

# TAYLOR & GUTIERREZ LLP

**Business, general liability, employment,  
construction, public entity, and products liability**

SERVING BUSINESSES AND PUBLIC ENTITIES THROUGHOUT CALIFORNIA

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# TORTS

## **Avila v. Citrus Community College District, 06 C.D.O.S. 2855, Cal. Supreme Court**

**(April 6, 2006)**

*Public Entities' Statutory Exemption from Liability for Injuries Sustained During Hazardous Recreational Activities Is Not Applicable to College Sports*

Plaintiff, a baseball player at a community college, was intentionally hit in the head by a pitch in a supervised pre-season game. He sued the opposing team's community college for personal injuries. The community college asserted that Cal. Government Code § 831.7 provided immunity because it exempts public entities from liability for injuries sustained during "hazardous recreational activities." The Court found, however, that this statute was designed to limit liability based on a public entities' failure to warn recreational users of dangerous conditions on public property, and was not intended to exempt liability for a public entity supervising organized sports. Nevertheless, Plaintiff's lawsuit was dismissed because he could not show that the community college breached its duty to supervise the game because the risk of being hit by a baseball was "inherent in the sport" and he voluntarily assumed this risk by playing in the game.

## **Hernandez v. City of Pomona, 06 C.D.O.S. 3013, Cal. App. Ct. 2d Dist. (April 11, 2006)**

*Federal Civil Rights Trial Judgment Does Not Preclude Plaintiff from Suing Officers in State Court for Wrongful Death*

Plaintiffs were the heirs of decedent who was an unarmed man that was shot 22 times by police officers in a foot chase in Pomona. Plaintiffs sued the officers and City in federal court for deprivation of decedent's constitutional rights under the Fourth Amendment. The federal court found that defendants had acted reasonably under the circumstances and did not violate decedent's Fourth Amendment rights to be free from unreasonable searches and seizures and dismissed the federal case. When Plaintiffs sued in state court for negligence against the same defendants, defendants argued that their lawsuit was barred by the federal court judgment. The Court ruled that Plaintiffs' negligence lawsuit was not barred because the federal judgment did not address

whether the officers' conduct was reasonable under California negligence law – it only addressed whether their conduct violated the U.S. Constitutional law.

## **Huff v. Wilkins, 06 C.D.O.S. 3124, Cal. App. Ct. 4th Dist. (April 14, 2006)**

*Alleged Tortfeasor's Violation of Safety Regulations May Preclude Argument that Injured ATV Rider Assumed the Risk of Collision*

Defendant, a 14 year-old, collided with Plaintiff while "off-roading" his father's ATV on public lands. Plaintiff sued Defendant for personal injuries. California Vehicle Code § 38503 requires drivers under the age of 18 to take a safety training course before driving ATVs on public lands. Defendant failed to take this safety course prior to operating the ATV. The trial court granted Defendant's summary judgment motion dismissing Plaintiff's lawsuit on the basis that an ATV collision was a "risk inherent in the sport" that Plaintiff assumed. However, the Appellate Court vacated the trial court's ruling because Defendant's violation of Vehicle Code § 38503 increased the inherent sport risks and Plaintiff did not assume this increased risk merely by driving his ATV. Because Defendant failed to fulfill its burden that Plaintiff had voluntarily assumed all of the risks that may have contributed to his injuries, summary judgment was improper.



## SEXUAL DISCRIMINATION

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### **Jesperson v. Harrah’s Operating Company, Inc., 06 C.D.O.S. 3093, 9th Cir. Court of Appeal (April 17, 2006)**

*Makeup Requirement Did Not Amount to Sexual Discrimination*

Plaintiff was fired for refusing to comply with Harrah’s appearance code that required female employees to wear makeup while bartending. Plaintiff argued that this requirement was offensive and placed an undue burden on female employees which amounted to sexual discrimination under Title VII.

The 9th Circuit ruled that Harrah’s makeup requirement was no more burdensome than the short hair requirement for male bartenders and that “without more, we cannot agree that the makeup requirement can give rise to a sex stereotyping claim under Title VII. If we were to do so, we would come perilously close to holding that every grooming, apparel or appearance requirement that an individual finds personally offensive, or in conflict with his or her own self-image, can create a triable issue of sex discrimination.”

