

VERDICTS & SETTLEMENTS

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COURT WATCH | MARC J. POSTER

Looking Back

Both the state and federal high courts primarily addressed the 'nuts and bolts of statutory construction' in cases heard this year.

Continuing a recent trend, this past year the U.S. Supreme Court and California Supreme Court shied away from most major constitutional issues and focused on the nuts and bolts of statutory construction. Interpretation of employment laws regarding wrongful termination, discrimination and workplace injuries highlighted the courts' calendars. The high courts also issued important decisions on a variety of topics of interest to civil practitioners involving civil rights, bankruptcy, insurance coverage, medical-malpractice damages and recovery of costs and attorney fees. They also decided several cases of particular concern to attorneys regarding Interest on Lawyers Trust Account (IOLTA) laws, the attorney-client privilege, the legal-malpractice statute of limitations and the unauthorized practice of law.

Below are summaries of these significant decisions:

■ **Employment and discrimination.** *Burlington Industries Inc. v. Ellerth*, 118 S.Ct. 2257 (1998), and *Faragher v. City of Boca Raton*, 118 S.Ct. 2275 (1998), attracted widespread attention for the U.S. Supreme Court's ruling on an employer's vicarious liability for a supervisor's sexual harassment of an employee in violation of Title VII of the 1964 Civil Rights Act. The employer will be vicariously liable for harassment that results in tangible adverse-employment action against the employee, even if the employer was not aware of the harassment. In the absence of tangible loss, however, the employer may avoid liability if it has taken reasonable care to prevent or redress the harassment and the employee unreasonably fails to make use of available remedies or otherwise avoid harm.

On the other hand, in a Title IX case, *Gebser v. Lago Vista Indep. Sch. Dist.*, 118 S.Ct. 1989 (1998), the court held a school district not liable for a teacher's sexual harassment of a student unless district officials have actual notice of and are deliberately indifferent to the teacher's misconduct.

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In another Title VII case, *Oncale v. Sundowner Offshore Servs. Inc.*, 118 S.Ct. 998 (1998), the court held that same-sex sexual harassment in the workplace is actionable. According to the court, "Common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or rough-housing among members of the same sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive." *Id.* at 1003.

The U.S. Supreme Court interpreted the Americans with Disabilities Act (ADA) in two cases. In *Bragdon v. Abbott*, 118 S.Ct. 2196 (1998), it held that a person infected with HIV has an ADA disability even if the virus is asymptomatic. According to the court, HIV infection is a "disability" because it substantially limits the major life activity of reproduction. And in *Pennsylvania Dept. of Corrections v. Yeskey*, 118 S.Ct. 1952 (1998), the court ruled the ADA protects a disabled prison inmate from discrimination in prison services, programs and activities.

The California Supreme Court also decided several important employment discrimination cases. In *Reno v. Baird*, 18 Cal.4th 640 (1998), the court held that under both the California Fair Employment and Housing Act (FEHA) and the common law of wrongful discharge in violation of public policy, an individual supervisor may be personally liable for harassment but not for discrimination. The court reasoned that for supervisors to do their jobs, they must make personnel-management decisions, but they do not have to engage in harassment.

Cotran v. Rollins Hudig Hall Int'l Inc., 17 Cal.4th 93 (1998), was an employee's action for breach of the implied covenant not to discharge without good cause. The court held that the jury must assess the objective reasonableness of the employer's factual determination of the employee's misconduct. The employer must reach a reasoned, honest and good-faith conclusion supported by substantial evidence gathered through an adequate investigation that includes notice to the employee and an opportunity to respond. See **LOOKING BACK**, Page 6

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The court added that the employer's reasons must not be trivial, capricious, unrelated to business needs or goals, or pretextual.

In *City of Moorpark v. Superior Court*, 18 Cal.4th 1143 (1998), the court held that Labor Code Section 132a, which prohibits employers from discriminating against employees who are injured in the course and scope of employment, is not the employee's exclusive remedy for such discrimination, and the employee may pursue FEHA and common-law claims. The exclusive remedy principle applies to matters within the normal compensation bargain, and discrimination is not part of that bargain.

McKeon v. Mercy Healthcare Sacramento, 98 Daily Journal D.A.R. 11521 (Nov. 10, 1998), holds that FEHA's exemption of a "religious association or corporation not organized for private profit" encompasses a nonprofit, public-benefit corporation that owns and operates hospitals controlled by the Roman Catholic Church. The court left for future decision whether the exemption is limited to discrimination on religious grounds against employees' religious duties, whether the exemption is an unconstitutional establishment of religion and whether the secular nature of health care precludes a religious exemption claim.

