

The Public Lawyer



STATE BAR OF NEVADA

Nevada Supreme Court Cases

Barney v. Mt. Rose Heating & Air No. 47300 (September 18, 2008) “NRS 108.237(1) entitles a prevailing mechanic’s lien claimant to the enforcement proceedings’ costs, including reasonable attorney fees. This appeal concerns three issues with regard to that statute. First, we consider whether NRS 108.237(1) contains within its scope attorney fees that are incurred after the district court enters a judgment determining the lienable amount and foreclosing upon the lien. We conclude that NRS 108.237(1) covers all attorney fees incurred to enforce a mechanic’s lien before the judgment is satisfied and the lien is discharged or released, and thus, any postjudgment attorney fees incidental to the lien’s enforcement through foreclosure are available under that statute.

Accordingly, here, as the district court had authority under NRS 108.237(1) to award attorney fees incurred postjudgment, we next review the prevailing lien claimant’s attorney fees award to determine whether the fees were

reasonable. Since the district court failed to provide any analysis or specific findings regarding the reasonableness of the fees awarded, and as it appears that some of the fees awarded were not reasonable because they ostensibly pertained to matters unrelated to the mechanic’s lien’s enforcement through foreclosure or matters on which the lien claimant did not prevail, we conclude that the district court abused its discretion.

Finally, we determine whether the district court erred in denying a postjudgment motion to enter satisfaction of the judgment. Because we have determined that a lien claimant is entitled to attorney fees incurred postjudgment under NRS 108.237(1) and a motion for such fees remained pending at the time payment in satisfaction of the judgment was tendered, we conclude that the district court correctly refused to compel satisfaction of the judgment, since the payment only partially satisfied the judgment.”

Public Lawyers
Section

September 2008



Inside this issue:

Ninth Circuit Cases 7

Compiled and edited by
Justin Tully. Please send
any comments or ideas to
justin.tully@lvvwd.com

Nevada Supreme Court Cases

Mitchell v. State No. 48840 (September 18, 2008)
“In this appeal, we principally consider whether the district court violated appellant Donald Mitchell’s Fifth Amendment privilege against self-incrimination when the court ordered him to undergo a compulsory psychiatric examination after he claimed that he justifiably fired in self-defense because his post-traumatic stress disorder caused him to suffer from a heightened threat perception. We conclude that Mitchell’s Fifth Amendment rights were not violated because he placed his mental state directly at issue. Concluding otherwise would permit him to enjoy the unfair asymmetry of being able to introduce defense expert witness testimony based upon personal interviews while denying State expert witnesses the same access. Mitchell also asserts a variety of other contentions, all of which we conclude lack merit. Accordingly, we affirm Mitchell’s conviction for second-degree murder with the use of a deadly weapon.”

Ferguson v. State No. 48420 (September 11, 2008)
“In this criminal appeal, we consider whether the Eighth Judicial District Court improperly delegated the adjudication of all competency matters to a particular district court judge. We further consider whether the district court is required to grant a defendant a hearing as to competency upon the defendant’s return from a mental health facility.

We conclude that under the Eighth Judicial District Court Rules (EDCR), the Eighth Judicial District may assign the determination of all initial competency matters (NRS 178.415 and NRS 178.455) to a particular district court judge; however, the determination of a defendant’s ongoing competency thereafter and during trial must vest with the trial judge who has been assigned to hear the matter. In addition, upon a defendant’s return from a mental health facility where the defendant has been deemed competent to stand trial, the district court

upon a timely request must afford the defendant a hearing wherein the defendant is afforded the opportunity to examine the members of the treatment team regarding their report. Moreover, a defendant’s right to a hearing cannot be waived when the challenge is based on the defendant not having the sufficient present ability to consult with defense counsel with a reasonable degree of rational understanding or on the defendant not having a rational, as well as factual, understanding of the proceedings against him or her.

Accordingly, we conclude that the district court erred in not affording appellant Angelo Ferguson a hearing as to competency after he had returned from a mental health facility. While Ferguson’s request for a hearing may have been untimely under the relevant statute, he should have been afforded a hearing as to competency because his request for a hearing was based in part on a claim that he did not have the sufficient present ability to consult with defense counsel. We further conclude that defense counsel raised sufficient doubt as to Ferguson’s competency. As a result, we reverse the judgment of conviction and remand this matter for a new trial, so long as Ferguson is found to be competent to stand trial.”

Picetti v. State No. 50342 (September 11, 2008)
“In this appeal, we consider whether a guilty plea canvass involving a mass advisement of rights, followed by an individual colloquy wherein the district court failed to ensure that the defendant was present during the mass advisement and understood his rights, renders a prior conviction unconstitutional. We agree that it would be better practice for courts engaging in mass advisements to follow up those advisements with an individual colloquy which demonstrates that each particular defendant

Nevada Supreme Court Cases

heard and understood his rights. Nevertheless, we conclude that the mass advisements and individual colloquies involved here are constitutionally sufficient because the justice court appropriately informed appellant Paul Picetti of: (1) the nature of the charges against him, (2) his right to be represented by counsel, and (3) the range of allowable punishments he could receive as a result of his guilty plea. We further conclude that the State met its burden to establish the validity of Picetti's prior convictions for driving under the influence (DUI) because it demonstrated that Picetti was informed of his right to counsel and that his prior DUI convictions met the spirit of constitutionality.

In this appeal we also decide whether a recently enacted statute (NRS 484.37941), which allows certain third-time DUI offenders who plead guilty to apply for treatment and, upon successful completion of an approved treatment program, to be convicted of a misdemeanor DUI, applies to an offender who both committed his offense and pleaded guilty prior to the new statute's effective date. We conclude that it does not. Instead, we conclude that NRS 484.37941 applies only to those offenders who entered guilty pleas on or after July 1, 2007, the statute's effective date. Picetti also raises several issues regarding the constitutionality of NRS 484.37941. However, because we conclude that this statute does not apply to Picetti, we decline to address those issues in the instant case."

Adaven Mgmt. v. Mountain Falls Acquisition No. 48429 (September 11, 2008) "In this appeal, we consider whether water rights may be transferred separately from the property to which they are appurtenant without prior sev-

erance under NRS 533.040. We also consider whether the anti-speculation doctrine adopted by this court in *Bacher v. State Engineer*[2] limits the ability to acquire a security or ownership interest in a water right separately from the land to which the right is appurtenant. Because NRS 533.040 and the anti-speculation doctrine focus on maintaining water's beneficial use, not its ownership, we conclude that such transfers are not limited by either NRS 533.040 or the anti-speculation doctrine.

