



### What's Inside

- CA Supreme Court Finds 3-Year Limitations Period Applies to Missed Meal Period Claims
- Court Concludes Supervisors May Be Held Liable for Retaliation Under FEHA
- Ninth Circuit Affirms Class Certification in Wal-Mart Sex Discrimination Case
- EEOC Launches the E-RACE Initiative
- Employee Fired For Violent Outburst May Pursue Disability Discrimination Claim
- NLRA Violated by Employer Restrictions on Union-Related E-mail
- Prohibiting Bulletin Board Usage During Union Campaign Offends NLRA
- Eight Circuit Holds Contraception Coverage Not A Necessary Element of Employee Health Plan
- CA Laws Providing Relief Regardless of Immigration Status Not Preempted by IRCA
- FEHC Further Modifies Harassment Training Regulations
- Employee Expectation of Privacy Gives Way to Employer's Consent to Computer Search
- Unsympathetic Behavior of Supervisor Did Not Amount to Harassment Under FEHA
- NLRB Split Decision Holds Bus Company Liable for Refusing to Hire Certain Drivers
- Employer Not Liable to Employee Who Rejects Reasonable Efforts to Correct Harassment by Supervisor
- Employee Goes "Driving For Dollars" At Employer's Expense
- San Francisco Ordinances Impose Heightened Requirements on Employers

their meal or rest breaks is compensation governed by a three-year statute of limitations. The ruling is expected to result in an increase in claims for meal and rest period violations, because most courts had previously held that the hour of pay was a penalty governed by a one-year limitations period. Now, employees can actually claim that missed meal or rest periods comprise an "unfair business practice" under the California Unfair Competition Law, so claims reaching back as far as **four years** are possible given the Court's decision. Unfortunately, we expect this dramatic expansion of the liability for past violations of meal and rest period requirements to spawn a new wave of class action lawsuits alleging such claims.

The Court concluded that the one-hour per day premium was wages and not a penalty because it is measured by the employee's rate of pay and not an arbitrary amount, as other penalties are. The Court also analogized premium wage payments such as reporting time pay, split-shift pay, and overtime, which compensate employees in for form of increased wages without additional time actually having been worked. Finally, the Court cited the affirmative obligation of employers to pay the additional hour immediately upon being forced to miss the meal or rest period as evidence of its compensatory purpose, as

### CA Supreme Court Finds 3-Year Limitations Period Applies to Missed Meal Period Claims

Should required payments to employees by employers who failed to give meal or rest

breaks be considered compensation for the employee or punishment of the company? The California Supreme Court recently decided this hotly contested issue in *Murphy v. Kenneth Cole Productions*, finding that the one-hour per day premium required to be paid to employees who miss

This occasional newsletter is published by Hill, Farrer & Burrill LLP as a service to clients, friends and colleagues.

Each publication summarizes recent developments in state and federal law affecting employers, but should not be relied upon as an opinion or advise of the Firm regarding any specific matter.

opposed to penalties which do not vest until someone has taken action to enforce them.

The last reason relied upon by the Court is very important one, as it confirms the duty of employers to include the one-hour premium in the wages earned by employees during the pay period in which the meal or rest break was missed. If this is not done, then employees can seek to recover up to 30 days of waiting time penalties following termination based on the employer's failure to pay all wages due. Please note, however, that the one-hour premium is not required to be counted as hours worked for the purpose of computing overtime pay.

A thorough review of your policies governing meal and rest periods is warranted based on this far-reaching decision. If you need any assistance in formulating those policies, in reviewing your wage and hour practices in general, or in limiting your exposure to wage and hour class action lawsuits, please do not hesitate to call on us for assistance.

## Court Concludes Supervisors May Be Held Liable for Retaliation Under FEHA

The recent California Court of Appeal's decision in *Jones v. The Lodge at Torrey Pines Partnership* confirms that supervisors may be held liable for retaliatory behavior under the California Fair Employment and Housing Act ("FEHA"). FEHA makes it unlawful for any "employer, labor organization, employment agency, or person to discharge, expel, or otherwise discriminate" against an employee in retaliation for his complaints pertaining to

unlawful practices under FEHA, or for opposing workplace discrimination.

