Plaintiff

The Magazine for
Northern California Plaintiffs' Attorneys

June 2015 issue

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THE MAGAZINE FOR NORTHERN CALIFORNIA PLAINTIFFS' ATTORNEYS

Plaintiff



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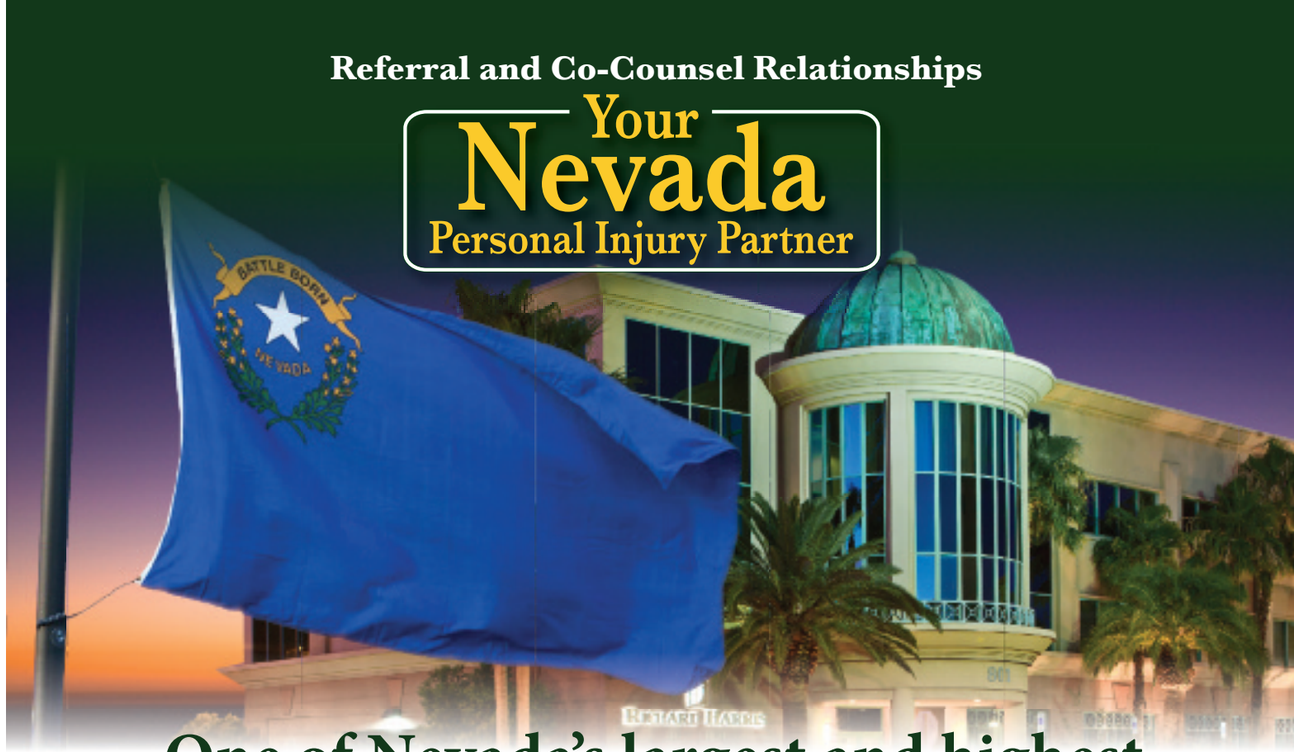
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California employees finally have paid sick leave

Understanding the myriad of new state and local regulations that impact Californians' sick leave

BY KARINE BOHBOT AND ELIZABETH RILES

On September 10, 2014, Governor Jerry Brown signed the Healthy Workplaces, Healthy Families Act of 2014 (AB1522), requiring that employers, public or private *and regardless of size*, permit employees to accrue paid sick time at the rate of at least one hour for every 30 hours worked. In doing so, California became the second state in the nation, after Connecticut, to mandate employers provide their employees, including part-time and temporary workers, paid sick leave.

What this means is that many employees who could not afford to take any unpaid sick days can now have the ability to take paid sick leave rather than infect their customers and co-workers with viruses and other illnesses. It also means that these same workers will be able to take paid time off to care for a sick child. This may not seem like much, but this is a big step forward for the health and safety of employees across the state.

A study done in 2012 by the National Institute for Occupational Safety and Heath found that workers with access to paid sick leave were 28 percent less likely overall to suffer nonfatal occupational injuries than workers without access to paid sick leave. (American Journal of Public Health, September 2012, "Paid Sick Leave and Nonfatal Occupational Injuries.")

There are some municipalities that have also instituted sick leave or that have already had paid sick leave in place. It is important to be familiar with these sick-leave regulations to be sure to protect all the rights of your client and/or potential clients.

California Healthy Workplaces; Healthy Families Act

Starting July 1, 2015, any individual employee is entitled to accrue sick leave if that individual works, in California, for *at least 30 days* within a year from the commencement of employment. This could mean that employees who live outside of California, but who travel into California and perform work for more than 30 days in a year, could be eligible for sick leave under the Act.

The Act makes a distinction between a cap on usage and accrual. It provides that an employer may cap an employee's *use* of paid sick leave to 24 hours or three days in each year and it gives the employer the option of limiting employees' total *accrual* of paid sick leave to 48 hours or six days, provided the employees' rights to accrue and use paid sick leave are not "otherwise limited." However, if the employer caps the *use* of sick leave at 24 hours per year, all other accrued, unused sick leave must carry over from year to year.

If an employer already has a paid sick-leave policy or paid time off policy, it is not required to do anything different, as long as the existing policy satisfies the Act's accrual, carry over and use requirements or provides at least 24 hours or three days of paid sick leave each year.

The Act allows the sick leave to be used for a variety of reasons including the care, treatment of existing health conditions of, preventive care for the employee or the employee's child, parent, spouse, registered domestic partner, grandparent, grandchild or sibling. The same group of "family members" covered by California Labor Code section 233. Sick time can also be used for employees who are the victims of domestic violence, sexual assault or stalking. New employees can start to use their accrued sick days on the 90th day of employment. To use the sick leave, employees must provide reasonable advance notice if the need to use paid sick leave is foreseeable. Otherwise, the employee must provide notice as soon as practicable.

Employers may set a reasonable minimum increment, not to exceed two hours, for the use of paid sick leave and must provide an employee with written notice, on the itemized wage statement or in a separate writing, of the amount of paid sick leave available.

Finally, employers must display a poster about the Act and a willful violation of the posting requirement will subject the employer to a civil penalty of not more than $100 for each offense.

There are some exceptions to the Act related to employees working under a valid collective bargaining agreement, employees in the construction industry, in-home supportive services and certain flight deck or cabin crew members.

The Act prohibits an employer from denying an employee the right to use accrued sick days, discharging, threatening to discharge, demoting, suspending, or otherwise discriminating against the employee for using or attempting to use accrued sick days or filing a complaint alleging a violation of the Act, cooperating in an investigation or prosecution of an alleged violation of the Act, or opposing a policy, practice or act prohibited by the Act. More importantly, the Act subjects an

Paid Sick Leave, continued from Previous Page

employer to a rebuttable presumption of unlawful retaliation if the employee was denied the right to use accrued sick days, discharged, threatened with discharge, demoted, suspended, or otherwise discriminated against within 30 days of the employee's filing a complaint with the Labor Commission or alleging a violation or cooperating in an investigation or prosecution of an alleged violation of the Act, or opposing a policy, practice or act prohibited by the Act.

Violations of the act are enforced by the Labor Commissioner through complaints by the employee or civil action by the Labor Commissioner or the Attorney General.

Oakland's Measure FF

A City of Oakland Ballot Measure FF, which went into effect on March 2, 2015, includes a new and more favorable paid sick leave policy for employees with businesses in Oakland.

As of March 2, 2015, Oakland-based employers must provide their employees with up to *nine days* (72 hours) of paid sick leave which may be accrued by eligible employees at the rate of one hour of paid leave for every 30 hours worked. Now one distinction, however, is that employers who normally employ *fewer than 10 employees per week* (including any employees working outside of Oakland) need only permit up to *40 hours of accrued paid sick leave*. Unused paid sick leave similarly carries over from year to year, but is subject to the applicable accrual cap. Unused time does not need to be paid out at time of separation from employment.

Employees are eligible to accrue paid sick leave if they work at least two hours per week in the City of Oakland and are not exempt from state minimum wage requirements. Also, unlike the new State of California paid sick-leave law that goes into effect July 1, 2015, there is no basis under Measure FF to grant paid sick leave at the beginning of each calendar year. The Measure, however, provides that employers who already make available sufficient paid time off to their employees to meet the Measure's requirements do not need to provide additional time off.

Accrual and eligibility for use of paid sick leave begins immediately on the March 2, 2015, effective date for existing employees. Employees hired after March 2 begin accruing paid sick leave upon hire, but they are not eligible to use any accrued time until they reach 90 days of employment.

Paid sick leave can be used not only for an employee's own illness or medical diagnosis or treatment, but also to aid or care for the employee's child, parent, legal guardian or ward, sibling, grandparent, grandchild, and spouse or registered domestic partner or other designated person who is ill, injured, or requires medical diagnosis or treatment. Under the Measure, the familial relationship extends not only to biological relationships, but also relationships resulting from adoption, step-relationships, and foster care relationships. "Child" includes a child of a domestic partner and a child of a person standing in loco parentis.

The Oakland Measure mirrors the San Francisco Paid Sick Leave Ordinance in permitting a covered employee without a spouse or registered domestic partner to designate one person for whom the employee may use paid sick leave to provide aid or care. An employee must be permitted to make such a designation no later than the date on which the employee first accrues an hour of paid sick leave (i.e., the employee has worked 30 hours after paid sick leave begins to accrue). The employee has 10 work days in which to make the designation. Annually thereafter, an employee with no spouse or registered domestic partner must be provided a 10-day window to make a designation, including the opportunity to change any previous designation.

An employer may require an employee to provide reasonable advance notice of the need to use paid sick leave. The Measure, however, does not define what constitutes "reasonable notice." The Measure clearly provides that an employee cannot be required to find a replacement worker when taking paid sick leave. Finally, an employer may take only reasonable measures to verify or document that an employee's use of paid sick leave is lawful, and may not require an employee to incur expenses in excess of five dollars to show his or her eligibility for such paid leave.

Every employer must give written notification of employees' rights under the Measure to each current eligible employee and to each new employee at the time of hire. The written notice must be in all languages spoken by more than 10 percent of the eligible employees and must be posted prominently in areas of each work site where it can be seen by all employees. The Measure authorizes the City Administrator to prepare sample notices and an employer's use of such notices will constitute compliance with the Measure's requirements.

Under the Measure, employers also must maintain for at least three years for each covered employee a record of his or her name, hours worked, pay rate, paid sick leave accrual and usage, and, if applicable, service charge collection and distribution. Employers must provide an employee with a copy of the records relating to the employee upon the employee's reasonable request.

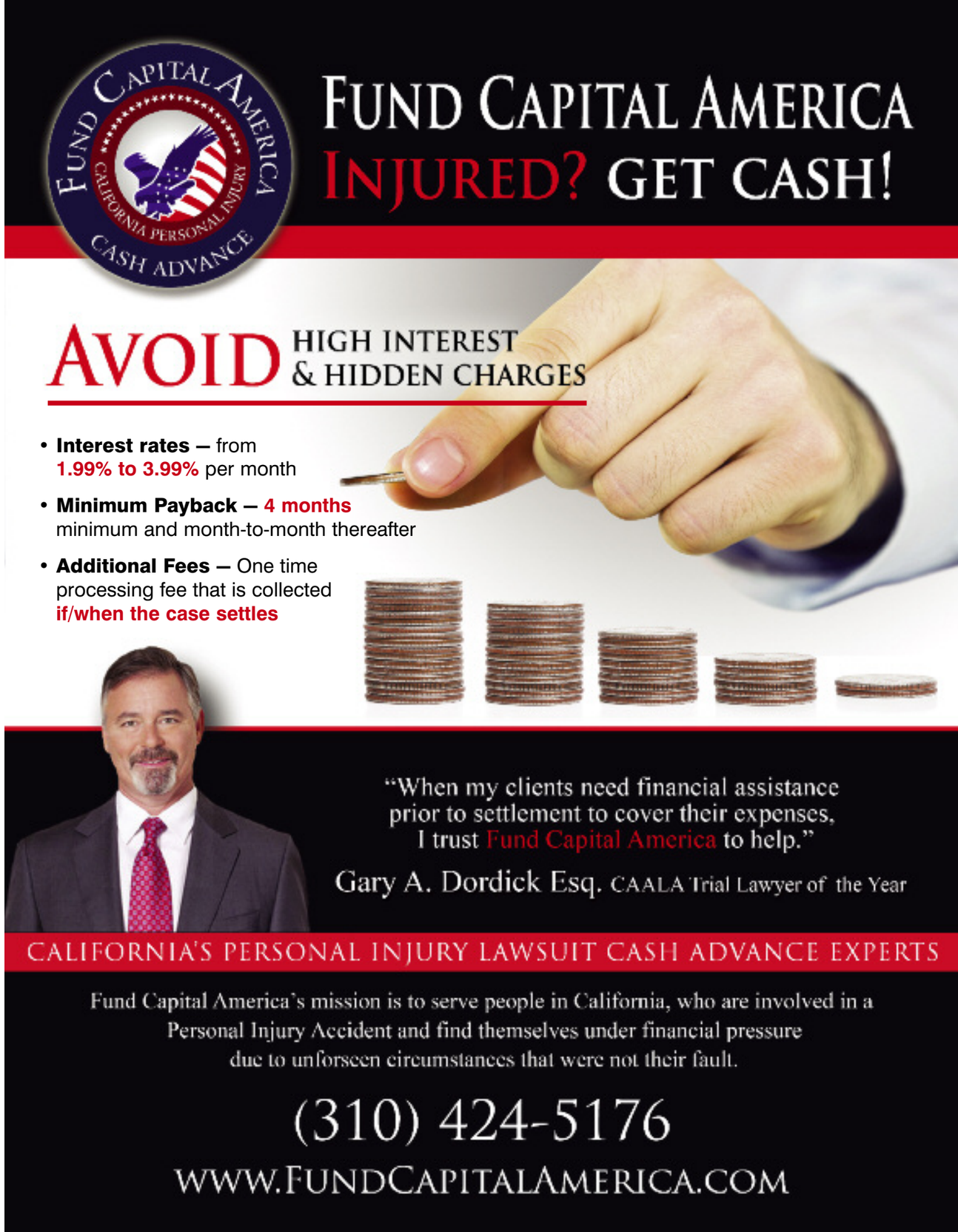
Measure FF authorizes aggrieved employees to seek damages and injunctive relief in court. A successful employee, but not a successful employer, is also entitled to recover reasonable attorneys' fees and costs.

San Francisco regulations – the 56-hour rule

Beginning February 5, 2007, all employers must provide paid sick leave to each employee who performs work in San Francisco. [Chapter 12W of the San Francisco Administrative Code]. An employee is any person who performs work, including on a part-time or temporary basis. An employer is any person, as defined in Section 18 of the California Labor Code, who directly or indirectly employs or exercises control over the wages, hours, or working conditions of an employee.

*See **Paid Sick Leave**, Page 10*

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For employees working for an employer on or before February 5, 2007, paid sick leave begins to accrue on that date. For employees hired by an employer after February 5, 2007, paid sick leave begins to accrue 90 calendar days after the employee's first day of work. For every 30 hours worked, an employee accrues one hour of paid sick leave. Paid sick leave accrues only in hour-unit increments, not in fractions of an hour. For a non-exempt employee, overtime hours worked are counted toward the employee's paid sick leave accrual. For an exempt employee, paid sick leave accrues based upon a 40-hour work week, unless there is evidence that the exempt employee's regular work week is less than 40 hours.

The Sick Leave Ordinance covers all employees who are "employed within the geographic boundaries of the City by an employer." This undefined provision caused a great deal of consternation among employers based outside San Francisco (in the Bay Area and across the country) whose employees occasionally perform work in San Francisco. The general rule is that "[e]mployees who perform work in San Francisco on an occasional basis are covered by the ordinance only if they perform 56 or more hours of work in San Francisco within a calendar year." The 56-hour rule applies to employees who: work from their homes in San Francisco, who are present in San Francisco for the sole purpose of attending or presenting at a convention or conference, and who travel within and stop in San Francisco for work such as to make pickups or deliveries.

Therefore, the rule effectively requires employers outside San Francisco to track the "San Francisco hours worked" of their employees, unless the employer chooses to have paid sick leave accrue for its employees for all hours worked. If the employer distinguishes between San Francisco hours worked and non-San Francisco hours worked, the employer need not pay for sick leave taken, however, unless the employee meets or exceeds the 56-hour threshold for San Francisco hours worked.

For employees of employers for which fewer than 10 persons (including full-time, part-time, and temporary employees) work for compensation during a given week, there is a cap of 40 hours of accrued paid sick leave. For employees of other employers, there is a cap of 72 hours of accrued paid sick leave. OLSE will calculate business size for the current calendar year based upon the average number of persons who worked for compensation per week during the preceding calendar year. The business size of new employers for the current calendar year will be determined based upon "the average number of persons per week who worked for compensation for the first 90 days after its first employee(s) began work." Use of the phrase "the current calendar year" indicates that determination of business size for the purpose of the Sick Leave Ordinance must occur annually.

San Francisco, sick leave carries over

An employee's accrued paid sick leave does not expire; it carries over from year to year.

For employees hired after February 5, 2007, who are separated from employment before completing the 90-day period, and are rehired by the same employer within one year of separation, "the prior period of employment counts towards the 90 calendar day eligibility period. The 90 calendar days do not have to be continuous or consecutive or completed within the same year." Employees who were separated after becoming eligible for paid sick leave, and are rehired within one year of separation by the same employer, are not required to satisfy the 90-day eligibility period, but they are not entitled to reinstatement of their previously accrued paid sick leave hours.

If an employer has a paid leave policy, such as a paid time off policy, that makes available to employees an amount of paid leave that may be used for the same purposes as paid sick leave under the law and that is sufficient to meet the accrual requirements under the law, the employer is not required to provide additional paid sick leave.

All or any portion of the applicable requirements shall not apply to employees covered by a bona fide collective bargaining agreement to the extent that the law's requirements are expressly waived in the collective bargaining agreement in clear and unambiguous terms.

An employee may use paid sick leave not only when he or she is ill, injured, or for the purpose of receiving medical care, treatment, or diagnosis, but also to aid or care for a family member or designated person (discussed below) when they are ill, injured, or receiving medical care, treatment, or diagnosis.

If an employee has no spouse or registered domestic partner, the employee may designate one person for whom the employee may use paid sick leave to provide aid or care. Employers must offer the opportunity to make a designation no later than 30 work hours after the date paid sick leave begins to accrue. The employee has 10 work days to make this designation. Thereafter, employers must offer the opportunity to make or change the designation on an annual basis, again with a window of 10 work days for the employee to make the designation.

Under the Sick Leave Ordinance, an employer may require employees to give "reasonable notification" of an absence from work for which paid sick leave is or will be used. The law does not define "reasonable notification." The OLSE rule states that requiring advance notification of a pre-scheduled or foreseeable absence from work (such as a doctor's appointment or ongoing injury or illness) for which paid sick leave will be used is "in principle reasonable and thus presumptively lawful." The rule cautions, however, that advance notification may be unreasonable in a particular case "because the time required for the advance notification is excessive or the method required for providing advance notification is unnecessarily burdensome."

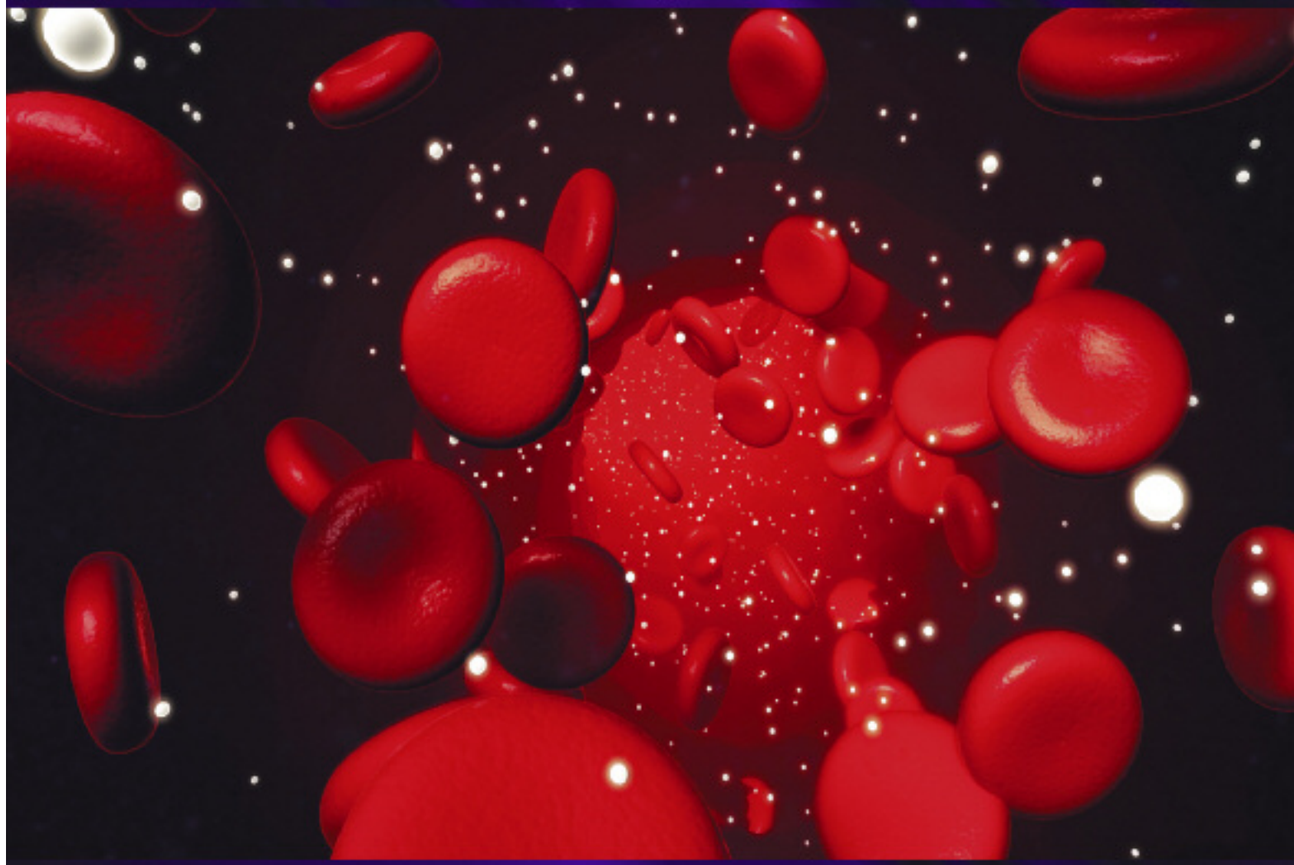
As with the California regulations, employers must post a notice, in a location where employees can read it easily, informing employees of their rights.

