

# California Employment Law Notes

Vol. 5  
No. 2  
April 2006

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## Plant Manager's Use Of The Word "Boy" May Have Been Evidence Of Racial Discrimination

*Ash v. Tyson Foods, Inc.*, 546 U.S. \_\_\_, 126 S. Ct. 1195 (2006) (*per curiam*)

Anthony Ash and John Hithon, two African-American poultry plant superintendents, unsuccessfully sought promotion to shift manager positions; instead, two white males were selected. The employer filed a motion for judgment as a matter of law after a jury found in favor of Ash and Hithon. The district court granted the motion and, in the alternative, ordered a new trial as to both plaintiffs. The Court of Appeals for the Eleventh Circuit affirmed in part and reversed in part. However, the United States Supreme Court vacated the judgment and remanded the case for further consideration. The Supreme Court held the Court of Appeals had erred in concluding that the use of the word "boy" (not modified by "black" or "white") could not be evidence of race discrimination. *Cf. Cornwell v. Electra Central Credit Union*, 439 F.3d 1018 (9th Cir. 2006) (court properly dismissed retaliation and termination claims, but not claim that demotion resulted from race discrimination).

## \$30 Million Punitive Damages Award In Sexual Harassment Case To Be Reduced

*Gober v. Ralphs Grocery Co.*, 137 Cal. App. 4th 204 (2006)

Six Ralphs employees sued for sexual harassment after the store director allegedly engaged in inappropriate touching, used profanity, made inappropriate comments about some of the employees' sex lives and threw various objects at some of them. The jury awarded each of the employees between \$50,000 and \$200,000 in compensatory damages and between \$150,000 and \$1.3 million in punitive damages. On retrial, a second jury awarded each of the employees \$5 million in punitive damages – a ratio of punitive to compensatory damages ranging from 25 to 1 to 100 to 1. Relying upon "guideposts" articulated by the United States Supreme Court, the Court of Appeal held that a maximum ratio of 6 to 1 (punitive to compensatory damages) is sufficient to punish Ralphs and to deter it and others from similar conduct in the future. *Cf. Arbaugh v. Y&H Corp.*, 546 U.S. \_\_\_, 126 S. Ct. 1235 (2006) (employer may have waived defense to

Title VII sexual harassment claim by not asserting earlier that it had fewer than 15 employees).

### **Telemarketers Permitted To Proceed With Class Action For Violation Of State And Federal Wage Laws**

*Harris v. Investor's Business Daily*, \_\_\_ Cal. App. 4th \_\_\_, 2006 WL 786806 (Mar. 29, 2006)

Plaintiffs were employed as telemarketers selling subscriptions to a financial newspaper, *Investor's Business Daily*. The telemarketers' compensation was based on a point system, which rewarded them for selling longer subscriptions, winning daily contests and meeting weekly sales goals. In addition, they were subject to a "chargeback" if the subscriber cancelled the subscription within 16 weeks. The employees were paid the greater of commissions earned or the prevailing minimum wage for hours worked. In their lawsuit, plaintiffs challenged the chargebacks and asserted overtime violations. The Court of Appeal reversed the dismissal of plaintiffs' claim for violation of California Business & Professions Code § 17200 (predicated upon a violation of the federal Fair Labor Standards Act), holding that the state law claim was not preempted by the federal statute. Similarly, the Court reversed the dismissal of plaintiffs' overtime claim, finding material issues of fact as to whether they were subject to the commission exemption, and the chargeback claim on the ground the deductions may have been unlawful pursuant to California Labor Code § 221. *Cf. Jones v. Gregory*, \_\_\_ Cal. App. 4th \_\_\_, 40 Cal. Rptr. 3d 581 (2006) (company's CEO was not personally liable for unpaid wages and vacation benefits).

