__________, pursuant to the filing a motion for attorneys’ fees and costs.

Dated: __________________________

THE HONORABLE KATHERINE BACAL
JUDGE OF THE SUPERIOR COURT

---

Case No. 37-2015-00019384-CU-WT-CTL

JUDGMENT ON JURY VERDICT
EXHIBIT A
Case No. 37-2015-00019384-CU-WT-CTL [Assigned for all purposes to the Hon. Katherine Bacal; Dept. C-69]

SPECIAL VERDICT FORM
We, the jury, answer the questions submitted to us as follows:

**Associational Disability Discrimination**

1. Was Maria Gonzalez's association with Pedro Moreno a substantial motivating reason for Kaiser's decision to discharge Maria Gonzalez because Pedro Moreno's disability was costly to Kaiser since he was covered under Maria Gonzalez's employer-provided health care plan?
   
   Answer: [ ] Yes [X] No

   Regardless of whether you answered yes or no to question 1, go to question 2.

2. Was Maria Gonzalez's association with Pedro Moreno a substantial motivating reason for Kaiser's decision to discharge Maria Gonzalez because Kaiser wanted to avoid the nuisance that Maria Gonzalez's association with her disabled son Pedro Moreno caused Kaiser?

   Answer: [X] Yes [ ] No

   If you answered yes to question 1, yes to question 2, or yes to both questions 1 and 2, then answer question 3. If you answered no to question 1 and no to question 2, stop here, answer no further questions and have the Presiding Juror sign and date this form.

3. Was Maria Gonzalez harmed?

   Answer: [X] Yes [ ] No

   If your answer to question 3 is yes, then answer question 4. Otherwise, stop here, answer no further questions and have the Presiding Juror sign and date this form.

- SPECIAL VERDICT FORM -
4. Was Kaiser's discharge of Maria Gonzalez a substantial factor in causing harm to Maria Gonzalez?

Answer: ☒ Yes ☐ No

If your answer to question 4 is yes, then answer question 5. Otherwise, stop here, answer no further questions and have the Presiding Juror sign and date this form.

Punitive Damages

5. Has Maria Gonzalez proven by clear and convincing evidence that a managing agent of Kaiser was guilty of malice, fraud, or oppression in engaging in the conduct upon which you base your liability verdict(s) against Kaiser?

Answer: ☐ Yes ☒ No

Regardless of whether you answered yes or no to question 5, answer question 6.

Damages

6. What are Maria Gonzalez's damages?

A. Past economic damages $192,114

B. Future economic damages $300,000

C. Past loss of enjoyment of life, mental suffering, anxiety, humiliation, grief, inconvenience, physical pain or impairment, and emotional distress: $0

D. Future loss of enjoyment of life, mental suffering, anxiety, humiliation, grief, inconvenience, physical pain or impairment, and emotional distress: $0

Total: $492,114

SPECIAL VERDICT FORM
Please have the Presiding Juror sign and date this form.

Dated: March 16, 2017

Signed: [Signature]

Presiding Juror

After this verdict form has been signed and dated, notify the court attendant that you are ready to present your verdict in the courtroom.
PROOF OF SERVICE
Gonzalez v. Kaiser Foundation Health Plan, Inc.,
Case No. 37-2015-00019384-CU-WT-CTL
STATE OF CALIFORNIA, COUNTY OF SAN DIEGO

1. I am employed in the County of San Diego, State of California. I am over the age of 18 and not a party to the within action. My business address is 225 Broadway, Suite 2050, San Diego, CA 92101.

2. On April 28, 2017, I caused to be served the foregoing document described as JUDGMENT ON JURY VERDICT on the parties in this action by placing true copies thereof enclosed in sealed envelopes and addressed as stated below:

<table>
<thead>
<tr>
<th>David W. Ammons</th>
<th>David M. deRubertis</th>
</tr>
</thead>
<tbody>
<tr>
<td>(<a href="mailto:david.ammons@ltlattorneys.com">david.ammons@ltlattorneys.com</a>)</td>
<td>(<a href="mailto:David@deRubertisLaw.com">David@deRubertisLaw.com</a>)</td>
</tr>
<tr>
<td>Steven C. Gonzalez</td>
<td>THE deRUBERTIS LAW FIRM, APC</td>
</tr>
<tr>
<td>(<a href="mailto:steven.gonzalez@ltlattorneys.com">steven.gonzalez@ltlattorneys.com</a>)</td>
<td>4219 Coldwater Canyon Avenue</td>
</tr>
<tr>
<td>Caleb H. Liang</td>
<td>Studio City, California 91604</td>
</tr>
<tr>
<td>(<a href="mailto:caleb.liang@ltlattorneys.com">caleb.liang@ltlattorneys.com</a>)</td>
<td>Telephone: 818-761-2322</td>
</tr>
<tr>
<td>LTL ATTORNEYS LLP</td>
<td>Facsimile: 818-761-2323</td>
</tr>
<tr>
<td>300 South Grand Avenue, 14th Floor</td>
<td></td>
</tr>
<tr>
<td>Los Angeles, CA 90071</td>
<td></td>
</tr>
<tr>
<td>Telephone: 213-612-8900</td>
<td></td>
</tr>
<tr>
<td>Facsimile: 213-612-3773</td>
<td></td>
</tr>
</tbody>
</table>

Counsel for Defendant         Counsel for Plaintiff

X BY U.S. MAIL pursuant to C.C.P. §§1012, 1013. I enclosed the document(s) in a sealed envelope to the person(s) indicated and placed the envelope for collection and mailing following our ordinary business practices. I am readily familiar with the firm’s practice for collecting and processing correspondence for mailing. On the same day that an envelope is placed for collection and mailing, it is deposited in the U.S. Postal Service with postage fully prepaid. I am employed in the County where the mailing occurred. The envelope was placed in the mail in San Diego, California.

X BY ELECTRONIC SERVICE pursuant to C.C.P. §1010.6(A) and C.R.C. Rule 2.250(b)(2) via OneLegal Online Court Services.

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct. Executed this 28th day of April, 2017, at San Diego, California.

