

# The Public Lawyer



STATE BAR OF NEVADA

## Nevada Supreme Court Cases

***Sicor, Inc. v. Hutchison***, 127 Nev. Adv. Op. No. 82 (December 15, 2011) In this appeal, appellants challenge the district court's post-voir dire denial of their motion for a change of venue in the underlying tort action. Having recognized the propriety of deferring consideration of such motions until after the completion of voir dire in our contemporaneously issued opinion in *Sicor, Inc. v. Sacks*, 127 Nev. \_\_\_, \_\_\_ P.3d \_\_\_ (Adv. Op. No. 81, December 15, 2011), we now enlarge the test to be applied when evaluating post-voir dire motions for a change of venue based on pretrial publicity in civil proceedings. Expanding upon this court's analysis in *National Collegiate Athletic Ass'n v. Tarkanian*, 113 Nev. 610, 939 P.2d 1049 (1997), we hold that the district court must apply a multifactor test to determine whether there is a reason to believe that the party seeking a change of venue will not receive a fair trial in the community where the case originated. Because appellants have not demonstrated that the circumstances

presented here warrant a reasonable belief that a fair trial of this case could not be had in Clark County, we conclude that the district court did not manifestly abuse its discretion by denying appellants' motion for a change of venue.

***Sicor, Inc. v. Sacks***, 127 Nev. Adv. Op. No. 81 (December 15, 2011) In this appeal, we consider the propriety of a district court order deferring a final ruling on a change of venue motion based on adverse pretrial publicity until after jury selection began and whether such an order is appealable. We conclude that such an order does not finally decide the motion and thus dismiss this appeal. When a change of venue motion is based on adverse pretrial publicity, the district court's discretion under NRS 13.050(2) to change venue includes the authority to conduct a more probing evaluation of the prospective jury panel before the district court decides whether there is reason to believe that an impartial trial cannot be had in the

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judicial district. Courts in other jurisdictions and our criminal venue jurisprudence approve the trial court's use of juror questionnaires and a thorough voir dire to seat impartial juries in high-profile civil and criminal cases before deciding venue motions based on adverse pretrial publicity. Therefore, we conclude that a district court's decision to defer a final ruling on a motion to change venue until after such efforts have been attempted should not be treated as a denial of the motion.

Because the district court in the present case permissibly deferred its ruling on the motion to change venue, we conclude that the challenged order is not appealable until the district court finally resolves the motion to change venue, following an attempt to seat an impartial jury.

***Holt v. Regional Trustee Services Corp.***, 127 Nev. Adv. Op. No. 80 (December 15, 2011) Since 2009 Nevada law has required loan-modification mediation on homeowner request before a nonjudicial foreclosure sale can proceed on an owner-occupied residence. Compliance is evidenced by a Foreclosure Mediation Program (FMP) certificate that mediation has concluded or been waived. This certificate must be recorded for a valid foreclosure sale to occur.

On this appeal, we consider whether a lender who has been denied an FMP certificate for failing to mediate in good faith can reinstate foreclosure by means of a new notice of default and election to sell and rescission of the original, thereby restarting the FMP process. In the circumstances of this case, we conclude that it can. We therefore affirm the district court's refusal to enjoin the nonjudicial foreclosure initiated by the second notice of default and election to sell and its further order directing the parties to return to FMP mediation. ***Reno Newspapers v. Gibbons***, 127 Nev. Adv. Op. No. 79 (December 15, 2011) This appeal involves

the denial of a records request made pursuant to the Nevada Public Records Act (NPRa). The primary issue we are asked to resolve is whether, after the commencement of a public records lawsuit, the state entity withholding the requested records is required to provide the requesting party with a log containing a factual description of each withheld record and a legal basis for nondisclosure. We conclude that based upon the provisions of the NPRa, our NPRa jurisprudence, and elementary notions of fairness inherent in our adversarial system, the requesting party generally is entitled to a log. In most cases, this log should contain, at a minimum, a general factual description of each withheld record and a specific explanation for nondisclosure. Here, we conclude that such a log was required and that the district court erred to the extent it denied the request for a log.

We also address what the state entity withholding the requested records is required to provide to the requesting party in prelitigation situations. We conclude that, as mandated by NRS 239.107(1)(d), if a state entity denies a public records request prior to the commencement of litigation, it must provide the requesting party with notice of its claim of confidentiality and citation to legal authority that justifies nondisclosure. Here, we conclude that the state entity withholding the requested records failed to satisfy these responsibilities.

***Choy v. Ameristar Casinos***, 127 Nev. Adv. Op. No. 78 (November 23, 2011) At issue in this appeal is the procedure required by NRCp 56(f) for the party opposing a motion for summary judgment to request the denial or continuance of the motion in order to obtain additional affidavits or conduct further discovery. By its plain language, NRCp 56(f) requires that the party opposing summary judgment provide an affida-

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vit stating the reasons why denial or continuance of the motion for summary judgment is necessary to allow the opposing party to obtain further affidavits or discovery. Because appellant failed to provide the required affidavit, the district court properly denied appellant's request for a continuance.

***Public Agency Compensation Trust v. Blake***, 127 Nev. Adv. Op. No. 77 (November 23, 2011) In this appeal, we determine the proper method of apportioning permanent partial disability (PPD) benefits between prior and subsequent industrial injuries when the impairment ratings for those injuries were based on different editions of the applicable guide. PPD awards are based on the percentage of whole person impairment as determined by a rating physician, who makes the calculations using the edition of the American Medical Association Guides to the Evaluation of Permanent Impairment (AMA Guides) adopted by the Division of Industrial Relations. See NRS 616C.490; NRS 616C.110. Relying on a regulation that addresses the apportionment of PPD benefits, NAC 616C.490(4), the appeals officer and the district court in this case concluded that respondent's prior impairment rating, which was calculated using an older version of the AMA Guides, should be deducted from his current impairment rating, which was calculated using the current edition of the AMA Guides. We disagree. The plain language of the governing statute, NRS 616C.490(9), requires the rating physician to reconcile the different editions of the AMA Guides by first recalculating the percentage of the previous impairment rating using the current edition and then subtracting that recalculated percentage from the current level of impairment. Thus, we reverse.