Finally, having determined that water rights are freely alienable, we address appellant Adaven Management, Inc.'s argument that, even though the water rights at issue had been sold before Adaven bought the land to which they were appurtenant, it nevertheless owns the water rights because they were purchased with the land and without notice of the prior sale. We conclude that Adaven has failed to demonstrate that a genuine issue of material fact exists concerning whether it had notice of respondents' prior recorded interest in the water rights at issue. Therefore, we affirm the district court's grant of summary judgment in this quiet title action."

Chartier v. State No. 47908 (September 11, 2008) "The primary issue in this appeal is whether the district court abused its discretion in failing to sever appellant John Douglas Chartier's trial from that of his codefendant, David Wilcox. We conclude that the district court abused its discretion in failing to sever Chartier's trial from Wilcox's trial. Chartier suffered unfair prejudice because the cumulative effect of the joint trial violated Chartier's right to a fair trial by preventing the jury from making a reliable judgment as to his guilt or innocence. For this reason, we reverse the judgment of conviction and remand to the district court for a new trial."

Nevada Supreme Court Cases

Boulder City v. Boulder Excavating No. 47761 (September 11, 2008) “In this appeal, we consider when it is appropriate to afford government entities discretionary immunity under NRS 41.032(2) in the context of accepting and rejecting bids for public works projects. More specifically, we examine whether a government entity can be held liable in tort for replacing a subcontractor on a public works project bid before accepting the contractor’s bid, based on the guidelines for accepting and rejecting bids for public works projects set forth in NRS Chapter 338, which contains the Nevada public bidding laws. Because the agent of the government entity in this case was engaged in an act involving individual judgment based on policy considerations under NRS Chapter 338, within the scope of his employment, and because no independent theory of liability was advanced against the government entity, we conclude that the government entity enjoys discretionary immunity from suit.”

Countrywide Home Loans v. Thitchener No. 46499 (September 11, 2008) “This appeal and cross-appeal from a district court order in a breach of contract and tort action arising from improper foreclosure proceedings involve several compensatory and punitive damage award issues. With respect to compensatory damages, since respondents/cross-appellants’ actual losses did not exceed the damages that they incurred to their real and personal property, we conclude that they were not entitled to recover separately under breach of contract and negligence theories in addition to theories of trespass and conversion. Moreover, we conclude that the district court inappropriately trebled the jury’s award for trespass and conversion as it relates to personal property. In the remaining portions of the compensatory damages awarded, we perceive no error.

Regarding the punitive damage award, we conclude that the award was supported by substantial evidence, and we affirm the district court’s judgment in that respect. In doing so, we take this opportunity to clarify our punitive damages jurisprudence in light of NRS 42.001. In 1995, the Legislature enacted NRS 42.001, which defines implied malice as a distinct basis for punitive damages in Nevada and establishes a common mental element for implied malice and oppression based on conscious disregard. We now clarify this mental element in accord with its statutory definition and align our jurisprudence with NRS 42.001 in the following two respects. First, we overrule *Granite Construction v. Rhyne* as a guide to determining the showing required to demonstrate conscious disregard under NRS 42.001(1). Second, we retreat from our past use of the term “unconscionable irresponsibility” to describe the outer limit of culpable conduct that would escape liability for punitive damages in Nevada. Separately, we conclude that NRS 42.007 governs vicarious employer liability for punitive damages and overrule *Smith’s Food & Drug Centers v. Bellegarde* to the extent that its common law approach conflicts with this statute.”

Dutchess Bus. Servs. v. State, Bd. of Pharm. No. 46345 (September 11, 2008) “On May 29, 2008, this court issued an opinion in this matter affirming in part and reversing in part the district court’s order and remanding with instructions. Subsequently, appellants filed a petition for rehearing of that decision. On July 17, 2008, this court withdrew the prior opinion pending resolution of the petition for rehearing. After reviewing the rehearing petition, as well as the briefs and appendix, we conclude that rehearing is warranted under NRAP 40(c)(2), and we grant the petition for rehearing. We now issue this opin-

Nevada Supreme Court Cases

ion in place of our prior opinion.

In this case, two pharmaceutical wholesalers appeal from the district court's denial of a petition for judicial review of an order by respondent Nevada State Board of Pharmacy revoking the wholesalers' licenses for violations of Nevada's statutes and regulations governing the secondary prescription drug market. After a disciplinary hearing, the Board found that appellants Dutchess Business Services, Inc., and its successor company, Legend Pharmaceuticals, Inc., violated numerous sections of the Nevada Revised Statutes and the Nevada Administrative Code; therefore, the Board revoked Dutchess's and Legend's wholesaler's licenses and imposed fines on the entities. Dutchess and Legend appeal on multiple grounds, four of which raise issues of first impression.

Specifically, after addressing the Board's jurisdiction to discipline Dutchess and Legend for conduct that occurred outside of Nevada, we consider the following issues in the context of resolving Dutchess and Legend's appellate contentions: an administrative agency's discretion concerning joinder in an administrative proceeding; an administrative agency's discretion with respect to discovery in an administrative proceeding; whether intent must be proven to render an entity liable for violating NRS 585.520(1), which prohibits "[t]he manufacture, sale or delivery, holding or offering for sale of any food, drug, device or cosmetic that is adulterated or misbranded"; and whether a wholesaler that has established an ongoing relationship with a pharmaceutical manufacturer must nonetheless provide a pedigree when reselling the prescription drugs under NAC 639.603(1). Concerning an administrative agency's discretion to decide joinder and discovery issues dur-

ing an administrative proceeding, we conclude that in the absence of a rule, statute, or regulation governing the type of proceeding before the agency, issues such as joinder and discovery are generally left to the agency's discretion. With regard to determining liability under NRS 585.520(1), because the plain language of that statute does not require intent for its violation, we conclude that the Board may find that a licensee violated NRS 585.520(1) without proving a licensee's intent to cause harm or violate the statute. And with respect to NAC 639.603(1)'s pedigree requirement, that regulation plainly requires authorized distributors to provide pedigrees on subsequent sales of prescription drugs if they purchased the drug from another wholesaler, even if the wholesaler has established an ongoing relationship with the pharmaceutical manufacturer. After addressing those issues, we resolve Dutchess and Legend's remaining contentions."

