

The Public Lawyer



STATE BAR OF NEVADA

Nevada Supreme Court Cases

Brooks v. State, 124 Nev. Adv. Op. No. 19 (April 3, 2008) “The primary issue in this appeal is whether the district court erred in refusing to instruct the jury what it was required to find to subject an unarmed offender to the deadly weapon enhancement in accordance with *Ander-son v. State* Although appellant Jamon Brooks’ proposed deadly weapon enhancement instruction

was a correct statement of the law, we take this opportunity to clarify the test used to determine when an unarmed offender is subject to the deadly weapon enhancement because the test in *Ander-son* is based on the elements of constructive possession rather than ‘use’ of a deadly weapon as provided in NRS 193.165. Specifically, we conclude that the proper focus is on the un-

armed offender’s knowledge of the use of the weapon brandished by another principal. Due to this and another instructional error in this case, we reverse Brooks’ judgment of conviction and remand this matter to the district court for a new trial.”

International Game Tech., Inc. v. Second Judicial Dist. Court, 124 Nev. Adv. Op.

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Where There's Smoke, There's Flames Legal Blog Watch

A blogger's posting about a lawyer-couple's lawsuit against their neighbor for her failure to abate cigarette smoke

seepage from her apartment into a common hallway ignited a swarm of flames against lawyers for their aggressive, obnoxious

and money-grubbing ways. The firestorm started with Simple Justice blogger Scott Greenfield's post criticizing John

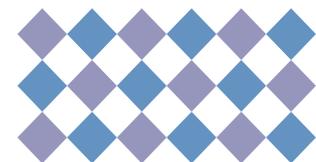
Public Lawyers Section

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Stossel's commentary that lawyers are parasites ruining America. As evidence of lawyers' bullying ways, Stossel cited a lawsuit by lawyers Jonathan and Jenny Selbin against their co-op neighbor, Galina Huff, demanding that she cease and desist from causing smoke to enter the common hallway. Greenfield initially agreed that the Selbins seemed unreasonable, though he later learned from an e-mail from the Selbins that they had made several attempts to negotiate with Huff before filing the suit. But disclosure of that information didn't do much to allay the swarm of nasty commentary, causing Greenfield to ponder why lawyers have such a bad rap.

However, perhaps the public has good reason to criticize the Selbins themselves -- albeit, not the entire legal profession. New York magazine suggests that the Selbins weren't as reasonable as they depicted themselves; among other things:

- They introduced the lawsuit by slipping a note under the neighbor's door that read: "As you may not be aware, we are both lawyers and both litigators, for whom the usual barriers to litigation are minimal."
- In the complaint, they referred to the

neighbor, Galila Huff, a quirky restaurant owner with a Chihuahua named Boo-Boo, as "evil."

- They complained that Huff had Boo-Boo urinate on their son's stroller in retaliation for their complaints.
- When ABC News pointed out that this was in fact New York City -- "There are lots of chimneys, and exhaust fumes from cars, trucks, and buses. How pristine does the air have to be?" -- Jonathan Selbin retorted, "Have you asked Ms. Huff how she would react if we put dog poison in the shared hallway?"

You might think that the suit was destined for trial with this kind of back and forth. However, this morning, the New York Times reported that the lawsuit has settled -- no thanks to either party. According to the :

Within days of publicity over the lawsuit, a company called Aerus, formerly known as Electrolux, offered to install a free air filtration system in both the Selbins' and Ms. Huff's apartments that the company said would clear the smoke. Joe Urso, CEO of Aerus, said that the filtration system had been installed and that he believed it was instrumental in driving the settle-

ment.

So basically, it took an air filter to clear the air between these feuding parties.

Unfortunately, it's the outrageous stories like this one or the \$65 million pants suit brought by administrative law judge Roy Pearson against his dry cleaner that gain so much press and, ultimately, tarnish the reputation of all of us lawyers.

Bullying Indiana Style Makes a (Limited) Comeback

Jottings by an Employer's Lawyer

by Michael Fox

Readers will know that in my ongoing campaign about the dangers of adoption of a "bullying" cause of action, one case that attracted considerable attention was that of a cardiac surgeon who was accused of being a workplace bully when he charged and yelled at a perfusionist (the fellow who operates the heart/lung machine during open heart surgery).

