

**Legal Updates of Key
Labor and Employment
Matters**

Presented by:
**Inés Vargas Fraenkel &
Richard Whitmore**

Oral Interview Guidelines

- California’s Commission on Peace Officer Standards and Training (POST) Issues Entry-Level Peace Officer Oral Interview Guidelines – Tape Included
– www.post.ca.gov

**Discrimination –
Law Enforcement Promotion**

- California Highway Patrol Promotional Examination Challenge Decided?
– *Paige v. State of California, California Highway Patrol, CHP Commissioner* (9th Cir. 2002) 2 Cal. Daily Op. Svc. 4730

Adverse Impact – Claim by Majority

- Tenth Circuit Case Sheds Light on Exception to Teal Principles Where Complainant in Adverse Impact Case is Member of Traditionally Majority Group

– *Livingston v. Roadway Express* (10th Cir. 1986) 802 F.2d 1250, 1252

Discrimination – Disability

- 2003 – United States Supreme Court Vacates Ninth Circuit Decision and Finds That an Employer’s Neutral Policy Not to Rehire Employees Who Had Been Dismissed for Drug Use May Be Lawful; An Employer Need Not Rehire Rehabilitated Drug Addict It Had Previously Terminated for Drug Use

– *Hernandez v. Hughes Missile Systems Company* (2003) 124 S.Ct. 513

Discrimination – Disability

- 2004 – Terminated Employee with Drug and Alcohol Problem Who Was Not Rehired May Sue under Americans with Disabilities Act

– *Hernandez v. Hughes Missile Systems Company (now Raytheon)* (9th Cir. 2004) 362 F.3d 564.

Discrimination – Disability

- Defense of Risk to Health of Employee Him or Herself Under Disability Law to be Resolved by Jury

– *Echazabal v. Chevron USA Inc.* (9th Cir. 2003)
336 F.3d 1023

Discrimination – Disability

- Employee’s Refusal to Cooperate in an Interactive Process on the Question of Reasonable Accommodation Prevents the Employee from Establishing that His Termination Constituted Unlawful Discrimination

– *Allen v. Pacific Bell* (9th Cir. 2003) 348 F.3d 1113

Discrimination – Disability

- California Case – Employee Seeking Accommodation is Not Entitled to Reassignment to Position in Different Civil Service Classification without First Complying with Competitive Examination Process

– *Hastings v. Dept. of Corrections* (2003)
110 Cal.App.4th 963, 2 Cal.Rptr.3d 329

Discrimination – Age

- Long Term Employee Fails to Establish He Was Terminated in Violation of Age Discrimination in Employment Act
– *Pottenger v. Potlatch Corp.* (9th Cir. 2003) 329 F.3d 740
- California Case – Employer Satisfied Its Burden of Demonstrating It had Legitimate, Nondiscriminatory Reason for Terminating Employee
– *Gibbs v. Consolidated Services* (2003) 111 Cal.App.4th 794, 4 Cal.Rptr.3d 187

Discrimination – Race

- Employer's Decision to Save White Employee from Impending Layoff by Giving That Employee Preference in Filling Job Opening over African American Employee Who
– *Neal v. Roche* (10th Cir. 2003) 349 F.3d 1246
- California Case – The State Is Not Liable for Enacting a Safety Regulation That Had the Effect of Prohibiting An African American Fire Fighter from Working Because of Facial Hair Disorder
– *Vernon v. California* (2004) 116 Cal.App.4th 114, 10 Cal.Rptr.3d 121

Discrimination – Religious

- Termination Upheld of Employee Who Refused to Remove From His Office Wall Biblical Passages That He Intended to be Condemning of Homosexual Employees
– *Peterson v. Hewlett-Packard Co.*, 2003 DJDAR 170 (January 7, 2004)

Harassment – Sexual

- The California Supreme Court alters the Employment Law Landscape: The Shifando and McGinnis decisions
 - *Burlington Industries, Inc. v. Ellerth* (1998) 524 U.S. 742
 - *Faragher v. City of Boca Raton* (1998) 527 U.S. 775
- Employee Who Allegedly was Coerced by Supervisor to Have Sex to Keep Job Failed to Establish Case under Title VII
 - *Holly D. v. California Institute of Technology* (9th Cir. 2003) 339 F.3d 1158

Harassment – Sexual

- California Legislative Action Takes Employer Responsibility to Behavior by Third Parties – AB 76
 - *Amends Section 12940 of the California Government Code.*
- California County Subject to Liability for Failure to Prevent Further Harassment
 - *Sheffield v. Dept. Of Social Services of Los Angeles* (2003) 109 Cal.App.4th 153, 134 Cal.Rptr.2d 492

Harassment – Ethnic

- Employee Failed to Prove Co-Worker's Actions were Sufficiently Severe to Establish a Hostile Work Environment
 - *Manatt v. Bank of America* (9th Cir. 2003) 339 F.3d 792
- California Case – A Hostile Environment May Arise from a Single Offensive Act When Committed by a Supervisor
 - *Dee v. Vintage Petroleum, Inc.* (2003) 106 Cal.App.4th 30, 129 Cal.Rptr.2d 923

Harassment – Ethnic

- Two Discriminatory Statements by Fellow Employee, And Transfer to Field Assignment, Held Not to Constitute Actionable National Origin Discrimination

– *Vasquez v. County of Los Angeles*, 2003 DJDAR 12205 (November 10, 2003)

Retaliation

- Sheriff's Office Found Liable for Retaliation against African-American Deputy

– *Bell v. Clackamas County* (9th Cir. 2003) 341 F.3d 858

- Employee Who was Terminated After Reporting Sexual Harassment of Another Employee May Sue for Retaliation

– *Hernandez v. Spacelabs Medical Inc.*, 2003 DJDAR 10427 (September 15, 2003)

Retaliation

- Firefighter Who Protested Station Closing Unlawfully Suspended

– *Brennan v. Norton* (3rd Cir. 2003) 350 F.3d 399

Employee Speech Rights

- Disciplinary Action, which Resulted from Statements Challenging the City’s Conduct Toward Female Employees, Held Not an Abridgment of Free Speech

– *Skaarup v. City of North Las Vegas*
(9th Cir. 2003) 320 F.3d 1040

Privacy

- California Case – Information Revealed by Medical Provider Does Not Violate Confidentiality of Medical Information Act

– *Garrett v. Young* (2003) 109 Cal.App.4th 1393, 1 Cal.Rptr.3d 134

- Alleged Disclosure of Confidential Medical Information in FMLA Form Subjects Postal Service to Privacy and ADA Claims

– *Doe v. United States Postal Service* (D.C. Cir. 2003) 317 F.3d 339

Privacy

- California Case – Dentist’s Disclosure of Suspected Prescription Drug Abuse of Police Officer was not Unlawful

– *Shaddox v. Bertani* (2003) 110 Cal.App.4th 1406,
2 Cal.Rptr.3d 808

LIEBERT CASSIDY WHITMORE

A PROFESSIONAL LAW CORPORATION

**International Personnel Management Association
Assessment Council**

**“LEGAL UPDATES OF KEY
LABOR AND EMPLOYMENT
MATTERS”**

Presented By:

**INÉS VARGAS FRAENKEL
RICHARD WHITMORE**

June 21, 2004

©2004 LIEBERT CASSIDY WHITMORE

6033 W. Century Blvd., Suite 500, Los Angeles, CA 90045 (310) 981-2000 Fax: (310) 337-0837
153 Townsend St., Suite 520, San Francisco, CA 94107 (415) 512-3000 Fax: (415) 856-0306

www.lcwlegal.com

TABLE OF CONTENTS

Oral Interview Guidelines	1
Discrimination – Law Enforcement Promotion.....	1
Adverse Impact – Claim by Majority	2
Discrimination – Disability	3
Discrimination – Age	7
Discrimination – Race	9
Discrimination – Religious.....	10
Harassment – Sexual	12
Harassment – Ethnic.....	17
Retaliation.....	20
Employee Speech Rights.....	23
Privacy.....	23
Workplace Violence.....	26

ORAL INTERVIEW GUIDELINES

California's Commission on Peace Officer Standards and Training (POST) Issues Entry-Level Peace Officer Oral Interview Guidelines – Tape Included.

