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Celebrating the FEHA's 50th Anniversary: A Review of the Most Significant Cases

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Note: *This article is the result of the authors' collaboration with the California Department of Fair Employment and Housing. However, the statements and opinions in this article are those of the authors, and not necessarily those of the Department of Fair Employment and Housing.*

This year marks the 50th anniversary of the California Fair Employment and Housing Act ("FEHA"),[1] and its predecessor, the Fair Employment Practices Act

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1 Cal. Gov't Code §§ 12900–12996.

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("FEPA"),[2] and we recognize the sea change it has brought to the lives of Californians, who presently work and conduct business under the most comprehensive anti-discrimination laws in the nation. This article is written as a tribute to the FEHA's 50th anniversary and is in collaboration with the California Department of Fair Employment and Housing ("DFEH") celebration of 2009 as the "Civil Rights Year."

FEPA, FEHA, and Finding the Way Forward

The first comprehensive federal anti-discrimination law was, of course, Title VII of the Civil Rights Act of 1964.[3] The path Congress followed in 1964, however, had been set out by the states, led by New York and California. It was New York that acted first, in 1945.[4] In that same year, California State Assemblymember Augustus F. Hawkins introduced similar legislation, which ultimately was passed in 1959 with the enactment of the FEPA.[5]

By today's standards, the Legislature's aim in 1959 was rather modest: to prohibit discrimination in compensation, terms, conditions and privileges of employment, and in hiring and firing, on the basis of race, creed, national origin or ancestry. The statutory remedies were limited to criminal penalties, injunctive relief and administrative orders for reinstatement.[6]

Since its enactment, California's primary employment discrimination law has grown in its scope, prohibitions and protections to outstrip its prior limitations and, in most instances, federal law and the laws of other states. In 1980, the FEPA was formally combined with the previously enacted Rumford Fair Housing Act of 1963,[7] and renamed the California Fair Employment and Housing Act.[8] Today, the FEHA's employment provisions prohibit discrimination and harassment in the workplace based on race, creed, color, national origin, ancestry, physical disability, mental disability, mental condition, marital status, sex, age or sexual orientation; protect employees from retaliation for invoking the protection of the FEHA; require employers to provide reasonable accommodation and engage in an interactive process to find reasonable accommodation for individuals with disabilities; provide liability for employers who fail to prevent unlawful discrimination and harassment; and prohibit employers from testing for genetic characteristics.[9] The FEHA also permits employees to take family care leave; provides anti-harassment and anti-discrimination protections for pregnancy, childbirth or related medical conditions; requires employers to make reasonable accommodations for pregnancy, childbirth or related medical conditions; requires employers to provide sexual harassment training to their supervisors; and prohibits the enforcement of certain workplace language policies.[10]

What we now understand to be the major features of California's anti-discrimination laws have developed and changed significantly through the years. Much of

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2 Former Cal. Labor Code § 1410 et seq., 1959 Cal. Stats. ch. 121 § 1, *repealed by* 1980 Cal. Stats. ch. 992 § 11.

3 *See* 42 U.S.C. § 2000e et seq.

4 *See* Thomas E. Kellett, *The Expansion of Equality*, 37 S. Cal. L. Rev. 400, 409 (1963–1964) (citing Laws of New York, ch. 118, § 1).

5 *See* 1959 Cal. Stats., ch. 121. According to the papers of Augustus F. Hawkins, stored in the Department of Special Collections at the University of California at Los Angeles ("UCLA") Library, then-Assemblymember Hawkins introduced fair employment practices legislation in 1945 and then worked over the next fourteen years until FEPA's enactment in 1959. For example, see http://content.cdlib.org/xtf/view?docId=hb7k40090x&query=&brand=calisphere.

6 *See* 1959 Cal. Stats. ch. 121.

7 Former Health & Saf. Code § 35700 et seq., 1963 Cal. Stats. ch. 1853 § 2, *amended by* 1968 Cal. Stats. ch. 944, 1974 Cal. Stats ch. 1224, 1975 Cal. Stats. chs. 280, 1189, 1977 Cal. Stats. chs. 1187, 1188, 1978 Cal. Stats. ch. 380, *repealed by* 1980 Cal. Stats. ch. 992 § 8.

8 *See* 1980 Cal. Stats. ch. 992 § 4; Rojo v. Kliger, 52 Cal. 3d 65, 72 (1990) (discussing history of FEHA and FEPA).

9 *See* Cal. Gov't Code § 12940.

10 *See* Cal. Gov't Code § 12940, § 12945 et seq., § 12950 et seq. and § 12951.

this expansion has been at the hands of the Legislature, but the courts, too, have been instrumental in shaping the law. Courts have defined, refined and explained what the FEHA means, and one cannot reflect on the last 50 years of anti-discrimination efforts without appreciating the role courts have played in making the FEHA what it is today. Identifying the most significant FEHA cases and trends is a difficult, and surely subjective, task. Here is our "top ten" list, in no particular order.

Number 10: The Arbitrability of FEHA Claims

For many years employers and employees alike assumed, not without question, that discrimination claims could properly fall within the scope of a predispute arbitration provision. In 2000, in *Armendariz v. Foundation Health Psychcare Services, Inc.*, the California Supreme Court held that FEHA claims are arbitrable "if the arbitration permits an employee to vindicate his or her statutory rights."[11] Although the court struck down as unconscionable the particular agreement at issue, it made clear that arbitration of employment-related claims under California law, including claims under the FEHA, can be compelled if the predispute arbitration agreement (1) provides for a neutral arbitrator;[12] (2) provides for adequate discovery;[13] (3) requires a written award;[14] (4) provides for all of the types of relief that would otherwise be available in court;[15] (5) does not require employees to pay unreasonable costs, fees or expenses as a condition of access to the arbitration;[16] and (6) contains a "modicum of bilaterality," requiring both the employee and employer to arbitrate claims arising out of the same transactions or occurrences.[17]

Number 9: Defining the Administrative Remedy

Approximately twenty years ago, the California Supreme Court in *Rojo v. Kliger*[18] and *Dyna-Med, Inc. v. Fair Employment and Housing Commission*[19] delineated the FEHA's administrative remedy. The court limited administrative exhaustion requirements, as well as the categories of damages awardable by the Fair Employment and Housing Commission ("FEHC"), and thereby cleared the way for FEHA plaintiffs inclined to pursue their claims in court.

In *Rojo*, the court concluded that the FEHA was not an exclusive remedy; rather, the Legislature in enacting the FEHA "manifested an intent to amplify, not abrogate, an employee's common law remedies for injuries relating to employment discrimination."[20] The court, accordingly, found that the FEHA did not limit other common law and statutory claims,[21] and that administrative exhaustion was not required before filing a civil action for damages alleging a nonstatutory cause of action.[22] While the *Rojo* opinion noted that administrative exhaustion was a precondition to bringing a civil suit under the FEHA, the court in prior cases had recognized that a FEHA complainant who wanted to withdraw his administrative complaint and proceed directly to court could request a right-to-sue letter and, as a practical matter, receive one even before the expiration of the statutorily-prescribed 150-day accusation period.[23]

In *Dyna-Med*, the court held that the FEHC was not authorized to award punitive damages, reasoning that "[t]he Commission . . . has broad authority to fashion an appropriate remedy without resort to punitive damages."[24] The court also found that allowing the FEHC to award punitive damages would disserve the efficiency of the administrative process.[25] Three years later in *Peralta Community College District v. Fair Employment and Housing Commission*,[26] the court

11 24 Cal. 4th 83, 90 (2000) (emphasis omitted).

12 *Id.* at 103 ("[T]he neutral arbitrator requirement . . . is essential to ensuring the integrity of the arbitration process.").

13 *Id.* at 104 ("[A]dequate discovery is indispensable for the vindication of FEHA claims.").

14 *Id.* at 107 ("[I]n order for such judicial review to be successfully accomplished, an arbitrator in a FEHA case must issue a written arbitration decision that will reveal, however briefly, the essential findings and conclusions on which the award is based.").

15 *Id.* at 103 ("[A]n arbitration agreement may not limit statutorily imposed remedies.").

16 *Id.* at 110–11 ("[T]he arbitration agreement or arbitration process cannot generally require the employee to bear any *type* of expense that the employee would not be required to bear if he or she were free to bring the action in court.").

17 *Id.* at 117, 120.

18 52 Cal. 3d 65 (1990).

19 43 Cal. 3d 1379 (1987).

20 52 Cal. 3d at 75.

21 *Id.*

22 *Id.* at 88.

23 Commodore Home Systems, Inc. v. Superior Court, 52 Cal. 3d 211, 218 n.8 (1982); State Personnel Board v. Fair Employment and Housing Comm'n, 39 Cal. 3d 422, 433 n.11 (1985).

24 43 Cal. 3d at 1393 (internal citation omitted).

25 *Id.*

26 52 Cal. 3d 40 (1990).

used similar reasoning to conclude that the FEHC was not authorized to award general compensatory damages.[27] Coupled with the court's decision in *Commodore Home Systems, Inc. v. Superior Court*[28] that private litigants could recover punitive damages in FEHA civil actions, *Dyna-Med* and *Peralta* arguably encouraged aggrieved persons to pursue private actions, in which they could assert both FEHA and common law claims with the possibility of recovering punitive damages.

Number 8: Preserving the Summary Adjudication of FEHA Claims

In October 2000, in *Guz v. Bechtel National, Inc.,*[29] the California Supreme Court reversed the court of appeal and affirmed the trial court's grant of summary judgment in favor of the defendant employer on the plaintiff's FEHA age discrimination claim, among others.[30] FEHA plaintiffs frequently argued that because liability turns on the decisionmaker's intent, summary judgment in discrimination cases was inappropriate (i.e., that discrimination claims necessarily presented triable issues). The *Guz* Court clarified this issue through its holding that discrimination claims can be resolved as a matter of law and confirmed that "summary judgment for the employer may [] be appropriate where, given the strength of the employer's showing of innocent reasons, any countervailing circumstantial evidence of discriminatory motive, even if it may technically constitute a prima facie case, is too weak to raise a rational inference that discrimination occurred."[31]

Number 7: Expanding the FEHA's Disability Protections

Disability discrimination has been an area of marked difference between California and federal anti-discrimination law. Even with the recent amendments to the federal Americans with Disabilities Act ("ADA"), the FEHA's disability protections remain broader than those found anywhere else. While the California Legislature, through AB 2222,[32] was primarily responsible for expanding the FEHA's disability protections, no list of the most significant FEHA trends and cases would be complete without recognizing the breadth of the FEHA in this area and recounting the back-and-forth between the California Legislature and the California Supreme Court over the issue of whether a disability must "substantially limit," or merely "limit," a major life activity in order to qualify an individual for protection under the FEHA.

Before AB 2222, the California Supreme Court in *Cassista v. Community Foods*[33] held that the plaintiff (who stood five feet, four inches tall and weighed 305 pounds at the time she applied for a job with the defendant employer) was not disabled under the FEHA because her weight did not "substantially limit" her in any major life activity.[34] The court found that the FEHA's disability provisions tracked those of the ADA and, thus, it was appropriate to consider federal interpretations of the ADA when interpreting the FEHA's provisions.[35]

On January 1, 2001, the California Legislature expressly rejected *Cassista's* suggestion that federal interpretations of the ADA should guide construction of the FEHA: "The law of this state in the area of disabilities provides protections independent from those in the [ADA]. Although the federal act provides a floor of protection, this state's law has always, even prior to passage of the federal act, afforded additional protections."[36] Thus, the Legislature made clear that the FEHA was intended to do more than simply mirror the protections provided by the ADA.

The Legislature, accordingly, disregarded the holding in *Cassista* and clarified that the FEHA requires only that a disability "limit" a major life activity, not (as the ADA requires) that it impose a "substantial limitation."[37] "This distinction is intended to result in broader coverage under the law of this state than under the federal act."[38] Later, in *Colmenares v. Braemar*

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27 *Id.* at 55–56 ("[T]he purpose of the FEHA to provide an efficient and expeditious avenue for elimination of discriminatory practices would be compromised as agency proceedings would come increasingly to resemble traditional lawsuits. . . .").

28 52 Cal. 3d 211 (1982).

29 24 Cal. 4th 317 (2000).

30 *Id.* at 327.

31 *Id.* at 362.

32 2000 Cal. Stats. ch. 1049 (amending sections 51, 51.5, and 54 of the California Civil Code, and sections 12926, 12940, 12955.3, and 19231 of, and adding section 12926.1 to, the California Government Code).

33 5 Cal. 4th 1050 (1993).

34 *Id.* at 1060.

35 *Id.*

36 Cal. Gov. Code § 12926.1(a).

37 *Id.* § 12926.1(c).