When the perfusionist sued the surgeon, his legal claims were intentional infliction of emotional distress and assault, but the trial strategy was to present Dr. Raess as a classic "workplace bully." The jury found for the surgeon on the intentional infliction

claim, but for the perfusionist on the assault claim and awarded \$325,000. See, *Is My One Man Quest Against Bullying Failing?*

On appeal the intermediate court threw out the award because the trial court allowed the testimony of a "bullying expert," Dr. Gary Namie and failed to give a requested instruction that "workplace bullying" was not an issue in the case and that there was no basis in the law for such a claim.

Unfortunately, for the those of us who see this as a very dangerous trend, the Indiana Supreme Court today reversed the appellate court and reinstated the judgment of the trial court. *Raess v. Doescher* (Ind. 4/8/08). Although it will certainly get more limited attention in any media reports on this case than it should, it is very important to understand the really narrow basis of the decision on the "bullying aspects" of the case.

The opinion addresses two: 1) was admitting the testimony of Dr. Gary Namie as a workplace bullying expert error? and 2) did the Court err when it refused to submit the proposed instruction?

Unfortunately, the answer was no to both. However, the

reason for the first was extremely limited -- the Court refused to decide the issue because it found the question of Dr. Namie's qualifications had not been preserved on appeal. (In defense of counsel for the surgeon, that seems to be a very strained reading of what happened.) The one dissenting judge makes clear that he not only found the error had been preserved but that he thought it was error to permit Dr. Namie's testimony. His view: Dr. Namie by his own testimony is not a clinical psychologist and is not qualified to testify as to how workplace bullying affected the plaintiff, and he did not testify on that subject. This is testimony characterizing an event, but offering no assistance to interpret or understand it. Without any context, the "workplace bullying" label is nothing more than highly prejudicial name-calling of no help to the jury.

On the issue of the instruction, the Court fell back to the argument that in order to be error it must first be a correct statement of the law. In language that will no doubt be utilized in other "bullying" cases the Court said: The tendered instruction advanced two concepts: (a) that "workplace bullying" was not an issue in the case, and (b) that the jury need not determine whether the defendant was a "workplace bully" to de-

cide the case. As to the first concept, we disagree. In determining whether the defendant assaulted the plaintiff or committed intentional infliction of emotional distress, the behavior of the defendant was very much an issue. The phrase "workplace bullying," like other general terms used to characterize a person's behavior, is an entirely appropriate consideration in determining the issues before the jury. As evidenced by the trial court's questions to counsel during pre-trial proceedings, workplace bullying could "be considered a form of intentional infliction of emotional distress."

The Court did cite the trial judge's statement that the parties could argue about workplace bullying not being an issue and pointing out that he was not giving an instruction that the case was about workplace bullying.

Hopefully any other Court cited this case as supportive of bringing bullying claims or offering "bullying" evidence, will see how limited it is.

It should be a case limited in its application; let's just hope that in trying to right one wrong, the Indiana Supreme Court has not opened the lid to a true Pandora's box. At a minimum, they certainly did nothing to help keep it shut.

Charlton Heston 1923-2008



Nevada Supreme Court Cases

(Continued from page 1)

No. 18 (March 27, 2008) “In this original petition for extraordinary relief, we examine statutory provisions that afford remedies to whistleblowers who are retaliated against for lawfully disclosing information regarding purportedly fraudulent activity in furtherance of Nevada’s False Claims Act (FCA). In particular, we address whether the FCA’s anti-retaliation remedies are limited to those whistleblower employees whose employers pressured or attempted to pressure them into participating in the reported fraudulent activity.

In the underlying matter, a former employee filed a complaint for FCA whistleblower protections, alleging that his employer had retaliated against him for disclosing allegedly fraudulent activity. The employee, however, did not allege that his employer had pressured or attempted to pressure him into participating in the reported activity. In a motion to dismiss the employee’s complaint, the employer argued that dismissal was required because, under NRS 357.250(2)(b), the employee was not entitled to recover unless he asserted and proved that the employer had in some manner pressured him to participate in the alleg-

edly fraudulent activity. When the district court denied the motion to dismiss, the instant petition for a writ of mandamus followed.