Finally, in *Green v. Ralee Engineering Co.*, 19 Cal.4th 66 (1998), the court revisited its ruling in *Gantt v. Sentry Ins.*, 1 Cal.4th 1083 (1992), and held that in a retaliatory-discharge action based on a violation of public policy, the public policy need not be directly expressed in a statute or constitutional provision. Government administrative regulations may be a source of fundamental public policy that limits the employer's right to discharge an at-will employee. The court ruled that Federal Aviation Administration regulations implementing the Federal Aviation Act of 1959, a public-safety statute, is such a source of fundamental public policy.

■ **Civil Rights.** In *County of Sacramento v. Lewis*, 118 S.Ct. 1708 (1998), the U.S. Supreme Court decided that for purposes of a civil rights action under 42 U.S.C. Section 1983, a police officer does not violate the Fourteenth Amendment guarantee of substantive due process by causing death through deliberate or reckless indifference to life in a high-speed auto chase aimed at apprehending a suspected offender. To be liable, the officer must act with "a purpose to cause harm unrelated to the legitimate object of arrest." *Id.* at 1711.

The California Supreme Court ruled that a district attorney acts on behalf of the state and therefore is not a "person" within the meaning of Section 1983 for purposes of liability for violation of civil rights, insofar as the district attorney is preparing to prosecute criminal violations of state law and establishing policy and training employees in this regard. *Pitts v. County of Kern*, 17 Cal.4th 340 (1998).

The California court also decided two cases under the Unruh Civil Rights Act, Civil Code Section 51. *Curran v. Mount Diablo Council of the Boy Scouts*, 17 Cal.4th 670 (1998), holds that the Boy Scouts is not a "business establishment." The act therefore does not prohibit the Boy Scouts from rejecting an assistant scoutmaster applicant because of his announced homosexuality. Similarly, *Randall v. Orange County Council*, 17 Cal.4th 736 (1998), holds that the act does not apply to the Boy Scouts' exclusion of persons because of their refusal to participate in religious-related elements of the Boy Scouts program and to affirm a belief in God.

■ **Workers' Compensation.** The California Supreme Court tackled the issue of course and scope of employment in *La Tourette v. Workers' Comp. Appeals Bd.*, 17 Cal.4th 644 (1998), where an employee suffered cardiac arrest while on an employment-related trip and then died from a bacterial infection incurred while being treated for the cardiac arrest. The court held the death did not arise out of and in the course and scope of the employment. The court explained that an ailment does not become an occupational disease simply because it is contracted on company time. The infection was not natural to, inherent in, an incident or concomitant of the employment.

■ **General tort law.** In an action under the Death on the High Seas Act, the U.S. Supreme Court held that relatives are limit-

In *Toland v. Sunland Hous. Group Inc.*, 18 Cal.4th 253 (1998), the court elaborated on the principles of *Privette v. Superior Court*, 5 Cal.4th 689 (1993), and held that an independent contractor's employee who is injured on the job by the negligence of the person who hired the contractor cannot recover in tort against the hirer because of the availability of workers' compensation benefits from the contractor.

And along the same pre-emption line in *Calatayud v. State of California* 18 Cal.4th 1057 (1998), the court examined the "firefighter's rule" that bars a public-safety officer's negligence claim against the person who caused the incident that required the officer's intervention. The case involved a suit by one law-enforcement officer against another for an injury sustained while the two officers were attempting to subdue and arrest a criminal suspect. The court concluded that the legislative exception to the firefighter's rule in Civil Code Section 1714.9(a)(1) for "any person" who causes injury after the person knows of the officer's presence was not intended to apply to another public-safety officer engaged in the discharge of official responsibilities.

And in *Jones v. Kmart Corp.*, 17 Cal.4th 329 (1998), the court ruled that Civil Code Section 52.1, which authorizes an award of damages and attorney fees against anyone who interferes with another's constitutional

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ed to recovery of their own pecuniary losses and cannot recover for their decedents' pre-death pain and suffering. *Dooley v. Korean Air Lines Co.*, 118 S.Ct. 189 (1998).

The California Supreme Court also drew the line on tort recovery in several cases. In *Cedars-Sinai Medical Ctr. v. Superior Court*, 18 Cal.4th 1 (1998), the court held there is no separate cause of action for intentional spoliation of evidence, at least where the spoliation is committed by a party to the underlying action to which the evidence is relevant and the spoliation victim knows or should know of the alleged spoliation before a decision on the merits of the underlying action.

rights "whether or not acting under color of law," does not authorize such an award against someone not acting under color of law who conducts a wrongful search and seizure. To be actionable, the defendant must have interfered with the plaintiff's ability to assert constitutional rights against the government.

■ **Damages.** In *Salgado v. County of Los Angeles*, 98 Daily Journal 12377 (Dec. 8, 1998), the California Supreme Court held in a medical-malpractice action that under Code of Civil Procedure (C.C.P.) Section 667.7 the plaintiff is entitled to periodic payment of future noneconomic damages totaling, over time, the equivalent of an immediate lump sum of the jury's award.