***Estate of Smith v. Mahoney's Silver Nugget***, 127 Nev. Adv. Op. No. 76 (November 23, 2011) In this opinion, we consider the apparent disconnect between NRS 651.015's limitation on innkeeper liability and our decision in *Doud v. Las Vegas Hilton Corp.*, 109 Nev. 1096, 864 P.2d 796 (1993). Having concluded that this discord arises from the multifaceted concept of "foreseeability," we clarify that the duty element of a negligence cause of action must be determined as a matter of law by considering whether the wrongful act that precipitated the plaintiff's injury was foreseeable. We further conclude that NRS 651.015(3)'s definition of "foreseeable" provides the appropriate framework for conducting this inquiry in the context of innkeeper liability by codifying the common-law approach that we set forth in *Doud*. Because the district court in this case properly applied NRS 651.015(3) in determining that the act which led to the victim's death was not foreseeable, respondent Mahoney's Silver Nugget, Inc., did not owe the victim a duty as a matter of law. We therefore affirm the district court's summary judgment in favor of the Silver Nugget.

***Friedman v. Eighth Judicial Dist. Court***, 127 Nev. Adv. Op. No. 75 (November 23, 2011) This interstate child custody dispute traces back to a stipulated Nevada divorce decree. The decree incorporated the parents' agreement that Nevada would have exclusive jurisdiction over future child custody disputes. When such a dispute arose, the mother returned to the Nevada decree court to resolve it. By then, both parents and their children had moved to California. With everyone gone from Nevada, the father maintains that Nevada lacks subject matter jurisdiction. He has initiated competing custody proceedings in California.

The question presented is whether the Nevada

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district court can proceed or should defer to California. The answer lies in the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), which Nevada and California have both adopted. Under the UCCJEA, California appears to have jurisdiction as the children's "home state," and Nevada cannot proceed unless California determines that Nevada is the more convenient forum. If asked to make an inconvenient/more appropriate forum determination, the California court could, under the UCCJEA, consider a number of factors, the parties' agreement to litigate in Nevada being one of them. But un-

der the UCCJEA, the decision is California's. Because California has not declined jurisdiction, the Nevada district court erred in asserting it. We therefore grant writ relief.

or her customers. Specifically, we are asked to clarify whether a pharmacist's only duty is to fill a customer's prescription with the correct medication and dosage or if, under certain circumstances, a pharmacist may have a duty to do more. We conclude that when a pharmacist has knowledge of a customer-specific risk with respect to a prescribed medication, the pharmacist has a duty to exercise reasonable care in warning the customer or notifying the prescribing doctor of this risk. Having determined that the pharmacist in this case had knowledge of a customer-specific risk, we conclude that the summary



der the UCCJEA, the decision is California's. Because California has not declined jurisdiction, the Nevada district court erred in asserting it. We therefore grant writ relief.

***Klasch v. Walgreen Co.***, 127 Nev. Adv. Op. No. 74 (November 23, 2011) In this appeal, we consider the duty of care that a pharmacist owes his

judgment record before the district court was inadequate to conclude, as a matter of law, that no genuine issues of fact remain as to breach of duty and causation of injury. Accordingly, we reverse the district court's summary judgment in favor of respondent and remand this case to the district court.

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*Chateau Vegas Wine v. Southern Wine & Spirits*, 127 Nev. Adv. Op. No. 73 (November 23, 2011) In this appeal, we address two primary issues. We first consider whether the district court abused its discretion in permanently enjoining appellants from importing and selling certain Bordeaux wines in Nevada. We conclude that it did not. Next, we address whether the district court abused its discretion in permanently enjoining appellants from importing and selling certain French champagnes in Nevada. We conclude that it did not. We therefore affirm the district court's order granting the permanent injunction.

### **COURT HOLDS FOR FIRST TIME THAT THE ADEA COVERS "WORKPLACE HARASSMENT" CLAIMS**

Fox Rothschild LLP

By their statutory language, neither Title VII nor the federal ("ADEA") explicitly prohibit workplace harassment based upon gender, race, nationality, religion, age, or other protected class characteristics. For example, Title VII prohibits discrimination with respect to "compensation, terms, conditions, or privileges of employment," but no mention is made of workplace harassment based upon any of these characteristics.

Some lower courts as far back as 1971 read into Title VII the provision that "terms, conditions, or privileges of employment" includes prohibiting a discriminatorily hostile or abusive workplace environment. For example, eloquently stated that Title VI should be liberally construed, and therefore the "terms, conditions, or privileges of employment:" "evinces a Congressional intention to define

discrimination in the broadest possible terms. Congress chose neither to enumerate specific discriminatory practices, not to elucidate in extensor the parameter of such nefarious activities. Rather it pursued the path of wisdom by being unrestrictive, knowing that constant change is the order of our day and that the seemingly reasonable practices of the present can easily become the injustice of the morrow."

The Supreme Court, as it applied to sexual harassment. Thus was eventually born the various theories of liability such as quid pro quo sexual harassment. Courts expanded Title VII's reach to include harassment based upon characteristics other than gender and race.

The latest change in the law has occurred in a case filed in Louisiana, where a federal has held for the first time that "a plaintiff's hostile work environment claim based on age discrimination under the ADEA may be advanced in this court." The court set out the elements of such a claim: (1) the plaintiff is over 40; (2) (s)he was subjected to harassment based upon age; (3) the nature of the harassment was such that it created an objectively intimidating, hostile, or offensive work environment; and (4) there exists some basis for liability.

Add this claim to the ever growing list of workplace actions which must be guarded against.

### **11TH CIRCUIT RULES FOR TRANS-GENDER EMPLOYEE IN SEX DISCRIMINATION CASE**

Littler Mendelson PC

The typically conservative Eleventh Circuit Court of Appeals recently found in favor of a transgender employee claiming sex discrimination when her employer fired her after she announced

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plans to undergo a gender transition. The Georgia General Assembly's Office of Legislative Counsel (OLC) hired Plaintiff Vandiver Elizabeth Glenn in 2005 as an editor. At that time, Glenn presented as a man named Glenn Morrison. Approximately one year into her employment with the OLC, Glenn told her supervisor that she was a transsexual and came dressed to the office's Halloween party as a woman. In 2007, Glenn announced she would be transitioning from a male to a female. For Glenn, this meant she would be coming to the office dressed as a woman and would legally adopt a female name. Following this announcement, the head of the OLC, Brumby terminated Glenn's employment.