38 *Id.*

Country Club, Inc.,[39] the California Supreme Court reconciled AB 2222 with its earlier ruling, explaining that the reference in *Cassista* to "substantial limitation" was mere dicta, and that the FEHA always has afforded greater protections to disability plaintiffs than the ADA. Thus, held the court, the Legislature in AB 2222 "intended not to make a retroactive change, but only to clarify the degree of limitation required to be physically disabled."[40]

Number 6: Clarifying the Disability Plaintiff's Proof Burden

Another important debate has been whether, and to what extent, the FEHA shares the ADA's requirement that a disability plaintiff must prove that he or she is a qualified individual. Two landmark cases shaped the law in this area: *Jensen v. Wells Fargo Bank, N.A.*[41] and, more recently, *Green v. State of California*.[42]

In *Jensen*, a California Court of Appeal held in the accommodation context that a FEHA disability plaintiff bears the burden of showing, as part of her *prima facie* case, that she is a qualified individual under the statute. In that case, the plaintiff, a bank branch manager who developed post-traumatic stress disorder after surviving a robbery at the bank branch, was medically restricted from working at the branch and unsuccessfully sought a non-branch position as an accommodation.[43] In evaluating the plaintiff's failure-to accommodate claim, the court held that the plaintiff in the first instance "must . . . establish that he or she suffers from a disability covered by FEHA and that he or she is a qualified individual."[44]

Jensen was recognized for many years as the prevailing rule, though not without debate. For example, in *Bagatti v. Department of Rehabilitation,*[45] the Third Appellate District criticized *Jensen* for failing to distinguish the statutory language of the FEHA from the ADA, which expressly includes the "qualified individual" requirement.[46]

In 2007, the California Supreme Court made clear that a plaintiff who cannot perform a job's essential functions because of a disability, even after reasonable accommodation, is not qualified and, therefore, has no discrimination claim, and that the plaintiff properly bears the burden of demonstrating that he or she is qualified.[47] The court reached its conclusion by referring to the ADA and its allocation of the burden of proof, noting the "striking[]" similarities between the language of the FEHA and the ADA with respect to this requirement.[48] The court further observed from the legislative history that the "[California] Legislature incorporated the ADA requirement with full knowledge of the purpose the language serves in the ADA."[49] The *Green* Court reconciled its reference to the ADA with AB 2222 and *Colmenares* by explaining that "the fact that the Legislature intended to provide plaintiffs with broader substantive protection under the FEHA . . . does not affect the Legislature's contemplation that a plaintiff must prove that he or she can perform the essential functions of the job. . . ."[50]

Number 5: Broadly Defining Retaliatory Adverse Employment Actions

In *Yanowitz v. L'Oreal USA Inc.*,[51] the California Supreme Court set the standard for what constitutes a retaliatory adverse employment action under the FEHA.[52] The court in *Yanowitz* adopted a "materiality"

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39 29 Cal. 4th 1019 (2003).

40 *Id.* at 1028.

41 85 Cal. App. 4th 245 (2000). To view Court of Appeal briefs available on Lexis.com, go to 1999 CA App. Ct. Briefs 34875.

42 42 Cal. 4th 254 (2007).

43 85 Cal. App. 4th at 250.

44 *Id.* at 256.

45 97 Cal. App. 4th 344 (2002). To view Court of Appeal briefs available on Lexis.com, go to 2002 CA App. Ct. Briefs 37965C.

46 *Id.* at 361 n.4 ("We respectfully disagree with *Jensen* to the extent it holds that, in order to assert a claim for failure to accommodate, a plaintiff must show that he or she is 'a qualified individual' within the meaning of [the ADA]. Jensen cites no apposite authority for that assertion, which, as we have explained, finds no reference in the FEHA statute or applicable regulation. The two federal cases cited by *Jensen* do not mention the FEHA but are rather interpretations of the ADA where, as we have seen, 'a qualified individual with a disability' is given express statutory definition.").

47 *Green*, 42 Cal. 4th at 262 ("[I]n order to establish that a defendant employer has discriminated on the basis of disability in violation of the FEHA, the plaintiff employee bears the burden of proving he or she was able to do the job, with or without reasonable accommodation.").

48 *Id.*

49 *Id.* at 263.

50 *Id.* at 265.

51 36 Cal. 4th 1028 (2005).

52 *Id.* at 1036.

test, i.e., "an employer's adverse action [must] materially affect the terms and conditions of employment."[53]

The standard protects employees not only with respect to " 'ultimate employment actions' such as termination or demotion, but also the entire spectrum of employment actions that are reasonably likely to adversely and materially affect an employee's job performance or opportunity for advancement in his or her career."[54] However, actions that are "[m]inor or relatively trivial adverse actions," or "from an objective perspective, are reasonably likely to do no more than anger or upset an employee" do not rise to the level of an actionable adverse employment action.[55]

In *Yanowitz*, the sales manager plaintiff claimed that a higher-ranking male executive instructed her to fire a sales associate because "he did not find the woman to be sufficiently physically attractive," telling the plaintiff to "[g]et me somebody hot."[56] The plaintiff refused and asked for justification for the instruction.[57] Thereafter, according to the plaintiff, her immediate supervisor (who reported to the executive) attempted to sabotage her career by soliciting negative feedback about her performance, criticizing her in front of her subordinates, and giving her negative performance evaluations.[58] The court found that the plaintiff alleged a retaliatory course of conduct and that each separate alleged retaliatory act need not rise to the level of an "adverse employment action" in itself, but may be considered together as a whole.[59] The court concluded that the plaintiff satisfied the materiality test because the alleged acts "placed her career in jeopardy," are "objectively adverse," and "constituted more than mere inconveniences or insignificant changes in job responsibilities."[60]

In adopting the materiality test, the *Yanowitz* Court rejected the broader standard of "deterrence" for retaliation claims, as opposed to discrimination claims. The proposed "deterrence" standard defined an adverse employment action to be "any action that is reasonably likely to deter employees from engaging in protected activities."[61] Instead, the court focused its analysis on the statutory language and reasoned that the California Legislature intended the standard to be the same for both retaliation and discrimination claims.[62]

The year following *Yanowitz*, the United States Supreme Court, in *Burlington Northern and Santa Fe Ry. Co. v. White*,[63] examined the issue of what constitutes an adverse employment action under Title VII. Analyzing language very similar to the FEHA, the Court adopted the "deterrence standard" that *Yanowitz* had rejected, reasoning that the anti-retaliation provision under Title VII was intended to reach a broader range of conduct than the anti-discrimination provisions.[64] Courts continue to interpret both *Yanowitz* and *Burlington Northern*.

Number 4: Harassment Versus Retaliation and Discrimination, and the Impact on Individual Liability

In *Reno v. Baird*,[65] the California Supreme Court differentiated between harassment and discrimination and held that individual supervisors may be liable for the former, but not the latter. The court reasoned that *harassment* (which is outside "the scope of necessary job performance [and] presumably engaged in for personal gratification"), is fundamentally different from *discrimination* (which involves personnel management actions—like hiring, firing, promotions, job assignments, etc.—that are necessary to running a business).[66] Whereas a supervisor can refrain from engaging in harassing behavior, it is impossible to refrain from making personnel management decisions.[67]

The *Reno* Court also relied on the statutory text for its holding. Whereas the FEHA's harassment prohibition specifically makes it illegal for "any other person," in addition to the employer, to engage in harassment, the anti-discrimination provision prohibits only "an employer" from engaging in discrimination.[68]

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53 *Id.* at 1051.

54 *Id.* at 1054.

55 *Id.*

56 *Id.* at 1038.

57 *Id.*

58 *Id.* at 1039.

59 *Id.* at 1055–1056 ("there is no requirement that an employer's retaliatory acts constitute one swift blow, rather than a series of subtle, yet damaging, injuries.").

60 *Id.* at 1060.

61 *Id.* at 1050.

62 *Id.* at 1050–52.

63 548 U.S. 53 (2006).

64 *Id.* at 68.

65 18 Cal. 4th 640 (1998).

66 *Id.* at 645–46.

67 *Id.*

68 *Compare* Cal. Gov't Code § 12940(j) *with* Cal. Gov't Code § 12926.

Building on its holding in *Reno*, the California Supreme Court last year in *Jones v. The Lodge at Torrey Pines Partnership*[69] held that individual, non-employer supervisors cannot be held personally liable for retaliation under the FEHA. Although the FEHA's retaliation provision makes it an unlawful employment practice for "any . . . person" to retaliate against an employee who has made a complaint,[70] the court held that the relevant subsection encompasses only employers. The court expressly left open the possibility, however, that "an individual who is personally liable for harassment might also be personally liable for retaliating against someone who opposes or reports that same harassment."[71]

Number 3: Limiting Employer Exposure for Supervisory Harassment

In *State Department of Health Services v. Superior Court*,[72] the California Supreme Court confirmed that employers are strictly liable under the FEHA for sexual harassment by their supervisory employees. However, under the doctrine of avoidable consequences, a plaintiff cannot recover damages that could have been "avoided with reasonable effort and without undue risk, expense, or humiliation."[73]

The court determined that the employer was strictly liable for the actions of the supervisor, reasoning that "[b]ecause the FEHA imposes [a] negligence standard only for harassment 'by an employee other than an agent or supervisor' (§ 12940, subd. (j)(1)), by implication the FEHA makes the employer strictly liable for harassment by a supervisor."[74] "But strict liability is not absolute liability in the sense that it precludes all defenses."[75] Rather, under the FEHA, as "[i]n civil actions generally, the right to recover damages is qualified by the common law doctrine of avoidable consequences."[76] The court explained that this defense has the following elements: "(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."[77]

The court explained that one of the FEHA's goals is to encourage employers to establish "effective measures to prevent workplace harassment," including "establish[ing] . . . antiharassment policies and . . . set[ting] up and implement[ing] effective grievance procedures."[78] The court reasoned, "[a]lthough full compensation of workplace harassment victims is an important FEHA goal, *preventing* workplace harassment is a FEHA goal of equal and perhaps even greater importance."[79] "By encouraging prompt resort to employer-provided remedies, application of the avoidable consequences doctrine can stop workplace harassment before it becomes severe or pervasive."[80]

One issue ostensibly before the *State Department of Health Services* Court was whether the rule set forth by the United States Supreme Court in *Burlington Indus., Inc. v. Ellerth*[81] and *Faragher v. City of Boca Raton*[82] for sexual harassment claims under Title VII—which provided an employer with a partial or complete defense to liability by showing that it exercised reasonable care to prevent and promptly correct any sexually harassing behavior and that the employee unreasonably failed to take advantage of preventive or corrective opportunities—applied to claims under the FEHA. The court effectively held "no," making clear that the defense it articulated "affects damages, not liability."[83] The court did, however, state that "to the extent the United States Supreme Court grounded the *Ellerth/Faragher* defense in the doctrine of avoidable consequences, its reasoning applies also to California's FEHA."[84]

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69 42 Cal. 4th 1158 (2008). To view California Supreme Court briefs available on Lexis.com, go to 2007 CA S. Ct. Briefs 51022A.

70 Cal. Gov't Code § 12940(h).

71 42 Cal. 4th at 1168 n.4.

72 31 Cal. 4th 1026 (2003). To view California Supreme Court briefs available on Lexis.com, go to 2002 CA S. Ct. Briefs 103487.

73 *Id.* at 1034.

74 *Id.* at 1041.

75 *Id.* at 1042.

76 *Id.*

77 *Id.* at 1044.

78 *Id.* at 1047.

79 *Id.*

80 *Id.*

81 524 U.S. 742 (1998).

82 524 U.S. 775 (1998).

83 31 Cal. 4th at 1045.

84 *Id.* at 1044.

Number 2: Not-So-Friendly Work Environments (i.e., You Won't Make Any "Friends" Here)

In *Lyle v. Warner Brothers Television Productions*,[85] the California Supreme Court concluded that adult comedy writers' use of sexually explicit language and gesturing in the presence of their female writer's assistant did not constitute harassment within the meaning of the FEHA. The plaintiff in *Lyle* was a comedy writer's assistant for the popular adult-oriented television show, "Friends."[86]

The plaintiff, Amaani Lyle, was forewarned during her job interview that the show dealt with sexual matters, that she would be listening to sexual jokes and discussions, and that it would be her job to transcribe much of this material for use in future scripts.[87] At that time, she indicated that such jokes and discussions did not bother her, and she was hired.[88] After approximately four months of work, she was terminated for problems with her typing and transcriptions.[89] She filed suit claiming, *inter alia*, that the writers' use of coarse and vulgar language and conduct constituted harassment under the FEHA.[90] Plaintiff's complaint and subsequent filings described a work environment that she considered far more sexualized, vulgar and degrading than she had been led to believe it would be.[91] For instance, beyond detailed discussions of the writers' own sexual experiences and sexual desires, one of the writers apparently maintained a book with graphic sexual images.[92] According to the plaintiff, sex-based discussions and gestures also occurred in the breakroom and hallways.[93]

In evaluating the plaintiff's harassment claim, the court looked at the totality of the circumstances and asked whether a reasonable trier of fact could conclude that such language constituted harassment directed at plaintiff *because of her sex*.[94] The court noted the unique circumstance of the workplace as "focused on generating scripts for an adult-oriented comedy show featuring sexual themes," explaining that this was significant to the determination of whether there were triable issues of fact "regarding whether the writers' sexual antics and coarse sexual talk were aimed at plaintiff or at women in general, whether plaintiff and other women were singled out to see and hear what happened, and whether the conduct was otherwise motivated by plaintiff's gender."[95] Considering these circumstances, and in light of the fact that males and females alike participated in the sexual discussions and the fact that the sexual discussions were not aimed at plaintiff or any other female employee, the court concluded that no reasonable trier of fact could find that such language constituted harassment directed at plaintiff "because of . . . sex" within the meaning of FEHA.[96]

If the court in *State Department of Health Services* was reluctant to find consistencies between state and federal harassment law, the *Lyle* Court was not. It relied heavily on Title VII harassment cases and emphasized the similarities between federal and state law in the area of harassment.[97]

Number 1: Relaxing the Statute of Limitations

The FEHA generally requires that a complaint be filed within a year "from the date upon which the alleged unlawful practice . . . occurred."[98] In a series of cases over the last decade, the California Supreme Court has liberalized this statute of limitations, resulting in a lowered bar for employees to bring claims under the Act, more employee control over the timing of their litigation, and less certainty for employers about when FEHA claims are timed-out.