In March 2004, the California's POST Commission published guidelines to assist law enforcement agencies fulfill the POST mandate to conduct Oral Interviews when hiring police officers. POST Regulation 1002(a)(8). The entire publication may be found in POST's website: www.post.ca.gov. Additionally, the Commission produced a video for assistance to Assessors who will conduct the interviews. The Guidelines and Video are the result of collaborative efforts of an Advisory Committee comprised of subject matter experts, Industrial Organizational Psychologists, and employment attorneys. The end result is an excellent document that assists those charged with developing and conducting peace officer hiring interviews. It also contains concrete guidelines on structured interviewing based on the latest research and practice.

DISCRIMINATION – LAW ENFORCEMENT PROMOTION

California Highway Patrol Promotional Examination Challenge Settled.

The facts of this case involve an African American CHP Lt. who failed the In-Basket exam when testing for promotion to Capt. Paige brought suit on behalf of 'all current and future non-white' officers' as a certified Class of plaintiffs.

The case made a disparate impact challenge to the promotional process at CHP. Disparate Impact challenges a selection tool that is otherwise neutral in its face, but that yields results that are proportionately disparate to a particular protected group, as compared to the majority group. Unlike Disparate Treatment cases, intent is not necessary, and proportionality is measured by a statistical formula. For a prima facie case (case in the first instance), there needs to be a significant enough pool of applicants in order to make the initial calculations.

The Paige case involved a very small group of applicants and an even smaller group of African American applicants, for the Captain's exam. Courts have traditionally used the 'actual' pool of applicants to make the calculations. In this case, the courts painted a very broad brush to insure that there would be a big enough pool. The Central District Court (J. Consuelo Marshall) and the 9th Circuit Court of Appeals allowed a 'proxy' pool in order to go outside the limited number of actual African American applicants in this instance. The defendants wanted to use the actual pool and plaintiffs wanted to use an 'external pool' comprised of 'all similarly skilled police officers in the State of California.' The 9th Circuit said that one is too narrow and the

other too broad. It remanded for the trial court to take that information and figure it out. Therefore, what comprises this ‘proxy’ is yet to be defined and this issue is making its way through Judge Marshall’s court at this time, since the case was sent back to her for trial.

As to the inclusion of all non-whites in the Class, the 9th Cir. decided that it was ok as they are ‘presumed to have been similarly situated and affected by common policies.’ It said that “Employment practices have the identical discriminatory effect upon members of all minority groups, and those practices unlawfully benefit solely the members of the white majority.”

There was also a challenge by defendants to the fact that the lower court allowed ‘aggregation of data’ from other supervisory exams or promotional processes, not just the Lt.-to-Capt. exam which related to Paige. This was allowed by the 9th Cir. as there was “sufficient commonality among the duties and skills required by the various supervisory positions to justify aggregation.”

Pre-liability period data was also held to be properly included in the statistical calculation/analysis where the promotional practices remain similar over a long period of time.

The case was remanded to the Eastern District Court for trial.

Note:

On November 3, 2003, after a long court trial, a jury found in favor of the CHP in the intentional discrimination claims. They found that the CHP acted fairly in its promotional practices and that the department did not discriminate against Paige in promotions and job assignments. However, the jury did find that the CHP retaliated against Paige for complaining about discrimination in job assignments. The adverse impact claims are to be tried in another phase, when a judge will decide whether a statistical analysis of CHP data shows white employees were promoted more often than blacks and other minorities. The judge will not have to find an intent to discriminate, only a pattern of hiring that favors whites.

ADVERSE IMPACT – CLAIM BY MAJORITY

Tenth Circuit Case Sheds Light on Exception to *Teal* Principles Where Complainant in Adverse Impact Case is Member of Traditionally Majority Group

Livingston v. Roadway Express (10th Cir. 1986) 802 F.2d 1250, 1252

DISCRIMINATION – DISABILITY

2003 - United States Supreme Court Vacates Ninth Circuit Decision and Finds That an Employer's Neutral Policy Not to Rehire Employees Who Had Been Dismissed for Drug Use May Be Lawful; An Employer Need Not Rehire Rehabilitated Drug Addict It Had Previously Terminated for Drug Use.

At the IPMAAC 2002 Conference in New Orleans, this United States Supreme Court decision was reported on at the Legal Updates Session. The Supreme Court's opinion reversed the appellate court and remanded the case back to the Ninth Circuit for a discreet question. The 2004 Ninth Circuit's decision is reported here. The pertinent facts follow.

Joel Hernandez worked for Hughes Missile Systems. Hughes suspected that Hernandez came to work under the influence of drugs or alcohol and that this affected his work. In 1991, Hernandez tested positive for cocaine use and resigned in lieu of being discharged for violating the company's workplace code of conduct. The "employee separation summary" noted the reason for Hernandez' separation only as "discharge for personal conduct (quit in lieu of discharge)." Approximately three years later, Hernandez applied for the same position that he held prior to his discharge. Hernandez stated on his application that he had been previously employed with the company, attached letters from his pastor about his active church participation and his participation in Alcoholics Anonymous, and that he was rehabilitated and no longer using drugs. Hughes declined to rehire him, citing a blanket oral policy not to rehire people terminated for violating workplace rules. Hernandez then filed charges with the EEOC alleging that Hughes discriminated against him because it 'regarded' him as a drug addict, in violation of the Americans with Disabilities Act. The EEOC issued a right to sue letter and Hernandez filed suit in Federal Court for disability discrimination under the ADA. The trial court granted summary judgment in favor of Hughes.

On appeal, the Ninth Circuit looked at the policy as a step in selection and determined that because the policy screened out individuals with an addiction, summary judgment was improper. Hughes appealed to the United States Supreme Court, which granted review. The Supreme Court reversed and remanded.

The Supreme Court determined that the only issue before the lower courts was whether a reasonable jury could conclude that Hughes' policy resulted in *disparate treatment* discrimination based on a perceived disability, not whether the policy had a *disparate impact* on certain employees as held by the Court of Appeal. Once Hernandez made a prima facie showing of discrimination, therefore, the next question was whether Hughes offered a legitimate, nondiscriminatory reason for its actions which demonstrated that its policy was not motivated by Hernandez's disability. The Court found that a blanket no-rehire policy provided a legitimate, nondiscriminatory reason for refusing to rehire Hernandez. Therefore, to the extent that the Ninth Circuit permitted itself to consider whether Hughes' policy had a disparate impact, and not

simply whether Hughes treated him differently because of a perceived disability, the Ninth Circuit's reasoning was faulty.

Hernandez v. Hughes Missile Systems Company (2003) 124 S.Ct. 513.

Note:

The Court did not address the question whether the result might have been different if the former employee had in the first instance alleged that the no rehire policy had an unlawful disparate impact on rehabilitated fired employees.

2004 - Terminated Employee with Drug and Alcohol Problem Who Was Not Rehired May Sue under Americans with Disabilities Act.

The U.S. Supreme Court remanded the *Raytheon Co. v. Hernandez* case back to the Ninth Circuit Court of Appeals to consider one question: Whether there was sufficient evidence from which a jury could conclude that Raytheon made its employment decision not to rehire Joel Hernandez based on his status as a recovered alcoholic and drug addict rather than its proffered explanation of a policy of not rehiring former employees discharged for misconduct. The summary below addresses this single issue.

On remand, the Ninth Circuit Court of Appeals reversed. It stated that the ADA protects individuals who have successfully completed or are participating in a supervised drug rehabilitation program and are no longer using illegal drugs, as well as individuals who are erroneously regarded as using drugs when in fact they are not. An employee bears the burden of proving, by a preponderance of the evidence, that his disability actually played a role in the employer's decision making process and had a determinative influence on the outcome. Hernandez argues that Raytheon's citation to an oral policy of never rehiring people fired for misconduct was pretextual. The Court held that there is a genuine issue of material fact regarding whether Raytheon failed to rehire Hernandez because of his status as a former drug addict and alcoholic, rather than an oral policy that is difficult to verify. The hiring officer had access to documentation of Hernandez' alcohol problem before deciding not to rehire him. Raytheon's explanations for its refusal to hire Hernandez were conflicting. Therefore, the Court held that there is sufficient evidence that Raytheon's reasons are a pretext for discrimination. The summary judgment was therefore reversed and the matter scheduled to go to trial.

Hernandez v. Hughes Missile Systems Company (now Raytheon) (9th Cir. 2004) 362 F.3d 564.

Defense of Risk to Health of Employee Him or Herself Under Disability Law to be Resolved by Jury.