### **The District Court Case**

Glenn sued Brumby under the Equal Protection Clause of the U.S. Constitution, claiming Brumby discriminated against her on the basis of her sex, including both her gender identity and her failure to conform to the male sex stereotype (i.e., behave and dress in "traditional male" ways) that Brumby expected. Unlike a typical sex discrimination case where a plaintiff claims a violation of Title VII of the Civil Rights Act of 1964, Glenn claimed government action (i.e., her state employer's termination decision) resulted in her discharge. Consequently, Glenn was entitled to sue her employer under the Equal Protection Clause on the basis that the state denied rights she was entitled to under the Fourteenth Amendment. Glenn was successful on her claim in the district court and Brumby appealed to the Eleventh Circuit Court of Appeals.

### **The Appeal to the Eleventh Circuit Court of Appeals**

On appeal, the Eleventh Circuit first examined whether discrimination against an individual be-

cause of his or her gender nonconformity constitutes sex discrimination under the Equal Protection Clause. The court, citing the U.S. Supreme Court and several other appellate courts, concluded the answer to this question is "yes." The court reasoned that:

A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes. The very acts that define transgender people as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior. There is thus a congruence between discriminating against transgender and transsexual individuals and discrimination on the basis of gender-based behavioral norms. Accordingly, discrimination against a transgender individual because of her gender-nonconformity is sex discrimination.

The court also pointed to a long line of holdings finding that all persons, whether transgender or not, are protected from discrimination based on gender stereotypes. Courts have held that women cannot be discriminated against for being "macho" and men cannot be penalized for dressing effeminately or holding the role of primary caregiver for children. Thus, where a transgender individual is discriminated against simply because he or she identifies with a gender that is not perceived to be his or her own, this constitutes sex discrimination.

Following its conclusion that discrimination against an individual because of his or her gender nonconformity constitutes sex discrimination, the court was faced with the question of whether this particular plaintiff's employment was terminated because of gender stereotyping. To answer this inquiry, the court first examined whether there was proof that discrimina-

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tory intent motivated Glenn's termination. Glenn provided direct evidence of discriminatory intent through Brumby's testimony regarding the termination of her employment. Brumby testified that he thought it "inappropriate" for Glenn to come to work dressed as a woman and that it was "unsettling" and "unnatural." Brumby also testified that his decision to terminate Glenn's employment was based on "the sheer fact of the [gender] transition." Given these admissions, it is easy to understand why the court concluded that Brumby's testimony alone was ample evidence to find that the termination decision was based on Glenn's gender nonconformity.

The court then examined whether Brumby's discriminatory act could be excused because it was substantially related to a sufficiently important governmental interest. Unlike a discrimination case under Title VII, where direct evidence like the above would likely resolve the issue of whether discrimination took place, the government is given an opportunity in an Equal Protection case to provide a sufficient justification for the discriminatory action. According to the Eleventh Circuit, Brumby offered only one justification for the termination – his fear of litigation arising out of Glenn's use of the female restroom at the OLC. This justification, however, was weak in light of the fact that the restrooms at the OLC are single-occupancy. This substantially reduces the likelihood that a born-female and a genetically transitioned female (born-male) would encounter each other in the OLC restroom and it therefore makes complaints regarding the same unlikely. Furthermore, no such claims had been raised at the time Brumby terminated Glenn's employment. The Eleventh Circuit noted that the U.S. Supreme Court has held that the government's burden is demanding and "cannot be met by relying on a justification that is 'hypothesized or invented post

hoc in response to litigation.'" Thus, Brumby failed to provide a sufficient justification or "governmental purpose" for his actions. Accordingly, the court found that the government failed to establish any justification for the termination of Glenn's employment, and ruled in favor of Glenn.

### Implications for Employers

Glenn v. Brumby directly impacts government employers in the Eleventh Circuit and now stands as possible persuasive authority for other jurisdictions. Importantly, while Glenn deals specifically with a public employer and employee, it also is conceivable that the court could apply the same reasoning to a transgender employee's sex discrimination claim against a private employer under Title VII. The breadth of the court's definition of sex discrimination is not necessarily restricted to a constitutional analysis. Therefore, both types of employers should review their anti-discrimination policies and revise them if necessary in order to comply with Glenn. The following types of policies should be reviewed and revised:

- Equal opportunity, anti-discrimination, anti-harassment and anti-retaliation policies;
- Dress code and appearance standard policies;
- Codes of conduct between employees, constituents or customers;
- Policies regulating the use of gender-segregated areas such as bathrooms; and
- Policies regarding respect for the individual or manager-subordinate relations.

Employers should also consider how they would like their managers to respond to em-

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employees who announce their intention to undergo a gender transition or sex change. Where such circumstances arise, managers should be trained on the appropriate response to such an announcement and how to have a discussion with the employee about the implications of such a transition or change on his or her work environment. Consequently, employers may also want to consider developing the following plan for responding to gender transition or sex change announcements when a transgender employee situation arises:

Training for managerial employees on transgender terminology and the employer's process for assisting and training employees undergoing a gender transition or sex change;

Developing a compilation of all relevant policies (i.e., dress code, bathroom usage, etc.) that should be reviewed with the transgender employee before gender transition/sex change;

Providing the transgender employee with the materials needed for changing his or her name on all important work place documents (if a name change will take place);

Appropriately managing adverse reactions to the transgender employee within workplace guidelines and codes of conduct;

Following the gender transition or sex change, appropriately manage the transgender employee within workplace guidelines and codes of conduct; and

Providing refresher anti-discrimination, anti-retaliation, anti-harassment, dress code, code of conduct, etc. training to the workforce if needed.

Employers are encouraged to take the appropriate

steps necessary to integrate transgender employees into the workforce and simultaneously to guard against discrimination, harassment, and retaliation claims. Above all, communication is key – talk to employees, including managers, and do not hesitate to bring in labor and employment counsel to provide guidance on the above legal issues.

### **10 TIPS FOR CONDUCTING AN INTERNAL INVESTIGATION**

Dinsmore & Shohl LLP

The recent news involving Penn State highlights how high the stakes can be when conducting an internal investigation. In fact, Penn State has hired former FBI director Louis Freeh to lead its internal investigation into alleged criminal conduct by a former employee. But while most employers do not face circumstances this challenging, the reality is that employers are presented with circumstances on a regular basis that must be investigated effectively to avoid significant legal liability.

