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ANNUAL MEETING ISSUE

In advance of the 24th Labor & Employment Law Section Annual Meeting in Silicon Valley on **October 27-28**, this issue of the Review focuses on new developments in the creative and high-tech workplace.

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Adam Levin is a partner at Mitchell Silberberg & Knupp LLP in Los Angeles, and was lead counsel for Warner Bros. Television Production and the named writers and producers of "Friends" at all stages of the case of *Lyle v. Warner Brothers Television Productions*. His argument before the California Supreme Court can be viewed at www.msk.com. His areas of practice include employment and entertainment litigation.

Taylor Ball is an associate at Mitchell Silberberg & Knupp LLP in Los Angeles. His areas of practice include employment and labor law.

MCLE Self-Study

"So This Guy Walks Into a Bar . . .": Dirty Jokes and Vulgar Language in the Workplace After the California Supreme Court's "Friends" Decision

By Adam Levin and Taylor Ball

The California Supreme Court recently wrote the epilogue of the hit "Friends" television series. Plaintiff Amaani Lyle, hired as a writers' assistant on the show, alleged that the use of sexual jokes, stories, comments and expressive gestures by the show's writers constituted sexual harassment. In a unanimous decision, the seven justice of the Supreme Court rejected Lyle's claim against Warner Bros. Television Production, and writers and producers of "Friends," ruling that because the

alleged conduct was not directed at or about the plaintiff, the conduct did not violate California law.¹ It is not the use of sexual speech that is prohibited by state and federal employment laws, the Court explained, but speech and conduct that is directed at an employee or group of employees *because of their gender*.² With its ruling, the Supreme Court brought California law into line with decisions interpreting Title VII of the Civil Rights Act of 1964.³

continued on page 19

— Inside the Review —

- 1 MCLE Self-Study: "So This Guy Walks Into a Bar..." Dirty Jokes and Vulgar Language in the Workplace After the California Supreme Court's "Friends" Decision | 3 Organizing Silicon Valley's High-Tech Workers | 5 The Adverse Impact of Work Visa Programs on Older U.S. Engineers and Programmers | 7 The Economics of Outsourcing | 8 Book Review
- 9 Employment Law Notes | 11 NLRB Update | 13 Public Sector Case Notes | 14 U.S. Supreme Court Employment Decisions
- 15 Cases Pending before the California Supreme Court | 21 MCLE Self-Assessment Test | 35 Message from the Chair

24th Labor & Employment Law Section

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David Bacon worked at National Semiconductor for a number of years until he was fired in 1982. He was President of the UE Electronics Organizing Committee from 1978 to 1983, and coordinated the three UE organizers assigned to the Versatronex strike. He is currently a freelance writer on labor and immigration issues, an associate editor for Pacific News Service, and an award-winning documentary photographer. His book, *THE CHILDREN OF NAFTA*, was published by University of California Press in 2004, and a new book, *COMMUNITIES WITHOUT BORDERS*, is coming from Cornell University Press in October, 2006. This article is excerpted from a longer work with the same title at <http://dbacon.igc.org/Unions/04hitec1.htm>.



Organizing Silicon Valley's High-Tech Workers

By David Bacon

INTRODUCTION

Unions have called the electronics industry “unorganizable.” Corporations like IBM, Hewlett-Packard, Intel and National Semiconductor have told workers for years they are family and need no union, because healthy bottom lines guarantee rising living standards and secure jobs for all. While Silicon Valley living standards have risen for privileged elites at the top, tens of thousands of workers have been dropped off the line as production leaves the Valley, permanent jobs become temporary, and companies eliminate the no-layoff pledge. Some workers, such as janitors, have organized to oppose these conditions. Unfortunately, in the last decade, the labor movement appears to have accepted the industry’s story that production workers can’t or won’t organize.

THE DEVELOPMENT OF THE HIGH-TECH WORKFORCE

One of the myths about the high-tech industry is that a few brilliant white men started in their garages the giant corporations that now dominate the Valley’s economic life. In fact, the basic technological innovations which form the foundation of the electronics industry, like the invention of the solid-state transistor, took place in the laboratories of such corporations as Bell Laboratories, American Telephone and Telegraph, Fairchild Camera and Instrument, and General Electric. Long before the appearance of the personal computer, high-tech industry grew on defense contracts and rising military budgets. Its Cold War roots affected every aspect of the industry, from its attitude towards unions to the structure of its plants and workforce.

As the electronics industry grew in the 1950s, the U.S. labor movement was in the height of a fratricidal struggle that led to the expulsion of unions and union members for their leftwing politics. One byproduct of that struggle was the near-

destruction of the union founded to organize workers in the electrical industry—the United Electrical, Radio and Machine Workers of America (UE). General Electric, in particular, fragmented the workforce in the electrical industry among 13 different unions, with a great portion of workers non-unionized. As a result, the ability of electrical and electronics workers to organize unions in the expanding plants fell to the lowest point in decades.

From the beginning, high-tech workers had to face an industry-wide anti-union policy. Transistor pioneers envisioned a non-union Silicon Valley. As a result, electronics plants employed a production workforce dominated by women, Asian and Latin American immigrants; and an engineering and management staff dominated by white men. The workforce segregation made it less likely that employees would agitate for pay hikes.

THE FIRST EFFORT — ORGANIZING SEMICONDUCTOR WORKERS

Starting in the early 1970s, workers began to form organizing committees affiliated to the UE in plants belonging to National Semiconductor, Siltec, Fairchild, Siliconix, Semimetals, and others. By the early 1980s, the UE Electronics Organizing Committee formed earlier had grown to involve a signed-up core membership of over 500 workers for union campaigns. The UE Electronics Organizing Committee envisioned a prolonged struggle to win the loyalty and commitment of workers in the semiconductor plants. It challenged the companies on wages, working conditions, discrimination and job security. It won cost-of-living raises, held public hearings on racism and firings in the plants, and campaigned to expose the dangers of working with numerous toxic chemicals. Eventually the semiconductor manufacturers, especially National Semiconductor, fired many of the lead-

ing union activists, and the committee gradually dispersed

The main strategic question the committee sought to answer remains unresolved. In large electronics manufacturing plants employing thousands of workers, the process of organization cannot take place overnight. Active union-minded workers are a minority of the workforce. Their organization has to be active on the plant floor, winning over the majority of workers as it fights to better working conditions and help its members survive in an extreme anti-union climate. This long-term perspective is different from the organizing style found in most unions today, which views organizing as a process of winning representation elections administered by the National Labor Relations Board. Since present prospects of campaigning for union elections are extremely remote inside such plants, most unions have simply abandoned the idea claiming these workers are “unorganizable.”

For a number of years, the South Bay Labor Council of the AFL-CIO mounted an effort to run a temporary employment agency or hiring hall for high-tech workers. This effort gave the labor movement greater presence among workers, but it concentrated on high-skilled rather than production workers on the lines. Because of its low presence and failure to mount campaigns for working conditions in the plants, it did not develop a base in the workforce that needs unions the most.

TOXIC CONTAMINATION AND RUNAWAY JOBS

Despite its lack of success in organizing permanent unions in the plants and winning bargaining rights, the UE Electronics Organizing Committee was a nexus of activity out of which other organizations developed.

The Santa Clara Committee on Occupational Safety and Health (SCCOSH), originally founded by health and safety activists in the late 1970s,

included members of the UE Committee who left the plants to work on its staff. It built broad ties with other unions, occupational health and safety experts and community activists. SCCOSH fought successfully for the elimination of carcinogenic chemicals and for the rights of electronics workers to know the hazards of toxics in the workplace. It sponsored the formation of the Injured Workers Group, which organized workers suffering from chemically-induced industrial illness. For Asian immigrants unaccustomed to organizing, SCCOSH introduced them to the concept of acting collectively in confronting employers on issues relating to chemical use.

Under pressure from SCCOSH and other groups, the Semiconductor Industry Association sponsored a study of 11 plants in 1992 to disprove any connection between the high miscarriage rate among women in the industry and their job conditions. It instead found a direct connection between the use of ethylene glycols and high miscarriage rates. SCCOSH then began its Campaign to End the Miscarriage of Justice to force an end to the use of these chemicals.

The Silicon Valley Toxics Coalition also grew out of the health and safety campaigns which ripped apart the image of the "clean industry." The Toxics Coalition won national recognition when it exposed the large-scale contamination of the water table throughout Silicon Valley by electronics manufacturers. Coalition activists organized the communities surrounding the plants, and forced the Environmental Protection Agency to add a number of sites to the Superfund cleanup list. In many areas environmental standards and requirements were increased as a result. The Toxics Coalition also worked with the local labor movement and city governments to force manufacturers to list the chemicals used in the factories, and develop plans for handling the possible release of toxic chemicals in fires or other disasters.

The UE Committee's last campaign in 1982 foretold much of the future for semiconductor workers. The committee tried to mobilize opposition to the industry's policy of moving production out of Silicon Valley. Over 30,000 semiconductor production jobs were relocated to other parts of the U.S. and Europe. In 1983 the plants employed 102,200 workers; but

only 73,700 remained ten years later. While the number of engineers and managers increased slightly, job losses fell much more heavily on operators and technicians, affecting many Filipino workers.

Rapidly evolving technology in electronics production reduced the lifespan of semiconductor plants, impacting the livelihood of production workers. In 1993, Intel built a new \$1 billion plant in Rio Rancho, New Mexico, instead of California. The company decided to locate outside Silicon Valley, because New Mexico offered Intel an industrial revenue bond worth \$1 billion to help finance the plant's construction and wages were lower in that state. Large electronics companies were able to initiate bidding wars, in which communities around the country competed to win new production facilities by guaranteeing a combination of cost savings, relaxation of regulations, and direct tax subsidies. In Silicon Valley, that competition created a two-tier workforce: disappearing permanent jobs in the large manufacturing plants; and growing contract workers that provide services to the large companies, from janitorial and food services to the assembly of circuit boards.

THE NEW WAVE — ORGANIZING THE CONTRACTORS

Conditions for janitors and contract assemblers are a far cry from those associated in the public mind with high-tech manufacturing. Workers losing jobs on wafer fabrication lines in the semiconductor plants make as much as \$11-\$14/hour for operators, and more for technicians. Companies provide medical insurance, sick leave, vacation and other benefits. By contrast, contract assemblers and non-union janitors are paid close to the minimum wage, have no medical insurance, and often no benefits at all. The decline in living standards made the service and sweatshop economy in Silicon Valley the subsequent focus for workers' organizing activity. In effect, workers in the service and sweatshop sector fought to win wages and benefits close to the level of those won by semiconductor workers at the time of the previous peak in organizing activity ten years before. Over that period of time, the workforce of Silicon Valley took a giant step backward.

The spark which set off this second wave was the campaign to organize the

janitors at Shine Maintenance Co., a contractor hired by Apple Computer Corp. to clean its huge Silicon Valley headquarters. Over 130 janitors joined Service Employees International Union Local 1877 during an organizing drive at Shine in the fall of 1990. When Shine became aware that its workers had organized, it suddenly told them they had to present verification of their legal residence in order to keep their jobs. The company cited the requirement, under the employer sanctions provision of the Immigration Reform and Control Act, that it maintain written proof of employees' legal status. When almost none of Shine's workers could present the required documents, they were fired. The company never questioned the documentation provided by workers when they were hired, or at any other time until the union drive began. Shine's actions ignited a year-long campaign, which culminated in the signing of a contract for Apple janitors in 1992.

The campaign at Shine and Apple was closely watched by other employers in the Valley. Using the same strategy, the union went on to win a contract for janitors at Hewlett-Packard Corporation, an even larger group than those at Apple. The momentum created in those campaigns convinced other non-union janitorial contractors to actively seek agreements with Local 1877, and over 1500 new members streamed into the union.

In September 1992, janitors were joined by electronics assembly workers at Versatronex Corporation, who used a similar strategy to organize against the sweatshop conditions prevalent in contract assembly factories. Conditions at Versatronex give credence to the accusation by labor and community activists that a high-tech image masks a reality of sweatshop conditions. The starting wage at the plant was \$4.25 per hour—the minimum wage at the time—and employees with over 15 years earned as little as \$7.25 per hour. There was no medical insurance.

Contract assembly provides a number of benefits for large manufacturers like IBM. Contractors compete to win orders by cutting their prices, and workers' wages, to the lowest level possible. Manufacturers can place new orders on a

continued on page 22

Dr. Matloff is Professor of Computer Science at the University of California, Davis. He has written extensively on IT labor issues, and has often served as a consultant to government and as an expert witness. His bio is at <http://heather.cs.ucdavis.edu/matloff.html>



The Adverse Impact of Work Visa Programs on Older U.S. Engineers and Programmers

By Norman S. Matloff, Ph.D.

On the surface, it should not be surprising that older workers in the tech field tend to face difficulties in finding work, since this is common in many professions. But it will be shown here that it is even harder for engineers and programmers, since in those fields employers tend to make use of an external source of additional younger workers, brought in from abroad under work visa programs such as H-1B.

DATA ON EMPLOYMENT PROBLEMS OF OLDER ENGINEERS AND PROGRAMMERS

My focus is on the computer fields, i.e., the job titles Computer Programmer, Software Engineer, Computer Engineer and Electrical Engineer.

In the dot-com boom in the late 1990s, while the industry was pressuring Congress to import foreign workers to remedy a claimed tech labor shortage, it became increasingly clear that many older programmers and engineers were being ignored. Even workers as young as 35 found it difficult to obtain work in a putative seller's market.

My own study¹ found that the attrition rates are striking. Five years after finishing college, about 57 percent of computer science graduates were working as programmers; at 15 years the figure dropped to 34 percent, and at 20 years—when most were still only age 42 or so—it was down to 19 percent. By contrast, six years after graduation, 61 percent of civil engineering graduates were working in the field, and 20 years after graduation the rate was still 52 percent.

Later a much more extensive study was conducted by the National Research Council (NRC). This work had been commissioned by Congress as part of legislation which enacted a doubling of the yearly cap on the H-1B work visa.² While tech employers had claimed they needed the foreign workers to remedy an acute shortage of programmers and engineers, critics had countered that employers were shunning a large group of older workers.

In response to the critics, the new statute commissioned the NRC to “conduct a study...assessing the status of older workers in the information technology field.”

The study's results clearly showed that older programmers and engineers had trouble finding work in their field. The NRC compared those under and over 40 years old, finding that:

- 12.3 percent of the older workers had been laid off, compared to only 10.6 percent of the younger ones;
- The mean number of weeks to re-employment was 13.5 for the older workers, compared to only 11.1 for the younger ones;
- Upon re-employment, the older workers experienced an average pay cut of 13.7 percent, while the younger workers enjoyed a pay *raise* of 6.6 percent.

In 2002, an engineering organization commissioned American University professor Laura Langbein to perform an analysis of a member survey.³ Controlling for a number of covariates, Langbein found that “for each additional year of age, unemployment rises by three weeks.” For example, a 40-year-old engineer would have on average nearly a year longer duration of unemployment than would a 25-year-old of the same education, type of industry and so on. Langbein had also found this three-week rate in her 1999 survey.⁴

Note that the two Langbein analyses were conducted in very different settings, with the 1998 survey being taken during the height of the dot-com boom era while the 2002 survey was done during the recession. Yet the three-week penalty per year of age held in both years.

SKILL SET ISSUES

Recall that the industry originally tried to justify its call on Congress to increase the H-1B visa cap in 1998 by saying we simply didn't have the “bodies.” The educational system was not produc-

ing enough programmers and engineers, the industry said.

Yet, after the findings of the NRC in 2000 and Langbein in 2002, the industry could no longer simply claim that the universities were failing to supply the nation with enough workers. Instead, it became clear that we were not making use of the workers we had. The lobbyists backpedaled, saying that the reason many older programmers and engineers were being bypassed by employers was that they lacked up-to-date skills. In other words, the industry claimed that employers are not averse to hiring older workers *per se*, but the workers' outdated skill sets render them unemployable.

Those in the field itself knew that the skills issue was being exaggerated. A competent software developer can become productive in a new skill quite rapidly.⁵

Moreover, the industry's claim was soon shown to be disingenuous. There was plenty of anecdotal information, along with some hard statistical data, showing that many older programmers and engineers did have the latest skills but that they too were being rejected by employers.

