

The Public Lawyer



STATE BAR OF NEVADA

Nevada Supreme Court Cases

State v. Lewis, 124 Nev. Adv. Op. No. 13 (March 13, 2008) “The State appeals from a district court order granting respondent Ricky D. Lewis’s presentence motion to withdraw his guilty plea. The issue before this court is whether an order granting a presentence motion to withdraw a guilty plea is independently appealable. We conclude that such an order is an intermediate order, not a fi-

nal, appealable judgment. This court’s appellate jurisdiction is determined by statute or rule. Because there is no statute or rule providing for an appeal from an intermediate order of the district court allowing a defendant to withdraw a guilty plea before sentencing, we conclude that we lack jurisdiction over this appeal. We therefore grant Lewis’s motion and dismiss this appeal.

Dozier v. State, 124 Nev. Adv. Op. No. 12 (March 13, 2008) “Appellant Clarence James Dozier appeals from an order of the district court denying his post-conviction petition for a writ of habeas corpus. In his petition, Dozier contended, among other things, that his trial counsel was ineffective for failing to challenge a jury instruction providing that the State had the

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It’s not just the money: New Center for Excellence poll finds Americans want health insurance and security; pay ranks farther down list.

WASHINGTON, DC – A new poll shows that health insurance and security are at the top of Americans’ list of desirables in a job,

while pay ranked much lower.

The national poll, conducted by Princeton Survey Research Associates for the

Center for State and Local Government Excellence, surveyed 1,200 adults age 18 and older.

Whether security

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comes from health insurance, job security, the promise of a retirement income, or clear work policies, Americans want a lot more than just a paycheck from their employment.

Given a list of 15 benefits and characteristics that may be important in choosing a job:

84 percent of Americans ranked health insurance at the very top.

Job security and clear policies and procedures (82 percent each) were ranked next in importance; the retirement or pension plan (76 percent); and a flexible, family-friendly workplace in fifth place (71 percent).

Pay ranked tenth with 65 percent, trailing such matters as getting quick decisions on issues (69 percent); working with talented managers (68 percent); having the potential for promotions (66 percent); and being creative and intellectually stimulated (66 percent).

In another key set of findings, Americans say state and local government jobs offer better benefits, job security, and chance to make a contribution to society, while jobs in the private sector offer better opportunities for innovation, greater chances to work with the best people, and better opportunities for promotion. They are divided on which sector offers the best compensation.

The poll, which surveyed participants by landline and cellular phone within the continental United States from October 24-November 4, 2007, had an overall margin of sampling error of plus or minus three percentage points.

So You Want To Be A Lawyer? Here Are Some Stats: mayitpleasethecourt.com

From the Law School Admission Council: last year, 515,000 applications were submitted to law schools. Approximately 140,00 took the LSAT, required by the approximate 195 law schools for all applicants. Some 84,000 students completed their applications to law school. 55,500 of those students were accepted into law school, about sixty-five percent.

Every year the LSAT prep company, Kaplan, does a random-sample exit survey of the students who took the test, about 2,000 students or so.

With the elections this year, how many of those 55,500 law students will get involved in politics? Who's looking for money?

Glen Stohr, the director of pre-law programs at Kaplan Test Prep and Admissions, says "law school remains a breeding ground for future politicians -

but a significant gender gap remains." Forty-two percent of LSAT takers reported they will "definitely" or "probably" run for political office, a breakdown by gender reveals that among male students, the figure jumps to 52 percent - versus a drop to 34 percent among female students.

Seventy three percent of LSAT takers said high income potential was a "very important" or "important" factor in their decision to attend law school.

The first number surprised me, but the second one didn't. After all, the range of debt of law students after they graduate can run from \$80K to \$140K. But then again, the top starting salaries for the upper one percent of students at the top of their class graduating from the top law schools can reach \$160K.

With that kind of debt, it's tough to imagine anyone going into politics.



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burden to prove by a preponderance of the evidence that some of the charges at issue were committed in a secret manner and were therefore not barred by the statute of limitations. In addressing the district court's decision rejecting this claim, we now clarify our prior precedent and conclude that when a defendant is charged with a criminal offense and affirmatively raises a statute-of-limitations defense, if the State seeks to disprove that defense under NRS 171.095(1)(a) by showing that the offense was committed in a secret manner, the State must do so by a preponderance of the evidence. Accordingly, the district court did not err in rejecting Dozier's claim of ineffective assistance, and we affirm the district court's denial of Dozier's petition.[]

Grey v. State, 124 Nev. Adv. Op. No. 11 (March 13, 2008) "In this appeal, we consider whether parties in criminal cases are required to give notice of expert rebuttal witnesses. We also consider whether the State's failure to formally file an allegation of habitual criminality precludes the district court from imposing an enhanced sentence under NRS 207.010.

Although we promulgate a new

rule of criminal procedure requiring parties in criminal cases to give notice of expert rebuttal witnesses, we hold that the State's failure to provide such notice in this case does not require reversal. We further conclude that the district court improperly sentenced appellant as a habitual criminal under NRS 207.010, where the State failed to file a notice of habitual criminality and failed to charge appellant as a habitual criminal in the indictment. We also address appellant's other assignments of error.