*See **Paid Sick Leave**, Page 12*

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Paid Sick Leave, continued from Page 10

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Employers must retain records documenting hours worked by employees and paid sick leave taken by employees, for a period of four years, and shall allow OLSE access to such records.

Employees who assert their rights to receive paid sick leave are protected from retaliation.

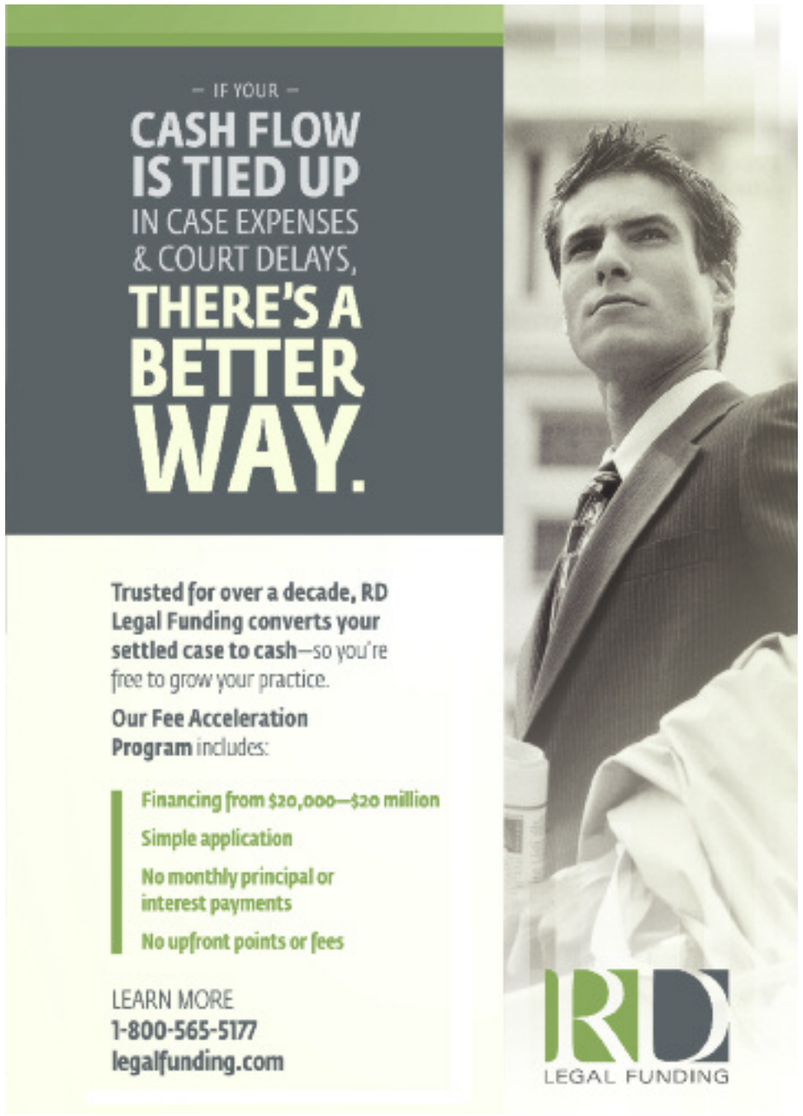
Employees who are denied their rights under the law may file a complaint with OLSE.

So with all that said, it's clear changes in sick-leave regulations have provided employees with additional benefits needed to care for themselves and their families, without losing income for exercising that need as the situation had been before these regulations took effect. But what one does need to remember is where you work. Does the city you work in provide for more paid sick-leave benefits than does the State? Does the employer know of the differences if they exist? Do you as an employer know what you are now required to do relative to providing your employees with paid sick leave? As an employer, you can work with your payroll company to implement these changes and have the calculations made and maintained by them so as to avoid any additional unnecessary work yourself. But whether you are employee or employer, read and know about your rights and obligations under these relatively new regulations.



Elizabeth Riles and Karine Bohbot

Karine Bohbot and Elizabeth Riles are partners in the Law Office of Bohbot & Riles and have been practicing employment litigation for the last 17 years. They have successfully tried numerous cases throughout the Bay Area and Southern California. Contact Bohbot & Riles directly at (510) 273-3111 or e-mail either Ms Bohbot at kbohbot@strikebacklaw.com or Elizabeth Riles at eriles@strikebacklaw.com.



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Using unpaid intern labor? It'll cost you

What you need to know about asserting claims for interns, apprentices, trainees, students, and volunteers

By Bryan Schwartz and Adetunji Olude

Unpaid intern wage lawsuits are springing up in federal and state courts across the country. But, you ask, aren't they compensated with academic credit or training they need to pursue their careers? Interns, apprentices, trainees, students, and volunteers may be entitled to wages and employee benefits under certain circumstances. Interns and volunteers also have new rights to prosecute discrimination claims in California.

Why now?

Employer compliance with wage and hour laws concerning students, interns, apprentices, trainees, or volunteers is a hot topic in employment law. One reason for the upsurge of litigation on behalf of these groups is the explosion of industries for which individuals not classified as employees are integral to business operations. For example, unpaid interns who blogged for an Internet-based publisher successfully moved for conditional certification and court-authorized notice in *Mark v. Gawker Media LLC,* for their work "writing, researching, editing, lodging stories and multimedia content, promoting content on social sites, moderating the comments forum and managing the community of Gawker users." *Id*., 2014 WL 4058417 at *1 (S.D.N.Y. Aug. 15, 2014). Entertainment companies are notorious for using unpaid labor. See, e.g., *Grant v. Warner Music Grp. Corp.*, 2014 WL 1918602 at *1 (S.D.N.Y. May 13, 2014) (student "intern" worked unpaid, five days a week from 9:30 a.m. until 8:00 p.m. on routine office tasks, such as answering telephones, making photocopies, making deliveries, preparing coffee, and organizing and cleaning the office). Beware – small law firms are also not immune to unpaid intern lawsuits. See *Griffiths v. Parker*, 2014 WL 2095205 at *1 (S.D. Fla. May 20, 2014) (partial summary judgment to unpaid worker who performed some secretarial duties for sole practitioner).

An increasing number of courts are recognizing that there is no categorical exemption for persons participating in an internship from the minimum wage and overtime requirements. A common myth in employment law is that students, interns, apprentices, trainees, or volunteers can always be employed as free labor in exchange for credit or training. Courts have debunked this myth recently, however, holding that …if it looks like a duck, swims like a duck, and quacks like a duck, then it probably is a duck (or employee, as the case may be).

Indicators of wage and hour violations regarding unpaid workers

If you are contacted by an intern, student, trainee, apprentice, or volunteer, screen for the following tell-tale signs that they may be due unpaid wages:

- ***Unpaid labor.*** If the individual is engaged in work that looks indistinguishable from that of an employee, investigate his or her duties and responsibilities compared with those of the paid employees in the workforce. The duties of a genuine intern or apprentice should be distinguishable from those of the day-to-day duties of an employee, and should be dominated by educational or training elements.
- ***Labor on behalf of for-profit entities.*** Whether an unpaid intern is entitled to wages can depend greatly on whether her or his labor is for a non-profit or a for-profit business. Businesses operate to generate revenues, and work designed to increase a company's revenues should presumably be compensated because it generates an immediate benefit for the employer.
- ***Lack of educational benefit.*** Where you see "students" in specific industries working on activities that have little or no relevance to their field, or little applicability for licensure in that field (e.g., cosmetology "students" cleaning, doing laundry, and performing receptionist services for the cosmetology "school" salons where they work getting hours needed for licensure), opportunities may be ripe for claims that unpaid students, interns, apprentices, volunteers, or trainees should be receiving at least minimum wages and other employee benefits.
- ***Inadequate supervision.*** Interns and trainees may be deemed exempt from wage and hour laws where there is evidence that the internship *hinders* the employer's operations, taking away from the otherwise profitable labor of paid employees to provide training for an unpaid trainee. On the other hand, where you see trainees working largely independently, with little supervision or oversight, arguments that the trainee is a hindrance rather than an advantage to the employer become untenable, giving rise to claims for unpaid wages.
- ***Working overtime.*** Where a trainee works in excess of eight hours a day or 40 hours a week, it is likely that the student, intern, or trainee is entitled to wages. After all, an appropriately structured internship would account not only for training time, but also allow the student time in a classroom and/or studying in addition to the training.
- ***Missed or interrupted meal and rest breaks.*** Interns that are not provided uninterrupted meal breaks and do not have rest breaks made available, as required under California labor laws, also may assert claims. An employer who causes students or interns to work in conditions that would be unlawful if they were employees is likely prioritizing its

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own immediate advantage over the education or training due a trainee, resulting in them working long hours without sufficient breaks.

• ***Unreimbursed expenses.*** Under Labor Code section 2802, an employer must reimburse its workers for their out-of-pocket costs paid in service of the employer's business. Few students, interns, volunteers, apprentices, or trainees, however, understand which costs should be reimbursed, and which they can be required to incur as part of their education and training. If the costs are incurred for items that are used to serve the employer's interests, they may be reimbursable.

Factors to determine if interns, apprentices, trainees, students, and volunteers have wage claims

In *Walling v. Portland Terminal* (1947) 330 U.S. 148, 151-153, the Supreme Court distinguished training time that is not compensable and employment that is compensable under the FLSA. The Court discussed unpaid non-employee trainees, defined as such because they work for *their own* advantage on another's property, to serve *only their own* interest, aided and instructed by someone else.

The United States District Court for the Northern District of California applied *Portland Terminal* in discussing whether trainees are employees entitled to California minimum wages. See, e.g., *Harris v. Vector Mktg. Corp.* (N.D. Cal. 2010) 753 F. Supp. 2d 996. In *Harris,* the court certified a class of trainees asserting wage claims against Vector Marketing (Cutco), a for-profit cutlery sales business. (*Id.* at 1004.) Referencing a persuasive Labor Commissioner (Division of Labor Standards Enforcement – DLSE) Opinion Letter that embraced the *Portland Terminal*/DOL six factor test, the Court outlined factors including:

- The training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school;
- The training is for the benefit of the trainee;
- The trainees do not displace regular employees, but work under close observation;
- The employer that provides the training derives no immediate advantage from the activities of the trainees and on occasion his operations may actually be impeded;
- The trainees are not necessarily entitled to a job at the completion of the training period; and
- The employer and the trainees understand that the trainees are not entitled to wages for the time spent in training.

(*Id.* at 1006 (discussing DLSE Opinion Letter April 7, 2010) available online at http://www.dir.ca.gov/dlse/opinions/2010-04-07.pdf). See also U.S. Dep't of Labor (DOL) Wage and Hour Division Fact Sheet # 71, Internship Programs Under The Fair Labor Standards Act, April 2010 (http://www.dol.gov/whd/regs/compliance/whdfs71.htm); DOL Opinion Letter Fair Labor Standards Act (FLSA), 1996 WL 1031777 (1996). Interns, students, trainees, apprentices, or volunteers should prevail where it is sufficiently pled that their training is largely not for their own benefit, that trainees do not have close observation by licensed professionals or instructors, and that the employer derives significant, immediate advantage from the activities of the trainees.

Courts are split on the correct application of the *Portland Terminal* factors. While *Portland Terminal* and the DOL seem to require that all of the six factors apply, some courts instead look to the "totality of the circumstances," balancing the *Portland Terminal* factors to determine holistically if the employer derives the greater benefit from the relationship with the trainee. (See, e.g., *Solis v. Laurelbrook Sanitarium & Sch., Inc.* (6th Cir. 2011) 642 F.3d 518, 527 (vocational program where student was the primary beneficiary of work performed did not create an employer/employee relationship); *Reich v. Parker Fire Protection District* (10th Cir. 1993) 992 F.2d 1023, 1026 (firefighter trainees were not "employees" within meaning of the FLSA based on totality of circumstances; "determination should not turn on the presence or absence of one factor in the *Portland Terminal* equation"); *Hallisey v. America Online, Inc.*, 2006 U.S. Dist. LEXIS 12964 (S.D.N.Y. 2006) (AOL derived a "direct and substantial economic benefit" from the volunteers' labor, so volunteers should be compensated).)

Some courts outright reject this "primary beneficiary" simplification. (See, e.g., *Glatt v. Fox Searchlight Pictures, Inc.* (S.D.N.Y. 2013) 293 F.R.D. 516, 532 (the "primary beneficiary" test has no support in *Portland Terminal*; "a 'primary beneficiary' test is subjective and unpredictable;" the Supreme Court only "created a narrow exception to an expansive definition" of employee).) In the *Glatt* case, the unpaid interns received some benefits from their internships, including an understanding of how a production office works, but those benefits were incidental to working in the office like any other employee. A training program must provide something beyond on-the-job training to qualify as a bona fide program exempt from wage requirements.

The *Harris* case suggests that, in the 9th Circuit, businesses using interns, students, trainees, apprentices, or volunteers will only be exempt from paying wages if they meet all six *Portland Terminal* factors, and do not meet an "economic realities" test for employment. (*Harris,* 753 F. Supp. 2d. at 1006.)

Public policy arguments against free labor

Interns, students, trainees, apprentices, or volunteers should also argue that entities which profit or gain competitive advantage using unpaid labor engage in unfair competition, under Business & Professions Code section 17200 and otherwise. The payment of substandard or no wages unlawfully gives employers deriving income from trainee services an advantage over their competitors. (*Tony & Susan Alamo Foundation v. Sec'y of Labor* (1985) 471 U.S. 290, 299. "Employers should not derive direct and substantial benefits from their trainees' work without having to pay for it.") (*Hallisey*, 2006 U.S. Dist. LEXIS 12964 at *21-22.)

Moreover, free labor is bad for the workforce generally – beyond just the unpaid workers. Where interns, students, trainees, apprentices, or volunteers provide the bulk of the labor for the employer, or where a limited number of paid employees

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oversee the labor of large groups of interns, the unpaid workers likely displace paid positions. (See, e.g., *id.* at *29.) If the employer could not operate its business as needed even without the contribution of the unpaid workers, then they are likely not exempt.

For example, in *Solis,* the court found that the employer was sufficiently staffed such that if the students did not perform work, the staff members could continue to provide the same services there without interruption. (*Id.,* 642 F.3d at 530-531.) On the other hand, if a business would have to hire additional employees or pay existing employees but for the tasks performed by the free laborers, then the business should be paying wages. In *Marshall v. Baptist Hosp., Inc.* (M.D.Tenn. 1979) 473 F.Supp. 465 (M.D.Tenn. 1979), *rev'd on other grounds*, 668 F.2d 234, 236 (6th Cir. 1981), the students in an X-ray technician vocational program were employees because they performed the same tasks for paying customers repeatedly (well after they had learned how to perform them), and regular employees were displaced by the use of the trainees.

New anti-discrimination protections for unpaid workers

The Legislature has taken note that unpaid work is an increasingly common phenomenon among both young people seeking to enter the workforce and others compelled to change fields as the result of economic conditions. In September 2014, California State Assembly member Nancy Skinner's Assembly Bill 1443 became new law aimed at eliminating harassment of unpaid workers. Effective January 2015, the California's Fair Employment Housing Act (FEHA), Government Code section 12940 definition of protected groups includes interns, volunteers, and apprentices. FEHA now expressly prohibits an employer from engaging in unlawful discrimination against any person in the selection, termination, or training of interns, volunteers and apprentices, and outlaws unlawful harassment of an unpaid intern or volunteer. The bill goes beyond inclusion of apprentices, interns, and volunteers with a catch-all phrase for a person in another "limited duration program to provide unpaid work experience for that person."

Conclusion

Our firm is currently involved in three class-action wage and hour cases on behalf of unpaid workers in California and Nevada for wages and related claims related to services they performed for paying customers during their enrollment in cosmetology "schools." (See *Jaqueline Benjamin v. B&H Education, Inc., et al.*, Case No. 13-cv-4993 (N.D. Cal.); *Maria Ford v. Gary Yasuda, et al.*, Case No. 13-cv-1961 (C.D. Cal.); *Claire Gerard, et al. v. John Paul Mitchell Systems, et al.*, Case No. 14-cv-4999 (C.D. Cal.).) For more information regarding these cases or advice on how to navigate litigation on behalf of interns, apprentices, trainees, students, or volunteers, contact us at Bryan Schwartz Law (www.bryanschwartzlaw.com).


Schwartz

Bryan Schwartz has an Oakland-based firm representing workers in class, collective, and individual actions in wage/hour, discrimination, whistleblower, and unique federal and public employee claims. He practices in state and federal trial and appeals courts, in arbitration, and before a variety of administrative agencies. Schwartz has been elected to chair the State Bar of California's Labor & Employment Law Section, is an Executive Board member for the California Employment Lawyers Association (CELA), and is on the Board of Directors of the Legal Aid Society – Employment Law Center. He is President of FAIR (www.fair-foundation.org), an organization dedicated to providing fellowships to enter plaintiffs' employment law for diverse new lawyers and law students. Schwartz is an amicus writer for CELA, having authored or co-authored the organization's Supreme Court briefs in Brinker, Kirby, and Duran. *He can be contacted at Bryan@BryanSchwartzLaw.com.*


Olude

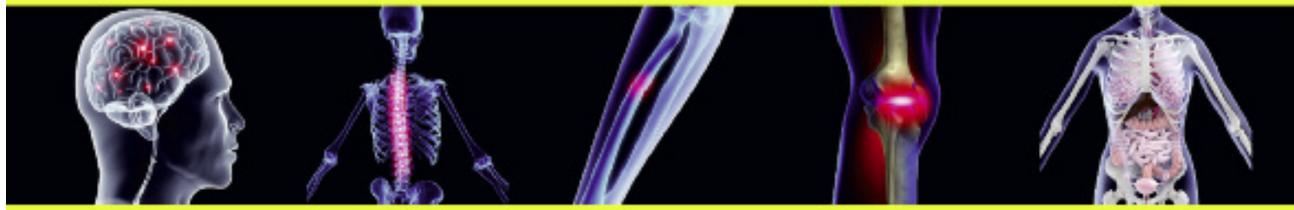
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The equal-opportunity bully

The problem of workplace bullying often has no immediate remedy

By Katie Debski, Kathryn Bain and Laura Mazza

The voice at the other end of the line is tremulous, distraught. "I think I have a claim for…. hostile work environment? Maybe wrongful termination?" The potential client, Joe, starts at the beginning, describing his 10-year career with a non-profit organization. He was passionate about the nonprofit's cause and devoted himself to his job, working long hours including nights and weekends. He was promoted several times, well-liked by coworkers and the community he served. Then six months ago, everything changed.

His manager retired and was replaced by a new hire from outside the agency. The new manager was Cruella Davis, who Joe had known in graduate school and who happened to be an old friend of the Executive Director. Joe opposed Cruella's hiring based on her grating personality, but once the E.D. made the decision to hire, Joe quietly resigned himself to the new management style.

Cruella seemed less than enthusiastic to work with Joe. Two weeks after she joined the organization, Cruella called Joe into her office and gave him a written warning about attendance, advising him to be at his desk no later than 9:00 a.m. each morning (though he typically worked a 9:30 a.m. to 6:00 p.m. schedule and often worked from home on evenings and weekends). She asked other employees to monitor Joe for compliance.

A month later, Joe had his first formal performance review under Cruella. She ranked him as "Needs Improvement," criticizing Joe's work ethic and interactions with certain community leaders with whom he had a long-standing positive relationship. In the review meeting, she referred to him as "moronic" and said he was one of the worst employees she had ever had the "unfortunate job of supervising."

Joe, unsurprisingly, felt attacked and insulted, so he went to the E.D. for guidance. The E.D. refused to take sides, urging Joe to speak with Cruella and "work things out."

Joe tried to meet with Cruella, but she repeatedly cancelled at the last minute, and in one instance even sent him an email saying she had "better things to do than listen to your pathetic whining." When she finally met with Joe, she raised her voice and berated him, telling him that he needed to "stop being an idiot," that he "wasn't going to win a popularity contest," and that it was "only a matter of time until he would be out of here." Cruella began excluding Joe from key meetings with other teams which specifically impacted his projects, and he overheard her joking about him on multiple occasions with his co-workers. She gave him an assignment with a deadline that was impossible to meet, and when he was predictably unable to complete it, she called him a "failure" in front of two of his co-workers, and asked "how did someone like you ever get this job in the first place?" Then, at an organization-wide meeting, Cruella publicly criticized Joe and his handling of a recent public relations issue. She asked other employees to take an anonymous survey regarding "better ways to handle that situation." After the meeting, several co-workers told Joe privately that they disagreed with Cruella's comments, that she was being a "jerk" to him and singling him out, but they all agreed there was nothing he could do since Cruella and the E.D. were friends.