Eventually, the industry's own actions showed the skills claim to be misleading, essentially by revealing that employers were not interested in hiring retrained programmers and engineers. The 1998 legislation had set up funds to retrain the shunned older workers, with the idea being that the retraining programs would remedy the shortage and eventually eliminate the need for the H-1B expansion, which had been enacted only on a three-year basis. However, two years into the program, Sun Microsystems, a major Silicon Valley firm which had been at the forefront of lobbying Congress to expand the H-1B program in 1998, stated that the training programs had not reduced—and, more tellingly, *could* not reduce—its dependence on H-1Bs.⁶ This contradicted Sun's 1998

testimony to the Senate, in which it had said, “H-1B workers [are a] stop-gap measure to help carry Sun through an interim period while we work to educate and train U.S. workers so they can fill needed positions.”⁷

Furthermore, if specialized skills were in such short supply, and if it were primarily the young new graduates that possess such skills as claimed by the employers, starting salaries in this field would be on the rise. Instead, wages for new graduates have been flat (when adjusted for inflation) since 1999.⁸

The skills issue, then, is a red herring, not the primary factor underlying the employment problems of older programmers and engineers.

WAGE ISSUES

In fact, the industry’s claim that the older workers’ problems were due to skills deficits can be seen to be disingenuous in other ways. Consider a report by the Information Technology Association of America, one of the leading organizations lobbying for H-1B increases.⁹ The report complained that, while older programmers and engineers could be retrained, this made them flight risks:

“You take a \$45,000 asset, spend some time and money training him, and suddenly he’s turned into an \$80,000 asset,” says Mary Kay Cosmetics CIO Trey Bradley...[the problem being that the retrained workers] become highly marketable individuals . . . attractive to other employers.

It is clear that Bradley was not willing to pay the salaries paid by other firms. The real issue was money, not skills.

This, then, is the first key to understanding why older programmers and engineers have so much trouble finding work—they are perceived as being much more expensive than younger workers. Here, for example, is a comparison of wage distributions among new computer graduates and all software engineers:¹⁰

Group	25th Percentile	Median	90th Percentile
New Workers	\$45,000	\$50,664	\$61,500
All Workers	\$65,070	\$82,120	\$120,410

As the IT director at a large law firm put it, “I’d love to have somebody with 20 years of experience, but unfortunately I’m only paying for three or four.”¹¹ An engineering firm that claimed to the WALL STREET JOURNAL that its officials “struggle to fill openings” also conceded that it rejects many candidates because they are “overqualified.”¹²

Many unemployed or underemployed workers¹³ would be willing to take lower pay, as we saw for instance in the NRC data above. However, often employers avoid older job applicants because they assume that even if the workers were to accept lower pay, they may soon move to a better-paying job.

OTHER BARRIERS

The fabled “youth culture” in the tech industry has an obvious major effect on older workers. For instance, a former employee told me that Inktomi (later acquired by Yahoo) rejected a job applicant who was “gung-ho to work, learn what he needed, and was obviously smart enough, but he didn’t fit Inktomi’s profile”—his lack of “fit” stemming from his being in his 30s and married. Inktomi’s employment Web site boasted that the company is “jam-packed with fun people,” presumably a code word for youth.

Some employers fear that friction would arise if an older worker were to work for a younger manager. As one article put it, “...both older workers and younger managers may be daunted by the idea of a staff member working for a manager who could be his daughter.”¹⁴ Indeed, a trade magazine’s survey of managers found that the younger the manager, the less likely he/she had hired anyone over 40 in the past year:¹⁵

Age of Manager	Percent Hired at Age 40 or Over
20-30	13%
31-40	24%
41-50	39%
51+	45%

The tech industry is also notorious for requiring a lot of overtime.¹⁶ The perception among many managers is that it is difficult to get older workers to work

overtime. This perception may be false, though; *InfoWorld’s* survey found that the average number of hours worked per week was independent of age, 48 hours for every group.¹⁷

RELATION TO THE H-1B WORK VISA PROGRAM

The H-1B work visa program, heavily used by the tech industry, has been controversial ever since its enactment in 1990. Starting with a scathing *60 Minutes* television report in 1993,¹⁸ and continuing through the present, critics have charged that the program is used as a source of cheap, compliant labor rather than for its putative (though not statutory) purpose of filling labor shortages.¹⁹

A number of statistical studies, both academic and governmental, have confirmed that H-1Bs often are indeed paid less than similarly-qualified U.S. citizens and permanent residents (hereafter referred to simply as Americans).²⁰ I call this Type I salary savings.

What is less widely known, though, is the connection to the age issue. What I refer to as Type II savings accrue from the lower wages generally paid to younger workers (whether domestic or foreign). In many cases, when employers exhaust the supply of younger American workers, they turn to hiring younger, cheaper H-1Bs in lieu of older, more expensive Americans.

This was illustrated well by comments made last year by Manoj Prasad, President of NexGen Infosys:

It’s a tough, competitive business. If given the choice between a seasoned IT veteran laid off from a position in which he worked for 10 years and who has not updated his skills, and a recent H-1B tech graduate from Bangalore, New Delhi, Bombay or Calcutta, Prasad said, he would go for the latter.²¹

Though Prasad cited the skills issue, his unusually frank comments make it clear that he preferred the H-1Bs because they are younger and cheaper than his hypothetical “seasoned veteran.” As the earlier quote of Trey Bradley shows, skills can be bought or developed among older workers, but not at the wages employers are willing to pay.

Employers turn to hiring younger H-1Bs when they exhaust the supply of

continued on page 24

Dr. Benjamin Powell (left) is Assistant Professor of Economics at San Jose State University and Director of the Center on Entrepreneurial Innovation at the Independent Institute. Matt Ryan is a Ph.D. student in economics at West Virginia University.



The Economics of Outsourcing

Benjamin Powell, Ph.D., and Matt Ryan

The outsourcing, or “offshoring,” of American technology and service jobs has become a hotly debated topic over the past five years. California’s large concentration of technology jobs makes the issue particularly relevant here. Is outsourcing good or bad for California?

This article begins by reviewing why the outsourcing of service jobs has emerged in recent years. The economic consequences of outsourcing are then explained. The final section concludes that outsourcing is beneficial to our economy.

WHY OUTSOURCING NOW?

Many hail the globalization of the world economy as the beginning of a new era. However, the United States was nearly as integrated into the world economy over 100 years ago. Merchandise exports were eight percent of our economy in the year 2000, while they were approximately seven percent of our economy during the late 19th century.¹ We are not in a new era of globalization; what has changed is the composition of what is traded internationally. Merchandise imports and exports still account for most of the United State’s international trade, but the service industry trade has increased substantially. In 1970, service exports accounted for less than one percent of our economy; by 2000, they accounted for over three percent of it.² Even this number understates our true level of international trade in services since companies oftentimes make direct investments abroad (and foreign companies here) and provide services on sight. United States’ direct investment abroad increased from six percent of our economy in 1960 to 20 percent by 1996, while foreign investment in the U.S. increased to 16 percent of our economy, up from one percent.³ Changes in technology, capital mobility, and the external environment are the three main factors that account for the increasing role services play in international trade.

Many services have traditionally required face-to-face interaction. Changes in technology have helped lessen the need for physical proximity in services trade. The wide spread use of computers, increased broadband data capacity, and lower international calling rates have all made it easier to perform services from abroad. It is no longer necessary for the person who reads and diagnoses your x-ray to be at the same location. Today, the same x-ray can be sent to a technician halfway around the world instantaneously, and a diagnosis can be returned just as fast. Technical support for products and other call-in centers are now operated from abroad due to low international calling rates. Computers and high-speed networks have allowed more marketing, product design, and software development to be done abroad and sent back to the U.S.

Technology alone doesn’t account for the rise of outsourcing. Capital must be free to move between countries so that investments can be made to establish supporting infrastructure, such as software development facilities and call-in centers. Under the Bretton Woods system of fixed exchange rates, which emerged shortly after World War II and lasted until the early 1970s, many countries put restraints on capital mobility. Since the end of Bretton Woods, capital has flowed more freely, allowing more investments to be undertaken which support the outsourcing of service and technology jobs.

Finally, improvements in the external environment have played a major role in promoting outsourcing from the United States. Companies generally do not make the investments that promote outsourcing in countries that lack secure property rights and the enforcement of contracts, or in countries with high rates of taxation, inflation, and excessive business regulation. All of these conditions generally can be thought of as decreasing economic freedom. The *Economic Freedom of the World Annual Report* ranks countries

based on how they perform on these measures. From 1980 through 2003 they find that the overall level of economic freedom around the world has increased by 25 percent.⁴ This improvement in policies around the world has increased the attractiveness of starting business ventures in other countries.

Although manufacturing outsourcing can occur in many countries around the world where there are low-cost and low-skilled workers, the outsourcing of technology and service jobs generally requires a better educated workforce and often the ability to speak English. Ireland and India, two well-educated and English speaking countries, have been extremely successful in attracting U.S. outsourcing of technology and services. It is no coincidence that this pair has also made dramatic improvements in their respective economic policies.

After achieving independence, India’s economic policies were heavily influenced by socialist planning ideology. Some reforms were initiated in the 1980s but the majority of India’s reforms stemmed from a financial crisis the country faced in 1991. Fortunately for India, its reforms coincided with the rise of technology that made the outsourcing of service and technology jobs to India possible. India increased its economic freedom score by over 30 percent between 1990 and 2003. Far from the top of the list, it currently ranks as the 65th freest country in the world. However, the freedom to trade internationally has been one of the biggest areas of improvement in India. Telecommunications have benefited from decreased regulation, while the software industry emerged after, and independent of, the industrial licensing system in India. Thus, the sectors in India that benefit most from U.S. outsourcing can be traced to India’s greatest advances in economic freedom over the last decade and a half.⁵

continued on page 25

Book Review: Employment Practices in the Digital Gaming Industry

By Phyllis W. Cheng



Phyllis W. Cheng is a member of the Labor and Employment Law Section's Executive Committee, co-editor-in-chief of this law review, and a senior appellate court attorney at the Court of Appeal, Second Appellate District, Division Seven.

Scott Bonds, et al., *QUALITY OF LIFE IN THE GAME INDUSTRY: CHALLENGES AND BEST PRACTICES* (IGDA Apr. 20, 2004), at <http://www.igda.org/qol/whitepaper.php>, 90 pages.

The 90-page white paper,¹ *Quality of Life in the Game Industry: Challenges and Best Practices*, was prepared by the International Game Developers Association's (IGDA) Quality of Life Committee, which represents a wide range of computer and video game development professions and companies. The authors include producers, corporate executives, designers, artists and writers of such diverse digital gaming enterprises as Electronic Arts (EA), Exertris, Zeitgeist Games, and Blue Fang Games.

The objective of the white paper is to address the long hours, high pressure and inherent instability in the video and computer game industry that make it difficult for industry employees to lead a balanced life. It attempts to identify solutions for balancing work and life demands.

The white paper is partly based on the results of the "Quality of Life Survey" commissioned by the IGDA in early 2004, which garnered nearly 1,000 responses from developers. The unscientific survey examined developers' attitude toward work, their internal pressures (salary, long hours, job instability), external pressures (family and relationships), inadequate staffing and work organization problems. Some of the findings from the survey include:

- 34.3 percent of developers expect to leave the industry within five years, and 51.2 percent within 10 years;
- Only 3.4 percent responded that their coworkers averaged 10 or more years of experience;
- Crunch time is omnipresent, during which respondents work 65 to 80 hours a week (35.2%). The average "crunch work week," mandatory overtime imposed in order to bring a team that has fallen behind sched-

ule back on track, exceeds 80 hours (13%). Overtime is often uncompensated (46.8%);

- 44 percent of developers claimed they could use more people or special skills on their projects;
- Spouses are likely to respond, "You work too much" (61.5%); "You are always stressed out" (43.5%); and "You don't make enough money" (35.6%);
- Contrary to expectations, more people responded that games were only one of many career options for them (34%) than responded that games were their only choice (32%).

The IGDA white paper explains how studios can adopt best practices to help alleviate some of the stress and allow for a more balanced life:

- Family friendly practices;
- A conscious effort to minimize overtime;
- Better communication between management and developers;
- Better contracts between individuals, studios and publishers;
- Better planning and budgeting;
- Better human resource management.

With the long hours demanded by the gaming industry, it is unfortunate that the white paper does not make reference to compliance with employment law, particularly wage and hour provisions regarding workdays, workweeks, breaks, overtime pay and any exemptions that may apply.

The long working hours in the gaming industry was also brought to light when a 2004 blog posted by the spouse of an EA employee made the working conditions known to the media. She compared working at EA to being incarcerated, commented that time off was for "good behavior," and described a typical workweek as stretching from 9 am to 10 pm, Monday through Saturday. The

blog post rallied a movement among employees against EA, which the blogger described as a "money factory."²

Today wage and hour violations comprise the leading employment actions in Silicon Valley. Recently, for example, a class action settlement was reached for employees in the gaming industry in *Hasty v. Electronic Arts, Inc.* (San Mateo County Super. Ct., Apr. 25, 2006, No. CIV444821).³ The lawsuit sought to recover unpaid overtime compensation for current and former computer programmers employed in California by EA, the world's largest manufacturer of computer video games. The case was settled after the parties conducted formal and informal discovery, including numerous depositions and review of thousands of pages of company records. The settlement totaled \$14.9 million for approximately 600 class members.

In conclusion, the white paper exposes problems associated with employee overtime in the gaming industry. Employment counsel are likely to find the survey and interview results useful when initiating or defending these wage and hour actions.⁴ ⁴

ENDNOTES

1. A white paper is a short treatise whose purpose is to educate industry customers. See www.msdnaa.net/curriculum/glossary.aspx.
2. See <http://ea-spouse.livejournal.com/274.html>; <http://www.gamespot.com/pages/news/story.php?sid=6148369&page=4>.
3. See complaint at <http://www.schubertreed.com/EA%20Programmers%20Complaint.pdf>.
4. For more information on the racial-ethnic, gender, age, education and other demographic makeup of the gaming industry's workforce, see the IGDA's white paper, *GAME DEVELOPER DEMOGRAPHICS: AN EXPLORATION OF WORKFORCE DIVERSITY* (IGDA Oct. 2005), at <http://www.igda.org/diversity/report.php>, 26 pages.

Anthony J. Oncidi is a partner in and the Chair of the Labor and Employment Department of Proskauer Rose LLP in Los Angeles, where he exclusively represents employers and management in all areas of employment and labor law. His telephone number is 310.284.5690 and his email address is aoncidi@proskauer.com.



Employment Law Notes

By Anthony J. Oncidi

Receptionist Whose Job Was Filled While She Was On A 7-Month "Stress Leave" Was Not Discriminated Against

Williams v. Genentech, 139 Cal. App. 4th 357 (2006)

Rochelle Williams, a receptionist at Genentech, was criticized by her supervisors for mishandling an incident involving company security. (Instead of following the company's established procedure for dealing with a security alert, Williams spoke to a security officer in a "code of her own devise" – "Hurry and bring the pizzas" and "It was a sad movie.") Williams allegedly suffered stress and the exacerbation of an existing medical condition (asthma) as a result of the criticism of her performance and then commenced a seven-month medical leave of absence. During her absence, Williams' position was filled, and when she was ready to return, she was unable to obtain a different position at Genentech within 60 days and, consistent with company policy, was terminated as a result. Although Genentech used "floaters" to cover Williams's job duties during the first 12 weeks of her leave, thereafter the Company decided to fill the position because the continued use of floaters adversely impacted the other receptionists and the business. Williams responded with a lawsuit alleging, among other things, race and disability discrimination, failure to reasonably accommodate a disability, failure to engage in a timely interactive process with Williams and violation of the Unruh Civil Rights Act.

The Court of Appeal affirmed summary judgment in favor of Genentech, holding that although Williams had timely exhausted her administrative remedies (due to an alleged continuing violation by Genentech through the date of the termination), she failed to establish disability discrimination because at the time the decision was made to fill her position, she

was "totally disabled" and, therefore, was unable to perform the essential functions of her job. Similarly, at the time her employment was terminated, Williams was not qualified to fill any other available position. As for the failure to accommodate claim, the Court held Williams was not entitled to an accommodation that (1) would have resulted in her being transferred to a different supervisor; (2) would have kept her position open until she returned to work; or (3) would have placed her in a vacant position upon her release to return to work. Finally, the Court concluded Genentech had sufficiently engaged in the interactive process with Williams and that the Unruh Act does not apply in the employment discrimination context. *See also Gelfo v. Lockheed Martin Corp.*, 140 Cal. App. 4th 34 (2006) (employee with prior back injury was not actually (or regarded as) physically disabled but was entitled to possible reasonable accommodation and interactive process).

