CALIFORNIA
LABOR & EMPLOYMENT LAW
UPDATE

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# Federal Court

## First Amendment

**Since College's Safety And Pedagogical Concerns Outweighed Instructor's Rights To Free Speech And Association, Instructor Was Properly Terminated For Taking Students To A WTO Protest Over College's Objection.** Plaintiff taught Economics at a college in Vancouver, Washington. In the fall of 1999, Plaintiff's students suggested they attend a public rally and march, sponsored by the AFL-CIO, opposing the WTO. The school opposed the "field trip" and informed Plaintiff that she was not to attend the rally with students as a school-sponsored trip, due to the projected danger and potential violence from the protests. Plaintiff and her students attended the rally nevertheless, in what the school characterized as a *de facto* class field trip, without incident. Consequently, Plaintiff's contract was not renewed and her classes were reassigned.

Plaintiff sued, alleging she was retaliated against for exercising her First Amendment rights of free speech and free association. The court concluded that her claim failed because her associational interests were "strongly outweighed" by the college's administrative interest in safety and pedagogical oversight. The college's safety concerns were legitimate, even though none of the students were injured. "[A] retrospective analysis of the College's position" was unnecessary because the question was whether the stated position was reasonable at the time, and the court concluded it was. The court determined that summary judgment for the College was properly granted. *Hudson v. Craven*, 2005 U.S. App. LEXIS 5434 (9th Cir. Apr. 6, 2005).

# State Courts

## Administrative Remedies

**Failure To Begin Peer Review Hearing Within Statutory 60-day Period Did Not Excuse Physician From Exhausting Her Administrative Remedies.** Plaintiff was hired as an OB/GYN associate physician in November 2001. In March 2003, her surgery privileges were summarily suspended and, shortly thereafter, she was terminated. In response to a letter she received regarding her administrative rights, she requested an administrative hearing. Her attorney and the hospital's attorney communicated throughout May and into June regarding the appointment of a hearing officer, panel and date for the hearing, but no hearing had commenced by the end of June.

In early July, Plaintiff filed a civil complaint in court seeking a declaration that she was not required to exhaust her administrative remedies because the hospital had not commenced a hearing within 60 days, as required by Business and Professions Code Section 809.2. The court ruled in favor of Plaintiff, finding that because a hearing was not timely held and Plaintiff did not consent to the delay, she was not required to exhaust her administrative remedies before pursuing her superior court action.

The appellate court reversed, finding no statute exempting a physician from exhausting administrative review simply because a hospital or employer failed to begin a hearing within 60 days of the request. The court reasoned that had the legislature intended such a result, it could have provided such, as it has done in other contexts. The court further explained that the 60-day deadline is not meaningless, but that Plaintiff's recourse for the alleged delay did not lie in an immediate superior court action. The court also rejected Plaintiff's argument that she was exempt because the peer review process was biased, as she was entitled to voir dire the panel members about their bias. *Kaiser Foundation Hosps. v. The Sacramento County Superior Court*, 2005 Cal. App. LEXIS 526 (Cal. App. 3d Dist. Apr. 4, 2005).

## Arbitration

**Individual Who Is Not A Party To Or Beneficiary Of A Promissory Note Cannot Enforce Arbitration Clause Contained Therein.** In January 2001, Plaintiffs enrolled at the San Diego campus of CEI, paying more than $10,000 for training in "computer networking." In June 2002, Plaintiffs sued CEI claiming it made false representations regarding its accreditation and course

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work that would be offered. CEI moved to compel arbitration under its contracts with Plaintiffs. The court denied the motion, reasoning that state law actions were outside the scope of the contract's arbitration clause. CEI filed a second motion to compel arbitration, arguing that arbitration was mandated by clauses contained in various Sallie Mae promissory notes Plaintiffs had signed to obtain school loans. The court again denied the motion because the arbitration clauses concerned disputes between borrowers and lenders, and CEI was neither a party to, nor a beneficiary of, the notes. The appellate court agreed, rejecting CEI's claim that since it received the loan funds as tuition, it was a "nonsignatory 'closely related' to the Sallie Mae promissory notes." The court further rejected CEI's argument that it was an intended third party beneficiary of the note. *Thornton v. Career Training Center*, 2005 Cal. App. LEXIS 527 (Cal. App. 4th Dist. Apr. 4, 2005).

## FEHA

**Uncompensated Volunteer Is Not An Employee And Could Not Sue For Discrimination And Wrongful Termination.** Plaintiff, a quadriplegic who used a wheelchair for mobility, was an uncompensated volunteer Community Service Officer (CSO) for the Town of Ross. He was assigned to a grammar school and assisted in traffic duties, crime prevention, and neighborhood crime watch. When Plaintiff's position as CSO was terminated, he sued alleging disability discrimination and wrongful termination in violation of public policy. The town sought a dismissal, contending that Plaintiff was a volunteer rather than an employee. The court dismissed the action, reasoning that under case law interpreting Title VII, volunteers are not employees and cannot sue for employment discrimination and wrongful termination. *Mendoza v. Town of Ross*, 2005 Cal. App. LEXIS 612 (Cal. App. 1st Dist. Apr. 19, 2005).