The first key case was *Romano v. Rockwell International, Inc.*,[99] which held that a termination "occurs" on the date of actual termination of employment, not on the date the employee receives notice that his employment will be terminated.[100] In *Romano*, the plaintiff first was told of his termination approximately two and a half years before his employment actually terminated.[101] By holding that the limitations period

[85] 38 Cal. 4th 264 (2006). To view California Supreme Court briefs available on Lexis.com, go to 2006 CA S. Ct. Briefs 125171.

[86] *Id.* at 271.

[87] *Id.*

[88] *Id.* at 275.

[89] *Id.* at 272.

[90] *Id.*

[91] *Id.* at 275–76, 287.

[92] *Id.* at 275.

[93] *Id.*

[94] *Id.* at 286–87, 292.

[95] *Id.* at 287.

[96] *Id.* at 286, 292.

[97] *Id.* at 278–79.

[98] Cal. Gov't Code § 12960(d).

[99] 14 Cal. 4th 479 (1996).

[100] *Id.* at 479.

[101] *Id.* at 484–85.

ran from the date of actual termination, in *Romano* the court affirmed the appellate court's reversal of the trial court's dismissal of the plaintiff's claims as time-barred.

This decision was distinctive for, among other reasons, the fact that it rejected a contrary rule under Title VII articulated by the United States Supreme Court.[102] The *Romano* Court acknowledged this rejection, emphasizing the different statutory language of the FEHA and questioning the soundness of the Supreme Court's reasoning.[103] The *Romano* Court offered several policy justifications for its decision. Its primary rationale was that a "notification rule" would encourage premature litigation and discourage informal conciliation between employees and employers. Such a rule would, in the court's opinion, be contrary to the purposes of the FEHA.[104] The court further noted that the "date-of-termination rule" would result in no undue burden to employers because the time period between notification and termination is usually short, the employer usually controls both dates and should have sufficient opportunity to preserve evidence, and the "date-of-termination rule" provides simplicity by the fact that the termination date is usually undisputed.[105]

The following year, the California Supreme Court in *Mullins v. Rockwell International, Inc.*[106] extended the rule set forth in *Romano* to "constructive discharge" cases, holding that the limitations period begins to run on the date of the involuntary resignation, not on the date that conditions allegedly became intolerable to a reasonable employee.[107] As in *Romano*, the court stressed that "a rule requiring a lawsuit to be filed as soon as intolerable conditions begin would interfere with informal conciliation in the workplace," leading to premature claims.[108]

Further extending the relaxed standards set forth in *Romano* and *Mullins*, the California Supreme Court in *Richards v. CH2M Hill, Inc.*[109] held that the continuing violation exception to the statute of limitations applies to claims for failure to accommodate a disability and disability harassment under the FEHA.[110] The *Richards* Court applied the same policy rationale set forth in *Romano* and *Mullins* against encouraging "premature litigation at the expense of informal conciliation" in reasoning that a disabled employee need not file a lawsuit at the first sign of failure to accommodate, but only after a degree of "permanence."[111] In the disability accommodation context, only "when an employer makes clear it will not further accommodate an employee," does "justification for delay in taking formal legal action no longer exist[]."[112]

Finally, just this last year, the California Supreme Court in *McDonald v. Antelope Valley Community College District*[113] held that "equitable tolling" may apply to extend the FEHA statute of limitations during an employee's voluntary pursuit of a claim through an employer's internal administrative grievance proceedings.[114] The court reasoned that equitable tolling is available under the FEHA, because the statute does not include an express prohibition and nothing in the statutory text suggests an implicit legislative intent to preclude equitable tolling, and because no policy underlying the FEHA would foreclose equitable tolling in all circumstances.[115] In fact, the court (citing *Richards* and *Romano*) held that the policies underlying the FEHA "evince a legislative intent that it and its statute of limitations must be liberally interpreted in favor of both allowing attempts at reconciliation and ultimately resolving claims on the merits."[116]

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102 *See* Delaware State College v. Ricks, 449 U.S. 250 (1980); Chardon v. Fernandez, 454 U.S. 6 (1981).

103 14 Cal. 4th at 498.

104 *Id.* at 494.

105 *Id.*

106 15 Cal. 4th 731 (1997) (a non-FEHA breach of contract case with reasoning applicable to FEHA cases and which has been cited by subsequent FEHA cases).

107 *Id.*

108 *Id.* at 741.

109 26 Cal. 4th 798 (2001).

110 The court set forth a three-part test for when "an employer's persistent failure to reasonably accommodate a disability, or to eliminate a hostile work environment targeting a disabled employee, is a continuing violation." *Id.* at 823. The alleged unlawful conduct (1) must be similar in kind; (2) must have occurred with reasonable frequency; and (3) must have not acquired a degree of "permanence," which the court defined as a situation where "an employer's statements and actions make clear to a reasonable employee that any further efforts at informal conciliation to obtain reasonable accommodation or end harassment will be futile." *Id.*

111 *Id.* at 821.

112 *Id.* at 823.

113 45 Cal. 4th 88 (2008).

114 *Id.* at 106.

115 *Id.* at 106–108.

116 *Id.* at 107–108.

Honorable Mentions

Weeks v. Baker & McKenzie

This well-publicized case surely put California harassment law on the map. A jury found that former Baker & McKenzie law firm partner, Martin R. Greenstein, had a history of sexually harassing female attorneys and support staff and unlawfully harassed legal secretary Rena Weeks.[117] The jury awarded compensatory damages and punitive damages against both Greenstein and the law firm, as well as substantial attorneys' fees. The $3.5 million punitive damages award remains the largest published single-plaintiff FEHA harassment verdict to have survived judicial review.

Constructive Discharge

Although not primarily a FEHA case, *Turner v. Anheuser-Busch, Inc.*[118] set a high bar for constructive discharge claims. The California Supreme Court held that an employee must establish "that the employer either intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee's resignation that a reasonable employer would realize that a reasonable person in the employee's position would be compelled to resign."[119]

New Trials

In *Lane v. Hughes Aircraft Co.*,[120] the California Supreme Court held that an order granting a new trial under California law must be sustained on appeal unless the opposing party demonstrates that no reasonable finder of fact could have found for the movant on the trial court's theory.[121] The *Lane* Court found that the appellate court erred in applying "the same standard when reviewing the new trial order as when reviewing the judgment notwithstanding the verdict."[122] Rather, a highly deferential standard should have been applied to reviewing an order granting a new trial.[123] The court emphasized that "so long as the outcome [of the trial] is uncertain at the close of trial—that is, so long as the evidence can support a verdict in favor of either party—a properly constructed new trial order is not subject to reversal on appeal."[124]

Workplace Injuries and Workers' Compensation Exclusivity

A number of cases have explored whether discrimination claims are preempted by workers' compensation exclusivity, and answered the question in the negative.[125] These cases underscore that California's anti-discrimination laws are intended to amplify and expand on existing rights and remedies.

Paramour Favoritism

In *Miller v. Department of Corrections*,[126] the California Supreme Court held that "an employee may establish sexual harassment under the FEHA by demonstrating that widespread sexual favoritism was severe or pervasive enough to alter his or her working conditions and create a hostile work environment."[127] Plaintiffs, two former state prison employees, claimed that a warden at the prison where they were employed created a hostile work environment by treating various female employees with whom he was sexually involved much more favorably than those employees with whom he was not sexually involved.

Conclusion

The FEHA's next 50 years surely will bring additional and exciting changes. At this anniversary mark, we celebrate FEHA's 50th and take a moment to look back at the pivotal turns that have shaped the FEHA's development so far.

The authors are attorneys from each California office of Paul, Hastings, Janofsky & Walker LLP, where they exclusively represent employers in state and federal employment litigation and advice matters. The authors wish to express their gratitude for their colleagues across California who contributed to the preparation of this article.

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117 63 Cal. App. 4th 1128, 1138, 1143 (1998).

118 7 Cal. 4th 1238 (1994).

119 *Id.* at 1251.

120 22 Cal. 4th 405 (2000).

121 *Id.* at 409.

122 *Id.*

123 *Id.*

124 *Id.* at 414.

125 *See, e.g.*, City of Moorpark v. Superior Court, 18 Cal. 4th 1143, 1150–58 (1998); Shoemaker v. Myers, 52 Cal. 3d 1, 22 (1990).

126 36 Cal. 4th 446 (2005). To view California Supreme Court briefs available on Lexis.com, go to 2003 CA S. Ct. Briefs 114097.

127 *Id.* at 466.

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EYE ON THE SUPREME COURT

By Kimberly M. Talley

Supreme Court to Consider Mixed-Motive Instruction in Non-Title VII Cases

Gross v. FBL Financial Services, 2008 U.S. LEXIS 8885 (Dec. 5, 2008).

The United States Supreme Court has agreed to resolve the question regarding what standard should apply in a mixed-motive case brought under the Age Discrimination in Employment Act ("ADEA").

Executive Jack Gross began working for FBL Financial Services ("FBL") in 1987. Throughout his employment, he received multiple promotions and was ultimately promoted to the position of Claims Administration Vice President. In 2001, FBL underwent a major reorganization, and Gross was reassigned to the position of Claims Administration Director. Although his job responsibilities did not change, Gross viewed this reassignment as a demotion, because it reduced his points under FBL's point system for salary grades. In 2003, the company reassigned Gross to the position of Claims Project Coordinator. Many of the duties associated with the Claims Administration Director position were transferred to the position of Claims Administration Manager—a position given to another employee in her early forties. In Gross's new position as Claims Administration Director, he had the same salary and pay grade as the Claims Administration Manager. Nevertheless, Gross considered the reassignment as another demotion, because his coworker assumed many of his former duties and responsibilities. Gross further claimed that his new position as Claims Administration Director was ill-defined and lacked a job description or any specifically assigned duties.

In April 2004, Gross, who was in his early 50's, filed a lawsuit against FBL alleging that FBL demoted him in 2003 because of his age in violation of the ADEA. The trial court instructed the jury that Gross had the burden to prove that (1) FBL demoted him to Claims Project Coordinator in January 1, 2003, and (2) that his age was "a motivating factor" in FBL's decision to demote him. The jury was further instructed that its verdict must be for FBL "if it has been proved by a preponderance of the evidence that defendant would have demoted plaintiff regardless of his age." After a five-day trial, the jury for the United States District Court for the Southern District in Iowa found in Gross's favor and awarded him $46,945 in lost compensation. FBL appealed the verdict arguing that the district court had erred in giving the mixed-motive jury instruction.

The Eighth Circuit Court of Appeals reversed the judgment and remanded the case for a new trial, holding that the mixed-motive jury instruction was not correct, because it shifted the burden of persuasion on a central issue in the case.[1] Citing the Supreme Court's decision in *Price Waterhouse v. Hopkins*,[2] the Eighth Circuit stated that "to justify shifting the burden on the issue of causation to a defendant, a plaintiff must show by 'direct evidence that an illegitimate factor played a substantial role' in the employment decision."[3]

Relying on the Fifth Circuit's decision in *Rachid v. Jack in the Box,*[4] Gross had argued on appeal that the Civil Rights Act of 1991[5] superseded *Price Waterhouse*, because the statute provides that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."[6] He also cited the Supreme Court's decision in *Desert Palace v. Costa,*[7] in which the Court unanimously held that a Title VII plaintiff did not need to produce direct evidence of discrimination in order to obtain a mixed-motive jury instruction.

Rejecting Gross's argument, the Eighth Circuit found that while certain provisions in the Civil Rights Act mentioned the ADEA, the mixed-motive amendment applied to Title VII, but "did not make a corresponding change to the ADEA."[8] The court further stated that "because *Price Waterhouse* interpreted language identical to that found in the ADEA," it must follow the *Price Waterhouse* rule in ADEA cases.[9]

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1 Gross v. FBL Fin. Servs., 526 F.3d 356 (8th Cir.), *cert. granted*, 2008 U.S. LEXIS 8885 (Dec. 5, 2008).

2 490 U.S. 228 (1989).

3 526 F.3d at 359.

4 376 F.3d 305, 312–13 (5th Cir. 2004).

5 42 U.S.C. § 2000e-2m.

6 526 F.3d at 360 (citing 42 U.S.C. § 2000e-2(m)).

7 539 U.S. 90 (2003).

8 526 F.3d at 361.

9 *Id.* at 362.