Torrealba v. Kesmetis, 124 Nev. Adv. Op. No. 10 (March 6, 2008) "This appeal concerns claims of negligence per se and fraud based on alleged misconduct by notaries public. Appellants Leonard and Shelly Torrealba filed a complaint for damages against two notaries public, respondents Laurie Kesmetis and Emily Herrera, and the notaries' employer, respondent J.M.K. Investments, Ltd., claiming that the notaries were negligent as a matter of law under regulatory statutes governing notaries public and that they fraudulently notarized the Torrealbas' signatures on certain loan documents. The district court dismissed both the negligence per se claim and the fraud claim as time-barred. To-

day, we consider, first, the statute of limitations applicable to claims brought under NRS 240.150, which establishes civil liability and penalties for notary misconduct or neglect. Second, we consider whether instruments recorded but improperly acknowledged provide constructive notice under NRS 111.320 to start the running of the limitations period.

We conclude that claims brought under NRS 240.150(1) and NRS 240.150(2) are claims upon a liability created by statute, other than a penalty or forfeiture, and are subject to a three-year statute of limitations under NRS 11.190(3)(a). Because the Torrealbas' negligence per se claim is based upon NRS 240.150(1)-(2), we reverse the district court's order dismissing that claim as time-barred and remand for further proceedings.

Actions for fraud are subject to a three-year statute of limitations under NRS 11.190(3)(d), which commences when the aggrieved party discovers the facts constituting the fraud. Respondents maintain that the Torrealbas had constructive notice of the recorded but improperly acknowledged loan documents at least three years before they commenced their action, result-

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ing in the fraud claim being time-barred. In resolving this issue, we adopt the test articulated by the Supreme Court of Appeals of West Virginia in *In re Williams* for determining whether a recorded but improperly notarized instrument can impart constructive notice. Under the *Williams* test, an improperly notarized instrument is void, and thus does not provide constructive notice for statute of limitations purposes, if either the notary or any party to the instrument benefited from the improper notarization or any harm flowed from the transaction. In light of our holding, we reverse the district court's order dismissing the Torrealbas' fraud claim and remand for further proceedings under the *Williams* test."

UMC Physicians v. Nev. Serv. Emp. Union, 124 Nev. Adv. Op. No. 9 (March 6, 2008) "In this appeal, we consider who may properly file a complaint with Nevada's Local Government Employee-Management Relations Board.

Appellant UMC Physicians' Bargaining Unit (PBU) maintains that it represents approximately 75 physicians who worked for respondent University Medical Center of Southern Nevada. PBU filed a complaint

with the Board on behalf of those physicians. The Board dismissed PBU's complaint, however, finding that PBU lacked standing because it was not an employee organization recognized as the exclusive bargaining agent for the group of physicians it claimed to represent. The district court denied judicial review, and PBU has appealed.

Historically, the Board has allowed only those employee organizations that are recognized as exclusive bargaining agents to complain to it on behalf of the employees whom the organization represents. We conclude, however, that the Board's authority, and its corresponding duty, to hear matters is broader. Under Nevada statutes and administrative codes, the Board must hear a complaint from any 'employee organization of any kind having as one of its purposes improvement of the terms and conditions of employment of local government employees,' so long as the employee organization has a legally recognizable interest in the relief sought. Because, in this case, the Board dismissed PBU's complaint without determining whether PBU met these criteria, we reverse the district court's order denying PBU's petition for judicial review and remand

this matter for the Board to determine whether PBU is a proper complainant as an 'employee organization' with a legally recognizable interest in the relief sought."

In re Tiffany Living Trust 2001, 124 Nev. Adv. Op. No. 8 (March 6, 2008) "In these consolidated appeals, we consider whether an attorney, whose law firm partner prepares an estate plan for a client who names the attorney as a beneficiary, has overcome the presumption of undue influence. We further consider whether violations of the Nevada Rules of Professional Conduct afford a private right of action. Finally, we address whether the district court erred in dismissing a civil action for constructive trust that was initiated after trust proceedings had already taken place.

In considering whether the attorney in this case has overcome the presumption of undue influence, we determine that such a showing must be made by clear and convincing evidence, and we conclude that clear and convincing evidence demonstrates that the client in this case was not unduly influenced in naming the attorney as the primary beneficiary of her estate. Further, we reiterate our holding in *Mainor v. Nault* that violations

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of Nevada's professional conduct rules do not give rise to a private right of action. Lastly, we conclude that the district court did not err in dismissing the civil action for constructive trust that was instituted after the trust proceedings had already taken place.

Loomis v. Whitehead, 124 Nev. Adv. Op. No. 7 (February 28, 2008) "In this appeal, we address whether NRS 602.070 bars the partners of an unregistered fictitious name partnership from bringing an action arising out of a business agreement that was not made under the fictitious name. NRS 602.070 prohibits persons who fail to file an assumed or fictitious name certificate from suing on any contract or agreement made under the assumed or fictitious name. We conclude that NRS 602.070 does not bar the partners from bringing the action so long as the partners did not conduct the business or enter into an agreement under the fictitious name or otherwise mislead the other party into thinking that he was doing business with some entity other than the partners themselves."