Temporary County Employee Was Not Discriminated Against On The Basis Of Her Disability

Jenkins v. County of Riverside, 138 Cal. App. 4th 593 (2006)

Evelyn Jenkins worked as a full-time "Office Assistant II" for the County for six years before her employment was terminated. During the entire six years, Jenkins was classified as a "temporary employee." After taking a workers' compensation leave of absence and having surgery for carpal tunnel syndrome, Jenkins informed the County that she was disabled; she presented the County with documentation from her physician stating that her disability required that she be provided restricted duty and that she receive reasonable accommodation. Six hours later, the County terminated Jenkins's employment ostensibly because she had been classified as a temporary employee but had worked more than

1,000 hours per year in contravention of the County's salary ordinance. Jenkins challenged her termination in lawsuits filed in both state and federal court. Although the United States Court of Appeals for the Ninth Circuit reversed the summary judgment that had been granted in the County's favor in federal court and ordered that summary judgment be entered in favor of Jenkins (398 F.3d 1093 (9th Cir. 2005)), the California Court of Appeal in this opinion affirmed the state trial court's entry of summary judgment in favor of the County on the ground that Jenkins was a temporary and not a "regular" employee and, accordingly, it could not be liable for discriminating or failing to provide a reasonable accommodation to Jenkins. The California appellate court concluded that the Ninth Circuit had misconstrued California law and held that the Ninth Circuit's decision was not binding in the state court action.

"Friends" Typist Was Not Subjected To Hostile Environment Sexual Harassment

See lead MCLE Article

Lyle v. Warner Bros. Television Productions, 38 Cal. 4th 264 (2006)

Amaani Lyle was terminated after four months of working as a typist in the writers' room of the producers of the television show "Friends." Following her termination because she could not type (contended the producers), Lyle asserted, among other things, that she had been subjected to a hostile environment in the form of conversations among the writers about their personal sex lives, their sexual preferences and predilections, their fantasies about female cast members, as well as sexually explicit doodling and cartoons on scripts, calendars and other pieces of paper. However, Lyle admitted during her deposition that none of this activity was directed at her, no one had said anything that was sexually explicit about her and no one on the show had asked her on a date or sexually propositioned her in any

way. Because Lyle had failed to establish that she was exposed to sexually explicit conduct in the workplace “because of sex” or that it had been sufficiently severe or pervasive as to alter the terms and conditions of her employment, the California Supreme Court reinstated summary judgment in favor of defendants. *Cf. Carter v. California Dep’t of Veterans Affairs*, 38 Cal. 4th 914 (2006) (amendment to the Fair Employment and Housing Act providing for employer liability for the sexually harassing conduct of third parties (e.g., customers or clients) “merely clarified” existing law and was, therefore, to be retroactively applied).

Primary Employer Was Liable For OSHA Violation For Failure To Have Injury Prevention Program

Sully-Miller Contracting Co. v. California OSHA Bd., 138 Cal. App. 4th 684 (2006)

Sully-Miller, an asphalt-paving company, leased one of its employees, Jeff Moreno, to Manhole Adjusting, Inc., as a roller operator. While working at Manhole’s worksite, Moreno was fatally injured when he was thrown from the roller because it lacked an operable seatbelt. OSHA cited Sully-Miller for a serious violation of the employer safety provisions of its regulations due to Sully-Miller’s failure to have an Injury Prevention Program (IPP) that would have instructed Moreno to refuse to work at the secondary site until he was provided an operative seatbelt and further for its failure to provide periodic monitoring of the worksite. The Court of Appeal concluded that Sully-Miller was Moreno’s primary employer and that it was not relieved of its responsibilities to provide general safety training to its employees when the employee is leased to a secondary employer. *Cf. Violante v. Communities Southwest Development & Constr. Co.*, 138 Cal. App. 4th 972 (2006) (subcontractor’s employee on a public works project cannot sue the general contractor for the sub’s non-payment of prevailing wages).

Car Dealership Was Liable For Injuries Caused By Employee Who Was On A Personal Errand

Taylor v. Roseville Toyota, Inc., 138 Cal. App. 4th 994 (2006)

Derrick Lewis, a car detailer employed by Roseville Toyota, was driv-

ing a car owned by the dealership and was on a personal errand during his lunch break when he rear-ended another car that was stopped at a stoplight. The jury concluded that although Lewis was not acting within the scope of his employment at the time of the accident, Roseville had given Lewis permission, by words or conduct, to use the car before the accident. The evidence of permissive use was that Lewis was given the key to the car by the dealership’s key shack attendant, who told Lewis he could use the car during his lunch break “as long as he brought it back.” In affirming the judgment against Roseville, the Court of Appeal acknowledged there was no evidence the key shack attendant had actual authority to ignore the dealership’s “unwritten policy” against personal use and give Lewis the keys, but there was sufficient evidence the attendant had ostensible authority to do so since the dealership did not expressly prohibit the personal use of its vehicles in the employee handbook and because Roseville had failed to better supervise the use of the vehicles. *Cf. Thomas v. Duggins Constr. Co.*, 139 Cal. App. 4th 1105 (2006) (company whose employees made intentional misrepresentations about equipment was not entitled to reduction of non-economic damages under Fair Responsibility Act of 1986 (Proposition 51)).

Casino Did Not Discriminate Against Female Employee Who Was Fired For Refusing To Wear Makeup

Jespersen v. Harrah’s Operating Co., 444 F.3d 1104 (9th Cir. 2006) (en banc)

Darlene Jespersen, a former bartender in the sports bar at Harrah’s Casino in Reno, filed this Title VII action, alleging the casino had discriminated against her on the basis of her sex when she was fired for refusing to comply with the casino’s appearance standards policy requiring all female beverage servers to wear makeup. (Harrah’s “Personal Best” appearance standards also required that male employees maintain short haircuts and neatly trimmed fingernails.) The district court granted summary judgment to the employer, and the Ninth Circuit (sitting *en banc*) affirmed that judgment after concluding that “grooming standards that appropriately differentiate between the genders are not facially discriminatory.” The Court determined that

Jespersen had failed to provide evidence that Harrah’s “Personal Best” appearance standards policy imposed unequal burdens on male and female employees. Further, the Court held that Harrah’s policy was not based on sex stereotypes. It applied to all bartenders, regardless of sex, and most of it applied to both sexes equally. Women were not asked to dress suggestively or provocatively in a way that would stereotype women as sex objects. Moreover, Harrah’s grooming policy did not create a hostile work environment. The only evidence to support Jespersen’s claim was her own subjective reaction to the makeup requirement. There was no objective evidence that the grooming standards would impair a woman’s ability to do her job.

New York Federal Court Enjoins California Employee From Competing With His Former Employer

The Estée Lauder Companies Inc. v. Batra, 2006 U.S. Dist. LEXIS 26296 (S.D.N.Y. May 4, 2006)

While working as Global General Brand Manager for Estée Lauder, Shashi Batra (a resident of San Francisco) signed a non-compete agreement that prohibited him from competing with the company anywhere in the world for a period of 12 months after his employment ended. Batra had worldwide responsibilities for two of Estée Lauder’s skin care brands. Pursuant to the non-compete agreement, which contained a New York choice-of-law provision, the company would continue to pay Batra’s salary (post employment) during the non-compete period. When Batra announced his resignation to become Worldwide General Manager of Perricone (a competitor), Estée Lauder offered to reduce the duration of the non-compete to four months. Batra responded that he believed the non-compete was unenforceable under California law and immediately filed a lawsuit in California seeking a declaration to that effect. Two days later, Estée Lauder filed the instant lawsuit in the United States District Court for the Southern District of New York, seeking to enforce the non-compete under New York law. In this ruling, the federal judge rejected Batra’s request to apply the abstention doctrine, applied New York law and concluded that because Batra would

continued on page 32

Alan Berkowitz is a partner and Dan Feldstein is an associate in the Labor and Employment Law Department of Bingham McCutchen, LLP in the firm's San Francisco office.



NLRB Update

By Alan Berkowitz and Daniel Feldstein

Intermittent Picketing May Violate the Act Even if Only a Handful of Union Supporters Participate

Ranches at Mt. Sinai, 346 NLRB No. 105 (April 28, 2006).

In a unanimous decision, the Board announced that a union violates § 8(b)(4) when it pickets a neutral construction site and violates § 8(b)(7)(C) when it continues such picketing for 28 days over 4 months. CSI was a non-union concrete contractor. Beginning in July 2002, the Laborers began a lengthy organizing drive consisting of monthly demands for recognition to CSI's president, handbilling/picketing at CSI's construction sites, requesting that the primary contractor (the "Ranches") use a "responsible" concrete sub-contractor, and displaying 15-30 foot inflatable rats. The Board declined to comment on the ALJ's decision that the use of an inflatable rat amounted to signal picketing. The Ranches replaced CSI with a union cement contractor.

The picketing involved two to three union agents positioned at the entrance to the Ranches property *before* the sales office opened to the public and patrolling the entrance. The union argued that their agents were too few to constitute picketing and they did not block the Ranches' entrance. The Board was not satisfied and noted, "no minimum number of persons is necessary to create a picket line. The issue is not how many persons participated, but rather the activities in which they were engaged." The fact that the union did not use picket signs was also "not controlling." Ultimately, the union agents' "back and forth movements . . . effectively formed a barrier at the entrance to the sites that could be viewed as a form of picketing." The union also argued that its communications were directed at the public rather than at the employees of other contractors. However, the timing of the union's activities belies their explana-

tion. The union's "agents arrived onsite each day at the Ranches location 2 ½ hours before the sales office opened, at a time when only employees of contractors would encounter them. Thus, their activities, including patrolling and the blocking of the entrance, were plainly directed at employees of neutral companies . . . in violation of 8(b)(4)(i)(B)."

Under § 8(b)(7)(C) of the Act a union commits an unfair labor practice by engaging in recognitional picketing without filing a petition for an election "within a reasonable period of time not to exceed thirty days from the commencement of such picketing." In this instance the union picketed for 28 days at three jobsites over the course of four months. While admittedly less than 30 days of picketing, the Board announced "that the duration of the [union's] picketing was unreasonable.

Employer's Investigation Interview Notes Are Confidential and Not Subject to Disclosure to Union

Northern Indiana Public Service, Co., 347 NLRB No. 17 (May 31, 2006).

In a 2-1 decision, the Board announced that an employer's "interest in confidentiality" may sufficiently "outweigh" a union's interest in processing a grievance regarding workplace safety. The employer, NIPSCO, received an internal complaint that a supervisor, Long, confronted a union member, Chaplin, when he "stated 'peace, love, and understanding, and then you empty the clip,' while pointing his finger as if it were a gun." The employer immediately responded by sending Chaplin home with pay and changing Chaplin and Long's schedule so the two did not work together. Subsequently, NIPSCO's labor relations manager performed separate interviews with Chaplin and Long to assess the situation. These interviews began with an admonition "assuring each of them that she would keep their conversation confi-

dential." At the conclusion of NIPSCO's investigation Long was counseled to keep all conversations with Chaplin strictly work related.

The following day, the union filed a grievance on behalf of Chaplin alleging that Long had engaged in violent behavior and therefore the employer violated the work safety provision of their Collective Bargaining Agreement. As part of its grievance, the union requested NIPSCO's investigation notes. The company refused to provide its interview notes citing confidentiality concerns. The union alleged that withholding such information violated § 8(a)(5) of the Act. A majority of the Board disagreed holding, "that the information requested by the Union is confidential and that NIPSCO's interest in confidentiality outweighs the Union's need for the information." The majority held that interview notes could be kept confidential for "two important purposes: (1) encouraging witnesses to participate in investigations of workplace misconduct and (2) protecting these witnesses from retaliation because of their participation." Because NIPSCO promised Chaplin and Long their interview notes would be kept confidential, the Board assumed that such promises were essential to encourage their participation. Moreover, the union has the essential information in the investigation notes. After all, the union already "has at its disposal, if only by virtue of Chaplin's account, the substance of what it must show to process a grievance related to workplace safety" and "the Union could interview them, just as Respondent did." In sum, the Board "conclude[s] that the balance of interests favors NIPSCO's confidentiality interest."

In a vigorous dissent, Member Liebman noted that "[t]he majority departs from Board precedent at each step." Member Liebman begins with the premise that an employer's duty to bar-

continued on page 12

gain includes an “obligation to provide information that is relevant to the union’s performance of its grievance-processing duties” and NIPSCO’s notes clearly meet this “liberal” threshold. Next, Member Liebman faults the majority for requiring the union to gather information from other sources. As Member Liebman noted “the availability of information from other sources has never been a valid defense under Board law.” Moreover, Member Liebman posited a host of reasons why the interview notes could be relevant because they may provide “information at odds with Chaplin’s version, or which may have indicated mitigating circumstances.” By withholding such information, the union was “unable to fairly consider whether it should continue the grievance.” As Member Liebman concluded, “[t]oday, without acknowledging it is doing so, the majority alters Board law regarding confidentiality defenses to information requests.”

Refusing to Meet with the Union at Reasonable Times Is Not, Without More, Sufficient to Demonstrate Surface Bargaining and Employer May Withdraw Recognition Despite Such Conduct

Garden Ridge Management, Inc., 347 NLRB No. 13 (May 31, 2006).

On April 22, 2002, the union was certified as the exclusive bargaining representative of the employer’s employees. Between May 15, 2002 through April 7, 2003, the parties engaged in bargaining on 20 occasions and reached tentative agreements on 28 articles. No final agreement was reached. Subsequently, in late April 2003, the employer received a petition indicating that a majority of its employees no longer wanted the union to represent them. On April 25, 2003, the employer withdrew recognition from the union. The union challenged the employer’s repeated refusals for more frequent bargaining sessions and accused the company of engaging in surface bargaining. In a 2-1 decision, a majority of the Board agreed that the employer should have agreed to more bargaining sessions. Nevertheless, the Board did not presume that the refusal to meet on a more frequent basis constitutes surface bargaining. Nor was it linked to the union’s loss of majority support. According to the

Board, “not every unfair labor practice committed by an employer will taint evidence of a union’s subsequent loss of majority support. In cases, such as this one, where the unfair labor practice does not involve a general refusal to recognize and bargain with the union, there must be specific proof of a causal relationship between the unfair labor practice and the ensuing events indicating a loss of support.” Particularly relevant to the majority was the fact that the union stopped requesting additional bargaining sessions with the employer during the final five months of negotiations. Moreover, there was no showing that the union’s prior requests for additional bargaining sessions (and the employer’s unexplained refusals) “had a tendency to cause disaffection towards the union.” Based on this conclusion, the majority found that “the Respondent’s withdrawal of recognition from the Union was lawful.”

Dissenting, Member Liebman noted that the Respondent expressed its intent to engage in surface bargaining prior to the election and later followed through on this intention. According to Member Liebman, the Respondent’s unlawful refusal to meet with the Union at reasonable times was enough, by itself, to taint the Respondent’s withdrawal of recognition from the Union. Nevertheless, Member Liebman continued, the record demonstrates that the Respondent engaged in surface bargaining by resubmitting the same objectionable language at subsequent bargaining sessions and refusing to agree to substantive economic terms. Member Liebman also opined that the fact that the Union stopped asking for additional bargaining sessions during the last few months was irrelevant. “Surely the union simply gave up asking, rather than continue to make futile requests.”

Employer’s Strong Criticism of the Union is Protected Free Speech

Children’s Center for Behavioral Development, 347 NLRB No. 3 (May 15, 2006).

In another 2-1 decision, the Board strengthened an employers ability to express negative opinions regarding the union. While the Children’s Center and the union were engaged in bargaining for a successor contract, the Children’s Center distributed a highly critical memo to its employees. That memo stated:

I am sure that you know that Children’s Center for Behavioral Development is suffering from severe financial hardship. What many of you may not know is that, I believe that for months now, the Union has been doing everything in its power to harm Children’s Center for Behavioral Development. The Union has interfered with our relationship with the United Way, which affected our funding. Now the Union is trying to arbitrate grievances on behalf of Eileen Redeker, which has caused the Children’s Center for Behavioral Development to incur costs and legal fees, which it cannot afford. In addition, the Union is now claiming that it has a contract with CCBBD, even though the Union rejected the Center’s last offer earlier this year and the parties have not been back to the negotiating table since.

I wanted to make all of you aware of these issues and ask that you not permit Union issues to distract us from our mission. It is only by working together that we can move forward and succeed in these difficult times.

The union argued, and the ALJ found that this memorandum denigrated the union in the eyes of its employees and interfered with the free exercise of their § 7 rights. The Board disagreed.