In Gross's petition for review to the United States Supreme Court, he argued that there is well-established conflict among the appellate courts on the existence of a requirement for direct evidence in a mixed-motive case. He argued that while the Second and Third Circuits have held in accordance with the view adopted by the Eighth Circuit, the First, Fifth, Seventh, Ninth and Tenth Circuits have rejected the argument that direct evidence of discrimination must be proven before a mixed-motive instruction is appropriate. In opposition to the petition, FBL argued that the cases cited by Gross in his petition involved summary judgment motions and, thus, there was no "compelling support" for review. On December 5, 2008, the Supreme Court accepted Gross's petition for review to resolve the split of authority among the federal appellate courts.

While the decision will have no practical impact on employers, it could change the manner in which these cases are tried.

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The 2008 New Media Labor Agreements in the Entertainment Industry

By Sallie C. Weaver

I. Introduction

The entertainment industry has been rocked in many ways this year. This article will address the environment in which the recent (and on-going) labor bargaining sessions occurred, the path of the negotiations with the various guilds and, finally, in broad strokes, the elements of the new agreements which may be of interest.

A. The Parties

The entertainment industry is highly organized, meaning that most of the work that is done both behind and in front of the camera is performed by union labor. The unions and guilds in the entertainment industry are the Screen Actors Guild ("SAG"), Directors Guild of America ("DGA"), Writers Guild of America - West and East ("WGA"),[1] American Federation of Musicians ("AFM"),[2] American Federation of Television and Radio Artists ("AFTRA"),[3] International Alliance of Theatrical and Stage Employes[4] and International Brotherhood of Teamsters ("Teamsters").[5]

The television and film production arms of major studios, including Warner Bros., Disney, Columbia, Twentieth Century Fox, DreamWorks, Sony, MGM, Universal and Paramount, participate in a multi-employer bargaining unit represented by the Alliance of Motion Picture and Television Producers (generally known by its acronym "AMPTP"). The AMPTP also represents a number of smaller television and film production companies, who authorize such representation by letter. All the employers that authorize the AMPTP to bargain on their behalf agree to be bound to the union agreements reached by the AMPTP with the unions.

The labor organizations named above generally have a Basic Agreement, covering film and, usually, television that is negotiated with the AMPTP and applied industry-wide. The Basic Agreements and, if separate, Television Agreements were the subject of this latest round of negotiations.

DGA has a separate agreement, called the Freelance Live & Tape Television Agreement (known as "FLLTA"), that generally covers work in non-dramatic programming and certain non-primetime, non-network programs.

SAG has both a separate agreement covering all television, which is bargained at the same time as their Basic Agreement, the Television Agreement, and a variety of side letters covering specialized production (i.e., programs produced for basic cable, animated programs and the like).

AFTRA's central agreement covering work in television is the National Code of Fair Practice for Network Television Broadcasting (generally known as the "Network Code" or "Net Code"), which includes Exhibit A that governs primetime network production,

[1] The WGA is actually two unions, East and West. However, the parties negotiate many agreements jointly. The Modified Basic Agreement (frequently abbreviated as "MBA") that covers film and television work is led by the West.

[2] The AFM is a federation of locals, but the international (i.e., the central federal organization) handles the bargaining of their basic agreement.

[3] AFTRA is also a federation of locals, but has centralized almost all principal functions, including the bargaining of their central agreement.

[4] To this day, the IA uses the antiquated spelling of employees leaving only one "e." The IA international (i.e., the central United States and Canada organization) handles bargaining of the Basic Agreement. The IA's Basic Agreement, by its terms, covers only Los Angeles County. Each of the 18 film and television locals based in Los Angeles covers different motion picture crafts (e.g., design, lighting, camera operation) and has unique agreements supplementing the IA Basic Agreement. Moreover, the international and the locals bargain "one-production-only" agreements, generally at higher terms than the Basic Agreement, and do not allow new companies to sign the Basic Agreement until the company is established as one that abides by their agreements.

[5] The Teamsters structure is similar to the IA's. However their basic agreement, known as the Black Book, covers the 13 western states (excluding Texas), and covers drivers. They negotiate separate agreements for location managers and casting directors with varying scope provisions.

and the WB/UPN Supplement that now covers CW productions.

One of the unique elements of the industry is the representation of performers in television by both SAG, which grew out of the film industry, and AFTRA, which grew out of live radio and then live television at the network facilities. Although SAG's traditional employers are the studios and AFTRA's traditional employers are the networks, both unions sign agreements with many of the same employers. This unusual practice has accelerated as the networks and studios have merged. The jurisdictional disputes between these unions, and the efforts to resolve those disputes, are legion. As digital production, including new media production,[6] has increased, the areas of disputed jurisdiction have increased.

B. The Environment

The months leading up to the negotiating sessions for the 2007–2008 collective bargaining agreements in the entertainment industry were full of anxiety.[7] Hollywood was worried that the unions would demand too much, and the industry would offer too little. The production slowdown that occurred in advance of the 2004 contract expirations was fresh in industry minds.

Through the years, talks of strikes and the shutting down of production in advance of most bargaining cycles have typically surfaced. But this year the stakes felt much higher. The internet appeared to be living up to the promise of becoming a viable distribution method for entertainment. Ideas had been previewed on the internet and achieved enough recognition to be picked up for television. People had produced for cell phones and iPods, and viewers were actually watching these "mobisodes." The networks had scrambled to get their episodes up on the web, not wanting to be left behind, but could not decide if those episodes should be streamed with the broadcast commercials, sold through iTunes, streamed for free without advertising to promote the series, or streamed with newly sold commercials. The money spent on internet advertising was growing at double-digit rates.

The backdrop of these developments was the steady advance of reality television as the primary entertainment for United States broadcast television viewers. Network reruns of dramatic programs, a key source of residual revenue for talent, had disappeared to create space for *Survivor*, *Fear Factor* and *American Idol*. Dramatic television had largely fled to basic cable following the pay television original programming success. The licensing fees are lower for cable than broadcast, because the audience is splintered between the many available channels. Ad revenue per basic cable channel is not as much as broadcast network revenue, therefore, the talent residuals for basic cable continue to be a fraction of the network residuals. Everyone is still waiting for the shoe to drop on network ad money in the Digital Video Recorder ("DVR") generation. And, if all that was not bad enough, the target demographic (young adult men) are watching TV much less than their predecessors. Instead, they are surfing the net in their leisure time, a trend with no apparent end in sight.[8]

C. The Prelude

Perhaps because of the anxious economic environment described above, both SAG and the WGA elected officers and board members who campaigned on a "get tough" at the bargaining table platform during the 2004, 2005 and 2006 union elections. Each of the newly elected boards fired their National Executive Directors and other executive staff in fairly short order. The National Executive Directors, or the equivalent, have traditionally served as the Chief Negotiators for the "above the line" guilds, working with a Member Negotiating Committee for the negotiation of the Basic and Television Agreements.

David Young, former head of organizing at the WGA, was promoted to National Executive Director and would lead the 2007–2008 negotiations for the WGA. Doug Allen, former NFL Players Association senior executive, was selected as SAG's National Executive Director and would head up SAG's negotiations.

The WGA turned up the heat in advance of the negotiations, staging protests at meetings of advertising executives, objecting to the increase in product placement and product integration. The WGA put out a position paper on the subject and advocated for FCC

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6 The term "New Media" is meant to encompass digital, computerized and networked information, often having the characteristics of being manipulable, networkable, dense and compressible.

7 *See, e.g.*, "Striking A Pose," *Variety*, April 18, 2006, at 1.

8 *See Executive Summary Global Entertainment and Media Outlook: 2008–2012*, PriceWaterhouseCoopers (2008).

intervention.[9] SAG consistently supported the WGA in these actions, aligning itself with the more assertive tactics advocated by the WGA leadership.

The industry uncertainty was exacerbated as the tensions between SAG and AFTRA resulted in a public and bitter war of words, largely over each union's basic cable contracts. An effort to amend the joint bargaining structure, known as Phase One,[10] which had been in place since the early 1980s, and ongoing disputes concerning jurisdiction, resulted in the structure's termination, at least for the Basic and Television negotiations.

II. The Negotiations

A. WGA Bargains to Impasse

The WGA was first to begin negotiations. The WGA and the AMPTP started bargaining on July 16, 2007, broke off and reconvened several times, and eventually appeared to be making modest progress as the contract expiration neared. However, it quickly became clear that the negotiations had failed to produce a timely agreement and, contrary to generally held opinions, the WGA was going on strike sooner, rather than later. The WGA waged a well-coordinated strike beginning November 5, 2007, with an effective communications campaign. After the strike was called, there were brief periods of bargaining through November, but they appeared to be relatively unproductive. The parties broke off negotiations on December 7, 2007.

B. DGA Negotiations Commence

The DGA announced in mid-December that they had delayed commencing negotiations to allow the WGA and the AMPTP to reach an agreement. However, because of the apparent AMPTP/WGA impasse, they felt the need to move forward on behalf of their members.[11] The formal negotiations began January 12, 2008 and ended January 17, 2008, with an announcement of a tentative deal. As historically had been the case, this deal would prove to be the template for each succeeding deal based on an industry model of pattern bargaining on issues pertinent to the guilds and/or unions.

AFTRA had postponed the Network Code negotiations, originally scheduled for mid-January, until mid-February, permitting the DGA to close their agreements.

C. WGA Resumes Bargaining

The AMPTP went back to the table with the WGA after the DGA deal was reached. The DGA deal was successful in moving the AMPTP on many of the issues denounced by the WGA in their press materials. The WGA and the AMPTP reached a deal, and the WGA called off their strike on February 12, 2008, to the relief of everyone in Southern California.

D. AFTRA's Network Code

Shortly thereafter, on March 9, 2008, AFTRA announced a similar deal on the Network Code, covering all but primetime dramatic television. Exhibit A to the Network Code covers work in primetime dramatic programming and this Exhibit was ordinarily bargained jointly with SAG at a separate time.

E. SAG Starts Negotiations

SAG and the AMPTP began formal negotiations on SAG's Basic and Television Agreements on April 15, 2008, without AFTRA. SAG made a last minute, unsuccessful effort to mend fences, but AFTRA rejected the invitation.

In a statement issued just prior to the commencement of negotiations, SAG made clear that the pattern set by the DGA was unacceptable, as it did not take into account the unique needs of performers. In April 2008, there were a number of days of apparently unfruitful bargaining. The AMPTP suspended negotiations with SAG on May 6 after an unsuccessful effort to reach a deal by the end of April, and announced their need to meet with AFTRA.

F. AFTRA's Primetime Dramatic Television Negotiation

AFTRA commenced bargaining on Exhibit A to the Network Code on May 7, 2008, and announced a tentative deal on May 28. In large part, this deal followed the DGA pattern on the new media provisions, but broke from the pattern in dealing with the reuse of photography and soundtrack provisions relating to performers.

Shortly after AFTRA sent the deal to its members for ratification, SAG announced that it would campaign against ratification because, in its view, the deal insufficiently

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9 *See* WGA Press Release, *Writers Guild West President Patric M. Verrone to Testify on Product Integration at FCC Media Ownership Hearing in Chicago*, Sept. 20, 2007, available at http://www.wga.org/subpage_newsevents.aspx?id=2467.

10 Phase One is an agreement between SAG and AFTRA that lays out the participation of each union in each stage of the bargaining process. The relative earnings of each union under the Phase One contracts and the nature of the participation required by the agreement had been one of the points of contention for many years.

11 DGA Press Release, *DGA and AMPTP Agree to Begin Contract Negotiations*, Jan. 11, 2008, available at http://www.dga.org/index2.php3?chg=.

dealt with performers' issues. Ratification of the contract was successful, but SAG had made a significant dent in the ordinarily overwhelming majority. SAG took this as a signal that their positions found favor with members.

G. SAG Bargains to a Stalemate

SAG and the AMPTP continued bargaining through June and into July 2008 as the expiration date of the contract passed. The AMPTP gave the SAG negotiating committee a final offer on June 30 and, thereafter, there were several formal sessions in July. As inducement, the AMPTP offered a retroactive application of the increase if the offer was accepted and ratified by August. SAG apparently made some effort to counter the final offer, but the AMPTP clearly did not view the effort as sufficient movement and refused to re-engage in any official manner. SAG has continued to communicate with its members, but does not appear to be ready to concede any of the points the AMPTP views as critical to making a deal. In October, the SAG Board of Directors voted to request that a federal mediator be brought into the negotiations, and also authorized a strike authorization vote of the membership to be taken.[12] On November 5, 2008, the SAG National Negotiating Committee met with the mediator assigned by the Federal Mediation and Conciliation Service.[13] However, the federal mediation did not result in an agreement and was adjourned on November 22, 2008.[14] At press time, SAG's strategies on next steps were unclear, although the current leadership has made a number of public statements about the need for strike authorization from the members.[15]

III. The New Media Deals

The key elements of the new media deals in the entertainment industry have been:

- Internet jurisdiction;
- Minimum terms;
- Residuals for both "made for new media programs" and "new media as a secondary market";
- Sunset clauses;
- Data to unions; and
- Use of clips

A. Internet Jurisdiction

The guilds and unions, with the exception of SAG, have thus far all agreed to a basic structure of jurisdiction for new media production. The definition of new media is, consistently across the agreements, that technology which is known on the date of the agreement. Only some "made for new media programs" will be produced subject to the terms of the union agreements.

i. Derivative New Media Programs

All "derivative" new media programs will be covered. Derivative programs are those based on a traditional media program or film. Notably, each union's agreement and AMPTP's final offer to SAG have a slightly different definition of which traditional media productions are relevant to this definition and provide the basis for coverage.[16]

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12 SAG Press Release, *SAG Board of Directors Votes to Request Federal Mediator and Send Strike Authorization Referendum to Membership if Necessary*, Oct. 19, 2008, available at http://www.sag.org/press-releases/october-19-2008/sag-board-directors-votes-request-federal-mediator-and-send-strike-au.