Joe was deeply upset and humiliated and started having trouble sleeping. He went to see a physician for anxiety and depression, and was prescribed medication. He didn't tell anyone at the organization about his symptoms because he feared Cruella might retaliate against him. Last week, Cruella called Joe into her office and told him that he "was no longer a good fit" and was being terminated. He was being replaced by a junior employee who Joe had trained two years ago. Joe was devastated.

Bullying is a frequent complaint

We get calls from employees like "Joe" almost every day, oftentimes with even more severe examples of bullying behavior, including name-calling, verbal abuse, and the frequent use of screaming or yelling. Joe was unfairly treated and badly damaged. He watched a successful decade-long-career go down the drain – all because of a workplace bully.

We talk to Joe and learn that he is a white heterosexual male, in his late 30s, born in the United States. He doesn't fall into any protected category under the law (e.g., race, color, sex, sexual orientation, national origin, age, etc.). The company was never put on notice of his recent mental health issues. He didn't take a medical leave and never filed a worker's compensation claim. He's not a whistleblower, nor has he engaged in any other protected activity for which the company could arguably have retaliated against him.

Equal-opportunity harassment

Joe is not the victim of sexual harassment or physical assault – just plain old "equal opportunity harassment." He is shocked when we tell him there is no legal recourse. We explain the concept of at-will employment, which can be a bitter pill to swallow under these circumstances. Cruella's treatment of Joe may have been abusive, grossly unfair, unmerited, and traumatic, but it was not illegal.

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Why aren't there legal protections for victims of workplace bullying? That is a question that has been increasingly examined in the United States since at least 2000, when Suffolk University law professor David Yamada wrote a seminal law review article on the topic in which he examined various potential common law and statutory remedies that might apply and concluded that existing law failed to play an adequate compensatory and preventive role in severe bullying situations.[1]

Yamada covers a growing body of research showing the negative health effects (and business impact) of workplace bullying. He has updated the research over time and, as of today, it is estimated that up to 37 percent of Americans have been victims of workplace bullying at some point during their careers. The health ramifications are severe, including psychological effects like depression, stress, loss of sleep (and resulting fatigue), mood swings, feelings of shame, guilt, embarrassment and low self-esteem, even Post-Traumatic-Stress-Disorder, with physical effects ranging from stress headaches, high blood pressure, reduced immunity to infection, and digestive problems. There are also bottom-line ramifications for employers that tolerate abusive work environments, including tangible costs (e.g., increase in medical and workers' compensation claims and costs of defending lawsuits), and less tangible ones (e.g., opportunity costs). Soon after Yamada published his article, he authored a model "Healthy Workplace Bill" (HWB) that was designed to combat the problem, but as yet, has failed to be adopted by any state in its entirety.

Despite lackluster legislative support for the full HWB, Yamada's work along with others such as Dr. Ruth Namie and Dr. Gary Namie (psychologists who founded the Workplace Bullying Institute [WBI] in the late 1990's) have spurred a campaign in the U.S. against workplace bullying and a movement to get the HWB passed into law all around the nation. The history and status of this movement is summarized on the WBI's Website (www.workplacebullying.org) and also the site for the HWB itself, including text of the model bill (www.healthyworkplacebill.org). The problem of workplace bullying has been featured prominently in the national press, including National Public Radio, the New York Times, the Wall Street Journal, and Time Magazine. Some commentators have noted the irony that bullying is widely prohibited throughout our schools, but that adult workers have absolutely no protection.

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Legislation can't get legs

The anti-workplace-bullying initiative has enjoyed bipartisan support, but to date, only limited success in getting any relevant legislation – much less the full HWB – passed. In 2003, California made the nation's first attempt at anti-bullying legislation (AB 1582), but the bill died in committee with no hearing date scheduled. In 2014, there was a second attempt in California by Assemblywoman Lorena Gonzalez (D-San Diego) who authored AB2053. During the legislative hearings on the bill, Gonzalez and other proponents explained that abusive work environments are unfortunately a growing epidemic in the United States. The bill had bipartisan support and the legislative findings were that workplace bullying could "reduce productivity and morale, which may lead to higher absenteeism rates, frequent turnover, and even increases in workers' compensation claims," estimating the financial cost of workplace abuse to be as much as $200 billion annually.[2]

AB2053 was ultimately signed into law on September 9, 2014, by Governor Jerry Brown and went into effect on January 1, 2015. The new provision omits much of the model HWB, and it doesn't apply to smaller entities with fewer than 50 employees. Instead, it simply amends California Government Code section12950.1 (part of the Fair Employment and Housing Act, "FEHA"), to expand existing training and education requirements for supervisory employees. Previously, for employers with 50 or more employees, the section required two hours of mandatory sexual harassment training, but the new law includes the prevention of "abusive conduct" as a component of this program.

The act defines "abusive conduct" to mean: "conduct of an employer or employee in the workplace, with malice, that a reasonable person would find hostile, offensive and unrelated to an employer's legitimate business interests. Abusive conduct may include repeated infliction of verbal abuse, such as the use of derogatory remarks, insults, and epithets, verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating, or the gratuitous sabotage or undermining of a person's work performance." The provision further specifies that "[a] single act shall not constitute abusive conduct, unless especially severe or egregious."

Twenty-eight other states have introduced some version of the HWB, but only three states currently have some portion of it, or a related bill, signed into law (Tennessee, California and Utah)[3]. In California, the bill's proponents explained that they wanted to take a "measured approach to the problem" and thus, drafted the law with the purpose of preventing bullying by educating managers "rather than being punitive." They also coupled it with sexual harassment training, finding that "it is not uncommon for the two problems to occur hand in hand."[4]

Where are the teeth?

In fact, Cal. Government Code section 12950.1(d) specifically states that a failure to provide the training will *not give rise to a cause of action* for sexual harassment (nor "abusive treatment" for that matter): "[A] claim that the training and education required by this section did not reach a particular individual or individuals shall not in and of itself result in the liability of any employer to any present or former employee or applicant in any action alleging sexual harassment. Conversely, an employer's compliance with this section does not insulate the employer from liability for sexual harassment of any current or former employee or applicant."

Although the statute is clear that a failure to train cannot be offered as the sole proof of harassment or discrimination, that does not eliminate a lack of training as a factor to be considered in those cases. For example, in a recent unpublished case, *Alejandro Madera Chavez v. Southern California Edison Company*, 2015 Cal.App.Unpub. LEXIS 760, the plaintiff appealed after trial, claiming that the employer's failure to train on sexual harassment under section 12950.1 should have been considered in determining whether it was liable on his failure to prevent a sexual harassment claim under section 12940(k). While the appellate court considered this argument, it ultimately found that there was insufficient evidence presented at trial to establish the training had not in fact occurred. The court then reiterated that even if plaintiff had established a lack of training, he still needed to show "more" than a lack of compliance with section12950.1 in order to prevail.

The only enforcement mechanism found within the new provision lies with the government, and not with the private litigant, per section12950.1(e), and does not carry any apparent financial consequence: "If an employer violates this section, the [Department of Fair Employment and Housing] may seek an order requiring the employer to comply with these requirements." Even though part (f) states that the training component is only intended to "establish a minimum threshold and should not discourage or relieve any employer from providing for longer, more frequent, or more elaborate training and education regarding workplace harassment or other forms of unlawful discrimination in order to meet its obligations to take all reasonable steps necessary to prevent and correct harassment and discrimination," one might inquire: Where are the teeth?

Interestingly, according to research by proponents of the HWB on its Website, the United States is one of the only Western democracies lacking an anti-workplace bullying statute in place at the national or federal level. The term "workplace bullying" was popularized in the United Kingdom in the 1980's and early 1990's in a series of BBC radio broadcasts addressing the topic.[5] Why is the U.S. different in this respect? Is it our concept of federalism? Are we worried about the socioeconomic implications of banning workplace bullies? The financial impact on companies by creating a mandate to employers? Are we concerned with issues of proof, or worried about

See ***Workplace Bullying****, Page 26*

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Workplace Bullying, continued from Page 24

somehow chilling employers' disciplinary processes?

For now, there is still little recourse for someone like our imaginary client, Joe. Joe's situation bears many of the hallmarks of a classic bullying situation. He was competent and well-liked, making him a threat to the bully. The bully thus isolated him, fabricated evidence against him, and deliberately embarrassed him in front of colleagues. Joe received little help from his employer and was told it was simply a "personality conflict" that he should try to work out on his own. His co-workers supported him privately, but no one stood up for him when it counted, and no one could prevent his ultimate termination.

If a case of workplace bullying were particularly egregious, (especially if the employer failed to heed the new training mandate), an aggrieved employee could try to bring a claim of intentional infliction of emotional distress (IIED). Yamada's research, however, has shown that typical workplace bullying (akin to Joe's), with no sexual harassment or protected-class discrimination element, rarely leads to IIED liability.[6] When courts have rejected workplace bullying related IIED claims, the most frequent reason was that the complained of behavior was not sufficiently extreme and outrageous to meet the elements of the tort, that plaintiffs could rarely show the requisite level of severe emotional distress, or else the plaintiff's claims were precluded by a workers' compensation statute.[7]

Other legal approaches that Yamada examined and found largely ineffective were claims for intentional interference with the employment relationship (arguing that the interfering "third party" is a co-worker or supervisor acting outside the scope of the employment relationship), and discrimination claims for hostile work environment based on a protected class (including mental disability created by the bullying).[8] According to Yamada, the disability discrimination claims tend to fail because abuse and stress are often seen as intrinsic to employment (not unlike the way sexual harassment was perceived a generation ago; just watch any episode of "Mad Men" for examples). Unfortunately, a disability discrimination theory would not work for someone like Joe, since the employer never had knowledge of his

See ***Workplace Bullying****, Page 28*



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Workplace Bullying, continued from Page 26

disability. Even in cases where the person is in a protected class, it is often difficult to prove a causal link between the protected class and the abusive behavior, as it more typically appears like a bullying situation rather than actionable harassment targeting the person because of their protected status.

One theory that has yet to be explored in California is whether a bullied and then terminated employee like Joe could bring a claim for wrongful termination in violation of public policy (assuming the organization had 50+ employees and the employer had failed to implement the section12950.1 training requirement), since the new statute evinces a strong public policy against bullying.

The bipartisan support and passage of AB2053 shows that California may be open to a healthier, bully-free workplace in the years to come, but for now, it is only prepared to support prevention efforts and not any type of enforcement mechanism. The effect of the new training provision may be measured over time to see whether training is an effective way to help prevent the problem of workplace bullying. In the meantime, plaintiffs' attorneys will be testing the waters to see whether the new law can be used to establish new legal precedent to give victims more viable causes of action against workplace bullies and garner support for stronger legislation. As practitioners fielding calls from people like Joe every day, we certainly hope so.

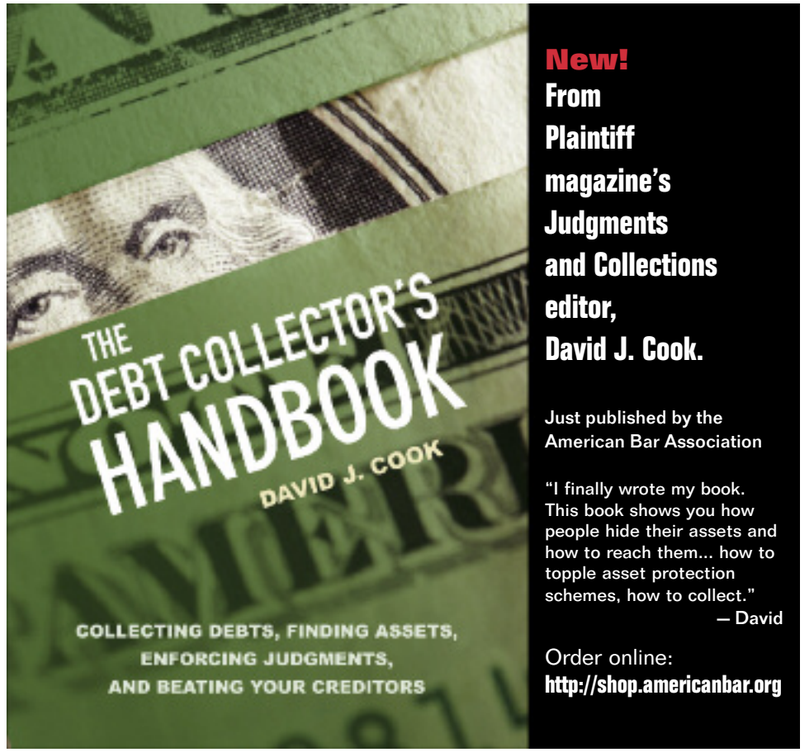


Katie Debski, Kathryn Bain and Laura Mazza

Katie Debski is a Plaintiff's side employment attorney at the firm of Bain Mazza & Debski LLP. *She authored this article with the assistance of her two partners, Kathryn Bain and Laura Mazza. Their firm handles a broad range of employment law matters, including employment discrimination, harassment, retaliation, wrongful termination, and wage and hour violations. Their practice also includes personal injury, representing plaintiffs in automobile and slip and fall accidents. All three partners are mothers of young children and firmly believe that litigation and parenthood do not have to be mutually exclusive. A collaborative approach, in which all attorneys work on every case together, sets their firm apart. Check them out on Yelp and at www.bmdlegal.com.*

Endnotes

[1] David C. Yamada, *The Phenomenon of "Workplace Bullying" and the Need for Status-Blind Hostile Work Environment Protection*, 88 Geo.L.J. 475 (2000).
[2] Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assembly Bill No. 2053 (2013-2014 Reg. Sess.), July 31. 2014, pg. 3
[3] http://www.healthyworkplacebill.org/states.php
[4] Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assembly Bill No. 2053, supra.
[5] According to Yamada's research posted on his Website, Great Britain passed the Protection from Harassment Act 1997, with its final provisions enacted in August 2001, containing broader anti-harassment provisions than the U.S. which encompass the problem of bullying. Scandinavian nations were some of the first to enact explicit anti-bullying laws as early as 1994. Many other European nations (particularly EU nations) also have robust employee protections which legally compel employers to prevent or correct bullying. Since 2005, Ireland has had a health and safety code that has strong provisions to address bullying. Canada has enacted several provincial laws that target bullying starting in 2004. Australia has actually criminalized workplace bullying starting in 2011.
[6] David C. Yamada, *Workplace Bullying and American Employment Law: A Ten-Year Progress Report and Assessment*, 32 Comp. Labor Law & Pol'y Journal 251, 257 (2010).
[7] Ibid.
[8] Id. at 258-259.



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Combatting the "privilege defense" when you represent a lawyer who was fired

Pursuing the rights of attorneys against discrimination and wrongful termination by law firms

By Pieter Bogaards

Representing attorneys in employment actions against their former law firms presents serious potential ethical and discovery pitfalls. Our profession is not immune from illegal employment practices, but any action on behalf of a wronged attorney will likely be met with claims of immunity based on Attorney-Client Privilege (ACP), Attorney Work Product (AWP) and the Litigation Privilege. Anti-SLAPP motions may also be filed on a claim that an employment discrimination action is premised upon a law firm's protected petitioning activity – i.e., your client was terminated for sub-par performance in his/her legal representation of the defendant firm's Non-Party Clients (NON-PTY-CLT).[1]

The gist of the defense is that the defendant law firm would sincerely like to be able to explain the faulty performance of your attorney client which led to his/her termination, but they are lamentably barred by their ethical obligations to the NON-PTY-CLT.[2] The defense would seriously restrict the ability of any attorney from raising the issue of improper discharge where the defense to the claim was purportedly incompetent legal work that involved the use of privileged or confidential information. Such a broad application of the privilege would effectively remove the protection of the wrongful termination statutes from most attorneys who regularly use privileged information.

Unfortunately, there is legal support for the defense position, and courts have held that dismissal of a lawsuit is mandatory where claims – and essential defenses – are based on privileged information. Where a discharged attorney's claims against the employer cannot be established without breaching the attorney-client privilege, "*the suit must be dismissed in the interest of preserving the privilege*."[3]

Therefore there are a number of critical considerations in analyzing, or preparing, a case against a law firm or corporate in-house legal department, on behalf of a former attorney, including:

- Avoid any claim which requires your client to rely on privileged information or documents, unless based upon information or documents for which any NON-PTY-CLT involved has waived ACP.[4] Though there is a balancing test for the court to apply if the defense relies on ACP and AWP for its defenses, there is none if your client relies on such information of documents for his/her claims;
- Prepare to face repeated efforts to dispose of your client's case entirely with the argument that the employer's defense relies on *essential* ACP communications and confidential information related to the firm's NON-PTY-CLT, whose cases your client will be accused of having mishandled in various unspecified ways, which the defense further claims cannot be disclosed due to the obligation to protect the APC and confidences of the same NON-PTY-CLT;
- Prepare to hunker down for a discovery battle, and do not let slide conclusory discovery responses that the basis for termination relates to unidentified privileged matters constituting your client's sub-par performance of legal services on behalf of a NON-PTY-CLT, none of which are explained;
- Be inventive regarding finding alternative non-privileged sources of information and documents related to the purported basis for your client's termination in the public record, filed pleadings, correspondence with opposing counsel, exchanged discovery responses, etc.

***Example*:** Defendant law firm claims that your plaintiff, who was terminated shortly after return from surgery, was allegedly terminated for having failed to file a verified answer to a verified complaint, further obstructing discovery on claim that all relevant and essential documents and information rests in privileged documents which cannot ethically be disclosed. Evidence to refute the pretextual defense may be found in numerous non-privileged sources, including:

- Timing of filed pleadings in Court Docket, which may demonstrate that:
  - Non-verified answer was filed by other counsel or before the plaintiff attorney was associated in the case;
  - No effort was ever made by defendant law firm to later file an amended verified answer, in the months;
  - No Motion to Strike Answer, or to Amend the Complaint, was filed by any party in the action;
- No evidence that the issue was ever raised to attorney plaintiff or to the NON-PTY-CLT, absence of warning or discipline short of termination;
- Never addressed in correspondence with opposing counsel;

*See **"Privilege Defense"**, Page 32*

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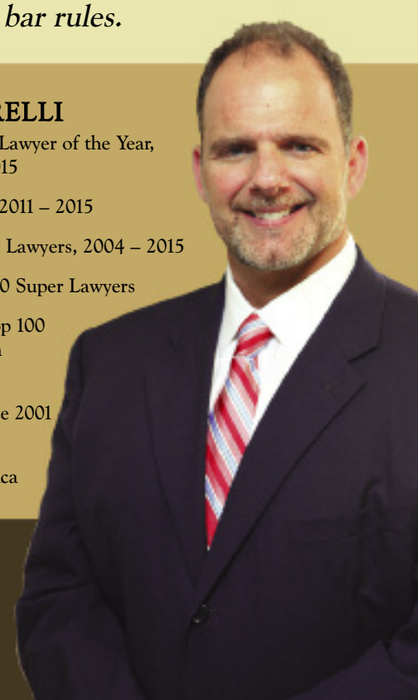
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Privilege Defense, continued from Page 30

• Lack of any injury to firm or NON-PTY-CLT;
• Evidence that other attorneys in firm have been publicly sanctioned for pleading and discovery abuse or sued for malpractice which has actually damaged firm and NON-PTY-CLT, without any adverse employment action. In this regard when a law firm states that the terminated attorney fell below their acceptable standard of practice, it opens up the question of what that standard is, much of which will be evident in the public record, including its more costly and serious errors;
• Prior to the surgery, the attorney client was described by the managing partner of the firm as a "*key player*" on the litigation team. After surgery, he/she is claimed to "*not be a team player*;" and
• Defendant themselves offer declarations which misstate the law, such as supervising partner declaration that a non-verified answer exposed NON-PTY-CLT to immediate judgment [*not without prior motion, for which court would liberally grant leave to file an amended verified answer*], or that a Motion for Judgment on the Pleadings could be sought after trial commenced [*it cannot, the defect is waived if not previously raised pursuant to noticed motion*.]

Conclusory non-specific responses do not limit defendant's claims

One cannot accept evasive and conclusory discovery responses and then comfortably rest on the theory that the defense has failed to articulate any specific factual basis for the termination, and is therefore essentially without a defense at trial. The core defense is that the defendant law firm employer is barred from presenting any such exculpatory evidence due to the Rules of Professional Conduct, and therefore the case *must* be dismissed. It is incumbent upon the plaintiff attorney to demonstrate that this is not the case.

Court may not review privileged documents or information

Nor can one rely on Court assistance – without the principles noted below. Generally, the court cannot compel disclosure of information claimed to be privileged, even for an in camera review to rule on the claim of attorney-client privilege.[5,6] Similarly absolute AWP may be shielded from Court review.[7]

See ***"Privilege Defense"****, Page 34*

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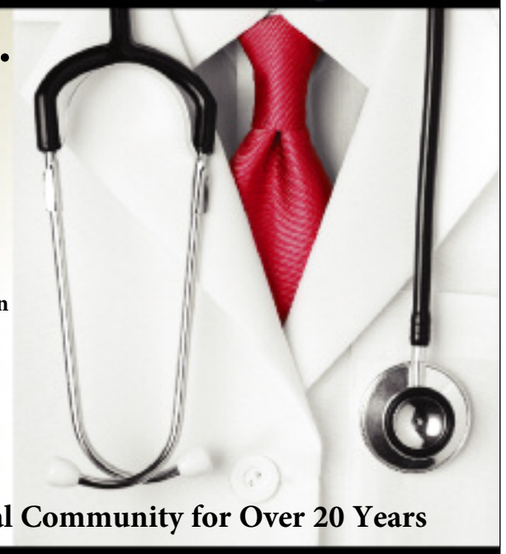
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Privilege Defense, continued from Page 32

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But there are also very important tools to demonstrate that ACP and AWP would not be compromised, and/or is not *essential* to the defense, or is not even privileged in the first place. The accurate test is best and most authoritatively stated as follows:

> [A] court may take the extraordinary step of dismissing a plaintiff's claim on the ground that an attorney defendant's due process right to present a defense is compromised by the defendant's inability to present confidential information in support of that defense only in the rarest of cases.