Mario Echazabal worked for an independent contractor at an oil refinery owned by Chevron. After testing positive for Hepatitis C, Chevron refused to hire him because his medical condition was subject to being aggravated by continued exposure to toxins at Chevron's refinery. Echazabal brought suit under the Americans with Disabilities Act (ADA). The United States Court of Appeals, Ninth Circuit, held that the ADA did not allow Chevron to refuse to hire Echazabal when the working conditions only threatened his own health. The United States Supreme Court, which accepted the case for review, reversed. It held that the ADA did not require an employer to hire an individual where the working conditions posed a direct threat to his or her health or safety. On remand to the District Court, Chevron was granted summary judgment because of its direct threat defense. Echazabal appealed to the Ninth Circuit.

The Ninth Circuit reversed. An employer can defend against a disability discrimination claim under the ADA by relying on a qualification standard that is job related and consistent with business necessity. Such a qualification standard may include a requirement that an individual does not pose a direct threat to the health or safety of others or to the individual. The factors to be considered when determining whether a direct threat exists are: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm.

The Court found that Echazabal raised a triable issue of fact as to whether Chevron had sufficient scientific basis to claim the direct threat defense. Several doctors supported Echazabal's contention that he could perform the job without serious harm to himself. In addition, Chevron over-characterized the potential harm to Echazabal. It did not have specific evidence that the potential harm to Echazabal would be either imminent or severe. Since a reasonable jury could dispute Chevron's findings, summary judgment was not proper.

Echazabal v. Chevron USA Inc. (9th Cir. 2003) 336 F.3d 1023

Employee's Refusal to Cooperate in an Interactive Process on the Question of Reasonable Accommodation Prevents the Employee from Establishing that His Termination Constituted Unlawful Discrimination.

Clarence Allen worked for Pacific Bell as a Service Technician. His position required physical labor, including climbing poles and ladders. Allen's excessive drinking, however, resulted in internal bleeding and liver damage. As a result of the symptoms with Allen's substantial liver disease, both the independent consultant hired by Pacific Bell and Allen's treating physician determined that Allen could only perform sedentary tasks. Pacific Bell searched for a position that would accommodate Allen's condition, but it could not find one. Allen, refused to

cooperate with the search for an alternate position and instead demanded his old job back. Pacific Bell requested information from Allen to support his contention that his condition had improved, but he did not respond. Pacific Bell terminated Allen and he brought suit for disability discrimination under the Americans with Disabilities Act (ADA) and Fair Employment and Housing Act (FEHA) claiming that Pacific Bell failed to engage in an interactive process. The District Court granted Pacific Bell's motion for summary judgment and Allen appealed.

The United States Court of Appeals, Ninth Circuit, affirmed. To prevail on his disability discrimination claims, Allen must show that (1) he suffered from a disability, (2) he was qualified to do his job, either with or without reasonable accommodation, and (3) his disability was a motivating factor in his termination. Once an employer is aware that an employee suffers from a disability, it is required to participate in an "interactive process" to determine whether the employee can be reasonably accommodated.

Allen argued that Pacific Bell violated the law by failing to engage in any interactive process. He argued that Pacific Bell never engaged in such a process to see if he could work as a Service Technician. The Court concluded that Allen's argument had no merit. Pacific Bell undertook a significant interactive process with Plaintiff that included conducting two job searches for an alternative position for him. Allen failed to provide any medical evidence to Pacific Bell to show that he could return to his previous job. In the absence of that information, Pacific Bell did not have a duty under the ADA or the FEHA to engage in further interactive processes. Since Pacific Bell undertook all necessary and reasonable steps to reasonably accommodate Allen, he could not demonstrate that Pacific Bell failed to participate in the interactive process.

Allen v. Pacific Bell (9th Cir. 2003) 348 F.3d 1113.

California Case - Employee Seeking Accommodation is Not Entitled to Reassignment to Position in Different Civil Service Classification without First Complying with Competitive Examination Process.

Walter Hastings received a letter of conditional employment from the California Department of Corrections (CDC). Before starting in the position, however, the CDC requires all candidates to complete training as a correctional cadet at the Basic Correctional Officer Academy. Hastings permanently injured himself at the Academy and could not complete the course. The CDC determined that the injury precluded Hastings from working as a correctional officer and withdrew its offer of employment. Hastings filed suit for disability discrimination because the CDC did not reassign him to another position. The trial court granted the CDC's motion for summary judgment and Hastings appealed.

The California Court of Appeal affirmed. The Fair Employment and Housing Act (FEHA) makes it an unlawful employment practice for an employer to discriminate based on an actual or perceived disability, unless the employee or applicant for employment is unable to perform the essential functions of the position even with reasonable accommodations.

Here Hastings contended that even if he could not perform the essential functions of a Correctional Officer because of his disability, the CDC should have reassigned him to another position. The Court disagreed. Hastings' entitlement to reassignment to another position as part of a reasonable accommodation is dependent on his employment classification. Since the CDC offered Hastings a conditional offer of employment as a correctional officer, he was not entitled to reassignment to a position in a classification other than correctional officer. Though reassignment is a reasonable accommodation under the FEHA, it need only be in the same class of positions. Hastings' injuries prevented him from performing the duties of a correctional officer and the CDC was not required to move him into a vacant position in another classification without his qualifying pursuant to the State's Competitive Examination Process.

Hastings v. Dept. of Corrections (2003) 110 Cal.App.4th 963, 2 Cal.Rptr.3d 329

DISCRIMINATION – AGE

Long Term Employee Fails to Establish He Was Terminated in Violation of Age Discrimination in Employment Act.

Charles Pottenger worked for the Potlatch Corporation for 32 years. After Potlatch suffered severe losses, the president of the company decided that significant changes needed to be made. During a meeting with Pottenger, the president characterized Pottenger as "old management" using an "old business model." About a year-and-a-half later, the president fired Pottenger, who was then 60, and replaced him with a 43 year old. Pottenger soon brought suit in federal court under the Age Discrimination in Employment Act (ADEA). Potlatch brought a motion for summary judgment which the court granted, and Pottenger appealed.

The United States Court of Appeals, Ninth Circuit, affirmed. The ADEA makes it unlawful for an employer to discharge any individual who is at least 40 years old because of the individual's age. To prove age discrimination under a disparate treatment theory, a plaintiff must show that his or her age actually played a role in the decision-making process and that it had a determinative influence on the outcome. If a plaintiff makes out a prima facie case of age discrimination, the employer may articulate a legitimate, nondiscriminatory reason for its action. If it does, the burden shifts back to the plaintiff to demonstrate that the reason is simply pretext.

Here, Pottenger established a prima facie case. He was 60 years old, he was terminated, and he was replaced with a younger employee with equal or inferior qualifications. Potlach, in turn, articulated a legitimate, nondiscriminatory reason for terminating Pottenger: a lack of confidence that he could make the hard decisions necessary to turn around his division. Though Pottenger suggested reasons that might undermine Potlach's explanations for his termination, the Court did not find them convincing. For example, the president's depictions of Pottenger as "old

management" with an "old business model," were insufficient to show discriminatory motive. The phrases were a mere colloquialism generally associated with ideas, not age.

Pottenger v. Potlatch Corp. (9th Cir. 2003) 329 F.3d 740

California Case - Employer Satisfied Its Burden of Demonstrating It had Legitimate, Nondiscriminatory Reason for Terminating Employee.

Robert Gibbs worked for Atlas Transport. He worked as a driver and then became an operations manager. Consolidated Services purchased Atlas. Anticipating his removal from a management position on account of the acquisition, Gibbs requested to be transferred to his former position as a driver. His supervisor responded "Maybe you're getting too old." Consolidated restructured its management staff and required them to begin using a new computer system. Gibbs responded that he could not use the computer system because he lacked computer skills, and became increasingly aggressive to those he supervised. Shortly thereafter Consolidated informed Gibbs that his services were no longer needed. He again requested a driving position, but was told that none existed even though Consolidated had at least one open position. At the time he was fired, Gibbs was 57 years old. He brought suit for age discrimination, but the court granted summary judgment for Consolidated. Gibbs appealed.

The California Court of Appeal affirmed. A prima facie case of age discrimination requires evidence that the plaintiff was over 40-years old, was performing satisfactorily, and was discharged under circumstances giving rise to an inference of unlawful discrimination. Here, Gibbs could not demonstrate that he was discharged because of his age. Consolidated had legitimate reasons for terminating Gibbs; namely his lack of computer skills and negative behavior toward other employees.