LVCVA v. Secretary of State No. 51509 (September 4, 2008) "These are consolidated appeals and cross-appeals concerning three initiative petitions.

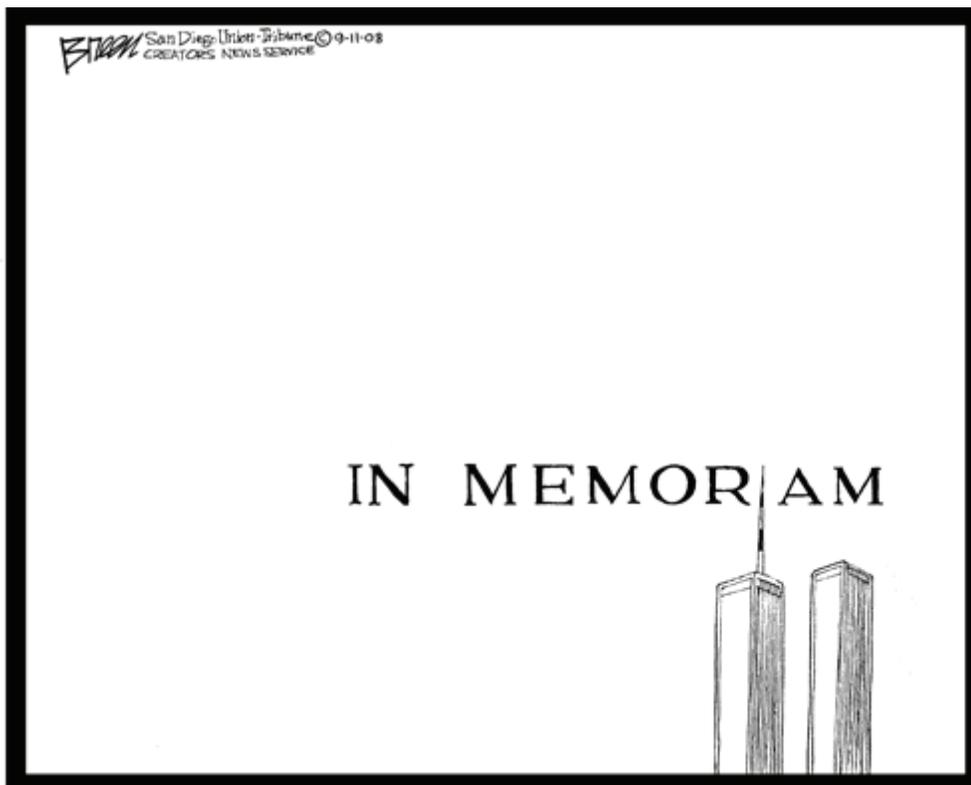
These appeals present a fundamental procedural question—whether the initiatives' circulators' failure to include statutorily mandated language in their affidavits verifying the signature-gathering process voids the signatures collected. Under this court's precedent, the initiative circulators' affidavits must substantially comply with certain statutory requirements. Here, the circulators' affidavits completely failed to include two statements mandated by NRS 295.0575: first, they do not state the number of signatures on the document, and second, they do not state that each signer had an opportunity to read the full text of the initiative before signing. We conclude that the affidavits do not substantially comply with the

Nevada Supreme Court Cases

statutory requirements. Moreover, the proponents' efforts in the district court to cure the affidavits' defects were insufficient because the proponents failed to make a valid offer of proof necessary to show whether the circulators nevertheless complied with the statute's purposes.

In addressing these issues, we reject the proponents' First Amendment challenge to enforcement of NRS 295.0575's affidavit requirements, as the United States Supreme Court has implicitly approved of requirements similar to those at issue here. We also reject the proponents' argument that enforcement of the statute is barred by substantive due process concerns or estoppel. We therefore affirm the district court's judgment approving the decision of the Secretary of State to strike the signatures."

Pentagon Memorial
Opens on 7th Anniversary
of September the 11th,
2001.



NINTH CIRCUIT CASES

Fairbanks North Star v. United States Army No. 07-35545 (September 12, 2008) “The Clean Water Act (‘CWA’) makes it unlawful to discharge dredged and fill material into the waters of the United States except in accord with a permitting regime jointly administered by the Army Corps of Engineers (‘Corps’) and the Environmental Protection Agency (‘EPA’). See *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 123 (1985). Fairbanks North Star Borough (‘Fairbanks’) seeks judicial review of a Corps’ ‘approved jurisdictional determination,’ which is a written, formal statement of the agency’s view that Fairbanks’ property contained waters of the United States and would be subject to regulation under the CWA. We have jurisdiction under 28 U.S.C. § 1291, and we affirm the district court’s dismissal on the pleadings for lack of jurisdiction. The Corps’ approved jurisdictional determination is not final agency action within the meaning of the Administrative Procedure Act (‘APA’), 5 U.S.C. § 704.”

Sprint Telephony PCS v. County of San Diego No. 05-56076 (September 11, 2008) “The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in U.S.C. Titles 15, 18 & 47) (‘the Act’), precludes state and local governments from enacting ordinances that prohibit or have the effect of prohibiting the provision of telecommunications services, including wireless services. In 2003, Defendant County of San Diego enacted its Wireless Telecommunications Facilities ordinance. San Diego County Ordinance No. 9549, § 1 (codified as San Diego County Zoning Ord. §§ 6980-6991, 7352 (‘the Ordinance’)). The Ordinance imposes restrictions and permit requirements on the construction and location of wireless telecommunications facilities. Plaintiff Sprint Telephony PCS alleges that, on its face, the Ordinance prohibits or has the effect of

prohibiting the provision of wireless telecommunications services, in violation of the Act. The district court permanently enjoined the County from enforcing the Ordinance, and a three-judge panel of this court affirmed. *Sprint Telephony PCS, L.P. v. County of San Diego*, 490 F.3d 700 (9th Cir. 2007). We granted rehearing en banc, 527 F.3d 791 (9th Cir. 2008), and we now reverse.”