13 SAG Press Release, *SAG Will Meet with Federal Mediator November 5, 2008*, Oct. 31, 2008, available at http://www.sag.org/press-releases/october-31-2008/sag-will-meet-with-federal-mediator-november-5-2008.

14 SAG Press Release, *Screen Actors Guild—AMPTP Mediation Fails*, Nov. 22, 2008, available at http://www.sag.org/press-releases/november-22-2008/sag-amptp-mediation-fails.

15 *Id.*

16 *See* DGA Summary of Changes in the 2008 BA and 2008 FLTTA ("DGA Summary"), at 11, available at http://www.dga.org/contracts/2008-contracts/Comprehensive Summary 2008 BA and FLTTA.pdf ("e.g., a free television, basic cable or pay television motion picture or program . . ."); WGA Sideletter on Literary Material Written for Programs Made for New Media, Feb. 13, 2008 ("WGA Sideletter"), at 2, available at http://www.wga.org/contract_07/NewMediaSideletter.pdf ("e.g., a free television, basic cable, or pay television motion picture . . . and is otherwise included among the types of motion pictures traditionally covered by the MBA"); Summary of Proposed Agreement 2007–2010 AFTRA Network TV Code, at 5 ("AFTRA Net Code Summary") available at http://www.aftra.org/netcode/Summary_Document.pdf ("based on an existing program"); AFTRA Summary of Proposed Agreement 2008–2011 Exhibit A to the AFTRA Network Television Code, at 11 ("AFTRA Summary of Proposed Exhibit A," available at http://www.aftra.com/primetimeYES/primetime_tv.pdf ("e.g., a free television, basic cable, or pay television program . . ."); Producers' Final Offer to Screen Actors Guild ("SAG Final Offer"), at 6, available at http://www.amptp.org/files/AMPTP_SAG_final_offer_063008.pdf ("based on an existing motion picture that was produced for "traditional" media other than one produced for basic cable to the extent that said production is covered under the terms of the Codified Basic Agreement or the Television Agreement").

ii. Original New Media Programs—Budgetary Minimums

The coverage of new media programs other than derivative programs (referred to as "original new media productions") is conditioned upon either a budgetary minimum or the professional stature of those hired. The budgetary minimums are $15,000 per minute, $300,000 per program, or $500,000 per series. Programs falling below these thresholds are known as "experimental new media programs." The AMPTP argues that the companies must be positioned to participate in the market and establish a presence. Application of the contract below those levels, AMPTP asserts, would stifle their companies' ability to do so.

This is one of the sticking points with SAG. SAG notes their ongoing organization of productions below these budget levels, and asserts that almost all of the current new media production is below these thresholds.

iii. Original New Media Programs - Professional Hires

The AMPTP has agreed that if professionals are hired on an original new media program, notwithstanding the budget levels, the contract will cover all of the employees hired in the jurisdiction of the same union. The definition of "professional" is another area where the agreements differ somewhat.[17]

iv. Optional

Each of the agreements makes clear that these jurisdictional requirements are not intended to limit the ability of a producer to cover a production at his or her discretion under one or more of the union agreements.

B. Minimum Terms

Each agreement includes a list of contract provisions from the Basic and Television Agreements that will be applicable to new media production. These are very limited, and generally include provisions requiring: 1) wages be subject to negotiation (note an exception for WGA and derivative programs); 2) pension, health and welfare contributions and tax withholding be paid on negotiated wages; 3) application of the union security provisions;[18] 4) union preclusion from striking instead of following the arbitration process to resolve disputes; and 5) residuals, the substance of which is outlined below.

C. Residuals

These provisions are, by a good measure, the most complex of the new media agreements. The categories of payments and general principles will be discussed here.

i. Categories of Use

The parties divided the residuals provisions into: 1) traditional media films and programs being exhibited in new media; and 2) the exhibition of programs produced for new media.

The formulas for traditional media include both theatrical films and television programs. The use made of the traditional films or programs is divided into three types—each of which is applicable to both television programs and theatrical films.[19] The three types of new media use anticipated by these agreements are: 1) electronic sell through ("EST") (download-to-own, e.g., iTunes); 2) limited license (download-to-rent, to view for a limited period of time, or based on a subscription that is limited by its term, e.g., Netflix downloads); and, finally, 3) free to the user and advertiser supported.

The new media programs, as noted in the jurisdiction discussion, are of two types—derivative and original new media programs. The uses anticipated by the agreement are: 1) consumer paid (any use in new media where the consumer pays for the program); 2) ad

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[17] *See supra*, note 16, DGA Summary, at 13 (DGA coverage is required if an employee is utilized "in any DGA-covered category who has previously been employed under a DGA collective bargaining agreement"); WGA Sideletter, at 1 (references the definition of "Professional Writer" in Article 1.C.1.b of the MBA. The definition includes alternative types of experience which qualify a writer as "professional"); AFTRA Net Code Summary, at 5 (parties agreed to meet and discuss criteria for "covered Performers"); AFTRA Exhibit A Summary, at 7 (term used is "covered performer" rather than professional); SAG Final Offer, at 14 (The term used is "covered performer" rather than professional. Covered performer is defined as having "been employed pursuant to the terms of a collective bargaining agreement covering his or her employment as a performer" *and* has one or two professional credits in a list of alternate types of experience.).

[18] Union security clauses generally require that the employer notify the union if it is going to employ a nonmember in a covered position. Further, union security provisions generally require that employees join or at least pay fees, usually within thirty days, to the union that has been selected by the employees to represent them as a group.

[19] It is here, when presenting this material in person, the author generally makes reference to Tom Lehrer and his song "New Math" released on the album *That Was the Year that Was*.

supported; and 3) use in traditional media (broadcast television and the like).

a. Traditional Media

1. EST

The provisions relating to download-to-own were one of the most hard-fought between the guilds and the AMPTP. At the time that the WGA negotiations broke off, the industry's official position was that the DVD formula, unadjusted, was the applicable formula. The industry's position was rooted in the assumption that EST would cannibalize the already flattening DVD market. The guilds argued that the expenses for EST were nothing compared to the expenses for VHS cassettes, or even to DVDs. Therefore, the model of twenty percent (20%) of a distributor's gross as the residuals base was outmoded and unfair.

The DGA was successful in obtaining an increase from the DVD formula at a threshold of units sold. The subsequent union deals incorporated these provisions.

2. Limited License to View

The parties renewed their agreements concerning the "MovieFly.com" model. These provisions are rooted in the contract language for exhibition on pay television of films and programs produced for other outlets. Pay television includes premium service subscriptions and pay-per-view. Similar structures are included in this category of use in new media. Each guild receives a percentage of distributor's gross receipts that are then distributed to the individual covered talent.

3. Free to the User and Ad Supported

The exhibition of theatrical films in this manner requires payment of a fairly straightforward percentage of gross receipts to the union on behalf of talent.

The exhibition of television programs in a new media outlet that is free to the user and ad supported (referred to for the sake of ease as "free") is the most complicated of the formulae. Each program, depending on the term of use, may go though three phases of residual payments.

The first phase for a television program on free new media outlets is a *free streaming window*. This window is either 17 or 24 days, depending on whether the program is part of an established series (17 days) or not (24 days). This free streaming window may occur at any time associated with exhibition of the program on television, but the exhibition must occur at some point during the streaming window.

The second phase for a television program on free new media outlets is the year immediately following the expiration of the free streaming window. Within this year, the distributor may purchase one or two 26-week periods with the payment of a fixed residual.[20] The 26-week period can be prorated in some circumstances. Importantly, this is where the WGA broke from the pattern. The WGA side letter requires that for literary material written on or after May 2, 2010, the writer would be paid two percent (2%) of imputed "accountable receipts."[21] Accountable receipts in the WGA agreement is the term of art meaning worldwide distributor's gross receipts. The imputed figures would result in a fixed residual for the writers of $400 for a half-hour program and $800 for an hour program.

The third phase occurs after the expiration of the year following the free streaming window. If the distributor wishes to continue use of the program, the unions must be paid a percentage of gross receipts that is then distributed to the covered talent.

It must be noted that the complexity of this formula is an example of the classic quandary of the negotiation of mature collective bargaining agreements. This likely represents an effort on the part of the unions and employers to find agreement by compromise, addressing concerns of the party across the table, but not capitulating. The formula also reflects the shared concern about the difficulties facing dramatic television.

b. Reuse of New Media Programs

As noted above, new media programs are divided into two categories, derivative and original, and the union agreements anticipate three types of use: consumer paid, ad supported, and use in traditional media.

1. Derivative New Media Programs

In all the new media agreements there is a period of use that is included in the original compensation for both consumer paid (26 weeks) and ad supported (13 weeks).

For ad supported use, after the 13-week period, there is a second phase similar to the structure for television programs detailed above. A fixed residual is paid for each of two 26-week periods. Then, after the expiration of the potential periods of use detailed above, the

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20 A fixed residual in the context of the industry guild agreements is a residual that is based on a static amount or at least a static formula—but not based on a percentage of the distributor's gross receipts. In each of these agreements, the static formula is three percent (3%) of a residual base for each covered individual. The residual base is determined by the existing formulas in the Basic and Television Agreements governed, in addition, by the type of program exhibited.

21 *See supra* note 17, WGA Sideletter at 8.

formulas for both types of use move to a percentage of gross receipts.

When derivative new media programs are used in traditional media, the Basic or Television Agreements apply, as appropriate. However, for free television, there is a formula based on a prorated amount of a contractual fixed residual.

2. Original New Media Programs

In general, for original new media programs, there are no new media residuals required by the agreements. This is one of the cornerstones of SAG's objection to the pattern deal. The roadblock that SAG will face as it continues to negotiate is that, while residuals are critical to performers as they survive the inevitable ups and downs of their career, those payments are equally important to other talent. It may be difficult to argue that performers are unique in this regard.

In the case of original new media programs produced for more than $25,000 per minute, consumer paid use is paid at six percent (6%) of distributor's gross receipts distributed to the talent after a 26-week period of free exploitation.

As in the case of derivative new media programs, use in traditional media requires payment according to the terms of the Basic or Television Agreement, except for the pro-ration of free television residuals.

D. Sunset Clauses

The unions each approached the sunset clauses differently, but the underlying principle was the same. A deal covering these elements is necessary because the new media world is moving so quickly. But the unions and the industry must be positioned to adjust their thinking in the next contract round.

E. Data Sharing

The requirement to share data is an element of each union agreement, and is a corollary to the sunset clause. In order to be prepared and knowledgeable, the unions wanted to make sure that they would have access to real information about the economic drivers of the new media environment.

F. Clips

The reuse of clips in new media was a relatively simple issue for the DGA and WGA. The discussion focused on clip fees, circumstances under which the fee would be owed, how much the fee would be, and refining the definition of promotional use.

For the actors, this issue is critical and complex. The current agreement requires consent for the use, and bargaining on the compensation for the use. The employers argue that the current system is burdensome and unrealistic in a YouTube world. Reuse of performances recorded after the effective date of the contract remains an unresolved issue in both the AFTRA and SAG deals.

IV. Conclusion

Shortly after this article was completed the AMPTP reached a deal with the IATSE based on the structure outlined above. At press time, it appeared that SAG would seek strike authorization. Whether or not such an authorization vote occurs and passes, it is hoped that the AMPTP and SAG will return to the table and reach an agreement as soon as possible.

Sallie Weaver is currently available as an independent consultant on entertainment labor agreements. Previously she served at Screen Actors Guild as Deputy National Executive Director leading the Contracts division. That division was tasked with negotiation, administration and enforcement of all of SAG's agreements. She sat as Chief Negotiator or second chair during her tenure for each of SAG's major collective bargaining agreements. During her tenure at SAG, Sallie was privileged to work closely, on a variety of collaborative projects, with other U.S. unions and guilds in the entertainment industry and the English-speaking actors' unions globally. She is admitted to practice in New York and California. *The author thanks Linnie Wheeless for her editorial assistance.*

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PROFILE: Josh Gruenberg

By Donta Pride

Josh Gruenberg, the founder and managing partner of the Law Offices of Joshua Gruenberg in San Diego, is easily described as disciplined, hard-working and dedicated. Mr. Gruenberg, a champion for plaintiffs' rights since 1992, is a tireless competitor, with a "never say quit" attitude. Whether he is advocating for his clients in the courtroom, fighting through back surgery to become a competitive cyclist, or just "catching air" while snowboarding with his sons, one thing is for certain: Josh Gruenberg is going to give everything, every time.