Of course, this begs the question of when an employer needs to investigate. The simplest answer is when the employer has knowledge of misconduct. Misconduct can include a breach of an employer policy, violation of a drug or alcohol policy, theft or other criminal activity, or even misuse of company property. Employers should not, however, too narrowly construe what constitutes "knowledge," which can include formal and informal complaints, information obtained during exit interviews, anonymous tips and third-party information.

Employers should also keep in mind that an internal investigation may become your defense in any subsequent litigation and therefore

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may be subject to significant scrutiny by the plaintiff, the plaintiff's lawyer and possibly a jury. For example, in a sexual harassment lawsuit, the employer's investigation is what typically shows that the employer exercised reasonable care to prevent and correct any harassing behavior. Another defense used by employers in wrongful termination lawsuits is the "honest belief" rule. Specifically, if the employer can show that it reasonably relied on the particularized facts that were before it at the time the decision was made, it can potentially avoid liability over a challenged decision. The investigation does not need to be perfect, but the employer must make a reasonably informed decision before taking an adverse employment action.

As a result, conducting an effective internal investigation is critically important. Every investigation comes with a unique set of facts and challenges, but the following 10 principles serve as a guide for conducting an effective investigation.

### **Determine the objectives and strategy for the investigation.**

At the outset, employers must establish the objectives of the investigation. Questions that should be addressed include:

Are you trying to develop a complete record to justify a decision?

Are you attempting to avoid litigation?

What are your legal obligations?

Do you need an attorney involved?

Evaluating the answers to these questions will allow you to tailor your investigation.

### **Maintain confidentiality.**

A guiding principle in any investigation is confi-

dentiality, which employers should maintain to the extent possible. However, don't promise what you can't deliver. Absolute confidentiality when employees will be interviewed is virtually impossible. Also, employers need to be vigilant when it comes to thoroughness and promptness. For example, if you had to answer questions one year later in a deposition, can you give a reasonable explanation of why it took the amount of time it did to complete the investigation?

### **Determine if immediate actions need to take place to protect the workforce.**

Based on what you know at the time the investigation begins, you may need to take immediate steps to protect the complaining party, alleged victim or the workforce in general. For example, an accused harasser may be put on a paid or unpaid leave, supervisory responsibilities could be changed or an employee could be temporarily transferred pending an investigation, but in no case should an employer penalize the alleged victim.

### **Review company policies.**

Take an inventory of employer policies that may impact the investigation process. For example, a collective bargaining agreement may provide an employee the right to have a representative present at any interview.

### **Conduct a preliminary search of available records.**

This includes reviewing personnel files and any documents relating to the misconduct. Act quickly to retrieve what electronic information is still available, including emails and text messages.

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### Select the appropriate personnel to conduct the investigation.

Investigators should be unbiased and unprejudiced — and perceived as such. Good investigators are skilled at setting people at ease and drawing out reticent witnesses in order to collect facts. They also need knowledge of company policies and procedures, the ability to maintain confidentiality and a level of authority consistent with the significance

should include the facts, not legal conclusions, or your interpretations and assumptions. Give witnesses ground rules: No conclusion has been reached, no reprisal will be taken, and no discussions about the interview are allowed with anyone.

### Communicate throughout the process.

Many employers launch an investigation, only to fail to keep the complainant reasonably in-



of the matter being investigated.

### Control the interview process.

Obtaining detailed statements from interviews with the complaining party and the accused are a critical part of any investigation. Documentation

formed during the process. Unfortunately, this results in the complaining party believing their complaint was ignored, which may prompt them to involve an attorney.

### Close the investigation properly.

Having invested the time and cost associated

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with the investigation, protect your investment by properly closing out the investigation. Make a decision, communicate the decision and document the process.

### **Ensure against retaliation.**

Employees who make complaints may be legally protected from experiencing an adverse employment action. This includes complaints involving discrimination, harassment, safety violations, wage and hour violations and more. Do ensure against retaliation by continuing to monitor the situation.

### **EEOC WARNS HIGH SCHOOL DIPLOMA REQUIREMENT MAY VIOLATE ADA**

Bllard Spahr LLP

Requiring a high school diploma from a job applicant might violate the Americans with Disabilities Act (ADA), the Equal Employment Opportunity Commission (EEOC) warned in a recent [decision](#), if the employer cannot show why that level of education is necessary for the job.

The letter, while not carrying the force of law, nonetheless cautions that a high school diploma requirement may effectively “screen out” anyone unable to graduate because of a learning disability, and may therefore unlawfully exclude a category of disabled individuals.

Under the ADA [regulations](#), the letter states, a qualification standard must be “job related for the position in question and consistent with business necessity”—a standard that can be met only if the requirement accurately measures the individual’s ability to perform the job’s “essential functions.” An employer demanding a high school diploma will not be able to meet this requirement, the let-

ter warns, if the job functions can be easily performed by someone without a diploma.

But even if the employer can satisfy the test, the EEOC letter goes on to remind employers of the duty to consider whether a disabled candidate can perform the job with a reasonable accommodation. If an applicant without a high school diploma can perform the fundamental duties of a job—with or without a reasonable accommodation—an employer may not exclude the applicant on that basis.

Employers in such situations may have to consider the applicant’s relevant work history or abilities during the application process, according to the EEOC’s letter.

### **Document Conversion and Vendor Management — Absent "Intellectual Effort" — Upheld in Taxation Award**

*Jardin v. DATAlegro, Inc.*, 2011 WL 4835742 (S.D.Cal. Oct. 12, 2011). In this patent infringement litigation, the plaintiff objected to a taxation of costs award for the defendants, who prevailed on summary judgment. Specifically, the plaintiff requested that the court “stay, deny, or re-tax” portions of the award for the costs of converting data to TIFF format and a for a project manager who oversaw the conversion process. The plaintiff also motioned to deny costs entirely based on economic disparity between the plaintiff and Microsoft, the defendant’s parent company. First addressing the plaintiff’s economic disparity argument, the court denied on grounds that Microsoft was not a party and further noted that an economic disparity argument required limited financial resources, which the plaintiff’s earlier assertions contradicted. Turning to the TIFF conversion discussion, the

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court noted the variety of file formats in which the plaintiffs produced ESI, and considered the TIFF conversion done "in lieu of making traditional paper copies," thus within the scope of Federal Rule of Civil Procedure 54's language. Finally, the court considered the work done by the project manager substantially different than the work done by an attorney or paralegal because it was confined solely to physical production and required no "intellectual efforts." Thus, the court denied motions to deny or re-tax the award.