RUTH A. CAMERON
41st Annual
Labor & Employment Law
Symposium

Session 4, Panel 2:

The Whole Lawyer: Mental Health, Well-Being, and Substance Abuse
(1.0 hr. Competence Issues CLE Credit)

Araceli Cole, SVP, Human Resources, Paramount Pictures (a Viacom CBS Company)
Robin Sax, JD & MSW
Scott Tillett, Pine Tillett Pine LLP (Moderator)
Araceli Cole is with Paramount Pictures currently in the role of Senior Vice President, Human Resources. Ms. Cole works with business leaders to align HR programs with corporate business goals, and to guide development and implementation of strategies relating to talent acquisition and retention, leadership training and development, succession planning, organizational structure, changing business needs, and building a high performing culture. Her work with business leaders and with her private clients focuses on optimizing performance by raising awareness, connecting to one’s strengths and values, and thereby making choices with greater clarity and intention.

Prior to assuming her current role, Ms. Cole was Senior Vice President & Associate General Counsel, working closely with the General Counsel on company-wide compliance efforts related investigations. Ms. Cole’s responsibilities also included global oversight of employment-related legal matters.

Prior to joining Paramount Pictures, Ms. Cole was with the law firm of Sheppard, Mullin, Richter & Hampton where she represented employers in employment relations and litigation matters involving state and federal wage and hour laws, employment discrimination, and wrongful discharge.

Ms. Cole received her Bachelor of Science degree, *cum laude*, as well as a Master’s in Business Administration from Loyola Marymount University. She received her JD degree from Berkeley Law and is a member of the State Bar of California.
Robin Sax, JD & MSW
Attorney at Law | Parenting Plan Coordinator | Mediator

Robin Sax is an attorney and a clinical therapist. Her practice focuses on the cases and causes at the intersection of mental health and law, with specialties in criminal and family law. Robin’s approach to practice is based on her social work experience where she is client centered and takes a strength based approach to assisting people overcome the most complex issues at the most stressful times. Robin draws on fifteen years of experience where she was a prosecutor who specialized in domestic violence, child abuse, sexual assault, and stalking restraining orders.

287 S. Robertson Suite 375
Beverly Hills, CA 90211
Office: ☑ 424-402-1729
        ☑ 424-402-1SAX
Mobile: ☑ 310-650-6494
Email: ☑ robin@robinsax.com
Web: ☑ www.robinsax.com
Web: ☑ www.dearcoparent.com

To schedule an appointment with Robin, click here.
Scott Tillett is a partner and co-founder of the Los Angeles-based appellate firm, Pine Tillett Pine LLP. His practice is devoted exclusively to handling civil appeals, specializing in plaintiff-side appeals, with an emphasis on employment and personal injury matters. Scott is recognized as a Certified Appellate Law Specialist by the State Bar of California and he has been named to the Super Lawyers Southern California Rising Stars list consecutively since 2016. In 2019, he was selected as one of five finalists for the Consumer Attorneys Association of Los Angeles’s (“CAALA”) Appellate Attorney of the Year Award. Scott received his Juris Doctor from the University of Southern California’s Gould School of Law in 2010. He has authored articles for CAALA’s publication, Advocate, on PAGA enforcement against public entities, whistleblower protections, the disentitlement doctrine, and arbitration enforcement. He has also authored articles about, and has been a frequent presenter on, issues related to substance abuse and recovery. Scott is the Vice Chair of CAALA’s Wellness Committee and he also serves on the California Employment Lawyer’s Association’s Education Committee. Along with his partner, Norman Pine, Scott serves as an Associate Editor of Advocate, supervising the annual “Employment Law” issue. Scott regularly volunteers with Public Counsel’s Appellate Self-Help Clinic and he has continuously been recognized by Super Lawyers as a Rising Star in appellate law since 2016.
Mental Health

- *10 Therapeutic Interventions to Use in Your Legal Practice*, Robin Sax, JD and MSW

- *Well-Being and Managing Stress for Lawyers*, Araceli Cole, Senior Vice President Human Resources, Paramount Pictures

Well-Being

- Links:
  - LACBA Lawyer Well-Being Project Resources [https://www.lacba.org/resources/lawyer-well-being-project](https://www.lacba.org/resources/lawyer-well-being-project)
  - American Bar Association [https://www.americanbar.org/groups/lawyer_assistance/resources/lawyer_wellness](https://www.americanbar.org/groups/lawyer_assistance/resources/lawyer_wellness)

Substance Abuse

- *A Bar Story* – Scott Tillett

- The 20 Questions – John Hopkins Questionnaire

- *Competency*, Greg Dorst JD, CADC II, Consultant to The Other Bar

- *Alcoholism* – Lawyers Need a Confidential Hand-Up, Greg Dorst JD, CADC II, Consultant to The Other Bar

- The Other Bar Links:
  - The Other Bar [www.theotherbar.org](http://www.theotherbar.org)
  - The Other Bar meetings directory [Meetings - The Other Bar](http://www.theotherbar.org/meetings)
10 THERAPEUTIC INTERVENTIONS TO USE IN YOUR LEGAL PRACTICE

ROBIN SAX, JD AND MSW
TEN THERAPEUTIC INTERVENTIONS FOR YOUR LEGAL PRACTICE

• Validation
• Goal setting
• Wise mind
• Reality testing
• Dialectal thinking
• Communication is everything
  – Dearman
  – Motivational interviewing
  – BIFF
• Radical acceptance
• Drop the rope
• Praise
Validation is done with words and actions
Show that you understand the other person’s feelings and thoughts about a situation
See the world from the other person’s point of view and then say or act on what you see

VALIDATION DOES NOT MEAN YOU HAVE TO AGREE WITH THE OTHER PERSON OR THEIR VIEWPOINT
VALIDATION

- Pay attention
- Reflect back
- Be sensitive as to what is not being said, pay attention to body language, facial expressions
- Understand
- Acknowledge the valid
- Show equality
**THERAPEUTIC INTERVENTION: GOAL SETTING**

<table>
<thead>
<tr>
<th>Specific: State what you will do use action words. A SMART goal should provide clear description of what needs to be achieved and what must be accomplished.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Measurable: In order to determine when a goal is achieved must be measurable. Metrics help here.</td>
</tr>
<tr>
<td>Achievable: Must be in the realm of possibility, within your scope.</td>
</tr>
<tr>
<td>Relevant: makes sense, consistent with overall strategy.</td>
</tr>
<tr>
<td>Time-bound: Deadlines, start and end time</td>
</tr>
</tbody>
</table>
THERAPEUTIC INTERVENTION: ACTIVATE THE "WISE MIND"
**Reality testing** is where one is led to see a situation for what it really is as opposed to what one hopes (or fears) it to be.

