



### What's Inside

- Seminar On Reasonable Accommodations Set For May 23, 2006
- Employee With A History Of Violence Covered Under ADA
- Court Rules That Permanent Accommodation Of Disabled Employee Is Not Required
- Waiver Of Class Action Arbitrations Upheld
- Court Denies Arbitration Remedy To Employer Who Breached Agreement
- Minimum Wage Requirements Held Applicable To Each Hour Worked
- Court Strikes Down Exemption From Second Meal Period Requirement For Construction Employers
- Supreme Court Issues Trio Of Opinions In Employment Cases
- Federal Court Allows Discrimination Challenge To Be Made Against English-Only Rule
- DOL Issues Opinion Letter On Volunteer Home Study

### Employee With A History Of Violence Covered Under ADA

Can an employer discharge an employee who has contact with the public after finding out about past felony convictions and name changes, without violating the laws prohibiting discrimination against employees based on actual or perceived disabilities? Not when it singles out an employee with a good performance record for termination, according to the U.S. Ninth Circuit Court of Appeals in the case of *Joseph v. Pacific Bell*.

In that case, PacBell terminated a service technician, and then denied him reinstatement, based on its discovery that he was charged for attempted murder and found not guilty by reason of insanity sixteen years before he went to work for the company, and was also convicted in that same time frame for battery on a police officer. It later discovered that the employee had spent several years in a state mental hospital, and six months in a board-and-care mental health facility. The company then terminated the technician for falsifying his employment application by denying any past felony convictions, and because

### Seminar On Reasonable Accommodations Set For May 23, 2006

The Firm's Labor and Employment Department will host a seminar on reasonable accommodations under the Americans With Disabilities Act and the California Fair Employment and Housing Act in a luncheon presentation to be held on Tuesday, May 23, 2006 from 12:00 p.m. to 1:00 p.m. at the Omni Hotel located at 251 S. Olive Street in downtown Los

Angeles, (213) 617-3300. The presentation will review the differences between the state and federal laws in the kinds of physical and mental conditions that can constitute protected disabilities, as well as the nature and extent of reasonable accommodations that may be required under both laws.

The forum will be presented to the Association of Legal Administrators, and will also be open to clients and friends of the firm.

If you are interested in attending, please call Sherry Hill, secretary to Ronald W. Novotny, at (213) 620-0460.

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 advice of the Firm regarding any specific matter.

of its concern that he had an emotional dysfunction that might result in liability to the company if he “went off” on a customer while working in their home.

The company did not conduct any inquiry into whether or not it had any other job available for the technician that did not require contact with the public. Nor did it offer him the opportunity to expunge his conviction, as it had with other employees.

The technician sued, claiming that he had been denied employment based on having a “record of disability” consisting of his prior mental health problems, and because PacBell illegally “regarded him” as having a mental illness that might result in future acts of violence because of the violent acts he had previously committed. Although the jury was expressly instructed that an employer “may take into account a past history of violence in making employment-related hiring decisions,” it nevertheless determined that PacBell illegally discriminated against the technician because it regarded him as a mentally disabled individual in violation of the ADA, and awarded him compensatory damages. The appellate court upheld the judgment based in large part on the fact that the company had no written policy prohibiting the employment of persons who had committed violent acts, and on the fact that it had reinstated another service technician who had a felony domestic violence conviction.

This case poses serious problems to employers which discover an existing employee’s past criminal

convictions during the term of their employment. According to the court, the employer must consider other alternative jobs in its organization for the employee, even if the conviction bears directly on the employee’s performance of his job duties – such as a customer service representative who was convicted of some violent crime and who deals with the public, or an employee working in the accounting or finance department who was found guilty of some crime involving theft or fraud. The case also highlights how important it is to adopt and implement strict policies that expressly permit discipline or discharge of employees who falsify their criminal history records in their employment applications. Finally, the case presents a valuable object lesson in “setting the bar too high” in tolerating past criminal or violent behavior; because if PacBell had terminated the previous service technician with the domestic violence record, it could have more easily justified terminating the technician in this case on the ground that it was consistent with past practice.