The Board found this memorandum was legitimate and protected employer speech. Specifically, the Board announced that this speech does not violate the act because it is factually accurate, (i.e., “arbitration *does* cost money), and it merely states the employer’s legal contention (i.e., that the parties do not have a contract). While admittedly conveying the employer’s negative opinion of the union, the Board believed there were no implied threats contained in this speech and therefore it was lawful. According to the Board, “denigration of the Union is insufficient to support a finding that the Respondent has violated the Act unless it is such as to threaten reprisals or promise benefits.”

continued on page 27

Connie Chuang provides representation and legal counsel to Liebert Cassidy Whitmore clients out of its Los Angeles office in matters pertaining to education, employment and labor law, including discrimination, harassment, employee discipline, labor negotiations, audits of personnel policies, and conducting workplace investigations.



Public Sector Case Notes

By Connie Chuang

RELIGIOUS DISCRIMINATION/FIRST AMENDMENT

Agency did Not Violate Employee's First Amendment Rights by Prohibiting Employee from Talking to Clients about Religion, Posting Religious Symbols in his Cubicle, and Holding Religious Meetings in Agency's Conference Room.

Berry v. Department of Social Services, 447 F.3d 642 (9th Cir. 2006)

Daniel Berry worked for the Department of Social Services and assisted unemployed and underemployed clients in their transition out of welfare programs. His job duties required him to frequently conduct client interviews in his cubicle. Berry was also an evangelical Christian whose religious beliefs required him to share his faith and to pray with others.

When Berry began working, the Department told him that employees in his position were prohibited from talking about religion with clients. The Department did not prohibit Berry from talking about religion with other employees, so Berry began holding monthly employee prayer meetings in the Red Bluff Room, a conference room in the Department's facility. The Director told Berry that he could not use the Red Bluff Room for these meetings, but Berry continued to hold unofficial prayer meetings in the room. The Director sent Berry a letter reiterating that prayer meetings could not be held in the conference room and advising Berry that he could hold prayer meetings in the break room during lunch hours or he and his group could go outside and pray on the departmental grounds.

Department employees were also prohibited from displaying religious items in areas where those items are visible to any applicant, recipient, or participant under any Department program. Nevertheless, Berry began placing a Spanish language Bible on his desk and hung a sign in his

cubicle reading "Happy Birthday Jesus." The Department reprimanded Berry for displaying religious items where they would be visible to clients.

Berry then sued the Department for violation of his rights under the First Amendment and Title VII. The district court granted summary judgment in favor of the Department and Berry appealed.

The Ninth Circuit applied the Supreme Court's *Pickering* balancing test, which is used for cases involving constitutional challenges to restrictions on public employee speech in the workplace. The test requires a court to balance the interests of the employee, as a citizen, in commenting upon matters of public concern and the interest of the government, as an employer, in promoting the efficiency of the public services it performs through its employees. The Court held that the Department had a compelling state interest to avoid an Establishment Clause violation, and Berry's desire to speak to clients about religion and post religious symbols visible to clients would risk entangling the Department with religion. Therefore, under the balancing test, the Department's need to avoid potential Establishment Clause violations outweighed the curtailment on Berry's religious speech on the job.

With respect to the posting of religious symbols, courts have held that government has a greater interest in controlling the content of posted materials than it does in controlling its employees' speech because the materials may be readily interpreted as representing the state's views. Because these religious symbols would be visible to clients, the Department's need to avoid an appearance of endorsement of religion outweighs the curtailment of Berry's ability to display religious items.

The Court also held that the Department acted properly in not allowing Berry's prayer meetings to be held in the Red Bluff Room. The room was used

exclusively for business related functions and employee social organizations, such as birthday parties and baby showers. A different group of employees once used the room to organize a walk to raise money for cancer research, but the Director also advised this group that they could not use the room because it was a non-business related group. The Department had not opened the Red Bluff Room as a public forum and its prohibition of Berry's prayer meetings being held in the room was not based on Berry's religion. The Department's limitations on the use of the room were reasonable.

Berry's Title VII claims for failure to accommodate and disparate treatment also failed. The Department established that it could not reasonably accommodate Berry without undue hardship because Berry's desire was to discuss religion with clients and display religious items in his cubicle where clients frequented. Likewise, with respect to his disparate treatment claim, Berry could not establish that he was treated less favorably than other similarly situated employees or prove an inference of discrimination based on the circumstances. The Department did not want to convert the room from a nonpublic to a public forum. This was a legitimate nondiscriminatory reason for prohibiting Berry's use of the room for prayer meetings. The Department's use of the room for birthday parties and baby showers does not demonstrate that other similarly situated individuals were treated more favorably.

RETALIATION

Fraudulent Portions Aside, Charging Party's Allegations Accepted as True Still Failed To Establish Prima Facie Claim of Retaliation for Filing a Grievance.

State of California (Department of Corrections), PERB Dec. No. 1826-S (2006)

Julia Zanchi purchased airline tickets
continued on page 28

U.S. Supreme Court Employment Decisions

By the Editors



Burlington Northern & Santa Fe Ry. v. White, No. 05-259, 2006 U.S. LEXIS 4895 (U.S. Jun. 22, 2006).

A forklift operator alleged her employer retaliated against her for complaining about her supervisor's sexual harassment by reassigning her from forklift duty to standard track laborer tasks and by suspending her without pay before reinstating her.

In a 9-0 decision by Justice Breyer, the U.S. Supreme Court determined that: (1) the anti-retaliation provision, 42 U.S.C.S. § 2000e-3(a), unlike the substantive provision, 42 U.S.C.S. § 2000e-2(a), was not limited to discriminatory actions that affected the terms and conditions of employment; and (2) the employee needed to show that a reasonable employee would have found the challenged action materially adverse. The Court found that there was a sufficient evidentiary basis to support the jury's verdict because: (1) a jury could reasonably conclude that the reassignment of responsibilities would have been materially adverse to a reasonable employee, even though the former and present duties fell within the same job description; and (2) it was reasonable for the jury to conclude that the

37-day suspension without pay was materially adverse, even though the suspension had been rescinded. The Court affirmed the Sixth Circuit's judgment.

Justice Alito concurred, stating he would hold that a plaintiff asserting a retaliation claim must show the same type of materially adverse employment action that is required for a discrimination claim, but would find the employee had met that standard in this case.

Garcetti v. Ceballos, 126 S. Ct. 1951 (May 30, 2006)

A Los Angeles County supervising deputy district attorney (DDA) wrote a disposition memorandum explaining his concerns regarding alleged inaccuracies in an affidavit used to obtain a search warrant in a pending criminal case. The DDA was also called by the defense to recount his observations about the affidavit. He alleged that his supervisors retaliated against him based on his memo. The DDA did not dispute that he prepared the memo pursuant to his duties as a prosecutor. In finding that the employee's speech was protected, the Ninth Circuit did not consider whether the speech was made in his capacity as a citizen.

In a 5-4 opinion authored by Justice Kennedy (joined by the Chief Justice and Justices Scalia, Thomas and Alito), the Supreme Court determined that the DDA's allegation of unconstitutional retaliation failed because he was not speaking as a citizen for First Amendment purposes since he made the statements pursuant to his official duties. The employee did not speak as a citizen by writing a memo that addressed the proper disposition of a pending criminal case. The First Amendment did not prohibit managerial discipline based on the employee's expressions made pursuant to official responsibilities. The Court reversed the judgment of the Ninth Circuit and remanded the case for further proceedings.

Justice Stevens filed a dissenting opinion. Justice Souter filed a dissenting opinion, in which Justices Stevens and Ginsburg joined. Justice Breyer filed a dissenting opinion.

Look for *Garcetti v. Ceballos* to be the lead MCLE article in the October 2006 California Labor and Employment Law Review. Cindy S. Lee and Jin S. Choi, counsel for petitioners, will be the authors. ⁴²



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Phyllis W. Cheng is a member of the Labor and Employment Law Section's Executive Committee, co-editor-in-chief of this law review, and a senior appellate court attorney at the Court of Appeal, Second Appellate District, Division Seven.



Cases Pending Before the California Supreme Court

By Phyllis W. Cheng

Adams v. Los Angeles Unified School District, decision without published opinion, *review granted*, 2004 Cal. LEXIS 11343 (2004). S127961/B159310. Petition for review after affirmance of judgment. (1) Prior to its amendment by Statutes 2003, chapter 671, did the Fair Employment and Housing Act (Cal. Gov't Code § 12900 et seq.) impose a duty on an employer to take reasonable steps to prevent hostile environment sexual harassment of an employee by a client with whom the employee is required to interact? (2) If not, did the Legislature intend the 2003 amendment to apply retroactively to incidents that occurred prior to the effective date of the amendment? (3) If so, would application of the 2003 amendment to such cases violate the due process clause of the state or federal Constitution?

Atwater Elem. School District v. Dept. of General Services, 116 Cal. App. 4th 844 (2004), *review granted*, 13 Cal.Rptr.3d 534 (2004). S124188/F043009. Petition for review after the reversal in judgment in action for writ of administrative mandate. Can a school district ever suspend or dismiss a credentialed teacher based on matters occurring more than four years before issuance of the notice of intention to impose such discipline (for example, under an equitable tolling or delayed discovery theory), or does Cal. Ed. Code § 44944(a) absolutely ban reliance on such evidence? (Cf. Cal. Ed. Code § 44242.7(a).)

Claremont Police Officers Association v. City of Claremont, 112 Cal. App. 4th 639 (2003), *review granted*, 8 Cal. Rptr. 3d 541 (2004). S120546/B163219. Petition for review after judgment reversing denial of petition for writ of mandate. (1) Under what circumstances, if any, does a public agency's duty under the Meyers-Milias-Brown Act (Cal. Gov't Code § 3500 et seq.) to meet and confer

with a recognized employee organization before making changes to working conditions apply to actions implementing a fundamental management or policy decision where the adoption of that decision was exempt under Cal. Gov't Code § 3504? (2) In particular, did the city have a duty to meet and confer before implementing the Vehicle Stop Data Policy at issue in this case? Cause argued and submitted June 6, 2006.

Cohen v. Health Net, 129 Cal. App. 4th 841 (2005), *review granted*, 34 Cal. Rptr. 3d 190 (2005). S135104/G033868. Petition for review after affirmance of judgment. Further action in this matter is deferred pending consideration and disposition of a related issue in *Branick v. Downey Savings and Loan*, S132433 and *Californians for Disability Rights v. Mervyn's*, S131798 (see Cal. Rules of Court, rule 28.2(d)(2)), or pending further order of the court.

Doe v. City of Los Angeles, 137 Cal. App. 4th 438 (2006), *review granted*, 2006 Cal. LEXIS 7583 (2006). S142546/B178689. Petition for review after affirmance of judgment. Were plaintiffs' claims against the City of Los Angeles and the Boy Scouts of America for sexual abuse by a city police officer while they participated in police department programs in the 1970s barred by the statute of limitations, or did plaintiffs sufficiently invoke the provisions of Cal. Code Civ. Proc. § 340.1(b)(2), which permits the revival of certain claims of sexual abuse that would otherwise be barred where the defendant "knew or had reason to know, or was otherwise on notice, of any unlawful sexual conduct by an employee, volunteer, representative, or agent, and failed to take reasonable steps, and to implement reasonable safeguards, to avoid acts of unlawful sexual conduct in the future by that person"?

Dore v. Arnold Worldwide, Inc., decision

without published opinion, *review granted*, 2004 Cal. LEXIS 6634 (2004). S124494/B162235. Petition for review after reversal of judgment. Is an employment contract that states that "your employment with [the employer] is at will" but also states that "[t]his simply means that [the employer] has the right to terminate your employment at any time" reasonably susceptible of the interpretation either that employment may be terminated at any time without cause or that employment may be terminated at any time but only with cause, permitting the introduction of extrinsic evidence on the issue of the proper interpretation of the contract? Cause argued and submitted May 30, 2006.

Gattuso v. Harte-Hanks, 133 Cal. App. 4th 985 (2005), *review granted*, 2006 Cal. LEXIS 2545 (2006). S139555/B172647. Petition for review after affirmance of order denying class certification. May an employer comply with its duty under Cal. Lab. Code § 2802 to indemnify its employees for expenses they necessarily incur in the discharge of their duties by paying the employees increased wages or commissions instead of reimbursing them for their actual expenses?

Gentry v. Superior Court, 135 Cal. App. 4th 944 (2006), *review granted*, 2006 Cal. LEXIS 5122 (2006). S141502/B169805. Petition for review after denial of peremptory writ of mandate. What is the enforceability of an arbitration provision that prohibits employee class actions in litigation concerning alleged violations of California's wage and hour laws?

Green v. State of California, 132 Cal. App. 4th 97 (2005), *review granted*, 2005 Cal. LEXIS 12602 (2005). S137770/E034568. Petition for review after affirmance in part and reversal in part of judgment. In order to establish a prima facie case under the Fair Employment and Housing Act

(Cal. Gov't Code § 12900 et seq.) for discrimination in employment based on disability, does the plaintiff bear the burden of proving that he or she is capable of performing the essential duties of the job or does the employer have the burden of proving that the plaintiff was not capable of performing those duties? Holding for lead case in *Flatley v. Mauro*, S128429.

Harron v. Bonilla, 125 Cal. App. 4th 738 (2005), *review granted*, 2005 Cal. LEXIS 4585 (2005). S131552/D042903. Petition for review after affirmance of judgment. The court ordered briefing deferred pending decision in *Flatley v. Mauro*, S128429, which presents the following issue: When a plaintiff files a cause of action based upon illegal conduct (e.g., extortion) allegedly engaged in by the defendant in relation to prior litigation, is the plaintiff's action subject to a special motion to strike under the anti-SLAPP statute (Cal. Code Civ. Proc., § 425.16)?

International Federation of Professional Engineers v. Superior Court (Conta Costa Newspapers) 128 Cal. App. 4th 586 (2005), *review granted*, 32 Cal. Rptr. 3d 1 (2005). S134253/A108488. Petition for review after denial of writ of mandate. (1) Are the names and salaries of public employees who earn more than \$100,000 per year exempt from disclosure under the California Public Records Act (Cal. Gov't Code § 6250 et seq.) pursuant to Cal. Gov't Code § 6254(c)? (2) Is salary information about individually identified peace officers within the definition of confidential "personnel records" under Cal. Pen. Code §§ 832.7 and 832.8, and thus exempt from disclosure under the Public Records Act pursuant to § 6254(k)?

Kibler v. No. Inyo Co. Local Hosp. Dist., 126 Cal. App. 4th 713 (2005) *review granted* 2005 Cal. LEXIS 4596 (2005). S131641/E035085. Petition for review after affirmance of order denying a special motion to strike under Cal. Code Civ. Proc. § 425.16. Is an action arising out of the hospital peer review mandated by Cal. Bus. & Prof. Code § 809(a)(8) subject to a special motion to strike under the anti-SLAPP statute because such review is an "official proceeding" or implicates a public issue or issue of public interest within the meaning of Cal.

Code Civ. Proc. § 425.16(e)(2) and (e)(4)? Cause argued and submitted June 1, 2006. Letter of settlement negotiation filed June 9, 2006.

Lockheed Litigation Cases, 126 Cal. App. 4th 271 (2005), *review granted* 2005 Cal. LEXIS 3888 (2005). S132167/B166347. Petition for review after affirmance of judgment. On a claim of workplace chemical exposure, does Cal. Evid. Code § 801(b) permit a trial court to review the evidence an expert relied upon in reaching his or her conclusions in order to determine whether that evidence provides a reasonable basis for the expert's opinion?

Lonicki v. Sutter Health Central, 124 Cal. App. 4th 1139 (2004), *review granted* 2005 Cal. LEXIS 2778 (2005). S130839/C039617. Petition for review after affirmance of judgment. (1) Under the provisions of the Moore-Brown-Roberti Family Rights Act (Cal. Gov't Code § 12945.2) that grant an employee the right to a leave of absence when the employee has a serious health condition that makes the employee "unable to perform the functions of the position of that employee," is an employee entitled to a leave of absence where the employee's serious health condition prevents him or her from working for a specific employer, but the employee is able to perform a similar job for a different employer? (2) Did defendant's failure to invoke the statutory procedure for contesting the medical certificate presented by plaintiff preclude it from later contesting the validity of that certificate?