What are the weaknesses of my case? With me?

What are the strengths of the other side?

What are the weaknesses of the other side?

If you were on the other side, how would you attack the logic (or the facts or the conclusions) that underlie your position?

What is problematic?

What (real) public policy issues may impact a case? (i.e. #metoo)

What expectations do I have?

Am I listening and taking in the reality of the case?

Am I coming at this with some sort of ulterior motive?

Am I trying to pay someone back or get even? Am I trying to send a moral message?

What is my ideal goal?

What is a realistic goal?
THERAPEUTIC INTERVENTION: DIALECTAL THINKING

- The universe is filled with opposing/sides and forces
- Everything and ever person is connected in someone way
- Change is the only constant
- Change is transactional

Examples:
- You can want to be alone and connected to others
- You are tough and you are gentle
- You can understand why somebody is feeling or behaving in a certain way, AND also disagree with his or her behavior and ask that it be changed
THERAPEUTIC INTERVENTION “DEARMAN” FOR EFFECTIVE COMMUNICATION

• Describe
• Express
• Assert
• Reinforce
• Mindful
• Appear confident
• Negotiate
MOTIVATIONAL INTERVIEWING: OARS

- Open Questions
- Affirmation
- Reflective Listening
- Summary Reflections

- DID I MISS ANYTHING?
- ARE THERE OTHER POINTS TO CONSIDER?
- ANYTHING YOU WANT TO CORRECT OR ADD?
• Brief
• Informative
• Friendly
• Firm
A DIVORCE EXAMPLE

“Jane, I can’t believe you are so stupid as to think that I’m going to let you take the children to your boss’ birthday party during my parenting time. Have you no memory of the last six conflicts we’ve had about my parenting time? Or are you having an affair with him? I always knew you would do anything to get ahead! In fact, I remember coming to your office party witnessing you making a total fool of yourself— Including flirting with everyone from the CEO down to the delivery guy! Are you high on something? Haven’t you gotten your finances together enough to support yourself yet, without flinging yourself at every Tom, Dick, and Harry? ...”

“Thank you for responding to my request to take the children to my office party. Just to clarify, the party will be from 3-5 on Friday at the office and there will be approximately 30 people there—including several other parents bringing school-age children. There will be no alcohol, as it is a family-oriented firm and there will be family-oriented activities. I think it will be a good experience for them to see me at my workplace. With this information I hope you will reconsider. Please let me know by Thursday at 5 P.M. if you change your mind. Thanks!”
Roberta was fired for several violations of company policies. She writes this email to the human resources manager:

- Roberta: "Hi Jerry, I had another job interview this week. This is good, because my medical benefits are running out, thanks to you. You had no right to ruin my career and make it impossible for me to get a good letter of reference. Your corrupt company will be exposed sooner or later. By the way, I need a copy of that last list of job duties that I had. I’ve asked you three times for it, and you refuse to respond. Let me know if I need to drop by to pick it up. Your old friend, Roberta"
Jerry’s response:

• “Hi Roberta, First of all, it will not benefit you at all to make threats about “exposing” our company. We have done nothing wrong and are ready to refute any claims you may raise against us. I was not aware of you ever asking for a list of your job duties. Please see it attached. As a reminder, you are not allowed to return to our company, nor allowed to set foot on our grounds. We will have you arrested if you attempt to do so. I hope that this message is clear. Sincerely, Jerry Butler, Human Resource Manager”
“Dear Roberta, I’m glad you’re making progress and getting interviews. I really want you to find a company that’s a good fit for you. I am attaching a copy of your job duties. I hope that helps! Best wishes! Jerry”
THERAPEUTIC INTERVENTION: RADICAL ACCEPTANCE

- Roots in DBT
- A skill for distress tolerance
- A skill that can be used for “getting over” or “moving on from” a painful or traumatic incident in the past or present. Especially one that you had or have no control over.
RADICAL ACCEPTANCE IS NOT:

• Judging situations or emotions as “good” or “bad.”
• Condoning behaviors.
• Giving up your needs.
• Ignoring or denying a situation.
• Never asserting your thoughts/feelings.
• Acceptance does not equal agreement.
TEN STEPS TO RADICAL ACCEPTANCE

• Observe that you are questioning or fighting reality ("it shouldn’t be this way")
• Remind yourself that the unpleasant reality is just as it is and cannot be changed ("this is what happened")
• Remind yourself that there are causes for the reality ("this is how things happened")
• Practice accepting with your whole self (mind, body, spirit) - Use accepting self-talk, relaxation techniques, mindfulness and/or imagery
• List all of the behaviors you would engage in if you did accept the facts and then engage in those behaviors as if you have already accepted the facts
• Imagine, in your mind’s eye, believing what you do not want to accept and rehearse in your mind what you would do if you accepted what seems unacceptable
• Attend to body sensations as you think about what you need to accept
• Allow disappointment, sadness or grief to arise within you
• Acknowledge that life can be worth living even when there is pain
• Do pros and cons if you find yourself resisting practicing acceptance
THERAPEUTIC TECHNIQUE: ANALOGIES - DROP THE ROPE
THERAPEUTIC INTERVENTION: PRAISE

• Be specific. Vague praise doesn’t make much of an impression.
• Find a way to praise sincerely and realistically. It’s a rare situation where you can’t identify something that you honestly find praiseworthy.
• Never offer praise and ask for a favor in the same conversation. It makes the praise seem like a set-up.
• Look for something less obvious to praise – a more obscure accomplishment or quality that a person hasn’t heard praised many times before.
• Don’t hesitate to praise people who get a lot of praise already. I’ve noticed that even people who get constant praise – or perhaps especially people who get constant praise – crave praise. Is this because praiseworthy people are often insecure? Or does getting praise lead to a need for more praise? I’m not sure, but it seems often to be the case.
• Praise people behind their backs. The praised person usually hears about the praise, and behind-the-back praise seems more sincere than face-to-face praise.
• Beware when a person asks for your honest opinion. This is often a clue that they’re seeking reassurance, not candor.
WELL-BEING – Generally 5 inter-related components of wellbeing

• **Physical well-being** - This includes lifestyle choices that affect the functioning of our bodies. What we eat and how active we are will affect our physical wellbeing. Are we getting the proper amount of quality sleep.