Gibbs attempted to demonstrate unlawful discrimination by emphasizing Consolidated's refusal to transfer him to a position as a driver. Specifically, his supervisor's statement that he was too old to be a driver. The Court concluded, however, that since Consolidated had no use for Gibbs' skills as a manager, it was not required to move him into a different position. Since Gibbs could not establish a discriminatory purpose from Consolidated's failure to move him into a position as a driver - since he was not entitled to that position - he could not state a claim for age discrimination.

Gibbs v. Consolidated Services (2003) 111 Cal.App.4th 794, 4 Cal.Rptr.3d 187

DISCRIMINATION – RACE

Employer's Decision to Save White Employee from Impending Layoff by Giving That Employee Preference in Filling Job Opening over African-American Employee Who Did Not Face Layoff Did Not Give Rise to Inference of Discrimination.

Vanessa Neal, who is African American, worked as a medical data technician at Tinker Air Force Base. She filed a claim for race discrimination under Title VII after she applied for, but did not receive, a promotion to a budget analyst position. Neal contended that the Air Force discriminated against her by promoting a less-qualified white woman named Betty Norton to the position. The Air Force explained that it selected the white woman because of her superior experience and moved for summary judgment. The district court granted the motion and Neal appealed.

The United States Court of Appeals, Tenth Circuit, affirmed. Under a Title VII claim for discrimination, the plaintiff must first demonstrate that he or she suffered an adverse action because of race. If he or she does, then the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its actions. The plaintiff must then demonstrate that the defendant's explanation for its action was merely pretext.

Here, Neal established a prima facie case. Neal could not, however, demonstrate that the Air Force's motivation was discriminatory because she conceded in an affidavit that the Air Force acted to keep Norton from being laid off. The Court noted that a public employer may feel bound to offer explanations that are acceptable under a civil service system, such as that one employee is more skilled than another, but that another reason may actually account for the decision. Title VII, however, is not a civil service statute requiring an employer to have a good reason for its decisions. If the employer did not act for a reason prohibited by the statute, the plaintiff cannot successfully advance his or her claim. Since Neal conceded that the Air Force acted simply to save Norton's job, and not for a discriminatory reason, her claim of racial discrimination must fail.

Neal v. Roche (10th Cir. 2003) 349 F.3d 1246

California Case - The State Is Not Liable for Enacting a Safety Regulation That Had the Effect of Prohibiting An African-American Fire Fighter from Working Because of Facial Hair Disorder.

Harry Vernon worked for the City of Berkeley as a fire fighter. Vernon suffers from pseudofolliculitis, a skin disorder that affects only African-American males. As a result, Vernon cannot shave. Fire fighters are required to wear a self-contained breathing apparatus to fight fires. Tests indicated that Vernon could safely wear the apparatus despite having facial hair.

However, California promulgated work place safety regulations that prohibited the use of the apparatus by employees with visible facial hair. Because Vernon could no longer use the apparatus, he was terminated from his job. Vernon sued the State for race discrimination under the Fair Employment and Housing Act (FEHA). California filed a demurrer to the complaint and it was sustained without leave to amend. Vernon appealed.

The California Court of Appeal affirmed. Liability under FEHA arises when there is an actual employment relationship. Vernon argues that the State was an indirect employer that aided and abetted the discrimination by the City. However, the State exercised no control over the means and manner of Vernon's employment with the City. The State neither compensated Vernon nor engaged his services in any way. The City, not the State, implemented the regulations that led to his termination. Although the State promulgated the regulations, this does not establish an employment relationship.

To find that the State is Vernon's employer within the meaning of FEHA merely by virtue of enactment of regulations that affect the conditions of employment would effectively make the State the potential employer of any person employed by any business that must comply with state law. As the State is not considered Vernon's employer, no violations under FEHA exist. The State also cannot be liable for aiding and abetting a discriminatory employment practice under FEHA because the State was not Vernon's employer and the State is not a person as defined under FEHA.

Vernon v. California (2004) 116 Cal.App.4th 114, 10 Cal.Rptr.3d 121.

DISCRIMINATION – RELIGIOUS

Termination Upheld of Employee Who Refused to Remove From His Office Wall Biblical Passages That He Intended to be Condemning of Homosexual Employees.

Hewlett-Packard initiated a workforce diversity campaign by displaying "diversity posters." It consisted of five posters, each showing a photograph of an employee above the caption "Black," "Blonde," "Old," "Gay," and "Hispanic." Richard Peterson, a Hewlett-Packard employee who describes himself as a devout Christian, posted two biblical passages in response to the posters titled "Gay." Peterson's supervisor removed the passages and explained to him that they might be offensive to some employees. Peterson responded that he intended the passages to be hurtful and to condemn "gay behavior." He stated that he would only remove the passages if Hewlett-Packard removed the "Gay" posters. Peterson was given time off with pay to reconsider his position. When he returned to work and once again posted the passages, Hewlett-Packard terminated Peterson for insubordination. Peterson then filed a claim with the EEOC alleging

religious discrimination, and ultimately filed suit for a violation of Title VII. The district court granted Hewlett-Packard's motion for summary judgment and Peterson appealed.

The United States Court of Appeals, Ninth Circuit, affirmed. Title VII makes it unlawful for an employer to discharge any individual because of such individual's religion. To survive summary judgment on his disparate treatment claim, Peterson must establish a prima facie case by showing that he experienced an adverse employment action, and similarly situated individuals outside his protected class were treated more favorably. Here, Peterson could not demonstrate the last element.

Peterson maintained that he was treated less favorably during the disciplinary proceedings and his subsequent termination than three other similarly situated groups. First, he compared himself to the employees who hung the diversity posters. The Court found that this comparison failed because the employees who hung the diversity posters were simply communicating the views of the company as they were directed to do by management. Peterson, on the other hand, expressed his own personal views which contradicted management. Moreover, unlike Peterson's postings, the company's workplace diversity campaign did not attack any group of employees on account of an individual characteristic. Therefore, Hewlett-Packard's failure to fire employees for following management's instructions to hang the posters did not provide any evidence of disparate treatment.

Second, Peterson compared himself to other employees who posted religious and secular messages and symbols in their workplaces. Yet Peterson failed to present any evidence that messages or symbols in other cubicles were intended to be hurtful or violate the company's harassment policy.

Third, Peterson claimed that he was similarly situated to a network group of Hewlett-Packard homosexual employees. The Court also rejected this contention because Peterson could not demonstrate that the company would have permitted any network group or individual employee to post messages of either a secular or religious variety that demeaned other employees or violated the company's harassment policy.

Peterson v. Hewlett-Packard Co., 2003 DJDAR 170 (January 7, 2004)

HARASSMENT – SEXUAL

The California Supreme Court alters the Employment Law Landscape: The Shifando and McGinnis decisions

This article originally appeared in the February 2004 edition of Employment Practices Monthly.

As 2003 ended, the California Supreme Court handed down two employment law decisions that are of vital importance to public entities and which illustrate the old saying, "I've got good news and I've got bad news." First the bad news. In *Shifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 6 Cal.Rptr.3d 457, the Court determined that a public employee may file a civil action for employment discrimination directly with the Court without first exhausting any internal administrative remedies set forth in the public entities' rules, regulations or Charter.

Now for the good news. In *State Department of Health Services v. Superior Court (McGinnis)* (2003) 31 Cal.4th 1026, 6 Cal.Rptr.3d 441, the Court held that while employers are still strictly liable under the FEHA for sexual harassment by a supervisor, an employee's recoverable damages in sexual harassment cases does not include damages the employee could have reasonably avoided by reporting harassment to his or her employer. Together, the cases change the legal landscape of FEHA claims in general and sexual harassment claims under FEHA in particular.

Steve Schifando was employed as a storekeeper for the City of Los Angeles. He suffered from severe hypertension which caused him to become dizzy and lightheaded in stressful situations. During a meeting in August, 1998, two of Schifando's supervisors began arguing with Schifando in an attempt to trigger his hypertension. As the argument progressed, Schifando experienced severe hypertension and had trouble breathing. He finally informed the supervisors that he could not take it anymore and that he quit. The supervisors then asked Schifando to sign a document which he later realized was a resignation form. Schifando filed a complaint against the City for employment discrimination based on physical disability under the California Fair Employment and Housing Act ("FEHA"). Prior to filing his civil action, Schifando timely filed an administrative claim with the Department of Fair Employment and Housing ("DFEH") and received a right to sue letter. However, Schifando never attempted to exhaust the internal administrative remedies set forth in the City's Charter.