United States v. Waknine No. 06-50521 (September 10, 2008) “Hai Waknine appeals his sentence of 121 months of imprisonment and \$646,000 in restitution payments imposed by the district court after he pleaded guilty to one count of racketeer influenced and corrupt organizations (‘RICO’) conspiracy, in violation of 18 U.S.C. § 1962(d), for laundering proceeds by embezzling from the Tel Aviv Trade Bank and brokering loans through extortion. He argues that (1) the government violated the plea agreement by not orally recommending at the sentencing hearing a 108-month prison term pursuant to the plea agreement, (2) the district court violated Rule 32 of the Federal Rules of Criminal Procedure by not giving the government an opportunity to speak at the sentencing hearing, (3) the district court committed procedural error by not considering the 18 U.S.C. § 3553(a) factors before imposing his sentence, and (4) the district court erred in its restitution calculation. Waknine also asks us to remand this case to a different district judge. We have jurisdiction under 28 U.S.C. § 1291. We conclude that there was plain error in the sentencing, and we therefore vacate the sentence, and remand with instructions for the district court properly to calculate the United States Sentencing Guidelines range, to discuss the 18 U.S.C. § 3553(a) factors in rendering sentence, and to comply with Rule 32 of the Federal Rules of Criminal Procedure

NINTH CIRCUIT CASES

by permitting each party to be heard before announcing the sentence. We also vacate the district court's restitution order, and remand for recalculation and explanation of restitution payments. Finally, we reject Waknine's request for a new sentencing judge."

EEOC v. FedEx No. 06-16964 (September 9, 2008) "We consider three issues pertaining to Federal Express Corporation's ('FedEx') refusal to comply with an administrative subpoena issued by the Equal Employment Opportunity Commission ('EEOC' or 'Commission'). First, we consider whether FedEx's compliance with an administrative subpoena in another case, which resulted in FedEx providing the EEOC with the same information that the EEOC seeks to compel in this case, moots this appeal. We hold that it does not. Second, we consider, as a matter of first impression, whether the EEOC retains the authority to issue an administrative subpoena against an employer after a charging party has been issued a right-to-sue notice and instituted a private action. We hold that the EEOC does. Third and finally, we consider whether the EEOC subpoena in this case, which does not seek direct evidence of discrimination, but instead, seeks general employment files in order to help the EEOC draft future information requests, seeks evidence 'relevant' to a charge of systemic discrimination. We hold that it does. In light of these holdings, we affirm the district court's decision to enforce the administrative subpoena."

South Ferry LP v. Killinger No. 06-35511 (September 9, 2008) "Defendants-Appellants Kerry Killinger ('Killinger'), Thomas Casey ('Casey'), Deanna Oppenheimer ('Oppenheimer') and Washington Mutual, Inc. ('WAMU', collectively, 'Defendants') appeal the district court's partial denial of their motion to dismiss a securities

fraud action brought by Plaintiffs-Appellees South Ferry LP et al. ('South Ferry'), who allege violations of Sections 10(b) and 20(a) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78j(b), 78t(a), and its underlying regulations, found at Rule 10b-5, 17 C.F.R. § 240.10b-5. Defendants argue that the district court erred by inferring that Defendants had knowledge of 'core operations' at WAMU based on their management positions and argue that such an inference does not satisfy the heightened pleading requirements of the Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u-4(b)(2) ('PSLRA'). The district court certified for interlocutory appeal its order granting in part and denying in part defendants' motion to dismiss. We have jurisdiction pursuant to 28 U.S.C. § 1292(b), vacate the district court's order, and remand."

Townsend v. University of Alaska 07-35993 (September 5, 2008) "Robert David Townsend sued his former employer, the University of Alaska, Fairbanks, in federal district court, alleging violations of the Uniformed Services Employment and Reemployment Rights Act of 1994 ('USERRA' or the 'Act'), 38 U.S.C. §§ 4301-4333. The district court dismissed his action, concluding that it lacked jurisdiction over a USERRA claim brought by an individual against an arm of the state. The district court also denied Townsend's motion to amend his complaint to add individual state supervisors as defendants, reasoning that such an amendment would be futile because the court would still lack jurisdiction over the amended complaint. Townsend timely appealed. We must decide whether a federal district court has jurisdiction over an USERRA action brought by an individual against an arm of a state, and whether USERRA creates a private right of

NINTH CIRCUIT CASES

action against individual state supervisors. We hold that a federal district court lacks jurisdiction over a USERRA action brought by an individual against a state and that USERRA does not create a cause of action against state employee-supervisors. We thus affirm the district court.”

Wong v. Bush 07-16799 (September 5, 2008)
“Plaintiff-Appellants (‘Appellants’), many of

bor, the United States Coast Guard violated their First Amendment right to free speech, the National Environmental Policy Act (‘NEPA’), and 50 U.S.C. § 191 and 33C.F.R. § 165.30, which govern the Coast Guard’s authority to create security zones safeguarding United States waters and harbors. We have jurisdiction pursuant to 28 U.S.C. § 1292(a)(1). Because the issue presented is ‘capable of repetition, yet evading re-



whom participated in protests on August 26 and 27, 2007, oppose the Hawaii Superferry’s (‘HSF’) operation to the Nawiliwili Harbor in Kauai, Hawaii, alleging that it is illegal. Appellants appeal the district court’s denial of their motion for declaratory relief, a temporary restraining order, a preliminary injunction, and a permanent injunction. They contend that by establishing a security zone to enable the HSF to dock at Nawiliwili Har-

view,’ it is not moot. See *Fed. Election Comm’n v. Wis. Right to Life, Inc.*, 127 S. Ct. 2652, 2662 (2007). We affirm.”

N.B. v. Hellgate Elementary District 07-35018 (September 4, 2008) “Appellants, minor C.B. and his parents (collectively ‘Appellants’), allege that Hellgate Elementary School District (‘Hellgate’) violated the Individuals with Dis-

NINTH CIRCUIT CASES

abilities Education Act ('IDEA'), 20 U.S.C. § 1400, by failing to provide minor C.B. with a free appropriate public education ('FAPE'). Appellants appeal from the district court's order, affirming the hearing officer's findings of fact, conclusions of law, and order that found Hellgate did not violate the IDEA. On appeal, Appellants argue that C.B.'s procedural and substantive rights under the IDEA were violated. Appellants assert that Hellgate failed to meet its procedural obligation under the IDEA to evaluate C.B. to determine whether he was autistic. Appellants also contend that C.B. was denied his substantive rights under the IDEA when Hellgate denied him extended school year ('ESY') services. We vacate and remand the district court's order that Hellgate was not liable for violating C.B.'s procedural rights under the IDEA. We conclude that Hellgate did not fulfill its procedural requirements under the IDEA to evaluate C.B. We affirm the district court's decision that Hellgate did not violate C.B.'s substantive rights in denying ESY services.