• **Emotional or psychological well-being** - This is our ability to cope with everyday life and reflects how we think and feel about ourselves.

• **Social well-being** – Our relationships, and the extent to which we feel a sense of belonging and social inclusion. Our values, beliefs, lifestyles and traditions are all important factors of social well-being.

• **Purpose and Meaning**, referred by some as Spiritual well-being - This is the ability to experience and integrate meaning and purpose in life. Achieved through being connected to our inner self, to nature and to a greater power, something bigger than oneself.

• **Intellectual well-being** - intellectual wellness helps us to expand our knowledge and skills in order to live an enjoyable and successful life. Cultivating curiosity and a desire to be a life-long learner engages us with life, and increases our well-being.

• **A 6th component considered important** - **Economic wellness**, in short, our ability to meet our basic needs and feel a sense of security.

Well-being is fundamental to our sense of life satisfaction and fulfillment. We want to thrive, not just survive.

Our lives are a product of our choices not our conditions. There are lifestyle choices, and practices that you can utilize to promote your own optimal performance and happiness.
Neuroscience – understanding how the brain functions empowers us to make better choices and experience increased well-being.

Since chronic stress can have negative effects on our physical and mental health, understanding the stress response can help us manage our stress more effectively.

**MANAGING STRESS and the STRESS RESPONSE**

The stress response, also known as the fight or flight response, is an automatic physiological reaction to an event that is perceived as stressful or frightening. The perception of threat triggers the amygdala, located in the limbic brain, and activates the sympathetic nervous system, triggering an acute stress response and preparing the body to fight or flee.

The sympathetic nervous system is one of two components of the autonomic nervous system. The other component is the parasympathetic nervous system. If you imagine a car, one acts as the gas pedal, the other as the brake.

- The sympathetic nervous system functions like a gas pedal in a car. In response to a stressful event, whether real or perceived, the sympathetic nervous system is triggered and the hormones adrenaline and cortisol are released in the body to aid in responding to the threat. This causes a number of physiological changes. The heart beats faster, pulse rate and blood pressure go up, breathing is shallow and more rapid.

- The parasympathetic nervous system acts like a brake. It promotes the "rest and digest" response that calms the body down after the danger has passed.

- When the threat passes, cortisol levels fall. The parasympathetic nervous system then dampens the stress response, a calming effect.

- Stress, in and of itself, is not a bad thing. The stress response helps us meet the challenges of day to day demands. An appropriate level of stress motivates us.

- Chronic stress, on the other hand, can wreak havoc on our wellbeing. Persistent hormonal surges of adrenaline and cortisol in the body can damage blood vessels and arteries, increasing blood pressure and raising risk of heart disease or stroke.

- This underscores the importance of interventions that activate the parasympathetic nervous system, the relaxation response - Deep breathing, yoga, meditation, physical activity.

- Think of these interventions as allowing for “recovery.” Just as your body needs recovery after a workout to rebuild muscle tissue, so the body needs recovery periods between stressful events to counter the harmful effects of chronic stress.

- Chronic stress can be uncomfortable and painful. Unfortunately, some people turn to self-medicating to manage the discomfort. Turning to alcohol or other substances generally serves to exacerbate stress because it’s a form of avoidance and numbing of the discomfort and pain,
rather than managing and addressing it in healthier ways. And if this form of coping becomes addictive, we know, of course, that this brings additional pain and challenges.

Also helpful to understand the way in which the brain receives stimulus.

- Prefrontal cortex (neocortex) – the executive function center of our brain, the seat of higher reasoning. The prefrontal cortex is where you access insight, response flexibility, attuned communication, emotion regulation, fear modulation, logic, empathy.

- Limbic brain – This is where the fight, flight or freeze response is centered, where the amygdala resides. The limbic brain regulates the autonomic nervous system. It is constantly scanning the environment for threats, asking “am I safe?” The limbic brain is also where emotions live.

- In processing stimulus, it is key to note that stimulus first arrives at our emotional center, the limbic brain, before traveling to the prefrontal cortex. This brain wiring is primal and is there for our survival.

- Given that stimulus first arrives at our limbic brain, we often engage emotions before reason

- And, if the threat response is triggered in the limbic brain, the prefrontal cortex shuts down to allow the full brain to respond to the emergency. Say you’re on a hike and you see a rattlesnake, you’re limbic brain is immediately engaged in response, and there’s not much rational thought happening in that moment. Adrenaline and cortisol are flowing, your heartrate increases, your breathing becomes shallow, allowing you to quickly retreat.

- The problem is, for some people, this stress response can be triggered by interactions with others that are perceived as threatening. Someone cuts you off in traffic, or a colleague is critical of you; perceiving this as threatening can trigger a knee jerk reaction from your emotional center, rather than your thinking center.

- It is beneficial to allow a pause between receiving a stimulus and engaging a response. That pause between stimulus and response can serve us powerfully.

- If you find yourself in a state of stress that is creating anxiety, panic or paralysis, one of the fastest ways to calm yourself is to take deep, slow breaths to engage the parasympathetic
nervous system, the brake pedal, the calm button. This will then allow you to access your thinking brain.

You can train your brain to pause. Neuroplasticity of the brain refers to the brain’s ability to create new neural pathways, new learnings. So much of our behavior is nothing more than conditioned behavior, patterns of response, and habit. When we are not self-aware, we are often relying on default patterns of response. What would it be like to live by design, not default? Again, we are a product of our choices, not our circumstances. And awareness that we have a choice is fundamental.

Mindfulness is an incredibly effective tool to cultivate greater awareness in order to promote thoughtful response rather than emotional reactions.

Our minds are subjected to constant chatter, thoughts come and go relentlessly, often creating anxiety, worry, guilt, regret, and on and on.

“...We suffer more in imagination than in reality.” Seneca, Roman Philosopher
Two forms of mindfulness:

- **Formal mindfulness/meditation** – we are all generally familiar with meditation as the practice of coming into a still position, usually sitting, closing our eyes, and focusing on our breath, a mantra, or some other single object of focus, as we look to bring stillness in the mind. Studies support the finding that as little as 5 minutes of meditation daily can be beneficial. Taking the time to find stillness every day is like training a muscle that will allow you to stay more aware and more readily find calm throughout your day.