### **Court Upholds Sanctions Due to Highly Suspect Timing of Software Reinstallation and "Wildly Overstated" Cost Estimate to Search Backup Tapes**

*Escamilla v. SMS Holdings Corp.*, 2011 WL 5025254 (D. Minn. Oct. 21, 2011).

In this sexual battery and harassment litigation, the defendants—a former employer and supervisor—objected to a magistrate judge's order to produce a personal laptop for forensic review, search backup tapes for deleted e-mails and pay the associated costs. Specifically, defendants object that reinstalling the operating system on the supervisor's personal computer at a technician's recommendation was not done intentionally or in bad faith and that the court compelled discovery based solely on a forensics expert's "speculation" that reinstallation was done to "hide or destroy relevant information." Additionally, the defendants argued that the court did not properly conduct a proportionality analysis by considering the prejudice suffered by the plaintiff. Finally, the defendants argued that data on the employer's backup tapes was not reasonably accessible and would constitute an undue burden. The court overruled the objections related to the personal laptop, finding the timing of the reinstallation—which was done two weeks after the plaintiff's motion to compel—highly suspect

and further noted that the prejudice suffered could only be determined by allowing a forensics expert to review the laptop. With regard to searching employer's backup tapes, the court overruled the defendants' objection, finding that the cost estimate from a single vendor was "wildly overstated" and further found that increased costs were a result of the defendants' failure to preserve data at the outset of litigation. However, the court found that searching the backup tapes for deleted data was technically impossible and ordered the defendants to search the backup tapes only for live data.

### **Court Holds Defendant's Knowledge of Employer's Ability to Review E-mail Constitutes Attorney-Client Privilege Waiver**

*Hanson v. First Nat'l Bank*, 2011 WL 5201430 (S.D.W. Va. Oct. 31, 2011).

In this case, the plaintiff sought production of a defendant-employee's e-mails with his attorney. The plaintiff contended that the employer's data policy, which stated that employee e-mails were not confidential and were subject to review, constituted a waiver of any existing attorney-client privilege. The defendant, while conceding awareness of the policy, tried to show that he nonetheless believed the e-mails were confidential by relying on a different section of the policy. The relevant section provided that other employees should regard messages as confidential and accessible only by the intended recipient. Noting that the defendant's reliance was misplaced as it did not address the employer's ability to review the e-mail, the court held that the defendant's knowledge of the policy waived the attorney-client privilege.

### **Court Finds Data Relevant to Damage Calculation Sufficiently Foreseeable for Preser-**

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*Oleksy v. General Electric Co.*, 2011 WL 4626015 (N.D. Ill. Oct. 3, 2011). In this patent infringement case, the defendant requested reconsideration of a prior court order that compelled production of litigation hold documents. The defendant contended that at the time it deleted the data at issue, the relevance of the data was unforeseeable due to the allegedly countless ways by which future damages in an infringement case could be calculated. Noting that the scope of preservation is broader than the defendant assumed, the court reasoned that as soon as the defendant knew of the infringement claim, the "well-known" factors for an infringement damage calculation put the defendant on notice of issues that could be relevant to damages. Because the defendant failed to specifically state why the relevance of the particular data was unforeseeable in light of these factors, the court denied the defendant's motion for reconsideration.

### NEVADA eDISCOVERY CASES

*Cannata v. Wyndham Worldwide Corp.*, 2011 WL 3495987 (D. Nev. Aug. 10, 2011). In this federal sexual harassment and discrimination litigation, the defendants sought an emergency protective order to limit the scope of the plaintiffs' requested deposition, claiming it was overbroad. Prior to this motion, the plaintiffs had received a court order to depose the defendants' "person most knowledgeable" on several topics, including the defendants' litigation hold process. Noting that a litigation hold is generally not discoverable unless spoliation is at issue, the court determined the plaintiffs' request for information regarding the basic details surrounding the litigation hold (when and to whom the hold was issued, what categories of ESI were included in the hold, etc.)

was reasonable. In denying the defendants' motion, the court further stated the request may ultimately benefit the defendants if questions arise regarding efforts to preserve ESI.

*Corbello v. Devito*, 2010 WL 4703519 (D. Nev. Nov. 12, 2010). In this intellectual property litigation, the court considered several discovery motions filed by both parties, including the requested production of native files, e-mail communications and privilege logs. The court had previously admonished counsel regarding their lack of cooperation concerning electronically stored information and the exchange of *ad hominem* attacks, and in an attempt to settle the ongoing discovery disputes, ordered the parties to file a joint status report following a meet and confer session. Despite making significant progress, the parties were unable to reach a resolution, leaving several issues before the court. Addressing these motions, the court denied the request for native files as —an unjustifiable waste of time and resources. because the requested information was already produced in PDF form, which constituted a reasonably useable format. Regarding the requested e-mail communications, the court agreed with the defendants that the scope of the request and bulk of information available warranted a temporal limitation on discovery. Finally, the court ordered the defendants to produce a privilege log within thirty days of the order.

*G.K. Las Vegas L.P. v. Simon Prop. Group, Inc.*, 2009 WL 4283086 (D. Nev. Nov. 30, 2009). In this business litigation, the defendants previously requested case dismissal and sanctions based on the plaintiffs' alleged spoliation of evidence. Due to the defendants' failure to demonstrate that electronic evidence was destroyed and no longer available, the motion was

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dismissed without prejudice. However, the court ordered a forensic examination of the plaintiffs' computer equipment by a court-appointed independent computer forensics expert. Upon learning of the defendants' ex parte communications with the independent expert during the imaging process, the plaintiffs moved to have the forensic examination order vacated and the spoliation motion modified to dismissal with prejudice. The defendants claimed that the expert was not court-appointed but was instead a "party retained independent expert." Finding the intent to enlist a court-appointed, independent expert blatantly clear in the record and subsequent agreement, the court determined the defendants "forfeited their opportunity to obtain an independent forensic examination" and granted the plaintiffs' motions.