Nevada Classified Sch. Emp. Ass'n v. Quaglia, 124 Nev. Adv. Op. No. 6 (February 28, 2008) "In this appeal, we con-

sider whether a corporate bylaw is invalid when it contravenes the voting requirements of the corporation's articles of incorporation. We conclude that a corporation's bylaw is void to the extent that it is inconsistent with the corporation's articles of incorporation. Based upon this conclusion, we next consider whether an amendment to the bylaws is likewise invalid when it is adopted under the invalid bylaw's voting procedure. We conclude that the amendment, adopted under a void bylaw's required procedure, is also invalid. Accordingly, we affirm the district court's order refusing to grant a preliminary injunction based upon the invalid amendment and also affirm its order granting declaratory relief to the opposing party.

Hooks v. State, 124 Nev. Adv. Op. No. 5 (February 21, 2008) "This appeal presents the issue of whether appellant Jerry Hooks knowingly, intelligently, and voluntarily waived his right to counsel when he exercised his right to represent himself at trial. Because the district court did not adequately canvass Hooks regarding his waiver, pursuant to *Faretta v. California* and the record as a whole does not sufficiently establish a valid waiver, we reverse the judgment of conviction. In do-

ing so, we clarify that a *Faretta* canvass conducted in justice court before a preliminary hearing will rarely be sufficient, standing alone, to establish a valid waiver of the right to counsel at trial. And although a trial judge's failure to conduct a thorough *Faretta* canvass does not require reversal when the record as a whole establishes a valid waiver of the right to counsel, we again urge the district courts to conduct thorough inquiries to ensure that criminal defendants understand the dangers and consequences of self-representation and to make findings regarding the validity of any waiver of the right to counsel."



7th Circuit: ADA Prohibits Association Discrimination Against Employees

By Maria Greco Danaher

The 7th U.S. Circuit Court of Appeals reversed the dismissal of a nurse's claim of association discrimination against a hospital in an Americans with Disabilities Act (ADA) lawsuit.

The nurse claimed that a self-insured hospital fired her because it viewed the cost of her husband's cancer treatment as inordinately high. The 7th Circuit's decision will allow the claim to go forward to a jury.

Phillis Dewitt, a registered nurse, was hired by Proctor Hospital in Peoria, Ill., in September 2001. After working on an as-needed basis for a month, Dewitt was promoted to the position of clinical manager, where she supervised nurses and other hospital staff members. Mary Jane Davis, Dewitt's supervisor, rated Dewitt's performance as "outstanding."

Dewitt and her husband were covered under Proctor's health insurance plan, which was largely self-funded—the hospital paid for members' covered medical costs up to \$250,000 each year, with costs in excess of that amount covered by the Standard Security Life Insurance Co. of New York. Throughout Dewitt's employment at the hospital, Dewitt's husband, Anthony, suffered from prostate cancer. His medical treatment was continuous and expensive and was paid for through the hospital's self-coverage.

Proctor reviewed medical coverage

costs periodically and documented medical claims in quarterly "stop-loss" reports, which listed all employees whose medical claims had exceeded \$25,000 within the quarter. Dewitt's claims were listed on reports in 2003, 2004 and 2005.

In September 2004, Dewitt was confronted by Davis, who told her that a committee was reviewing Anthony's medical expenses, which the hospital felt were unusually high; Davis then asked Dewitt about the type of treatment being received by Anthony for his cancer. When Dewitt responded that her husband received both chemotherapy and radiation, Davis asked whether she had considered hospice care, a less expensive alternative.

Dewitt responded that her husband's doctor considered hospice care to be premature. In February 2005, Davis again raised the treatment issue with Dewitt and was told that Anthony's status had not changed.

At a meeting of clinical managers in May 2005, Davis informed employees that the hospital was facing financial troubles and would take "creative" efforts to cut costs. On Aug. 3, 2005, Dewitt was fired and was designated as "ineligible for rehire." The hospital continued to provide medical benefits through the end of August; after that, Dewitt paid for COBRA coverage. Anthony Dewitt died on Aug. 6, 2006.

Dewitt filed a lawsuit against Proctor, alleging age, gender and disability discrimination claims. The district court granted summary judgment to the hospital on all

three claims. On appeal, the 7th Circuit upheld the dismissal of the age and gender claims, but reversed as to the ADA claim, finding a factual dispute on the issue of whether the hospital's action was based on "association discrimination." The 7th Circuit found that association discrimination may have motivated Proctor to fire Dewitt and that a jury should be allowed to decide the claim.

While Dewitt's case seems compelling, the concurring opinion by Judge Posner raises an interesting issue, and one that may have changed the outcome of the case. Posner pointed out that the hospital failed to produce any evidence of a nondiscriminatory reason for terminating Dewitt. If, in fact, that information had been available to the court, it may have allowed the case to be reviewed under the often used "shifting burden" analysis. Had the hospital been able to provide a legitimate business reason for Dewitt's termination, the burden would have shifted back to Dewitt to prove that the proffered reason was simply a pretext for discrimination.