May v. Trustees of the California State University, decision without published opinion (2005) *review granted*, 2005 Cal. LEXIS 5971 (2005). S132946/H024624. Petition for review after affirmance of order for a new trial. Briefing deferred pending decision in *Oakland Raiders Football Club v. National Football League*, S132814, which presents the following issue: If the trial court fails to specify its reasons for granting a new trial (Cal. Code Civ. Proc. § 657), is the trial court's order granting a new trial reviewed on appeal under the abuse of discretion standard or is the order subject to independent review?

Miklosky v. U.C. Regents, decision without published opinion (2005) *review granted*, 2006 Cal. LEXIS 6 (2006). S139133/A107711. Petition for review after affirmance sustaining demurrer. Does the requirement of the Whistleblower Protection Act (Cal. Gov't Code §§ 8547-8547.12) that an employee of the University of California have "filed a complaint with the [designated] university officer" and that the university have "failed to reach a decision regarding that complaint within [specified] time limits" before an action for damages can be brought (§ 8547.10(c)) merely require the exhaustion of the internal remedy as a condition of bringing the action, or does it bar an action for damages if the university timely renders any decision on the complaint?

Mills v. Superior Court, 135 Cal. App. 4th 1547 (2006) *review granted*, 2006 Cal. LEXIS 4402 (2006). S141711/ B184760. Petition for review after denial of peremptory writ of mandate. Further action in this matter is deferred pending consideration and disposition of a related issue in *Murphy v. Kenneth Cole Productions, Inc.*, S140308, *infra*.

Moran v. Murtaugh Miller Meyer & Nelson, decision without published opinion (2005) *review granted*, 2005 Cal. LEXIS 5385 (2005). S132191/G033102. Petition for review after affirmance of judgment. In assessing whether a vexatious litigant has failed to demonstrate a reasonable probability of success on his or her claim and should be ordered to furnish security before proceeding (Cal. Code Civ. Proc. § 391.3), is the trial court permitted to weigh the plaintiff's evidence, or must the court assume as true all facts alleged in the complaint and determine only whether the plaintiff's claim is foreclosed as a matter of law?

Murphy v. Kenenth Cole Productions, 134 Cal. App. 4th 728 (2005) *review granted* 2006 Cal. LEXIS 2547 (2006). S140308/A107219, A108346. Petition for review after affirmance in part and reversal in part of judgment. (1) Is a claim under Cal. Lab. Code § 226.7 for the required payment of "one additional hour of pay at the employee's regular rate of compensation" for each day that an

employer fails to provide mandatory meal or rest periods to an employee (see Cal. Code Regs., tit. 8, § 11010(11)(D), 12(B)) governed by the three-year statute of limitations for a claim for compensation (Cal. Code Civ. Proc. § 338) or the one-year statute of limitations for a claim for payment of a penalty (Cal. Code Civ. Proc. § 340)? (2) When an employee obtains an award on such a wage claim in administrative proceedings and the employer seeks de novo review in superior court, can the employee pursue additional wage claims not presented in the administrative proceedings?

National Steel & Shipbuilding Co. v. Superior Court, 135 Cal. App. 4th 1072 (2006) review granted 2006 Cal. LEXIS 4401 (2006). S141278/D046692. Petition for review after denial of writ of mandate. Further action in this matter is deferred pending consideration and disposition of a related issue in *Murphy v. Kenneth Cole Productions, Inc.*, S140308, *supra*.

O'Meara v. Palomar-Pomerado Health, 125 Cal. App. 4th 1324 (2005) review granted 2005 Cal. LEXIS 4600 (2005). S131874/D043099. Petition for review after affirmance of order granting a special motion to strike under Cal. Code Civ. Proc. § 425.16. Is an action arising out of the hospital peer review mandated by Business and Professions Code section 809, subdivision (a)(8), subject to a special motion to strike under the anti-SLAPP statute because such review is an

"official proceeding" or implicates a public issue or issue of public interest within the meaning of Cal. Code Civ. Proc. § 425.16(e)(2) and (e)(4)? Deferred pending consideration and disposition of a related issue in *Kibler v. No. Inyo Co. Local Hosp. Dist.*, S131641, *supra*.

Prachasaisoradej v. Ralphs Grocery, 122 Cal. App. 4th 29 (2004), review granted, 2004 D.A.R. 14910 (2004). S128576/B165498, B168668. Petition for review reversal in judgment. Does an employee bonus plan based on a profit figure that is reduced by a store's expenses, including the cost of workers compensation insurance and cash and inventory losses, violate (a) Cal. Bus. & Prof. Code § 17200, (b) Cal. Cal. Lab. Code §§ 221, 400-410, or 3751, or (c) Cal. Code Regs. tit. 8, § 11070?

Ross v. Ragingwire Telecommunications, 132 Cal. App. 4th 590 (2005), review granted, 2005 Cal. LEXIS 13284 (2005). S138130/C043392. Petition for review after affirmance of judgment. When a person who is authorized to use marijuana for medical purposes under the California Compassionate Use Act (Cal. Health & Saf. Code § 11362.5) is discharged from employment on the basis of his or her off-duty use of marijuana, does the employee have either a claim under the Fair Employment and Housing Act (Cal. Gov. Code § 12900 et seq.) for unlawful discrimination in employment on the basis of disability or a common law tort claim for wrongful termination in violation of public policy?

Sacramento Police Officers Association v. City of Sacramento, 117 Cal. App. 4th 1289 (2004), review granted, 16 Cal. Rptr. 3d 625 (2004). S124395/C042493, C043377. Petition for review after reversal in judgment in action for writ of administrative mandate. Briefing deferred pending decision in *Claremont Police Officers Assn. v. City of Claremont*, S120546, *supra*. Under what circumstances, if any, does a public agency's duty under the Meyers-Milias-Brown Act (Cal. Gov't Code § 3500 et seq.) to meet and confer with a recognized employee organization before making changes to working conditions apply to actions implementing a fundamental management or policy decision where the adoption of that decision was exempt under Cal. Gov't Code § 3504?

Siebel v. Mittlesteadt, 118 Cal. App. 4th 406 (2004), review granted, 12 Cal. Rptr. 3d 906 (2004). S125590/H025069. Petition for review after reversal in judgment. Where a post-judgment settlement agreement (1) revises a damages award, (2) provides for the parties to withdraw their appeals but does not provide for an amended judgment, and (3) expressly preserves the defendant's right to bring a malicious prosecution action, does the settlement agreement preclude a finding that the initial action was "favorably terminated" (in defendant's favor) for purposes of the defendant's subsequent malicious prosecution action? (Cal. Rules of Court, rule 29(a)(1).) ⁴²

DISCHARGE ELEMENT OF CAL. LAB. CODE §§ 201 and 203 SATISFIED WHEN EMPLOYEE INVOLUNTARILY TERMINATED OR RELEASED

When this publication was at press, the California Supreme Court issued its ruling in *Smith v. Superior Court* (July 10, 2006, S129476). The court considered § 201 of the Cal. Lab. Code, which provides that if an employer "discharges" an employee, wages earned and unpaid at the time of discharge are due and payable immediately. Under § 203, an employer's willful failure to pay wages to a "discharged" employee in accordance with § 201 subjects the employer to penalties. The question presented was whether the discharge element of these two statutes requires an involuntary termination from an ongoing employment relationship, such as when an employer fires an employee, or whether this element also may be met when an employer releases an employee after completion of the specific job assignment or time duration for which the employee was hired. The Supreme Court concluded that the application of settled statutory construction principles contemplates both types of employment terminations. A more detailed summary of this decision will be forthcoming in the October 2006 issue of the Law Review.

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Dirty Jokes at Work

continued from page 1

A contrary decision would have severely limited the free speech rights of writers, directors, actors, journalists, advertising executives and other creative persons, whose jobs, at times, involve the use of sexually coarse and vulgar language. Further, employers throughout California would have been forced to assume the uncomfortable roll of workplace censor, charged with protecting employees from all manner of offensive speech they might have been exposed to in the course of their jobs. Instead, employers can rely on the Court's decision to develop and enforce reasonable sexual harassment policies tailored to their specific business needs without having to adopt "Big Brother" type surveillance of their employees.

SEXUALLY COARSE AND VULGAR DOES NOT EQUAL DISCRIMINATORY

In the brief four months plaintiff Amaani Lyle was employed as a writers' assistant on the "Friends" production, she allegedly witnessed male (and female) writers engage in a myriad of offensive conduct including sexual banter, comments and jokes about the writers' own personal sexual experiences, vulgar expressions, sexually graphic drawings and simulated masturbation.⁴ Although this conduct was generally related to the creating of an adult-themed situation comedy, and none of it was directed at Lyle or other female employees in the writers' room, Lyle nonetheless claimed that mere utterance of certain vulgar words by the male writers was inherently discriminatory and created an unlawful, hostile work environment under the Fair Employment and Housing Act (FEHA) which prohibits harassment "because of" sex.⁵

The Supreme Court flatly rejected Lyle's argument, ruling "it is the disparate treatment of an employee on the basis of sex—not the mere discussion of sex or use of vulgar language—that is the essence of a sexual harassment claim."⁶ A sexual harassment plaintiff must show

"gender is a substantial factor in the discrimination, and that if the plaintiff had been a man she would not have been treated in the same manner."⁷

Lyle's harassment claim, no matter how salacious the alleged details, could not meet this standard because she had no evidence of jokes, comments or pictures directed at her *because of* her gender.⁸ All of the writers' assistants on the "Friends" production, both male and female, were privy to the same creative process, including the same sorts of jokes, stories, gestures and comments.⁹ If Lyle "had been a man," she would have experienced the exact same conditions of employment. And, though Lyle attempted to base a claim on a few purported disparaging remarks made by the writers about the show's female actors (all of which were vehemently denied by the writers), even these the Court found were not actionable as harassment because they were neither severe nor pervasive.¹⁰

LYLE NOT LIMITED TO CREATIVE WORKPLACES

In *Lyle*, the writers on "Friends" used sexual speech as a tool of the trade to foster a "creative" work environment geared towards generating scripts for a show featuring sexual themes.¹¹ The Supreme Court clearly considered the writers' non-discriminatory motives to be an important factor in rejecting Lyle's claim. As a result, several commentators, attempting to downplay the significance of the Court's holding, have dismissed the case as merely a context-specific exception to the purported general rule that coarse language in the workplace constitutes harassment "because of" sex. However, the broad legal principles articulated by the Supreme Court, primarily based on federal case law, make clear that the Court's holdings are not limited to creative work environments or to employees who serve in creative capacities.

The Court's decision in *Lyle* brings California law into line with the standard currently governing harassment claims under Title VII: sexual language is actionable as harassment only if it is discriminatorily targeted at an employee or group of employees because of their sex.¹² Under this standard, federal courts have consistently held an array of sexually charged speech not actionable in a variety of

industries. For example, the Seventh Circuit Court of Appeals held that vulgar expressions like "fuck me" and "kiss my ass" are "commonplace in certain circles," and did not constitute unlawful harassment when used by warehouse employees (both with and without accompanying crotch grabbing gestures) in the absence of evidence that the comments were directed at an employee because of gender.¹³ The Second Circuit would not permit the punishment of a display of graphic caricatures by postal employees.¹⁴ Even though the derogatory cartoons had the names of a specific employee written on them, the court held that the hostility was grounded in workplace dynamics unrelated to the plaintiff's sex and did not reflect an attack on her because she was a woman.¹⁵ Similarly, the D.C. Circuit held that a campaign of vulgarity by a security guard, including kissing gestures and oral sex comments, was a "workplace grudge match" and, therefore, not directed at an employee because of sex.¹⁶ And, the district court for the Northern District of Illinois held that statements graphically describing male homosexual activity by a bank manager could not be the basis for a claim of harassment by a heterosexual female co-manager.¹⁷ These cases reflect a general unwillingness of courts to impose liability for sexual harassment unless speech or conduct is directed at a particular employee, or group of employees, because of sex, regardless of how vulgar, graphic, or unnecessary to the purposes of the job the speech or conduct may be.

It is inevitable that employees will gather around the water cooler to tell dirty jokes and discuss sexual exploits, salacious celebrity gossip, or even last night's rerun of *Sex and the City*. For the majority of employers outside of creative work environments, these discussions are not likely to be job related. However, under *Lyle* these discussions may not constitute unlawful sexual harassment, unless motivated by the gender of employees. The same is true of vulgar language and even sexually graphic visual displays. The employee, who slides down his trousers on a single occasion to show a group of his male and female co-workers a new strategically placed tattoo or piercing, likely is not guilty of unlawful harassment. Other things, perhaps, but not sexual harassment.

IN THE WAKE OF LYLE

Lyle provides employers with strong defenses to harassment claims based on undirected speech. Beyond that, the Supreme Court has offered throughout the decision valuable practical guidance which employers would be wise to heed.

A. Warn Applicants and Employees About Potentially Offensive Speech

In evaluating the sufficiency of *Lyle*'s factual showing, the Supreme Court repeatedly observed that *Lyle* was warned—before she was hired—that the show “Friends” dealt with sexually suggestive subject matter and that as an assistant to the comedy writers she would be exposed to their jokes and discussions about sex.¹⁸ While the Supreme Court did not explicitly rule that such advance notice is legally required, providing such a notice (preferably in writing) to job applicants and employees may nonetheless serve useful purposes in workplaces in which exposure to offensive speech is an inherent part of the job.

Practically speaking, a written notice is an effective way to weed out easily offended employees—the proverbial “eggshell” plaintiffs. An applicant who is truly uncomfortable with, or offended by, sexual speech, will likely opt to work elsewhere upon receiving such notice. Moreover, from a legal perspective, employees who sign an acknowledgment and accept the position will have a more difficult time later establishing that the sexual speech was so severe or pervasive that it altered the conditions of employment as required by California law.

B. Implement Effective Complaint Procedures

Lyle's failure to complain about the writers' purported offensive epithets directed at other women was a factor the Supreme Court considered in concluding that *Lyle* did not subjectively perceive such comments as hostile and abusive to her own work environment.¹⁹ The Court's finding serves as a reminder to employers that it is critical to provide employees with a comprehensive and well-publicized

process for registering complaints about harassment. Employees should be encouraged to report inappropriate sexual speech or conduct to human resources, their supervisors, or a neutral management designee for prompt investigation. Employees should also be reassured that they will not be retaliated against for their complaints. With such a process in place, an employee who chooses not to complain about perceived sexual harassment will, after *Lyle*, have a difficult time showing that he or she subjectively perceived the conduct as severe or pervasive. Furthermore, when litigating a hostile work environment claim, an employer will be able to raise as an affirmative defense that the employee unreasonably failed to take advantage of preventative or corrective opportunities provided by the employer to avoid the harm.²⁰

C. First Amendment Protections Are Alive and Well

The majority of the Supreme Court left for a later day the complex issue of the scope of First Amendment protections in California workplaces. Nevertheless, in a separate concurring opinion, Justice Ming Chin explained why, in Justice Chin's words, *Lyle*'s attack on the “Friends” creative process, “has very little to do with sexual harassment and very much to do with core First Amendment free speech rights.”²¹ Justice Chin's concurrence suggests that speech arising in the context of a creative or editorial process (like a writers' room or newsroom) should be actionable only if directed at the plaintiff.²² In future litigation over workplace speech, Justice Chin's opinion may serve as an important starting point for an employer seeking to build a formidable constitutional defense.²³

CONCLUSION

The Supreme Court's decision in *Lyle* makes clear that the purpose of the FEHA is to prevent discrimination against an individual because of his or her protected characteristics; it is not meant to be enforced as a general civility code.²⁴ Simply because an employee uses a four letter expletive when he loses a sale or burns himself on the coffee maker does

not mean that the employer has to immediately send that employee out for remedial training. However, if an employee regularly greets male employees with a handshake, while greeting a female employee with a lingering stare (either with or without an accompanying crotch grabbing gesture), state and federal law may be implicated. ☞

ENDNOTES

1. *Lyle v. Warner Brothers Television*, 38 Cal. 4th 264 (2006).
2. *Id.* at 286.
3. 42 U.S.C. § 2000e *et seq.* (2006).
4. *Id.* at 274-77.
5. Cal. Gov't Code § 12940 (2006).
6. *Lyle*, 38 Cal. 4th at 280.
7. *Id.*
8. *Id.* at 287.
9. *Id.*
10. *Id.* at 291.
11. *Id.* at 288.
12. *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 80 (1998).
13. *Johnson v. Hondo, Inc.*, 125 F.3d 408, 412 (7th Cir. 1997).
14. *Brown v. Henderson*, 257 F.3d 246, 256 (2nd Cir. 2001).
15. *Id.*
16. *Davis v. Int'l Security, Inc.*, 275 F.3d 1119, 1121 (D.C. Cir. 2002).
17. *Crawford v. Bank of America*, 181 F.R.D. 363, 364-65 (N.D. Ill. 1998).
18. *Lyle*, 38 Cal. 4th at 271, 287.
19. *Id.* at 291.
20. *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 (1998); *State Dept. of Health Services v. Superior Court*, 31 Cal. 4th 1026, 1034 (2003) (holding that the avoidable consequences doctrine applies to damage claims under the FEHA, and that under that doctrine a plaintiff's recoverable damages do not include those damages that the plaintiff could have avoided with reasonable effort and without undue risk, expense, or humiliation).
21. *Lyle*, 38 Cal. 4th at 295 (Chin, J., *concurring*).
22. *Id.* at 300.
23. To avoid waiving what may ultimately prove to be a viable and powerful defense, the defense should be pled in the answer. *Carranza v. Noroian*, 240 Cal. App. 2d 481, 488 (1996) (affirmative defenses not raised in the answer are irrelevant at trial).
24. *Lyle*, 38 Cal. 4th at 295.