(*Dietz v. Meisenheimer & Herron*, (2009) 177 Cal.App.4th at pp. 794, 771.)

> If dismissal were required whenever a lawyer's ethical duties prevented the lawyer from presenting evidence having *any* relevance to the action, without respect to the materiality of the evidence, the 'drastic action' of dismissal would become commonplace.

(*General Dynamics Corp. v. Superior Court*[8], (1994) 7 Cal.4th at p. 1190.)" (*Dietz, supra,* 177 Cal.App.4th at p. 792,) [*People ex rel. Herrera v. Stender*, 212 Cal.App.4th 614, 646-47, 1ast modified (Jan. 16, 2013)]

It would be grossly improper for the Court to simply dismiss a case based on the claim that privileged information *might* be involved in the defense in some unspecified way. As the Court held in *General Dynamics,* trial judges can minimize the dangers to the legitimate privilege interests such cases may present by taking an "*aggressive managerial role*," (*General Dynamics, supra.*) and it is a collaborative effort of plaintiff counsel and the Court, vigorously opposed by the defense, to assist in the management of discovery in the case.

The *"Balancing Test"* for defense claims of reliance on privileged documents

Before dismissing a case on the ground that defendant law firm's due process right to present a defense would be violated by the defendant's inability to disclose a client's APC and/or confidential information, a court must apply a *balancing test* comprised of at least four factors:

- The evidence at issue must be the client's confidential information, *which the client insists on keeping confidential*;
- The evidence must be "*highly material to the defendants' defenses*";
- The trial court must determine whether it could "effectively use '*ad hoc* measures from [its] equitable arsenal,' including techniques such as redaction, 'sealing and protective orders, limited admissibility of evidence, orders restricting the use of testimony in successive proceedings, and, where appropriate, *in camera* proceedings,' so as to permit the action to proceed"; and
- The court "should consider whether it would be 'fundamentally unfair' to allow the action to proceed." (*Dietz, supra,* 177 Cal.App.4th at pp. 792-794.) The last of these considerations "is an extension of the principle that, '[t]he privilege which protects attorney-client communications may not be used both as a sword and a shield.'" (*Chevron Corp. v. Pennzoil Co.* (9th Cir. 1992) 974 F.2d 1156, 1162.) [*People ex rel. Herrera v. Stender*, A131625, 2012 WL 6808475 (Cal. Ct. App. Dec. 4, 2012), as modified (Jan. 16, 2013)][9]

The foregoing requires extensive briefing, a strategy which foresees the pitfalls and constant diligence. It is the duty of the plaintiff attorney to press the issue and move for the necessary aggressive judicial management.

Privilege Log, Protective Order and Notice to NON-PTY-CLTs

The recommendations below are drawn from issued court orders which detailed the procedures for discovery, obligations of the defendant to provide evidence of both privilege and that the NON-PTY-CLT has been fully informed of the issue and actually claimed APC. To that extent the article is more anecdotal illustration than what would have to be a much more lengthy and detailed legal treatise. In most cases, once the discovery battle is fought and the following matters addressed, and the orders for production issued, is when serious and realistic settlement discussions finally commence.

Protective Order

Because of the sensitive privilege issues, you should prepare to file a Protective Order at the outset of the case to facilitate the Court's application of the equitable *ad hoc* measures. This places you in the unusual position of seeking a Protective Order for documents largely held by the defense, and the ironic argument of the defense that no Protective Order should apply, except a blanket order barring any discovery of unilaterally claimed privileged information. The proposed Protective Order should provide for notice to subject NON-PTY-CLTs – once the law firm identifies which are related to its defenses – and a form of Privilege Log to meet the requirements of *Dietz, Herrera, Rickley*, etc., and for limited dissemination. It is important to both your client and to protect the interests of the NON-PTY-CLTs – to whom your client also has a continuing post-termination ethical obligation to protect their APC and confidential information.

In one case, based upon plaintiff's motion, the Court ordered a protective order with the conditions listed below:

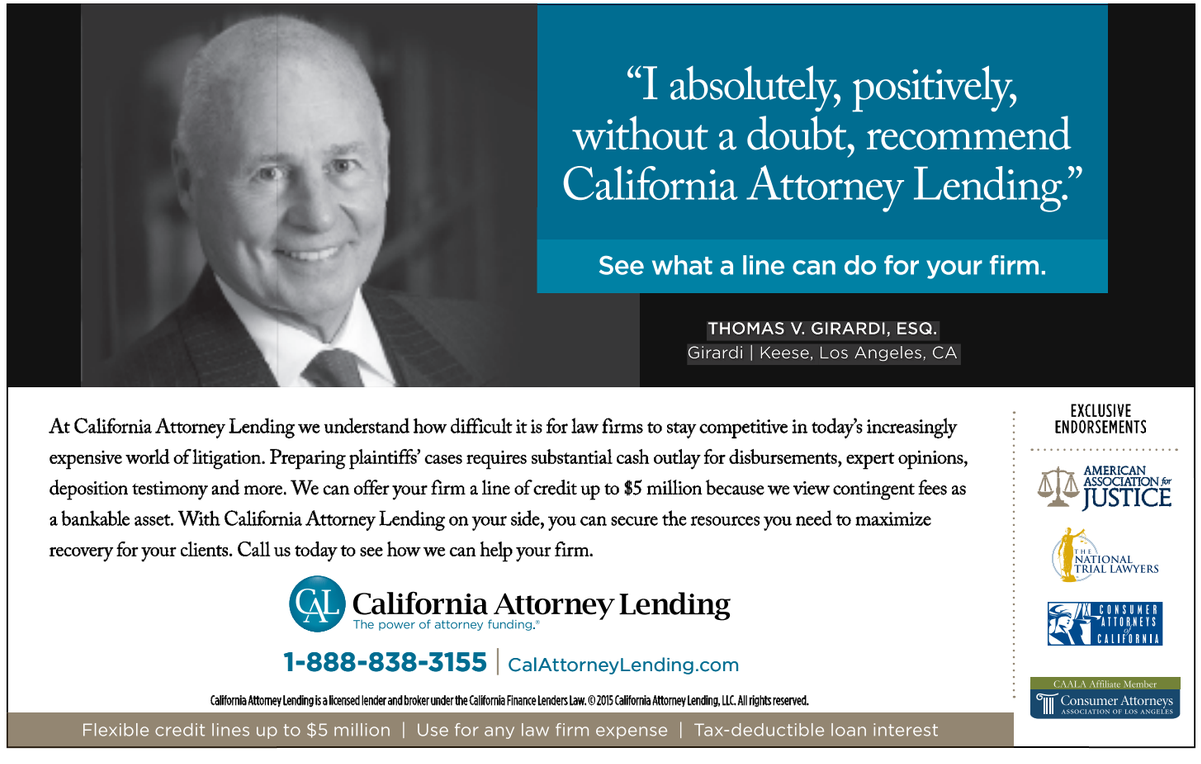
- Redact client names and identifying information from public disclosure or court filings to preserve their identity, including pleadings or documents attached as exhibits. For the same reason do not include NON-PTY-CLT names or identifying information in your own pleadings. The benefits of redaction dwindle when the names are previously revealed[10];
- Adhere to use of a Client Legend utilizing "Doe" or numerical references in place of NON-PTY-CLT names in any filings or public disclosure which may include confidential information;
- Production of documents which may include work-product should be limited to those portions necessary to understand the supervision and evaluation of your attorney client's work, and any criticisms, or any defenses to such criticisms, of your client's performance;
- Submit documents for which there is a qualified AWP objection – or includes AWP which the defense has placed at issue in the case – to the Court for *in camera* hearing; and
- Establish a procedure for the designation of any information disclosed at a deposition as confidential and for attorney's eyes only in an effort to fully ensure there is no public dissemination of any privileged information.

Privilege Log

The first step in the analysis is for the defense to provide a detailed Privilege Log, which you can anticipate they will adamantly refuse to do. However, without it, the Court will not be able to conduct an evidentiary hearing to determine whether it is able to effectively use *ad hoc* measures from its *equitable arsenal*, including techniques such as redaction to protect privileged information.[11,12,13]

The Court must order the defendant to provide sufficient factual information so that the Court is able to assess any claim of privilege. In doing so, one court in an attorney discharge case ordered the defendant law firm to provide the following information when objecting on the basis of privilege:

1. Identify documents claimed to be privileged and the nature of the privilege (e.g., whether ACP or AWP)[14];
2. Identify who the document is from and/or who created the document;
3. Identify the sender, the recipients and anyone who reviewed the documents, including anyone outside privilege;
4. Identify whether Plaintiff was a recipient of the information or the drafter of any document, or if the information was available for her review while employed by defendant as a licensed attorney, in the course of such employment;
5. Identify the type of protection claimed and whether the protection is claimed on behalf of a party or client (i.e., attorney-client privilege; and/or attorney work product);
6. Identify what case the document is associated with;
7. Identify the general nature of the mistake made by Plaintiff with respect to the document that provided the reason for termination (e.g., missed a relevant issue or overlooked applicable law);
8. If the mistake was the result of Plaintiff omitting information from a document,



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such as a case analysis, identify what the omission was (e.g., failed to analyze relevant law, failed to recommend appropriate discovery);
9. Explain whether there are any attachments to the allegedly privileged documents. If there are any attachments, explain whether these attachments were used for other purposes which are not privileged (i.e., such as a pleading or a letter from opposing counsel);
10. Explain whether a NON-PTY-CLT has asserted a claim of privilege;
11. Provide NON-PTY-CLT contact information;
12. Identify if case is filed in public record (e.g., pleadings, deeds, etc.);
13. Explain whether defendant is claiming that the document/information is "highly material" or "pertains to the central disputed issues" and the factual basis for such claim[15];
14. Explain the nature of the documents (e.g., Case Evaluation, Letter to Client, Inter-office Memorandum).
15. Identify which individuals were involved in the termination decision, who reviewed the alleged privileged documents.

The California Supreme Court's decisions in this area indicate that the Court is to ascertain whether the assertion of privilege is so central that the protection of privileged information requires a dismissal of what would otherwise be a perfectly viable lawsuit. The foregoing list would be useful if you find yourself demanding a Privilege Log.

Verification of facts in Privilege Log

Any detailed Privilege Log should be verified by knowledgeable attorneys employed with the defendant who were principally responsible for preparing the Privilege Log. An itemized Verification should:

• State that all documents called for in the requests have been produced or, if they were subject to any privilege, they have been listed on the Privilege Log.
• Include a signed certification by attorneys who have reviewed each alleged privileged document that the information on the Privilege Log correctly describes the document by date, author, recipient, description, and other factual information listed on the Privilege Log.

Defendants will argue that there is no obligation to verify a legal determination regarding identification of a legal privilege. However, the foregoing Privilege Log contains extensive factual information, and facts must be verified.[16]

Notice to NON-PTY-CLTs

Once the NON-PTY-CLTs whose APC or confidentiality interests are disclosed in a detailed Privilege Log, you have another means of debunking the defense claims. One means is via a court ordered notice regarding the case to all identified NON-PTY-CLTs whose privileges are invoked by the defense.

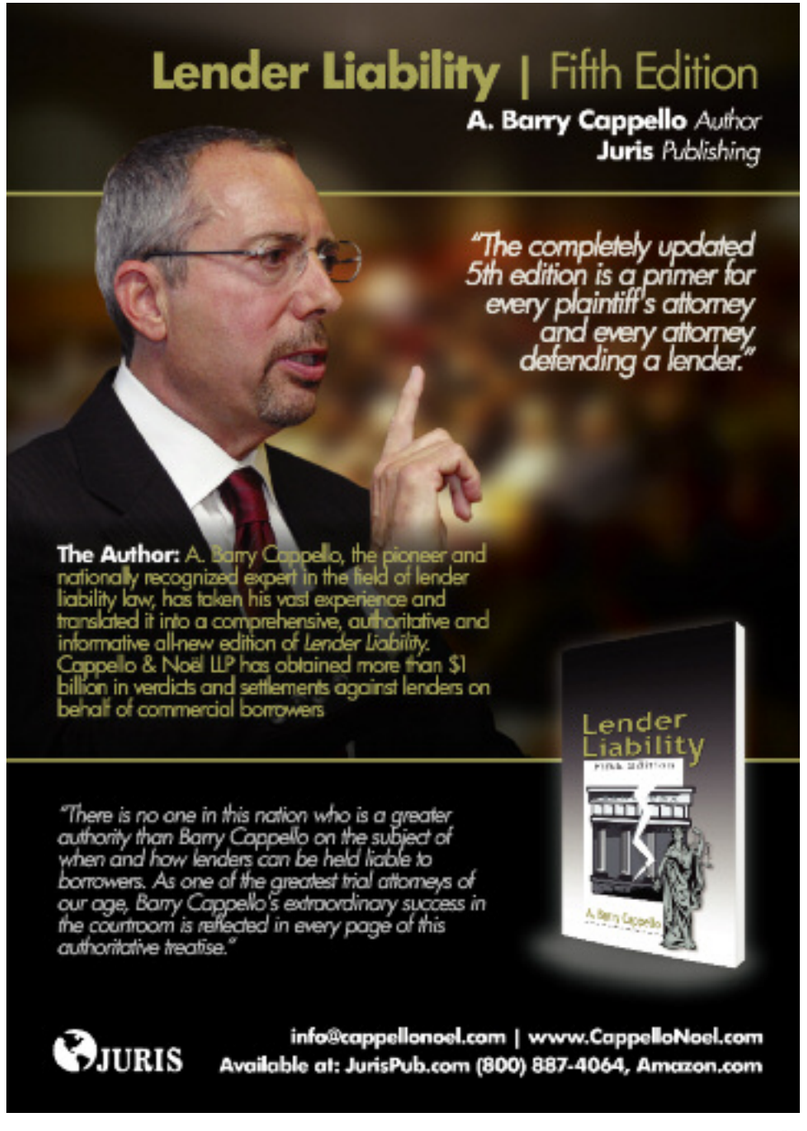
Often the NON-PTY-CLTs may like your attorney client, who likely directly represented their interests, better than the defense law firm whose most notable contribution was to send them invoices. To the extent there is APC involved, they may waive the privilege either completely, or in a more select manner related to the specific defense claims. However, you cannot rely on the defense to provide a neutral or informed notice, and you can further expect that they will scream about *ex parte* communications if you directly contact the NON-PTY-CLTs, whether there is continuing representation or not.

Therefore, it may be advisable to include a Notice provision in any draft Protective Order. Propose a focused written notice – to just those whom the defendant identifies as relevant to its defenses. The Court may issue the notice, advising NON-PTY-CLTs of their right to retain or waive the privilege in regards to the documents listed in the revised Privilege Log. The Notice should also provide an explanation of how NON-PTY-CLTs identifying and APC information could be protected. A NON-PTY-CLT may prefer and accept a surgical and limited waiver, or disclosure which protects their identity and APC, to the alternative of the parties tromping through the public record or a less judicially managed procedure.[17]

Alternate sources of non-privileged or confidential documents

A detailed Privilege Log should reveal alternate non-privileged sources to investigate. The bulk of any client file in a law practice is not privileged, and a defendant's claims will likely relate to matters for which the subject NON-PTY-CLT has provided a written release, and/or are based upon court filed documents, correspondence with opposing counsel, and documents which can be redacted, filed under seal, limited to its admissibility, etc. to prevent the public disclosure of privileged or confidential information. Admissible evidence to refute defenses based upon APC or AWP in NON-PTY-CLT cases may be found in:
• The public record, including court filings and dockets related to any claim that your client produced sub-par work;
• Non-privileged correspondence with opposing counsel in the cases your client handled regarding discovery, continuances for filing of Motions for Summary Judgment, etc.
• Propounded discovery and discovery responses related to claims that your client failed to propound discovery, and/or that later propounded discovery provided substantive information resulting in settlement;
• Non-confidential settlement or filed release documents to demonstrate that your client had successfully settled cases





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for which defendants may now seek to find micro-managed faults;
• Inter-Office management communications, which do not contain any privileged information, confirming that the errors defendants now seek to attribute to your client to justify his/her termination were originally alleged to be errors of other partners and attorneys;
• Evidence of similar – or even more serious – infractions by other attorneys in the defendant law firm for which they were not terminated. As in one case where the managing partner of the defendant firm had been sanctioned heavily for discovery abuse, and been sued for malpractice and the defendant firm lost hundreds of thousands of dollars, without consequence to the attorneys involved.

A defendant's claims may be refuted with non-privileged documents which may be discovered and admitted as evidence. To that end you must diligently pursue discovery seeking further responses and production by the defendant, and anticipate pursuing subpoenas for non-privileged documents from other sources such as opposing counsel in the relevant cases, many of whom may be happy to cooperate.

First step – RPC Rule 3-500D and *Chubb*

An attorney client is entitled to retain documents

In some cases we must struggle to protect – or face surrender of – documents presented by a client which were acquired in the course of, and related to, the client's employment. However, the rules differ in cases of attorneys who retain *copies* of NON-PTY-CLT documents for whom they provided legal services. Trial courts have held that the general rule that client papers must be promptly returned to the client is not intended to prohibit a member from making and retaining *copies* of the papers released to the client following termination of the member's services[18]. There are a variety of important reasons to permit a former attorney to retain a copy of client documents, such as needing to justify client fees when disputed, or defending a malpractice suit or explaining why an attorney has acted appropriately. It is critical that the attorney clients have access to these documents to refute claims by the defendant law firm that his/her performance was inadequate and/or might constitute malpractice.

Entitled to share documents with counsel

Moreover, thanks to the hard work of the firm of Levy, Vinick, Burrell & Hyams, an appellate court has recently confirmed the threshold question of whether the attorney client and his/her own counsel may review such client's NON-PTY-CLT documents without facing disqualification, or worse. In the case of *Chubb & Son v. Superior Court* (2014) 228 Cal.App.4th 1094, 1106 the court held that the disclosures to the attorney client's own counsel:
• Would not be a *public* disclosure, but a disclosure solely to the attorneys representing the parties in the wrongful termination case and that these attorneys would be precluded from further disclosure by the rules requiring attorneys to maintain confidences of their own client;
• Would be limited to information each party reasonably believes is necessary for the attorney's preparation and representation in the case. (*Fox Searchlight, supra,* 89 Cal.App.4th at pp. 310-311.)
• Fundamental fairness requires that the plaintiff attorney be allowed to make a limited disclosure to his/her attorneys to the extent necessary to prepare his/her claims. (*Fox Searchlight, supra,* 89 Cal.App.4th at p. 311), and
• Disclosure of the alleged privileged communications and confidences to the parties' respective attorneys ultimately helps to *protect* the privilege and, thus, its holder, by allowing counsel to make judgments about what is disclosable and what is not (*Fox Searchlight, supra,* 89 Cal.App.4th) and equip the court with the factual and legal arguments needed to evaluate any claimed privilege. (*Chubb & Son v. Superior Court v. Paladino* (2014) 228 Cal.App.4th 1094, 1108-09.)

Though you may review the documents, if they indeed are APC or confidential, you will still be prohibited from admitting or using them, directly. However, as noted above, they may indicate alternate means of discovering admissible evidence, securing NON-PTY-CLT waiver, or undermining the defense claim of how "essential" they actually are.

Conclusion

Representing attorney clients is vastly rewarding. Correcting bad behavior within our profession is important and necessary. But one must acknowledge that these are not cases of formulaic checkers. It is three-dimensional chess. The foregoing is more anecdotal and illustrative than an exhaustive legal analysis. For each position taken or recommendation made, anticipate that the defense will provide equally persuasive counter argument and authority. But it is a place to start, and to plan, when doing the important work of representing our colleagues who have been wrongfully terminated, harassed, faced retaliation and been discriminated against. Even an attorney needs good counsel now and again.

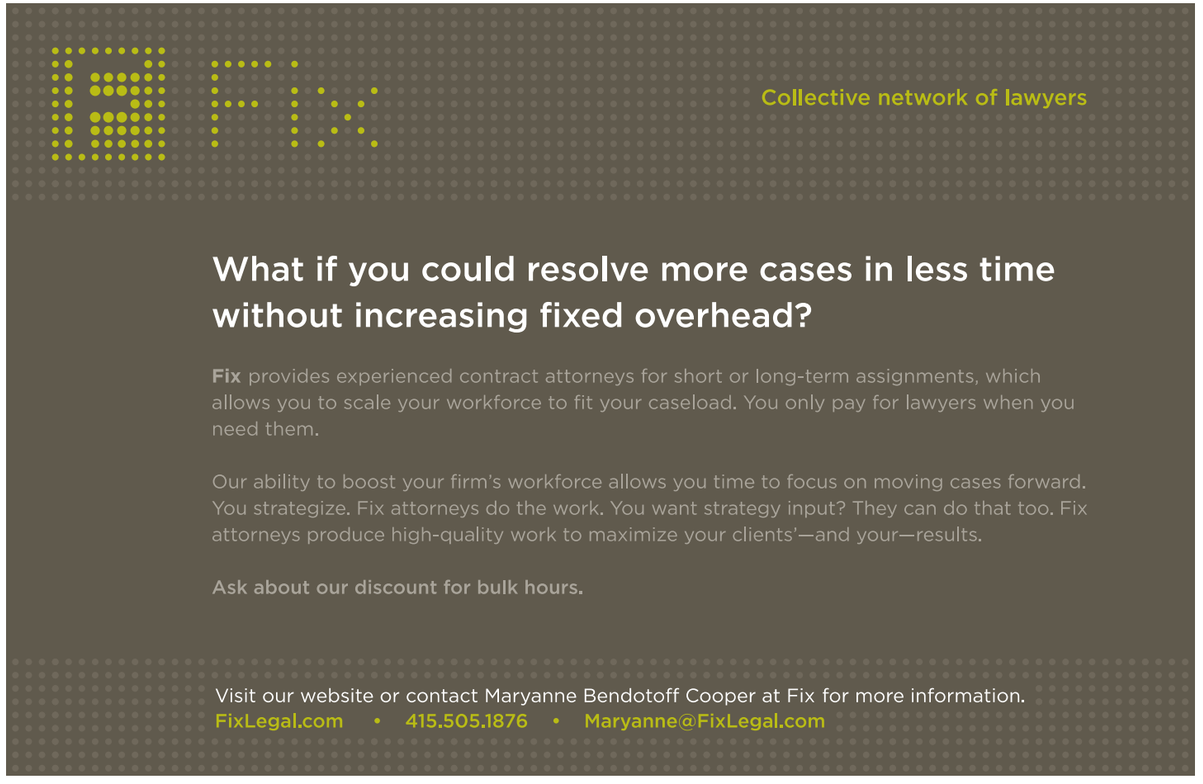

Bogaards

Pieter Bogaards has extensive experience in both mediating and litigating employment cases, including representing employees in claims for wrongful termination, discrimination, harassment, breach of contract, retaliation and wage and hour violations. As a law student he had the privilege to clerk for Prudence Kay Poppinck, author of the Poppinck Act. He received his J.D. from the University of San Francisco School of Law 1982. Prior to law school, he received a Master's in Rehabilitation Counseling, working with the Independent Living Project, an agency devoted to enhancing access and "habilitation" for the disabled.