Long before Mr. Gruenberg decided to practice law, he began to develop the tenacity and competitive spirit that helps his thriving law practice today. At the age of eighteen, Mr. Gruenberg, a young wiry kid from Hollywood, began rowing competitively. As a member of San Diego State University's rowing team, Mr. Gruenberg was an intricate part of his team's success. In what has proven to be true Josh Gruenberg fashion, his crew battled some of the biggest names in rowing—including Harvard and Yale—and gained national recognition for its performances. Mr. Gruenberg's crew became comfortable in its role as underdog and blossomed into the apparent David to the more renowned schools' Goliaths. But aside from "giant-killing," Mr. Gruenberg's rowing experience taught him at least one valuable life lessons: through hard work, he could accomplish anything.

Mr. Gruenberg maintained his rowing career for over twenty years, rowing with the San Diego Rowing Club. His hard work and competitive drive kept him competing and winning national championships and international regattas until 2004, when a herniated disc and back surgery sidelined him from the sport. In order to rehabilitate after surgery and return to the sport he loved, he began cycling. He jumped in head first and picked up the sport with an unmatched vigor. In his first year as a cyclist, Mr. Gruenberg competed in, and won, all three legs of his division in the San Diego Omnium (an annual three-day stage race). Not only did he accomplish the seemingly impossible task of beating cyclists with much more experience, but he did it in just over a year.

Mr. Gruenberg's athletic escapades provide an effective context to understand his burgeoning practice and legal career. The spirit and drive that wills a man with herniated discs and past back-surgeries to train for hours on end, bent-over on a bicycle, translates well to his practice as a solo practitioner.

To those familiar with Mr. Gruenberg's tenacity, it comes as no surprise that in January 1993, just a few weeks after he was admitted to the California Bar, he started his own law practice. He had clerked for a year and a half for a solo practitioner, Mr. Dale Hilmen, who continued to give Mr. Gruenberg work during the start-up of his own practice. In his first year as a "managing partner," Mr. Gruenberg realized that developing his young practice was going to be an uphill battle. Making just $12 to $15 an hour for the work he received from Mr. Hilmen, it was difficult for Mr. Gruenberg to cover his overhead, let alone turn a profit. Luckily, Mr. Hilmen allowed Mr. Gruenberg office space rent-free for his first three months of practice, and for only $300 per month for his next three months. This bit of help was enough to get Mr. Gruenberg on his way.

Although he only grossed $18,000 in his first full year of practice, Mr. Gruenberg knew not to focus on the money. He believed that "if you work hard and you're good at what you do, then the money will come." One look at his nicely appointed office—which he now owns—in the "well-to-do" Bankers Hill community of San Diego, and it is obvious that Mr. Gruenberg's principled belief rang true. According to Mr. Gruenberg, in the infancy of his practice, aside from the work he received from Dale Hilmen, he focused mainly on "door law": anything that came through his door was the type of law that he practiced. Driven by his desire to gain respect and develop a reputation as a "hard-nosed and tenacious" litigator, Mr. Gruenberg took ten cases to trial in his first few years. As he took on many different types of cases, he began to get a feel for what he was good at, and what he enjoyed.

Mr. Gruenberg's transition from practicing "door law" to specializing in serious personal injury cases, business litigation and employment matters was fueled by his belief in " 'deep and narrow,' as opposed to 'far and wide.' " His first employment case was a favor for a neighbor who was terminated from a trendy clothing store after she became pregnant. In true Josh Gruenberg fashion, the case was aggressively litigated and his neighbor's rights were vindicated. His second employment matter was a case referred by a friend. A woman who was terminated from a grocery store after sixteen years of service and replaced by a male employee, came into Mr. Gruenberg's office distraught and upset. Mr. Gruenberg filed suit and obtained a mid-six-figure settlement for his client. The tremendous feeling of accomplishment he received from these cases fueled his desire to take on more employment matters. "It became clear to me very early in my career that representing the rights of employees felt right and made me feel good about what I was doing."

As Mr. Gruenberg's employment caseload grew, his reputation as an employment lawyer grew along with it. Soon he was taking cases against Fortune 500 companies that had Harvard-educated lawyers and millions of dollars to expend on defense costs. But unbeknownst to these multi-national companies and their counsel, Mr. Gruenberg still carried his "slingshot" from his rowing days at San Diego State. While he admits to sometimes suffering losses to the employment defense bar, his meteoric rise in the plaintiffs' bar continued because he took his rowing coach's words to heart: "You learn a lot more about yourself from defeat than from victory." Learning from defeats along the way, Mr. Gruenberg kept his nose to the grindstone and built a successful practice.

Through his involvement in the San Diego County Bar Association, Consumer Attorneys of San Diego, American Association for Justice (formerly American Trial Lawyers Association), and Consumer Attorneys of California, (formerly California Trial Lawyers' Association), Mr. Gruenberg was able to network with other attorneys and put his practice on display. His colleagues noticed his hard work, dedication and competency. In 2008, he was selected as a California Super Lawyer. In 2004, he received the Outstanding Trial Lawyer Award from Consumer Attorneys of San Diego for his work in *Haist v. Rohr, Inc.*[1] In 2000 and 2005, he was awarded the Consumer Attorneys of California's President's Award for his efforts at defeating anti-consumer initiatives.

While Mr. Gruenberg loves the flexibility of running his own firm (which allows family vacations to Mammoth and Wednesday morning bike rides from 8 a.m. to 1:30 p.m.), he warns that it does not come without increased responsibility. He currently has a payroll of four employees who depend on him to produce favorable results in his cases. He comments, "It can be really stressful and quite a rollercoaster when you have people relying on you in a contingency practice." With only two secretaries in fifteen years of practice, Mr. Gruenberg has proved that he is someone his employees can depend on. When asked for advice to give those thinking of starting their own firm, Mr. Gruenberg counsels: "Find an area of law you enjoy and can be proud of doing." Mr. Gruenberg has found his area, and he loves every minute of it. Commenting on his work, he reflects: "I feel really lucky to do what I do. I love my staff and enjoy the relationships I've made with my colleagues here in San Diego."

From an 18-year-old rower to a 40-something cyclist, Super Lawyer, father of three, and dedicated husband, Mr. Gruenberg has shown that, through hard-work, dedication, discipline and tenacity, all is possible. Now if he could only keep up with his sons on his snowboard!

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1 *See* 2004 Cal. App. Unpub. LEXIS 7504 (Aug. 13, 2004).

CASE NOTES

DISCRIMINATION/HARASSMENT/ RETALIATION

Dominguez v. Washington Mutual Bank, 168 Cal. App. 4th 714 (Nov. 21, 2008).

A California Court of Appeal reversed an award of summary judgment granted to an employer and co-worker on claims of sexual orientation discrimination, harassment and retaliation under the Fair Employment and Housing Act ("FEHA") based on the continuing violation doctrine, but upheld summary adjudication of the plaintiff's punitive damages claim and plaintiff's retaliation claim against her coworker.

Yoko Dominguez ("Dominguez") began working for Washington Mutual Bank ("WaMu") as a temporary employee in March 2002. Within two weeks, it became known that Dominguez was a lesbian, and one of her co-workers, Javier Gutierrez ("Gutierrez"), began making crude and offensive comments relating to her sexual orientation. After Dominguez complained to a supervisor, Gutierrez stopped making the comments, but he began to interfere with her work by throwing balls of paper that jammed her work equipment, blocking her access to work areas with boxes, and submitting mail to her at the last minute, which forced her to revise her work output reports. In May 2002, Dominguez again complained to a WaMu supervisor about Gutierrez's behavior, including another offensive comment she overheard him make about her sexual orientation. Over the next four months, Dominguez complained about Gutierrez to WaMu supervisors at least twelve times, but Gutierrez's behavior continued. In August 2002, Dominguez, who was described by one supervisor as an "excellent worker with a great attitude," was encouraged to apply for a permanent position. Two days later, Dominguez was fired by the same supervisors to whom she had reported Gutierrez's conduct, allegedly because she was frequently late to work.

On August 8, 2003, Dominguez filed a complaint of sexual orientation discrimination, harassment and retaliation with the California Department of Fair Employment and Housing ("DFEH"), which issued her an immediate right to sue letter.

WaMu's and Gutierrez's motions for summary judgment were granted by the trial court on the grounds that Dominguez's DFEH complaint was not filed within the one-year statute of limitations period under the FEHA. The trial court found that Gutierrez stopped making offensive comments in May 2002, and that his behavior toward Dominguez after that date was too unrelated to the prior comments to extend the one-year limitations period under the continuing violation doctrine. The trial court also found that Dominguez's tardiness was a legitimate, nondiscriminatory reason for WaMu to terminate her.

The court of appeal rejected the trial court's findings and held that Dominguez's DFEH complaint was timely because she had established a continuing violation under the FEHA. A continuing violation exists under the FEHA if (1) the conduct occurring within the limitations period is similar in kind to the conduct that falls outside the period; (2) the conduct was reasonably frequent; and (3) it had not yet acquired a degree of permanence. Under this test, the court of appeal found that Gutierrez's non-verbal conduct toward Dominguez after May 2002 "was just another way for Gutierrez to harass Dominguez about her sexual orientation without expressly saying so" and, thus, was sufficiently similar in kind to his conduct before May 2002 to meet the first prong of the continuing violation doctrine. Dominguez also established a triable issue of fact relating to the second prong of the doctrine, since she claimed that Gutierrez's harassing comments and conduct occurred on an almost daily basis. Finally, since WaMu's argument about permanency focused solely on whether the conduct had stopped by May 2002—an argument that was rejected by the court of appeal—triable issues of fact existed on the third prong of the continuing violation doctrine as well. Since Gutierrez's inappropriate conduct continued throughout Dominguez's employment, the court found that her August 8, 2003 DFEH complaint was timely.

The court of appeal also rejected WaMu's and Gutierrez's argument that the conduct complained of did not rise to the level of severe or pervasive harassment, finding that Gutierrez's remarks were abusive and hostile, and that he thereafter engaged in a daily, or near-daily, campaign of interference with Dominguez's work. Based on the numerous complaints Dominguez made to her supervisors, the court also rejected WaMu's argument that it did not have notice of Dominguez's complaints. The court further rejected WaMu's argument that it had a legitimate, nondiscriminatory reason to terminate Dominguez, finding that factual disputes existed about the reasons for her tardiness. For example, Dominguez claimed that changes to her schedule made it appear that she was late on some occasions when she was not, and that on the few occasions when she admitted to being late, it was caused by sleeplessness related to Gutierrez's conduct.

The court of appeal did uphold the trial court's grant of summary adjudication on Dominguez's punitive damages claim against WaMu. The appellate court found that because there was no evidence that the employees to whom Dominguez complained were WaMu's managing agents, summary adjudication was appropriate. The court also found that summary adjudication was proper on the retaliation claim against Gutierrez, since an individual employee cannot be liable for retaliation under the FEHA.

References. For more on prohibitions against sexual orientation discrimination in the FEHA, see Wilcox, *California Employment Law*, § 41.36[2][d]. For more on the timeliness of a DFEH complaint and continuing violations under the FEHA, see Wilcox, *California Employment Law*, § 42.23[2].

WRONGFUL TERMINATION

Warwick v. University of the Pacific, 2008 U.S. Dist. LEXIS 97207 (Nov. 21, 2008).

The United States District Court for the Northern District of California granted defendants' motion to dismiss plaintiff's complaint, because the First Amendment prohibition against government intrusions into free speech is not a proper basis for a claim of wrongful termination in violation of public policy against a private employer. Further, the court concluded that the plaintiff failed to properly plead any other legitimate basis for her wrongful termination claims.

Joanne Warwick was employed as an attorney in the California Parole Advocacy Program, which was administered by University of the Pacific ("UOP") pursuant to a contract with the California Department of Corrections and Rehabilitation ("CDCR"). Warwick's complaint, which named UOP and CDCR as defendants, alleged that she was terminated in retaliation for voicing concerns that the program was violating the law in serving its parolee clients. Specifically, the complaint asserted claims against UOP for wrongful termination in violation of the public policies embodied in the First Amendment, California's whistleblower protection statutes and other statutory sources. UOP and CDCR moved to dismiss Warwick's complaint.

With respect to Warwick's First Amendment theory, although the court noted that "California courts of appeal are somewhat divided as to whether *Tameny*[1] free speech claims are cognizable against private employers," the court found that such a claim was not cognizable here, especially because Warwick's speech was on-duty and directly related to her job. The court next found that the other sources of public policy alleged by Warwick, including California's whistleblower protection statutes, were insufficiently pled. Accordingly, UOP's motion to dismiss was granted, and the complaint was dismissed with leave to amend "to allege that UOP violated a public policy applicable to it as a private employer."

Likewise, CDCR's motion to dismiss was granted. Because CDCR is a public entity, no *Tameny* claim could lie against it. Moreover, Warwick had failed to allege she made a written claim to the CDCR, a required prerequisite to filing suit against a public entity under the California Tort Claims Act.[2] Again, Warwick was granted leave to amend her claims against CDCR.

References. See Wilcox, *California Employment Law*, Chapter 60, "Liability for Wrongful Termination and Discipline."

LABOR

Helmsley-Spear Inc. v. Fishman, 2008 N.Y. LEXIS 3402, 185 L.R.R.M. 2488 (Nov. 24, 2008).