The Charter provides that a person who is wrongfully discharged must file a demand for reinstatement with the Board of Civil Service Commissioners and a claim for compensation within ninety days.

The City argued that Schifando was required to exhaust both the FEHA remedies and the City Charter remedies before filing a lawsuit in superior court. The Court disagreed. Relying upon a prior decision which held that state employees may bring suit under the FEHA (rather than only under the Civil Service Act), the Court determined that public employees should not be required to exhaust internal administrative remedies prior to filing a FEHA claim in superior court. While

the Court noted that government employees remain perfectly free to pursue a city's internal remedies, such remedies need not be followed if the employee chooses to file a claim with the DFEH instead. The Court reasoned that requiring government employees to exhaust both DFEH and internal remedies would frustrate the intent of the FEHA to expand an employee's right to address discrimination.

The Schifando decision may lead public entities to believe that employees asserting FEHA claims will never proceed administratively and will always proceed directly to Court. In an attempt to ease this fear, the Schifando court noted that civil actions often take years to conclude and are expensive. The Court surmised that only those with the most egregious discrimination claims would choose litigation over internal remedies. The Court also emphasized that employees are still required to exhaust internal remedies for non-FEHA claims as long as the Legislature has not mandated another statutory scheme containing its own exhaustion procedures.

Following Schifando, public employers can expect that more and more employees will bypass the internal administrative remedies which most public employers have in place in order to file a complaint directly with the court. Public entities must carefully review any claims from employees which bypass the internal remedies to determine if the claim really falls under the provisions of the FEHA. In addition, the Schifando decision does not change an employee's obligation to exhaust his or her DFEH remedies prior to a civil action. Public entities must continue to carefully review all FEHA claims for procedural defects. Interestingly, the holding of Schifando has some connection to the second case addressed in this article.

In McGinnis, the California Supreme Court finally resolved an issue concerning sexual harassment claims that has been left unresolved in California since 1998. In 1998, the United States Supreme Court issued two decisions *Burlington Industries, Inc. v. Ellerth* ("Ellerth") 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton* ("Faragher") 527 U.S. 775 (1998) which for the first time created a partial or complete defense for employers facing claims for sexual harassment based on supervisory conduct. Specifically, in Ellerth and Faragher, the Supreme Court held that an employer may establish a partial or complete defense to an employee's claim for sexual harassment not involving a "tangible employment action" (i.e. demotion or termination) by proving (1) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior and (2) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. Since the Supreme Court's decision arose from a claim of sexual harassment under Title VII of the Civil Rights Act rather than the FEHA, it was unclear whether the Ellerth and Faragher defense articulated by the Supreme Court applied to sexual harassment claims brought under California law. The Court finally addressed this issue in McGinnis.

The California Supreme Court's response to the United States Supreme Court holding was somewhat novel. In McGinnis, the Court determined that it would not adopt the partial or complete defense articulated by the Supreme Court. However, the Court did determine that the doctrine of "avoidable consequences" applied to claims for sexual harassment under FEHA and that under this doctrine, an employee's damages for sexual harassment do not include damages the employee could have avoided with reasonable effort and without undue risk, expense or

humiliation. The Court made clear that from a liability standpoint, California employers are strictly liable for harassment committed by a supervisor. However, from a damages standpoint, California employers can potentially limit the damages recoverable from an employee claiming harassment by a supervisor.

The McGinnis decision identified three elements which an employer must establish to create a defense based on the avoidable consequences doctrine: (1) the employer took reasonable steps to prevent and correct workplace sexual harassment, (2) the employee unreasonably failed to use the preventive and corrective measures that the employer provided and (3) reasonable use of the employer's procedures would have prevented at least some of the harm that the employee suffered. The Court warned that the defense will allow an employer to escape only those damages that the employee likely could have prevented with reasonable effort by taking advantage of the employer's internal complaint procedures appropriately designed to prevent and eliminate sexual harassment.

The Court also stated that in some instances, an employee's failure to report harassment may be reasonable, such as where the employer lacks an adequate antiharassment policy or procedures, the employer never communicated the policy or procedures to the victimized employee, the employee may reasonably fear reprisal for complaining, or the employee can show that embarrassment, humiliation or shame prevented him or her from reporting the harassing conduct.

The McGinnis decision emphasizes how important it is for public entities to have updated, adequate and appropriate antiharassment policies and procedures. In addition, public agencies must ensure that its antiharassment policies and procedures are disseminated to its employees through posters, notices, on-going training and distribution. Public employers must also ensure that employees have several ways to report harassment in a way that will protect the employee's confidentiality to the extent possible and which will not result in embarrassment or humiliation to the employee. Any allegations of retaliation against an employee for reporting harassment must be swiftly and effectively addressed to ensure that employees can reasonably be expected to report harassment when it occurs without fear of retribution. Public entities must also investigate claims of harassment thoroughly and promptly so that employees cannot claim that it would have been unreasonable to make a report of harassment. Handling all harassment claims in strict accordance with the employer's policies and procedures is particularly important under McGinnis since employees may be able to obtain this information when the employer asserts the avoidable consequences defense.

The effect of a public entity having an updated and comprehensive approach to preventing and responding to harassment claims will be a reduction of such claims and the ability to limit damages when such claims are brought.

Finally, the McGinnis decision has an interesting relation to the Schifando case. Specifically, though the Schifando case makes clear that an employee need not exhaust an internal administrative remedy prior to bringing a FEHA claim, the fact that such a remedy exists and whether or not the employee utilized the remedy is relevant under the McGinnis analysis of whether the employer can assert a defense to damages. Since most internal remedies obligate an

employee to notify the employer of alleged misconduct, failure of an employee to utilize the internal administrative remedy may be a basis upon which a public entity can argue the "avoidable consequences" doctrine set forth in McGinnis.

Employee Who Allegedly was Coerced by Supervisor to Have Sex to Keep Job Failed to Establish Case under Title VII.

Holly D worked for a professor at Caltech. The professor initiated sexual contact with Holly, but she initially rebuffed him. The professor criticized Holly's work, threatened to extend her probationary period, and gave her a negative performance evaluation. Holly decided that if she were to keep her job, she would have to engage in sex with the professor. After a year of sexual activities, Holly received a second performance evaluation which characterized her work as excellent. She eventually complained to an ombudsman at Caltech about sexual harassment and filed a complaint with the EEOC. Both Caltech and the EEOC investigated the charges. Caltech undertook an independent investigation but found insufficient evidence of sexual harassment. The EEOC issued a right to sue letter. Holly then brought suit against Caltech and the professor, but the court granted summary judgment against Holly, who timely appealed.

The United States Court of Appeals, Ninth Circuit, affirmed. Under Title VII, when a supervisor takes concrete action against an employee, known as a "tangible employment action," the employer may be liable for the supervisor's action. When the employee has been unlawfully harassed, but there has been no tangible employment action, the employer may avoid liability by proving the defense of "reasonable care."

Normally, a tangible employment action is one where a supervisor threatens to fire an employee if he or she does not acquiesce to the sexual demands and then actually fires the subordinate. Here, the Court pondered whether a tangible employment action could be said to have occurred where the supervisor threatens the employee with discharge and in order to avoid the threatened action the employee complies with the supervisor's demands. The court held that it did because by giving in to the supervisor's demands, the employee is still physically and emotionally damaged from the unwanted sexual acts.

Nevertheless, the Court found that here Holly did not present sufficient evidence to raise a genuine issue of material fact. She did not present any evidence connecting a discussion of her job duties with the professor's requests that she engage in sexual acts with him. Nor is there any evidence that the professor ever mentioned any potential change in her employment status, or any job-related matters or problems, when discussing sexual acts with him. In addition, the negative job evaluation, without more, does not support Holly's contention that compliance with the sexual overtures was necessary to save her job.

Moreover the Court noted that even if a hostile work environment existed, Caltech would have avoided liability by establishing a "reasonable care" defense. To prevail on the affirmative defense of reasonable care, an employer must prove two elements. First, that it exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and second that

the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer.