***Johnson v. Wells Fargo Home Mortg., Inc.***, 2008 WL 2142219 (D. Nev. May 16, 2008). In this mortgage loans and credit dispute, the defendants filed a motion to dismiss, alleging evidence spoliation. Through forensic analysis, the defendants' computer forensic expert established that the plaintiff reformatted both laptops shortly after a production request for the hard drives, and also found two documents containing metadata suggesting the plaintiff created the documents one year later than claimed. Opposing the motion, the plaintiff claimed the hard drives were wiped and reformatted for maintenance purposes due to virus infections. The court ordered an adverse jury instruction creating a presumption in favor of the defendants finding the plaintiff acted willfully; was on notice that information contained on the hard drives was potentially relevant to litigation; and did not produce backup files despite numerous requests. The court reasoned that the harsh sanction of dismissal was not appropriate because the evidence secured by the defendants' computer forensic expert, combined with the adverse jury instruction, did not

render it .helpless to rebut any material that [the] plaintiff might use to overcome the presumption. at trial.

***Coburn v. PN II, Inc.***, 2008 WL 879746 (D.Nev. Mar. 28, 2008). In this gender discrimination claim, the defendants filed a motion to compel the plaintiff to provide supplemental answers to interrogatories and requests for the production of documents. Specifically, the defendants sought a forensic examination of the plaintiff's home computers, and the plaintiff opposed the request as potentially violating her privilege, privacy and confidentiality interests. Finding the burden of compliance to be minimal, the court set out a protocol for appointing a computer specialist to conduct the examination, whose cost was payable by the defendants. The protocol contemplated agreement of the parties, whereby access to protected information would not result in waiver of the attorney-client privilege. Additionally, the parties were ordered to agree to a time and date for collection whereby the plaintiff's attorney would maintain the sole copy of the mirror image of the computers.

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***Crockett & Myers, Ltd. v. Napier, Fitzgerald & Kirby, LLC***, No. 10-16040 (December 16, 2011) Brian Fitzgerald appeals for a second time the district court's award to him of \$33,333 in quantum meruit based on the unjust enrichment he conferred on Appellee Crockett & Myers, Ltd. (Crockett). In his first appeal, Fitzgerald argued to a previous panel of this court that the district court's quantum meruit award was erroneous because Fitzgerald referred a major client to Crockett but the award did not account for the value of that referral. The panel agreed and remanded with instruc-

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tions that the district court recalculate Fitzgerald's quantum meruit award to include the value of the client referral apart from the value of any other services Fitzgerald performed for Crockett. On remand, the district court re-entered its original award of \$33,333. We are once again asked to consider whether the district court's \$33,333 award was proper, and once again we hold that it was not.

***Bravo v. City of Santa Maria***, No. 09-55898 (December 9, 2011) Hope Bravo and Javier Bravo Sr., along with their minor granddaughter E.B. (collectively "the Bravos"), appeal the adverse summary judgment grant in their 42 U.S.C. § 1983 action arising out of the nighttime SWAT team search of their home for weapons suspected of being used in a drive-by shooting and stored in the Bravo home by their son, Javier Bravo Jr. ("Javier Jr."). The Bravos allege their Fourth Amendment rights were violated by the issuance and execution of a search warrant whose application failed to disclose that Javier Jr. was at that time, and for over six months had been, incarcerated in the California prison system and therefore not only was not present in the Bravo home, but moreover could not have been involved in the shooting or the storage of weapons used in it. Because the Bravos presented sufficient evidence establishing a genuine issue as to whether Santa Maria Police Department ("SMPD") Detective Louis Tanore's ("Tanore") omission of this material fact was intentional or reckless, as opposed to merely negligent, we reverse the summary judgment grant in his favor and remand.

***Johnson v. Bd. of Trustees of Boundary County School Dist. No. 101***, No. 10-35233 (December 8, 2011) We must decide whether a disabled teacher is a "qualified individual with a disability" under the Americans with Disabilities Act.

In sum, an individual who fails to satisfy the job prerequisites cannot be considered "qualified" within the meaning of the ADA unless she shows that the prerequisite is itself discriminatory in effect. Otherwise, the default rule remains that "the obligation to make reasonable accommodation is owed only to an individual with a disability who . . . satisfies all the skill, experience, education and other job-related selection criteria." 29 C.F.R. Pt. 1630, App. to § 1630.9(a).

Because Johnson does not allege that the Board's legal authorization requirement was itself discriminatory, her failure to satisfy such requirement rendered her unqualified, and the Board was not required to accommodate her disability.

***Flynn v. Holder***, No. 10-55643 (December 1, 2011) This is a challenge to a criminal statute prohibiting compensation for "bone marrow" donations.

It may be that "bone marrow transplant" is an anachronism that will soon fade away, as peripheral blood stem cell apheresis replaces aspiration as the transplant technique, much as "dial the phone" is fading away now that telephones do not have dials. Or it may live on, as "brief" does, even though "briefs" are now lengthy arguments rather than, as they used to be, brief summaries of authorities. Either way, when the "peripheral blood stem cell apheresis" method of "bone marrow transplantation" is used, it is not a transfer of a "human organ" or a "subpart thereof" as defined by the statute and regulation, so the statute does not criminalize compensating

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the donor.

***Sacks v. Dietrich***, No. 10-16524 (November 23, 2011) Richard Sacks appeals from the dismissal of his claims against two arbitrators who disqualified him from representing a client. The district court concluded that the claims were barred by arbitral immunity. We agree and affirm.

The doctrine of arbitral immunity provides that

will be governed more by the fear of such suits than by their own unfettered judgment as to the merits of the matter they must decide.”). Thus, “[a]s with judicial immunity . . . , arbitral immunity is essential to protect the decisionmaker from undue influence and protect the decision-making process from reprisals by dissatisfied litigants.” *Wasyf*, 813 F.2d at 1582.