### **Stockbroker's Fraud Claim Was Preempted By Federal Law**

*Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. \_\_\_, 2006 WL 694137 (2006)

Shadi Dabit, a former Merrill Lynch broker, filed this class action on behalf of himself and all other former or current brokers who, while employed by Merrill Lynch, owned and continued to own securities. Dabit alleged Merrill Lynch breached the fiduciary duty and covenant of good faith and fair dealing it owed to its brokers by disseminating misleading research and thereby manipulating stock prices. Merrill Lynch moved to dismiss Dabit's claim on the

ground that it was preempted by the Securities Litigation Uniform Standards Act of 1998 (SLUSA). The Supreme Court agreed that Dabit's claim was preempted by the statute. *Cf. Abrego v. The Dow Chem. Co.*, \_\_\_ F.3d \_\_\_, 2006 WL 864300 (9th Cir. Apr. 4, 2006) (employer failed to establish coverage under Class Action Fairness Act of 2005 of complaint alleging exposure to chemical pesticide asserted by 1,160 Panamanian banana plantation workers); *Bearden v. U.S. Borax, Inc.*, \_\_\_ Cal. App. 4th \_\_\_, 2006 WL 893605 (Apr. 7, 2006) (employees covered by collective bargaining agreement were not exempt from meal-period requirements of state law).

### **Employer Not Required To Give Retirement Credit For Pregnancy Leaves Taken Before 1979**

*Hulteen v. AT&T Corp.*, \_\_\_ F.3d \_\_\_, 2006 WL 549099 (9th Cir. Mar. 8, 2006)

The federal Pregnancy Discrimination Act of 1978 (PDA) became effective in 1979. Prior to the PDA, an AT&T employee who was on pregnancy leave was not awarded service credit for the period of her pregnancy leave, whereas employees who were on other temporary disability leaves received full credit for such absences. Four female employees and their union, the Communications Workers of America, challenged AT&T's pre-PDA policy as a violation of Title VII. The Ninth Circuit held the PDA could not be applied retroactively and that plaintiffs' claims were barred by the applicable statute of limitations.

### **Employee Could Sue Employer For Threat Of Violence Based On Race**

*Stamps v. Superior Court*, 136 Cal. App. 4th 1441 (2006)

Robert Stamps sued his former employer, Traylor Brothers, Inc., for, among other things, violation of California Civil Code §§ 51.7 and 52.1 (granting all persons the right to be free from violence and intimidation by threat of violence based on race, religion, ancestry, national origin, etc.). The employer filed a demurrer in response to this claim, asserting that these provisions do not apply in employment cases. The Court of Appeal disagreed, holding that the Ralph Civil Rights Act (Section 51.7) and the Tom Bane Civil Rights Act (Section 52.1) authorize a private cause of action in employment cases such as this one.

## California Supreme Court Asked To Decide Whether Website Posting Invaded Company Owner's Privacy

*Readylink Healthcare v. Lynch*, 440 F.3d 1118 (9th Cir. 2006)

Readylink Healthcare and its founder, sole shareholder and officer, Barry Treash, sued David Lynch and his law firm for invasion of privacy (public disclosure of private facts) based upon, among other things, Lynch's posting on his website that Treash was a "convicted felon." (Lynch had defended a former Readylink employee in trade secret litigation initiated by Readylink in state court.) In their federal court lawsuit against Lynch, Readylink and Treash alleged Lynch's statements, while true, falsely represented that Readylink was currently involved in illegal activity because of Treash's conviction 20 years before. Readylink and Treash argued that although the statements in question were in the public record, they were "not newsworthy and thus invaded Treash's right to privacy under California law." The district court disagreed and dismissed the invasion of privacy claim. On appeal, the Ninth Circuit certified the following question of law (among others) to the California Supreme Court pursuant to California Rule of Court 81: "Can there be liability under an invasion of privacy theory where a nonmedia defendant, with a commercial interest in or a malicious motive for publishing facts about a plaintiff's past crimes, does so?"

## Event-Staffing Company Could Not Proceed With Malicious Prosecution Action Against Competitor

*StaffPro, Inc. v. Elite Show Services, Inc.*, 136 Cal. App. 4th 1392 (2006)

StaffPro initiated this malicious prosecution action against Elite Show Services, one of its competitors in the event-staffing industry. Previously, Elite had sued StaffPro for unfair business practices that were allegedly designed to "artificially lower [StaffPro's] cost of labor and to diminish or destroy competition for security guard and traffic control services in San Diego." In the underlying lawsuit, Elite alleged that StaffPro used unlicensed personnel to perform security officer functions, allowed unlicensed employees to direct traffic at events, and staffed events with "group labor" paid by lump-sum payments to third party organizations without making the required tax withholdings. At trial, Elite prevailed on some of its claims and succeeded in

compelling StaffPro to ensure that workers' compensation coverage was extended to its "group labor" and to utilize licensed personnel for certain security activities, among other things. In response to StaffPro's malicious prosecution lawsuit, the trial court granted Elite's motion to strike on the ground that there had not been a termination of the underlying lawsuit entirely in StaffPro's favor. The Court of Appeal affirmed the judgment.