Thus, in this writ petition, we are asked to compel the district court to dismiss a whistleblower complaint seeking protections against retaliatory employment actions that purportedly resulted from an employee’s lawful disclosure of allegedly fraudulent activity. But the statute under which dismissal is sought, NRS 357.250(2)(b), applies only when the employee has actually participated in the purportedly fraudulent activity, thereby preventing any such employee from recovering unless he or she can show that the employer pressured him or her into that activity. As a result, the employee here was not obliged to allege in his complaint that his employer pressured him to participate in fraudulent activity. Instead, such an assertion of employer pressure becomes necessary for recovery only upon a showing that the employee participated in the fraudulent activity. Accordingly, we deny this petition.”

Andersen Family Assocs. v. State Engineer, 124 Nev. Adv. Op. No. 17 (March 27, 2008) “In this appeal, we ad-

dress whether an entity can lose its vested rights to utilize certain water flow—rights that it acquired before the adoption of Nevada’s statutory water law scheme—when a permit modifying those rights is canceled and later reinstated pursuant to NRS 533.395. For the reasons set forth below, we conclude that the cancellation and later reinstatement of a permit modifying an entity’s prestatutory vested water rights cannot result in the entity losing its priority to use that water flow because Nevada law prevents such rights from impairment by statute. In reaching this conclusion, however, we reiterate that prestatutory vested water rights are subject to state regulation, and the holders of such rights must comply with state permit requirements when seeking to modify the use of their vested rights.”

In re Orpheus Trust, 124 Nev. Adv. Op. No. 16 (March 27, 2008) “In this appeal, we examine a question of first impression under Nevada law: whether a special trustee’s power, under NRS 164.795, to adjust amounts of trust income and principal distributed to a trust income beneficiary and the trust corpus may be exercised with respect to principal and income accrued before the special trustee’s ap-

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pointment. Because the power to adjust is a corrective power, we conclude that, at a minimum, a special trustee may adjust between principal and income accrued in the year immediately preceding the special trustee's appointment. Because under NRS 164.725(7) the beneficiary challenging the propriety of any proposed adjustment bears the burden of demonstrating that the trustee did not appropriately comply with the requirements set forth in NRS 164.795(1) and (2), we conclude that the district court in this case did not hold the challenging beneficiary to his appropriate burden. Accordingly, we remand this matter to the district court for further proceedings."

Sparks Nugget, Inc. v. State ex rel. Dep't of Taxation, 124 Nev. Adv. Op. No. 15 (March 27, 2008) In this appeal, we confront an issue of constitutional importance to Nevada: whether businesses in this state are required to pay sales or use tax on meals that they provide free of charge to patrons and employees. Article 10, Section 3(A) of the Nevada Constitution establishes a sales and use tax exemption for most "food for human consumption." Appellant contends that complimentary patron and employee

meals are exempted under this provision because the uncooked food used to prepare those meals qualified as "food for human consumption" at the time of its initial purchase, and no taxable event occurred thereafter. We agree. Since no taxable event occurred between the time appellant initially purchased the food used to prepare complimentary meals (in a tax-exempt transaction) and the time appellant gave those meals away, the meals were exempt from sales and use taxation under the plain and unambiguous language of the Nevada Constitution"

Public Employees' Benefits Program. v. Las Vegas Metro. Police Dep't, 124 Nev. Adv. Op. No. 14 (March 20, 2008) "This appeal raises important questions of statutory interpretation, with potentially far-reaching consequences, regarding local government employers' obligation to subsidize the health insurance premiums of their retirees who choose to participate in the State Public Employees' Benefits Program (PEBP). Local government employees may elect to join PEBP upon retirement if the health benefits they obtained during employment fall within a statutorily described health care program. If an employee who was

covered by one of those statutory health care programs joins PEBP upon retirement, the former local government employer must, under a different statute, subsidize the retiree's PEBP premiums."

"Given these statutory provisions, the primary question raised here is whether local government employers must pay the subsidy for their retirees who joined PEBP, even though, before retirement, those local government employees' health insurance benefits were provided through a collectively bargained-for health trust. To answer this question, we necessarily determine whether a collectively bargained-for health trust is one of the types of statutorily described health care programs that qualifies local government employees to enroll with PEBP in the first instance. If a collectively bargained-for health trust does constitute such a qualifying health care program, the second issue is whether the statutory subsidy for PEBP premiums applies to retirees who joined PEBP before the subsidy statute's effective date."