Dewitt v. Proctor Hospital, 7th Cir., No. 07-1957 (Feb. 27, 2008).



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United States v. Approximately 64,695 Pounds of Shark Fins, No. 05-56274 (March 17, 2008) “We agree that neither the statute nor the regulations provided fair notice to TLH that it would be considered a fishing vessel under § 1802(18)(B). We therefore reverse the judgment of forfeiture and remand for further proceedings consistent with this opinion.”

Lanier v. City of Woodburn, No. 06-35262 (March 13, 2008) “This appeal requires us to decide whether the City of Woodburn’s policy requiring candidates of choice for city positions to pass a pre-employment drug test as a condition of the job offer is constitutional, facially or as applied to Janet Lynn Lanier, the preferred applicant for a part-time position as a page at the Woodburn Library. The dis-

“the City failed to demonstrate a special need to screen a prospective page for drugs”

trict court held that it was not. We agree that Woodburn’s policy is unconstitutional as applied because the City failed to demonstrate a special need to screen a prospective page for drugs, and affirm on this basis.

By the same token, Lanier did not show that the policy could never be constitutionally applied to any City position. We reverse the district court’s order to the extent it implies otherwise, and remand for its declaratory judgment to be clarified so that it is consistent with our holding.”

Porter v. Bowen, No. 06-55517 (March 13, 2008) “KLEINFELD, Circuit Judge, with whom Circuit Judges O’SANNLAIN and BEA join, dissenting from denial of rehearing en banc: I respectfully dissent.

This case is about whether the First Amendment protects from prosecution people who buy votes. Instead of cash, or beer and cigars, the buyers offered promises. The special twist, a very important one, was that the purpose of the scheme was to effectuate what amounted to people voting in states other than their own. The not very special twist is that instead of standing around the polling place to buy votes, or chartering buses to bring voters to other states, the scheme used internet sites to enable people to exchange promises. The deals were in the form, ‘if you promise to vote for my preferred candidate in your state, I will prom-

ise to vote for your preferred candidate in my state.’

During the 2000 election, Porter and the other plaintiffs set up internet sites, votexchange2000.com and voteswap2000.com, to facilitate vote swapping agreements. The vote swap2000.com site said that its purpose was “[t]o maximize the percentage of the popular vote that Nader receives, yet allow Gore to win the national election.” While voteswap2000.com targeted ‘[o]nly swing-state Nader supporters and safe-state Gore supporters,’³ at votexchange2000.com ‘any third-party supporter in a swing state could be matched with an appropriate major-party supporter in a safe state.’

The Secretary of State of California sent a letter to the voteswap2000.com owners threatening criminal prosecution under several California statutes relating to voting fraud and conspiracy. The central one prohibits anyone from making a ‘promise to pay . . . any money or other valuable consideration to . . . induce any voter to . . . vote for . . . any particular person.’ In response, both the websites disabled their mechanisms for facilitating the exchanges of promises. This evidently satis-

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fied the Secretary of State, and no one was prosecuted.

Our panel decision holds that by sending the letter threatening criminal prosecution, the Secretary of State ‘violated Appellants’ First Amendment rights.’ The theory seems to be that the sites expressed support for candidates, and the agreements they facilitated ‘involved’ political opinions, so the solicitations were constitutionally protected speech.

My disagreement with the panel opinion comes down to a syllogism: (1) vote buying is not protected by the First Amendment; (2) vote swap agreements are vote buying; so (3) vote swapping agreements are not protected by the First Amendment.

There is not much precedent on point, because few have had the chutzpah to argue that buying promises to vote for someone, or arranging for them, would be

constitutionally protected. *Brown v. Hartlage*, the only case relied upon by the panel, says the opposite of what the panel decision uses it for.”

Alvarez v. Hill, No. 06-35068 (March 13, 2008) “We revisit in this appeal the longstanding principle that federal complaints plead claims, not causes of action or statutes or legal theories. Blackie Alvarez brought suit alleging that prison officials substantially burdened his reli-



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gious exercise by denying him various accommodations. Those officials now insist that Alvarez's failure to specifically plead in his complaint a violation of the Religious Land Use and Institutionalized Persons Act of 2000, *see* 42 U.S.C. § 2000cc-1, bars his argument that the district court erred in not analyzing his religious exercise claims under RLUIPA, which establishes a more protective standard than does the First Amendment. They are plainly incorrect. We have jurisdiction under 28 U.S.C. § 1291, and we affirm in part, reverse in part and remand."

Clement v. City of Glendale, No. 05-56692 (March 11, 2008)
 "We determine the extent to which the Due Process Clause of the Fourteenth Amendment requires a state to provide notice before it may tow a vehicle parked in violation of state registration laws, if the owner has dutifully complied with an alternate form of registration."

"Officer Young could have avoided years of litigation and needless hassle for himself, the Glendale Police Department, the towing company, the courts, Ms. Clement and her daughter, by simply erring on the side of caution and good public service

by letting her know that her vehicle was illegally parked. Instead, the rush to tow led to this protracted litigation that, no doubt, has consumed far more city resources than it would

"Officer Young could have avoided years of litigation and needless hassle"

have taken to properly notify Clement."

