

The Public Lawyer



STATE BAR OF NEVADA

NEVADA SUPREME COURT

HD Supply Facilities Maint. v. Bymoan, No. 50989 (June 11, 2009) “The United States District Court for the District of Nevada has certified, under NRAP 5, three questions concerning ‘[w]hether the Nevada rule stated in *Traffic Control Servs. v. United Rentals*, 120 Nev. 168, 172, 87 P.3d 1054, 1057 (2004), that ‘absent an agreement negotiated at arm’s length, which explicitly permits assignment and which is supported by separate consideration, employee [noncompetition] covenants are not assignable,’ applies when a successor corporation acquires a non-competition covenant[, or a covenant of nonsolicitation or confidentiality] as a result of a merger?” We answer these questions in the negative and clarify that *Traffic Control*’s rule of nonassignability does not apply when a successor corporation acquires restrictive employment covenants as the result of a merger.

Ramet v. State, No. 50204 (June 4, 2009) “Appellant Daniel Anthony Ramet was convicted of

first-degree murder. On appeal, Ramet raises several points of error allegedly committed during his trial, only one of which merits detailed consideration.

Ramet contends that the testimony concerning his refusal to consent to a search of his home, taken together with the prosecutor’s comment on it, was violative of his Fourth Amendment rights.

We conclude that the district court erred in allowing testimony and argument regarding Ramet’s invocation of his Fourth Amendment right. However, the error in admitting the statements was harmless. We therefore affirm Ramet’s conviction.”

Rivera v. Philip Morris, Inc., No. 49396 (June 4, 2009) “The United States District Court, District of Nevada, has certified the question of whether Nevada law recognizes a heeding presumption in strict product liability failure-to-warn cases. A heeding presumption is a rebuttable presumption that allows a fact-

Public Lawyers Section

June 2009



Inside this issue:

<i>2/3 of Public Employers Considering Modifying Health Care Benefits</i>	5
<i>NINTH CIRCUIT CASES</i>	6
<i>Former Fire Union President Indicted for Tape Recording Chief</i>	10
<i>NY Governor Vetoes Police, Fire Pension Bill</i>	16
<i>U.S. SUPREME COURT CASES</i>	17
<i>KROLLONTRACK.COM eDISCOVERY</i>	20
<i>Your Fiancée Can Get You Fired</i>	23

NEVADA SUPREME COURT

finder to presume that the injured plaintiff would have heeded an adequate warning if one had been given. Thus, it shifts the burden of proving the element of causation from the plaintiff to the manufacturer. We exercise our discretion to answer this question and conclude that Nevada law does not recognize a heeding presumption.

In Nevada, it is well-established law that in strict product liability failure-to-warn cases, the plaintiff bears the burden of production and must prove, among other elements, that the inadequate warning caused his injuries. Because a heeding presumption shifts the burden of proving causation from the plaintiff to the manufacturer, it is contrary to Nevada law. Rather than demanding that the plaintiff prove that the inadequate warning caused his injuries, a heeding presumption requires the manufacturer to rebut the presumption that the plaintiff would have heeded an adequate warning by demonstrating that a different warning would not have changed the plaintiff's actions. While other jurisdictions have permitted this shifting of the burden of production, we are unwilling to do so."

Las Vegas Taxpayer Comm. v. City Council, No. 53657 (May 28, 2009) "In this appeal, we consider whether the district court properly refused to require the Las Vegas City Council to place a proposed local initiative and referendum on the June 2009 ballot for the general city election. In reaching its decision, the district court ruled that the City Council had discretion to consider the measures' substantive validity in determining whether to place them on the ballot. We disagree and conclude that the City Council improperly refused to place these measures on the ballot. In the future, should the City Council believe that a ballot measure is invalid, it must comply with its statutory duty to place the measure on the ballot, and it may then file an action in district court challenging the

measure's validity.

Nevertheless, in determining whether the district court abused its discretion in denying relief, and based on considerations of judicial economy and efficiency, we must consider the City of Las Vegas's objections to the statute while placing the burden on the City to demonstrate the measures' invalidity. The district court concluded that NRS 295.009, which requires that ballot questions pertain to a single subject and that they include an accurate description of effect, applies to municipal initiatives and referenda. We conclude that the district court's ruling was correct because, by its terms, the statute applies to all petitions for an initiative or referendum. The district court further rejected appellants' contention that NRS 295.061's time limits bar consideration of the City's objections to the measures, holding that this statute applies only to statewide measures. The district court's reasoning, based on the statute's language, was sound, and we determine that the district court properly interpreted NRS 295.061. Finally, in applying NRS 295.009 to the measures at issue, the district court properly found that the proposed initiative pertains to more than one subject and that the description of effect for the proposed referendum is materially misleading. Therefore, we affirm the district court's order denying appellants' petitions to require that these measures be placed on the ballot."

Hartford Fire Ins. Co. v. Trustees of Constr. Indus., No. 49059 (May 28, 2009) "The Ninth Circuit Court of Appeals has certified two questions of law to this court concerning various trustees' attempts to collect unpaid contributions owed to employee-benefit trust funds. This matter arose when a public works subcontractor failed to contribute to employee-benefit

NEVADA SUPREME COURT

trust funds, which were created as part of a collective bargaining agreement between the subcontractor and its employees' union. After the subcontractor failed to pay employee-benefit contributions owed to the trusts, the trusts' trustees sued, in federal court, the general contractor and its surety to recover the unpaid contributions. The trustees sued the general contractor under NRS 608.150, which makes general contractors liable for their subcontractors' employees' unpaid wages, including fringe-benefit trust-fund contributions. They sued the surety under NRS 339.035(1), which allows 'any claimant who has performed labor or furnished material' under a bonded, public works construction contract and who has not been paid in full, to bring an action on the payment bond to recover the amount due.

