

TAYLOR & GUTIERREZ LLP

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CIVIL LITIGATION & PROCEDURE

Charles Karel Bouley II v. Long Beach Memorial Medical Center, et al.
05 C.D.O.S 2247, Cal. App. 2d Dist.
(March 15, 2005)

Statute Granting Domestic Partners Right to Sue For Wrongful Death Can Be Applied Retroactively

On January 1, 2002, California Code of Civil Procedure § 377.60, which originally granted only a “decedent’s personal representative” or a “decedent’s surviving spouse, children, and issue” to bring a wrongful death suit based on the “wrongful act or neglect of another” was amend-

ed by the State Legislature to include domestic partners as defined by Family Code § 297. Thereafter, appellant Karl Bouley filed suit for medical malpractice against the hospital and operating doctors who allegedly contributed to the negligent death of his domestic partner. The superior court granted the hospital’s demurrer and dismissed the suit pursuant to defendants’ argument that the suit was governed by the un-amended § 377.60.

The appellate court reversed, holding that the Legislature has thus determined that the state has a “significant interest in promoting family relationships” – including domestic partners – that overrode any concerns regarding due process of law. Accordingly, § 377.60 may be enforced retroactively, allowing domestic partner lawsuits.

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05 C.D.O.S 2643, U.S. Sp. Ct.
(March 29, 2005)

Federal Statute Prohibiting Sex Discrimination in School Sports Provides Private Right of Action that Encompassed Claim of Retaliation Against School Official Who Complained About Gender Discrimination

In December 2000, a high school girls' basketball coach began complaining to his supervisors about unequal treatment of the girls' basketball team. His complaints went ignored and the school failed to remedy the problem. Ultimately, he was removed as the girls' coach and sued the school board alleging that they violated Title IX, which prohibits sex discrimination by recipients of federal funding, by retaliating against him for protesting the discrimination against the girls' basketball team.

The board had the suit dismissed at the trial court level on the basis that Title IX's private cause of action does not encompass claims of retaliation. The suit was appealed to the U.S. Supreme Court.

Because reporting incidents of discrimination is integral to Title IX enforcement, the purpose of the statute would be discouraged if retaliation for those who report went unpunished. Therefore, the Court, in a majority opinion, concluded that retaliation against individuals who complain of sex discrimination is "intentional conduct that violates the clear terms of the statute."

Kalesha Jackson v. Terrence Fitzgibbons,
05 C.D.O.S. 1925, Cal.App. 2nd District
(March 3, 2005)

Minor Child Not Allowed To Sue For Wrongful Death When Mother's Parental Rights Had Been Terminated

Plaintiff, a minor child, sued for wrongful death damages after her mother died as a result of alleged medical malpractice. The trial court granted defen-

dant doctor's summary judgment and ruled that plaintiff had no standing to sue. The appellate court affirmed the ruling.

Both courts based their ruling on the fact that the juvenile court had terminated the mother's parental rights two years before she died. Apparently, the mother "came up dirty on a drug test." The appellate court explained, "an order terminating parental rights . . . represents the total and irrevocable severance of the bond between parent and child." When the mother's parental rights were terminated, plaintiff no longer had any expectation of comfort, support, society or companionship from her mother. As such, she had no grounds to sue for her mother's wrongful death.

EMPLOYMENT LAW

Janet Campbell v. The Regents of Univ. of California,
05 C.D.O.S 2016, Cal. Sp. Ct.
(March 7, 2005)

The Exhaustion of Administrative Remedies Rule Required University Employee To Pursue Retaliatory Dismissal Claim Based On "Whistleblowing" Through University Administrative Procedures Prior To Filing Suit In Court

Plaintiff worked as a senior architect with the University of California at San Francisco whose job was to review architectural plans and specifications and ensure that projects complied with competitive bidding procedures. In 1991, her supervisor directed her to prepare bid documents that limited competition by using restrictive specifications. Plaintiff protested that these procedures violated competitive bidding laws, specifically Pub. Contract Code § 3400 (prohibiting state agencies from limiting contract bidding "to any one specific concern"). When her protests went unheeded, she later reported the alleged violations to the F.B.I.

The Regents eventually discharged allegedly as a result of "downsizing." She claimed that she discharged in retaliation for whistleblowing and filed under improper grievance procedures that did not apply to her allegations. Thus, UCSF advised her to refile under the correct dispute provisions as required by university procedures and regulations.

Plaintiff ignored UCSF's instructions and instead filed her whistleblower complaint in San Francisco Superior Court. Her complaint was dismissed after the Regents demurred on the basis that she failed to exhaust her administrative remedies prior to filing suit in court because procedures instituted by the University were "equivalent to that of state statutes."

The court concluded that absent a clear indication of legislative intent, the court should refrain from inferring a statutory exemption from the settled rule that an administrative remedy provided by statute must be exhausted prior to seeking judicial redress.

Bains LLC v. ARCO Products Company
05 C.D.O.S 3275, U.S. Ct. App. 9th Cir.
(April 19, 2005)

Corporation Could Be Held Liable For Non-Managerial Employee's Racially Motivated Conduct Against Victim, Where Managerial Employee Failed To Protect Victim, Even Where Manager's Motivation Was Non-Racial

In 1999, when the Washington state oil pipeline ruptured, Defendant Arco Products Co. was forced to hire independent contractors to drive its refined oil in tanker trucks from their refineries to the distribution point in Seattle. Plaintiffs owned five gas stations in the area and decided to expand into transporting oil via trucks and were eventually hired on via contract with Arco. Plaintiffs were American citizens born in the punjab region of India and were religiously observant Sikhs who wore the long beards and turbans indicative of their religious beliefs.