Boot These Five Dumb Office Practices

By The Assistant-at-Law
Texas Lawyer
March 19, 2008

Most firms are striding proudly into the 21st century, investing in technology, finding more efficient ways to work and touting these advances to clients. Yet behind the scenes, large remnants of yesterday's procedures remain, like house guests who have overstayed their welcomes. They get in the way, cramp our styles and eat up much of our saved time and money.

Here are just a few of the biggest wasters of law firm time and resources.

E-mail: a tree's worst nightmare. In one particular case, I have more than 700 e-mails waiting to be entered into the electronic database. After entering them, I must print them all and place them in correspondence folders. This is in addition to more than 3,000 e-mails I've already processed over the case's three-year life.

I'm not likely to ever finish archiving that mountain of e-mail. As a legal secretary, I have briefs to file, dockets to maintain, travel to arrange, discovery to draft and telephone calls to answer. Fortu-

nately, no one is likely to notice my backlog, since no one actually reads e-mails in the file or in the database. When lawyers want to see e-mails, they do the obvious: read them in Outlook.

While a court might hold that e-mail correspondence is equal to paper or fax in every legal sense, it does not follow that e-mails must be filed in the same way. They are too brief, repetitive, convoluted and numerous for traditional methods of archiving. Filling drawers full of folders with reams of printed e-mails is a stunning waste of time, trees, money and space. It's time legal secretaries, paralegals and, yes, even lawyers started using the built-in archiving function that comes with e-mail software.

Correspondence deja vu. I receive a letter by fax, enter it into the database and file a paper copy. Three days later, I receive by mail what appears to be a second copy of the same letter. But a good legal secretary never assumes two documents are identical just because they appear so at first glance. It takes a careful comparison to be sure.

If only I could have back all the time I've spent analyzing incoming mail to make sure it

is, indeed, something we've already received by e-mail, fax or both. And this doesn't even count the time I spend sending my own lawyers' correspondence by two or three different means.

There was a time when new communication technologies remained untested and a little suspect, but that time is long past. If anything, e-mails and faxes are more reliable than physical mail.

Some attorneys are wont to claim nonreceipt of anything that wasn't sent at least two different ways, but they are a small minority. For everyone else, multiple sending is a waste of time and resources.

Courts can be just as susceptible to this problem as lawyers. One year into its mandatory electronic filing and service program, the U.S. District Court for the Southern District of Texas still sends orders by fax as well as e-mail. Why?

E-file, then refile. Opposing counsel e-files a lengthy brief and appendix with the court. Instantly, my lawyer and I receive an e-mail containing a link to the filed document, and I print the file-marked copy. But three days later, a 6-inch stack of paper arrives in the mail from opposing counsel --

the same brief and appendix, not file-marked. It's trash I can't throw away. Somehow, I have to shoehorn it into my bulging file cabinets.

I know of no court that offers e-filing and still requires service of paper copies on e-filing registrants. Lawyers who persist in this practice should have their computers confiscated.

The \$2,000 typewriter. I'm asked to revise and prepare for filing a Microsoft Word document someone else created. Upon opening it, I find a hodgepodge of hard returns, tabs, page breaks, manual numbering and direct formatting. I feverishly rework the document, because I understand the pitfalls of treating Word like a typewriter, and I've seen the embarrassment that can result. Then, I pray the original typist doesn't work on the document again before it's safely filed with the court.

Firms must acknowledge the time and money they waste by not providing adequate training to everyone who creates documents. It's time to stop this hemorrhaging of profits and make good word processing practices mandatory for all personnel.

The paper chase. I send a lengthy document to the printer I share with eight other people. The phone rings, then one of my lawyers needs something, and I forget my print job. An hour later, I check the printer and my document has vanished. After a fruitless search of the piles of unclaimed print jobs littering the table, I give up and send my job again. This time, I rush to the printer to claim my pages before they can disappear, and I find them mysteriously reordered. The only way I can ensure they're in the correct sequence is by printing them a third time.

When will the bean counters realize shared printers are *more* costly, not less? Aside

from the reams of wasted paper, the gallons of toner and the needless wear on printer components, there are the hours staff and lawyers spend printing everything multiple times and sifting through stacks of unclaimed pages.

One foot in the current century is not enough. Firms must drag that second foot over the technology threshold and enter the Information Age fully and finally. Anyone with suggestions on how to effect that change can find me easily: I'll be at my desk, printing e-mails.