- **Informal mindfulness**
  - It’s being fully present to the experience in front of you.
  - It’s knowing what you are doing as you are doing it.
  - Single-tasking with full awareness of your surroundings, the sounds you’re hearing, smells, other sensory perceptions.
  - So much of our day goes by unnoticed when we’re operating on auto-pilot; we get stuck in the chatter in our heads, ruminating on the past or worrying about the future. Fear, anxiety and worry run amok in our heads.
  - One of the main reasons for the declining level of mental health is the rising levels of disengagement, distraction, and disconnection from the present moment. It’s no wonder given how we are bombarded with stimulus daily.

Mindfulness provides a break from the overwhelm of everyday demands for your attention. And you will soon find that you become much more discerning of where you place your attention because you are cultivating a greater level of awareness.
Bringing Awareness to Two Human Tendencies

- **NEGLIGENCE BIAS**: psychological phenomena by which humans pay more attention to and give more weight to negative rather than positive experiences or other kinds of information. The brains of humans and animals are wired to give priority to bad news, to focus on what’s wrong, what can go wrong. It’s a mechanism by which the species seeks to survive, by being able to quickly perceive threats because you’re looking for threats.

We often miss the good. We need to learn to take in the good.
When I work with clients and they are discussing managing a challenging situation, and they are intently focused on the problem in front of them, in order to disrupt the negative thought pattern I’ll ask, what’s going well for you in this situation? And as the mind opens to the good, it often becomes evident that the perceived “problem,” is not so big or so bad, it becomes manageable. In a relationship, personal or professional, focusing on what one appreciates in the other person, rather than what annoys you, can bring a more balanced perspective by countering the negativity bias.

A key Intervention to the negativity bias is adopting a gratitude practice, reflecting daily on the good in your day and your life. It’s almost impossible to feed fear or anger when you engage your heart and mind on the good in your life.

Also, bring awareness to practices that may be boosting the negativity bias. What are you consuming (content) and who you are spending time with. The news cycle is mostly negative, and can increase stress and anxiety. Limit news intake and your social media feeds, especially when you are managing a particularly stressful period in your life, such as a job loss, death of someone close, busy period at work.

Bring awareness to who you spend time with. Are you spending time with someone that consistently makes you feel depleted or that is constantly complaining? Spend time with people that inspire you, energize you, support you.

- **COMPARISON** – We are constantly comparing ourselves to others. Bring awareness to where your focus is...Most people focus on what they are lacking, rather everything they already have. Reference points – the subject of our comparison.

Well known study Olympic medalists looked at which medal winners were the most unhappy, the gold, silver or bronze medal winners? Turns out, it was the silver medalists. The silver medalist’s reference point was the gold medalist. Bronze medalist’s reference point was everyone else that wasn’t even on the podium. They were feeling pretty darn good to have gotten a medal at all.

Part of the comparison trap is also the laser focus on the outcome, completely losing perspective of the experience itself. Often our greatest fulfillment and joy is in the journey, if you allow yourself to be present to it, to experience it. A desired result can certainly bring about joy, but then it passes. Joyful living is living in the journey.
RESOURCES

*Thinking, Fast and Slow*, Daniel Kahneman
*Emotional Intelligence: Why It Can Matter More than IQ*, Daniel Goleman
*Buddha’s Brain: The Practical Neuroscience of Happiness, Love & Wisdom*, Rick Hanson, Ph.D.
*Permission to Feel: The Power of Emotional Intelligence to Achieve Well-Being and Success*, Marc Brackett, Ph.D.
*Why We Sleep: Unlocking the Power of Sleep and Dream*, Matthew Walker, Ph.D.

TED Talk
How to Make Stress Your Friend, Kelly McGonigal

TED Talk
What Makes a Good Life? Lessons From the Longest Study on Happiness, Robert Waldinger
https://www.ted.com/talks/robert_waldinger_what_makes_a_good_life_lessons_from_the_longest_study_on_happiness?language=en

TED Talk
The Positive Effects of Positive Emotions, Jennifer Stellar
https://www.tedmed.com/talks/show?id=526817

TED Talk
The Happy Secret to Better Work, Shawn Achor
https://www.ted.com/talks/shawn_achor_the_happy_secret_to_better_work#t-471329
A “Bar” Story
Scott Tillett

I did not become a lawyer until I was 32 years old. Although I graduated from USC Law School in May 2010, I was not sworn in with the rest of my class and my California Bar profile reflects that I was admitted to practice law on January 5, 2011. At legal networking functions I am often asked what my first career was. The question is met with a mix of humor and shame as I explain that I was not very focused as a young adult, but that I had a lot of fun. Some people do not get the hint and ask me what I am drinking. After all, alcohol is the social lubricant that is present at every legal networking event—usually at a sponsored, open bar. As the saying goes, “we work hard and we play harder.” Lawyers use alcohol—and although few will openly admit it, drugs—to unwind and talk about something other than work. On occasion, I am pressed by someone who simply will not take no for an answer. In these situations, I typically tell the person that I am allergic to alcohol, which is almost always received with a sympathetic “oh no, what happens?” My reply: “I break out in handcuffs.” Laughter ensues and the party goes on.

When I tell people that I have been sober for 19 years, I am almost always met with praise and congratulations on overcoming my addictions, followed by further conversation about their friends and family members who have recovered or are still struggling. Sometimes the attorneys I am speaking to apologize for drinking in front of me, to which I generally respond with the anecdote: “I have vegan and vegetarian friends, but I don’t apologize for eating steak in front of them when we go out to dinner.” I explain that I know where to get alcohol if I want it and what other people choose to do does not dictate my decision to drink or not.

My sobriety date is August 31, 2001; I was only 24 when I stopped drinking and doing drugs. That said, I started my “drinking career” young and by age 21 I liked to say I had spilled more alcohol and drugs than most people my age had consumed. I was arrested for a DUI at age 16. I was court-ordered to attend Teenage Alcohol Prevention meetings as well as 12-step meetings, but at 16 years-old I was not ready to quit. I went to the meetings, drank coffee, smoked cigarettes, ate cookies, and got my court-card signed.