**Race And Religious Discrimination Actions Reinstated By The Court.** Plaintiff, a practicing Muslim who wore a beard and skullcap and prayed several times a day, began as a project coordinator for an architectural firm in 1999. Plaintiff alleged that his supervisor told him that his beard and skullcap were preventing him from being promoted. Plaintiff was eventually laid off in 2002. He sued for discrimination, harassment, retaliation, and invasion of privacy. The trial court granted summary judgment in favor of the employer.

On appeal, the court reversed as to the race and religious discrimination actions. The court rejected Plaintiff's argument that a "totality of circumstances" test should be used in place of the *McDonnell Douglas* test, but did find that Plaintiff presented sufficient evidence of pretext on his failure to promote claim to require denial of summary judgment. There was evidence that he was at least minimally qualified and that positions were available during the time he was employed, but that he was not promoted. The court further found that Plaintiff's claim was not barred by the one-year statute of limitations because there was a factual question of whether the continuing violations doctrine applied and that a failure to promote occurred every day that Plaintiff was not promoted, and therefore, was not limited to one instance. *Khan v. HMC Group, Inc.*, 2005 Cal. App. Unpub. LEXIS 3435 (Cal App. 4th Dist. Apr. 19, 2005).

**Punitive Damages Available Where Store Knew Of Chronic Harasser.** Plaintiffs worked in various capacities at Ralphs Grocery Stores, and claimed that Roger Misiolek, the store director, had sexually harassed them. In 1995, Misiolek worked at Ralphs' Escondido store. When complaints arose, he was transferred to a store in Mission Viejo, but Ralphs did not advise management as to why Misiolek had been transferred. New complaints surfaced from employees and customers. Eventually, Misiolek was demoted to a merchandise receiver in the warehouse of another store, and later resigned.

Plaintiffs sued Ralphs and Misiolek and were awarded compensatory and punitive damages. The jury determined that Misiolek was a managing agent for Ralphs, that Ralphs either ratified his misconduct or had advanced knowledge that he was unfit, and that hiring him constituted a conscious disregard of the rights and safety of others. The trial court granted a new trial on the amount of the punitive damages awarded. On retrial, the jury awarded punitive damages again. On appeal, the court affirmed, finding that Ralphs' appeal was not timely. The court further found that evidence admitted at the punitive damages trial need not be limited to the evidence presented at the first phase of trial where liability was determined. Evidence that Misiolek caused trouble before coming to the Escondido store, and after leaving the Mission Viejo store, was admissible on the reprehensibility of Ralphs' conduct, so long as its probative value outweighed its prejudicial effect. *Gober v. Ralphs Grocery Co.*, 2005 Cal. App. LEXIS 614 (Cal App. 4th Dist. Apr. 19, 2005).

**Award Of Damages For Maintenance Worker Fired After Injuring His Back Affirmed.** On Appeal. Plaintiff worked as a lead maintenance worker for approximately 18 years when he injured his back in April 2000. In June 2000, he returned to work and was assigned light duties to accommodate a lifting restriction. Between June 2000 and October 2001, Plaintiff mainly watered trees, and occasionally hosed down sidewalks, picked up trash and painted. In October 2001, Plaintiff was placed on leave and was told he would be terminated once his leave ran out. Plaintiff asked what he could do to avoid being termi-

nated and was told to talk to risk management or obtain vocational training. He was told that no permanent light duty assignment was available.

Plaintiff sued and was awarded damages for the City's failure to accommodate his disability. The appellate court affirmed, rejecting the City's argument that it did not have a duty to engage in the interactive process because the process was never triggered by Plaintiff. It further rejected the City's argument that Plaintiff was responsible for the breakdown of the interactive process. The court concluded that there was sufficient evidence for the jury to conclude that the City should have offered Plaintiff some accommodation, such as a part-time position or placing him on disability leave. *Kerry v. City of West Covina*, 2005 Cal. App. Unpub. LEXIS 3392 (Cal. App. 2d Dist. Apr. 18, 2005).

## *Wrongful Termination*

**City Manager's Defamation And Wrongful Termination Suit Reinstated.** Plaintiff was the General Manager of the City of Carson, overseeing the city's waste disposal services. In January, 2002, she received a fax from an attorney representing an executive involved in the bidding process for a City contract, which constituted an unauthorized disclosure of another's confidential bid. She immediately reported it to the City Manager, who told her he would handle it and she should not contact anyone. She responded that the entire City Council should be informed, and that if he did not tell them, she would. Ultimately, she advised the Council of the "bid rigging issue." An investigation, which included the FBI, was launched shortly thereafter.

On September 17, 2003, Plaintiff learned she was being dismissed and that the City Manager had told staff and community members that she was being terminated because she was incompetent. Plaintiff sued for wrongful termination and defamation. Defendants responded with an anti-SLAPP motion, contending that the allegedly defamatory statements were made within the scope of protected communications and that Plaintiff could not demonstrate a probability of success on the merits. The court granted the motion and dismissed the case. Reversing and reinstating the case, the appellate court determined that there was a probability that Plaintiff could prevail on the merits. The court reasoned that if Plaintiff's evidence were credited at trial, it is likely that she would be able to prove the alleged statements were defamatory, that the statements were made to staff and community members, and that no privilege existed. *Gallant v. City of Carson*, 2005 Cal. App. LEXIS 617 (Cal App. 2d Dist. Apr. 20, 2005).



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