### **Lyle v. Warner Brothers, 06 C.D.O.S. 3528, Cal. Supreme Court (April 20, 2006)**

*Sexually Vulgar Comments Arising from a Sit- Com’s Creative Process Do Not Constitute Sexual Harassment*

Plaintiff was a comedy writers’ assistant who worked on the production of “*Friends*.” When she was hired, she was warned that the show dealt with sexual matters and that part of her job would be listening to the writers’ sexual jokes and discussions about sex. After four months of employment, she was fired for poor typing skills. She then filed suit against three male writers on the show asserting that the writers’ use of sexually explicit language, including recounting their own sexual escapades and fantasizing about sex with the stars of the show, constituted sexual harassment and created a hostile work environment prohibited by California law.

Plaintiff’s lawsuit was properly dismissed because: 1) none of the writers’ sexual remarks were actually aimed at Plaintiff; 2) the creative process necessarily involved sexual discussions as a result of the shows’ content; 3) both male and female writers shared their sexual experiences in the brainstorming process; and 4) Plaintiff assumed the risk of being offended when she was hired. Therefore, these offensive, sex-based comments did not amount to verbal abuse, harassment or sexual assault and did not create a “pervasive atmosphere of sexual harassment.” While California prohibits harassing conduct that creates a work environment that is hostile or abusive on the basis of sex, it does not prohibit sexually coarse and vulgar language or conduct that merely offends.

## CONSTITUTIONAL LAW

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### **Harper v. Poway Unified School District, 06 C.D.O.S. 3239, 9th Cir. Court of Appeals (April 20, 2006)**

*School Did Not Violate Freedom of Speech or Expression of Religion by Demanding that Student Remove Anti-Homosexual T-Shirt*

Plaintiff, a high school student, sued his school for allegedly violating his rights to the freedom of speech and expression of religion by demanding he remove a t-shirt which stated on the front, “be ashamed, our school has embraced what God has condemned,” and on the back, “homosexuality is shameful.”

Plaintiff’s lawsuit was properly dismissed. The Free Speech Clause permits public schools to restrict student speech that intrudes upon the rights of other students or collides with their rights to be secure and left alone. Attacks that are based on student’s race, sex or sexual orientation can be harmful to self-esteem and affects the educational process. Here, the student’s t-shirt message constituted a verbal attack that was detrimental to homosexual students’ psychological health, general well-being, and educational development. Thus, the School was within its rights to limit or restrict such speech. Further, injurious speech that can be restricted is not immune from regulation simply because it reflects the speaker’s religious views.

## EMPLOYMENT LAW

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### **Kelton v. Stravinski, 36 C.D.O.S. 3320, Cal. App. Ct. 5th Dist. (April 21, 2006)**

*A Joint Venture “Covenant Not to Compete” Is Held Unenforceable and May Impact Ongoing Employment Agreements*

California joint venture partners frequently enter into contracts containing express provisions, or “covenants,” that are aimed at preventing a partner from engaging in a competing business, commonly referred to as no “moonlighting” clauses. However, this type of clause was recently held void and unenforceable which may mean that similar provisions within employment agreements could also suffer the same fate.

In Kelton, the plaintiff and defendant entered into a partnership agreement to develop industrial warehouses which included an express provision stating that neither partner could develop warehouses without the other. Thereafter, defendant became separately involved in other warehouse projects. Plaintiff then sued for a portion of the profits the defendant made on the separate allegedly competing projects.

Plaintiff argued that the defendant breached his partnership fiduciary duties. However, the Court found that Cal. Bus. & Prof. Code § 16600 controlled the agreement which states that except as expressly provided by statute, “every contract by which anyone is restrained from engaging in a lawful profession, trade or business of any kind is to that extent void.” The only exceptions to the rule are in the context of the sale of goodwill of a corporation, and the dissolution of a partnership, neither of which applied. Accordingly, the court voided the provision.

The Kelton case is important for two reasons. First, restrictive covenants are unenforceable in joint venture agreements and should be avoided. One way to counteract the elimination of restrictive covenants is to broadly define the fiduciary duties owed by partners/joint venturers. While this will not prevent partners from pursuing opportunities, it will preserve the right to seek compensation if the opportunity was not first presented to the joint venture.

Second, and perhaps more important, Kelton raises the question of what obligations an employee owes to his employer. While the Court did not specifically state that its ruling would also invalidate similar provisions in employment contracts, its literal interpretation of Bus. & Prof. § 16600 suggests that a restrictive covenant which applies solely to conduct during employment may not withstand judicial challenge. We expect that this issue will be resolved in the future by the courts. In the interim, however, employers may want to review their employment agreements to determine if they contain similar restrictions, and to explore other options that may better secure their employees’ loyalty in the event that no “moonlighting” clauses are declared void.

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