I attended Indiana University right out of high school, but failed out, earning a 0.89 GPA for three semesters of coursework (not an easy feat). While there, I left the scene of what would have been my second DUI at age 19. I did a couple of days in jail for leaving the scene of an accident and decided to come back home. Addicts and alcoholics call this a “geographic.” We leave town to start over, thinking that we will leave our problems behind. But, of course, wherever you go, there you are; my problems followed me.

I went back to school, this time attending Santa Barbara Community College, but I continued to abuse drugs and alcohol. In Santa Barbara I plead to a lesser offense to reduce a drug charge and was once again court-ordered to attend 12-step meetings. I went to the meetings, but I was not ready. I had not yet hit bottom. I listened to the stories I heard at the meetings, but I looked for the differences instead of the similarities. I convinced myself that I was not like these people and that I could stop if I wanted to, but that I just had no interest in quitting. After a series of mishaps in Santa Barbara, I returned home to Los Angeles.
I got a job, met a girlfriend, got an apartment, totalled my car, lost the job, broke up with the girlfriend, and lost the apartment, all due to drugs and alcohol. I couch surfed for a while and, when I had nowhere else to go, I ended up back at my parents’ house at the age of 24. It was there that my parents staged the intervention that led to my recovery.

Many people who read this article will likely know my parents, Norm and Beverly Pine, who are successful appellate attorneys in Los Angeles. My parents can attest to my insanity. I put them through hell. They would come to my rescue and bail me out of situations that I had gotten myself into. It is extremely difficult to deal with a loved one who has a problem with drugs and alcohol. Most people want to help, but often end up enabling the afflicted person by giving them money and helping them to clean up the messes they create, only to have them lash out and point the finger, looking for someone besides themselves to blame for their troubles. If you ask my parents now what they would have done differently, they would tell you that as difficult as it would have been, they would have let me fail and left me in jail when I called them to bail me out.

At the intervention, I said that I needed to think about it and that I might be willing to go in a few days. Thankfully, my parents told me that if I did not go that day, I could not stay at their house and that I would have to leave. Faced with the prospect of homelessness, I went to rehab. I am not sure why, but for some reason sobriety stuck the first time around for me. I have known plenty of people (some who are no longer with us) who have struggled with sobriety, checking in and out of various rehab facilities several times. I attribute my ability to stay sober to being ready. I was beat into a state of reasonableness. I had tried life on my terms, and it had not worked. My best plans had gotten me into trouble with the law, with health issues, and nowhere to go.

While in rehab, I was introduced to a 12-step program. I owe my life to the program and to my parents for getting me into treatment. I got a sponsor, worked the steps, and have since given back, helping other men and taking them through the steps as my sponsor had done with me. I thought that the whole thing seemed kind of like a cult at first. I am not religious and the God concept was unsettling. Thankfully, the program did not push any one conception of God on me and, instead, allowed me to conceive of a Higher Power of my own understanding. The key was that I was willing to believe in something greater than myself and that I was not in charge. This allowed me to let go of the control I thought I had and to listen to another person who had gone before me.

While in rehab I went back to school, attending community college through the rehab center’s “TEACH” program and then continued school after leaving rehab. To my astonishment, it was relatively easy to maintain good grades when I actually showed up to class—go figure. After a few years of community college, I was ready to transfer to a 4-year school. I had an “A” average and applied to all of the UC schools and several top private institutions, but none were willing to take a chance on me. Looking back, I cannot blame them. I had only been sober for a few years at that time and the recidivism rate for addicts and alcoholics is extremely high.

I ended up attending Chapman University where I flourished academically, graduating with honors and obtaining a Bachelor of Science in Psychobiology. While at Chapman I
managed the neuroscience lab on campus, co-authored a scientific paper on learning and memory that was published in the Journal for Neuroscience, and presented at the Neuroscience convention in Atlanta, Georgia. I had discovered a love for hard science and aspired to become a surgeon, but when I graduated from Chapman in 2006, I was 30 years old and I did not want to attend another 6 to 8 years of school and internships before finally becoming a licensed surgeon.

That is when I decided to pursue a career in law. My mother, stepfather, and uncle were all practicing attorneys in Los Angeles and my younger sister was in law school at the time, so I figured a legal career just made sense. I performed extremely well on the LSAT, scoring a 169 out of 180, just a few points shy of my sister’s score, which had earned her a spot at Columbia Law School. I had a 3.8 undergraduate GPA, which included classes such as Physics 1 & 2, Calculus 1 & 2, Organic Chemistry 1 & 2, Biochemistry, and Cellular and Molecular Biology, all of which I took while managing the neuroscience lab and volunteering as a Clinical Care Extender at Hoag Hospital.

Armed with a solid GPA and LSAT scores, I confidently applied to nearly all of the top-20 law schools: Harvard, Yale, Stanford, Berkeley, UCLA, USC, etc. My personal statement was a comeback story, focusing on overcoming adversity, and rising from the lowest depths of alcoholism and drug abuse to becoming a productive, upstanding member of society. I thought long and hard before writing about my struggles with addiction, recognizing that some see addiction as a moral failing rather than a genetic predisposition or disease, and that schools may be cautious given that many addicts and alcoholics relapse. On the other hand, I was proud of my accomplishments, wanted to tell my story, and the truth provided the only sensible avenue for me to explain the gaps in my education and my failing grades at Indiana University. With all of this in mind, I was sure that I would be admitted to several top-20 schools, but I applied to several of what I considered to be “safety schools,” just in case.

One by one, I was rejected from the top-20 schools. I was wait-listed at Columbia Law School, which I was extremely proud of, but by April or so I still had not been accepted to any of my top choices. When the dust settled, I was accepted by USC but rejected by every other top-20 law school I had applied to (with the exception of the waitlist at Columbia). I was very proud to have been admitted to USC, which is where I ultimately went to law school, but my ego was severely deflated.

During law school I externed for a Los Angeles Superior Court Judge and a United States District Court Judge and I authored a scholarly paper on off-label prescribing of antidepressants to children, which was published in the Spring 2011 Southern California Review of Law and Social Justice. I also clerked for one of the top plaintiff’s firms in Los Angeles.

After law school I practiced litigation for approximately four years, focusing on plaintiffs’ class actions, personal injury, products liability, and employment law. I am currently an appellate attorney at a small firm and I love it. I was named as a partner in 2016 and I could not be happier.