A New York Court of Appeals upheld a state law nuisance claim against the Service Employees International Union local (the "Union") for noisy demonstrations, finding that the claim was not preempted by the National Labor Relations Act ("NLRA" or the "Act").

Helmsley-Spear, Inc., managing agent for the Empire State Building, retained a private firm, Copstat Security ("Copstat"), to provide security at the New York office building. The Union began its attempt to organize Copstat employees in 2005, and engaged in eighteen days of leafletting outside the building's entrances between November 2005 and February 2006. On each occasion, the Union announced its presence by drumming on plastic containers, metal pots and tin pans for up to forty-five minutes.

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[1] *See* Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167 (1980).

[2] Cal. Gov't Code § 810 et seq.

Helmsley-Spear and several of its tenants filed a state court nuisance action against the Union. A supreme court of New York issued a temporary restraining order and a preliminary injunction to enjoin the Union's "banging racket" outside the Empire State Building. The injunction prohibited the Union's "noise pollution" but did not interfere with their right to leafleting activity. The Appellate Division of the Supreme Court of New York subsequently vacated the injunction, finding that the state law nuisance action was preempted by federal labor law. Helmsley-Spear appealed.

The New York Court of Appeals found that the state nuisance law was not preempted by the NLRA. The court noted the United States Supreme Court's decision in *San Diego Building Trades Council v. Garmon*[3] and its finding that "state regulations and causes of action are presumptively preempted if they concern conduct that is actually or arguably either prohibited or protected by the NLRA." The court of appeals found that the state court injunction against the Union prohibited Union members from engaging in noise pollution, conduct not protected under the NLRA. In short, the court was not persuaded that Congress intended to preempt states from protecting its citizens from "obnoxious conduct." Accordingly, the state law nuisance claim against the Union was upheld.

References. See Lareau, *National Labor Relations Act: Law and Practice*, Chapter 36, "Preemption."

Cibao Meat Prods., Inc. v. NLRB, 547 F.3d 336 (2nd Cir. Nov. 4, 2008).

A New York meat processing company violated the NLRA when it unilaterally stopped making fringe benefit contributions required by a collective bargaining agreement ("CBA"), despite the expiration of the contract and a merger of union benefit funds.

Cibao Meat Products Inc.'s ("Cibao") production workers, mechanics and drivers had been represented by UNITE Local 169 (the "Union") since 2000. The Union and Cibao signed a CBA, effective from March 2001 to February 28, 2005, which required Cibao to make monthly contributions to a multiemployer pension fund and to a health and welfare fund. Cibao ceased making contributions to the funds upon the expiration of the CBA in February 2005. On April 1, 2005, the two funds merged with two Union funds, but fund officials notified Cibao that its duty to make monthly payments remained in effect.

Bargaining for a new contract continued until February 2006, when Cibao announced that bargaining had reached an impasse. The Union denied that an impasse occurred and filed an unfair labor practice charge, alleging that Cibao violated its duty under the NLRA to bargain in good faith. The NLRB found that bargaining had never reached an impasse and concluded that Cibao violated section 8(a)(5) of the Act by unilaterally ending benefit contributions. Cibao petitioned the Second Circuit Court of Appeals for review of the Board's ruling.

Cibao did not present its "impasse" argument to the Second Circuit. Rather, the company argued that the Board allows for unilateral changes prior to an impasse in the event of "economic business emergencies." Cibao contended that it had a dispute with the Union's auditor during late 2004 that constituted such an emergency. The Second Circuit rejected this argument, noting that Cibao continued to make benefit payments until February 28, 2005 - four months after the dispute.

Alternatively, Cibao argued that the Labor-Management Relations Act ("LMRA")[4] prohibited the company from continuing its fringe benefits contributions after the contract expired. Specifically, Cibao cited section 302(c)(5)(B) of the LMRA,[5] which states that should an employer make payments to union-management trust funds for the benefit of employees, "the detailed basis on which such payments are to be made" must be specified in a written agreement with the employer. The court likewise rejected this defense, holding that an expired CBA satisfies the written-agreement requirement of Section 302(c)(5)(B). For these reasons, the Second Circuit enforced the Board's unfair labor practice findings against the company.

References. See *Labor and Employment Law*, Chapter 12, "Duty to Bargain."

United Food and Commercial Workers Union, Local 4 (Safeway, Inc.), 353 NLRB No. 47 (Oct. 31, 2008).

The NLRB found that the United Food and Commercial Workers Local 4 ("Local 4" or the "Union") violated its duty of fair representation when it failed to provide

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3 359 U.S. 236 (1950).

4 29 U.S.C. § 141 et seq.

5 *Id.* at § 186(c)(5)(B).

independently verified financial information to a nonmember who objected to paying for nonrepresentational expenses and challenged the Union's calculation of her agency fees.

Local 4 represents workers at a Whitefish, Montana Safeway store. Pamela Barrett began working at the store in April 2007, joined the Union, and signed a form authorizing payroll deduction of Union dues. Local 4 mailed Barrett a notice soon after, informing her that if she opted *not* to join the Union, she would pay an amount equal to Union dues in agency fees. The notice also informed Barrett that if she elected not to join the Union, she could object to paying agency fees for any Union expenditure not related to representational purposes, such as collective bargaining, contract administration and grievance adjustment, and also explained procedures for challenging the Union's calculation of the amount of reduced agency fees.

Barrett subsequently wrote to the Union, stating that she no longer wished to be a member and objecting to paying fees for nonrepresentational purposes. She requested a verified financial disclosure of Union expenditures. The Union acknowledged her resignation and stated that Barrett's agency fee would amount to $31.50 per month, ninety-five percent (95%) of full Union dues. Barrett objected, stating that she thought the fee was too high, and again requesting a verified financial disclosure explaining the basis for the calculation. The Union responded, contending that as a small local, they did not have many nonchargeable expenses. The Union later provided Barrett with a document titled "Independent Accountant's Report," stating that the accountant had reviewed Local 4's expenditure statement, that the information in the report was based solely on materials provided by the Union, and that the review was "substantially less in scope than an audit."

Barrett filed an unfair labor practice charge against Local 4, and the General Counsel for the National Labor Relations Board ("NLRB" or the "Board") issued a complaint against the Union. The issue before the Administrative Law Judge ("ALJ") was whether the financial information provided by the Union was sufficiently verified. The ALJ held that the Union's financial disclosure was sufficiently verified, such that the Union did not violate its duty of fair representation.

The Board subsequently found otherwise, pointing to its own decision in *California Saw & Knife Works*.[6] There, the Board held that "once an employee objects to paying dues for nonrepresentational activities and seeks a reduction in fees for such activities, the employee must be apprised of the percentage of the reduction, the basis for the calculation and the right to challenge the union's figures."[7] *California Saw* further held that the expenditure information provided must be "sufficient to enable the objector to determine whether to challenge the dues-reduction calculations."[8] In *KGW Radio,*[9] the Board stated that the expenditure information must be audited within the generally accepted meaning of the term, with the auditor independently verifying that the claimed expenditures were actually made, rather than simply relying on the representations of the Union, as was the case here. Alternatively, a local union may "presume that its allocation of chargeable and nonchargeable expenses is the same as that of its international affiliate."[10] Local 4 did not rely on the presumption as a defense. Consequently, the Board found that the Union violated its duty of fair representation by failing to provide Barrett with independently verified financial information to support their calculations.

References. See *Labor and Employment Law*, § 25.08, "Scope of Obligation to Pay Union Dues and Fees."

WAGE AND HOUR

Sullivan v. Kelly Services, Inc., 2008 U.S. Dist. LEXIS 91608 (N.D. Cal. Nov. 12, 2008).

The United States District Court for the Northern District of California granted summary judgment to the employer on a former temporary staffing employee's putative class action claim that the employer violated California labor law by failing to immediately pay her when the temporary assignment ended. The court also held that Senate Bill 940, effective January 1, 2009, clarified, but did not change, existing law; as such, the new law could be applied to previous transactions, and it expressly sanctioned as timely the employer's payment of the plaintiff's wages the week after the week worked.

Catherine Sullivan began working in February 2006 for temporary services agency Kelly Services, Inc. ("Kelly"), which employs individuals and places them in various work assignments for its clients.

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6 320 N.L.R.B. 224 (1995).

7 Citing *id.* at 233.

8 Citing *id.* at 239.

9 327 N.L.R.B. 474 (1999).

10 *Id.* at 477 n.15.

Unless the employee or Kelly takes affirmative steps to terminate the employment relationship, the employee remains a Kelly employee whether or not he or she is actively working in an assignment. Also, Sullivan signed an agreement in which she acknowledged her understanding that she was a "Kelly employee" and not an employee of any of Kelly's customers.

From approximately May through August 11, 2006, Sullivan worked in an assignment for Kelly's customer, Managed Health Network ("MHN"). Four days after her assignment ended, and before Kelly's regularly scheduled payday, Sullivan asked Kelly for her final paycheck related to her work performed for MHN. Kelly told Sullivan she was still a Kelly employee, and on August 16, 2006, Kelly's regular pay date, Sullivan collected her paycheck for the conclusion of her MHN work. Weeks later, Sullivan interviewed twice for an assignment with Kelly's client Wells Fargo Bank, but eventually declined its offer of a temporary position in August or September of 2006. Kelly did not tell Sullivan her employment would terminate after the MHN assignment, and Sullivan never resigned from Kelly.

In April 2007, Sullivan filed a class action complaint in state court, alleging violations of California Labor Code sections 201 and 202. These laws generally require employers to pay employees' earned and unpaid wages immediately upon discharge, layoff or resignation. Sullivan also brought a claim alleging unfair business practices under California Business and Professions Code section 17200. Kelly succeeded in removing the case to federal court.

First, Sullivan claimed that she was entitled, under California Labor Code Section 203, to recover her continued wages as a penalty for Kelly's failure to pay her wages under Section 201, which states that "[i]f an employer discharges an employee, the wages earned and unpaid at the time of the discharge are due and payable immediately." Sullivan argued that the end of her MHN assignment amounted to a "discharge" such that Kelly was obliged to immediately pay her for that work.

The district court rejected both of Sullivan's arguments in support of this position. First, the court distinguished the California Supreme Court's recent decision in *Smith v. Superior Court*,[11] in which the Court concluded that "an employer effectuates a discharge within the contemplation of sections 201 and 203, not only when it fires an employee, but when it releases an employee upon the employee's completion of the particular job assignment or time duration for which he or she was hired."[12] The facts in *Smith*, according to the district court, were significantly different than in the present case. In *Smith*, the plaintiff was directly employed by L'Oreal to work as a hair model for one day at a show, and was "released" after that single day of work, but not paid by L'Oreal until over two months later. In contrast, Sullivan was not "released" from employment, but remained an employee of Kelly after the MHN assignment ended. In fact, she "remained an active Kelly employee by going on multiple job interviews for other temporary assignments" through Kelly. Sullivan did not complete her "job assignment or time duration for which she was hired," as required under *Smith*. Thus, the district court reasoned that Sullivan was not "dismissed" by Kelly when she finished her MHN tenure.

Second, the district court found Sullivan's efforts to avoid the retroactive application of Senate Bill 940, which would dispose of Sullivan's claim in favor of Kelly, "not persuasive." The court pointed out that this bill, effective January 1, 2009, was proposed in the wake of the *Smith* decision to clarify controversy surrounding Sullivan's very situation, *i.e.*, whether a temporary services employee is considered to be discharged after every temporary assignment ends. The bill, signed into law in July 2008 by Governor Schwarzenegger, provides as follows:

> [I]f an employee of a temporary services employer is assigned to work for a client, that employee's wages are due and payable no less frequently than weekly, regardless of when the assignment ends, and wages for work performed during any calendar week shall be due and payable not later than the regular payday of the following calendar week. A temporary services employer shall be deemed to have timely paid wages upon completion of an assignment if wages are paid in compliance with this subdivision.[13]

Because California statutes that change existing law cannot be applied retroactively, but clarifying statutes can be so applied, Sullivan urged the district court to find that the new law actually changed existing California law, largely by arguing about the legislative history of Sections 201 and 202. The court disagreed.

11 39 Cal. 4th 77 (2006).

12 *Id.* at 90.

13 Cal. Labor Code § 201.3.

Equally unavailing was Sullivan's reliance on a 1996 letter by the Division of Labor Standards Enforcement ("DLSE") as support for her argument that the new statute actually changed existing law. In the DLSE letter, the agency declined to confirm the following statement posited by an employer: "[I]f an employee's assignment ends, but the employee has not been terminated by the temporary service, remains on the temporary service's payroll, and is available for future assignments, that employee has *not* been terminated, and hence, may be paid for hours worked in accordance with the temporary service's regularly weekly payroll."

The court rejected that the DLSE letter was significant for two reasons. First, citing illustrative decisions, the district court noted that not only do California courts not defer to DLSE opinion letters, but they often dispute the DLSE's views. Further, the court distinguished the 1996 DLSE letter because it "did not directly address whether employees of temporary services agencies are considered terminated once they complete a job assignment even though they would still receive a weekly paycheck from the temporary employment agency."

Based on this analysis, the court found that Senate Bill 940 clarified existing law, as applied to Sullivan, and justified judgment for Kelly on Sullivan's first cause of action under Labor Code sections 201, 202 and 203.