NINTH CIRCUIT CASES

United States v. Vasquez-Ramos, No. 06-50553 (April 10, 2008) “Mario Manuel Vasquez-Ramos and Luis Manuel Rodriguez-Martinez (Defendants) were charged by information for possessing feathers and talons of bald and golden eagles and other migratory birds without a permit in violation of the Bald and Golden Eagle Protection Act (BGEPA), 16 U.S.C. §§ 668-668d, and the Migratory Bird Treaty Act (MBTA), 16 U.S.C. §§ 703-712. They moved to dismiss the information claiming that prosecuting their possession of the feathers and talons violated the Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb-1 to 2000bb-4. In *United States v. Antoine*, 318 F.3d 919, 924 (9th Cir. 2003), under nearly identical facts, we held that there was no RFRA violation. *Antoine* remains binding law in our circuit, and we affirm the district court’s order denying Defendants’ motion to dismiss.”

Council of Ins. Agents & Brokers v. Molasky-Arman, No. 04-17271 (April 10, 2008) “On cross-motions for summary judgment, the district court declared Nevada’s ‘countersignature’ statute, Nev. Rev. Stat. § 680A.300, unconstitutional, holding that it violates the Privileges and

Immunities Clause of Article IV and the Equal Protection Clause of the Fourteenth Amendment. 358 F. Supp. 2d 981, 982-83. The district court stayed its injunction pending appeal, and Defendant-Appellant Alice Molasky-Arman, Nevada Commissioner of Insurance (the Commissioner), now appeals. We have jurisdiction under 28 U.S.C. § 1291, and we affirm and remand.”

Brown v. City of Los Angeles, No. 06-55699 (April 10, 2008) “Plaintiffs Darryl Brown and Martin Whitfield were injured in the line of duty as officers of the City of Los Angeles Police Department. They both applied for benefits under LAPD’s disability retirement pension, which contains an offset: disability pension payments are reduced by the amount of any worker’s compensation award the officer receives for the disabling injury. Plaintiffs claim that the offset amounts to disability discrimination. They sued the City in state court, alleging violations of (1) Title II of the Americans with Disabilities Act of 1990, (2) California’s Fair Employment and Housing Act, and (3) 42 U.S.C. § 1983. After the City removed the case to federal court, the district court granted its motion for summary judgment

and denied Plaintiffs’ cross-motion. Plaintiffs timely appealed. We affirm.”

Richter v. Hickman, No. 06-15614 (April 9, 2008) “Appellants in these two consolidated cases were jointly convicted of murder, attempted murder, robbery and burglary in California state court. They were sentenced to life in prison without the possibility of parole. In the present action, they appeal the district court’s denial of writs of habeas corpus. Appellants allege that they received ineffective assistance of counsel at trial in violation of *Strickland v. Washington*, 466 U.S. 668 (1984). Appellants further allege that the prosecution suppressed exculpatory evidence at trial in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). Appellant Christian Branscombe argues that his trial counsel failed to engage in ‘meaningful adversarial testing’ in violation of *United States v. Cronin*, 466 U.S. 648 (1984). Appellant Joshua Richter alleges that the trial court violated his Eighth Amendment right to a jury trial and Fourteenth Amendment right to due process by providing an incorrect or inaccurate answer to a question of law posed by the jury to the trial court. We affirm the district court’s denial of appel-

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lants' habeas petitions."

United States v. Stringer, No. 06-30100 (April 4, 2008) "The United States appeals from a final order of the district court dismissing criminal indictments against three individual defendants charging counts of criminal securities violations. The dismissal was premised on the district court's conclusion that the government had engaged in deceitful conduct, in violation of defendants' due process rights, by simultaneously pursuing civil and criminal investigations of defendants' alleged falsification of the financial records of their high-tech camera sales company.

Foreseeing the possibility of an appeal, the district court held that the indictments must be dismissed, but ruled in the alternative that, should there be a criminal trial, all evidence provided by the individual defendants in response to Securities and Exchange Commission subpoenas should be suppressed. *See United States v. Stringer*, 408 F. Supp. 2d 1083 (D. Or. 2006). The court also suppressed evidence relating to the "Swedish Drop Shipment," an allegedly fraudulent accounting entry. The district court reasoned that the government had improperly interfered with, or

intruded into, the attorney-client relationship of one of the defendants by accepting incriminating evidence about the entry from a defense attorney. The attorney had an apparent conflict of interest because she represented the corporation as well as an individual defendant.