Timing is one of the key factors that I attribute to my success. When my parents finally confronted me with the intervention, I weighed only 135 pounds and I was dying. I was too tired
to fight and I reluctantly agreed to go to rehab. This was pure luck. If any other option had been available, I likely would have taken it. I was also very fortunate to have a family who cared about me and who had the means to offer me help. There are people whose families cannot afford to send them to rehab even if they are willing to go and there are others who have so badly damaged their relationships with their families that they are not willing to help. I am also extremely grateful to the 12-step program—it is not the only means of recovering from drugs and alcohol, it is just the method that worked for me. I am thankful for the fellowship and the altruistic nature of the program that focuses on one addict or alcoholic helping another. I have seen miracles in my own life as well as the lives of those who I have helped on their path to recovery.

Mine is a success story. There were several trying times along the way, but ultimately my hard work and perseverance paid off. Hopefully my story will inspire others who have experienced hardships in their lives—alcoholism or otherwise—helping them to see that if I was able to overcome seemingly insurmountable odds, they can too.

There are many misconceptions about alcoholism and drug addiction; the fact that attorneys are particularly prone to substance abuse is not one of them. Addiction is one of those strange concepts that most people in our society would publicly recognize as a genetic predisposition or disease, congratulating those who have overcome it, but privately believe is a moral failing or lack of will power. Either way, I have raised myself from some of the darkest depths of society to where I am now. I could not list my sobriety or the number of people who I had helped to recover from addiction as accomplishments on my resume to tout at job interviews, but maybe that is because addiction is still such a touchy subject in our society. Groups of people who have historically been subjected to negative stereotypes based on genetic characteristics (e.g., LGBTQ, minorities, women) can read about others like them who have overcome great obstacles and achieved great things despite societal hardships they have faced. I believe persons recovering from addiction should have heroes to look up to as well. My hope is that I can be that for someone reading this article.
The Twenty Questions
John Hopkins Questionnaire

John Hopkins University developed the following self-test for identifying alcoholism. It has been modified to include drugs as well as alcohol. Please answer the questions as honestly as possible.

1. Do you lose time from work due to drinking or drug use?
2. Is drinking or drug use making your home life unhappy?
3. Do you drink or use drugs because you are shy with other people?
4. Is drinking or drug use affecting your reputation?
5. Have you ever felt remorse after drinking or drug use?
6. Have you gotten into financial difficulties as a result of your drinking or drug use?
7. Do you turn to lower companions and an inferior environment when drinking or using drugs?
8. Does your drinking or drug use make you careless of your family’s welfare?
9. Has your ambition decreased since drinking or using drugs?
10. Do you crave a drink or a drug at a definite time daily?
11. Do you want a drink or drug the next morning?
12. Does your drinking or drug use cause you to have difficulties in sleeping?
13. Has your efficiency decreased since drinking or using drugs?
14. Is your drinking or drug use jeopardizing your job or business?
15. Do you drink or use drugs to escape from worries or troubles?
16. Do you drink or use drugs alone?
17. Have you ever had a complete loss of memory?
18. Has your physician ever treated you for drinking or drug use?
19. Do you drink or use drugs to build your self-confidence?
20. Have you ever been in a hospital or institution on account of drinking or drug use?
If you answered “yes” to 3 questions, it suggests you probably have a drinking or drug problem.

If you answered “yes” to 4-7 questions, it suggests you may be in an early stage of alcoholism or drug addiction.

If you answered “yes” to 7-10 questions, it suggests you may be in the second stage of alcoholism or drug addiction.

If you answered “yes” to more than 10 questions, it suggests you may be in end-stage alcoholism or drug addiction.
COMPETENCY

GREG DORST JD, CADC II
The Problem
2014
Survey Of Law Student Well Being

- 3,500 Law Students - 15 Law Schools
- Law students experience problematic drinking issues as well as other mental health concerns such as depression at rates higher than the general public and other graduate students.
Here are the specifics:

- More than one in six had been diagnosed with depression while in law school.
- Thirty-seven percent of law students screened positive for anxiety; and
- 14 percent of them met the definition for severe anxiety.

Depression coupled with severe anxiety can lead to alcohol and drug abuse.
22 percent of law student survey respondents reported that they were binge drinkers. The National Institute on Alcohol Abuse and Alcoholism defines binge drinking as a pattern of drinking that brings a person's blood alcohol concentration (BAC) to 0.08 grams percent or above.
When these student participants were offered further assessment or treatment for the issues uncovered during the study, at no cost to them, only 3% of those identified as binge drinkers accessed these services.

Why do you think 97% of those identified as needing help turned down the offer of assistance?
2016
ABA/Hazelden Betty Ford Study on Substance Use and Mental Health
12,825 licensed, employed attorneys & judges

- Males = 53.4%  Females = 46.5%
- Transgender = .1%
- Asian  1.2%
- Black/African American  2.5%
- Caucasian/White  90.9%
- Latino/Hispanic  2.6%
- Native American  .3%
- Other  .7%
Substance use in the past 12 months
Alcohol 10,874 (84.1)
Tobacco 2,163 (16.9)
Sedatives 2,015 (15.7)
Marijuana 1,307 (10.2)
Opioids 722 (5.6)
Stimulants 612 (4.8)
Cocaine 107 (0.8)
The Study — the most comprehensive national research to date — reported that:

• 21 percent of licensed, employed lawyers qualify as problem drinkers;
• 28 percent struggle with some level of depression; and
• 19 percent demonstrate symptoms of anxiety.
The study also found that younger attorneys in the first 10 years of practice exhibit the highest incidence of these problems (31%). As longevity in the practice of law increases, dependency numbers go down.
Conclusions:
Attorneys experience problematic drinking that is hazardous, harmful, or otherwise consistent with alcohol use disorders at a higher rate than other professional populations.
Here are some signs and symptoms to watch for:

• A person's behavior changes, they start coming in late to the office or leaving early;
• Work product changes; decreased production or the quality of work suffers;
• They isolate, stop attending work-related functions or communicating with colleagues;
• They have noticeable mood changes with irritability or apathy;
• Appearance changes; weight gain or loss;
• Lack of attention to clothing and hygiene needs;
• In later stages of problems with alcohol they may come to work smelling of alcohol.
• When asked if there are problems, they avoid the question or insist nothing has changed.
Here are some questions to ask yourself:

1. Have you ever felt you needed to **Cut down** on your drinking?
2. Have people **Annoyed** you by criticizing your drinking?
3. Have you ever felt **Guilty** about drinking?
4. Have you ever felt you needed a drink first thing in the morning -**Eye-opener**- to steady your nerves or to get rid of a hangover?
Alcoholism: Continuing to drink alcohol despite adverse consequences around drinking.