## Court Rules That Permanent Accommodation of Disabled Employee Is Not Required

Employers are increasingly faced with the question of whether they have an obligation under the state and federal disability laws to make a temporary light duty assignment available indefinitely when an employee’s condition

does not improve. In a significant case recently decided by a California court under the state Fair Employment and Housing Act, the employer was found to have no such duty. *Raine v. City of Burbank*.

The case involved a patrol officer for the City of Burbank who had been employed for 14 years when he injured his knee while on duty. The city permitted him to work a temporary light duty position at the front desk to accommodate his injury while it healed. However, when the condition was determined to be permanent, the city advised the officer that it had no available position consistent with his qualifications and physical limitations, which caused him to take a disability retirement. The city relied primarily on the fact that its front desk positions were required to be filled by “police technicians” who were paid substantially less and provided fewer benefits than sworn police officers. It also contended that the officer’s request for a permanent accommodation in that position was not reasonable.

The court ruled that the city did not violate FEHA by denying the officer a permanent assignment to the front desk position. Important to that determination were its findings that the officer declined a transfer to a police technician position, and was found to be either unqualified or unable to perform the essential duties of other positions in the police force that he desired.

The court confirmed that the law does not require the employer to create new positions in order to accommodate a disabled

employee, or to transform a temporary accommodation to a permanent job assignment once the employee's disability has become permanent. The court also agreed with federal law in stating that an employer is not required to "set aside a pool of positions for recovering employees and to make those positions available indefinitely to an employee whose recovery has run its course without restoring that worker to her original healthy state."

In rejecting the officer's claim, the court also relied on the fact that the officer did not seek a restructuring of either his existing patrol officer position or the civilian front desk position to accommodate his disability, but instead wanted a reclassification of the front desk job without the "attendant essential functions of the sworn officer position."

This case is obviously good news for California employers, since it is one of the few decisions issued under the state anti-discrimination law holding that a specific accommodation need not be offered.

## Waiver Of Class Action Arbitrations Upheld

More and more arbitration agreements are being written in ways that exclude class action claims by existing employees. In the case of *Gentry v. Superior Court*, a California appellate court analyzed the legality of a provision in such an agreement which stated that the arbitrator "shall not consolidate claims of

different employees into one proceeding," and "shall not have the power to hear the arbitration as a class action." The court upheld this limitation on the basis that it was neither procedurally or substantively unconscionable under California law.

The court noted in its decision that the agreement was not "procedurally unconscionable" because it was not made a condition of employment, in view of the fact that the employee was given 30 days to opt out of the arbitration agreement. However, since both types of unconscionability must be present in order to invalidate such an agreement, the court's finding that the agreement was not substantively unconscionable provides a basis for seeking to enforce waiver of class action claims in arbitration agreements at the present time.

## Court Denies Arbitration Remedy To Employer Who Breached Agreement

In another recent case, a California appellate court exposed the dangers of an employer attempting to "pick and choose" which claims it is required to arbitrate under an arbitration agreement. In *Brown v. Dillard's, Inc.*, the court concluded that an employer was not able to enforce an arbitration agreement against an employee, when it repudiated the contract by failing to participate in the processing of the employee's wrongful termination claim to the American Arbitration Association.

The claim in that case was made by a sales associate employed by a department store who was fired for allegedly falsifying her time card by ten minutes after giving the store notice that she intended to work two jobs. The employee followed the requirements of the arbitration agreement by sending in her part of the arbitration fee along with a notice of intent to arbitrate, but the store ignored the notice and refused to correspond with the AAA regarding the arbitration of her claim. The employee then filed suit in state court alleging 12 separate claims, including breach of an employment contract and violation of various state Labor Code provisions. The court ruled that the department store could not enforce its arbitration agreement in this instance, since it had breached its duty to participate in the arbitration proceedings.

This case serves as a good example of why employers should scrupulously follow arbitration agreements that they require their employees to sign, in order to preserve their right to enforce them over employee objections.