MCLE Self-Assessment Test

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Name _____	Bar Number _____	E-mail _____
1. Hostile work environment under the Fair Employment and Housing Act (FEHA) prohibits harassment “because of” sex. <input type="checkbox"/> True <input type="checkbox"/> False	12. Courts are generally unwilling to impose liability for sexual harassment unless speech or conduct is directed at a particular employee, or group of employees, because of sex, regardless of how vulgar, graphic, or unnecessary to the purposes of the job the speech or conduct may be. <input type="checkbox"/> True <input type="checkbox"/> False	
2. The use of sexual speech in the workplace is prohibited by state and federal employment laws. <input type="checkbox"/> True <input type="checkbox"/> False	13. Employees that gather around the water cooler to tell dirty jokes and discuss sexual exploits, salacious celebrity gossip, or last night’s rerun of <i>Sex and the City</i> are engaging in sexual harassment. <input type="checkbox"/> True <input type="checkbox"/> False	
3. Discussion of sex or use of vulgar language is the essence of a sexual harassment claim. <input type="checkbox"/> True <input type="checkbox"/> False	14. Employers should provide notice to job applicants and employees in workplaces in which exposure to offensive speech is an inherent part of the job. <input type="checkbox"/> True <input type="checkbox"/> False	
4. The purpose of the FEHA is not meant to be enforced as a general civility code. <input type="checkbox"/> True <input type="checkbox"/> False	15. Practically speaking, a written notice is an effective way to weed out easily offended employees. <input type="checkbox"/> True <input type="checkbox"/> False	
5. In <i>Lyle v. Warner Brothers Television</i> , 38 Cal. 4th 264 (2006), the plaintiff, who was hired as a writers’ assistant on the show “Friends,” alleged that the use of sexual jokes, stories, comments and expressive gestures by the show’s writers constituted sexual harassment. <input type="checkbox"/> True <input type="checkbox"/> False	16. An employer cannot raise as an affirmative defense that the employee unreasonably failed to take advantage of preventative or corrective opportunities provided by the employer to avoid the harm. <input type="checkbox"/> True <input type="checkbox"/> False	
6. In <i>Lyle</i> , the plaintiff was not given prior notice upon hiring that she would be exposed to sexually explicit content. <input type="checkbox"/> True <input type="checkbox"/> False	17. The avoidable consequences doctrine applies to damage claims under the FEHA, and that under that doctrine a plaintiff’s recoverable damages do not include those damages that the plaintiff could have avoided with reasonable effort and without undue risk, expense, or humiliation. <input type="checkbox"/> True <input type="checkbox"/> False	
7. In the creative process for a television program with sexual themes, writers’ use of sexual jokes, stories, comments and expressive gestures in the presence of employees constitutes sexual harassment. <input type="checkbox"/> True <input type="checkbox"/> False	18. The <i>Lyle</i> court also ruled on the scope of First Amendment protections in California workplaces. <input type="checkbox"/> True <input type="checkbox"/> False	
8. A sexual harassment plaintiff must show “gender is a substantial factor in the discrimination, and that if the plaintiff had been a man she would not have been treated in the same manner.” <input type="checkbox"/> True <input type="checkbox"/> False	19. In <i>Lyle</i> , the First Amendment was discussed in a concurrence. <input type="checkbox"/> True <input type="checkbox"/> False	
9. In <i>Lyle</i> , had the female plaintiff been a man, she would not have experienced the exact same conditions of employment. <input type="checkbox"/> True <input type="checkbox"/> False	20. In future litigation over workplace speech, Justice Chin’s concurring opinion in <i>Lyle</i> regarding First Amendment Rights may serve as an important starting point for an employer seeking to build a formidable constitutional defense. <input type="checkbox"/> True <input type="checkbox"/> False	
10. The Court’s decision in <i>Lyle</i> brings California law into line with the standard currently governing harassment claims under Title VII. <input type="checkbox"/> True <input type="checkbox"/> False		
11. Federal courts have been inconsistent in determining whether sexually charged speech is actionable in a variety of industries. <input type="checkbox"/> True <input type="checkbox"/> False		

moment's notice when production demands increase, without having to hire any workers themselves. When production needs decrease, they can simply cut orders. If workers lose their jobs, the manufacturer has no responsibility for them.

Workers at Versatronex called in the UE after they had already organized themselves to protest these conditions, and as they were preparing to stop work to demand changes. When the company heard rumors of the stoppage, they held a meeting to head off the planned action. One worker, Joselito Muñoz, stood up in the meeting and declared in Spanish that "the time of slavery is over." Muñoz was fired two days later, and Versatronex workers went on strike to win his job back.

In the course of their strike, workers focused on a large customer whose boards were assembled at Versatronex—Digital Microwave Corporation. The year before the strike DMC closed its own manufacturing facility in Scotland. Its orders became a main source of work for the Versatronex plant. At the high point of the six-week strike, 10 women strikers went on a hunger strike outside DMC's gleaming office building. For four days, they fasted to dramatize their effort to hold the manufacturer responsible for their working conditions. Male strikers supported them by setting up tents and living around the clock on the sidewalk outside its front door. Word of their action spread like an electric current through the Valley's immigrant Mexican community. The strike drew from experiences that workers brought from their countries of origin, including the hunger strike.

Korean immigrants at another contract assembly factory, USM, Inc., began a similar struggle for justice. Their employer closed the factory doors owing them two weeks pay, not an uncommon event in the lives of contract laborers in many industries. USM workers turned to the Korean Resource Center, a community service agency in Silicon Valley's growing Korean community. Through the winter and the following spring, they organized a series of demonstrations in downtown

San Jose against Silicon Valley Bank, which took over the assets of the closed factory and refused to pay the workers. In the course of their struggle workers formed an organization to provide services, job referrals and education programs to Korean immigrants. Despite differences in union experience among different immigrant nationalities, many trade unionists believe that the immigrant workforce is fertile ground for the message of unionism. Immigrant workers are on the bottom in terms of wages, working conditions, and the quality of life in immigrant communities. The Versatronex strike, and similar movements among other South Bay workers, was an upheaval from below that focused attention on sweatshop working conditions in Silicon Valley.

According to SEIU organizers, immigrants are the vast majority of building maintenance workers in many U.S. cities. That poses special problems for the union, but it also creates important advantages. Immigrants have a harder time standing up for their rights in front of the employer, because they are often unaware of their rights as workers. In addition, sanctions and the threat of deportation make the risk of losing a job much higher than for non-immigrants. Vulnerability to the employer, and the weakness of legal protections, are primary reasons why Justice for Janitors, SEIU's national organizing strategy, does not rely on elections administered by the National Labor Relations Board.

Instead, the union combines intense community pressure with an all out attack on the parent corporation. Marches, demonstrations, sit-ins and other mass actions mobilize the pressure of workers against the employer. The militant history of many immigrants becomes a positive advantage for the union.

NEW OBSTACLES AND NEW TACTICS

Many unions have lost faith in the ability of workers to use the legal process for winning union representation, especially the NLRB election process. One worker out of every 10 involved in a union organizing drive gets fired as a result, according to the AFL-CIO. Employers can shift production, spend hundreds of thousands of dollars on expert anti-union consultants, and use

the fear of job loss to exert enormous pressure on workers. Although technically illegal, these hardball tactics go effectively unpunished when unions and workers rely exclusively on the NLRB's legal process.

Tactics like those used at Apple and Versatronex have been at the cutting edge of the labor movement's search for new ways to organize for the last decade. They rely strongly on close alliances between workers, unions and communities to offset the power exercised by employers. Often, though not always, they use organizing tactics based on action by workers themselves, rather than on a lengthy propaganda war during a high-pressure election campaign, which companies almost inevitably win.

Grassroots tactics respond well to the basic issues of low wages and bad conditions prevalent in contract and sweatshop employment. They also contribute to the character of a social movement. As workers organize around conditions they face on the job, they learn organizing methods they can use to deal with issues of immigration, discrimination in the schools, police misconduct, and other aspects of daily life in immigrant communities.

The movement to challenge exploitive conditions for contract employees took an important step when janitors united with workers from Versatronex and USM in a march through downtown San Jose, demanding an end to exploitive conditions for immigrant workers. Workers, unions and community organizations recognized that it was impossible for any single organization to challenge high-tech industry alone.

Electronics manufacturers have been forced over the years to permit outside contract services, like janitorial services and in-plant construction, to be performed by union contractors. Nevertheless, the industry has drawn a line between outside services, and the assembly contractors, who are part of the industry's basic production process. In one section, unions can be grudgingly recognized; in the other, they cannot.

Workers, communities and unions need a higher level of unity to challenge high-tech industry successfully, and to win the right for workers to organize effectively in the plants. Combined organizing efforts, in which unions seek to organize

many contractors at the same time, would limit the ability of employers to cut off a single contractor like Versatronex.

A step towards this kind of unity was taken when unions and community organizations came together in 1993 to protest plans by high-tech industry to impose its own blueprint for economic development on the future of Silicon Valley. The industry effort, called Joint Venture: Silicon Valley, brought together a coalition of over 100 industry executives and representatives of local governmental bodies. Together, they projected initiatives to shape public policy on subjects like regulatory relaxation, education, and resources for technological development.

The labor/community coalition pointed to issues unaddressed by Joint Venture. It drew up a Silicon Valley Pledge, calling on companies to respect the rights of workers and communities, and deal with them as equals. After their experiences at Apple, Versatronex and other Valley factories, unions also tried to organize a much broader, more comprehensive campaign, called the Campaign for Justice. Initiated by the janitors' union, instead of concentrating on a single contractor or organizing plant-by-plant, the campaign was aimed at the whole low-wage contract workforce. While employers could close a single plant in response to organizing activity, organizers argued, closing many plants would be much more difficult.

Rather than competing against each other, drawing jurisdictional lines in the sand among the Valley's unorganized workers, the Campaign for Justice was based on union cooperation. Four separate international unions, including the janitors' union, the Teamsters, the hotel and restaurant workers, and the clothing workers, formed an overall strategy committee and contributed researchers and organizers to a common pool. Two community representatives also sat on the strategy committee, making joint planning decisions with union representatives.

Ultimately, however, the pressure for

immediate results led unions other than the janitors to pull out. Local 1877 pushed forward with a drive aimed at landscape gardeners in the Valley's industrial parks. The campaign won the support of many workers, some of whom were fired in the process. Workers marched through the streets and brought community pressure to bear on contractors and their corporate clients.

The campaign was eventually folded into the effort to renew union contracts for the Valley's janitors. In Justice for Janitors style, immigrant workers organized sit-in demonstrations blocking streets and expressways. They also threw the union's resources into the statewide effort to defeat the anti-immigrant initiative on the 1994 ballot, Proposition 187. Local 1877 organizers were the backbone of the anti-187 effort in Silicon Valley, which was headquartered in the union's office.

ELECTRONICS COMPANIES PRESS FOR POLITICAL CHANGES

After President Clinton was elected in 1992, high-tech companies began using their support to press for political changes. Among those they sought were ones in labor law which would, they said, bring it into line with what they called new realities. Unions and workers also wanted changes, including enforcement of existing rights, and new legislation to take into account the proliferation of contracted and temporary work.

The Clinton administration set up a commission to review labor law reform, the Commission on the Future of Labor-Management Relations, known as the Dunlop commission for its chairman, John Dunlop, Secretary of Labor under President Nixon. But its mandate, rather than reinforcing workers' union rights, was "to make recommendations concerning what changes, if any, are needed to improve productivity through increased worker-management cooperation and employee participation."

When the Dunlop Commission finally made its report, it made minor concessions

to unions by recommending better enforcement of existing law, and then recommended altering § 8(a)(2) of the National Labor Relations Act to legalize labor-management cooperation programs. Ultimately, the dilemma was turned on its head by the election of November, 1994. The Republican Party won a majority in both houses of Congress, and promptly introduced a bill to accomplish the high-tech agenda on labor law reform—the elimination of § 8(a)(2)—with no concession to unions of any kind. President Clinton then vetoed the TEAM Act, as the Republicans called it. No one wanted to bring up the awkward point that the administration's own Dunlop Commission had opened the door.

CONCLUSION

Perhaps the most telling comment about the state of labor law today is that the most effective organizing activity among workers is that which depends on the law the least. While it seems that this activity has given up any immediate hope of reform, labor law reform efforts ultimately depend on real-life organizing activity.

For the working-class and minority communities of Silicon Valley to assert their own interests, and to ensure that economic development meets their needs, the workers in the Valley's plants must be organized. High-tech industry dominates every aspect of life in Silicon Valley, and its voice is virtually unchallenged on questions of public policy, because the workers who have created the Valley's fabulous wealth have no voice of their own.

Strong, democratic, rank-and-file unions in the electronics plants can give workers that voice, and in the process change every aspect of political and economic life. The basic decisions on issues of living standards, job relocation, toxic pollution, housing, discrimination, and economic development could then be made by the people those decisions affect the most, rather than by employers or public officials, whether well-intentioned or not. This is the challenge of Silicon Valley. ⁴²

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Older Workers

continued from page 6

younger Americans. The Indian IT giant Tata Consultancy Services, a major supplier of H-1B workers to the U.S., actually highlighted the youth of its programmers on its Web page.²²

BCIS data show that the computer-related H-1Bs in general have a median age of 27.4.²³

experience	percent
under 2 years	52%
2-5 years	41%
5-10 years	5%
10-15 years	1%
15+ years	1%

This is the point which is largely missed about H-1B, even by critics of the program: the most significant factor underlying the industry's perennial pressuring of Congress to increase the H-1B cap is actually a desire to hire young workers. Type I savings are already of importance, with estimated magnitude ranging from 15-20 percent²⁴ to 33 percent,²⁵ but the Type II savings—i.e., the age-related savings—are even greater, in the 30-50 percent range we saw earlier.

One of the most strident advocates of an expanded H-1B program has been Intel. The firm has a major hiring focus on new or recent graduates, which author Tim Jackson reported was instituted in response to a suggestion “by management consultants who feared the company was aging too fast, [recommending] easing older employees out of the company and replacing them with younger ones.”²⁶ Intel has stated repeatedly that most of the H-1Bs it hires are new graduates.²⁷ The prevailing wage rates Intel declares in its Labor Condition Applicants for hiring H-1Bs are well below national median values.²⁸

Though employers like to point out that only a small percentage of their

workers are H-1Bs, they are including all of their nontechnical workers in those statistics. The percentage is much higher when one restricts attention to only programmers and engineers. Indeed an analysis by the Federal Reserve Bank of Boston found that “Foreign workers accounted for half of all the new jobs created in system analysis, programming, and other computer-related occupations.”²⁹

As of this writing, a bill is being considered that would institute the most liberal expansion of the H-1B program in its history. It would also establish a new F-4 visa which would, in effect, grant automatic permanent residence status to new foreign graduates of Master's and Ph.D. programs at U.S. universities. By focusing on new graduates, F-4 would expand even further the pool of young programmers and engineers available to employers, greatly exacerbating the barriers to employability among older workers.