"Officer Young did not violate Clement's clearly established right by calling for her car to be towed. The constitutional requirement at issue—that pre-towing notice be given before a car with a valid PNO certificate may be removed from a parking lot matching the owner's address—was not clearly established at the time of Officer Young's actions. Neither the text of the Constitution nor our caselaw clearly spoke to the balance between the rights of citizens to predeprivation notice and the authority of police to enforce registration statutes."

Budnick v. Town of Carefree, No. 06-15841 (March 11, 2008)

"Plaintiffs-Appellants, F.G. Budnick, and the development company of which he is the chief executive officer, Tempo, Inc. (collectively, Budnick), sued Defendants-Appellees, the Town of Carefree and four Town Council members (collectively, Carefree) after Carefree denied Budnick's request for a Special Use Permit (SUP) to build a multi-level continuing care retirement community in Carefree. Budnick claimed that by denying the SUP, Carefree had violated the Fair Housing Amendments Act of 1988 (FHAA), the Americans with Disabilities Act (ADA), 42 U.S.C. § 1983, the Rehabilitation Act, and Budnick's rights to due process and equal protection under the Fourteenth Amendment. The district court granted summary judgment in Carefree's favor on all claims. Budnick now appeals the district court's grant of summary judgment on his FHAA claim. We affirm the decision of the district court."

United States v. Rodriguez, No. 07-10 (March 10, 2008)
 "Defendant-Appellant Jose A. Rodriguez appeals from the district court's denial of his motion to suppress incriminating statements that he claims National Park Rangers obtained in violation of his *Miranda* rights. The

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district court held that, under *Davis v. United States*, 512 U.S. 452, 462 (1994), the Rangers did not have a duty to stop questioning Rodriguez because he did not unambiguously and unequivocally assert his right to silence in response to the Park Ranger's *Miranda* warning. We reverse, and hold that the 'clear statement' rule of *Davis* applies only *after* the police have already obtained an unambiguous and unequivocal waiver of *Miranda* rights. Prior to obtaining such a waiver, however, an officer must clarify the meaning of an ambiguous or equivocal response to the *Miranda* warning before proceeding with general interrogation."

Manufactured Home Communities, Inc. v. County of San Diego, No. 05-56401 (March 6, 2008) "We must decide whether a county supervisor's hostile public statements directed at a company owning and managing several local mobile home parks were actionable as a matter of law."

"On November 16, 2002, Defendant Jacob attended a tenants meeting at Lamplighter Park, where Defendant Jacob made several allegedly false statements about [Plaintiff], including the following: (1) statements that MHC is a greedy, profit-

driven company that enjoys forcing the elderly out of their homes in order to move in more expensive homes for a greater profit; (2) a statement that 'it would be interesting to see' if Plaintiff had engaged in any fraudulent actions; and (3) a statement that Defendant Jacob had spoken with County Counsel and District Attorney Bonnie Dumanis, who were 'very interested' in following up on

"We must decide whether a county supervisor's hostile public statements directed at a company owning and managing several local mobile home parks were actionable as a matter of law."

whether civil or criminal actions should be pursued against Plaintiff.

In a letter dated November 18, 2002, to Plaintiff's Chairman, Sam Zell, and distributed to Lamplighter Park tenants and attached to a subsequent civil complaint, Defendant Jacob

made the following allegedly false statements: (1) Plaintiff's actions were 'rent gouging at its worst' and indicative of 'corporate greed'; (2) some 'residents have already been forced to surrender their homes'; and (3) Plaintiff's rent increase was well above the 2003 Fair Market Rent of \$539 for manufactured home spaces.

On or about December 10, 2002, Defendant Jacob allegedly stated to local media that MHC had lied to the Department of Environmental Health about [Plaintiff's] clean-up effort in response to a sewage spill at Rancho Valley Mobile Home Park Defendant Jacob allegedly also stated: (1) that Plaintiff is a 'bad company' and that she wanted them 'out of town,' (2) that they 'shouldn't get away with' their lies, and (3) that she wanted 'to make sure that they're cited for every single offense . . . and whatever actions need to be taken are taken, civil [sic] or criminally.'"

"While the district court may have been correct in its assessment that each of these statements is properly interpreted as an assertion of opinion rather than fact, a reasonable factfinder could disagree with that assessment. It does not seem unrea-

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sonable to imagine, for instance, that a juror could conclude Jacob meant as a matter of fact that MHC had lied about the sewage situation, or that she meant it as fact that MHC had a reputation for driving out elderly tenants. Nor does it seem unreasonable to imagine a juror interpreting a statement about the intentions of the incoming district attorney as a statement of fact, rather than mere opinion. Indeed, the district court's decision, before concluding that this statement was not falsifiable, also declared that it was 'not factually untrue.' If the district court can assess the truth or falsity of the claim, that seems a strong indication that it was a provably false assertion of fact, and therefore actionable."