## Minimum Wage Requirements Held Applicable To Each Hour Worked

Employers charged with minimum wage violations under the federal Fair Labor Standards Act (FLSA) are permitted to divide total weekly earnings by hours worked in order to obtain an average hourly wage rate to be used for compliance purposes. In

the case of *Armenta v. Osmose, Inc.*, a California appellate court held that this “averaging” method was not permissible under state law, and that employees must instead be paid the minimum wage for *each hour worked*.

The employees in that case were members of a union who earned between \$9 and \$20 per hour under the collective bargaining agreement. They brought suit for unpaid wages on the ground that they were not compensated for travel time in company vehicles, time spent loading equipment and supplies in the vehicles, doing daily and weekly paperwork, and maintaining the vehicles. The employer contended that when their weekly earnings were divided by total hours worked, it satisfied the minimum wage requirement of \$6.75 per hour for all hours worked. However, the court agreed with the employees’ contention that they were entitled to payment of the minimum wage for *each* uncompensated hour. The court relied in part on a state Labor Code provision which states that an employer is prohibited from using any part of wage payments “as a credit for satisfying minimum wage obligations,” and on the language in the state Wage Orders requiring payment of \$6.75 per hour for *all hours worked*.

## Court Strikes Down Exemption From Second Meal Period Requirement For Construction Employers

Section 512 of the California Labor Code requires employers to provide a second meal period after ten hours of work to employees working 12-hour shifts. Wage Order No. 16, which applies to employers in the construction, drilling, logging and mining industries, provided for an exemption to this second meal period requirement for employees covered by a collective bargaining agreement that provided premium wage rates for all overtime hours worked and a regular hourly rate of pay not less than 30% more than the state minimum wage. In the recent case of *Bearden v. U.S. Borax, Inc.*, a California appellate court held that the exemption from the second meal period requirement contained in the wage order was not valid because it contravened the mandates of the state Labor Code provisions. The court also held that the issue of whether the employer violated the law by not providing employees who worked over ten hours a day with a second meal period was not required to be arbitrated under the union agreement.

## Supreme Court Issues Trio Of Opinions In Employment Cases

In the past several months, the U.S. Supreme Court has issued three separate decisions in employment law cases. Although these decisions affect rights that exist under federal law as opposed to California state law, they may still be relied upon as authority by all courts, and specifically delineate requirements for certain federal law claims. The cases are as follows:

(1) *Ash v. Tyson Foods, Inc.* – involved a claim for discrimination by two African American employees who were denied promotions to shift manager positions at a poultry processing plant. The Court of Appeal had dismissed the case even though the plant manager who made the disputed hiring decisions referred to the employees as “boy.” The Supreme Court reinstated the case based on its holding that use of that term alone can support a claim for discrimination. The Court stated “Although it is true the disputed word will not always be evidence of racial animus, it does not follow that the term, standing alone, is always benign.” Use of that term alone “can establish discrimination based on various factors including context, inflection, tone of voice, local custom, and historical usage,” according to the Court.

(2) *Arbaugh v. Moonlight Café* – here, the court considered

whether the requirement under Title VII that an employer have 15 employees was “jurisdictional” as opposed to an element of the plaintiff’s case. The case involved a sexual harassment claim that proceeded through trial and a verdict for the plaintiff – but was later dismissed on the ground that the employer did not meet the 15-employee requirement of the statute. The Supreme Court determined that the employee numerosity requirement was simply an element of claim for relief as opposed to a requirement for federal court jurisdiction, and that it could be waived if it was not timely raised in defense of the lawsuit.

(3) *Domino’s Pizza, Inc. v. McDonald* – involved a claim by a black man, who was a shareholder and president of J.W. Investments, against Domino’s Pizza for refusal to enter into a construction contract with him because of his race. The individual ended up bringing suit by himself after his company filed for bankruptcy and did not pursue the claim in the bankruptcy court. The Supreme Court concluded that because the individual was not a party to the proposed contractual relationship, he could not bring a claim under Section 1981 of the federal Civil Rights Act based on racial discrimination. The Court reasoned that to conclude otherwise would permit class actions by all minority employees who could contend that the reason for the contract breach was racial animus, and that this “cure-all” remedy was not envisioned by the statute.