Here, Holly sought no relief of any kind from Caltech until a full year after the sexual activity had begun. She refused to follow procedure in the employee handbook or to seek help from the employee relations department because of dissatisfaction with the department's handling of an earlier disability claim. The Court found that a complete failure to use available and adequate procedures is generally unreasonable. Moreover, when Caltech became aware of the allegations, it immediately undertook a neutral investigation.

Holly D. v. California Institute of Technology (9th Cir. 2003) 339 F.3d 1158

California Legislative Action Takes Employer Responsibility to Behavior by Third Parties - AB 76.

Currently, the Fair Employment and Housing Act (FEHA) has been interpreted to the affect that employers may not be held liable for sexual harassment conducted by non-employees. This bill "clarifies" language in the FEHA to ensure that under State law employers may potentially be liable for sexual harassment committed against their workers by clients, customers, vendors, and other third parties if the employer knew or should have known of the harassment and failed to take immediate and appropriate corrective action to stop the harassment. This bill effectively repudiates the reasoning of a court of appeal decision last year in *Salazar v. Diversified Paratransit, Inc.* (2002)103 Cal. App. 4th 131 (2002). Since the bill clarifies existing law, it is effective immediately.

Amends Section 12940 of the California Government Code.

California County Subject to Liability for Failure to Prevent Further Harassment.

Betra Thompson and Tina Sheffield worked for the Department of Social Services. Thompson called Sheffield at home and informed her that she liked Sheffield "like a man likes a woman" and asked her on a date. Sheffield declined the offer. Nevertheless, when Thompson continued to pursue Sheffield she wrote a letter to Thompson asking that she stop contacting her. After receiving the letter, Thompson made a fist which she slammed into her other palm while looking at Sheffield and frowning. Sheffield informed her supervisor of these incidents and provided a copy of the letter, but no action was taken. Then, a few days later, Thompson hit Sheffield on the back of the head and neck. Sheffield filed a claim with the County in compliance with the Tort Claims Act and received a right to sue letter from the California Department of Fair Employment and Housing. Sheffield brought suit alleging sexual harassment against the County. The Department moved for summary judgment on the ground that there was no showing of a hostile work environment. The court granted the motion and Sheffield appealed.

The California Court of Appeal reversed. In order to show a sex-based hostile or abusive environment claim, a plaintiff must demonstrate that 1) he or she was subjected to verbal or physical contact of a sexual nature; 2) the conduct was unwelcome and; 3) the abusive conduct was sufficiently severe or pervasive so as to alter the conditions of employment, thereby creating an abusive working environment. Same-sex harassment is considered harassment under California law.

In evaluating a sexual harassment claim based upon a hostile work environment, two things must be determined: has the employee been subjected to a hostile work environment and, if so, is the employer liable for the harassment that caused the hostile work environment. The Court noted that the short time span between the initial telephone call and the attack may not be sufficient to create a hostile work environment. However, the Court found that Thompson's threats of violence that preceded the attack may have drastically changed Sheffield's working conditions and created a hostile work environment. A trier of fact could determine that the County failed to take reasonable steps to prevent the harassment once it knew of the implied threats.

Sheffield v. Dept. Of Social Services of Los Angeles (2003) 109 Cal.App.4th 153, 134 Cal.Rptr.2d 492

HARASSMENT – ETHNIC

Employee Failed to Prove Co-Worker's Actions were Sufficiently Severe to Establish a Hostile Work Environment.

Li Li Manatt is of Chinese descent and worked at Bank of America. She overheard a co-worker tell Manatt's supervisor that "I am not a China man, I'm not like China man with their eyes like that." The same employee told Manatt "I've had the worst kind of trouble with your countrymen." Other employees once pulled their eyes back with their fingers in an attempt to imitate or mock the appearance of Asians. Manatt complained to the human resources department and to her supervisor. The supervisor told Manatt that the employees were just joking, but held a staff meeting to discuss the matter. The supervisor instructed the employees to be more sensitive about each others feelings and the derogatory comments stopped. Shortly thereafter, Bank of America merged with NationsBank, and, along with the Asian financial crisis, caused the business to contract. The company downsized, and Manatt was transferred to an administrative assistant position. She filed suit alleging a hostile work environment and retaliation. The district court entered summary judgment in favor of Bank of America and Manatt appealed.

The United States Court of Appeals, Ninth Circuit, affirmed. To establish a prima facie hostile work environment claim, Manatt must raise a triable issue of fact as to whether 1) she was subjected to verbal or physical conduct because of her race, 2) the conduct was unwelcome, and

3) the conduct was sufficiently severe or pervasive to alter the conditions of Manatt's employment and create an abusive work environment.

The Court decided that the actions of Manatt's coworkers generally fell into the "simple teasing" and "offhand comments" category of non-actionable discrimination. The conduct of Manatt's coworkers was neither severe nor pervasive enough to alter the conditions of Manatt's employment. If these actions had occurred repeatedly, Manatt may well have had an actionable hostile work environment claim. Since the instances claimed by Manatt took place over a two-and-a-half-year period, and did not alter the conditions of Manatt's employment, her hostile work environment claim failed.

The Court also dismissed Manatt's retaliation claim. To make out a prima facie case of retaliation, Manatt must establish that 1) she engaged in a protected activity, 2) the bank subjected her to an adverse employment action, and 3) a causal link existed between the two. If Manatt makes out a prima facie case, the burden shifts to Bank of America to articulate a legitimate, nondiscriminatory reason for the adverse employment action. If Bank of America articulates such a reason, the burden shifts back to Manatt to demonstrate that the reason was merely a pretext for discriminatory motive.

Here, Manatt demonstrated that she was transferred shortly after complaining of the alleged harassment to her supervisor. Complaining of harassment, even if the charge is not ultimately sustained, is a protected activity. The transfer - particularly to a less desirable position - could be an adverse employment action, and, given the short period of time between the two, Manatt demonstrated a causal link. Nevertheless, the Bank established that the transfer resulted from the merger, not Manatt's complaint. Her retaliation claim could not be sustained.

Manatt v. Bank of America (9th Cir. 2003) 339 F.3d 792

California Case - A Hostile Environment May Arise from a Single Offensive Act When Committed by a Supervisor.

Glenda Dee worked for Vintage Petroleum as a production clerk. Her supervisor, Paul Strickland, referred to her as a "bitch" and instructed her to steal a document from another supervisor's desk. When Dee confronted Strickland, he told her that his friend was the chairman of the board who would support his decision to terminate an employee. He also stated that if there were a question of what had actually occurred, it would be "your Filipino understanding versus mine." Dee went out on stress leave. She asked Vintage to accommodate her disability by limiting her contacts with Strickland, but it refused, and terminated her. She brought suit alleging a violation of the Fair Employment and Housing Act (FEHA) for harassment on the basis of race and national origin, refusing to accommodate her disability, and wrongful termination. Vintage moved for summary judgment, which the trial court granted. It found that one racial comment is insufficient to establish a hostile environment. Dee appealed.

The California Court of Appeal reversed. The FEHA explicitly prohibits an employer from harassing an employee on the basis of race, sex, or ethnicity. To prove a claim of harassment, the conduct must be sufficiently severe or pervasive to alter the conditions of the victim's employment and to create an abusive working environment.

The court noted that there is not a magic number of harassing incidents that give rise to liability. In many cases, a single offensive act by a co-employee is not enough to establish employer liability for a hostile work environment. However, where the act is committed by a supervisor, the result may be different. The court found that a reasonable jury could, when considering the ethnic slur, the derogatory language, and the veiled threat of termination, conclude that Strickland created a hostile work environment. It was improper, therefore, for the trial court to grant the motion of summary judgment.

Dee v. Vintage Petroleum, Inc. (2003) 106 Cal.App.4th 30, 129 Cal.Rptr.2d 923

Two Discriminatory Statements by Fellow Employee, And Transfer to Field Assignment, Held Not to Constitute Actionable National Origin Discrimination.

Kelly Berglund and Francisco Vasquez worked as Deputy Probation Officers. Berglund criticized Vasquez as having a "typical Hispanic macho attitude" and commented that Vasquez should take a job in the field because "Hispanics do good in the field." He also reported Vasquez for organizing and participating in a game of touch football with youths at their detention center in violation of County policy. Vasquez's supervisor, Karma Leeds, decided to transfer Vasquez to a field position. Vasquez filed a complaint with the Equal Employment Opportunity Commission (EEOC) which issued a right to sue letter. Vasquez then filed a complaint against the County under Title VII. The District Court granted the County's motion for summary judgment. It found that Vasquez could not establish a prima facie case for disparate treatment because there was no adverse action and because he failed to show that similarly situated employees were treated differently. The Court also found that the alleged harassment was not sufficiently severe or pervasive enough to create a hostile work environment. Finally, the Court dismissed the retaliation claim because Vasquez did not exhaust his administrative remedies. Vasquez appealed.