In re Copley Press, Inc., No. 07-72143 (March 4, 2008) "The public does have a First Amendment right to access the cooperation addendum to Higuera-Guerrero's plea agreement, the unredacted transcript of Higuera-Guerrero's plea colloquy, the transcripts of the public portions of the hearings on the motions to seal and the government's sealed May 21 memorandum. Though this right can be overcome by a compelling interest in some circumstances, the district court did not abuse its discretion in

unsealing the portions of these documents that describe Higuera-Guerrero's cooperation. However, the district court did abuse its discretion in unsealing those portions that describe the other people in danger."

United States v. Turvin, No. 06-30551 (February 26, 2008) "The government appeals from the district court's order suppressing evidence obtained from the search of Turvin's vehicle. While Turvin was waiting for a police officer to issue a traffic citation, the officer questioned Turvin about methamphetamine and obtained Turvin's consent to search his vehicle for contraband. The district court held that the officer's questions about methamphetamine and request to conduct a search, unsupported by reasonable suspicion, turned an initially reasonable detention into an unconstitutional one and rendered Turvin's consent involuntary. We have jurisdiction pursuant to 18 U.S.C. § 3731 and we reverse."

"We hold that *Mendez's* conclusion that officers do not need reasonable suspicion to ask questions unrelated to the purpose of an initially lawful stop applies here because Christensen's question and request for consent to search did not unrea-

sonably prolong the duration of the stop. Because we decide on this basis, we do not reach the issue of whether reasonable suspicion supported Christensen's questioning."

NOTE: The case below discusses the Federal Tort Claims Act standard for discretionary immunity—the standard adopted last October in *Martinez v. Maruszczak*, 168 P.3d 720 (2007) for determining a discretionary act under NRS ch. 41.

Terbush v. United States, No. 06-15033 (February 21, 2008) "This case illustrates the intersection of the National Park Service's mandate to open federal park lands for recreational use, the scope of NPS's obligation to provide for visitor safety, and the risks of mountain climbing. In 1999, Peter Terbush was killed by a rockslide in Yosemite National Park while climbing Glacier Point. His family filed claims under the Federal Tort Claims Act, 28 U.S.C. § 2671-2680, claiming that it was not a freak accident and that the NPS is responsible for creating unsafe conditions and failing to warn of the hazards it created. The district court dismissed for lack of subject matter jurisdic-

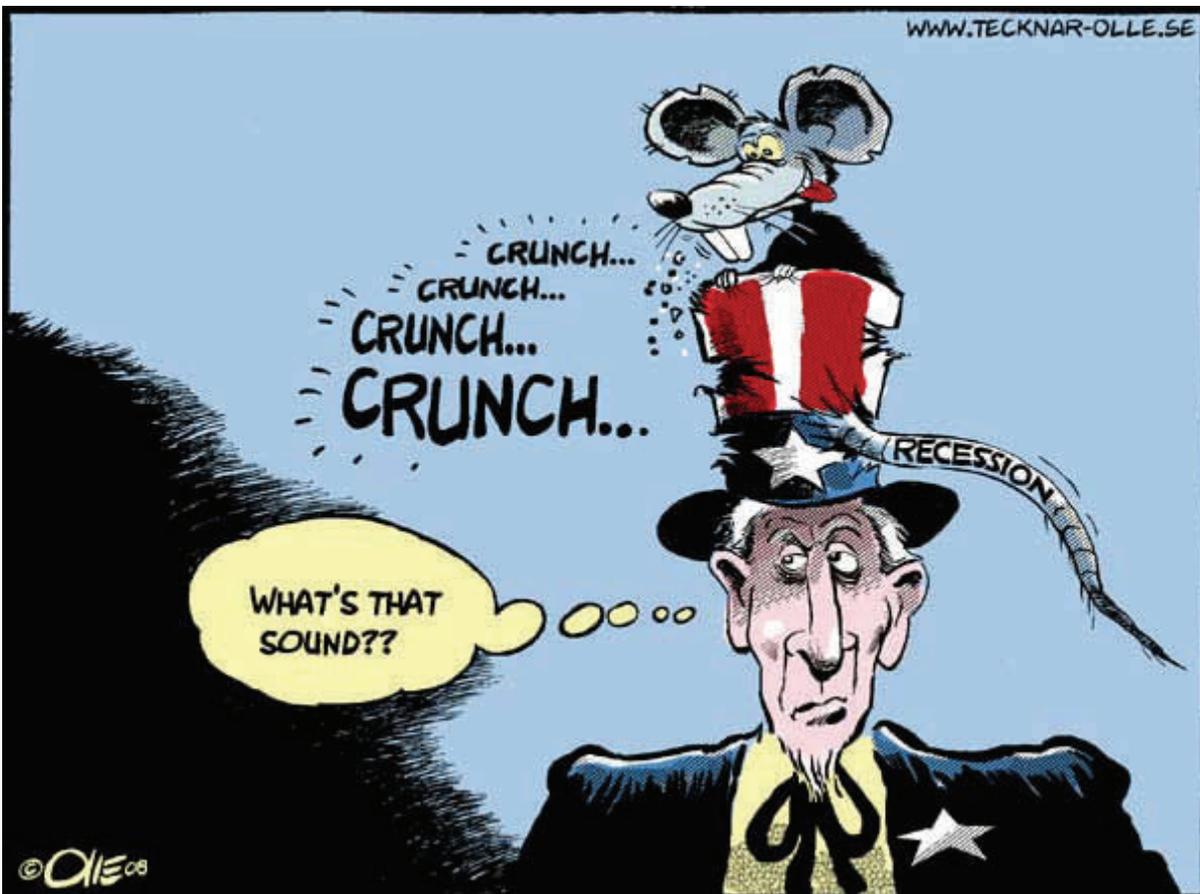
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tion on the ground that the NPS's actions fell within the discretionary function exception to the FTCA. We agree with the district court's analysis with respect to the failure to warn claims and those regarding the design and construction of the wastewater facilities, but the record is insufficient to rule as a matter of law on the Terbushes' maintenance claims, and so we reverse and remand on this issue.

