



Excessive Attorney’s Fee Awards in FEHA Cases May Be Rejected Where Plaintiff’s Damages Are Less Than \$25,000

Where a plaintiff’s attorney has “no reasonable basis to anticipate” a damages award in excess of \$25,000 in a case brought under the Fair Employment and Housing Act (FEHA), and where the case could have been fairly litigated as a limited civil case, California Code of Civil Procedure Section 1033(a) provides the court with discretion to limit or deny recovery of attorney’s fees.

A recent case before the California Supreme Court involved the issue of whether the attorney’s fees provisions under FEHA and Section 1033(a) are at odds with one another. The California Supreme Court ultimately determined that there is no conflict between the provisions. Under FEHA, the trial court has discretion to award reasonable attorney’s fees and costs to the prevailing party. Generally, this means that absent special circumstances that would make an award of fees unjust, a

prevailing plaintiff should ordinarily be awarded attorney’s fees in a FEHA action. On the other hand, Section 1033(a) states that “where the prevailing party recovers a judgment that could have been rendered in a limited civil case [less than \$25,000],” and such case was not brought as a limited civil case, “[c]osts or any portion of claimed costs shall be as determined by the court in its discretion.”

In *Chavez v. City of Los Angeles*, the jury awarded the plaintiff \$11,500 in damages for his FEHA retaliation claim. The plaintiff claimed attorney’s fees of \$870,935.50. The trial court denied the plaintiff’s motion for attorney’s fees, based on the discretion afforded the court in Code of Civil Procedure Section 1033(a). The Court of Appeal reversed, concluding that Section 1033(a) did not apply to FEHA cases. The Supreme Court evaluated the policies and legislative history behind

the two provisions and reversed the appellate court, holding that there is no conflict between the attorney’s fees provisions and that 1033(a) does apply to FEHA cases.

In light of *Chavez*, plaintiffs’ attorneys may be less likely to inflate their fees, especially where a low damage award is expected. In settlement negotiations for certain cases, this decision may provide some advantage for employers. Where a plaintiff is not likely to recover more than \$25,000 in damages, a plaintiff’s attorney may be deterred from using the threat of a potentially large attorney’s fee award as a bargaining chip. In minimal damage cases, if plaintiffs’ lawyers believe that their disproportionate fees may be rejected altogether by the court, they may also be more inclined to recommend settlement to their clients.

In This Issue:

Excessive Attorney’s Fees in FEHA Cases	1
Defining Compensable Work Time: <i>Rutti v. Lojack</i>	1
More Difficult to Claim Sexual Harassment	2
Free Speech in a “Public Forum”	2
Alternatives to Layoffs	3
Class Action Plaintiffs Can’t Mix Federal and State Claims	3
Failure to Provide an Agreed Upon Accommodation	4
Reminder: Statutory Wage & Hour Rights	4
Obama Makes Recess Appointments to the NLRB and EEOC	4
Recent Items From Our Blog	5

Defining Compensable Work Time: *Rutti v. Lojack*

When are the things a nonexempt employee does before and after work compensable work time? That is the question that the Ninth Circuit dealt with in *Rutti v. Lojack*.

Plaintiff Rutti sought to bring a class action on behalf of the employer’s nonexempt technicians who travel each day from worksite to worksite in an employer vehicle installing alarms in customers’ cars. The plaintiff wanted to be paid for his off-the-clock time, including his pre-work activities to prepare for the day before he left home, his commute time and his post-work activities including completing a required report by modem.

In a bit of good news for employers, the Ninth Circuit found that most of these

activities were not compensable work time for a variety of reasons.

The court found that the plaintiff’s commute time was not compensable, even though he was provided with a company car. The court rejected the plaintiff’s argument that the restrictions on use of the car imposed by the employer rendered his commute time an integral part of his workday. The restrictions had included a prohibition on personal use and transporting passengers, a requirement that the employee drive directly from home to work and from work to home and that the employee keep a cellular phone turned on.

The court also found that his preliminary activities of receiving assignments, mapping his route and prioritizing his jobs were not

compensable either because such activities were either related to his commute or *de minimus* in that they took no more “than a minute or so.”

The one issue that is still potentially compensable is post-work activities. The employer required its technicians to transmit data about their daily activities from home by modem at the end of the workday. Evidence presented indicated that this often took as much as 10 or 15 minutes, over several attempts, and required the employees to come back later to verify the transmission was received. The employer had written policies that required the data be transmitted between 7 p.m. and 7 a.m. While the district court had granted summary judgment to the employer on the issue of whether such post-work activity was compensable, the Ninth Circuit reversed and remanded for further proceedings. At issue is whether the transmission time was in fact *de minimus*, which the court found here was a factual question not appropriate for summary judgment. On remand, the issue will turn on three factors: (1) the practical administrative difficulty of recording the additional time; (2) the aggregate amount of compensable time; and (3) the regularity of additional work.