Paulino v. Harrison 07-55429 (September 4, 2008) "Delbert Paulino ('Paulino'), an African-American male, was tried and convicted of second degree robbery, kidnaping for robbery, and first degree murder in Los Angeles County Superior Court. He is currently serving a life sentence, plus one year, without the possibility of parole. In his 28 U.S.C. § 2254 habeas petition, Paulino alleges that the jury that convicted him was unconstitutionally constituted, in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986). We previously considered this petition in *Paulino v. Castro* ('Paulino I'), 371 F.3d 1083 (9th Cir. 2004), where we held that Paulino had established a prima facie case of discrimination and remanded his petition to the district court for an evidentiary hearing. After conducting that hearing, the district court granted Paulino's habeas petition. We have jurisdiction under

28 U.S.C. § 1291, and we affirm."

Cox v. Del Papa No. 06-15106 (September 4, 2008) "We must decide whether the Constitution requires that a trial court conduct a *sua sponte* examination of a criminal defendant's *Miranda* waiver when his competency to stand trial has been raised."

"Cox first argues that because the state trial court received psychiatric evaluations that revealed some doubts as to his competency to stand trial, the court should also have ordered, *sua sponte*, a hearing on his cognitive ability to waive his *Miranda* rights."

"In sum, after scouring the record for mitigating evidence that counsel failed to present—and in light of Cox's failure to present any such evidence on his own—we must conclude that counsel's investigation was appropriate and reasonable in light of the facts and issues in this case and the applicable AEDPA deferential standard of review. Therefore, the Nevada Supreme Court's denial of relief, despite Cox's claim of ineffective assistance of counsel at resentencing, cannot be said to be 'contrary to, or . . . an unreasonable application of, clearly established Federal law, as determined by the Supreme Court.' § 2254."

For the foregoing reasons, the decision of the district court denying federal habeas relief is AFFIRMED."

American Bankers' Association v. Lockyer No. 05-17163 (September 4, 2008) "This case comes before us for the second time. See *Am. Bankers Ass'n v. Gould*, 412 F.3d 1081 (9th Cir. 2005). In 2003, the California State Legislature enacted the California Financial Information

NINTH CIRCUIT CASES

Privacy Act ('SB1'), Cal. Fin. Code §§ 4050-4060, 'for financial institutions to provide their consumers notice and meaningful choice about how consumers' nonpublic personal information is shared or sold by their financial institutions,' id. § 4051(a). Plaintiffs American Bankers Association, The Financial Services Roundtable, and Consumer Bankers Association filed suit, alleging that the federal Fair Credit Reporting Act ('FCRA'), 15 U.S.C. §§ 1681-1681x, preempted SB1's regulation of information sharing between financial institutions and their affiliates.

Previously, we held that the affiliate-sharing preemption clause of the FCRA, 15 U.S.C. § 1681t(b)(2), preempted the affiliate-sharing provision of SB1, Cal. Fin. Code § 4053(b)(1), 'insofar as [SB1] attempts to regulate the communication between affiliates of 'information,' as that term is used in [15 U.S.C.] § 1681a(d)(1),' *Am. Bankers Ass'n*, 412 F.3d at 1087, which defines 'consumer report' information under the FCRA. We remanded to 'determine whether, applying this restricted meaning of 'information,' any portion of the affiliate-sharing provisions of SB1 survives preemption and, if so, whether it is severable from the portion that does not.' Id. On remand, the district court held that no portion of section 4053(b)(1) survives preemption and that, even if a portion did survive, the court lacked the power to sever the preempted applications. Accordingly, the court enjoined enforcement of section 4053(b)(1) 'to the extent [that it is] preempted by 15 U.S.C. [§] 1681t(b)(2),' which, the court ruled, meant the statute in its entirety. On de novo review, *Silvas v. E*Trade Mortgage Corp.*, 514 F.3d 1001, 1004 (9th Cir. 2008) (preemption); *Ariz. Libertarian Party, Inc. v. Bayless*, 351 F.3d 1277, 1283 (9th Cir. 2003) (

per curiam) (severability), we reverse and remand. We hold that section 4053(b)(1) has non-preempted applications and that California law requires that we reform section 4053(b)(1) to sever its preempted applications.

Whitman v. Mineta 05-36231 (September 2, 2008) "Terry Whitman ('Whitman') was employed by the Federal Aviation Administration ('FAA') as a Flight Data Specialist at the Anchorage Air Route Traffic Control Center. Whitman filed suit against the FAA, alleging violations of the Age Discrimination in Employment Act ('ADEA'), 29 U.S.C. § 633a et seq. Whitman alleged that his employer discriminated against him when it promoted a student intern to a full-time salaried position which he sought, and when it denied Whitman's request for an extension of a work detail. Whitman also alleged that his employer retaliated against him when he filed a formal complaint of age discrimination.

The district court dismissed Whitman's retaliation claim after concluding that the ADEA did not permit a claim for retaliation against a federal employer. The district court granted summary judgment to the FAA on the remaining claims of age discrimination. We reverse and remand in part, and affirm in part."

Richards v. Richards No. 06-56562 (August 28, 2008) "Nationwide Life Insurance Company ('Nationwide') brought this non-statutory interpleader action to resolve conflicting claims to the proceeds of a one million dollar insurance policy written on the life of Bryan Richards ('Bryan'), who was murdered on December 21, 2001. Bryan's wife, Angelina Richards ('Angelina'), appeals the district court's judgment against her and in favor of Bryan's brother, Keith Richards ('Keith'), in his role as guardian ad litem for

NINTH CIRCUIT CASES

Bryce and Kendall Richards ('Bryce' and 'Kendall'), the two minor children of Bryan and Angelina. Following a bench trial, the district court made a factual determination that Angelina conspired in, aided, and abetted Bryan's murder,

340B covered entities' — are able to purchase prescription drugs at a discount from drug manufacturers under a standardized agreement between the federal government and the drug companies. During 2003, for example, these covered



BAD NEWS. A SQUIRREL GOT IN THE SUPERCOLLIDER AND OPENED UP A BLACK HOLE THAT'S SUCKING UP INVESTMENT BANKS.

9/19

and thus is disqualified from receiving any proceeds of the life insurance policy under California law. Angelina asserts error in the district court's treatment of her pretrial assertion of the Fifth Amendment privilege against self-incrimination and in its admission of the deposition testimony of witness Gerald Strebendt. We have jurisdiction under 28 U.S.C. § 1291, and we affirm."