The FTCA waives the government's sovereign immunity for tort claims arising out of negligent

conduct of government employees acting within the scope of their employment. The government can be sued 'under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.' 28 U.S.C. § 1346(b)(1). The FTCA includes a number of exceptions to this broad waiver of sovereign immunity, including the oft litigated 'discretionary function exception,' which provides immunity from suit for '[a]ny claim . . . based upon the exer-

cise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.' 28 U.S.C. § 2680(a). In this way, the discretionary function exception serves to insulate certain governmental decision-making from 'judicial 'second guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.' *United States v. S.A. Empresa de Viacao Aerea Rio*



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Grandense (Varig Airlines), 467 U.S. 797, 814 (1984).

The Supreme Court in *Berkovitz v. United States* set out a two-step analysis to determine applicability of the exception. See *Berkovitz v. United States*, 486 U.S. 531, 536-37 (1988). First, we must determine whether the challenged actions involve an ‘element of judgment or choice.’ *Gaubert*, 499 U.S. at 322. This inquiry looks at the ‘nature of the conduct, rather than the status of the actor’ and the discretionary element is not met where ‘a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow.’ *Berkovitz*, 486 U.S. at 536. If there is such a statute or policy directing mandatory and specific action, the inquiry comes to an end because there can be no element of discretion when an employee ‘has no rightful option but to adhere to the directive.’ *Id.*

When a specific course of action is not prescribed, however, an element of choice or judgment is likely involved in the decision or action. We then must consider ‘whether that judgment is of the kind that the discretionary function exception was designed to shield,’ namely, ‘only governmental

actions and decisions based on considerations of public policy.’ *Berkovitz*, 486 U.S. at 536-37. Public policy has been understood to include decisions ‘grounded in social, economic, or political policy.’ *Varig*, 467 U.S. at 814. Even if the decision is an abuse of the discretion granted, the exception will apply. See 28 U.S.C. § 2680(a); *Soldano v. United States*, 453 F.3d 1140, 1145 (9th Cir. 2006).

The distinction between protected and unprotected actions and decisions has proven itself to be a particularly vexing determination for district and appellate courts alike. As we noted recently, governmental actions ‘can be classified along a spectrum, ranging from those “totally divorced from the sphere of policy analysis,” such as driving a car, to those “fully grounded in regulatory policy,” such as the regulation and oversight of a bank.’ *Whisnant v. United States*, 400 F.3d 1177, 1181 (9th Cir. 2005) (quoting *O’Toole v. United States*, 295 F.3d 1029, 1035 (9th Cir. 2002)). Courts have been reluctant to create formulaic categories or to demarcate flashpoints on this spectrum to illuminate which governmental decisions fall within the discretionary function exception. See *GATX/Airlog Co.*, 286 F.3d at

1174 (‘Whether a challenged action falls within the discretionary function exception requires a particularized analysis of the specific agency action challenged.’); *Cope v. Scott*, 45 F.3d 445, 449 (D.C. Cir. 1995) (noting the Supreme Court’s rejection of ‘analytical frameworks’ as ‘inappropriate means of addressing the discretionary function exemption.’).

The Supreme Court underscored this point in *Gaubert*, when it rejected a bright line between planning and operational functions. See *Gaubert*, 499 U.S. at 325 (‘Discretionary conduct is not confined to the policy or planning level. “[I]t is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case.’’) (quoting *Varig*, 467 U.S. at 813). In *Gaubert*, a shareholder of an insolvent savings and loan association brought suit alleging negligent supervision of directors and officers and negligent involvement in day-today operations by federal regulators. *Id.* at 319-20. In clarifying its prior treatment of the issue, the Court rejected the plaintiff’s reliance on a misunderstanding of the law that created convenient, but false, distinctions: The Court noted that the Court of Appeals had

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‘misinterpreted’ *Berkovitz* to ‘perpetuat[e] a nonexistent dichotomy between discretionary functions and operational activities. . . .’ *Id.* at 326.