When plaintiffs delivered their loads at Arco's Seattle distribution center they were forced to endure constant verbal harassment from the Arco distribution center employee in charge of overseeing delivery who called them "ragheads," "diaperheads" and "stupid Indians," among other things. The same Arco employee cited plaintiffs' trucking company for numerous "safety violations," when other trucking companies were never cited for the same "viola-

tions" after committing them. His supervisor never documented these violations at the time. When plaintiffs complained to the Arco employee's supervisor, he ignored their entreaties. After months of complaints, Arco eventually terminated plaintiffs' contract on the basis of "safety violations." Plaintiffs sued alleging they were discriminated against by Arco on the basis of race, in violation of 42 U.S.C. § 1981. A jury found against Arco.

Jury verdict stands. The fact that the discriminating employee's supervisor "backs up" the employee's discrimination by failing to take any action against him suffices for corporate liability for racial discrimination: "If a company official with sufficient authority to subject the company to vicarious liability backs-up a racist employee's racially-motivated conduct instead of protecting the victim from the employee, then the company is liable, even if the supervisor's motivation is non-racial."

POLICE PROCEDURE

Elizabeth Myers v. Redwood City, et al.
05 C.D.O.S 2125, U.S. Ct. App. 9th Cir.
(March 10, 2005)

Driver Who Was Forced To Choose Between Being Arrested Or Giving Up Her Car To Repossessor With Whom She Had Recently Had A Violent Confrontation With Failed To State 42 U.S.C. § 1983 Claim Against The City For Violation Of Her Civil Rights

Plaintiff leased a car and defaulted on the payments. When the reposessor attempted to repossess then car, a physical dispute arose after plaintiff pleaded for him to not take the car and that she would resolve the issue with the credit union the next day. When Redwood City police officers showed up to resolve the dispute, they noticed scratches and bruises on the reposessor, and not on the plaintiff despite her representations otherwise. Thus, the officers presented plaintiff with an alternative (offered by the reposess-

or): give up the car or get arrested for assault. As plaintiff had a young child in the household, she felt that she had no choice but to give up the car. Plaintiff sued the City for violating her Fourth and Fourteenth Amendment rights to due process and to be free from unreasonable searches and seizures.

Forcing plaintiff to choose between her liberty or her property was not a situation of the officers' creation but was instead merely a consequence of a nasty confrontation. The reposessor simply took advantage of the situation and California law. In this situation, it is the reposessor, and not the police officers, who risks suit for either wrongful repossession or false arrest. Plaintiff's suit was dismissed.

DAMAGES

Judy Broeken, as Trustee, etc., v. Philip Morris Inc.,
05 C.D.O.S 2871, Cal. App. 2d Dist.
(April 1, 2005)

Punitive Damages Award Reduced From \$3 Billion to \$50 Million Against Tobacco Company

Plaintiff's husband began smoking in 1957 and ultimately died as a result lung cancer. Plaintiff contended that her husband justifiably relied upon false utterances and concealment by Philip Morris of the dangerous effects of smoking and tobacco's relationship with lung cancer. Despite well-documented scientific studies that displayed a clear cause-and-effect between smoking tobacco and lung cancer, Philip Morris and other tobacco companies mounted large-scale public relations and advertising campaigns aimed at countering the "anti-cigarette crusade" by providing "balancing information" regarding

"unproven facts" despite the clear facts that they knew otherwise.

In 2001, a jury found for the Plaintiff on theories of strict liability, intentional misrepresentation, fraudulent concealment, false promise, and negligent misrepresentation and awarded over \$5 Million in compensatory damages and \$3 Billion in punitives. The court granted a reduction of the punitives from \$3 Billion to \$100 Million. Philip Morris appealed. The Appellate Court upheld the verdict but further reduced the punitive amount to \$50 Million as reasonable when comparing this amount to: 1) Phillip Morris's fraudulent actions; 2) the amount of compensatory damages; and 3) Phillip Morris's wealth.

FIRM ANNOUNCEMENTS

Taylor & Gutierrez, LLP, is pleased to announce the addition of Chance C. Hawkins as the newest associate with the firm. Mr. Hawkins' practice will focus on commercial and business litigation, specifically with regard to insurance, real estate, construction & employment law. Mr. Hawkins graduated from Golden Gate University School of Law in 2000 and is a member of both the California and Nevada state bars.

Patrick E. Taylor, Jr., managing partner of Taylor & Gutierrez, LLP, was recently elected as an executive board member of the Legal Activities Committee for the National Ready Mixed Concrete Association (NRMCA). NRMCA, based in Silver Spring, MD, represents the producers of ready mixed concrete, and the companies that provide materials, equipment and support to the industry, with regard to promotional and regulatory concerns.

Daniel P. Dean, a senior associate with Taylor & Gutierrez, LLP, was recently elected to the Board of Directors of Bay Area Lawyers for Individual Freedom (BALiF). BALiF is an organization that represents individual citizens' legal interests as to questions of law and justice affecting the San Francisco community.

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