We vacate the dismissal of the indictments because in a standard form it sent to the defendants, the government fully disclosed the possibility that information received in the course of the civil investigation could be used for criminal proceedings. There was no deceit; rather, at most, there was a government decision not to conduct the criminal investigation openly, a decision we hold the government was free to make. There is nothing improper about the government undertaking simultaneous criminal and civil investigations, and nothing in the government's actual conduct of those investigations amounted to deceit or an affirmative misrepresentation justifying the rare sanction of dismissal of criminal charges or suppression of evidence received in the course of the investigations.

We also reverse the order excluding evidence received from the conflicted attorney. We do

so because the government advised the attorney of the existence of a potential conflict and did not interfere with the attorney-client relationship."

Miller v. Davis, No. 06-55538 (April 2, 2008) "The California Constitution authorizes the Governor to review a state parole board's decision granting, denying, revoking, or suspending parole 'of a person sentenced to an indeterminate term upon conviction of murder.' Cal. Const. art. V, § 8(b). We are asked to decide whether the Governor is entitled to absolute quasi-judicial immunity for his reversal of a parole board's grant of parole where he erroneously extends his authority to review parole decisions to an individual convicted of *conspiracy* to commit murder. We hold that he is. Accordingly, we affirm the district court's dismissal of the plaintiff's 42 U.S.C. § 1983 claims against former Governor Gray Davis."

Osborne v. Dist. Attorney's Office, No. 06-35875 (April 2, 2008) "William Osborne, an Alaska prisoner, brought this action under 42 U.S.C. § 1983 to compel the District Attorney's Office in Anchorage to allow him post-conviction access to biological evidence—semen from a used condom and two hairs—that was used

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to convict him in 1994 of kidnapping and sexual assault. Osborne, who maintains his factual innocence, intends to subject the evidence, at his expense, to STR and mitochondrial DNA testing, methods that were unavailable at the time of his trial and are capable of conclusively excluding him as the source of the DNA. In a prior appeal, *Osborne v. District Attorney's Office*, 423 F.3d 1050, 1056 (9th Cir. 2005) (hereinafter *Osborne I*), we held that *Heck v. Humphrey* does not bar Osborne's § 1983 action because, even if successful, it will not necessarily demonstrate the invalidity of his conviction. We also remanded for the district court to address in the first instance whether the denial of access to the evidence violates Osborne's federally protected rights.

In this post-remand appeal, we affirm the judgment of the district court that, under the unique and specific facts of this case and assuming the availability of the evidence in question, Osborne has a limited due process right of access to the evidence for purposes of post-conviction DNA testing, which might either confirm his guilt or provide strong evidence upon which he may seek post-conviction relief."

Mendiondo v. Centinela Hosp. Med. Ctr., No. 06-55981 (April 1, 2008) "The parties dispute whether a FCA retaliation claim must meet the notice pleading standard in Rule 8(a) or the heightened pleading standard in Rule 9(b). Rule 8(a) requires that a pleading contain 'a short and plain statement of the claim showing that the pleader is entitled to relief.' Fed. R. Civ. P. 8(a)(2). Rule 8(a) applies to all civil claims except those containing averments of 'fraud or mistake,' which must be pleaded with particularity under Rule 9(b). Fed. R. Civ. P. 8, 9. The Supreme Court has narrowly construed Rule 9(b) to apply only to the types of actions enumerated in the rule—those alleging fraud or mistake—and has not extended the heightened pleading standard to other legal theories. See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 513 (2002) (declining to apply Rule 9(b) to claims for violations of 42 U.S.C. § 1983 or employment discrimination claims).

Because the FCA is an anti-fraud statute and requires fraud allegations, complaints alleging a FCA violation must fulfill the requirements of Rule 9(b). *Bly-Magee v. California*, 236 F.3d 1014, 1018 (9th Cir. 2001). In this case,

however, we are presented only with Mendiondo's FCA retaliation claim, not a FCA violation claim. In the only federal appellate decision addressing the pleading standard for a FCA retaliation claim, the First Circuit concluded that, unlike a FCA violation claim, a FCA retaliation claim 'does not require a showing of fraud and therefore need not meet the heightened pleading requirements of Rule 9(b).' *United States ex rel. Karvelas v. Melrose-Wakefield Hosp.*, 360 F.3d 220, 238 n.23 (1st Cir. 2004). We agree."