County of Santa Clara v. Astra USA, Inc. No. 06-16471 (August 27, 2008) "Certain federally funded medical clinics — so-called 'Section

entities spent \$3.4 billion on outpatient prescription drugs. They claim in this lawsuit that they have been overcharged for those drugs in violation of pharmaceutical pricing agreements between the Secretary of Health and Human Services ('Secretary') and the drug manufacturer defendants-appellees ('Manufacturers'). Applying the federal common law of contracts, we hold that the covered entities are intended direct beneficiaries of these agreements and thus have the right to enforce the agreements' discount provisions against the Manufacturers and sue them for reimbursement of excess payments. We

NINTH CIRCUIT CASES

have jurisdiction under 28 U.S.C. § 1291, and reverse the district court's dismissal of the complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim."

CPATH v. The Office of U.S. Trade No. 06-16682 (August 22, 2008) "The 'fairly balanced' membership requirement, imposed by the Federal Advisory Committee Act ('FACA') and applied to the Trade Act of 1974 ('Trade Act'), is not reviewable because those statutes provide us with no meaningful standards to apply. The district court therefore properly dismissed the complaint by the Center for Policy Analysis on Trade and Health, California Public Health Association - North, Chinese Progressive Association, and Physicians for Social Responsibility (collectively, 'CPATH'). We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

United States v. Hernandez-Orellana No. 06-50584 (August 20, 2008) "Today, we address the question left open in *United States v. Lopez*, 484 F.3d 1186 (9th Cir. 2007) (en banc), to explain what actions render a co-conspirator criminally liable for an alien smuggling conspiracy for profit even though there is no evidence that the conspirator herself committed an actual overt act of smuggling aliens across the border but other coconspirators did. We hold that a reasonable jury could have determined that Maritza Olmeda Drewry (Drewry) and Norma Hernandez-Orellana (Hernandez) participated in a conspiracy to bring aliens from Mexico to the United States for financial gain in violation of 18 U.S.C. § 371 and 8 U.S.C. § 1324. We conclude that our en banc decision in *Lopez* decided during the pendency of this case compels the reversal of Drewry's and Hernandez's convictions on the substantive 'bringing

to' counts, 8 U.S.C. § 1324(a)(2)(B)(ii). We therefore affirm in part and reverse in part the judgment of the district court. Because it is unclear whether the district court would have imposed the same sentence in light of our decision to reverse the substantive bringing to counts, we also remand for resentencing.

Boschetto v. Hansing No. 06-16595 (August 20, 2008) "This appeal presents a question that remains surprisingly unanswered by the circuit courts: Does the sale of an item via the eBay Internet auction site provide sufficient 'minimum contacts' to support personal jurisdiction over a non-resident defendant in the buyer's forum state? Plaintiff-Appellant Paul Boschetto ('Boschetto') was the winning bidder for a 1964 Ford Galaxie sold on eBay by the Defendant-Appellee, Jeffrey Hansing ('Hansing') for \$34,106. Boschetto arranged for the car to be shipped from Wisconsin to California, but upon arrival it failed to meet his expectations or the advertised description. Boschetto sued in federal court; his complaint was dismissed for lack of personal jurisdiction. We now affirm."

Hurlic v. Southern California Gas Co. No. 06-55599 (August 20, 2008) "David Hurlic, Susanna Selesky, and others similarly situated ('Plaintiffs') appeal the district court's dismissal of the entirety of their lawsuit against Southern California Gas Company ('SCGC') and the SCGC Pension Plan ('the Plan'). Plaintiffs allege that SCGC's 1998 amendment of the Plan violated both the Employee Retirement Income Security Act of 1974 (ERISA) and the California Fair Employment and Housing Act (FEHA). We have jurisdiction pursuant to 28 U.S.C. § 1291. We affirm in part, reverse in part, and remand.

This appeal requires our court to consider, for the

NINTH CIRCUIT CASES

first time, whether pension plans utilizing a so-called cash balance formula (‘cash balance plans’) violate various provisions of ERISA and FEHA. We join four of our sister circuits and hold that cash balance plans do not violate 29 U.S.C. § 1054(b)(1)(H), an anti-age discrimination provision of ERISA. We also hold that cash balance plans do not violate 29 U.S.C. § 1054(b)(1)(B), one of ERISA’s ‘antibackloading’ provisions. We further hold that ERISA preempts Plaintiffs’ state law FEHA claim. Thus, we affirm the district court’s dismissal of those claims. However, because Plaintiffs’ complaint adequately alleged that SCGC and the Plan violated ERISA’s notice requirement, we hold that the district court erred by dismissing that claim.”

El Comite v. Helliker No. 06-16000 (August 20, 2008) “This case involves a challenge under § 304 of the Clean Air Act (‘CAA’), *see* 42 U.S.C. § 7604(a), known as the citizen suit provision. A coalition of community organizations (‘El Comité’) brought suit against California state officials (‘California’) responsible for designing and implementing a state air quality plan. The complicated approval process for the State Implementation Plan (‘SIP’) required much backand- forth between California and the Environmental Protection Agency (‘EPA’). El Comité takes issue with both the process by which California obtained EPA approval of the SIP and the final outcome of that approval process. In particular, El Comité argues that California violated federal law by failing to adhere to the SIP approved by the EPA, which it argues required California to implement additional regulations in five areas where air quality standards for reducing harmful emissions have not been met. California went astray, according to El Comité, by using the wrong data to calculate

the baseline for its emission standards and by ignoring deadlines that were intended to be incorporated into EPA’s final approval of the SIP. El Comité’s claim turns on determination of what documents were incorporated into the final SIP and the EPA rule, and interpretation of what the SIP, and hence federal law, requires of California.

The district court concluded that it did not have jurisdiction to review El Comité’s claim regarding the data and methodology used by California to calculate the baseline for emissions standards. The court agreed, however, with El Comité’s expansive interpretation of the SIP, and ordered relief based on that interpretation. That relief was also built on the methodology El Comité advocated for use in calculating the baseline — the same methodology the district court had held it was without jurisdiction to review. As it carefully worked through the parties’ labyrinthine administrative law arguments, the court acknowledged that its rulings were potentially incongruous. We agree. In our view, the district court ultimately exceeded its jurisdiction. Because § 304 of the CAA provides jurisdiction only to enforce an ‘emission standard or limitation,’ and because the challenged conduct did not implicate such a standard or limitation, the court was without jurisdiction to order a remedy.