The United States Court of Appeals, Ninth Circuit, affirmed. A prima facie case of discrimination under Title VII requires Vasquez to offer evidence that "gives rise to an inference of unlawful discrimination." If so, then the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its allegedly discriminatory conduct. If the defendant provides such a reason, the burden shifts back to the plaintiff to show that the employer's reason is a pretext for discrimination.

Here Berglund was not the person who made job-related decisions and Vasquez could not show that his supervisors were influenced by Berglund's remarks. Moreover, even if Vasquez were

able to make out a prima facie case, the County offered a legitimate, nondiscriminatory reason for the transfer: his organization and participation in the game of touch football. Since his supervisor's motives were not even challenged, the district court properly granted summary judgment on the discrimination claim.

In order to prevail on his claims of racially based harassment that created a hostile work environment, Vasquez needed to demonstrate that he was subjected to verbal or physical conduct of a racial nature, that the conduct was unwelcome, and that it was sufficiently severe or pervasive to alter the conditions of employment and to create an abusive or hostile work environment. Here the Court found that the two statements made by Berglund, which came six months apart, were neither severe nor pervasive enough to create a hostile work environment.

Vasquez v. County of Los Angeles, 2003 DJDAR 12205 (November 10, 2003)

RETALIATION

Sheriff's Office Found Liable for Retaliation against African-American Deputy.

Carmichell Bell was the first African American deputy ever hired by the Clackamas County Sheriff's Office. During his training, Bell complained about several supervisors making improper comments about white supremacist organizations. He also complained that his supervisors instructed him to pull over vehicles based on the ethnicity of the occupants. After complaining, Bell's evaluations plummeted. The Sheriff's Office placed him on paid administrative leave and then terminated him. All other recruits passed the probationary period. Bell sued the Sheriff's Office and individual supervisors for discrimination and won. The Sheriff's Office filed a motion for judgment as a matter of law, which was denied, but the court reduced the punitive damages award against the eight individual plaintiffs from \$52,000 to \$10,000. Each side appealed.

The United States Court of Appeals, Ninth Circuit, affirmed the jury's verdict and reversed the district court's reduction of punitive damages. Temporal proximity between protected activity and an adverse employment action can by itself constitute sufficient circumstantial evidence of retaliation. Here, the time between Bell's complaints and the alleged adverse employment actions provide strong circumstantial evidence of retaliation. Since Bell offered specific and substantial circumstantial evidence in support of the jury's determination that he was terminated because of his complaints regarding racial profiling and racial comments, and not because of his abilities, the jury's verdict should stand.

In addition, the district court erred by uniformly reducing the punitive damages levied against the individual defendants. Rather, each defendant's misconduct must be considered separately. If the court determined that the damages should be reduced because the amount is "grossly

excessive" of an individual's ability to pay, it may do so only to the extent that the record substantiates the Defendants' wealth.

Bell v. Clackamas County (9th Cir. 2003) 341 F.3d 858

Employee Who was Terminated After Reporting Sexual Harassment of Another Employee May Sue for Retaliation.

Spacelabs hired Godofredo Hernandez as an electromechanical engineer. A co-worker confided to Hernandez that their supervisor, Ron Pray, was sexually harassing her. When Pray saw Hernandez and the co-worker speaking he became hostile and ordered them not to speak to each other. Hernandez reported the suspected sexual harassment to Spacelab's human resources manager. She revealed Hernandez' concerns to Pray. Less than three weeks later, Pray fired Hernandez for allegedly poor performance. He brought suit for retaliation, but the district court granted summary judgment for Spacelabs. Hernandez appealed.

The United States Court of Appeals, Ninth Circuit, reversed. To establish a prima facie case for retaliation, a plaintiff must show that he or she engaged in a protected activity, that he or she suffered an adverse employment action, and that there is a causal link between the two. Here, neither party contested that Hernandez engaged in a protected activity and that he suffered an adverse employment action. Only the existence of a causal link was contested.

Spacelabs contended that Pray did not know Hernandez reported the harassment prior to the decision to fire Hernandez. The Court noted that it is frequently difficult or impossible for a plaintiff in Hernandez' position to discover direct evidence contradicting someone's contention that he did not know something. Nevertheless, circumstantial evidence suggests that Pray terminated Hernandez for reporting the harassment. Moreover, Spacelab's legitimate nondiscriminatory reason for terminating Hernandez did not adequately demonstrate that its actions were more than pretext. A reasonable jury could decide based on timing and testimony that Spacelab's fired Hernandez for his protected actions, not his performance.

Hernandez v. Spacelabs Medical Inc., 2003 DJDAR 10427 (September 15, 2003)

Firefighter Who Protested Station Closing Unlawfully Suspended.

William J. Brennan was a firefighter employed by the Township of Teaneck. He openly opposed the Township's decision to close two of four fire stations because he believed that the closures would endanger the public. Brennan's opposition included erecting signs, arranging for public announcements, distributing leaflets and expressing opposition in an interview he gave to a local reporter. He orchestrated other protests concerning the fire department as well. For example, he organized a public rally challenging the Township's policy of removing firefighters from the payroll while on IOD (injury on duty) leave and publicly accused the Department of circumventing directives regarding compliance with building construction fire codes. When a dispute arose between Brennan and the Township over election materials located in his car, the Township suspended Brennan for 21 days. He filed suit for violations of his federal civil rights and received a jury award plus punitive damages at trial. The district court, however, granted judgment as a matter of law for the Township as to the punitive damages but let stand the jury's award of the compensatory damages. Both parties appealed.

The United States Court of Appeals, Third Circuit, affirmed. A public employee has a constitutional right to speak on matters of public concern without fear of retaliation. A public employee's speech involves a matter of public concern if it can be fairly considered as relating to any matter of political, social or other concern to the community. This means that public speech cannot constitute merely personal grievances. If the speech is a matter of public concern, the employee must still demonstrate that his or her interest in being able to speak publicly outweighed any injury the employer would suffer. In addition, the public employee must demonstrate that the protected activity was a motivating factor in the alleged retaliation. Here, Brennan argued that the matters about which he spoke were matters of public concern. The Court agreed and upheld the award of compensatory damages. The Court rejected the contention, however, that punitive damages were warranted. For a plaintiff to qualify for a punitive award, the defendant's conduct must be, at a minimum, reckless or callous. Punitive damages might also be allowed if the conduct is intentional or evilly motivated, but the defendant's action need not necessarily meet this higher standard. Despite Brennan's accusations, he could not demonstrate that anyone in the Township plotted against him or that anyone was rewarded for retaliating against Brennan.

Brennan v. Norton (3rd Cir. 2003) 350 F.3d 399

EMPLOYEE SPEECH RIGHTS

Disciplinary Action, which Resulted from Statements Challenging the City's Conduct Toward Female Employees, Held Not an Abridgment of Free Speech.

Elmer Skaarup worked as the Chief Fire Marshall of Las Vegas. The City decided to eliminate two of the five inspector positions in his department. One of the inspectors whose job was eliminated was a woman. Skaarup stated in conversations with fellow employees that the Deputy City Manager was targeting women and that the union had made a deal with management to get rid of her. Skaarup was charged with violating the Fire Department's Rules of Conduct. At his hearing, Skaarup produced no evidence to support the truth of his statements. The Fire Chief decided to suspend Skaarup, who then filed suit. The City moved for summary judgment, which the district court granted, and Skaarup appealed.

The United States Court of Appeals, Ninth Circuit, affirmed. When an employee incurs an adverse action for speech based on a matter of public concern, a court must balance the right to speak against the government's interest in being an effective employer. The court noted that when close working relationships are essential to fulfilling public responsibilities, such as in fire and police departments, a wide degree of deference to the employer's judgment is appropriate. Here, Skaarup spoke privately to two individuals. Though the issues discussed may have been matters of public concern, he did not attempt to raise his concerns to his superiors or to take his allegations public. While political discourse deserves a certain latitude for hyperbole and conjecture, the public interest in unsubstantiated rumors is small. In addition, the City has a strong interest in not disrupting relations with the Union and protecting the reputation of a Deputy City Manager. These interests outweighed Skaarup's right to air his suspicions.