Endnotes:

This article, complete with endnotes, will be found at www.plaintiffmagazine.com.





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Profile: Jean Hyams

Employment law specialist escaped the world of high-tech to become a steward for employee and civil rights

By Stephen Ellison

One evening nearly 30 years ago, Jean Hyams was driving along Interstate 280 on the Peninsula, alone with her thoughts, when she decided to take a detour. It wasn't a different route of travel she sought – it was a new path for her career.

At the time, Hyams was a pre-Internet-era Silicon Valley techie, working as a marketing and communications professional for Hewlett-Packard; she had previously spent time with Oracle – before it went public – as founder Larry Ellison's assistant. And while the high-tech sector was on the verge of a societal revolution, Hyams herself was at a crossroads, feeling unfulfilled in her small role at a giant corporation. So she made a choice, right then as she wheeled up toward her home in San Mateo, to chase a dream and go to law school.

"I realized I didn't find what I was doing compelling," recalled Hyams, founding partner with Levy Vinick Burrell Hyams LLP. "I knew that I wanted to do something that mattered to society. What I was doing was interesting, but I was writing about things, publishing things, not making things – not making a direct difference."

A fateful decision

On that fateful drive, "I thought to myself this is not what I want in my head for the rest of my life," Hyams continued. "I want to fill my head with problems and ideas that truly do matter … solve problems that need to be solved on a bigger scale. And I thought that, given my skills and talent, law was the place to go."

Having already taken the LSAT after college, Hyams that night prepared her letters and applications to various law schools. A year later, she landed at UC Berkeley's Boalt Hall with her sights set on becoming a civil rights lawyer.

Today, Hyams is among the leaders in the employment law field, representing people with disabilities, people of color, women, gays and lesbians, older workers, whistleblowers and injured workers in lawsuits involving civil rights violations. She and her partners have won jury verdicts, settlements and arbitration decisions in discrimination, retaliation, sexual harassment, wrongful termination and other unlawful employment practices.



Hyams

"I didn't do employment law in the first nine years of my practice because I knew it was a very complicated area, and I didn't want to dabble in it," Hyams said. "It didn't feel like a good idea to me to just dip my toe into it. Eventually, I started doing employment law full time. I represented some small businesses in contract disputes back then, but my interest was to find out how the law can level the playing field for people who need it – and that is the individual more than large corporations. I wanted to give them quality representation that I knew I was capable of."

Indeed, Hyams has thrown herself full-tilt into the area of employment law, working as a vigorous advocate not only for her clients but also for the overall cause. She thrives in a collaborative environment, devoting much of her spare time to helping colleagues in professional organizations such as the California Employment Lawyers Association, for which she has been a governing board member for the past nine years and is a co-founder and editor of the CELA blog. She also has worked on legislation that the organization is advancing and has testified before the Legislature on such bills. "I've kind of done most of the jobs throughout the organization, and I've had the pleasure of watching it grow to over 1,100 members," Hyams said. "So that's been a huge focus."

She also participates locally as a member of the Plaintiffs' Employment Lawyers Association, and she founded a sister organization called the Bay Area Cabal, which is more social, she said, and focuses on building community in the plaintiffs' employment bar. All the organizations, she said, cultivate collegial relationships among the members. "We're more like one big law firm. It's a real open-source mentality, which we foster and encourage," Hyams said. "If another CELA member calls you to ask a question or ask for help, you pick up the phone – you take the call. …

That's what it's all about."

Early political slants

Born and raised in the Washington, D.C. area in the 1960's, Hyams was exposed early to politics and the workings of the U.S. government. She started reading the Washington Post at the tender age of nine and as a mere preteen took an active interest in the George McGovern presidential campaign in 1972.

Her family moved to California when she was 13, so she left that politically robust environment behind, but she held on to her passion for justice and social change. "Very early influences were watching the Watergate hearings," Hyams recalled. "I learned a lot about law and the importance of integrity. My dad worked for the government, and he became disillusioned at about that time. He and my mom raised us to believe you do right by people, you act with integrity, you stick to your word – all those things, which I think are what the law is all about."

In high school, Hyams had a general idea of what lawyers did from her civics and other social studies classes. She went to college with an eye toward becoming a lawyer, majoring in political science and taking constitutional law courses at Wellesley. Though her interest was piqued by the law, she decided it might not be a good idea to just jump into it without some sort of work experience. That's when she ventured into the high-tech industry.

Assisting Ellison at Oracle was her first job out of college. "This was long before the company became public," Hyams explained. "I worked on the very early stages of the IPO, but I left before anything happened; sold my stock options, which were not worth anything at the time. If I had hung around for another few years, they would have been worth millions. So, you know, that was the folly of youth."

She then moved on to HP before her epiphany on the freeway that directed her across the bay to one of the most prestigious law schools in the country. At Berkeley, where social unrest, stern advocacy and general zaniness had come to dominate in the 1960's and beyond, Hyams helped open a law clinic and was involved in advocating for women in the law profession. She participated in and even helped organize protests against the lack of diversity on the faculty. She also took advantage of a relatively new program with the Berkeley law foundation where lawyers from big firms would donate a day of their salary so others could go to work for public interest firms. "So I had a summer fellowship working for a legal services center that worked with women prisoners," Hyams said, "and I had my sights set on civil rights law."

Self-made start

As she was nearing graduation, Hyams' job search targeted public interest law firms and nonprofits. Unfortunately, her resume told the story of a tech marketing worker and included very few chapters on public interest or civil rights legal experience; meanwhile, competing applicants could fill books with the necessary background for those jobs. "I couldn't get a job doing public interest work to save my life," she recalled. "So I hung out my shingle and started my own firm … doing personal injury and estate planning, some probate work. I started doing a little bit of civil rights work in representing people with disabilities in education, trying to get reasonable accommodations for people."

After about three years with her own firm, Hyams took a post as a civil rights attorney with the U.S. Department of Education, where she served for a year. She then returned to private practice with Boxer & Gerson, where she spent 10 years honing her employment law acumen and working her way up to partner. In 2010, she helped found her current practice in Oakland.

Though she'd like to go to trial more often, Hyams understands it's not something she can force upon her client. But she does consider herself a trial lawyer. She's even conducted seminars and lectures on trial advocacy, and particularly voir dire, for colleagues at CELA. "I've done a lot of training, teaching people how to talk to jurors, how to get (jurors) comfortable enough to respond honestly about the biases they have," Hyams explained. "You get people comfortable enough to say 'I've had experiences in my life that cause me to be suspicious of this particular type of situation or this type of person' … and that's what we need to know because it's not jury *selection*, it's jury *de-selection*."

Perhaps one of her more intriguing cases was one she co-counseled on against 24 Hour Fitness that didn't go to trial due to that company's mandatory arbitration clause. Hyams and her team won a $2 million award for their client, but the case took an interesting turn *after* it had been resolved. The employer wanted the record sealed for fear of bad publicity.

"They tried to gag us. So we filed the award under seal because there was a dispute, but instead of filing a motion to keep the record sealed, we filed a motion to *unseal* the record," Hyams said. "We decided that the court had a right to make a determination whether the record should be sealed or unsealed. It was an innovative way to deal with this quandary.

"I think one of the things that characterizes our office is we're not going to be backed into a corner," she said. The court granted the motion to unseal the record, and the 80-page ruling detailing the sexual harassment and retaliation that went up to the highest levels of 24 Hour Fitness is now a public record, the value of which is huge, Hyams said. Even though the company had paid the arbitrator's award "faster than you've ever seen anybody write a check," thinking there would be no need to involve the court, Hyams' team persisted. "We were fulfilling the oath of the attorney," she said, "to protect and defend the constitution and the law, not just your client."

Family and life

In her brief spells of spare time, Hyams enjoys traveling and spending time with her family. She makes frequent trips to Central and South America, particularly Brazil, where she has family. Her octogenarian parents still live in the Bay Area, and she sees them as much as she can. Her father attends all her trials, and she often goes over to their place for dinner and tells them about her work. "Our firm is really committed to people being able to have lives," she said.

Hyams' advice to today's young lawyers and law students is to maintain a cordial and professional demeanor – it will serve as a vehicle for a much longer and more rewarding career.

"The biggest skill to develop is the long view of a case or even of your career," she said. "When you're in the middle of a dispute, think about whether or not that dispute really matters – does it serve your client's long-term interests in the case? What serves your client – and serves you – is to stay the course as an advocate. Because what we do can be very stressful. We need to figure out, in order to keep at it for years and years, how to be engaged in conflict without adding fuel to the fire."

And yet, she contends, one should never sway from their obligation to uphold the protections and freedoms afforded to all citizens: "I really believe in the rule of law, and I think we are stewards of law. It's incumbent on us to make sure the law is allowed to develop as it should and remain as protective as it has been. There are so many erosions happening now that are troubling. But we live to fight another day."

Steve Ellison is a freelance writer based in San Jose. ssjellison@aol.com.

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The interaction between civil disability-discrimination cases and WC claims

Where they overlap and the impact on your civil case

By Anne Costin

Many employees who have civil disability-discrimination cases and medical-leave claims are simultaneously proceeding through a state disability or workers' compensation process. Understanding and anticipating issues that can arise due to the crossover in these areas will safeguard and improve your client's civil case.

Workers' compensation leave can proceed simultaneously with FMLA/CFRA

When an employee is off of work due to an industrial (on the job) injury, the employee and employer often simply refer to the employee being out "on a workers' comp leave." However that "comp leave" may also qualify as a job-protected medical leave under the California Family Rights Act ("CFRA"). The CFRA was drafted based on and often parallels the Federal Family Medical Leave Act ("FMLA"), and as such, California courts adopt and rely on FMLA regulations and interpretations as needed.

Federal FMLA regulation 29 CFR 825.702(d)(2) addresses the potential overlap between "comp leave" and FMLA leave: "An employee may be on a workers' compensation absence due to an on-the-job injury or illness which also qualifies as a serious health condition under FMLA. The workers' compensation absence and FMLA leave may run concurrently (subject to proper notice and designation by the employer)." (29 CFR 825.702(d)(2).

When an employee is out on a "comp leave," employers often fail to provide proper notice regarding their rights and obligations related to job protected medical leave under the FMLA/CFRA. If an employee is eligible for an FMLA/CFRA leave (because they have worked for an employer of the requisite size for a sufficient amount of time), an employer is required to "provide written notice detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations." (29 C.F.R.825.300(c)(1).) A failure by an employer to provide an employee with notice of the fact they are guaranteed up to 12 weeks of leave and return to the same or a comparable position upon the termination of the leave can constitute a violation (referred to as "interference") with an employee's leave rights under the FMLA/CFRA. (See Gov. Code, § 12945.2(a), 29 CFR 825.300(e), and *Mora v. Chem-Tronics, Inc*. (SD CA 1998) 16 F.Supp.2d 1192, 1220-1228.)

A leave longer than 12 weeks is often required

Disabled employees (including those who are disabled due to a workplace injury) may require more than the 12 weeks off work that are provided for by the FMLA/CFRA. When that occurs, the reinstatement protections of the FMLA/CFRA drop out of the picture, and attention should turn to whether an extended leave of absence is available as a form of "reasonable accommodation" under California's Fair Employment and Housing Act ("FEHA"), which is based on, but more expansive than, the Federal Americans with Disabilities Act ("ADA").

Employers often assume that once an employee's 12-week FMLA/CFRA leave expires, they are no longer required to hold the employee's job. That is not the case: "holding a job open for an employee on a leave of absence or extending a leave provided by the CFRA, the FMLA, or other leave laws, or an employer's leave plan may be a reasonable accommodation provided that the leave is likely to be effective in allowing the employee to return to work at the end of the leave, with or without further reasonable accommodation, and does not create an undue hardship for the employer." (2 Cal. Code Regs. § 7293.9(c). It is well settled that "holding a job open for a disabled employee who needs time to recuperate or heal is in itself a form of reasonable accommodation and may be all that is required where it appears likely that the employee will be able to return to an existing position at some time in the foreseeable future." (*Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 263; see also *Sanchez v. Swissport, Inc.* (2013) 213 Cal.App.4th 1331, 1338.)

"100 percent healed" policies are unlawful

When an employee is able to return to work following a leave of absence (regardless of what type of leave it is, i.e., workers' comp, FMLA/CFRA, or an extended leave as a form of reasonable accommodation for a disability), it is common for an employee to be unable to return to "full duty" (i.e., working the full number of hours and performing all of the job duties that they were prior to taking leave).

This is another prime area where employers often (incorrectly) decide to rely solely on workers' compensation reports and disability ratings, requiring that an employee be "100 percent healed" or "permanent and stationary" (i.e., injury not expected to worsen in future) before they be returned to work.

This is a clear violation of the FEHA, which provides that a disabled employee must be provided with reasonable accommodation upon return from a leave of absence, which expressly can include "job restructuring, [and] part-time or modified work schedules." (Gov. Code, § 12926(m); Cal. Code Regs. § 7293.9; *Prilliman v. United Air Lines, Inc.*, (1997) 53 Cal.App.4th 935, 947.) Reasonable accommodation must be provided unless it would cause the employer a financial or logistical "undue hardship."

FEHA requires that employers engage in an "interactive process" to make an "individualized assessment of the employee's ability to perform the essential functions of the job with or without accommodation." (*Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 49.) Therefore, having a "100 percent healed" policy is unlawful, because it necessarily means that the employer refused to conduct any form of personalized assessment to determine if job modifications would allow a disabled employee to return to work. (*Humphrey v. Memorial Hosp.* (9th Cir. 2001) 239 F.3d. 1128, 1138; *McGregor v. National Railroad Passenger Corp.* (9th Cir. 1999) 187 F.3d 1113, 1116. An employer "cannot simply point to the medical reports in [an employee's] file, and automatically absolve itself of liability under FEHA . . . an employer cannot slavishly defer to a physician's opinion." (*Gelfo* at 49-50, fn11.) Notably, an employer cannot fail to engage in the interactive process, then argue that had they done so it would have resulted in a conclusion that no accommodation was possible: "the interactive process could reveal solutions that neither party envisioned." (*Wysinger v. Automobile Club of Southern Cal.* (2007) 157 Cal.App.4th 413, 424.)

> An employer or other covered entity shall assess individually an employee's ability to perform the essential functions of the employee's job either with or without reasonable accommodation. In the absence of an individualized assessment, an employer or other covered entity shall not impose a '100 percent healed' or 'fully healed' policy before the employee can return to work after an illness or injury.

(Cal. Code Regs, § 11068(i).)

A forced leave of absence is unlawful

From another angle, requiring an employee to be 100 percent healed in order to return to work often results in an employee who could work (albeit part time or with modified duties) being forced to remain on a leave of absence. This is unlawful: "When an employee can work with a reasonable accommodation other than a leave of absence, an employer may not require that the employee take a leave of absence. (2 Cal. Code Regs. § 7293.9(c), see also *County of Fresno v. FEHC* (1991) 226 Cal.App.3d 1541, 1555, holding that placing an employee on a forced leave violated state law; *Bostean v. LAUSD* (1998) 63 Cal.App.4th 95, 110, holding that placing an employee "on [an] involuntary leave of absence without pay…was tantamount to a suspension without pay.)

Another issue that arises in the return to work context is an employer's purported concern that if a disabled employee returns to work, the employee will hurt themselves and make their condition worse (i.e., that returning to work would pose a health or safety risk). California Regulation 7293.8 addresses this issue head on, providing that it is not acceptable for an employer to merely assert that a future risk could arise: "so long as the condition or disease does not presently interfere with his or her ability to perform the job in a manner that will not immediately endanger the individual with a disability or others, and the individual is able to safely perform the job over a reasonable length of time." (Cal. Code Regs., § 7293.8 (c)-(e).)

Note, however, that if an employer can demonstrate that (even after reasonable accommodation is provided) "the job imposes an imminent and substantial degree of risk" to the employee herself, and/or that returning the employee to work would "endanger the health or safety of others," then a valid defense to a failure to accommodate claim exists. (Cal. Code Regs., § 7293.8 (c)-(e).) This situation/assessment is common when dealing with police, fire, and other safety sensitive positions.

In sum, an employer must offer more than mere speculation or fear that potential harm could occur. An employer must actually prove that the employee's performance poses a threat to his or her own safety or the safety of others based on "the most current medical knowledge and/or on the best available objective evidence." (29 CFR 16302(r); see also *Raytheon Co. v. California Fair Employment & Housing Comm'n* (1989) 212 Cal.App.3d 1242, 1252.) In order to determine whether a threat is real, an employer must first engage in an interactive process to determine if reasonable accommodation could mitigate any potential threat. (*Nunes v. Wal-Mart Stores, Inc.* (1999) 164 F.3d 1243, 1247-1249.)

Connection between employer and WC administrator

If you are representing a disabled employee who also has a workers' compensation claim, be aware that information regarding your client's condition and restrictions may have been shared with the employer by the employer's third-party workers' compensation administrator. (See Lab.Code, § 3762, permitting disclosure of "medical information regarding the injury for which workers' compensation is claimed that is necessary for the employer to have in order for the employer to modify the employee's work duties.") Because this information is commonly shared, employers are often on notice of an employee's need for accommodation even without receiving a direct request from the employee herself.

This can assist your employee's civil case, because if an employer becomes aware, through any means (including from its workers' compensation representative), that employer has an affirmative duty to investigate whether an accommodation is available that would permit the employee to work. (*Prilliman v. United Air Lines* (1997) 53 Cal.App.4th 935.) It is not necessary for the employee herself to come forward and ask for accommodation or refer to any disability discrimination law. (*Ibid.*)

Even if discovery shows that your client's condition and restrictions were not shared between the employer and the employer's third-party workers' compensation administrator, the employer may still be on the hook for information that its workers' comp representative possesses under the theory that that representative obtained that information while acting as an agent of the employer: "An agent is one who represents another, called the principal, in dealings with third persons. Such representation is called agency." (Civ.Code, § 2295.) In the workers' compensation context, a "third-party administrator" is expressly defined

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as "an agent under contract to administer the workers' compensation claims." (8 Cal. Code Regs., § 10100.2.) As such, the workers' compensation administrator "acts as an agent and its conduct is attributable to the insurer." (*McCormick v. Sentinel Life Ins. Co.* (1984) 153 Cal.App.3d 1030, 1040; see also *Diaz v. Federal Express Corp.* (C.D. Cal. 2005) 373 F.Supp.2d 1034; see also Civil Code section 2332, "As against a principal, both principal and agent are deemed to have notice of whatever either has notice of, and ought, in good faith and the exercise of ordinary care and diligence, to communicate to the other."

"Totally Disabled" assertions to WC

"Totally disabled" assertions to workers' comp and the State do not close the door on your civil disability case. In order to obtain workers' compensation benefits, an employee (likely through her physician) often declares that she cannot return to work because she is "totally disabled." (This same issue can arise when disabled employees apply for California State disability benefits through the Employment Development Department aka the "EDD.") When this occurs, defense counsel in your civil disability case may argue that this sworn statement that the employee is "totally disabled" means that the employee was completely unable to work and therefore cannot successfully argue that they were able to perform the job they previously held. This is a "judicial estoppel" argument, because the employer is asserting that the employee took a position in her workers' compensation case that is contrary to her position in her civil case.

Courts have recognized, however, that because workers' compensation and state disability systems do not take into account whether the employee would have been able to perform in their position had reasonable accommodation been provided, such a statement of "total disability" in another context does not bar civil disability claims. (See *Prilliman v. United Airlines, Inc.* (1997) 53 Cal.App.4th 935, "the receipt of such disability benefits does not answer the question as to whether [employer] violated the FEHA"; see also *Bell v. Wells Fargo Bank, N.A.* (1998) 62 Cal.App.4th 1382, explaining that judicial estoppel is applied only against a party that has taken positions or made statements that are "totally inconsistent"; see also *Saffle v. Sierra Pacific Power Company* (9th Cir. 1996) 85 F.3d 455, 459-460, application for disability benefits does not consider whether reasonable accommodations possible; see also *Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 190, "In many workers' compensation cases, a person has a 'total disability' when s/he is unable to do certain tasks, even if those tasks are marginal functions or if s/he could perform them with reasonable accommodation."

Be cautious, however, of a situation where no form of reasonable accommodation would permit the employee to perform in her position: in such a circumstance, judicial estoppel would likely apply and a "totally disabled" employee's civil disability claim would fail. (*Jackson, supra.*)

Response to a WC exclusivity assertion

Employers consistently assert, through an affirmative defense, that an employee's civil disability claims are barred because they fall within the workers' compensation arena, i.e., they argue workers' compensation exclusivity. When your employee has actually brought a workers' compensation claim, employers may push this argument further and raise it through a summary judgment motion.