Oltman v. Holland America Line, Inc. No. 07-35135 (August 19, 2008) “Jack Oltman and his mother, Bernice Oltman, allege that they both contracted a serious gastrointestinal illness on a cruise ship operated by Defendants Holland America Line, Inc. and Holland America Line—USA, Inc. (collectively, Holland). Together with Jack’s wife Susan, they filed an action against Holland in Washington state court, which later dismissed the action based on a forum selection clause in the cruise contract. The same day the state court dismissed the action, the Oltmans filed an essentially

NINTH CIRCUIT CASES

identical action against Holland in the federal court specified in the forum selection clause. Holland moved for summary judgment, arguing that the federal filing was too late based on a one-year limitations clause contained in the cruise contract. The Oltmans objected, arguing, among other things, that their filing in state court had been timely even though the one-year period had expired prior to their federal filing. The district court granted summary judgment on all claims in favor of Holland after concluding the claims were time-barred under the contract.

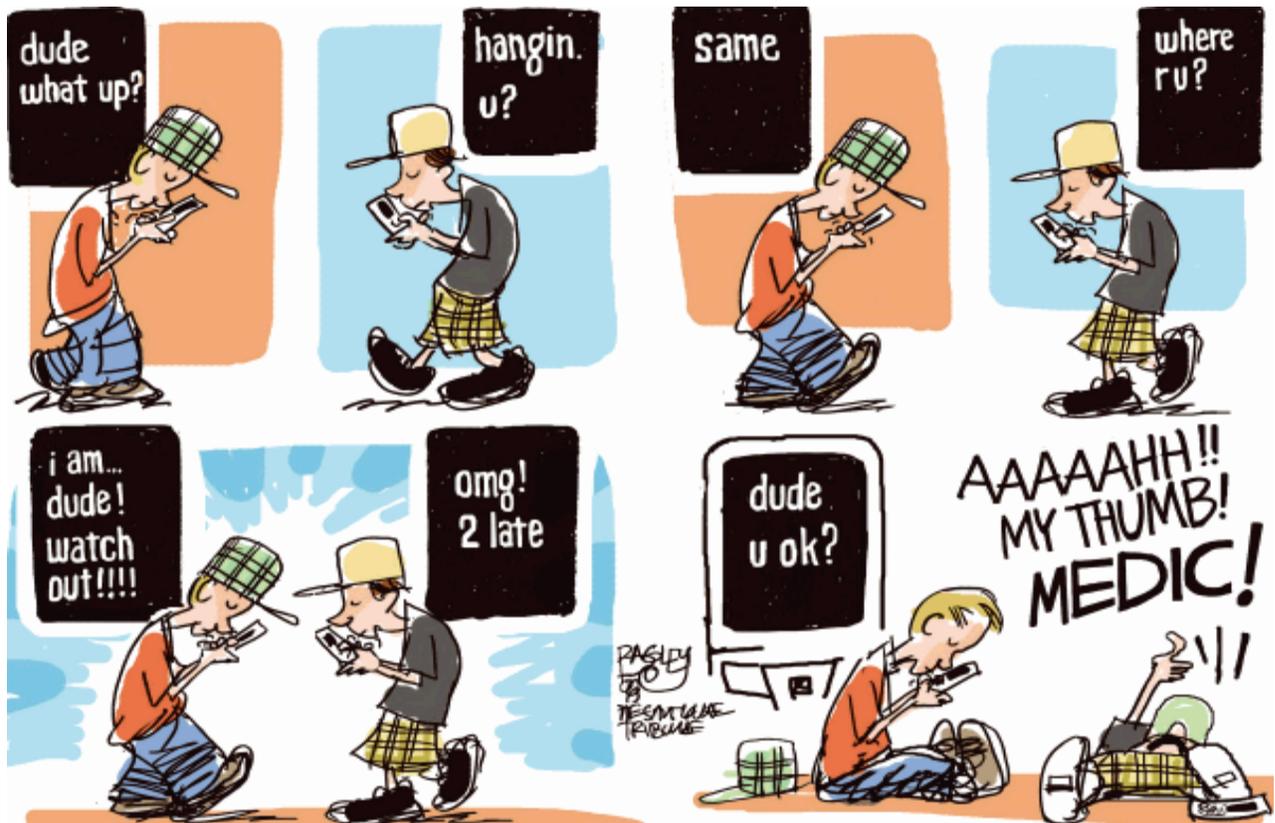
The primary question presented by this appeal is whether the contractual limitations period should have been equitably tolled based on the timely filing of the state court action and the prompt filing in federal court after the state action was dismissed. We answer that question in the af-

firmative and reverse.”

Ibrahim v. Homeland Security No. 06-16727 (August 18, 2008) “We consider our jurisdiction over the claims of a passenger detained at a U.S. airport because her name is on the federal government’s No-Fly List.

Rahinah Ibrahim is a Malaysian Muslim who studied at Stanford University under a student visa. In January 2005, she tried to fly from San Francisco to Malaysia, but when she presented her ticket at the United Air Lines counter, the airline discovered her name on the federal government’s No-Fly List. The airline refused to let her board, and its employee, David Nevins, called the San Francisco police.

When the police arrived, they phoned the Trans-



NINTH CIRCUIT CASES

portation Security Intelligence Service, which is part of the Transportation Security Administration, which is in turn part of the Department of Homeland Security. An employee named John Bondanella answered the phone at the Transportation Security Intelligence Service's office in Washington, D.C. He instructed the police to prevent Ibrahim from flying, to detain her for further questioning and to call the FBI. The police did as they were told: Without explaining their reasons, they handcuffed Ibrahim in front of her fourteen-year-old daughter and took her to the police station. Two hours later, the FBI told the police to release her, and the police complied.

The following day, Ibrahim again attempted to fly from San Francisco to Malaysia. This time she was permitted to do so, but only after 'enhanced' searches. She hasn't returned to the United States. Ibrahim brought this lawsuit against United Air Lines, Bondanella, the police, the city and county of San Francisco and numerous federal officials and agencies.² She asks for an injunction directing the government to remove her name from the No-Fly List and to cease certain policies and procedures implementing the No-Fly List, and also asserts causes of action under 42 U.S.C. § 1983, California tort law and the Constitution, see *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Ibrahim's case against some defendants is still pending below, but the district court dismissed Ibrahim's claims against the federal government, the United Air Lines defendants and Bondanella, and entered final judgment as to them under Rule 54(b). Ibrahim appeals that dismissal.