## Federal Court Allows Discrimination Challenge To Be Made Against English-Only Rule

In *Maldonado v. City of Altus, Oklahoma*, the federal Tenth Circuit Court of Appeals in Denver held that an Oklahoma city’s policy requiring all employees to speak English while they were at work should not have been dismissed. The claim was brought under Title VII of the Civil Rights Act, and was based on the allegation that the policy created a hostile work environment by encouraging hostility and taunting of Hispanic employees who spoke Spanish in the workplace. The court relied on the EEOC Guidelines, which state that an English-only policy is likely in itself to “create an atmosphere of inferiority, isolation, and intimidation” that constitutes a “discriminatory working environment” when no business need for the policy is shown.

The city submitted evidence that it adopted the policy because workers and supervisors could not understand what was being said over the city’s radios; because non-Spanish-speaking employees felt uncomfortable when their co-workers were speaking in front of them in a language they could not understand; and due to the alleged safety concerns with a non-common language being used around heavy equipment. But the court viewed the evidence of the city’s business necessity as “scant,” noting that

there was no written record of any communication, morale or safety problems resulting from the use of languages other than English prior to the implementation of the policy. The court accordingly distinguished this case from the U.S. Ninth Circuit Court of Appeal’s decision in *Garcia v. Spun Steak Co.*, which found that an English-only policy adopted by a California employer was permissible when it was not shown to have posed significant adverse effects on the terms, conditions or privileges of employment.

## DOL Issues Opinion Letter On Volunteer Home Study

In an Opinion Letter dated March 3, 2006, the U.S. Department of Labor & Wage & Hour Division stated that an employer which provided its employees with paid work time to learn English did not have to compensate those employees who voluntarily took materials home to gain more English-speaking skills. So long as the training was not directly related to the workers’ jobs, they were not required to be compensated under the Fair Labor Standards Act for time spent voluntarily studying English at home.

The employer in that case created a language skills training program for teaching basic English for its Spanish-speaking employees with the aim of creating greater opportunities for the workers, increasing morale, and helping the employees advance in society and in work.

English proficiency was not required for their jobs. The employees wanted to take the materials home for further study and to share them with family members, but the employer refused to permit them to do so without first obtaining an opinion from the DOL.

The DOL first reviewed the factors that require compensation for employees for attending trainings and other meetings. Attendance at such trainings and other meetings is not considered work time if (1) attendance is outside the employee's regular working hours, (2) attendance is in fact voluntary, (3) the training is not directly related to the employee's job, and (4) the employee does not perform any productive work during such attendance. The Department found that all four factors were met in this instance, because the study of English was only indirectly related to the employees' jobs.

The Department also noted, as an important factor in its decision, that the employer intended to continue to provide paid time for the employees to study the materials. By inference, if the employer did away with this paid study program, and instead required the employees to study the materials on their own time at home for job advancement purposes, such time would presumably be compensable. The DOL also noted that study time was akin to a program of instruction which corresponded to courses offered by independent bona fide institutions of learning, based on the fact that the study materials were similar to English

proficiency classes offered by local community colleges.

## State Legislature Considers Several Employment Bills

During this legislative session, the State Legislature has considered several bills which would affect California employers. The proposed bills are as follows:

- (1) AB 2371, Employment Arbitration Agreements – would invalidate mandatory binding arbitration agreements with respect to FEHA claims, by making it an unlawful employment practice on or after January 1, 2008 for an employer to require new or existing employees to waive their right to file a lawsuit for violation of the statute.
- (2) AB 2095, Mandatory Sexual Harassment Training – would limit the required two-hour training in sexual harassment every two years to employers having 50 or more employees in California, and limit the training requirement to supervisory employees within this state. This would address the perception by some observers that the training requirement applies to all employers who employ 50 employees anywhere in the world, and to all supervisors employed by such an employer wherever they are employed.
- (3) AB 2186, Misclassification of Employees – would subject employers to penalties for deliberately misclassifying

employees as independent contractors.

It is uncertain whether any of these proposed bills have any chance of being passed, and final action will not likely be taken on them until the end of the current legislative term in September 2006.

---

If you have any questions about these issues or any other labor or employment 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**

*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.

---