Skaarup v. City of North Las Vegas (9th Cir. 2003) 320 F.3d 1040

PRIVACY

California Case - Information Revealed by Medical Provider Does Not Violate Confidentiality of Medical Information Act.

Eufaula Garrett sought medical treatment from Dr. William Young. Garrett suffered from a rash, sleeplessness, weight loss, and complained of stress. Dr. Young diagnosed Garrett with severe depression, referred her to a psychiatrist, and sent "return-to-work" documents to her employer. Garrett's supervisor called Dr. Young to ask about Garrett's diagnosis. Dr. Young stated that Garrett was suffering from itching and stress. He did not discuss any diagnostic tests nor did he

reveal the psychiatric referral. Garrett discovered that Dr. Young had disclosed some information to her employer and she brought suit alleging a violation of the Confidentiality of Medical Information Act (CMIA), codified in Civil Code Section 56.10. After trial, the judge granted a directed verdict in Dr. Young's favor, concluding that the doctor acted lawfully, and Garrett appealed.

The California Court of Appeal affirmed. The CMIA prohibits a provider of health care from disclosing medical information regarding a patient without first obtaining an authorization, except under certain conditions. For example, medical providers may release a general description of the reason for treatment and the general nature of the injury unless there is a specific written request to the contrary.

Here, the Court noted that Garrett's rash and itching were plainly visible. Moreover, she had discussed her condition, along with job-related stress, to co-workers. The fact that Garrett openly discussed information about her medical condition to third parties effectively waived her right to sue for a violation of the CMIA. In addition, an employer that receives a document from a medical doctor purporting to contain a medical excuse for failure to appear at work may verify its contents with the physician whose name appears on it without either party violating the CMIA. While an employee may prevent his or her health care provider from releasing any information by providing a specific written request, Garrett did not do so. Without the proper request, a health care provider is statutorily permitted to discuss "a general description of the reasons for treatment, the general nature of the injury or condition, [and] the general condition of the patient." Since Dr. Young only revealed general information, he was not subject to the restrictions of the CMIA.

Garrett v. Young (2003) 109 Cal.App.4th 1393, 1 Cal.Rptr.3d 134

Note:

The federal Health Insurance Portability and Accountability Act's (HIPAA) privacy regulations also protects patients' personal health information. HIPAA, however, does not allow for a general discussion of a patient's medical condition. Had Garrett sued under federal law, therefore, the outcome may well have differed. On the other hand, if the employer had sent Garrett to the doctor as part of a fitness-for-duty exam, HIPAA would not have been implicated because it does not generally apply to the employment context.

Alleged Disclosure of Confidential Medical Information in FMLA Form Subjects Postal Service to Privacy and ADA Claims.

John Doe worked for the United States Postal Service. He missed several weeks of work while suffering from an AIDS-related illness. His supervisor sent Doe a letter inquiring about his extended absence and asked him to complete and submit a medical certificate explaining the nature of his illness. If he failed to submit the form, Doe faced discipline. The supervisor also sent forms for leave under the Family and Medical Leave Act. That form required a health care provider to certify that Doe suffered from a serious health condition. Doe's doctor stated that

Doe suffered from an AIDS-related complex. When Doe returned to work he learned that his HIV status was common knowledge. Doe brought suit alleging that his employer disclosed confidential medical information in violation of the Privacy Act and the Rehabilitation Act. The Postal Service moved for summary judgment which the district court granted. Doe appealed.

The United States Court of Appeals, District of Columbia Circuit, reversed. The Privacy Act generally prohibits non-consensual disclosure of any information that has been retrieved from a protected record. The Postal Service agreed that Doe's FMLA certification form was subject to the Privacy Act's confidentiality requirements, but it argued that no Postal Service employee had violated the Act. The court noted that Doe's co-workers stated during their depositions that a supervisor had either told them about Doe's condition or that they heard Doe's supervisor telling others. That evidence was sufficient to defeat a motion for summary judgment.

The Rehabilitation Act is similar to Doe's Privacy Act claim, but it required an additional showing: that the FMLA form amounted to an "inquiry" into Doe's medical condition within the meaning of the Americans with Disabilities Act (ADA). The Postal Service contended that Doe's submission was voluntary and therefore not part of an inquiry. The court, however, rejected this argument. It noted that the submission was clearly a response to a request by the employer, though Doe could have avoided submitting his medical information by foregoing his FMLA leave. The court rationalized that the Postal Service's position would force employees to choose between waiving their right to avoid being publicly identified and exercising their statutory rights. That result would run directly counter to Congress' purpose in enacting the ADA which was, in part, to allow employers to inquire into employees' medical condition without subjecting employees to the stigma of being identified as disabled.

Doe v. United States Postal Service (D.C. Cir. 2003) 317 F.3d 339

California Case - Dentist's Disclosure of Suspected Prescription Drug Abuse of Police Officer was not Unlawful.

Officer Ricky Shaddox had a wisdom tooth removed. Following the extraction, Officer Shaddox's dentist prescribed Vicodin. Several months later, Officer Shaddox returned to the dentist's office and requested more Vicodin. When the dentist refused, Officer Shaddox became visibly upset. The dentist called the police station, reported the incident, and stated that he believed the officer may be addicted to the pain killer. The police department initiated an investigation and disciplined Officer Shaddox for "improper conduct." During the investigation, Officer Shaddox professed relief and gratitude that his dependency was being addressed. He also filed a complaint against the dentist for a violation of the California Confidentiality of Medical Records Act (CMIA). After a trial, the court ruled that the dentist's actions were protected under the Act. Officer Shaddox appealed.

The California Court of Appeal affirmed. The CMIA is meant to provide for the confidentiality of individually identifiable medical information, while allowing certain reasonable and limited

uses of that information. To that end, the Act provides nine enumerated instances where disclosure of medical information is mandatory, and 17 situations where disclosure is permissive. One of the sanctioned disclosures is for information that is "otherwise specifically authorized by law."

The Court noted that California has a public policy of encouraging reports of suspected misconduct or unfitness by law enforcement officers. In addition, a State statute directs departments or agencies that employ peace officers to establish a procedure to investigate complaints by members of the public. The Court reasoned that the combination of a strong public policy and statute protects virtually every complaint made against a peace officer - no matter how ill founded or baseless - from criminal and civil liability.

Officer Shaddox argued that the public policy and statute should apply only in situations where a citizen reported suspected misconduct while an officer was on duty and performing official duties. The Court disagreed. It noted that police officers occupy a unique position of trust. To protect the public's confidence, an officer may be judged by private conduct as by on-duty performance. An officer's unfitness may be shown by off-duty, as well on-duty, behavior.

Shaddox v. Bertani (2003) 110 Cal.App.4th 1406, 2 Cal.Rptr.3d 808

WORKPLACE VIOLENCE

California Case - Employer May Seek Restraining Order On Behalf Of An Employee Even Though That Employee Was Not Specifically Threatened.

Ezell Edwards worked at USS-Posco Industries (UPI). Edwards refused to wear his safety glasses and confronted one of his supervisors by suggesting that they "take care of this" in the parking lot. Edwards was suspended for five days because of his comment. When Edwards returned, he told a co-worker that he might shoot one particular supervisor. The employer sought a temporary restraining order against Edwards, which was granted. It then sought a permanent injunction restricting Edwards from approaching UPI, the supervisor he threatened, and another supervisor who felt threatened by the statements because she had previously disciplined Edwards. The Court granted the permanent injunction. Edwards appealed.

The California Court of Appeal affirmed. An employer may seek a restraining order on behalf of an employee who has suffered unlawful violence or a credible threat of violence. Edwards argued that because he made no threat directed specifically at the employee who had disciplined him previously, the law did not authorize an injunction.

The Court found that an employer may seek an injunction on behalf of any employee who is credibly threatened with unlawful violence, whether or not that employee is identified by the defendant. Since Edwards threatened to bring a gun to UPI and shoot employees against whom he harbored a grudge, the employee's fears were reasonable. Given the seriousness of the threat and the justifiable fear by the employee, a permanent restraining order was warranted.

USS-Posco Industries v. Edwards (2003) 111 Cal.App.4th 436, 4 Cal.Rptr.3d 54.