Drug Addiction: Continuing to use drugs, prescription or street, despite adverse consequences around their use.

Compulsive Gambling: continuing to gamble despite adverse consequences around gambling.

Compulsive Porn Addiction: continuing to use porn despite adverse consequences around its use.
The Solution
Addiction is a complex but treatable disease that affects brain function and behavior. It is:

- Physical
- Emotional/Psychological
- Social
- Spiritual
Brain Chemistry

• We have the ability to feel good naturally

• Down-Regulation

• Over time the brain will up-regulate and create new pathways for what we want to experience
Creating Community

• The Other Bar
• Alcoholics Anonymous/Narcotics Anonymous
• Rational Recovery
• Religious Institutions
• Meet Ups
Resources

www.otherbar.org/resources/
• click on resources
www.publichealth.org/resources/addiction/
www.samhsa.gov/find-help/national-helpline
www.samhsa.gov/find-treatment
www.drugabuse.gov/
www.nami.org
www.aa.org
Alcoholism: Lawyers Need a Confidential “Hand-Up”

By: Greg Dorst JD, CADC II, Consultant to the Other Bar

Fact: "Attorneys experience problematic drinking that is hazardous, harmful, or otherwise consistent with alcohol use disorders at a higher rate than other professional populations. Mental health distress is also significant. These data underscore the need for greater resources for lawyer assistance programs, and also the expansion of available attorney-specific prevention and treatment interventions."

The above is a direct quote from original research published in the *Journal of Addiction Medicine*: January/February 2016 - Volume 10 - Issue 1 - p 46–52; the research was conducted and reported by Patrick R. Krill JD, LLM; Ryan Johnson, MA; and Linda Albert MSSW.

We all know lawyers who drink to excess, smell like alcohol or show signs and symptoms of the negative effects of alcohol and/or other drug usage. On June 8, 2018 the *American Bar Association* published a list of symptoms characteristic of various stages of alcohol dependency:

“An alcohol use disorder may be mild, moderate or severe depending on the number of symptoms. Symptoms may include:

- Being unable to limit the amount of alcohol you drink
- Feeling a strong need or compulsion to drink
- Developing tolerance to alcohol so that you need increasing amounts to feel its effects
- Having legal problems or problems with relationships, employment or finances due to drinking
- Drinking alone or in secret
- Experiencing physical withdrawal symptoms — such as nausea, sweating and shaking — when you don't drink
- Not remembering conversations or commitments, sometimes referred to as "blacking out"
- Making a ritual of having drinks at certain times and becoming annoyed when this ritual is disturbed or questioned.
- Losing interest in activities and hobbies that used to bring you pleasure
• Irritability when your usual drinking time nears, especially if alcohol isn't available
• Keeping alcohol in unlikely places at home, at work or in your car
• Gulping drinks, ordering doubles, becoming intoxicated intentionally to feel good or drinking to feel ‘normal’.

This list is by no means exhaustive and could include “drug seeking” behavior which is characterized by “doctor shopping” and multiple prescriptions as well as unhealthy relationships with street drug users. All of these signs and symptoms appear over the course of time rather than suddenly and frequently get worse, without help. The disease of addiction is characterized as a chronic and progressive disease which rarely gets better on its own.

The question that I ask attorneys who find that they are experiencing negative consequences around alcohol and/or drug usage is, “Is it okay with you if your life gets better?” Thousands of struggling attorneys need to know that they do not have to live as they have been living. The practice of law is stressful enough without the constant pressure of not feeling well, broken promises to clients, family and friends and the fear that someone will find out what the attorney is doing and how it is affecting him/her both personally and professionally. Since lawyers make their living by and through their reputation, many feel that they must hide what is going on. This is not an effective strategy. Moreover, trying to solve the problem of addiction all by oneself is a recipe for disaster both personally and professionally. So, where does one start the process of change?

Frequently, a thorough assessment by a professional, such as an MD, social worker, or psychologist is an important step as consequences of quitting “cold turkey” may be grave and can include suicidal ideations, seizures and death. Some, however, want to begin with an anonymous group; there are groups that are specifically designed for professionals. These groups are confidential and support professionals in their recovery. Confidential groups create a community of support which has long been known to increase a person’s chances of recovery.

The Other Bar is just such a community of support. As a private, nonprofit network of recovering lawyers, law students and judges throughout the state of California, the Other Bar is dedicated to assisting others within the legal profession who are suffering from alcohol and substance abuse problems. All participants in the Other Bar adhere to principles of confidentiality and anonymity. What is shared in meetings and who attended is held in the
strictest of confidence. The program is voluntary and open to all California lawyers, judges and law students and is not aligned with the State Bar of California. No information is shared with any person or organization.

This network of "lawyers helping lawyers" comprises over 30 peer support meetings throughout the state, most of which meet every week. This network serves thousands of lawyers throughout the State of California each year. Its members support each other in recovery and assist others in becoming and staying sober. For many, the Other Bar serves as a bridge to the larger community of recovery options. All lawyers, judges, and law students are welcome regardless of their recovery model: 12-steps, medical, therapeutic, religious, secular, etc. The **Other Bar** also provides MCLE programs, both online and live, focused on recovery. Through its Shot of Sobriety Loan Program, it assists with the costs associated with hospitalization and residential treatment for those who need it. Finally, it provides two retreats in the fall, one for men and one for women, and a statewide Networking Conference each spring, where lawyers, judges, law students and their families come together to share their experience, strength and hope.

A community of recovering lawyers can do wonders for one’s sense of well-being and support. Recovery is hard; working toward change with others helps to alleviate loneliness and depression. The cycle of secrecy and aloneness must be interrupted and not reinforced. It is nice to be a part of a community of friends and colleagues who help one another to stay sober one day at a time.

The **Other Bar** website can be accessed at [www.otherbar.org](http://www.otherbar.org); their confidential 24-hour hotline number is **(800) 222-0767**. The website offers resources including contact information for consultants here in Southern California as well as in Northern California.

Again, I ask, would you like a hand-up? Is it okay with you if your life gets better?