While individual employees remain exempt from personal liability for *discrimination* in employment under FEHA, the State Legislature specifically amended FEHA to clarify that non-supervisory employees may be held liable for instances of *harassment*. Similarly, the *Jones* court found that FEHA's broad prohibition against retaliation evidenced the Legislature's intention that supervisors be held personally liable for acts of retaliation under FEHA.

## Ninth Circuit Affirms Class Certification in Wal-Mart Sex Discrimination Case

On Feb. 6, the Ninth Circuit Court of Appeals affirmed a lower court's certification of a sex discrimination case brought by female employees of Wal-Mart, making it the largest civil rights class action ever certified against a private employer. The Wal-Mart plaintiffs allege they are paid less than men in comparable positions and receive fewer managerial promotions. Expert opinions, statistical analysis, as well as factual and anecdotal evidence provided "significant proof of a corporate policy of discrimination" substantiating the plaintiffs' claim that female employees "were subjected to a common pattern and practice of discrimination." Because of the alleged common pattern of discrimination, the plaintiffs were able to refute Wal-Mart's charge that the claims were not sufficiently typical and would vary by employee.

The court held that injunctive and declaratory relief

predominate despite the possibility that the plaintiffs' damages award may amount to billions of dollars, including punitive damages and awards of back pay. It also indicated that the predominance of injunctive and declaratory relief was undiminished by the fact that many members of the class are no longer employed by Wal-Mart, because a primary intent of the plaintiffs is to alter Wal-Mart's discriminatory practices.

## EEOC Launches the E-RACE Initiative

In support of several EEOC programs, including a recent initiative to target systemic discrimination, this February the EEOC introduced a campaign entitled Eradicating Racism and Colorism from Employment ("E-RACE"). Race discrimination claims made up 36% of the charges filed with the EEOC last year, and polls over the past two years indicate that many Asian and African American workers continue to feel the effects of discrimination in employment.

According to the EEOC, E-RACE "is designed to improve EEOC's efforts to ensure workplaces are free of race and color discrimination" by identifying means of discrimination, determining methods of effectively litigating race claims, and improving awareness of race-based discrimination. While the program is not enforcement-based, employers may want to consider reviewing their hiring practices and employee procedures to ensure that they are race-neutral in design and implementation, and do not systemically disadvantage individuals of color. For example, the E-RACE initiative recognizes that some facially neutral employment

criteria, such as video resumes or selection decisions based on an individual's name or credit score, may disparately affect applicants of color.

## Employee Fired For Violent Outburst May Pursue Disability Discrimination Claim

Consider this scenario: An employee with a poor performance record is called in to a meeting with management to receive a disciplinary warning. During the meeting she receives a performance plan which she throws across a desk, exits the meeting with a string of profanities, and begins kicking and throwing things at her cubicle. She then seeks to defend her conduct on the basis of a bipolar disorder. Does the employer violate the ADA by terminating her for this conduct?

It could, according to the Ninth Circuit Court of Appeals in *Gambini v. Total Renal Care, Inc.*, if a jury found that the violent outburst resulted from her disability. The court noted that "a decision motivated even in part by the disability is tainted."

This decision means that even in cases where an employee's volatile conduct frightens other employees or disrupts the workplace, terminating on the basis of that behavior may implicate the employer in an adverse employment action. However, if an employee's behavior poses a "direct threat" to the health or safety of other employees, the ADA grants employers the permission to terminate an individual despite their disability on this limited basis. Employees who engage in misconduct resulting from a disability may also still be

disciplined or terminated if a reasonable accommodation is explored and no accommodation is available that would permit the employee to perform the essential functions of their job.

## NLRA Violated by Employer Restrictions on Union Related E-mail

Affirming an order of the National Labor Relations Board (NLRB), the U.S. Fourth Circuit Court of Appeals recently ruled that where an employer does not otherwise enforce a policy prohibiting non-work use of corporate e-mail systems, it may not prevent employees from sending e-mails related to union matters. The court stated, "Restriction of the union's access to this communication channel, while others were allowed unfettered access, is an unfair labor practice that is prohibited by the National Labor Relations Act (NLRA)."