Finally, it should be noted that the H-1B program is also used to facilitate offshoring, with the typical ratio for an offshored project being one H-1B onshore for every two offshore.³⁰ Since offshoring is a cheap labor issue too, this again has an impact on older American workers. Indeed, a key but not widely-known point about offshoring is that the Indian business model is to staff projects with young, inexperienced programmers, in order to minimize costs.³¹ ¶12

ENDNOTES

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11. Margaret Steen, *Many Older IT Workers are Fishing for Jobs Despite Labor Shortage*, INFOWORLD, July 23, 1998.
12. Sharon Begley, *Slim Pickings: Behind 'Shortage' of Engineers: Employers Grow More Choosy*, WALL ST.J., November 16, 2005, at A1.
13. Unemployment data tell only part of the story, as laid-off programmers and engineers often take on work outside their field when they cannot find technical work, and thus do not count in the unemployment figures. See Carol Veneri, *Can Occupational Labor Shortages Be Identified Using Available Data?*, MONTHLY LAB.REV., March 1999 at 15.
14. *Supra* note 11.
15. Bob Violino, *The Age Factor*, INFO. WEEK, July 5, 1999.
16. Most programmers and engineers are exempt employees, and thus do not get paid for overtime. It is customary to give some compensatory time off, though it is not always provided.

continued on page 34

Outsourcing

continued from page 7

Ireland was in the economic backwater of Europe for much of the 20th century and, like India, experienced a fiscal crisis that initiated a wave of economic reforms. The reforms slashed government spending, eliminated fiscal deficits, controlled inflation and cut taxes. As a result, Ireland increased its economic freedom score by 30 percent from 1985 to 1995 and became the 5th freest economy in the world. The result was dramatic economic growth for much of the 1990s and large scale investment by many U.S. firms who located financial, technology, and back office processing jobs in Ireland. By 1994, America already had \$10 billion (\$3,000 per Irish citizen) invested in Ireland.⁶

It is no accident that outsourcing of U.S. service and technology jobs expanded throughout the 1990s and into this century. The rise of outsourcing was caused by improvements in technology, freer capital mobility, and improvements in economic policies in other countries. These forces combined to create the outsourcing observable in the Bay Area's technology sector. The next section analyzes outsourcing's effect on the well-being of the American population.

ECONOMIC IMPACT OF OUTSOURCING

When jobs that were performed in the United States move abroad, American workers get laid off and businesses close. These easily visible costs of outsourcing lead many Americans to believe that outsourcing is bad for our economy. The benefits we get from outsourcing are less direct and often go unseen. While some individual workers are made worse off when their jobs are outsourced, once the benefits are accounted for, the U.S. economy, on net, gains from the outsourcing of jobs.

The first crucial point to recognize is that there is not a fixed number or distribution of jobs in our economy. Jobs are constantly created and destroyed. When figures of job creation are released to the general public, the number of "jobs created" is the amount of jobs created *on net*. Creating 10,000 new jobs can involve the generation of 100,000 new positions and

the removal of 90,000 existing positions. Overall, total civilian employment and the size of the U.S. labor force have tracked each other fairly closely over the last 60 years.⁷ When we have extra workers, we create more jobs to help satisfy consumers' demand for goods and services. The massive entry of women into the work force in the post-World War II years did not create any long-term increases in unemployment. Instead, more jobs were created. The same is true when workers become available because their jobs were outsourced—other jobs are created for them. Outsourcing does not change the total quantity of jobs in the U.S. It changes the composition of those jobs.

Is the change in the mix of jobs desirable? Jobs are outsourced when foreign workers can complete a given job more cost effectively than U.S. workers. It's obvious that companies outsource the jobs to increase their profits. To understand the economic significance of what it means when a foreign worker can more cost effectively complete a job, one must understand how wages are determined.

In a competitive labor market, the maximum that any worker can earn is the marginal productivity of their labor. In other words, the upper limit of a worker's wage is the amount they contribute to their employer's profits. Employers, of course, want to pay as little as possible for labor. The lowest wage a worker will accept is what he could earn in his next best alternative employment. Therefore, the actual wage a worker receives will be in between these two limits.

Thus, when a service or technology job is outsourced to a foreign worker for a lower wage it reflects one of two things, or both: their marginal productivity of labor is lower, and thus can not command as high of a wage, and/or their next best alternative employment is less appealing than the alternative to for the U.S. worker. The gains to society from outsourcing stem from differences in the next best alternative employment of workers. The work that could be done in this alternative employment is the cost to society of having a worker perform a particular job. Assume that the alternative to working at a call-in center in India is the relatively unproductive job of hand weaving; the alternative to working in a call-in center in the U.S. is being a receptionist at another

company and that the cost adjusted value each call center provides are equal. If the call-in center is located in the U.S., Americans get call-in center services and can trade for a few hand woven garments. If the call-in center is located in India, U.S. society gets call-in center services and the services of the receptionist. Either way, the call-in center services are provided. The crucial question—the one of economic efficiency—is which is more valuable: the hand woven garments or the services of a receptionist? The market answers this question through competitive labor markets. In this example, since the Indian worker would not earn much in hand weaving, the lower bound of their wage would be much lower than what the U.S. worker could earn as a receptionist. Therefore, because the company could get the call-in center job performed at a lower wage in India, the firm would be led by the market's invisible hand to outsource the call-in center position to India. Society would benefit from the creation of a larger total economic pie by having both call-in center services and a receptionist, because these services are more valuable than call-in center services and hand woven garments.

Though a simple example, it illustrates a powerful economic concept—the law of comparative advantage. When countries specialize and produce what they are relatively more efficient at producing (i.e., have a comparative advantage in), *both* countries gain by having a larger total amount of goods and services. The economics of the outsourcing of services and technology jobs is not different than the economics of outsourcing manufacturing jobs. Since Adam Smith wrote the *Wealth of Nations* over 200 years ago, there has been widespread consensus among economists that countries are better off by specializing and freely trading with other nations. In a recent survey of members of the American Economics Association, economists were more strongly opposed to the imposition of tariffs to protect American industries than any of the other 17 policy questions surveyed.⁸

Unfortunately, the benefits of foreign trade are often harder to observe than the costs of it—namely, the workers who become temporarily unemployed because of it. It is hard to identify exactly which jobs were created because international

trade freed up U.S. labor and which jobs were created in our economy for any of a multitude of other reasons. Sorting out exactly which jobs stem from our outsourcing of other jobs is not possible. That these jobs are difficult to observe should not diminish the fact that they are no less real than any other job created in our economy.

Although not all domestic jobs created by our own outsourcing are identifiable, some are. Jobs that are “insourced” to the United States from foreign countries and jobs in companies that export products overseas are a direct result of our own outsourcing. One of the first lessons taught in international economics is that “exports are the price you pay for imports.” When we export some jobs overseas through outsourcing, other jobs are created in the United States because foreign workers use their earnings to buy American-made products and services, or to make investments back into the U.S. economy. California, and the San Francisco Bay Area in particular, benefit from this process. Bay Area manufacturers derive almost 60 percent of their revenue from foreign sales. Due to the Bay’s Area’s high technology, California leads the nation in “insourced” jobs—over

700,000 employees in the state work for subsidiaries of foreign corporations. According to a study by the Bay Area Economic Forum, the San Francisco Bay Area has more foreign-owned research and development facilities than other region or even State in the U.S. The Bay Area’s share of employment devoted to R&D positions, at 6%, is two and a half times that of the United States as a whole.⁹ If some of our technical support services and back office processing jobs were not outsourced overseas a smaller share of our labor force would be available to focus in R&D. America’s outsourcing of jobs and importing of products enables foreigners to demand our products and make investments within the United States. Policies attempting to limit outsourcing would have the detrimental effect of limiting “insourcing” as well.

CONCLUSION

The outsourcing of U.S. service and technology jobs is not something to fear. The economics of outsourcing is not different than the economics of international trade in traditional manufacturing sectors. In services and technology, as well as manufacturing, the U.S. benefits when it is open to international trade.

Our total number of jobs is unaffected, and our mix of jobs changes to better reflect what we more efficiently produce. In the process, the standard of living in the United States improves. ⁴²

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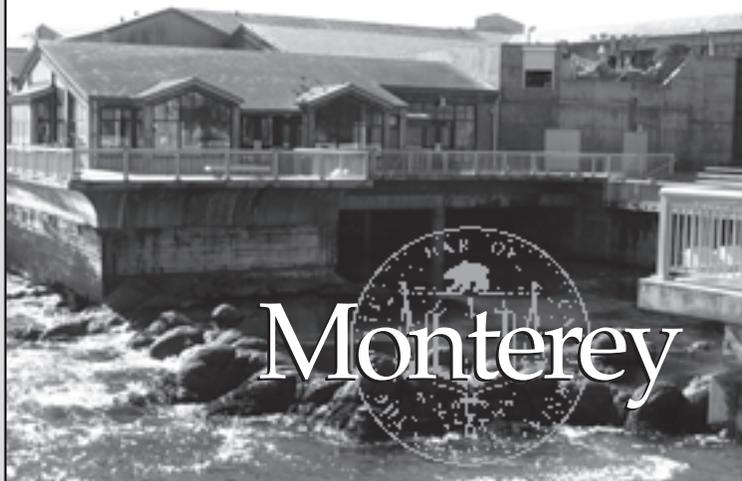
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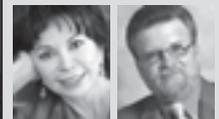
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NLRB Case Notes

continued from page 12

Member Liebman dissented because she would find an implied threat in the employer's statement that it is suffering financial hardship and blaming the union for such difficult economic times. "Thus, the Respondent clearly implied that unless the employees refrained from supporting the Union, the respondent's resulting financial difficulties would jeopardize the employees' job security." Member Liebman also notes that concurrent with the employer's memo were a series of unfair labor practices committed by the employer. "The memo's implicit threat against engaging in union support is reinforced by these unfair labor practices."

The Board majority refused to consider the employer's memorandum with other unfair labor practices committed during the same period. "In general, we are reluctant to convert otherwise lawful statements into unlawful threats simply because of the existence of other violations."

D.C. Circuit Court Rejects NLRB's *Villa-Barr* Decision and Refuses to Protect Picketing for Single-Employer Bargaining Unit

For 40 years the NLRB has followed its ruling in *Villa-Barr Co.*, 157 NLRB 588 (1966), holding that an employer cannot discipline an employee for picketing to form a single-employee unit despite the fact that the Board is prohibited from certifying such a unit. For years this decision has been criticized by legal scholars. The D.C. Circuit Court of Appeals in *Int'l Transp. Serv. v. NLRB*, No. 05-1063, 2006 U.S. App. LEXIS 13608 (D.C. Cir. June 2, 2006), recently rejected *Villa-Barr*. In short, the court announced that if a single-employee bargaining unit could not be certified by the NLRB, then an employer could not be liable for disciplining an employee who picketed to seek recognition of such an unprotected single-employee unit.

International Transportation Services ("ITS") operates a container terminal facility which indirectly employs longshoreman represented by the union. For several years, the union has attempted to include the payroll and billing represen-

tative in its clerical unit. ITS consistently refused. Subsequently, a new payroll and billing representative was hired named Tartaglia. Tartaglia, along with two union representatives, proceeded to picket ITS' terminal demanding recognition of a single-employee unit. ITS again refused and the picket line was honored by affiliated unions causing ITS to incur expenses of \$90,000. ITS terminated Tartaglia two days later. The Board held that ITS violated § 8(a)(3) and (1) of the Act by discharging Tartaglia for participating in a picket line.

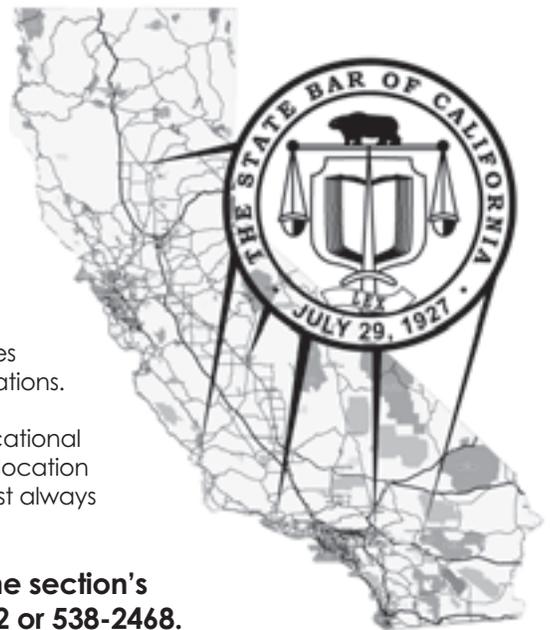
In refusing to enforce the Board's order the Court held, that "[t]he Section 7 right to collective bargaining has never extended to single-employee bargaining units." Just like a prohibited petition for a mixed-guard unit, a single-employee unit cannot be certified by the Board. "Therefore, picketing for recognition of" a single-employee unit "in no way serves as a prelude to an election." Tartaglia picketing for a single-employee unit was not protected activity and ITS was free to terminate her for such activities. It remains to be seen whether other courts or the Board will reconsider the *Villa Barr* decision. ☞

The Labor and Employment Section is Everywhere!

Executive Committee members have now conducted half-day educational programs (with CLE credit) in six different cities—San Bernardino, Chico, Oxnard, Fresno, Palm Springs, and San Luis Obispo. Each program includes three panel discussions on current labor or employment issues. The speakers include one or two members of the Executive Committee, and several experienced employment law attorneys from the country in which the program takes place. Each program is co-sponsored by one or more local bar associations.

The purpose of these "road shows" is to provide useful and timely educational programs to lawyers outside the state's major metropolitan areas, in a location more convenient than the section's annual programs, which are almost always set in either the San Francisco Bay Area, Los Angeles, or San Diego.

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for a vacation to Paris she had scheduled with her husband. The Department of Corrections offered her an assignment as acting sergeant, which she accepted. She also interviewed for a permanent sergeant position. She received a one year limited term assignment, but was never promoted to a permanent position. The Department's policy was that employees who worked out-of-class assignments had to forfeit any vacation scheduled during that period.

Zanchi did not take her vacation and she filed a grievance for loss of vacation and requested reimbursement for the airline tickets she had purchased. In processing the grievance, the Department investigated the truth of the information Zanchi had provided. The Department learned from her husband's co-worker that Zanchi and her husband were planning on canceling their trip to Paris after the September 11, 2001, attacks, but he encouraged Zanchi to seek reimbursement for the tickets.

The Department began criminal and administrative investigations as a result of the grievance investigation based on Zanchi's seeking reimbursement of funds under possible false pretenses. In her unfair practice charge, Zanchi alleged that the Department retaliated against her for filing her grievance by beginning investigations of her, denying her an extension of her limited term assignment and denying her promotion.

The Board held that Zanchi could not establish a prima facie case for retaliation because she had not shown a nexus between the denial of promotional opportunities and the filing of her grievance. Filing a grievance is a protected activity. Filing a fraudulent claim is not a protected activity. Looking at the non-fraudulent portions of Zanchi's allegations and accepting them as true, there was still no nexus between the filing of Zanchi's grievance and the Department's investigations or her not receiving the promotion. She was not investigated for filing a grievance. She was investigated because of her husband's statements to his co-worker, which led to the discovery of the fraud.

LABOR RELATIONS

Under San Francisco's Charter an Impasse in Negotiations Between the Civil Service Commission and the Fire Fighters Union Regarding a Change in Promotional Procedures is Not Subject to Binding Arbitration.

San Francisco Fire Fighters Local 798 v. City and County of San Francisco, 38 Cal. 4th 653 (2006).

The City and County of San Francisco's Charter charges the City's Civil Service Commission with adopting rules, policies and procedures for the City's employment. The Commission is mandated to adopt rules which govern various aspects of hiring and promotions, such as examinations and eligibility.

The Charter requires the Commission to negotiate with union representatives before making any change to the terms or conditions of the firefighters and other public safety employees' employment. If the parties bargain to impasse without reaching an agreement, the matter must be submitted to binding arbitration.

However, the Charter exempts from such binding arbitration "any rule, policy, procedure, order or practice...which is necessary to ensure compliance with federal, state or local anti-discrimination laws, ordinances or regulations." The Charter also states that in the event the City "acts to ensure compliance with federal, state or local anti-discrimination laws, ordinances or regulations and the affected employee organization disputes said determination, that determination or action shall not be subject to arbitration."

The San Francisco Fire Department has a long history of hiring and promotion practices which have adversely impacted minorities and women. Federal courts have ordered the Department to utilize practices which will ensure more equal hiring practices. However, minorities have continued to be significantly underrepresented within the Department.

In April 2000, the Commission decided to change the Department's promotions procedure and offered to negotiate with the Union about proposed changes. After two years of negotiations, the parties could not reach an agreement regarding the "Commission's proposed banding method" to be used to certify promotional candidates. The Union favored methods

which would result in a narrow band and limit the discretion of appointing officers. The Commission favored a banding method, known as Statistically Valid Grouping, which would lead to wider bands and greater discretion.