Instead of a rigid dichotomy between ‘planning’ and ‘operational’ decisions and activities, the Court in *Gaubert* adopted a different rule: ‘if a regulation allows the employee discretion, the very existence of the regulation creates a strong presumption that a discretionary act authorized by the regulation involves consideration of the same policies which led to the promulgation of the regulations.’ *Id.* at 324. Thus, ‘[w]hen established governmental policy, as express or implied by statute, regulation, or agency guidelines, allows a Government agent to exercise discretion, it must be presumed that the agent’s acts are grounded in policy when exercising that discretion.’ *Id.* Under *Gaubert*, for a complaint to survive a motion to dismiss, it must ‘allege facts which would support a finding that the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime.’ *Id.* at 324-25 (emphasis added). The Court clarified, ‘[t]he focus of the inquiry is not on the agent’s subjective intent in exercising the discretion conferred

by statute or regulation, but on the nature of the actions taken and on whether they are susceptible to policy analysis.’ *Id.* at 325.

B. APPLICATION OF THE DISCRETIONARY FUNCTION EXCEPTION TO THE TERBUSHES’ CLAIMS

Before discussing the Terbushes’ specific claims, as an initial matter we note that the authority for the NPS’s work is grounded in the Organic Act, 16 U.S.C. § 1, which sets forth the broad policy considerations that govern the NPS’s management of national parks. The Organic Act states the NPS’s purpose is ‘to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.’ 16 U.S.C. § 1. Much of the NPS’s work is ‘grounded’ in the Organic Act’s broad mandate to balance conservation and access. *See, e.g., Childers v. United States*, 40 F.3d 973, 975 (9th Cir. 1994). However, we do not quickly accept that every minute aspect of the NPS’s work is touched by the policy concerns of the Organic Act. *Cf. Gotha v. United States*, 115 F.3d 176 (3d Cir.

1997) (rejecting government’s argument that national security concerns were implicated in a decision of whether to install a staircase or bar passage down an embankment on a naval base). Accordingly, we must analyze each of the claims in light of the applicable policies and the Organic Act.

The Terbushes allege a collective failure by the NPS to provide for the safety of visitors to Glacier Point. They claim that once the NPS undertook to develop facilities atop Glacier Point, it could not do so negligently, either in the design, construction or maintenance of the facilities, or in the failure to warn the public of hazards. Specifically, they argue that the NPS was aware of the hidden hazard posed by the unnatural exfoliation of Glacier Point Apron by the wastewater management system, but failed to adequately ameliorate the problem through appropriate maintenance or warn the public of the hidden hazard they had effectively created. The Terbushes’ arguments amount to a ‘perfect storm’ theory wherein the NPS’s various failings over several decades built upon one another, making Peter Terbush’s death inevitable and, in their view, preventable by the NPS.”

GIRARD MILLER'S BENEFITS BEAT

Benefits for Younger vs. Older Workers

A new report by the Segal company reveals fresh insights into the factors that motivate public employees of various ages. Public managers are wise to pay close attention to these findings, because they suggest that money is seldom the answer.

The report sets forth five major categories of work satisfaction and motivation: pay, benefits, work content, career enhancement and organizational culture. As often reported elsewhere, pay proves to be the least motivating of the five factors! Work content gets the highest ratings, and career enhancement is a runner-up for younger workers. Benefits are second-place in the overall scoring, with roughly equal importance to workers young and old. For those familiar with public service, this may not come as a surprise. Most public servants don't start out in government for the pay, but they care about sufficiency of their benefits — which are often viewed as "making up" for lower pay. And work content and career development are now recognized as having financial value long beyond this month's paycheck, especially for younger workers.

Key motivational differences between older and younger workers are worth noting, as personnel managers and operat-

ing managers in government will need to differentiate their strategies depending on where talents are most needed.

First of all, it is generally the case that younger public employees are more satisfied with their organizations than older workers are. This includes many factors, such as the overall level of pay, the way pay is decided and communicated, and the raises received most recently. This may reflect an element of idealism and less cynicism than their older counterparts who have hit the top of their pay scales. Older workers are also likely to be more conscious of their career immobility and income limitations, and thus are focused more on financial security, especially health and retirement benefits.

Younger workers are also much more satisfied with the amount they must contribute toward health benefits, even though most employers do not differentiate by age. This could reflect higher actual expenses among older workers who pay more out-of-pocket for recurring medical expenses, whereas one-time pregnancy expenses tend to be the major cost factor facing younger workers.

So what can public managers learn from the Segal findings?

Here are two observations: Younger workers care most about their career, including training and job content. They want to be engaged in their work and not just put in their hours — although they also don't want to sacrifice their extracurricular lifestyle with extraordinary working hours. They rate these career factors highest in importance, yet lower in satisfaction than their elder colleagues. Thus, savvy managers will focus more attention on deeper professional interaction and providing challenging assignments to younger workers.

Older workers are less concerned about career development, presumably because they have already "settled in" and are more focused on bread-and-butter benefits such as retirement plans. Efforts to address retirement income security among older workers, by providing selective incentives to remain productively employed, will likely result in better retention of the workers that managers want to keep. All this suggests that targeted incentive-based retirement benefits may have a new role in HR management. This can be accomplished most easily through individually customized defined contribution incentives with retention-friendly vesting requirements.