A separate issue in the case was employer Media General's unwillingness to pay holiday bonuses it had paid over the previous 40 years. The court determined that because Media General was unwilling rather than unable to pay the bonuses, it was not required to submit to the union's demand for financial statements. Lacking a right to this information, the breakdown in bargaining was caused by the union and not Media General.

## Prohibiting Bulletin Board Usage During Union Campaign Offends NLRA

Restricting employees' use of company bulletin boards during union organizing campaigns

may violate the NLRA even if the employer can show that it consistently removed nonwork material from bulletin boards prior to initiation of union activity. A March 16 decision by the U.S. Sixth Circuit Court of Appeals affirmed the position taken by the NLRB that DynCorp, a government contractor, had selectively removed union flyers from its bulletin board while anti-union flyers posted by employees had remained for weeks at a time before being taken down.

The court also confirmed that DynCorp's practice of distributing buttons stating "Vote No" was unlawful and meant to pressure employees against supporting the union campaign, as well as comments by supervisors expressing disappointment with pro-union employees and promising that grievances would be remedied.

## Eight Circuit Holds Contraception Coverage Not A Necessary Element of Employee Health Plan

Excluding contraceptive coverage from an employee health care plan does not discriminate against women, according to the Eight Circuit's landmark decision in *Standridge v. Union Pacific Railroad*. Plaintiffs, female employees the railroad, charged the company with discriminating on the basis of sex by precluding contraceptive coverage. However, the court concluded that the policy, which also excluded male contraceptive devices and procedures, was gender-neutral and lawful.

The court determined that contraception is not "related to" pregnancy for purposes of

the Pregnancy Discrimination Act ("PDA") because "contraception is a treatment that is only indicated prior to pregnancy." It also rejected the plaintiffs' argument that employers who provide other types of preventative prescriptions or services in their plans are required to cover contraception as a preventative prescription.

Panel Judge Kermit Bye dissented, opining that the policy only affects women because men cannot become pregnant. This position is consistent with an enforcement directed issued by the Equal Employment Opportunity Commission in 2000, which concluded that failure to cover contraceptives constitutes pregnancy discrimination when a plan also covers other treatment and services designed to maintain current health and to prevent the occurrence of future medical conditions. The question has not been addressed by the Supreme Court, and an appeal or action by Congress to clarify the scope of the PDA is expected.

Despite this apparent streamlining of the PDA, California employers (with the exception of those deemed "religious employers") remain bound by state law requiring that group health plans providing coverage for prescription drugs include coverage of FDA-approved contraceptive methods.

The state law may not be applicable to self-insured plans, however, thereby raising the possibility that the *Union Pacific* holding may be applicable to such plans.

## CA Laws Providing Relief Regardless of Immigration Status Not Preempted by IRCA

According to a recent California Court of Appeal ruling, undocumented workers may sue their employer for failing to pay the prevailing wage rate for public works jobs and are not prevented from bringing such a claim under the federal Immigration Reform and Control Act ("IRCA"). In *Reyes v. Van Elk Ltd.*, the court found that the IRCA, designed to prevent employing illegal aliens through an extensive verification system, does not preempt state laws and is irrelevant to an employee's ability to bring a labor and employment claim. The court ruled that denying workers the right to sue for work already performed would provide employers with an incentive to hire undocumented aliens.

## FEHC Further Modifies Harassment Training Regulations

California law requires sexual harassment training for supervisors of employers with 50 or more employees. Last December, the FEHC submitted sexual harassment training regulations to the Office of Administrative Law ("OAL") for review. In February, OAL issued a Disapproval Decision, informing the FEHC it desired changes to improve the clarity of several definitions in the regulations. In response, FEHC modified the regulations and submitted them for public comment in March 2007. As a result of the comments it received, the FEHC further revised the regulations and has submitted them to a second

comment period running through April 16, 2007. The FEHC will meet on April 23 to once again address the proposed regulations.

The regulations generally define who may provide harassment prevention training required under the state law, what the content of such training must be, and which employers are covered. The regulations accordingly answer some of the questions that were left unanswered when the law was originally enacted .