In another bit of good news, the court also rejected application of continuous workday doctrine, which the plaintiff argued should have extended his entire workday on both the front and back ends. The court rejected this theory because the preliminary activities and the commute time were not compensable, and there was sufficient leeway in the timeframe required for the postliminary data transmission to break up the workday (“postliminary” being a word that isn’t found in the dictionary, but is used in the statute).

The lessons here are fairly good for employers. Giving a company car does not render commute time compensable. Planning your workday before work is not compensable, nor are minor tasks before and after work. But the real lesson here for employers, and the safest course, is to avoid mandating any specific pre-work or post-work tasks to be done on the employee’s own time. If the nature of the work requires such tasks, this case provides guidance on how to structure those tasks to keep them non-compensable.

Recent Decision Makes It More Difficult To Claim Sexual Harassment

Though California courts are generally reluctant to grant summary judgment for employers in sexual harassment cases, a recent California appellate court decision could make that uphill climb a little easier by narrowing the definition of illegal sexual harassment.

The plaintiff in *Haberman v. Cengage Inc.*, ___ Cal.App.4th ____ (2009), sued her employer and two former supervisors for sexual harassment and several other claims. Her sexual harassment claim was based exclusively on several alleged comments made by the two supervisors over a three-year period. Some of these comments included statements like:

- “Wow. You look so pretty. How do you look so good so early in the morning?”
- The plaintiff was referred to as “drop dead gorgeous.”
- A defendant joked at a meeting that his father is referred to as “Big Dick.”
- A defendant told the plaintiff that a co-worker had “the hots” for her, and then asked her if she would ever go out with him.
- After the death of his wife, a defendant told the plaintiff he was not ready for a relationship, and that he just wanted to have sex, and he asked the plaintiff whether she had any friends who just wanted to have sex, and whether she knew how anyone was good in bed.

Taking note of the recent California Supreme Court decision in *Hughes v. Pair*, 49 Cal.4th 1035 (2009), the appellate court reiterated that “[t]here is no recovery ‘for harassment that is occasional, isolated, sporadic or trivial.’” Rather, sexual

harassment based on a hostile work environment theory is actionable only when the harassing behavior is *pervasive* or *severe*. To be considered “pervasive,” the conduct must consist of more than a few isolated incidents. As to what constitutes “severe” conduct, vulgar and highly offensive comments of a sexual nature are not considered severe if they “would not plausibly be construed by a reasonable trier of fact as a threat to commit a sexual assault on plaintiff.”

Based on these principles, the Court of Appeal affirmed summary judgment for the defendants, holding that the alleged conduct constituted neither severe nor pervasive harassment. The plaintiff could not establish that she was subjected to “severe” harassment because none of the alleged incidents involved physical contact, propositioning or threats. Despite the relatively long period of time over which the alleged incidents took place, the plaintiff’s allegations also fell “far short” of establishing a pattern of continuous, pervasive harassment because the comments, while often inappropriate, were isolated, sporadic and often trivial.

Though this decision is favorable to employers, sexual harassment lawsuits continue to pose substantial exposure. It is very easy for a disgruntled employee to file a lawsuit based on isolated and trivial comments, but it remains time-consuming and expensive for employers to defend these cases. Employers can reduce the risk of being sued by training employees to avoid inappropriate and unprofessional conduct, such as mutual sexual banter, in the workplace.

California Supreme Court Rules on Free Speech in a “Public Forum”

The state high court has ruled that Los Angeles International Airport can prohibit the solicitation of the immediate donations of funds as a “reasonable” restriction on free expression. The decision may also affect the ability of private property owners to restrict such activity. While the justices disagreed on, and did not decide, whether the pre-screening areas of an

airport amount to a “public forum,” the majority of the justices appeared to agree that the post-screening areas are not a public forum and, thus, areas where leafleting and picketing by employees and unions can be restricted. The case is *International Society for Krishna Consciousness v. City of Los Angeles*, California Supreme Court, Case No. S164272 (March 25, 2010).

Alternatives To Layoffs: How the EDD May Help Your Business Reduce Costs and Retain Your Workforce

If your company is considering layoffs or a reduction in employee hours, your business should assess two options offered by the California Employment Development Department (EDD).

Work Sharing Program

First, California's Work Sharing Program provides payment of unemployment insurance benefits to eligible individuals if their wages and hours have been reduced. Employers may consider this program as an alternative to layoffs. For example, if an employer with 50 employees decides, due to lack of work and economic factors, that it needs to lay off 10 employees, the employer could instead choose to retain all of its employees and participate in the Work Sharing program. All 50 employees would remain on the payroll, but their workweek would be reduced from five days to four days, resulting in a 20 percent reduction in work hours and pay. All 50 employees would continue to earn their wages for four days, and they may be eligible to collect Work Sharing benefits for the fifth (nonworking) day from the EDD.