The district court also dismissed Sullivan's second and third causes of action under Business and Professions Code section 17200 and Labor Code section 2699, respectively, because they were predicated solely on alleged violations of Labor Code sections 201, 202 and 203, which the court found did not occur.

References. For more on requirements in regards to timely payment of wages, see Wilcox, *California Employment Law*, § 4.01.

Sullivan v. Oracle Corporation, 547 F.3d 1177 (9th Cir. Nov. 6, 2008).

The Ninth Circuit Court of Appeals reversed the district court's grant of summary judgment to the employer on employees' overtime claims under California law based on its holding that the California Labor Code's overtime requirements apply to nonresidents of California who perform a complete day or complete week of work within California. The Ninth Circuit also held that California's Unfair Competition Law, Business & Profession Code section 17200, does not apply to allegedly unlawful behavior occurring outside of California that causes injury to nonresidents of California.

Plaintiffs, two Colorado residents and an Arizona resident, formerly worked at Oracle Corporation ("Oracle") as instructors who traveled to other states to train customers on using the company's software. Plaintiffs filed a class action in California state court, claiming that Oracle, a Delaware corporation with its principal place of business and headquarters in California, misclassified its instructors as teachers exempt from overtime compensation requirements in violation of both the Fair Labor Standards Act ("FLSA")[14] and the California Labor Code.

In particular, plaintiffs raised three claims. First, they asserted that Oracle instructors who resided in other states, but worked complete days within California, were entitled to overtime compensation under the California Labor Code, and that Oracle violated California law by failing to pay them overtime compensation in accordance with the California Labor Code section 510(a). Second, plaintiffs claimed that the same unlawful behavior that violated California Labor Code also violated California's Unfair Competition Law. Third, two of the plaintiffs alleged a different violation of Section 17200 predicated on violations of the FLSA, and based on nonpayment of overtime wages for work performed throughout the country.

The case was removed to the United States District Court for the Central District of California, which granted summary judgment in favor of Oracle on all of plaintiffs' claims. The district court concluded, among other things, that California's Labor Code did not apply to nonresidents of California who mainly work in other states, and that to hold otherwise would violate the Due Process Clause of the Fourteenth Amendment.

On appeal, the Ninth Circuit first analyzed plaintiffs' claim that under the California Labor Code, Oracle instructors who were nonresidents of California were entitled to overtime pay for a day's work when that work was performed entirely in California, and for a week's work when such work was performed entirely in California (though not for a day or week when only part of the work that day or week was performed in California). Resolution of this issue, according to the Ninth Circuit, required it to decide if California's overtime laws applied to nonresidents working in California and, if so, whether such application of the law violated the United States Constitution.

Oracle argued that Colorado's overtime laws should apply to the two Colorado-resident plaintiffs

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[14] 29 U.S.C. §§ 201–219.

performing work in California, and that the federal FLSA overtime rules should apply to the Arizona-resident plaintiff performing work in California, since Arizona has no state overtime law. However, the Ninth Circuit pointed out the presumption applicable in "every American jurisdiction" that the forum state's law supplies the applicable substantive rule. At the same time, the Ninth Circuit said Oracle could overcome that presumption by showing that applying a foreign state's law would further that state's interest. If Oracle made this showing, the Ninth Circuit must then "assess the competing substantive rules of law and apply the one which, as it bears upon the issue before the court, the court determines to be the more appropriate of the two." To facilitate this analysis, the Ninth Circuit explained that it must follow the forum state's choice-of-rules analysis—here, California's three-step choice-of-rules test set forth in *Washington Mutual Bank v. Superior Court.*[15]

Under the first step, the Ninth Circuit examined whether the overtime laws of California and Colorado (but not Arizona, since it had no overtime law) were "materially different," an analysis that included determining if each law was intended to apply to plaintiffs' situation. In particular, the Ninth Circuit studied California Labor Code section 510(a) and the Code of Colorado Regulations section 1103-1(4).

The Ninth Circuit found that the two laws contained material differences. California law requires overtime pay of 1.5 times regular pay for hours worked beyond 8 in a single day or 40 hours in one week, and for the first eight hours of work on the seventh day worked in a workweek. It also mandates double pay for hours worked beyond 12 in a day or 8 hours on the seventh day of any one workweek. In contrast, Colorado law requires 1.5 times regular pay for hours worked beyond 12 in a day or 40 in a week. Colorado's law lacks any double pay requirement or any overtime pay requirement for work on the seventh consecutive day.

Importantly, in reaching its conclusion that California and Colorado law materially differed, the court also found that California's overtime rules were intended to apply to work performed in California by nonresidents. The Ninth Circuit rejected Oracle's two arguments as to why the California Labor Code should not be extended to plaintiffs' work in California. Specifically, the Ninth Circuit disagreed that the California Supreme Court's decision in *Tidewater Marine Western, Inc. v. Bradshaw*[16] furnished support for an inference that a nonresident is not a "wage earner" under the Labor Code. The Ninth Circuit distinguished *Tidewater* as involving the separate question of whether the Labor Code applied to California residents working outside California. In any event, the Ninth Circuit said that *Tidewater* supported plaintiffs' position more than Oracle's, since it characterized as a close call the more attenuated situation of the Labor Code applying to an out-of-state employer's employees working temporarily during the workday within California. In the Ninth Circuit's view, if those facts presented a marginal case for California Labor Code coverage, then certainly the plaintiffs' facts were within the statute's coverage, since they involved Oracle as a California employer with employees coming into California to work for complete workdays and workweeks, not just temporarily during a workday.

The Ninth Circuit found equally unavailing Oracle's reliance on *Campbell v. Arco Marine, Inc*.[17] Oracle argued that the California appellate court in *Campbell* dismissed a sexual harassment claim under California's FEHA on the grounds that the plaintiff was not a California resident and only worked in the state on a limited basis. However, the Ninth Circuit said such dismissal was for a different, distinguishing reason—the wrongful conduct in *Campbell* occurred outside of California, while plaintiffs alleged wrongful acts in California.

Under the second step of California's three-part choice-of-rules analysis, the Ninth Circuit examined "what interest, if any, each state has in having its own law applied to the case." The Ninth Circuit readily found that California had a "clear interest in the economic welfare of its own residents who perform work in California, both in ensuring that they have work and that such work is fairly compensated" and also in "the effect compensation for nonresidents working in California will have on the compensation for California residents." The Ninth Circuit based this finding on the express language in California Labor Code section 90.5(a). The Ninth Circuit went on to reason that "[i]f a California employer may avoid the requirements of the state Labor Code by the simple expedient of hiring nonresidents, California residents will be substantially disadvantaged in the labor market by the cheaper labor that will thereby be made available to California employers."

The Ninth Circuit then examined Colorado's minimum wage statute, finding that while Colorado expressed the

15 24 Cal. 4th 906 (2001).

16 14 Cal. 4th 557 (1996).

17 42 Cal. App. 4th 1850 (1996).

same interests in its workers' welfare, its overtime regulations expressly limited their application to work performed within Colorado's geographic boundaries. Finally, the Ninth Circuit noted that Arizona had expressed no interest in the wages paid to its residents because it enacted no state overtime laws.

In any event, the Ninth Circuit went on to reason that even if Colorado and Arizona were interested in the wages paid their residents working in California, their interest would align with application of the California Labor Code, given its relatively more generous payment requirements. As the Ninth Circuit reasoned: "We fail to see any interest Colorado or Arizona have in ensuring that their residents are paid less when working in California than California residents who perform the same work."

Under the three-step choice-of-rules test, the court normally would determine which state's interests would be "more impaired" if its laws were not applied and select that state's laws for application. However, the Ninth Circuit never reached this step, because it is predicated on the existence of countervailing states' interests, and the court had concluded in the second step that Colorado and Arizona lacked any interest in applying their laws to plaintiffs' California work. Thus, there was no state interest in contention with California's interests.

Having applied the California choice-of-rules three-part test, the Ninth Circuit set forth its conclusion: California had a strong interest in applying its labor code to the work of non-residents within California, and there was no foreign state interest in contention with that interest. With no extant competing law to displace application of the substantive law of the forum state, the Ninth Circuit concluded that California's Labor Code applied to plaintiffs' suit.

Moving on to plaintiffs' first claim for unpaid overtime under the California Labor Code, the Ninth Circuit next addressed—and rejected—Oracle's constitutional argument that application of the California Labor Code to nonresidents working in California violated both the Fourteenth Amendment's Due Process Clause and the "Dormant" Commerce Clause.

With respect to the Due Process Clause, the Ninth Circuit cited *Phillips Petroleum Co. v. Shutts*,[18] as establishing the test for ensuring that a state's substantive laws may be applied without violating the Due Process Clause. Under the *Shutts* test, the state's laws may be applied if there is a "significant contact or significant aggregation of contacts" with the state. These contacts create the state's interests in the case and ensure that applying such state's law "is neither arbitrary nor fundamentally unfair." Oracle's principal place of business and headquarters were in the state, its decisions relative to classifying plaintiffs as exempt were made in the state, and the plaintiffs' work at issue occurred within the state. These contacts, according to the Ninth Circuit, were consistent with the Due Process Clause.

The Ninth Circuit next turned to the "Dormant" Commerce Clause, a doctrine which requires that the burden on interstate commerce of a local law not be excessive relative to the law's intended benefits. The Ninth Circuit applied the standard set forth in *Pike v. Bruce Church, Inc.*: If a statute "regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[19] Noting that California's Labor Code applies equally to work performed in the state by residents or non-residents, the Ninth Circuit concluded that California treated nonresidents "equally with its own," rendering any Dormant Commerce Clause argument implausible.

The Ninth Circuit moved on to address plaintiffs' second claim on appeal: that Oracle simultaneously violated California Business & Profession Code section 17200 when it violated the California Labor Code by failing to pay overtime. The district court had dismissed this claim on summary judgment based on its earlier conclusion that there could be no predicate violation of the California Labor Code because such law did not apply to nonresidents working in California. The Ninth Circuit held just the opposite: because it found that California's Labor Code applied, it held that Section 17200 also applied.

Finally, the Ninth Circuit addressed the third claim brought under the FLSA by two of the plaintiffs, that Oracle's failure to pay overtime for work performed throughout the country violated Section 17200. The Ninth Circuit affirmed the district court's conclusion that Section 17200 did not apply to any FLSA overtime violations occurring outside of California because, based on the California court of appeal decision *Norwest Mortgage, Inc. v. Superior Court*,[20] Section 17200 does not have extraterritorial application.

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18 472 U.S. 797, 818 (1985).

19 397 U.S. 137, 142 (1970).

20 72 Cal. App. 4th 214 (1999).

As for any FLSA violations within California, because California's Labor Code sets forth more generous overtime provisions than the FLSA, any damages plaintiffs could recover under their third, Section 17200 claim for California-based FLSA violations would be encompassed within any damages they could recover under their second claim based on the California Labor Code. The Ninth Circuit expressly noted that if it was wrong on this point, the district Court could address the issue on remand.

ATTENTION Readers: A 50-state survey of minimum wage and overtime requirements is available on Lexis.com:

Legal > Area of Law—By Topic > Labor & Employment > Find Statutes & Regulations > View More Sources > Labor & Employment Multi-Jurisdictional Surveys with Analysis > State Minimum Wage Laws.

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BACK COVER PHOTOGRAPH

SONOMA COUNTY

Photograph courtesy of Sonoma County Library

The county seat fixed by the Legislature in 1850 was the town of Sonoma, site of the most northerly of the missions and home to the County's most prominent citizen: former General, then State Senator, Mariano Vallejo.

The first courthouse was an adobe building that the 1854 grand jury condemned as "unfit for a cattleshed." The ambitious residents of Santa Rosa solved that problem later that year by persuading the voters to relocate the county seat to their growing young city. Two public-spirited Santa Rosa residents promised to donate the land necessary for a new courthouse, as well as a public plaza if the voters chose Santa Rosa. Equally persuasive may have been a free Fourth of July barbeque hosted by Santa Rosa, to which all county voters were invited and which would be followed by a dance that lasted until daybreak.

The County built a courthouse in 1855 and expanded it in 1859. In the mid-1880s, it hired prominent architects A.A. Bennett and J.M. Curtis to design a grand courthouse in the popular Italianate fashion. It served only until 1906, when it was destroyed by the earthquake that shattered Santa Rosa as well as San Francisco.

The County moved quickly (remarkably so by today's standards) to rebuild. Plans for a much larger Beaux Arts courthouse were approved by 1907 and the building completed by 1910. It is shown in a postcard view, reprinted on the back cover. Shortly after its completion, a local historian proclaimed, "It is built for all time and the earthquake." In fact it lasted only slightly more than 50 years, when it was demolished in 1966 and replaced by a sprawling "government center" built on farmland at the edge of town.

Ray McDevitt

The photograph is from *Courthouses of California: An Illustrated History*.

Courthouses of California: An Illustrated History is a panoramic survey of the courthouses constructed in every county in California over the past 150 years. A large format, hardcover book, it is illustrated with hundreds of photographs and features essays by distinguished judges, architects and historians. It was edited by Ray McDevitt, a partner with the San Francisco office of Hanson Bridgett Marcus Vlahos & Rudy, LLP, and is published by the California Historical Society.