In December 2002, the Commission declared an impasse and amended the rule to employ Statistically Valid Grouping exclusively for certification of candidates for promotion. The amended rule also required appointing officers to establish nondiscriminatory selection procedures, and that the criteria be announced and approved by the Commission in advance of any job advancement. The revised rule deleted any reference to equal employment opportunity goals. The Commission also adopted a statement, stating that the amendments were "necessary to and will ensure federal, state and local anti-discrimination laws, ordinances or regulations."

The Union demanded binding arbitration on the issue and the Commission refused, claiming the exemption applied. The trial court denied the Union's petition. The Court of Appeal reversed, holding that the word "necessary" in the Charter clause should be interpreted strictly "to mean the only available means to ensure compliance with antidiscrimination laws."

The California Supreme Court held that the deferential standard of review was appropriate in this case since it is generally accorded to legislative and quasi-legislative actions. However, the level of deference accorded a decision will depend in part on the nature of the challenge to the agency action.

The Court examined the Charter's provisions for exemptions from binding arbitration and determined that it gave the Commission considerable discretion to determine what is necessary to accomplish a valid legislative goal.

The Court determined that the term "necessary" in the Charter should not be interpreted strictly because the Charter is meant to give the Commission broad discretion. Instead, the Charter should be interpreted to mean a rule, policy, procedure, order or practice that is necessary in the sense of convenient, useful, appropriate, suitable, proper or conducive to ensure compliance with antidiscrimination laws and that is then not subject to binding arbitration.

In light of this interpretation, the Court held that the Commission's revision of the promotions rule was reasonably related to ensuring the City's compliance with antidiscrimination laws and not merely a means of circumventing the Charter's binding arbitration provision.

Employer's Refusal to Utilize the Newly Negotiated Process to Resolve Grievability of Several Grievances Constituted Repudiation of a Contractual Provision.

County of Riverside, PERB Dec. No. 1825-M (2006)

Service Employees International Union (SEIU) and the County of Riverside had a Memorandum of Understanding (MOU) which required the County to interview all candidates on the certification list. Employee Margaret Turk submitted a grievance when she was not interviewed for a promotion, despite being on the certification list. The County refused to process the grievance, claiming it was not a grievable matter.

A few months later SEIU and the County negotiated a new MOU provision which required the parties to utilize the State Mediation and Conciliation Service to settle disputes regarding grievability and to comply with the mediators' decisions on grievability. SEIU presented seven to ten pending grievances, not including the Turk grievance, with grievability issues to the County and proposed sending them through the grievance procedure or to mediation. The County rejected both proposals.

SEIU filed an unfair practice charge, asserting that the County's refusal to process the Turk grievance is a repudiation of the grievance procedure and a refusal to negotiate in good faith. The Board determined that the MOU provisions regarding the parties utilizing mediators to determine grievability was retrospective, so Turk's grievance would still be subject to this process.

Moreover, the Board also held that the County unilaterally repudiated the newly negotiated language when it refused to refer any pending grievances to mediation to determine their grievability. In light of this refusal, the Board found that it would have been futile for SEIU to meet with the County regarding the grievability of Turk's grievance. ⁴²

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inevitably disclose Estée Lauder's trade secrets to Perricone, he should be enjoined from competing with Estée Lauder for five months. *Cf. Kelton v. Stravinski*, 138 Cal. App. 4th 941 (2006) (ongoing business relationship between business partners did not render covenant not to compete valid).

Names And Addresses Of Putative Plaintiffs In Class Action Are Protected By Privacy Rights

Tien v. Superior Court, 139 Cal. App. 4th 528 (2006)

In this wage and hour class action litigation against Tenet Healthcare Corporation, plaintiffs sought from Tenet the names, addresses and telephone numbers of all of the putative members of the class, which Tenet estimated to be approximately 50,000 people. The parties subsequently agreed that a neutral letter would be sent to a random sample of class members informing them of the existence of the lawsuit and providing them with contact information for plaintiffs' lawyers if they "would like more information." Tenet then served a set of special interrogatories on plaintiffs seeking, among other things, the names and contact information of all putative class members who had contacted plaintiffs' counsel. Although some of the putative class members who had contacted plaintiffs' counsel expressly consented to having their identities disclosed to Tenet, others either did not respond to the request for consent or expressly refused to give their consent. Plaintiffs' counsel filed a writ petition challenging the trial court's order to disclose the names and contact information of anyone who did not expressly consent to the disclosure. The Court of Appeal granted the petition and held that although disclosure of the identifying information of non-consenting putative class members was not barred by the work product doctrine or the attorney-client privilege, it would violate the individuals' rights to privacy and on that basis ordered the trial court to

grant plaintiffs' motion for a protective order. *Cf. Singh v. Superior Court*, 140 Cal. App. 4th 387 (2006) (health-care employees who elected to work three 12-hour days per week are entitled to overtime only after 40 hours in a week or 12 hours in a day).

Court Enforces New York Forum Selection Clause

Olinick v. BMG Entertainment, 138 Cal. App. 4th 1286 (2006)

Martin Olinick, a lawyer who is admitted to practice both in New York and California, began working for BMG's predecessor, RCA Records in New York in 1971. In the last of a series of 3-year employment agreements between the parties, Olinick and BMG executed an 8-page employment agreement covering the period from July 1, 2000 to October 31, 2004. The agreement was the product of nine months of negotiations that were conducted almost entirely in New York between Olinick's New York lawyer and BMG's in-house counsel also located in New York. The parties exchanged more than 10 drafts of the agreement. Among other things, the agreement contained a New York choice-of-law provision and a New York forum-selection clause. When BMG terminated Olinick before the expiration of the agreement, Olinick filed the instant lawsuit, alleging age discrimination. In response, BMG sought to stay Olinick's lawsuit on inconvenient forum grounds based upon the forum-selection provision in the contract. The trial court granted BMG's motion, and the Court of Appeal affirmed, holding that Olinick has an adequate remedy for his age discrimination claim under New York law.

Statute Of Limitations On Malpractice Claim Tolled During Period Of Attorney's Failure To Communicate With Client

Gonzalez v. Kalu, 140 Cal. App. 4th 21 (2006)

Gabriela Gonzalez, who worked as a cleaner for a building maintenance company, hired an attorney to represent her in a matter involving a possible sexual harassment claim against her employer. The attorney sent a letter to Gonzalez's employer asserting the employer's liability, threatening to file a lawsuit and demanding a settlement. The letter also warned the employer not to retaliate against Gonzalez by terminating her employment; Gonzalez's employment

was terminated by the end of the month. The attorney then filed an administrative complaint with the Department of Fair Employment and Housing and sent another letter to the employer, asserting there had been illegal retaliation and stating that he would be filing a lawsuit on Gonzalez's behalf as soon as he received the right-to-sue letter. Gonzalez alleged that she did not hear from the attorney for three years—until she came to his office to pick up her file in connection with separate litigation against her former employer and was told that the attorney would not be prosecuting the sexual harassment claim on her behalf. The attorney demurred to the malpractice complaint on the ground that it was barred by the one-year statute of limitations. Although the trial court granted the attorney's motion for summary judgment, the Court of Appeal reversed, concluding there was a triable issue of fact whether the attorney continued to represent Gonzalez, which would toll the statute of limitations. *Cf. In re ZiLog, Inc.*, 2006 WL 1642752 (9th Cir. June 15, 2006) (Ninth Circuit reverses dismissal and discharge of contract, tort and discrimination claims untimely filed against employer in bankruptcy based upon communication from employer to employees that seemed "designed to lull [them] into a false sense of security about the need to file claims"); *Wasti v. Superior Court*, 140 Cal. App. 4th 667 (2006) (unrepresented employee need not serve upon employer a copy of complaint filed with Department of Fair Employment and Housing before proceeding with FEHA claim).

Employee Who Received Settlement For Defamation Claims Was Liable For Back Taxes

Polone v. Comm'r, 449 F.3d 1041 (9th Cir. 2006)

Gavin Polone sued his former employer, United Talent Agency, alleging, among other things, wrongful termination and defamation. In settlement of the defamation claim, Polone agreed to accept \$4 million in four equal, six-month installments, beginning on May 3, 1996. Congress amended Section 104 of the Internal Revenue Code in August 1996 (after the first but before the second installment payment was received), resulting in the inclusion in taxable income of

compensation for defamation claims such as Polone's. The Tax Court held that the pre-amendment Section 104 applied to Polone's receipt of the first installment, but not to any of the other installments, resulting in his owing taxes on \$3 million. The Ninth Circuit affirmed.

Major League Baseball Did Not Violate Title VII By Providing Benefits To Former Negro League Players

Moran v. Selig, 447 F.3d 748 (9th Cir. 2006)

Seeking to make partial amends for its exclusion of African-American baseball players prior to 1947 (when Jackie Robinson "broke the color barrier"), MLB voluntarily decided to provide certain benefits, including medical coverage and a supplemental income plan, to African-Americans players who had been in the "Negro Leagues" prior to 1948. In this lawsuit, certain retired players (mostly Caucasians) who played in the Major Leagues between 1947 and 1979 for too short a period to vest in similar benefits challenged MLB's action on the ground that it discriminated against them on the basis of their race. The trial court granted MLB's motion for summary judgment, and the Ninth Circuit affirmed, holding that the benefits are not "part and parcel of the employment relationship" because members of the Negro Leagues were (by definition) not members of MLB. Moreover, since none of the plaintiffs had played for the Negro Leagues, none was similarly situated to those who did. The Court further held that MLB had a legitimate non-discriminatory and non-pretextual reason for providing these benefits and that it had acted "honorably and decently and not out of an improper or invidious motive." Finally, the Court affirmed summary judgment of plaintiffs' battery claim involving alleged multiple injections of cortisone and other drugs without their informed consent as a result of the absence of sufficient evidence in support thereof. ¹²

Visit the Section's Website

Those who haven't visited the Labor & Employment Law Section's website in a while are in for a surprise.

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We've added news of upcoming Section events and activities and full length articles and excerpts from past issues of the Review. Additionally, there is a comprehensive set of "links" to websites that all labor and employment lawyers should have at their fingertips, including links to legal research sites, state and federal resources, and the official websites of the EEOC, NLRB, DLSE, DFEH, DOL, FCC, OSHA and many others.



Log on Today!

continued from page 24

17. *Supra* note 11.
18. North of the Border, *60 Minutes*, CBS News, October 3, 1993.
19. See *supra* note 1, at 818-821, for the history of the program and the controversy surrounding it.
20. Matloff, *id.*, Section V at 833-835, presents an extensive literature survey on the various studies.
21. *Searching for Skills*, Lorraine Ash, Gannett News Service (Asbury Park Press, August 15, 2005).
22. TCS recruiting page, *originally available at* <http://www.usa-tcs.com/careers/whyjoin.html>. It was subsequently removed by Tata, but can be found in the cache *available at* <http://web.archive.org/web/20041010223626/www.tcs-america.com/careers/whyjoin.html>.
23. H-1B FOREIGN WORKERS: BETTER CONTROLS NEEDED TO HELP EMPLOYERS AND PROTECT WORKERS, General Accounting Office, GAO/HEHS-00-157, September 2000, at 15.
24. *Supra* note 1.
25. Paul Ong and Evelyn Blumenthal, *Scientists and Engineers*, in Darrell Hamamoto and Rodolfo Torres (ed.), *NEW AMERICAN DESTINIES: A READER IN CONTEMPORARY ASIAN AND LATINO IMMIGRATION*, at 163.
26. Tim Jackson, *INSIDE INTEL*, Dutton, 1997.
27. See for example Testimony of Patrick J. Duffy, Human Resources Attorney for Intel Corporation, Senate Judiciary Committee, September 16, 2000, *available at* http://judiciary.senate.gov/testimony.cfm?id=913&wit_id=2610, last visited June 8, 2006.
28. *Supra* note 1.
29. Miriam Wasserman, *EllisIsland.com?*, *REGIONAL REVIEW*, Quarter 4 2000/Quarter 1 2001.
30. Ron Hira, *U.S. Immigration Regulations and India's Information Technology Industry*, *TECHNOLOGICAL FORECASTING & SOCIAL CHANGE*, 71 (2004), 837-854.
31. Norman Matloff, *Offshoring: What Can Go Wrong?*, *IT PROFESSIONAL*, July/August 2005.

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From the Editors

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We would like the *Law Review* to reflect the diversity of the Section's membership in the articles and columns we publish. We therefore invite members of the Section and others to submit articles and columns from the points of view of employees, unions, and management. Our resources are you, the reader, so please provide us with the variety of viewpoints representative of more than 6000 members. In addition, although articles may be written from a particular viewpoint (i.e. management or employee/union), whenever possible, submitted articles should at least address the existence of relevant issues from the other perspective. For example, does the existence of a collective bargaining agreement affect the law on a particular subject? Thank you for all of your high quality submissions to date, and please...keep them coming! Please e-mail your submission to Section Coordinator Edward Bernard at edward.bernard@calbar.ca.gov.

The Review reserves the right to edit articles for reasons of space or for other reasons, to decline to print articles that are submitted, or to invite responses from those with other points of view. We will consult with authors before any significant editing. Authors are responsible for shepardizing and proof reading their submissions. Please follow the style in the most current edition of *The Bluebook: A Uniform System of Citation* and put all citations in endnotes.

Tony Skogen is the Managing Shareholder in the Los Angeles Office of Littler Mendelson, where he exclusively represents employers and management in labor and employment law matters. He can be reached at 310.772.7262 and at tskogen@littler.com.



Message from the Chair

By Tony Skogen

When the phone on my desk rang at 6:30 a.m. last Wednesday, I knew it had to be either someone from one of our offices back east or Phyllis Cheng, Fellow Executive Committee Member and Co-Editor in Chief of the Law Review. It was Phyllis, calling to ask me to write my final Chair's Message. What? Could this really be the end of my tenure on the Executive Committee? My first thought was about Pancho Villa's final words: "Don't let it end like this. Tell them I said something."

As you can see by the banner on the front page, this edition of the Law Review is devoted to the 24th Labor and Employment Law Annual Meeting on October 27-28 in San Jose, the heart of Silicon Valley. The enclosed articles are devoted to labor and employment issues in the high-tech and creative workplace. We invite you to come to the Annual Meeting to learn more about these and other exciting developments, network with colleagues, and earn up to 11.5 hours of MCLE credits. We hope to see you there!

This past year was a great year. We did not mark time. Our Section for the first time exceeded 6,000 members. I leave the Executive Committee at the same time as five incredibly talented and dedicated lawyers: Paul Avilla, Rupert Byrdsong, Phyllis Cheng, Matthew Gauger, and Patricia Perez. They and their contributions will be missed.

I wish I could say we were always able to leave our partisan hats at the door for our meetings. What I can say is that with such a spirited group of lawyers, all passionate about the interests of the part of the Section they represented, we often left our partisan hats at the door, rolled up our sleeves, and hammered out the work of our Section. At other times, I wanted to borrow

a line from the "Dr. Strangelove" film: "You can't fight in here. This is the War Room!"

Aside from increasing the membership of our Section, what have we done? In Disneyland, we had another exceptional Annual Meeting. After pulling the flags in Pasadena (inside joke), we had another first-rate Public Sector Meeting. And, we greatly improved the content and the look of the Law Review.

What I am most excited about, however, is what we started. We began studying the possibility of creating our own West-coast version of the Cornell University School of Industrial Relations, which would grow lawyers and other practitioners seeking careers in labor and employment law. In furtherance of this program, we started building bridges to private firms, unions, employers, bar associations, and universities to make this program a reality.

We also started our own state Fellows of Labor and Employment Law. This will allow us to identify and honor the best and the brightest in our Section. Our inaugural event, which is to be repeated annually, will be a Black Tie (Optional) Dinner on the Wednesday evening before the 25th Annual Meeting at the Claremont Hotel in the fall of 2007.

The future looks bright for our Section, despite the loss of five talented lawyers from our Executive Committee. Our leadership is assured for the next three years with a tremendous lineup of the next three Chairs: Wendy Rouder, Phil Horowitz, and Karen Clopton. And, we added five exceptional new members to the Executive Committee: Suzanne Ambrose, Barbara Chisholm, Henry Josefsberg, Trudy Largent, and Emily Prescott.

It has been an honor and a pleasure to serve you.

California Labor & Employment Law Review

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