According to the EDD, any employer who has a reduction in production, services or other conditions that cause the employer to seek an alternative to layoffs may participate in the Work Sharing Program.

Some of the specific requirements are:

- A minimum of two employees, comprising at least 10 percent of the employer's regular work force or a unit of the work force, must be affected by a reduction in wages and hours worked.
- The reduction in wages and hours worked also must be at least 10 percent.

Unfortunately, most employers will find that the Work Sharing Program is administratively demanding. Employers that wish to participate in the program must first apply, then certify each week that affected employees are working reduced hours. This administrative burden may not be significant if only a few employees are participating, but can be burdensome if many employees are involved. Also, an employer must reapply to continue to participate beyond six months. The advantages to using the Work Sharing Program, however, are obvious: employees do not lose their jobs. Employers retain all their employees and simultaneously achieve the cost reduction they need to survive the economic downturn. Then, when business improves, employees can resume their regular work schedule.

To obtain more information or participate in the Work Sharing Program, visit http://www.edd.ca.gov/Unemployment/Work_Sharing_Claims.htm.

Partial Unemployment Insurance Benefits

A second alternative is a claim for partial unemployment insurance benefits through the EDD. Partial unemployment claims are for employees whose earnings and hours are reduced, but the employees are not laid off. The employer provides a Notice of Reduced Earnings to the employee, and the employee files a claim for partial benefits. An employee may be eligible for partial unemployment insurance benefits if:

- The employee works less than their normal full time hours because of lack of work;
- The employee experiences a reduction in wages due to the decrease in work; and
- The employee's gross earnings, after deducting the first \$25 or 25 percent of the total earnings (whichever is greater), are less than the employee's weekly unemployment insurance benefit amount.

For more information on partial unemployment insurance benefits, visit http://www.edd.ca.gov/Unemployment/F AQ - Partial_Claims.htm.

Class Action Plaintiffs Can't Mix Federal and State Claims

A federal judge in Los Angeles has denied an attempt by class action lawyers to combine an opt-in "collective action" under the federal Fair Labor Standards Act with an opt-out "class action" under state wage and hour law. The controversy stems from a large retailer's practice of deducting credit card debt from final paychecks. The judge allowed the federal case to proceed, which alleged that the deductions caused compensation to fall below minimum wage. The judge, however, denied class certification of the state law case, which alleged that such deductions were unlawful. The judge ruled that to combine an opt-in case with an opt-out case would create confusion and would undermine the "superiority" of the state law class action. The case is *Ward v. Costco*, U.S. District Court for the Central District of California (March 10, 2010).

Even a Single Failure To Provide an Agreed-Upon Accommodation Can Be Costly

A recent California decision stresses the importance of ensuring supervisors are immediately made aware of agreed-upon accommodations and that such accommodations are consistently provided.

The plaintiff in *A.M. v. Albertsons, LLC* returned to work as a cashier after undergoing cancer treatment. Due to the effects of the treatment, she had to constantly drink water and urinate frequently. The employer agreed to allow the employee to drink at the checkstand and to provide bathroom breaks as needed. The employer successfully provided these accommodations from January 2004 until February 2005.

In February 2005, a new manager began working at the store. This manager did not know about the employee's disability or the store's accommodation. On February 11, 2005, the employee asked the manager for a break. At the time, the manager was the only employee on duty who could relieve the employee at the checkstand. The manager asked the employee if she could wait because a delivery truck was arriving, and the employee agreed to do so. A while later, when the employee had a line of customers at her checkstand, she told the manager she needed to go to the bathroom. The manager told her she could not relieve her because she was busy unloading merchandise. Approximately 10 minutes later, as the plaintiff still had a line of customers, she again told the manager she really needed to use the restroom. The manager again told the employee that she was too busy to relieve her. The employee could not control herself and urinated while standing at the checkstand.

The employee became severely distraught and developed severe anxiety and depression, including thoughts of suicide. She sued her employer for failing to accommodate her disability under the California Fair Employment and Housing Act (FEHA). A jury found in the employee's favor and awarded her \$200,000 in damages, including \$148,000 for past emotional distress.

The Court of Appeal affirmed the judgment, holding that employers can be liable for even a single failure to provide an agreed-upon reasonable accommodation. The court disagreed with the employer's contention that, by not informing the manager of her disability and accommodation, the employee had failed to meet a continuing duty to communicate. The court reasoned that, once the parties have identified and agreed upon an accommodation, the employee does not have a duty to inform every new supervisor of the accommodation. Instead, that responsibility falls squarely with the employer.