Davis v. Team Elec. Co., No. 05-35877 (March 28, 2008) "In this sexual discrimination action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., electrician Christie Davis contends that her former employer, Team Electric Company, treated her worse than the male employees at a work site that had no other women until she contacted the state civil rights agency; retaliated against her for filing a discrimination complaint with the agency; and failed to prevent her supervisors from creating and maintaining a hostile work environment. The district court granted Team Electric's motion for summary judgment on all claims. We reverse. "

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Card v. City of Everett, No. 05-35996 (March 26, 2008) “Jesse Card appeals the district court’s award of summary judgment to the City of Everett on his claim that the City’s display of a six-foot tall granite monument inscribed with the Ten Commandments on the grounds of the Everett Old City Hall violates the Establishment Clauses of the Constitutions of the United States and the State of Washington. In 2005, the Supreme Court issued decisions in *Van Orden v. Perry*, 545 U.S. 677 (2005) and *McCreary County v. ACLU*, 545 U.S. 844 (2005), both of which addressed the issues presented here, and the former of which involved a monument of virtually identical design and origin to the monument at issue here. The Court concluded that the display on the grounds of the Texas State Capitol in *Van Orden* is constitutional, but struck down as unconstitutional the Kentucky monument display at issue in *McCreary*. Although the circumstances of the Ten Commandments’ installation in the City of Everett vary slightly from those surrounding the Texas monument, we must agree with the district court that *Van Orden*, particularly Justice Breyer’s concurring—and determinative—

analysis, controls the decision here.

We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.”

United States v. Carty, No. 05-10200 (March 24, 2008) “Core principles having now been resolved by the Supreme Court, we are left with one open question presented by *Carty* and *Zavala*: whether to adopt an appellate ‘presumption’ of reasonableness for sentences imposed within the Guidelines range. We decline to do so, although we recognize that a correctly calculated Guidelines sentence will normally not be found unreasonable on appeal. Applying *Rita*, *Gall* and *Kimbrough*, we conclude that there was no significant procedural error in either *Carty* or *Zavala*, and that the sentences imposed were not unreasonable. Accordingly, we affirm in each case.”

Pierce v. County v. County of Orange, No. 05-55829 (March 24, 2008) “In 2001, plaintiffs-appellants Fred Pierce, Timothy Lee Conn, Fermin Valenzuela, and Laurie D. Ellerston—pretrial detainees in Orange County’s jail facilities—initiated *Pierce v. County of Orange*, No. 05-55829 (D. Ct. No. 01-981), a class action suit against the

County of Orange and Michael S. Carona, the county’s sheriff and agent. Seeking relief under 42 U.S.C. § 1983 for violations of their Fourteenth Amendment due process rights, plaintiffs contend, in essence, that the Orange County jails are operated in an unconstitutional manner, depriving them of opportunities for exercise, unduly limiting their access to common areas, and impermissibly restricting their ability to practice religion.”

“Having conducted a thorough review of the extensive pre-trial and trial record, we affirm in part and reverse in part. We affirm the district court’s pre-trial and evidentiary rulings challenged by the plaintiffs; the district court did not abuse its discretion in its pre-trial management of the case or its decisions related to the admission of evidence. On the merits, we affirm the district court’s termination of nearly all of the fourteen *Stewart* orders at issue. Two of those orders, however, which secure inmates housed in administrative segregation some minimal access to religious services and exercise, may not be terminated. The district court clearly erred in its finding that these two orders are unnecessary to correct a current and ongoing vio-

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lation of a Federal right. We likewise conclude that, because of physical barriers that deny disabled inmates access to certain prison facilities (bathrooms, showers, exercise and other common areas), and because of disparate programs and services offered to disabled versus nondisabled inmates, the County is in violation of the ADA.”

Canyon County v. Syngenta Seeds, No. 06-35112 (March 21, 2008) “This case involves an Idaho county’s attempt to recover damages under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968, for additional monies it claims to have expended on public health care and law enforcement services for undocumented immigrants. Plaintiff-appellant Canyon County commenced this action against four companies and one individual under RICO’s civil enforcement provision, 18 U.S.C. § 1964(c), alleging that defendants engaged in an illegal scheme of hiring and/or harboring undocumented immigrant workers within the County, and that their actions forced the County to pay ‘millions of dollars for health care services and criminal justice services for the illegal immigrants.’”