Of course, arbitral immunity does not extend to



“arbitrators are immune from civil liability for acts within their jurisdiction arising out of their arbitral functions in contractually agreed upon arbitration hearings.” *Wasyf, Inc. v. First Boston Corp.*, 813 F.2d 1579, 1582 (9th Cir. 1987) (citations omitted); see also *Lundgren v. Freeman*, 307 F.2d 104, 117-18 (9th Cir. 1962) (noting that “[i]f the[ ] decisions [of quasiarbitrators] can thereafter be questioned in suits brought against them by either party, there is a real possibility that their decisions

every act of an arbitrator. Arbitral immunity extends only to those acts taken by arbitrators “within the scope of their duties and within their jurisdiction.” *Wasyf*, 813 F.2d at 1582 (citation omitted). The pivotal question is “whether the claim at issue arises out of a decisional act.” *Pfannenstiel v. Merrill Lynch, Pierce, Fenner & Smith*, 477 F.3d 1155 (10th Cir. 2007) (citation omitted). If the claim, “regardless of its nominal title, effectively seek[s] to challenge the deci-

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sional act of an arbitrator or arbitration panel . . . then the doctrine of arbitral immunity should apply. If not, the doctrine would not apply.” *Id.* at 1159 (internal citations omitted).

### **FIRST CIRCUIT RULES THAT INTERVIEWING AN APPLICANT IS NOT AN ADMISSION THAT THE APPLICANT IS QUALIFIED FOR THE POSITION**

Seyfarth Shaw LLP

In *Goncalves v. Plymouth County Sheriff’s Dep’t*, the U.S. Court of Appeals for the First Circuit held that allowing an applicant to proceed through the stages of a hiring process is not an admission that the applicant was qualified for the position or similarly situated to other applicants for purposes of state and federal anti-discrimination laws.

Plaintiff Joy Goncalves was a 49 year old Cape Verdean woman who worked for the Plymouth County Sheriff’s Department and had applied for a promotion to two different information technology (IT) positions. Both positions called for an associate’s degree in a computer-related field, at least three years of relevant work experience, and three or more years of experience using certain web development and interface software. The Sheriff’s Department considered a number of applicants for each position, including two white applicants who were younger than the plaintiff. The application process involved several stages, including a panel interview and an examination that tested the applicants’ IT knowledge. Although the plaintiff was allowed to complete all stages of the application process, she scored considerably lower than the two white applicants at both the interview and the examination stages. As a result, the Sheriff’s Department hired the two white applicants rather than the plaintiff.

The plaintiff filed a lawsuit alleging unlawful discrimination based on her gender, race, age, and national origin in violation of Massachusetts General Laws ch. 151B, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, and the Age Discrimination in Employment Act, 29 U.S.C. § 623. The District Court granted the Sheriff’s Department’s motion for summary judgment, holding that the plaintiff had failed to sustain her prima facie burden because she had not shown that she was qualified for either of the positions or similarly situated to the applicants hired. The District Court also noted that the Sheriff’s Department had demonstrated a nondiscriminatory justification for its decision and that the plaintiff had not shown this reason to be pretextual.

On appeal, the plaintiff argued that by allowing her to advance through the interview process, the Sheriff’s Department had effectively admitted that she was both qualified for the positions and similarly situated to the applicants hired. The First Circuit reviewed the evidence concerning plaintiff’s IT background and experience and interview/examination scores, as well as the other applicants’ work experience, IT background, and interview/examination scores. The First Circuit dismissed the notion that the Sheriff’s Department had conceded plaintiff’s qualifications simply by allowing her to advance through the hiring process: “That the [Sheriff’s Department] in an abundance of caution let her application advance does not make Goncalves qualified.” It similarly found that the decision to allow the plaintiff to advance in the hiring process was insufficient to create a genuine dispute of material fact regarding the similarly situated element of her prima facie case, noting that it could not “rely on ‘overly attenu-

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ated inferences, unsupported conclusions, and rank speculation’ to quiet the tolling of the summary judgment bell.”

While *Goncalves* serves to protect employers who may provide opportunities to under-qualified applicants to proceed through the interview process, employers should do so with caution, keeping in mind the First Circuit’s statement that it was “confusing” as to why the Sheriff’s Department had permitted the plaintiff to proceed if she clearly lacked the requisite skills and experience. In another set of circumstances, a plaintiff may successfully argue that resolution of this “confusion” should be left to a jury.

### U.S. v. Nosal re-argued before the 9th Circuit

#### Dorsey & Whitney LLP

On December 15, 2011, the 9th Circuit Court of Appeals heard argument *en banc* in *U.S. v. Nosal*, 642 F.3d 781 (9th Cir. 2011), reh’g *en banc* granted (Oct. 27, 2011). As expected, the oral argument focused on the meaning of unauthorized access under the Computer Fraud and Abuse Act. The issue is whether an employee can be prosecuted under the CFAA for accessing his employer’s computer in violation of rules established by the employer restricting access to the company computers. In *Nosal*, the 9th Circuit had clarified its earlier decision in *LVRC Holdings LLC v. Brekka*, 581 F.3d 1127, 1131 (9th Cir. 2009). A key element to prove either a civil or criminal violation of the CFAA is that the employee accessed the company computer “without authorization” or “exceed[ed] authorized access.”

*Brekka* had been predicated on the simplistic proposition that employees have permission to access the company computers and, thus, by definition cannot access the company computers without authorization. David Nosal, a Korn/Ferry International executive, was indicted for stealing confi-

dential data from the company computers prior to joining a competitor. Nosal had allegedly recruited “three Korn/Ferry employees to help him start a competing business.” *Id.* at 782. The indictment charged these employees with “using their user accounts to access the Korn/Ferry computer system.” They then “transferred to Nosal source lists, names, and contact information from the ‘Searcher’ database—a ‘highly confidential and proprietary database of executives and companies’—which was considered by Korn/Ferry ‘to be one of the most comprehensive databases of executive candidates in the world.’” *Id.*

The district court had initially rejected Nosal’s motion to dismiss the CFAA counts but reversed its decision after the *Brekka* decision. The government appealed, citing Korn/Ferry’s computer policies that restricted the scope of its employees’ access to the company computers including one that “restricted the use and disclosure of all such information, except for legitimate Korn/Ferry business.” *Id.* The government argued that, based on these policies, Nosal had exceeded authorized access.

The court agreed, citing the statutory definition of “exceeds authorized access,” which is “to access a computer with -authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled so to obtain or alter.” The court held that the word “so” “refers to an accesser who is not entitled to access information in a certain manner.” *Id.* at 785. Thus, the court held that “an employee ‘exceeds authorized access’ under § 1030 when he or she violates the employer’s computer access restrictions—including use restrictions.” *Id.* The government stressed this interpretation in its argument to the 9th Circuit.