A series of precedential decisions are helpful to employees in this area. For example, the California Supreme Court has held that claims brought under FEHA "exceed the normal risks of the employment relationship, and are, therefore, not preempted by the Workers' Compensation Act." (*Livitsanos v. Superior Court* (*Continental Culture Specialists, Inc.*) (1992) 2 Cal.4th 744, 756; see also *City of Moorpark v. Sup. Ct.* (*Dillon*) (1998) 18 Cal.4th 1143, stating that disability discrimination "falls outside the compensation bargain and workers' compensation is not the exclusive remedy," see also *Accardi v. Superior Court* (*City of Simi Valley*) (1993) 17 Cal.App.4th 341, 352 (disapproved on other grounds), "The Legislature … did not intend that the employer be allowed to raise the exclusivity rule for the purpose of deflecting a claim of discriminatory practices.") As such, an employee's "emotional distress claims are not barred by the exclusivity rule to the extent they seek emotional distress damages for the alleged work-related injury discrimination." (*Fretland v. County of Humboldt* (1999) 69 Cal.App.4th 1478.)

Common law claims (for example, for wrongful termination and IIED) may also lie outside of the reach of the workers' compensation system so long as the employee's injury is due to an employer's violation of a fundamental public policy. (*Cabesuela v. Browning-Ferris Industries of California, Inc.* (1998) 68 Cal.App.4th 101, 113, addressing viability of IIED claim, "where a plaintiff's emotional distress claim is premised upon his employer's violation of a fundamental public policy of this state, such misconduct lies outside of the exclusive remedy provisions of the Labor Code"; see also *Shoemaker v. Myers* (1992) 2 Cal.App.4th 1407, 1418-1419, "where an employer's conduct implicates considerations of substantial public policy, interests beyond those of the employer and employee are involved. These interests are not protected by workers' compensation law and therefore must be accommodated outside the compensation bargain"; see also *Phillips v. Gemini Moving Specialists* (1998) 63 Cal.App.4th 563; see also *Kovatch v. California Casualty Management Co.* (1998) 65 Cal.App.4th 1256, 1277-1278 see also *Maynard v. City of San Jose* (9th Cir.1994) 37 F.3d 1396, 1405, IIED claim not preempted because employee claimed conduct violated California's fundamental public policy against retaliation for opposing discrimination.)

Even an employee's claim that she suffered physical injury due to an employer's discriminatory conduct may avoid workers' compensation preemption. (*Bagatti v. Department of Rehabilitation* (2002) 97 Cal.App.4th 344; see also *Jones v. Los Angeles Community College Dist.* (1988) 198 Cal.App.3d 794, 809.)

Collateral source/offsets

Employers often attempt to argue that any financial compensation an employee received from workers' compensation, or state disability benefits, should be taken into account when calculating claimed damages in the employee's civil case. An employee should attempt to prevent such a credit/offset from occurring by asserting (in written discovery, depositions, and through a pre-trial motion in limine) that such benefits constitute a collateral source.

In 2011, the California Supreme Court summarized the collateral source rule as follows: "If an injured party receives some compensation for his injuries from a source wholly independent of the tortfeasor, such payment should not be deducted from the damages which the plaintiff would otherwise collect from the tortfeasor." (*Helfend v. Southern California Rapid Transit District* (1970) 2 Cal.3d. 1, 20-21.) Put another way, "Payments made to or benefits conferred on the injured party from other sources [i.e., those unconnected to the defendant] are not credited against the tortfeasor's liability, although they cover all or a part of the harm for which the tortfeasor is liable." (*Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541, 551-52, *emphasis added.*)

The collateral source rule has been applied to the receipt of worker compensation benefits, see *Pacific Gas & Electric Co. v. Superior Court* (*Allen*) (1994) 28 Cal.App.4th 174: "Unlike the situation involving payment of collateral benefits by plaintiff's insurer, [FN67] the plaintiff/employee does not directly contribute to the workers' compensation fund providing the benefits. Nevertheless, the employee constructively pays for the benefits through his labor. [FN68] Benefits are part of the employee's wages. Accordingly, workers' compensation benefits fall into the category of 'actual or constructive' payment of benefits by the plaintiff and application of the Rule has been justified on this basis." (*Pacific Gas & Electric,* citing California's Collateral Source Rule, 37 Hasting L.J. at 675.) See also *DeCruz v. Reid* (1968) 69 Ca1.2d 217, "the negligent employer should not profit by his own wrong and take advantage of the reimbursement remedies provided him by the Labor Code.")

Note, however, that the court may permit such a set-off/credit to occur in order to avoid a purported double recovery, especially if the employee receives a settlement or award through the workers' compensation system. (See *Johns-Manville Prod. Corp. v. Sup. Ct.* (1980) 27 Cal.3d 465, 478-79 and *Felix v. Workmen's Comp. Appeals Bd.*, (1974) 41 Cal.App.3d 759.) Note that if the court decides that an offset will occur, the employee should request that that offset be calculated post trial so as to avoid prejudice before the jury; this is proper as the offset is "mere arithmetic" and "can be achieved by a simple calculation made by the court after the verdict has been rendered." (*Shepherd v. Walley* (1972) 28 Cal.App.3d 1079.)

Effect of settlement of WC case on your civil case

Workers' compensation cases may only be settled if the settlement is approved by the Workers' Compensation Appeals Board ("WCAB"). That generally occurs by having the employee sign a standard form "compromise and release" document, which releases "all claims and causes of action, whether now known or ascertained, or which may hereafter arise or develop as a result of the claimed injury." Some employers may attempt to argue that by signing this form, the employee also released her civil claims.

To cut this argument off before it begins, the best practice is to contact her workers' compensation attorney and request that the attorney expressly "carve out" your employee's civil claims in any workers' compensation settlement. This can be achieved by simply including a one-sentence addendum in the workers' compensation release stating that it does not apply in any manner to the employee's ongoing or potential civil claims.

If you pick up a case where a workers' compensation settlement has already occurred, or the workers' compensation attorney failed to include such carve-out language in the workers' compensation release, do not fret. *Claxton v. Waters* (2004) 34 Cal.4th 367, 371 makes clear that the workers' compensation release form language should be narrowly construed. It releases "only those claims that are within the scope of the workers' compensation system and does not apply to claims asserted in a separate civil action." (*Ibid.*) *Claxton* explains that if the settlement was intended to apply to claims outside of the workers' comp system, "the intended settlement of claims outside the compensation system would have to be reflected in a separate document." (*Id.* At 378.)

Lopez v. Sikkema (1991) 229 Cal.App.3d 31 is in accord: "If the mandatory compromise and release form executed by [plaintiffs] was intended to cover claims which are not compensable under the workers' compensation act, it should have contained express language to that effect. Indeed, since the civil action was pending at the time the parties executed the compromise and release, the settlement document would be expected to recite that the release included the particular lawsuit. It does not." See also *Asare v. Hartford Fire Ins. Co.* (1991) 1 Cal.App.4th 856, finding that workers' comp release did not apply to pending civil action as "no explicit reference to the [civil action] appears in the release."

Conclusion

The interaction between an employee's civil and workers' compensation claims should not be ignored. While the overlap between these areas can be challenging, it also often creates notice and liability arguments that will assist your client. Talking to your client from the beginning about these issues and working in conjunction with your client's workers' compensation attorney is key.


Costin

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Determining economic damages from wrongful termination

Statistical information can empower the jury in a wrongful termination case

By Joseph T. Crouse

The economic damages resulting from wrongful termination are substantial. An individual may become displaced from the labor market during a critical point in his or her career development. Even if an individual quickly finds re-employment following wrongful termination, the individual may have suffered economic damages if the earnings level pre-displacement is not quickly recaptured. There are two components to calculating the economic losses in wrongful termination litigation:

1. The likely compensation that the individual would have earned absent the wrongful termination.
2. The likely compensation that the individual can be expected to earn from alternate employment consequent to the wrongful termination.

The economic loss in a wrongful termination case is equivalent to the sum of:

1. The difference between the two compensation streams, and
2. The foregone earnings growth.

The calculation of this loss can be based upon the plaintiff's actual post-separation employment and earnings or on the statistically average employment and earnings the plaintiff could have received post-separation. This article provides both statistical information from the Displaced Workers Survey and a potential approach an economic expert may take in determining the economic damages resulting from wrongful termination.[1]

Economic overview of job displacement

One important characteristic of a labor market is its fluid nature. As a result of this fluid nature, however, many workers become displaced from their jobs due to a plant closing, a layoff, or the abolition of a job. These individuals are often *structurally unemployed*. This unemployment is generally the result from a mismatch between the skills needed for available jobs and the skills possessed by those seeking work. Second, structural unemployment may occur because of a geographical mismatch between the locations of job openings and job seekers. Some displaced workers experience a period of unemployment simply as a result of job search, and others are structurally unemployed and in need of retraining or further education.

Economic theory suggests some insights about structural unemployment. In the first place, higher levels of general education are associated with lower levels of structural unemployment. For instance, college graduates who are displaced from their employment because of changes in demand or technology have a wider range of job options and usually find retraining to be easier than persons who have little formal education. When the economy is at full employment and rapidly expanding, firms experiencing shortages of skilled workers often find it profitable to hire individuals who do not possess the required job skills but who can be trained while on the job. But when a recession occurs and the overall rate of unemployment rises, firms hiring new or replacement workers can draw skilled workers from the large unemployment pool. Workers who do not possess the required job skills will stay unemployed longer, and structural unemployment will rise.

There exists a large economic literature concerning earnings losses and time to re-employment for displaced workers. The consensus in this literature is that displacement leads to sustained earnings losses. Multiple papers written in the 1990s utilized the Displaced Workers Survey (DWS) data and found earnings losses ranging from 8 percent to 16 percent when the displaced worker is re-employed within a three year period.[2,3,4] This early research has shown that a portion of returns to tenure with a prior employer is rewarded when workers are reemployed in the same industrial sector.[5] Furthermore, displaced workers who switch industries following displacement have systematically larger earnings losses.[6] In a more comprehensive study, Farber (2005) examined the experiences of displaced workers from 1984 to 2004 utilizing the DWS.[7] He found that in the most recent period he examined, about 35 percent of job losers are not employed at the subsequent survey date, and that full-time job losers who find new full-time jobs earn about 13 percent less on average on their new jobs than on the lost job.

Kletzer & Fairlie (2003) utilize data from the National Longitudinal Survey of Youth (NLSY) in order to examine the experiences of younger displaced workers and find that the long-term earnings losses of younger displaced workers are similar to those with greater labor market experience.[8]

This article focuses on the insights that can be gained from the most recent editions of the DWS and how those insights can be applied in a litigation setting. Several worker characteristics play a role in the duration and magnitude of post-displacement economic loss: age, gender, education, tenure at pre-displacement job, and the length of unemployment following displacement. In order to examine these characteristics, statistics are presented in this article based on age, gender, and level of educational attainment for the *change in earnings*, the *time to employment*, and the *unemployment rate following displacement*. The other characteristics can be discussed theoretically.

The Displaced Workers Survey

The U.S. Bureau of Labor Statistics conducts, as a supplement to the Current Population Survey, the Displaced Workers Survey (DWS) biennially.[9] This survey provides a magnitude of information about the post-separation experiences of displaced workers. Perhaps the two most important pieces of information are the range of the length of job search and the earnings recapture rates in subsequent employment. It collects information from workers displaced within three years of the survey date on items such as: gender, age at survey date, educational attainment, employer tenure, reason for displacement, industry information regarding the pre-displacement position, whether the individual found work subsequent to the displacement, the duration of unemployment, and earnings information regarding both the position from which the individual was displaced and any positions the individual has held subsequent to the displacement.

The DWS asks only about a single involuntary job loss. The survey neither examines multiple job losses by the same worker nor does it consider workers terminated "for cause." The DWS captures worker terminations as a result of plant closings, layoffs, and the abolition of jobs primarily. Furthermore, the DWS asks about job separation within the previous three years from the survey date. The data is not longitudinal, and thus, only two time periods are available (pre-displacement three years prior to survey date and post-displacement as of survey date).

I analyze data on 284,121 individuals between the ages of twenty-five and sixty-four from the Displaced Workers Surveys conducted as part of the January CPS in 2008, 2010, 2012, and 2014. Job losers are defined as those workers who reported a job loss in the three calendar years prior to the survey date. Of this number, 15,222 (or roughly 6 percent) are defined as being displaced workers. I count as displaced workers those job losers who report that their reason for job loss is "plant or company closed down or moved," "plant or company operating but lost or left job because of insufficient work," and "position or shift abolished." Also, my analysis is restricted to the experiences of workers who were employed full time prior to displacement.

In order to investigate the loss in earnings due to displacement, I adjust all earnings figures to 2014 dollars. The change in earnings between the lost job and the job held at the DWS survey date is calculated, in real dollars. This forms the basis for the average earnings change statistics. I report these statistics by level of educational attainment, gender, and age grouping. Had the displaced worker not lost his or her job, earnings likely would have grown over the interval between the date of job loss and the DWS survey date. This effect remains unexplored in my analysis in this article for the sake of simplicity. As a result, the earnings changes are most likely greater in magnitude (more negative) due to this effect.

Furthermore, I explore the time to employment between job displacement and the beginning of a new full-time job. Lastly, the percentage of individuals that still remain unemployed or are not participating in the labor market as of the survey date (three years from job displacement) is reported.

Table 1: Displaced Workers, Males Aged 25-64

Years of Education	Earnings Change	Time to Employment	Unemployed
Less than HS	- 11.3%	14.9 weeks	33.3%
High School	- 8.2%	15.6 weeks	23.8%
Some College/Associate's	- 11.1%	14.7 weeks	19.1%
Bachelor's Degree	- 10.1%	16.0 weeks	9.9%
Master's Degree	- 8.2%	13.1 weeks	6.2%
Professional/Doctorate Degree	- 6.6%	15.0 weeks	11.8%

The economic damages from job displacement

In aggregate, earnings are found to be 8.7 percent less for those displaced that find subsequent employment during the three-year survey period. The average individual that found subsequent employment took 15.4 weeks to find a new job. About 23 percent of job losers are not employed at the subsequent survey date. However, there are substantial differences from these aggregate averages that the statistics in Tables 1-12 reveal.

Table 1 displays the statistical results for male displaced workers between the ages of 25 and 64 across various levels of educational attainment. Males with less than a high school education experience the greatest decline in earnings post-displacement and nearly one-third find themselves unemployed at the time of the survey following a displacement.

We concentrate our attention on younger male workers (ages 25-34) that have been displaced in Table 2 (see next page). These younger male workers do not experience as large of an earnings decline as their older counterparts in Tables 3-5. These individuals have short job tenures and have not invested in a long-term career in a single firm. While these workers do not display a large decline in earnings following job displacement, they still suffer substantial losses as a result of losing the accelerated earnings growth that comes with establishing a career.

Tables 3 and 4 (see next page) display statistics for displaced male workers aged 35-44 and 45-54, respectively. These individuals are in the prime of their career. Individuals aged 45-54 experience substantial losses from displacement. Higher educated and higher qualified workers seem to be employed first following displacement as the unemployment

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Table 2 : Displaced Workers, Males Aged 25-34

Years of Education	Earnings Change	Time to Employment	Unemployed
Less than HS	- 9.9%	14.4 weeks	22.4%
High School	- 3.3%	14.1 weeks	20.5%
Some College/Associate's	- 2.8%	12.7 weeks	16.0%
Bachelor's Degree	- 2.3%	11.4 weeks	4.0%
Master's Degree	- 8.3%	12.0 weeks	3.2%
Professional/Doctorate Degree	- 5.2%	14.1 weeks	11.1%

Table 3: Displaced Workers, Males Aged 35-44

Years of Education	Earnings Change	Time to Employment	Unemployed
Less than HS	- 2.1%	11.7 weeks	35.8%
High School	- 6.4%	13.7 weeks	15.3%
Some College/Associate's	- 12.7%	12.5 weeks	12.6%
Bachelor's Degree	- 8.0%	14.1 weeks	7.1%
Master's Degree	- 5.5%	15.5 weeks	4.6%
Professional/Doctorate Degree	- 2.9%	15.6 weeks	11.1%

Table 4: Displaced Workers, Males Aged 45-54

Years of Education	Earnings Change	Time to Employment	Unemployed
Less than HS	- 21.2%	17.5 weeks	36.8%
High School	- 10.3%	17.2 weeks	27.0%
Some College/Associate's	- 15.8%	17.2 weeks	16.5%
Bachelor's Degree	- 15.7%	20.0 weeks	5.0%
Master's Degree	- 5.9%	12.1 weeks	12.8%
Professional/Doctorate Degree	- 8.2%	13.9 weeks	20.4%

Table 5: Displaced Workers, Males Aged 55-64

Years of Education	Earnings Change	Time to Employment	Unemployed
Less than HS	- 24.3%	19.6 weeks	49.3%
High School	- 19.1%	20.1 weeks	38.8%
Some College/Associate's	- 13.3%	18.7 weeks	36.4%
Bachelor's Degree	- 14.4%	22.0 weeks	30.0%
Master's Degree	- 10.5%	12.9 weeks	10.4%
Professional/Doctorate Degree	- 10.5%	18.5 weeks	5.0%

rates drop by education except at the most advanced levels. Individuals with a professional/doctorate degree may find it challenging to find a comparable job due to their specialized skills and training. This could help explain the relatively high level of unemployment for 45-54-year-old males (20.4 percent).

Older male workers (aged 55-64) tend to experience the most relative economic damages due to job displacement. They typically experience a larger earnings decline, a greater time to reemployment, and a higher unemployment rate. Table 5 displays these results.

In Tables 6-10 statistics for women are presented in the same fashion as those for males in Tables 1-5.[10] The results for women provide a lot of the same conclusions of those available for men.

Lastly, Tables 11 and 12 (see page 50) consider male and female workers that have reported a disability. As is apparent from the tables, individuals with a disability fare far worse than the statistical averages in their respective groupings. Displaced workers with a disability experience a greater earnings decline, have a longer time to reemployment, and suffer a substantially increased unemployment rate.

Applying the statistics

An expert may find this information concerning displaced workers of use in authoring a report or in offering testimony in cases of wrongful termination. In wrongful termination cases, the economist must analyze the back pay (as a result of unemployment and/or a change in level of pay), front pay (the differential between pre-termination and post-termination earnings considering the duration for the recovery of pre-termination earnings, if ever), and the loss of benefits (health, pension, stock options, etc.).

A starting point in analyzing back pay is examining the difference between potential earnings and actual earnings. An economist may also consult statistical information (such as the Displaced Workers Survey) regarding duration of unemployment and relative pay levels upon finding a new position. For example, if the plaintiff in a wrongful termination case decided to attend a two-year college after a fairly short period of unsuccessful job search, an analyst could provide an estimate of how long a person with a similar background could have expected to find new employment. The 2008-2014 Displaced Workers Survey results show that a typical person is out of work 10 to 24 weeks after displacement from their job. Variables affecting that average include age, education, gender, and disability status. For example, females between age 25 and 34 with a baccalaureate degree have a mean of 11.1 weeks out of work after displacement. Female workers between age 45 and 54 with a baccalaureate degree are typically displaced considerably longer, with a mean of 17.4 weeks. Also, persons with 12 or fewer years of education tend to be displaced longer than those with higher levels of education.

In addition to applying statistics from the DWS to an individual who has been wrongfully terminated, the expert must review previous work history, the state of the local labor market, and circumstances surrounding the termination of employment.

Next, the expert must analyze front pay. Important considerations include previous level of pay, age, transferable skills, education, and the state of the local and national economy. Workers who were earning a relatively low wage typically will have little front pay damages. These levels of pay are usually associated with unskilled work or entry-level positions. Plaintiffs who had been performing unskilled work will have developed few skills specific to the firm they worked for. Many entry-level positions will also have few firm-specific skills, since these workers generally have little tenure with their employer. Plaintiffs that have developed valuable firm-specific skills will generally have greater front pay damages, since their skills are less transferable.