The present revisions can be accessed at [www.fehc.ca.gov](http://www.fehc.ca.gov). Hill Farrer provides harassment prevention training, and clients seeking such training should contact Ron Novotny or Jim Bowles at (213) 620-0460 or speak with their attorney.

## Employee Expectation of Privacy Gives Way to Employer's Consent To Computer Search

An employer may consent to a search of an employee's office or computer despite the employee having a reasonable expectation of privacy in either of these areas. In *United States v. Zeigler*, the U.S. Ninth Circuit Court of Appeals held that a warrantless FBI search locating child pornography on Jeffrey Zeigler's work computer was valid because Zeigler's employer, Frontline Processing, had consented to the search.

While the decision recognizes that employees retain "at least some expectation of privacy in their offices," requiring that police searches comply with Fourth Amendment requirements, an employer has "common authority" over work computers and locked offices to which the company has a

master key, and may therefore consent to a search of either. Adding personal content to computers does not inhibit the right of the company to consent to the search.

## Unsympathetic Behavior of Supervisor Did Not Amount to Harassment Under FEHA

In *Roby v. McKesson HBOC*, a California appellate court overturned a finding that a supervisor harassed an employee with panic disorder by treating her with “general scorn and contempt and [failing] to show any sympathy for her disability,” noting that FEHA was not intended to protect employees from rude behavior by their supervisors. The court stated that the harassment must have been based on the employee’s disability and “tinged with discriminatory animus” in order to be unlawful.

In that case, the court found that statements by Roby’s supervisor admonishing her to bathe more frequently were reasonably related to managerial oversight and, therefore, did not constitute harassment, despite Roby having informed her supervisor that the medication she was taking resulted in a foul body odor. California courts have previously limited findings of harassment to situations in which a supervisor has acted outside of the scope of duties necessary for business and personnel management.

Moreover, to prove harassment, an employee must show more than “an episodic pattern of antipathy.” Rather, incidents must be pervasive and objectively offensive, not merely subjectively offensive to a

person whose mental disability makes them more susceptible a supervisor’s lack of compassion. Here, the supervisor’s occasional comments that she found Roby’s behavior “disgusting” were not pervasive or objectively abusive.

## NLRB Split Decision Holds Bus Company Liable for Refusing to Hire Certain Drivers

The NLRB determined in a 2-1 ruling on Jan. 22 that Five Star Transportation, a school bus services company that refused to hire 11 employees of its predecessor who had written letters to a school district asking it to award the contract elsewhere, violated the NLRA. All of the employees had worked for First Student, a unionized bus company which had lost its contract with the school district. The Board agreed with the administrative law judge that all 11 drivers engaged in concerted activity by preparing and submitting individual letters to the school committee. However, Chairman Battista and Member Schaumber held that letters of only six of the drivers, which addressed employment concerns common to all 11 drivers, amounted to protected concerted activity. Letters by the other five focusing on safety concerns affecting others and discrediting Five Star’s reputation went beyond addressing terms and conditions of employment, and were not protected under the NLRA.

The Board also concluded that Five Star was not a “successor employer” because the majority of its workforce would not have consisted of former First Student drivers even if it had hired the six

drivers who had written protected letters.

Member Liebman in dissent contrarily felt that the Board should have looked to Five Star’s actions as to the 11 employees in concert, stating that the majority had erred in viewing the letters in isolation and that it was clear Five Star had not distinguished between the drivers in its refusal to hire. In her estimation, the majority position “offers employees no guidance in deciding how much ‘protected’ matter a communication must contain, in relation to what the Board may determine to be content that is unrelated to group concerns, before employees may safely seek the aid of a third party in a labor dispute.”

## Employer Not Liable to Employee Who Rejects Reasonable Efforts to Correct Harassment by Supervisor

A recent U.S. Eleventh Circuit ruling found that the investigative efforts and remedial measures offered by Blue Cross/Blue Shield of Alabama once Susan Baldwin alleged she was being harassed by her supervisor were sufficient despite their repeated rejection by Baldwin, precluding corporate liability under Title VII of the 1964 U.S. Civil Rights Act.