■ **Insurance.** In three cases, the California Supreme Court considered a commercial general liability (CGL) insurer's duties to an insured charged with environmental pollution.

In *Aerojet-General Corp. v. Transport Indem. Co.*, 17 Cal.4th 38 (1997), the court reaffirmed that if there is any claim potentially covered by a CGL liability policy, the insurer must defend the entire suit against the insured, even claims not potentially covered by the policy, under the insurer's "prophylactic" duty to defend meaningfully. The court held that site-investigation expenses are defense costs to the extent they are conducted within the temporal limits of the insurer's duty to defend and are reasonable and necessary to avoid or minimize liability. Such expenses may be allocated to the insured for any part of a claim that is not even potentially covered.

On the other hand, in *Foster-Gardner Inc. v. National Union Fire Ins. Co.*, 18 Cal.4th 857 (1998), the court held that an environmental agency's order notifying an insured that it is a responsible party for pollution and requiring remediation is not a "suit" triggering the insurer's duty to defend.

Finally, the court ruled that in an insured's action seeking indemnity for environmental-cleanup costs, the insured bears the burden of proving the claim comes within the "sudden-and-accidental" exception to the general pollution exclusion. The insured has the burden of establishing coverage under a CGL policy, and an exception to an exclusion is a coverage provision. *Aydin Corp. v. First State Ins. Co.*, 18 Cal.4th 1183 (1998).

■ **Attorney fees and costs.** The California Supreme Court addressed the issue of a litigant's right to recover attorney fees and costs in several different contexts.

Davis v. KGO-TV Inc., 17 Cal.4th 436 (1998), holds that a statutory award of attorney fees and costs to the prevailing party in a FEHA age-discrimination action should not include the cost of retained experts.

In *Santisas v. Goodin*, 17 Cal.4th 599 (1998), the court ruled that where a plaintiff voluntarily dismisses an action with prejudice, the defendant is the "prevailing party" and is entitled to costs under C.C.P. Section 1032(b). The defendant is also entitled to attorney fees if a contract so provides and if the contract is broad enough to cover fees incurred to defend causes of action not within Civil Code Section 1717, which does not authorize fees for a plaintiff who voluntarily dismisses an "action on a contract."

And in *Murillo v. Fleetwood Enters. Inc.*, 17 Cal.4th 985 (1998), the court decided that although the Song-Beverly Act (the "lemon law") mandates that a prevailing buyer recover costs and attorney fees but makes no mention of a prevailing seller, the prevailing seller is nevertheless entitled to costs under C.C.P. Section 1032(b) and is eligible to recover attorney fees under C.C.P. Section 998.

■ **Bankruptcy.** The U.S. Supreme Court considered two cases on the dischargeability of tort liability in bankruptcy. One case, *Cohen v. De La Cruz*, 118 S.Ct. 1212 (1998), holds that any liability arising from fraud, including punitive damages, treble damages, attorney fees and other relief that may exceed the value obtained by the debtor, is not dischargeable. The other, *Kawaauhau v. Geiger*, 118 S.Ct. 974 (1998), holds that a doctor may discharge a medical-malpractice judgment debt unless the debt is attributable to acts done with actual intent to cause injury.

■ **Attorneys.** The U.S. Supreme Court held that interest earned on client funds held in state-mandated IOLTAs is private property of the client for Fifth Amendment takings clause purposes. *Phillips v. Washington Legal Found.*, 118 S.Ct. 1925 (1998). The court remanded the cause for a determination whether the state's use of IOLTA interest to fund legal-services programs is in fact a taking.

The court also determined that in federal court, as is already the rule under California law, the attorney-client privilege survives the death of the client. *Swidler & Berlin v. United States*, 118 S.Ct. 2081 (1998).

The California Supreme Court ruled that an out-of-state law firm's fee agreement is unenforceable to the extent the firm claims fees for legal services rendered in California by persons not licensed to practice law in California. Business & Professions Code Section 6125's prohibition against unauthorized law practice applies even to attorneys who are licensed elsewhere. *Birbrower, Montalbano, Condon & Frank v. Superior Court*, 17 Cal.4th 119 (1998).

Finally, the California court changed course again on the issue of when "actual injury" occurs for purposes of the legal-malpractice statute of limitations, C.C.P. Section 340.6, in a case involving negligent transactional work. *Jordache Enters. Inc. v. Brobeck, Phleger & Harrison*, 18 Cal.4th 739 (1998), holds that, contrary to previous rulings, there are no "bright-line" rules for determining when actual injury occurs. Depending on the facts of a particular case, actual injury may not occur, and the statute may not begin to run, until the underlying litigation regarding the transaction has been resolved. The pertinent inquiry is whether "events have developed to a point where [the] plaintiff is entitled to a legal remedy, not merely a symbolic judgment such as an award of nominal damages."