Level of educational attainment is another important variable. For example, a high percentage of displaced workers with a bachelor's degree or higher can be

Table 6: Displaced Workers, Females Ages 25-64

Years of Education	Earnings Change	Time to Employment	Unemployed
Less than HS	- 5.9%	16.0 weeks	47.3%
High School	- 11.2%	16.4 weeks	35.5%
Some College/Associate's	- 9.0%	17.0 weeks	28.0%
Bachelor's Degree	- 7.7%	14.7 weeks	17.3%
Master's Degree	- 6.2%	13.3 weeks	16.9%
Professional/Doctorate Degree	- 8.8%	10.3 weeks	10.7%

Table 7: Displaced Workers, Females Aged 25-34

Years of Education	Earnings Change	Time to Employment	Unemployed
Less than HS	- 10.5%	12.7 weeks	56.2%
High School	- 4.1%	18.2 weeks	31.4%
Some College/Associate's	- 5.9%	17.3 weeks	26.7%
Bachelor's Degree	- 0.4%	11.1 weeks	14.8%
Master's Degree	- 2.3%	11.4 weeks	6.0%
Professional/Doctorate Degree	***	***	***

Table 8: Displaced Workers, Females Aged 35-44

Years of Education	Earnings Change	Time to Employment	Unemployed
Less than HS	- 5.3%	20.6 weeks	45.5%
High School	- 5.9%	13.5 weeks	31.5%
Some College/Associate's	- 10.7%	16.3 weeks	35.3%
Bachelor's Degree	- 5.4%	15.6 weeks	17.2%
Master's Degree	- 3.8%	14.2 weeks	12.8%
Professional/Doctorate Degree	***	***	***

Table 9: Displaced Workers, Females Aged 45-54

Years of Education	Earnings Change	Time to Employment	Unemployed
Less than HS	- 3.2%	12.0 weeks	33.4%
High School	- 8.9%	17.0 weeks	32.9%
Some College/Associate's	- 7.0%	18.4 weeks	35.2%
Bachelor's Degree	- 8.2%	17.4 weeks	14.0%
Master's Degree	- 10.3%	13.6 weeks	15.3%
Professional/Doctorate Degree	***	***	***

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Table 10: Displaced Workers, Females Aged 55-64

Years of Education	Earnings Change	Time to Employment	Unemployed
Less than HS	- 4.1%	21.1 weeks	15.4%
High School	- 28.3%	17.0 weeks	17.5%
Some College/Associate's	- 12.8%	15.5 weeks	21.8%
Bachelor's Degree	- 24.3%	17.3 weeks	21.5%
Master's Degree	- 22.1%	14.3 weeks	23.8%
Professional/Doctorate Degree	***	***	***

Table 11: Displaced Workers, Males Aged 25-64, With a Disability

Years of Education	Earnings Change	Time to Employment	Unemployed
High School	- 21.2%	18.2 weeks	48.1%
Some College/Associate's	- 22.4%	17.0 weeks	44.8%
Bachelor's Degree	- 12.1%	24.3 weeks	38.0%

Table 12: Displaced Workers, Females Aged 25-64, With a Disability

Years of Education	Earnings Change	Time to Employment	Unemployed
High School	- 19.1%	19.8 weeks	66.3%
Some College/Associate's	- 17.6%	18.5 weeks	51.7%
Bachelor's Degree	- 13.2%	20.5 weeks	36.6%

expected to recover comparable compensation after they generated new firm-specific capital in their new employment. It is not unreasonable for this to take anywhere from 2 to 10 years. However, this is without adjusting for inflation or earnings growth during that time period. When this is taken into consideration, the time period for recovery is extended. It is also important to note that a wrongfully terminated individual's earnings may never recover to the level of pre-termination earnings due to an impaired reputation. In cases like these, it is advisable to present to the jury a range of scenarios to consider. In addition, workers over the age of 45 typically have a harder time securing a level of compensation similar to what they had before displacement.

An economist should use statistical research on displaced workers as a guideline. Data collected on displaced workers are at the national level. However, the local economy may be relatively stronger or weaker than the national economy (at the time the data was collected). An economist can take into consideration the impact of local unemployment rates on front pay when developing their opinion.

The loss of pension and retirement benefits must often be considered as well. Pensions are typically calculated based on years of seniority and final average pay (over the last few years of employment). Thus, loss of employment may have a compound impact, especially on workers nearing full retirement qualifications. Health insurance, employer matching of 401(k) plans, and stock options are among many other benefits that may need quantification. The difference in the value of benefits is often an important "hidden" factor in determining the magnitude of the loss.

Conclusion

This analysis has provided statistics from the most recent editions of the Displaced Workers Survey. Importantly, this information is helpful in empowering the jury in a wrongful termination case by presenting the experiences of the typical displaced worker. The use of these statistics should be combined with professional judgment and an understanding of the unique characteristics of each individual worker.


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Endnotes:

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[10] The "***" indicates that there was an insufficient sample size from which to provide a statistically reliable average.

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Using third-party witness testimony at mediation in the employment case

Aside from the credibility of your plaintiff, a third-party witness may be your most powerful tool to increase the settlement value

By Dave Rudy

When this author was in practice and attended a CLE or read a practice-related article, the time was well-spent when it resulted in something – even one thing – that could be immediately applied in a real case in a practical way. This article provides practical help to the practitioner regarding preparation and use of third-party evidence at mediation in order to enhance the settlement value.

The problem

In many single employee cases involving claims or issues of wrongful termination, hostile work environment, discrimination, ADA (accommodation) and other employment-related claims, a major evidentiary/valuation issue (possibly next in importance to the credibility of the plaintiff) is the testimony of co-workers and/or supervisors. Indeed, the value of such cases is usually influenced by three factors, which may be present or absent to varying degrees and in varying ways:

- Credibility of the plaintiff;
- Existence, substance and persuasiveness of objective evidence (e.g., documentation);
- Testimony of third-party witnesses

Where the goal of plaintiff is to persuade the defense to be willing to pay more to settle the case[1], these are the sources of information available to make the attempted persuasion effective. The first two – plaintiff's credibility and the power and effectiveness of objective evidence – are beyond the scope of this analysis. We will limit our focus to the third: those cases in which there are third-party witnesses who are accessible to plaintiff prior to mediation, and whose testimony may be used to enhance settlement value.

It is not unusual for the plaintiff to contend at mediation that many co-workers will support his claims, or that any who won't are still employed and "under the thumb" of the employer.

Those still employed will likely side with the employer out of fear, intimidation, inducements and promises or the like, plaintiff may contend. Thus, these retained employees do not present a serious threat to the plaintiff's claims and can be dismissed from consideration due to obvious bias. Former co-workers, on the other hand, are free of that bias and thus will be more credible.

The defense, for its part, often claims that former employees who appear to confirm plaintiff's allegations are in fact not credible because of "sour grapes" or the like, and thus do not present a serious threat to the defense of the case because of their obvious bias against their former employer. They too, the defense may assert, should essentially be ignored because of obvious bias.

Beneath the posturing that pervades this aspect of the negotiation is an important reality – to the extent that the defense *believes* that plaintiff actually has credible witnesses who can corroborate plaintiff's claims, the defendant's *perceived* settlement value of the case will increase, resulting in greater willingness to settle for higher amounts, and benefit to the plaintiff in the negotiation. One recurring challenge to the plaintiff's counsel in attempting to settle a case to the client's best advantage at mediation is the *plaintiff's ability to influence* the defendant's perceived settlement value through use of third-party witnesses and the substance, quality and credibility of their expected testimony.

It should be emphasized that the goal here is persuasion, but not of the usual kind. As advocates, persuasion is our life's work. Trial advocates are successful in Court in relation to their persuasiveness to judge and jury. But here, the goal is for the plaintiff's counsel, assisted by the mediator, to *persuade the defense* that the testimony of credible third-party witnesses who are likely to appear at trial and present that evidence actually increases the settlement value. Arguably, persuading the opponent is the toughest task one can ask of an advocate. Lawyers are notoriously (and understandably) skeptical of the claims of their adversaries.

To maximize the impact on settlement of valuable third-party witness testimony, plaintiff's counsel should carefully work through several issues:

- *By what means* is the testimonial evidence to be gathered, preserved and presented to the opponent through mediation in a way that uses the mediator to full potential and serves to persuade the defense of greater settlement value (and not merely better prepares the opposition for trial.) The presentation also must be made in a way that communicates strength on the presenter's side, not weakness or overenthusiasm to settle.
- *When* does the presentation occur; more specifically, when is the best time to mediate this case with an eye to presentation of third-party evidence?
- *How* (by what mode) is the evidence to be presented, and when and under what circumstances to use it during mediation?

The means of gathering and preserving the evidence

In order to enhance the opponent's perception of settlement value, the evidence has to be presented as real and substantive, not merely wishful thinking on the part of plaintiff's counsel. The

third-party witness must be believed by the defense to be credible, so that it makes sense for defense counsel to conclude that the witness could sway the jury in plaintiff's direction. Finally, the defense has to believe that it is at least likely (if not definite) that the witness will appear at trial and actually give the predicted testimony.

There are several avenues to achieve the level of substance and credibility necessary. Which is used will depend on a multitude of factors, including the nature of the issue, the level of hostility between the parties, the level of trust, respect and hostility (or the opposite) between the lawyers, the gravitas of the witness, etc.

• *Plaintiff's statements as to what the witness is likely to say.*

Statements by the party or counsel are not likely to be taken too seriously by the other side. In the observation and experience of this writer, rarely are these statements effective in increasing the perceived settlement value of the case to the defense. Indeed, when that is all that is forthcoming from the plaintiff's side, the perception may be the exact opposite – that there is no firm, credible third-party evidence which bolsters the plaintiff's case, or it would have been presented as such.

• (*Trained*) *investigator's notes of interviews of third-party witnesses*

Leaving aside the privilege issues, these notes may have some value but are likely to be of limited value in accomplishing the plaintiff's objective. While an investigator's notes may be presumptively strong evidence of what the investigator was told on a given day, the witness may or may not maintain the same views until the time of trial. With notes alone, the defense is in effect being asked to substitute plaintiff's investigator's judgment for its own counsel's (claims adjuster, corporate representative, party) judgment as to quality of testimony, credibility, likeliness that views will not change by the time of trial, etc.

• *Sworn statement of witness*

This is the strongest evidence short of formal discovery of what the witness will say at trial. While it doesn't address credibility (except through characteristics such as internal consistency, lack of exaggeration, measured, credible speech), it does portray a witness who was willing to swear to the truth of what was said, and is now committed to the facts (and subject to impeachment/rehabilitation at trial if there is later wavering).

• *Deposition testimony*

Obviously, this is the most powerful method of presenting third-party witness testimony to the defense as a vehicle to increase the defense perception of settlement value. It is also the most expensive and has the most risk. Defense counsel will be allowed to cross-examine the witness at deposition, to test recollection and credibility and to try to make the witness more susceptible to impeachment at trial.

• *Creative, mediation-specific means*

Presentation of witness at the mediation. Plaintiff counsel can have a third-party witness physically present at the mediation and present the witness in some form to the defense live. This is extremely effective when successful, but includes a number of risks – some obvious, some subtle. The witness may appear to be overly interested in the successful outcome of plaintiff's case, raising questions of bias on its face. If not well delineated with the mediator and through the mediator by agreement with the opponent, the interaction can turn into an opportunity for cross-examination of an unprepared witness or worse, a hostile and unproductive exchange in the presence of the witness and parties. The witness's statements, (indeed, the whole mediation), is "off the record", so the witness is free to later change or recant the testimony. Unlike the full deposition or sworn statement options, plaintiff is vulnerable to the danger of providing a roadmap to the defense for how to handle plaintiff's best third-party witness as the case proceeds without having first irrevocably committed the witness to her testimony. Some of these risks can be ameliorated by careful preparation and precise agreement on how this joint session is to proceed. For example, the parties can agree that questions may only be asked by the mediator, that questions may only be asked by the plaintiff's counsel, or that the witness only be allowed to present a narrative of what she has to say.

Other modalities for presenting the undeposed witness at the mediation. The witness may appear by conference call (now probably outmoded), Skype or video connection, and the examination may still be limited as above. The witness may appear by pre-recorded video in which the plaintiff's counsel (or another as may be appropriate) questions the witness in front of the camera. The witness may do a narrative presentation by pre-recorded video. (Both of the last two methods have been used very successfully as part of "day in the life" presentations in catastrophic injury cases, sometimes to address critical issues of such things as complex medical causation, for example).

Finally, a means of presentation that is *not* recommended is to show or provide testimony (in any form, sworn or unsworn) to the mediator, then charge the mediator with the task of convincing the other side of the power or threat or value of the witness and her testimony. There are two reasons to avoid this method. Both involve compromising the mediator's credibility with the other side, in subtle but potentially devastating ways. The (facilitative) mediator is an effective advocate for each side precisely because of their neutrality. The mediator does not advocate from personal commitment but simply by effectively stating the position in the context of risk-based analysis to a willing and attentive audience in the opposing room. The mediator remains an effective advocate for each side in the other's room only to the extent that they do not cross the line and advocate from personal opinion or commitment. When that line is crossed, the mediator is no longer regarded as objective by the opposing party, and their usefulness is impaired (or destroyed) from that point forward. Second, if the mediator is persuaded that the third-party witness represents great value to the plaintiff and great risk to the defense, the mediator again injects their personal opinion and judgment into the equation in a manner inconsistent with mediator neutrality. By saying "trust me, I have seen this evidence and you need to change your settlement evaluation as a result of it," the mediator is both crossing an impermissible line and demanding a change of position from the defense purely as a matter of personal trust. In fact, for either party to change its settlement value or range, it is imperative that the decision-makers (including counsel) make their own assessment of the evidence, and not be asked to take *anyone else's word for it.*

Timing of the mediation

Great thought and preparation is required of counsel not only in *how* to present the third-party evidence, but in *when* to do so as well.

Timing of mediation is a complex issue in almost every case, but especially so in the circumstances discussed here. If it is apparent at the outset of the case that it is likely to require multiple mediations, counsel should strongly consider an early mediation (maybe even less than a full day) and seek the mediator's assistance – *before* as well as *during* the mediation session – to arrive at procedural agreements which will, for example, allow for the scheduling of key third-party witness depositions prior to mediation, without having to conduct unlimited discovery in every area prior to coming back to negotiate a settlement.

Even in cases which ought to resolve with only one session, it is advisable for the plaintiff's counsel to consider what information to provide to the defense ahead of mediation and when. A confidential brief to the mediator with instruction not to share it with the other side delivered to the mediator 24 hours before the start of mediation will not likely be effective to modify the defense view of settlement value.

Who are the decision-makers on the defense? If an insurer representative is involved, the more time she has to consider the issue and allow others at the insurer to evaluate the significance of the evidence, the more chance that the evidence will have a productive effect on settlement value.[2]

The decisions and alternatives considered here are never as easy in the real world as in a one-dimensional analysis. Many factors bear on whether and how to use third-party evidence in mediation. Many factors also bear on when to mediate, a good number of which are not in the plaintiff's sole control. The defense must agree and be prepared to mediate as well, or the whole enterprise will be fruitless.

Use of the witness testimony in negotiation

Finally, in those cases where counsel finds it inadvisable to present the third-party evidence prior to mediation, there remains the question of how to best present it at mediation. We have already considered different presentation modalities – the question here is rather whether and when to release the information at mediation.

Information and its timing and release are critical negotiation decisions. If counsel never provides a "preview" of witness testimony to the opposition, there is not much chance of damaging the witness's effectiveness at trial. On the other hand, all good negotiators know that information properly released at the right time is critical to better negotiation outcomes. Once the defense has evaluated the case (even tentatively), information is required to change the evaluation. Value-changing information can come through pleadings, discovery, motions and even trial – or it can come in mediation when each party has the opportunity to persuade the other to change its view of risk or value or both.

The problem is that most advocates resist the unilateral provision of information to their opponents – and not without good reason. In mediation, all information disclosure (even the re-framing and re-positioning of known information) is voluntary. There is no requirement that either side ever do so. But the underlying assumption here is that one side wants to influence the other side's case valuation. That can only be done by providing information to the opponent. Mediation provides arguably the ideal forum, since experienced mediators can collaborate and strategize with parties about when and how to release such voluntary information. But there is always risk that information will be disclosed which will educate the other side without achieving the goal of improving your negotiating position.

A couple of suggestions are worth considering to minimize that risk:

• Work through with the mediator ahead of time the desirability and timing of the release of information. Ask the mediator to help you "qualify" the other room – does the mediator think they can get through to your opponent? Are you talking to closed minds, or is the other side willing to listen – if not to you, to the mediator? What and when are the most effective means and times of providing the information? The right mediator is a source of good intel on the mood and receptiveness down the hall. They are also a good sounding board, and a good ally in strategizing how to improve your negotiation position and be persuasive in the other room.

• Follow a simple rule: whenever possible, trade information for movement. This rule is simple to state, but like most things in negotiation application is often more difficult than recitation. The point is that if the mediator is telling you that they believe that the other side will respond productively to the witness testimony or evidence, you can get corroboration for yourself by seeing movement in response to your willingness to provide information.

Dave Rudy is a highly experienced employment mediator, now in his 25th exciting year as a full-time neutral. He is based in San Francisco where he has recently joined ADR Services, Inc. (see daverudymediator.com).



Rudy

Endnotes

[1] This article is really about the use of a very specific kind of information to enhance a party's result in negotiation – it applies as well to defendants with third-party witness information as to plaintiffs.

[2] That is why the day-in-the-life presentations are often furnished to the defense well in advance of mediation, with plenty of copies made available for circulation to all of the decision-makers (those visible to the plaintiff as well as those invisible).

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The Bunkhouse Rule

New decision shines light on an old rule regarding the exclusive Workers' Comp remedy when employee lives on his employer's premises

By Andje Medina
The Veen Firm, PC

The Bunkhouse Rule has been around since the 1920's, but many do not know what it is or how it works. Those who are familiar with the rule know that in certain situations, it provides a defense to a civil suit by allowing an employer to invoke the Workers' Compensation exclusive remedy rule for employees who live on an employer's property, even if they are injured after their shift is over. However, as explained below, now the rule can also be used offensively by plaintiffs to preclude the analysis of other exclusive remedy rules, thereby allowing an employee to sue his or her employer in a civil third-party case.

Last month, in a case handled by the author, the First Appellate District Court issued a 20-page published opinion chronicling both the history and future of the rule, shining new light on this old rule and highlighting the nuances to consider when a client is injured while living on employer-owned property. (See *Wright v. State of California* (Cal.App.1st Dist. 2015) 233 Cal.App.4th 1218.)

This article addresses this critically important rule, which must be thoroughly analyzed in a case involving an injury to an employee who lives on an employer's premises.

Wright v. State of California facts

Monnie Wright was a correctional officer at the San Quentin State Prison and resided in one of the state-owned houses on San Quentin, making the State of California both his employer and landlord. One morning while he was walking (i.e., commuting) from his rental premises to his work premises he fell down a dilapidated concrete staircase that literally crumbled underneath his feet. He sustained serious and debilitating injuries in the fall that led to his early disability retirement. Not knowing whether the injury would be considered in the course and scope of his employment, Mr. Wright pursued both workers' compensation and civil remedies against his employer/landlord, the State of California.

Immediately after filing civil suit, his employer moved for summary judgment arguing that the workers' compensation exclusive remedy applied and thus barred his civil suit. The trial court granted the motion. The First Appellate District overturned the court's granting of summary judgment and remained the action back to state court.

Workers' Compensation Exclusivity Rule

Labor Code section 3600 *et seq.* provides that an employee's exclusive remedy against his employer for injuries arising out of and in the course and scope of employment is workers' compensation.

There are only a handful of exceptions to this general rule. And, the rule must be liberally construed in favoring of finding workers' compensation coverage. (See *Maher v. Workers' Comp. Appeals Bd.* (1983) 33 Cal.3d 729, 732-733.)

Coming and Going Rule

Injuries that occur during an employee's commute (i.e., his comings and goings) are generally not covered by workers' compensation. (*Santa Rosa Junior College v. Workers' Compensation Appeals Board* (1985) 40 Cal.3d 345) In the absence of special or extraordinary circumstances, the rule applies. (*Hinojosa v Workmen's Compensation Appeals Board* (1972) 8 Cal.3d 150, 156.) The rationale is that compensation is available only when an employment service is being provided. The act of coming to and leaving work is not an employment service. Service begins only when the employee arrives at the place of employment and is suspended when he leaves until he later resumes. (*Jeewarat v. Warner Brothers Entertainment, Inc.* (2009) 177 Cal.App.4th 427, 435; *Ocean Acc. & Guarantee Co. v. Industrial Acc. Commission of Cal.* (1916) 173 Cal. 313; *Zenith Nat. Ins. Co. v. Workmen's Compensation Appeals Bd.* (1967) 66 Cal.2d 944.)

As with any rule, there are exceptions. The most common exception to the coming and going rule is the premises' line rule. The premises' line rule attempts to define the end of an employee's commute, and thus the beginning of workers' compensation coverage, as the moment the employee enters the employer's premises or an extension of the premises necessary to access the work premises after commuting. (See *General Ins. Co. v. Workers' Comp. Appeals Bd.* (1976) 16 Cal.3d 595, 599.) "Whether an employee has entered into the areas of his employment involves a factual determination to be made in light of the circumstances in the case." (*Parks v. Workers' Comp. Appeals Bd.* (1983) 33 Cal.3d at 589 n. 5; *Hinojosa*, *supra*, 8 Cal.3d at 154-55.) The rule extends "employment" to areas necessary to access the work premises after commuting. See *Lewis v. Workers' Compensation Appeals Board* (1975) 15 Cal.3d 559.

In *Wright*, the State of California argued on summary judgment that the premises' line rule was a bright line rule and since Monnie Wright was technically on employer-owned premises at the time of his fall, he was covered by workers' compensation coverage to the exclusion of other remedies. The State conveniently overlooked the fact that there was no line for him to cross. Mr. Wright lived and worked on State property so there was no clear demarcation.

In effect, the State took the position that Mr. Wright and other workers that lived at San Quentin would be covered by workers' compensation coverage 24/7 – a surprising assumption of coverage. The First Appellate District Court pointed out that under this rationale, he and other co-workers would also then be covered on all state highways and other state owned properties at all times – coverage that is not the intention of the Workers' Compensation Act.
(*Wright, supra*, 233 Cal.App.4th at 1237.)

Not surprisingly, there were no cases where courts used the premises' line rule to determine whether an employee-resident was covered by workers' compensation when injured on employer-owned property. Instead, the First Appellate District Court made it clear that employee-residents must be analyzed by the bunkhouse rule. (*Wright, supra,* 233 Cal.App.4th at 1231.)

Discovery check-list for Bunkhouse cases

1. Does the employment contract contemplate the tenancy?
   - Is the rental unit mentioned in any employment document?
   - Was the rental unit a negotiated term during the hire?
   - Did the employment and the tenancy start at the same time?
2. Does the employment require or necessitate the tenancy?
   - Are there other housing options within a reasonable distance?
   - Is the job location so remote that employer-owned housing is the only suitable option?
   - Is the employee on-call at all times?
3. Does the employee derive benefits from the tenancy, beyond standard rental benefits?
   - Is the rent below market-rate?
   - Is rent taken directly out of the paycheck?
4. Are non-resident co-workers paid more as an off-set?
5. Is the lease agreement separate from the employment contract?
6. Does the lease agreement require the tenant to obtain liability insurance?
7. Does the lease agreement address liability of the landlord?
8. Can non-employees live in the rental units?
9. Does the employee carryout any work functions from his rental unit?
10. Do other non-resident employees access the rental unit for work functions?