## Employer Was Improperly Prohibited From Seeking To Enforce Non-Compete Agreement

*Biosense Webster, Inc. v. Superior Court*, 135 Cal. App. 4th 827 (2006)

Biosense, a manufacturer and seller of electrophysiology catheters and anatomical mapping devices, had its employees sign non-competition agreements prohibiting them from providing services to "conflicting organizations" for 18 months after leaving Biosense. After three of its former employees went to work for St. Jude Medical, one of its competitors, Biosense threatened St. Jude with litigation for "unlawful raiding" of its employees. In response, St. Jude filed a lawsuit against Biosense for declaratory relief and unfair competition under Sections 16600 and 17200 of the California Business and Professions Code and sought a temporary restraining order (TRO) and order to show cause (OSC) re preliminary injunction. The trial court granted the TRO enjoining Biosense from commencing any action other than in the Superior Court of the State of California to enforce any non-competition agreement with the three former employees and issued the OSC re preliminary injunction. However, the Court of Appeal granted Biosense's petition for writ of mandate and concluded that the trial court erred in granting the TRO prohibiting Biosense from commencing an action in a sister state (based on *Advanced Bionics Corp. v. Medtronic, Inc.*, 29 Cal. 4th 697 (2002)) or in federal court.

## Pregnant Employee Could Proceed With Discrimination Claims Arising From Layoff

*Kelly v. Stamps.com Inc.*, 135 Cal. App. 4th 1088 (2006)

Megan Kelly was discharged as the vice president of marketing of Stamps.com when she was seven months' pregnant as part of a company-wide reorganization and reduction in force. Within a year of Kelly's hire in October of 1999, the company suffered a precipitous 93 percent

reduction in its stock value and, in order to reduce expenses, laid off 240 of its 540 employees. Although Kelly was not terminated during the October 2000 RIF (in fact, she was given stock options and paid a retention bonus to induce her to remain employed), she was ultimately terminated by different decision-makers in February 2001 along with 150 other employees. The trial court granted the employer's motion for summary judgment, but the Court of Appeal reversed, holding that Kelly had established that the legitimate non-discriminatory business reasons offered by Stamps.com (elimination of Kelly's job as part of a restructuring) may have been false and, therefore, could have been pretext for pregnancy discrimination. Among other things, the Court focused on a comment from the company's CEO that Kelly had mentally "checked out" as she was approaching her pregnancy leave date. The Court affirmed dismissal of Kelly's contract claim for the second installment of her retention bonus, but reversed the dismissal of Kelly's statutory and public policy claims for prompt payment of earned wages.

## Court Was Not Required To Dismiss Appeal Of Employer That Failed To Post Bond

*Progressive Concrete, Inc. v. Parker*, 136 Cal. App. 4th 540 (2006)

Ron Parker was employed as a sales coordinator by both Progressive and another company. The Labor Commissioner awarded Parker \$133,339.38 in unpaid wages, interest and penalties. Progressive filed a notice of appeal with the San Diego County Superior Court, requesting a *de novo* hearing of Parker's claims. The trial court stayed execution of the Commissioner's award and ordered Progressive to post an appeal bond by a date certain, which Progressive failed to do in violation of Labor Code § 98.2(b). After the trial court refused to dismiss Progressive's appeal for its failure to post a bond, and after a trial *de novo*, the court entered judgment for Parker in the amount of \$75,263.79. Parker appealed. The Court of Appeal affirmed the judgment, holding that the trial court was not required to dismiss Progressive's appeal for its failure to post a bond: "It was incumbent on Parker to seek a court order requiring Progressive to post the undertaking by a certain date." *Cf. Bell v. Farmers Ins. Exch.*, 135 Cal. App. 4th 1138 (2006) (10 percent prejudgment interest rate applied to unpaid overtime compensation).

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