“The district court concluded

that the County did not have statutory standing under § 1964(c) because the County did not meet the threshold requirement that a civil plaintiff be ‘injured in his business or property’ by reason of the alleged RICO violation. Consequently, the court dismissed the County’s complaint.”

United States v. Davenport, No. 06-30596 (March 20, 2008) “We have jurisdiction pursuant to 28 U.S.C. § 1291, and we determine that Davenport’s simultaneous conviction for both receipt and possession of child pornography violates the Fifth Amendment’s prohibition on double jeopardy. We reverse and remand to the district court for further proceedings consistent with this opinion.”

“The Fifth Amendment’s prohibition on double jeopardy protects against being punished twice for a single criminal offense. U.S. Const. amend. V.; *Brown v. Ohio*, 432 U.S. 161, 165 (1977). When multiple sentences are imposed in the same trial, ‘the role of the constitutional guarantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense.’ *Brown*, 432 U.S. at 165. When a defendant has violated two

different criminal statutes, the double jeopardy prohibition is implicated when both statutes prohibit the same offense or when one offense is a lesser included offense of the other. *Rutledge v. United States*, 517 U.S. 292, 297 (1996). To determine whether two statutory provisions prohibit the same offense, we must examine each provision to determine if it ‘requires proof of a[n additional] fact which the other does not.’ *Blockburger v. United States*, 284 U.S. 299, 304 (1932); *Ball v. United States*, 470 U.S. 856, 861 (1985); *United States v. Williams*, 291 F.3d 1180, 1186-87 (9th Cir. 2002), *overruled on other grounds by United States v. Gonzales*, 506 F.3d 940 (9th Cir. 2007) (en banc). We also employ this analysis, commonly known as the *Blockburger* test, to determine whether one offense is a lesser included offense of another. *Rutledge*, 517 U.S. at 297. If two different criminal statutory provisions indeed punish the same offense or one is a lesser included offense of the other, then conviction under both is presumed to violate congressional intent. *See Missouri v. Hunter*, 459 U.S. 359, 366-67 (1983).”



Calif. State Workers Protest Salary Database Publication

www.govtech.com

Mar 17, 2008, By Gina M. Scott

A Sacramento newspaper has come under fire for publishing information on California state workers. Names, salaries, job classifications and work locations have been made available through a searchable database on the newspaper's Web site.

The issue of most concern has been the privacy of state employees. By including the names and work locations of the workers, claim some, such a database could jeopardize the safety of individuals whose information is made available.

Service Employees International Union (SEIU) Local 1000 President Jim Hard and California State Employees Association (CSEA) President Dave Hart met with the Sacramento Bee's editorial staff last week.

Following the meeting, Hard said The Bee was not receptive to removing names, even when a state workers' safety is an issue.

"They won't guarantee the name will be removed from the database," Hard said following the meeting. "I'm dis-

gusted by the paper's crass commercialism and callous disregard for our members' safety."

"We have considered this issue again today in light of the complaints but do not believe we are publishing information that could not easily be obtained from other public sources," countered The Bee said in a statement. "State workers' names and locations, for instance, are available online through the state government employee directory. So is other information, such as employees' e-mail addresses, that we have not published."

Susan, a CalTrans manager, says she doesn't remember signing away her privacy when she became a state worker.

"I was sickened when I saw what was on there," she said. "I felt like I can be tracked down by people I worked with and I feel like I'm vulnerable."

The database was designed as a public resource, The Bee explained.

"The Bee did not set out to embarrass anyone or to invade anyone's privacy -- government pay is public record, not private information," claimed

The Bee. "In California, salary data is public information, and some of this information has been published previously by The Bee along with other publications or by government entities."

"If they wanted the public to have information, they could have listed the positions, number of people in those positions and salary range," said Debbie, an employee of the Franchise Tax Board. "[The Bee] should not have published names and where the people worked."

"Our union is in favor of access of information to the public and I don't have an issue with the salaries being available on this database," Hard said. "But the names of our members being on the database -- what is the news value in that?"