The Bunkhouse Rule

> While the premises line establishes when a nonresident employee enters the course of his or her employment, an employee who resides in employer-owned housing is differently situated. As to such an employee, the 'in the course of employment' requirement is generally analyzed by what is called 'the bunkhouse rule.'
> (*Wright, supra,* 233 Cal.App.4th at 1231.)

Under the Bunkhouse Rule, an employee-resident's injuries are covered by workers' compensation only if the employment contract *contemplates* or the work *requires* the employee's residence on employer-owned premises. See *Vaught v. State of California* (2007) 157 Cal.App.4th 1538. The Bunkhouse Rule dates back to the 1920's, but hadn't seen much life until 2007 in the *Vaught* case where the court barred a civil suit by an employee-resident against his employer finding that his work both *contemplated* and *required* him to live on the employer premises where he was injured. (*Ibid*.) Prior to *Vaught*, the Bunkhouse Rule had been periodically addressed about every 20 years. (See, e.g., *Larson v. Industrial Acc. Com.* (1924) 193 Cal. 406; *C*; *Truck Ins. Exchange v. Industrial Acc. Commission* (1946) 27 Cal.2d 813; *Aubin v. Kaiser Steel Corp.* (1960) 185 Cal.App.2d 658; *Santa Rosa Junior College, supra,* 40 Cal.3d 345; *Crawford v. Worker's Comp. Appeals Bd.* (1986) 185 Cal.App.3d 1265.)

The *Wright* Court found the *Vaught* decision to be most instructive and embarked on an analysis regarding whether Monnie Wright's employment contract *contemplated* or *required* his employer-owned housing. The Court concluded that because he lived on the grounds voluntarily, paid market rent, obtained liability insurance as required by his lease and was not required to live on-site or be on-call that neither standard was met to cloak him with workers' compensation coverage 24/7. (*Wright, supra,* 233 Cal.App.4th at 1234-1235.)

The *Wright* decision is a victory for employee-residents and prevents negligent landlords, who also happen to be employers, from hiding behind the workers' compensation exclusivity shield. Using the clear guidelines articulated in *Wright*, employee-residents now have clearer standards within which they can understand and articulate their civil rights against their employer-landlords for premises liability and other torts unrelated to their employment.


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Will your client be liable for the defendant's costs if your employment case is unsuccessful?

Recent California Supreme Court decision provides comfort for FEHA plaintiffs

By William C. Jhaveri-Weeks and Andrew P. Lee

Plaintiffs alleging employment law violations are usually ordinary people with limited means. Although contingency representation and one-way fee-shifting statutes provide workers with access to the courts, the risk of being held liable for the employer's costs if the case is unsuccessful can deter employees from bringing suit. Court-reporter fees, transcription costs, and court-ordered expert fees may run in the tens of thousands of dollars. In extreme cases, such as the recent high-profile sex-discrimination case brought by Ellen Pao against venture capital firm Kleiner Perkins, the defense seeks costs approaching $1 million.[1]

Recently, the California Supreme Court provided clarity regarding the risk that plaintiffs face of bearing defendants' costs in unsuccessful FEHA cases. In *Williams v. Chino Valley Independent Fire District* (May 4, 2015) __ Cal.4th __ , 2015 WL 1964947, the Court held that a losing FEHA plaintiff will be liable for the employer's costs only upon a finding that the action was objectively without foundation. This article summarizes the *Williams* decision, discusses the primary differences between state and federal law regarding cost-shifting, and explores whether plaintiffs' attorneys may assume liability for costs if their clients do not prevail on their claims.

The *Williams* decision limits exposure to costs under FEHA

The *Williams* Court was called upon to reconcile Code of Civil Procedure section 1032, which entitles a prevailing party to recover ordinary court costs "as a matter of right" "except as otherwise expressly provided by statute," and Government Code section 12965(b) (FEHA's fee-and cost-shifting provision), which states that "the court, in its discretion, may award to the prevailing party … reasonable attorney's fees and costs, including expert witness fees."

The Court concluded that FEHA's fee-and cost-shifting provision is an express exception to the general rule contained in the Code of Civil Procedure. The Court went on to hold that a prevailing FEHA defendant's costs, like its attorneys' fees, should be shifted to the plaintiff only if the case was "objectively without foundation when brought, or the plaintiff continued to litigate after it clearly became so." In so holding, the Court resolved a Court of Appeal split on this issue, which had placed unsuccessful FEHA plaintiffs at greater risk of being held liable for costs. *Compare Cummings v. Benco Bldg. Servs.* (1992) 11 Cal.App.4th 1383 *with Perez v. Cnty. of Santa Clara* (2003) 111 Cal.App.4th 671 *and Knight v. Hayward Unified Sch. Dist.* (2005) 132 Cal.App.4th 121.

The "objectively without foundation" standard originates in the U.S. Supreme Court's landmark decision establishing one-way attorneys' fee-shifting under Title VII. (See *Christianburg Garment Co. v. E.E.O.C.* (1978) 434 U.S. 412 (holding that under Title VII, prevailing plaintiffs are entitled to reasonable attorneys' fees, but prevailing defendants are not unless the case was frivolous).) The *Williams* Court observed that although federal courts have not applied the asymmetrical *Christianburg Garment* rule to *costs* under Title VII, the language of Title VII and FEHA is materially different with respect to costs: FEHA discusses a court's discretion to award fees and costs in parallel (as quoted *supra*), while Title VII contains no comparable provision addressing costs. Accordingly, cases applying other federal civil rights statutes – those with language similar to FEHA's – such as the Americans with Disabilities Act, have applied the *Christianburg Garment* rule to costs as well as fees. (See *Williams*, 2015 WL 1964947, at *3, 8 (citing *Brown v. Lucky Stores, Inc.* (9th Cir. 2001) 246 F.3d 1182, 1190).) As a matter of statutory interpretation, the California Supreme Court held that costs and fees should be treated identically under FEHA – an outcome that the Court viewed as consistent with the Legislature's desire to ensure that employees are not discouraged from vindicating their civil rights under FEHA. The case provides an important protection for California workers.

The federal lay of the land: Less favorable and more varied

Federal Rule of Civil Procedure 54(d), which is the equivalent of California Code of Civil Procedure section 1332, states that costs "should be allowed to the prevailing party" unless "a federal statute, these rules, or a court order provides otherwise." The types of costs subject to this rule are enumerated in 28 U.S.C. § 1920, and include court fees, transcription and printing fees, and court-appointed expert fees. Federal circuits have provided varied interpretations of Rule 54(d) in the employment context.

The Ninth Circuit provides district courts with a measure of discretion to deny costs to prevailing Title VII defendants. The Court has explained that such discretion is necessary to guard against "the regrettable effect of discouraging potential plaintiffs from bringing" "important, close, but ultimately unsuccessful civil rights cases." (See *Assoc. of Mexican-American Educators v. State of Cal.* (9th Cir. 2000) 231 F.3d 572.) Although the presumption is that costs should be awarded to prevailing defendants in Title VII cases, a number of factors may support a discretionary denial of costs, including the following: the importance of the case, the closeness of the issues, the amount of the costs, whether the plaintiff's resources are limited, and the chilling effect on future civil rights litigants. (*Id.* at 592-93.)

As noted above, the Ninth Circuit has held that costs in ADA cases, unlike Title VII cases, may not be awarded to a prevailing defendant unless the case was frivolous under the *Christianburg Garment* standard. (See *Brown*, 246 F.3d 1182.) On the other hand, the Court has held that prevailing defendants under the Rehabilitation Act are generally entitled to costs without any showing of frivolousness, because the statute's language suggests a degree of discretion with respect to attorneys' fees that does not extend to costs. (See *Martin v. Cal. Dept. of Veteran Affairs* (9th Cir. 2009) 560 F.3d 1042.)

In wage-and-hour cases under the Fair Labor Standards Act, district courts in the Ninth Circuit have applied the same principles as in Title VII cases, holding that losing plaintiffs presumptively bear the defendant's costs, but that a showing of resulting inequity may serve as grounds for a discretionary denial of costs. (See, e.g., *In re Farmers Ins. Exch. Claims Representatives Overtime Pay Litig.* (D. Or. Nov. 13, 2009) 2009 WL 3834034 (holding that no special grounds for departing from the default rule existed); (*Taylor v. AutoZone Inc.* (D. Ariz. June 20, 2012) 2012 WL 2357379 (same).) This is troubling because the costs of a large class or collective action can be considerable, and the risk of being held liable for such costs could well deter employees from serving as named plaintiffs in meritorious wage violation suits. (See, e.g., *In re Famers Ins.*, 2009 WL 3834034 (awarding costs of $320,000 to defendants in multi-district wage & hour litigation).) Numerous courts in the circuit have noted, however, that the deterrent effect is absent when the client's fee agreement states that the attorney will bear such costs. (See, e.g., *Taylor*, 2012 WL 2357379, at *2); (*Jardin v. DATAllegro, Inc.* (S.D. Cal. Oct. 12, 2011) 2011 WL 4835742, at *4 (rejecting request to deny costs in part because plaintiff "has not argued that he – as opposed to his counsel, pursuant to a fee agreement – will have to pay the cost award himself")); (*Tibble v. Edison Int'l.*, 2011 WL 3759927, at *3 (C.D. Cal. Aug. 22, 2011) (noting that chilling effect would be minimal because fee arrangement required attorneys to pay costs).) Ethical issues surrounding plaintiffs' attorneys agreeing to bear costs of prevailing defendants are explored further in the following section."

Some circuits provide district courts with a measure of flexibility similar to that of the Ninth Circuit. (See, e.g., *Moore v. Cnty. of Delaware* (2d Cir. 2009) 586 F.3d 219, 221 (appropriate reasons to deny costs include, but are not limited to, misconduct by prevailing party, public importance of the case, difficulty of issues presented, and losing party's financial resources).) Others interpret Rule 54(d) in a much less plaintiff-friendly manner. For example, the Seventh Circuit applies a rigid rule, forbidding district courts from denying costs to prevailing defendants in Title VII cases unless (i) there has been misconduct by the defendant or (ii) the plaintiff can make a detailed, documented showing of "indigence," such that he or she is "incapable of paying the court-imposed costs at this time or in the future." (See *Rivera v. City of Chicago* (7th Cir. 2006) 469 F.3d 631, 635-36.) Even under the ADA, courts in the Seventh Circuit award costs to prevailing defendants, without limiting such cost awards to frivolous cases. (See, e.g., *Sanglap v. LaSalle Bank, FSB* (N.D. Ill. 2002) 194 F. Supp. 2d 798, 803.

An attorney filing a case in a new jurisdiction or under an unfamiliar statute would be well-advised to determine whether the applicable cost-shifting rules differ from those with which the attorney is familiar.

Can a plaintiff's attorney pay the defendant's costs?

If a potential plaintiff is deterred by the risk of being held liable for the defendant's costs, can the attorney promise to indemnify the client for such costs? If the issue was not discussed at the retention phase, can the attorney, out of sympathy for an unsuccessful client, voluntarily offer to cover the cost award? As noted above, several decisions in FLSA cases have alluded to plaintiffs' attorneys doing just that in their fee agreements. However, the question implicates the ethical rules, and does not necessarily have a straightforward answer.

California Rule of Professional Conduct 4-210 states:

> A) A member shall not directly or indirectly pay or agree to pay, guarantee, represent, or sanction a representation that the member or member's law firm will pay the personal or business expenses of a prospective or existing client, except that this rule shall not prohibit a member: …
>
> (3) From advancing the costs of prosecuting or defending a claim or action or otherwise protecting or promoting the client's interests, the repayment of which may be contingent on the outcome of the matter. Such costs within the meaning of this subparagraph (3) shall be limited to all reasonable expenses of litigation or reasonable expenses in preparation for litigation or in providing any legal services to the client.

A Bar Association of San Francisco advisory ethics opinion interpreting an earlier version of the rule stated: "[I]t does not strain the meaning of 'advance' in the context of litigation to read it as requiring repayment out of a recovery and only to the extent that there is a recovery." (See S.F. Bar Op. 1985-2.) Indeed, in 1989 the Rule was revised to embody that principle (adding the phrase "repayment of which may be

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contingent on the outcome of the matter"). However, the opinion also noted that "for purposes of this opinion, 'costs' do not include costs assessed against the client in the event of an unsuccessful outcome, nor do they include attorneys' fees assessed against the client pursuant to any statutory or common law fee-shifting provision." The opinion went on to state that the client's retainer agreement "should make clear that costs or attorneys' fees awarded to one's adversary are not included in the attorney's undertaking." The opinion was not called upon to decide whether an attorney could agree to bear the opponent's costs for a losing client, but its comments suggest that it would not necessarily have analyzed such costs the same as it did the client's own costs.

When the question was put squarely to the Los Angeles County Bar Association, that Bar concluded that "at either the inception of the representation or during the course of litigation, an attorney may agree to indemnify the client for court ordered costs if the client is not the prevailing party." (See L.A. County Bar Ass'n Ethics Op. 517 (2006).) The opinion reasoned that this result "is not materially different from advancing costs repayment of which is contingent on the outcome."

The issue is similar under the ABA Model Rules. Rule 1.8(e) states:

> A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that … a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter.

Comment 10 to the Model Rule states:

> Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition on a lawyer lending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts.
>
> …
>
> This article cannot provide an answer or legal advice, but any attorney considering whether to agree to pay the defendant's costs if the case is unsuccessful should be fully aware of the applicable ethical rules and guidance before making a decision.

Fortunately, at least in the context of FEHA cases, the Supreme Court's recent *Williams* decision should give comfort to California employees thinking of asserting their employment rights.

Endnote

[1] In the *Pao* case, $865,000 of the pending costs motion is attributed to expert witness fees, and the costs issue is complicated by the fact that the defendant made a pre-trial offer of judgment under California Code of Civil Procedure § 998, which is an additional consideration for plaintiffs but is outside the scope of this article.



Lee



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Appellate Reports and Cases in Brief

Miles v. Deutsche Bank National Trust Company *acknowledges that a breach-of-contract claim can be stated without attaching the contract as an exhibit or pleading its terms verbatim*

By Jeffrey I. Ehrlich

Miles v. Deutsche Bank National Trust Company

(2015) __ Cal.App.4th __ (4th Dist., Div. 2.)

Who needs to know about this case: Lawyers pleading breach-of-contract claims; lawyers claiming tort damages in cases involving contracts

Why it's important: (1) acknowledges that a breach-of-contract claim can be stated without attaching the contract as an exhibit or pleading its terms verbatim (recognizing that the case that says that this is a requirement, *Otworth v. Southern Pac. Transp. Co.* (1985) 166 Cal.App.3d 452, 459, was wrongly decided); (2) acknowledges that a plaintiff who chooses not to amend the complaint after a demurrer is sustained with leave to amend does not forfeit appellate review of the demurrer ruling; and (3) acknowledges that the measure of damages for a tort claim is defined by Civil Code section 3333, and that this standard applies even when the tort is associated with the breach of a contract. [*Editor's note*: the first two holdings, above, dispatch two arguments that are meritless, but which are frequently raised by demurring defendants].

Synopsis: Miles refinanced his $815,000 mortgage in July 2005, with an adjustable-rate loan. The servicer was HomeEq. When the monthly payment increased to $6,800 in August 2007, he sought a modification. In February 2008, HomeEq required him to pay a $12,000 "modification processing fee" before he could see the terms of the proposed modification. Miles paid. HomeEq sent a modification agreement increasing his principal balance to $834,052, and lowering the interest rate to 5.99 percent. Miles made the first payment under the agreement, but the next month HomeEq said it would not honor the agreement. It sent a new agreement showing a principal balance of $870,767, with no explanation for the increase. In the ensuing months, HomeEq continued to demand new fees from Miles to obtain a modification. In all, Miles paid over $44,000 in fees but never received a modification. He stopped making payments, and the lender foreclosed and evicted him. He sued HomeEq as well as the owner of the note for a variety of claims, including breach of contract, fraud, negligence, and wrongful foreclosure.

The trial court sustained the defendants' demurrers to all claims except for wrongful foreclosure with no explanation, but gave Miles 30 days to amend. He did not amend. The court then granted summary judgment against him on the sole remaining claim, wrongful foreclosure, on the ground that he could not prove any damages because he had no equity in his house. Reversed.

On appeal, the defendants argued that Miles "voluntarily abandoned" the claims he declined to amend. The Court of Appeal made it clear that there was no merit in this claim: "Defendants cite no authority for this remarkable proposition, and it would be an absurd rule indeed. If a plaintiff had already stated all available facts, but was given an opportunity to amend, how could forfeiture be avoided under defendants' rule? By making up facts? That is not the law. Even if given an opportunity to amend, a plaintiff may stand on the sufficiency of the complaint."

Next, the court held that Miles' failure to either attach the contract or plead its terms verbatim was not a defect that would support a demurrer to the breach-of-contract claim. The court explained that the case that holds that *all* breach-of-contract claims are defectively pleaded unless they attach the contract or plead its terms verbatim, *Otworth*, had misinterpreted the authority it relied on, and that there was, in fact, no such rule in California.

Finally, the court rejected the claim that unless Miles had equity in his house, he could not prove any damages on his wrongful-foreclosure claim. The court noted that the tort of wrongful foreclosure was likely to cause various types of damage to the plaintiff, including moving expenses, lost rental income, damage to credit, and emotional distress. These damages are recoverable even if the plaintiff had no equity in the home that was wrongfully foreclosed. "The rule applied by the trial court and urged by defendants would create a significant moral hazard in that lenders could foreclose on underwater homes with impunity, even if the debtor was current on all debt obligations and there was no legal justification for the foreclosure whatsoever. So long as there was no equity, there would be no remedy for wrongful foreclosure. . . . Surely that cannot be the law. The consequences of wrongfully evicting someone from their home are too severe to be left unchecked. For the reasons expressed above, a tort action lies for wrongful foreclosure, and all proximately caused damages may be recovered."



Ehrlich

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A lawyer for all seasons

Successful lawyering requires many different skills – and others who complement your strong suit


Cooper

By Miles B. Cooper

The jury panel sat in the box, in rapt attention. The man talking was one hell of a defense lawyer. Old school, pre-Discovery Act. He told stories – none of that computer slideshow crap – and jurors *listened.* The plaintiff's lawyer was nervous – as one should be when you dance with the devil in the pale moonlight. But a trial lawyer can only play the hand dealt. The defense lawyer's trial skills can only carry things so far when there has been weak case workup by an associate. The plaintiff's lawyer, who was less experienced in the courtroom, but a solid researcher, held pocket aces. A major motion, currently under consideration by the trial court, stood a good chance of gutting the defense's case. Each combatant brought devastating – but different – skills to court.

Successful lawyering requires more than a single skill, though. Identifying weak areas and strengthening them or staffing them can elevate a ho-hum practice to the upper echelon.

Not every situation needs a trial hammer

Lawyers don't spend every waking hour in trial. Nor do they spend all their time at depositions or talking at conventions. They need many different tools in their toolbox for the multitude of activities lawyers confront. These include case strategy, litigation (the heavy-lifting slog through mud between filing and trial), writing, editing, trial, office administration, technology, and marketing. Lawyers tend to be great at one or maybe two of these, but weaker in others. The strengths tend to follow personality types. Extrovert? You may excel in the courtroom and face-to-face marketing. Introvert? Your pleadings may read like Hemingway, and you might speak geek to the firm's Web developers and SEO squad.

We focus on the area that comes naturally

When you have a skill, you tend to spend your time using that skill. Think of it like a gym workout – you're good at the bench press. People tell you how good you are. Being good makes you happy. You spend your time working your upper body, setting lifting records at your gym. That's fine, until you need to go for a walk and your massive upper body collapses the toothpicks you call legs – they simply cannot support your weight. Being good at something thus caused an imbalance, impacting other areas.

Learn to live with discomfort

So how does one avoid imbalance? Awareness helps. Then learn to live with discomfort – spend time on the other areas. There are little discomforts and big discomforts.

Little discomforts – Learn how to do all the tasks in your office, every single one. This presumes you are not a one-person shop (if you are, you may be a step ahead of the competition). Run the postage meter, cut a check, pull together exhibits for a summary judgment motion and e-file it. This helps in two areas. First, when trying to meet that late night deadline, you are an office of one. Second, it helps you be a better boss. Understanding what goes into these tasks helps you plan your project lead times *and* review employees.

Big discomforts – Identify your weakest areas and find ways to strengthen them. One example: there is a social component to our job. Whether it is the political shindig, the local trial lawyers' awards dinner, or an MCLE presentation – we engage with others. Now for some of us, walking into a room full of people may dredge up high school feelings akin to being a John Hughes-style social outcast. "I'm wearing the wrong thing, I don't recognize anyone, people are staring at me because I'm not talking to anyone." (Guess, dear reader, one area where I'm weak.) That's discomfort. But no-one is staring at you. As you engage in your weak areas, you develop ways to become more comfortable and skilled. Eventually you might even start to enjoy and look forward to the areas that were once your weaknesses.

Partnerships and staffing – a great way to play to your strengths

One might conclude from the above that a dominant strength is a negative. Not at all. Developing the weaker areas ensures you are not a lopsided lawyer. This is essential if you are a solo, or work in a stovepipe firm (that's a partnership banded together for administration purposes but where each lawyer is in essence a solo.) But if you are a great trial lawyer and a crappy marketer, or a great case developer but an unseasoned trial lawyer, you have other options. Rather than master every skill, partner up with others who complement your skills. Build the firm and work the cases in a way that advantages everyone.

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Miles B. Cooper is a partner at Emison Hullverson LLP. *He represents people with personal injury and wrongful death cases. In addition to litigating his own cases, he associates in as trial counsel and consults on trial matters. He has served as lead counsel, co-counsel, second seat and schlepper over his career. He is a member of the American Board of Trial Advocates. Cooper's interests beyond litigation include trial presentation technologies and bicycling (although not at the same time.)*

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