The court concluded that Blue Cross’s offer to transfer Baldwin did not amount to an employment action, and that the company’s ultimate decision to fire Baldwin because she was unwilling to cooperate in resolving her complaints did not itself constitute sex discrimination. Further, the court held that even if the supervisor’s conduct was indeed harassing,

Blue Cross had provided a defense against liability by exercising reasonable care to prevent and correct the harassment in a timely manner. Likewise, even if the suggestion of a transfer was improper due to the hardship it may have imposed, the alternative suggestions provided by Blue Cross supported a finding that it had adequately attempted to remedy the situation.

## Employee Goes “Driving for Dollars” at Employer’s Expense

In the recent case of *Myers v. Trendwest Resorts, Inc.*, a California appellate court was confronted with a sexual harassment claim brought by a timeshare saleswoman against her supervisor, under circumstances in which he pursued a sexual relationship with her entirely outside the office. The supervisor, a Project Director, called the employee numerous times, bragged of his sexual prowess to her, and repeatedly invited her to his home or to a hotel room, all of which advances the employee rebuffed. The employer ultimately contended that it could not be liable for the supervisor’s harassment because it did not occur in any workplace setting over which it had control.

The court permitted the case to proceed to trial, based on the employee’s allegations that one of the supervisor’s advances had occurred during an outing known at the company as “Driving for Dollars” in which the salespeople went to a customer’s residence to receive a check. The court reasoned that the “Driving for Dollars” excursions were connected with the employment and of obvious benefit to the employer’s

enterprise, and that the employer could therefore be liable for the supervisor’s conduct during such outings when it was admittedly aware of that practice.

## San Francisco Ordinances Impose Heightened Requirements on Employers

Earlier this year, two San Francisco city ordinances were implemented which imposed heightened labor and employment obligations on employers who employ workers in that city. First, as of January 1, 2007 all temporary and permanent employees who perform work in San Francisco are entitled to receive a minimum wage of \$9.14 per hour, \$1.64 more than the current \$7.50 per hour statewide minimum wage. Employees need not live in the city to be entitled to the wages, and are entitled to receive the minimum wage if they perform as little as two hours of work per week within city boundaries.

Also, as of February 5, 2007, employees who work in San Francisco are entitled to receive one hour of paid sick leave for every thirty hours worked within city limits, up to a maximum of 72 hours. For employers with fewer than ten employees, workers can accrue up to 40 hours of paid sick leave. New employees begin accruing paid sick leave 90 calendar days after their first day of employment. The paid sick leave accrual ordinance applies to both exempt and non-exempt employees, and to employees who are based outside of San Francisco that travel to perform work there. Employers are required to post a

prominent notice informing employees of their rights under the sick leave ordinance, and must maintain records of the number of hours employees have worked and the sick leave hours they have accrued for four years. The hours do not expire, and can carry over from one year to the next. However, accrued paid sick leave is not required to be paid to employees who resign or are terminated.

---

If you have any questions about these issues or any other labor matters, please contact any member of the Labor & Employment Department at Hill, Farrer & Burrill LLP -- we’re here to help.

**Kyle D. Brown**  
**Stuart H. Young, Jr.**  
**Jonathan M. Brandler**  
**James A. Bowles**  
**Ronald W. Novotny**  
**Michael S. Turner**  
**Suzanne J. Holland**  
**Raymond W. Thomas**  
**Richard S. Zuniga**  
**E. Sean McLoughlin**  
**Warren J. Higgins**  
**Todd E. Hyatt**

**The firm wishes to thank  
 Amy B. Messigian  
 for her assistance in preparing  
 this issue.**

**Management News**  
 is published periodically  
 by the law firm of  
 Hill, Farrer & Burrill LLP  
 300 South Grand Avenue,  
 37th Floor  
 Los Angeles, CA 90071-3147  
 (213) 620-0460 (714) 641-6605  
 Fax (213) 624-4840  
<http://www.hillfarrer.com>  
 Ronald W. Novotny, Editor

This occasional newsletter is published as a service to clients, friends and colleagues.

Each publication summarizes recent developments in state and federal law affecting employers, but should not be relied upon as an opinion or advice of the Firm regarding any specific matter.

---