The court also rejected the employer's argument that its February 2005 failure to accommodate was trivial because it constituted a single incident in the context of a much longer period of successful accommodation. The court, however, held, that "a single failure to make reasonable accommodation can have tragic consequences for an employee who is not accommodated."

Employers should learn from this defendant's costly mistake by carefully documenting all reasonable accommodations and ensuring that supervisors are up-to-date and consistently provide agreed-upon accommodations.

Reminder: Statutory Wage and Hour Rights Cannot Be Waived

Employees' statutory rights cannot be waived by private agreement. Account executives recently sued their employer for damages for Labor Code violations relating to overtime, meal periods, commissions and itemized wage statements. The complaint also included unfair competition claims, which extended the statute of limitations period to four years. The employer asserted that the claims were barred because the plaintiffs signed employment agreements limiting the time during which they could file suit to six months after termination, and that this lawsuit was brought beyond that six-month limitation. The appellate court upheld the lower court's finding that such an employment agreement violated strong public policy and was unenforceable. The Court of Appeal held that claims for violations of wage and hour laws were based on unwaivable and fundamental statutory rights. The court cited Labor Code Section 219, which states: "Nothing in this article shall in any way limit or prohibit the payment of wages at more frequent intervals, or in greater amounts, or in full when or before due, but no provision of this article can in any way be contravened or set aside by a private agreement, whether written, oral, or implied." This case should remind employers to review their employment agreements to identify potential risks and issues that may be challenged by employees. The case is *Pellegrino v. Robert Half International, Inc.*, 181 Cal.App.4th 713 (2010).

Obama Makes Recess Appointments to the NLRB and EEOC

For the last two years, the National Labor Relations Board has consisted of only two members, one from each side of the political spectrum. President Obama however, has recently appointed two new members, without Senate approval: union lawyer Craig Becker and fellow Democrat Mark Pearce. The appointments create a 3-1 Democratic majority and make it unlikely employers will win appeals to the

Board. Unionized and nonunionized employers alike should be concerned that pro-union changes are afoot and there will likely be an increased risk of union-organizing drives.

Obama also appointed four individuals to the Equal Employment Opportunity Commission: Jacqueline Berrien (D) as Chairperson, Chai Feldblum (D) and Vicki

Lipnic (R) as Commissioners and David Lopez as General Counsel. The EEOC now has a full quorum of commissioners and will be able to complete its regulatory process with respect to recently passed legislation, including the ADA Amendments Act and the recently issued proposed rules for the Age Discrimination in Employment Act.

Recent Items From Our Blog

What Is Half of Infinity? Or It's Accrual World (Posted February 22, 2010)

It's been more than 10 years since California enacted Labor Code § 233, commonly referred to as the "kin care" statute. In essence, the statute requires employers to allow employees to use half of their sick leave accrual to care for certain relatives if they become ill. State law does not require employers to offer sick leave. But if they do, they must allow employees to use up to half their sick leave to care for a sick child, parent, spouse or domestic partner.

But what happens when an employer doesn't cap sick leave? That was the

situation in *McCarther v. Pacific Telesis Group* ([pdf](#)). The plaintiffs worked under collective bargaining agreements that allowed employees to take up to five consecutive days off for each illness with pay. Once they returned to work, even for a day, they would again be entitled to another paid sick leave period of up to five days in a row. If their absences were excessive, they could be disciplined. But the system did not provide for accrual of sick time and, because there was no accrual, there was no cap.

If there's no cap on paid sick leave, how do you apply the rule that employees get to take half their sick leave for kin care? The California Supreme Court said last week that you don't. It ruled that "the reach of the statute is limited to employers that provide a measurable, banked amount of sick leave." As a result, the court ruled that the employer in this situation wasn't required to provide kin care to its employees.

So what is half of infinity? In this case, zero.

A Clear Rule for Removal Jurisdiction (Posted February 24, 2010)

As we said before, we love federal court. And yesterday, the United States Supreme Court made it easier for us to get there. In *Hertz Corporation v. Friend*, the Court recognized a bright line rule regarding a corporation's principal place of business:

"[W]e conclude that the phrase "principal place of business" refers to the place where the corporation's high level officers direct, control, and coordinate the corporation's activities. Lower federal courts have often

metaphorically called that place the corporation's "nerve center." See, e.g., *Wisconsin Knife Works v. National Metal Crafters*, 781 F.2d 1280, 1282 (CA7 1986); *Scot Typewriter Co. v. Underwood Corp.*, 170 F.Supp. 862, 865 (SDNY 1959) (Weinfeld, J.). We believe that the "nerve center" will typically be found at a corporation's headquarters."

Before this decision, much time was spent comparing and contrasting how much

business a corporate defendant had in one state versus another. Now, absent a showing of jurisdictional manipulation, the inquiry is simple:

"[T]he courts should instead take as the "nerve center" the place of actual direction, control, and coordination."

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