Ibrahim challenges placement of her name on the No-Fly List and the government's policies and

procedures implementing the No-Fly List. We assume that section 702 of the Administrative Procedure Act waives sovereign immunity and provides Ibrahim with a cause of action. 5 U.S.C. § 702; *Glacier Park Found. v. Watt*, 663 F.2d 882, 885 (9th Cir. 1981) (the APA gives individuals the right to challenge illegal agency action in court). We do not decide that issue, however, because the parties haven't briefed it and the district court hasn't had an opportunity to consider it."

"In short, all of Ibrahim's section 1983 claims fail because none of the appellees now before us acted under color of state law.

Ibrahim also claims that defendants committed various torts. As for United Air Lines and David Nevins, her claims fail because these defendants' only supposedly tortious act was Nevins's phone call to the San Francisco police. That call is privileged under state law and thus cannot be the basis for tort liability. See *Hagberg v. Cal. Fed. Bank FSB*, 32 Cal. 4th 350, 364 (2004).

Except for John Bondanella, whom we consider below, Ibrahim has sued the federal officials in their official capacities. These officials, like their employer, cannot be liable for state-law torts unless Congress has waived the United States' sovereign immunity. *Gibbons v. United States*, 75 U.S. (8 Wall.) 269, 274-76 (1868). Ibrahim claims that Congress did so in the Federal Tort Claims Act, but that statute only waives sovereign immunity if a plaintiff first exhausts his administrative remedies. See 28 U.S.C. § 2675(a); *McNeil v. United States*, 508 U.S. 106, 113 (1993). Ibrahim didn't do this before she filed her complaint, and she didn't ask the district court to stay the litigation so she could attempt to do it while the litigation was pending. Dismissal with prejudice was therefore proper. See *McNeil*,

NINTH CIRCUIT CASES

508 U.S. at 113.

Unlike all the other federal defendants, John Bondanella was sued in his individual capacity. Ibrahim claims Bondanella injured her and violated her constitutional rights when he ordered the San Francisco police to detain her at the airport. The district court dismissed him from the lawsuit on the theory that it lacked personal jurisdiction over him. On appeal, Bondanella defends that ruling. He didn't argue below, and he doesn't argue here, that the Federal Tort Claims Act preempts state tort law because he was acting within the scope of his federal employment, see 28 U.S.C. § 2679(c)-(d), so we don't consider this or any other alternative defense.

Bondanella lives in Virginia and has no ties to California, so the district court doesn't have general jurisdiction over him. But the court does have specific jurisdiction under our three-pronged test: (1) Bondanella purposefully directed his action (namely, his order to detain Ibrahim) at California; (2) Ibrahim's claim arises out of that action; and (3) jurisdiction is reasonable. See *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1205-06 (9th Cir. 2006) (en banc) (describing the three-part test)."

"We therefore reverse the dismissal of Ibrahim's Bivens claims and state-law claims against Bondanella. We affirm the dismissal of Ibrahim's



section 1983 claims against him because, as explained above, Bondanella wasn't acting under color of state law. AFFIRMED in part, REVERSED in part and REMANDED. No costs."

United States v. Peterson No. 07-50120 (August 13, 2008) "Defendants Paul and William Peterson ran a home building business in California. In the 1990s, they subsidized down payments to home buyers and then submitted misleading gift letters to the Department of Housing and Urban Development ('HUD') falsely stating that a family member or friend of the buyer had provided the money for the down payment.

Defendants appeal their jury convictions for: 1) causing false material statements to be made in a matter within the jurisdiction of an agency of the United States, in violation of 18 U.S.C. § 1001; 2) aiding and abetting in the violation of § 1001, in violation of 18 U.S.C. § 2; and 3) conspiring to make such false statements, in violation of 18 U.S.C. § 371. They appeal also

NINTH CIRCUIT CASES

the district court's order of restitution in the amount of \$1,258,775, imposed pursuant to 18 U.S.C. § 3663A.

We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm. We hold that although it would be preferable for district courts to use a definition of materiality tracking the language approved by the United States Supreme Court in *United States v. Gaudin*, 515 U.S. 506 (1995), in this case, the district court did not commit plain error by giving the jury instruction it did. We further hold that the false gift letters and the source of the down payment for HUD-insured loans were material to HUD. Finally, we hold that Defendants' actions were the actual and proximate cause of HUD's losses, and we affirm the restitution order for the full amount of HUD's loss.

United States v. Tankersley No. 07-30334 (August 12, 2008) "Kendall Tankersley appeals a 41-month sentence imposed following her guilty plea to a three-count Information charging her with conspiracy to commit arson and destruction of an energy facility in violation of 18 U.S.C. § 371, aiding and abetting attempted arson in violation of 18 U.S.C. §§ 2 and 844(i), and aiding and abetting arson in violation of 18 U.S.C. § 844(i). We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

From 1996 through 2001, activist groups known publicly as the Earth Liberation Front ('ELF') and the Animal Liberation Front ('ALF') committed arson and other crimes against government and private entities in several Western states. The groups' membership changed over the lifetime of the conspiracy but included as many as sixteen conspirators. Tankersley actively participated in both an attempted and a

subsequently completed arson that destroyed the headquarters building of U.S. Forest Industries, Inc., a private timber company located in Medford, Oregon.

The district court imposed a sentencing enhancement for the commission of a 'federal crime of terrorism,' pursuant to United States Sentencing Guidelines ('U.S.S.G.' or 'Sentencing Guidelines') § 3A1.4 (2000), against several of Tankersley's co-defendants who targeted government property. The district court did not impose this enhancement on Tankersley because she targeted only private property. It did, however, impose a twelve-level upward departure pursuant to U.S.S.G. § 5K2.0, which had the effect of making her base offense level the same as if she had been subject to the terrorism enhancement.

Tankersley argues that her sentence is unreasonable and that the district court abused its discretion by imposing the upward departure. She argues that the terrorism enhancement should not apply to her because she did not target government property, and that the twelve-level upward departure amounts to an imposition of the terrorism enhancement. She argues that the district court is not empowered to depart upward based on what she frames as its disagreement with congressional policy concerning the applicability of the terrorism enhancement, and she argues that there were insufficient aggravating circumstances to remove her offense from the heartland of arson offenses.

We must decide whether a sentence outside the applicable advisory guidelines range is per se unreasonable when it is based on the district court's efforts to achieve sentencing parity between defendants who engaged in similar conduct: with some targeting government property