*Nosal* distinguished *Brekka* on the lack of com-

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puter policies governing Brekka's right to access the company computers: "Because LVRC [the employer] had not notified Brekka of any restrictions on his access to the computer, Brekka had no way to know whether—or when—his access would have become unauthorized." *Id* at 787. The court concluded that "as long as the employee has knowledge of the employer's limitations on that authorization, the employee 'exceeds authorized access' when the employee violates those limitations." *Id* at 788. The full 9th Circuit, however, on October 27, 2011, granted *en banc* reconsideration to its opinion on October 28, 2011.

The primary argument advanced by Nosal's counsel was that the CFAA only applies to hacking and that access cannot be unauthorized unless the employee circumvents the technology of the computer. In response to questioning by the court, Nosal's counsel stated that using another's password would qualify as a circumvention of the computer's technology. This argument dismisses as irrelevant any written policies or agreements that limit the scope of an employee's access to the employer's computers and the First Circuit's recognition without reference to the computer's technology that the "CFAA...is primarily a statute imposing limits on access and enhancing control by information providers." *EF Cultural Travel B.V. v. Zefer Corp.*, 318 F.3d 58, 63 (1st Cir. 2003).

In rebuttal the government rightly pointed out that there is nothing in the language of the statute that limits the definition of authorized access to the circumvention of technology. Given the Supreme Court's recent admonition to the lower courts in *Morrison v. National Australia Bank, Ltd.* 130 S.Ct. 2869, 2881(2010) not to add requirements to a statute that are not on its face, this should be a losing argument. The Court in *Morrison* expressly warned against such "judicial-speculation-made-law-divining what Congress would have

wanted if it had thought of the situation before the court." *Id*.

Based on the questioning by various members of the court, it appears that its decision in *Nosal* will not be reversed. You can decide for yourself. The full argument from last week can be heard at the following link: [http://www.ca9.uscourts.gov/media/view\\_subpage.php?pk\\_id=0000008546](http://www.ca9.uscourts.gov/media/view_subpage.php?pk_id=0000008546)

### Just when you thought you heard it all

#### Becker & Poliakoff PA

Several months ago, my colleague wrote a [post](#) about CareerBuilder.com's annual list of the most unusual excuses for calling in sick. And today, there should be a new number one.

[Scott Bennett](#) of Pennsylvania, published a fake obituary for his living mother to get some additional time off work. Apparently, Bennett did not want to get fired from his job for taking the time off work so he wrote an obituary for his living mother, which was later published.

After publication, several relatives called the paper to say that Bennett's mother was alive and well. Bennett's mother also visited the paper confirming her status among the living. The editor accepted the obituary after being unable to confirm the funeral arrangements at press time. Bennett has now been fired and charged with disorderly conduct.

While Bennett certainly deserves an A+ for originality, he gets an F for honesty and professionalism. Given that most employment is at-will, meaning an employee can be fired for a good reason, a bad reason, or no reason at all, so long as there is no unlawful motive for the termination, Bennett learned an important lesson that while creativity may be appreciated

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when it comes to your work product, it is not appreciated when it comes to your work excuse absences.

### [A Big Thumbs Up for Nathaniel Burney's 'The Criminal Lawyer's Guide to Criminal Law'](#)

When a renowned curmudgeon writes that something posted online "may well prove to be the most exceptional thing ever created in the blawgosphere, and the one thing that will outlast all of us," it is Legal Blog Watch policy to invest a mouse click to see what's going on.

That was the review Scott Greenfield [gave](#) earlier this week to Nathaniel Burney's new ongoing project called "[The Criminal Lawyer's Guide to Criminal Law](#)." Having now read all five parts of the series that Burney has posted so far, I'd like to join Greenfield and the many others who have praised Burney for his elegant and extremely creative guide to some fundamental criminal law concepts.

The Guide explains in simple terms the rationale behind core concepts such as [Punishment](#), [Rehabilitation](#), [Deterrence](#) and [Retribution](#). The explanations seem to be thoughtful and accurate, but what is most striking about the Guide is the beauty and impact of the illustrations and the text. The text is presented in an elegant style that, if it isn't already sold as its own font (the "Burney Font"?), ought to be. And each part of the series is accompanied by numerous illustrations that are expertly drawn and quite effective in helping to make the author's point.:

### [Things You Can't Do on a Plane: Vol. 9](#)

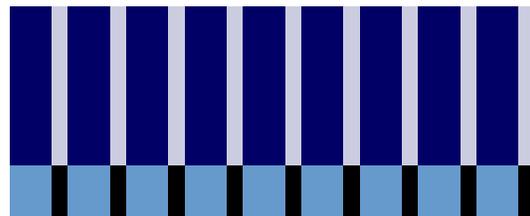
You might think that after [Volume 1](#), [Volume 2](#), [Volume 3](#), [Volume 4](#), [Volume 5](#), [Volume 6](#), [Volume 7](#), and [Volume 8](#) of Things You Can't Do on a Plane, that we'd have exhausted the list of things you can't do on a plane. Nope! The list grows daily.

Here are three more things I've recently learned that you cannot do on a plane:

**Continue to play "Words with Friends" on your smartphone after the pilot orders passengers to turn off all electronic devices.** Passengers may not ignore the captain's order to turn off electronic devices for takeoff. This is true even if the passenger is engaged in a game of "Words with Friends" and even if the passenger is a [TV and movie star](#). **CONSEQUENCE:** Plane will return to gate, passenger will be kicked off flight.

**Board flight wasted with a friend, argue loudly with friend, fight the flight attendants and then chew through plastic handcuff restraints.** Passengers who are so belligerent and rowdy that they must be subdued using plastic restraints as handcuffs and adhesive tape may not simply [chew through the plastic](#) and begin carrying on again. **CONSEQUENCE:** Such passengers will be apprehended by a collection of cabin staff and passengers, entire plane will be placed in lockdown and pilot will divert plane to next available landing spot. Passengers may be charged with crime of "mischief" and ordered to pay restitution.

**Attempt to carry on board a purse with a small western gun design on the front.** Passengers with a flair for Western fashion may not carry on purses with a [small handgun design](#) on the front, even if the design is just a few inches long. **CONSEQUENCE:** Passenger will not be allowed to pass through security with such a purse.





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