Just before trial, however, the surety moved for summary judgment, contending that the trustees had failed to meet a condition precedent to recovery: providing the general contractor with the notice required by NRS 339.035(2), which provides that '[a]ny claimant who has a direct contractual relationship with any subcontractor,' but no such direct relationship with the general contractor, 'express or implied,' may bring an action on a payment bond only if the claimant provided written notice of the claim to the general contractor. In response, the trustees also moved for summary judgment against the surety and the general contractor. The federal district court apparently disagreed that notice was required and granted summary judgment to the trustees. The surety and the general contractor then appealed to the Ninth Circuit Court of Appeals, which subsequently certified to this court two questions under NRAP 5. The certified questions ask us to determine whether the trustees must comply with NRS

339.035(2)'s notice requirement to recover (1) on the payment bond against the surety, and (2) against the general contractor under NRS 608.150.

The first question's answer is informed by the nature of the trustees' standing to recover against the payment bond under NRS 339.035, which is loosely based on their status as third-party beneficiaries to the labor agreement. That is, because the trustees are third-party beneficiaries, we conclude that they should be able to represent the employees who have claims against the surety. The trustees consequently stand in the employees' shoes for purposes of recovering on the payment bond under NRS 339.035.

The answer to the first question, then, is yes, notice is required to proceed with claims against the bond. Because the employees would be required to provide notice of their claims to the general contractor before recovering on the payment bond under NRS 339.035's clear terms, the trustees, standing in their shoes, likewise are required to do so.

The answer to the second question is no, the trustees are not required to provide notice to proceed with NRS 608.150 claims against the contractor. NRS 608.150 is in a statutory chapter completely separate from NRS 339.035, and NRS 608.150 plainly does not require that the trustees provide the contractor with notice of their claims before seeking to recover from the contractor under that statute."

Hannon v. State, No. 50594 (May 21, 2009) "In this appeal, we consider whether an emergency reason existed for a warrantless entry into a private residence. In resolving this issue, we bring our standard for emergency home entries into

2/3 Of Public Employers Considering Modifying Health Care Benefits

From The Charlotte Business Journal, June 1

Public employers nationwide are modifying their employee health-care benefits to save money, according to a report by the International Foundation of Employee Benefit Plans.

The survey found 72 percent of public employers are increasing or considering an increase in their employees' deductibles, co-insurance or co-pays. In addition, 74 percent of public employers are increasing or considering an increase in employee premiums.

When asked why they were considering higher deductibles, 46 percent of public employers cite the financial crisis. And 45 percent cite the economic downturn as the reason why they are thinking about higher employee premiums.

“These findings are surprising. Although cost-sharing measures have been common in the corporate world for quite some time, public employers have traditionally not modified their health-care plans in this direction,” says Sally Natchek, the foundation's senior director of research. “The fact that the majority of public employers are now increasing deductibles, co-pays and premiums illustrates the dual effect rising health-care costs and the financial crisis are having on their plans.”

Other cost-saving programs that public employers are instituting include adding a consumer-driven health plan, shifting to a self-funded plan and introducing spousal surcharges.

Nearly three-fourths of public-plan sponsors are placing more emphasis on controlling prescription-drug costs. The majority of public employers are expanding participant education about drug options and costs, increasing co-payments or co-insurance for drugs and mandating the use of generic drugs, the survey found.

The International Foundation of Employee Benefit Plans is a Wisconsin-based nonprofit providing information on employee benefits, compensation and financial literacy.



NINTH CIRCUIT CASES

Baker v. Exxon Mobile Corp, 04-35182 (June 15, 2009) “This epic punitive damage litigation arising from the 1989 wreck of the Exxon Valdez is before us once again. This time it is after the United States Supreme Court remanded the case to us to decide issues related to interest and appellate costs. Order in *Exxon Shipping Co. v. Baker*, No. 07-219 (S. Ct. filed June 25, 2008). The remand followed the Court’s 5-3 decision that, under maritime law, the maximum ratio of punitive damages to compensatory damages is 1-1. *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2633 (2008). On the issue of the availability of vicarious liability for punitive damages under maritime law, the Court was evenly divided and thus left in place our 2001 decision that punitives are available under precedents binding on this court. *Id.* at 2616; *see In re Exxon Valdez*, 270 F.3d 1215, 1233-36 (9th Cir. 2001) (citing *The Amiable Nancy*, 16 U.S. (3 Wheat) 546 (1818)); *Protectus Alpha Navigation Co., Ltd. v. N. Pac. Grain Growers, Inc.*, 767 F.2d 1379 (9th Cir. 1985)).

The parties have now stipulated to the entry of judgment against the defendant Exxon and in favor of the plaintiffs *Baker et al.* in the amount of \$507.5 million, representing the amount the plaintiffs were awarded as compensatory damages for the income they lost as a result of the massive oil spill. This judgment achieves the 1-1 ratio the Supreme Court deemed appropriate. We delayed issuance of the mandate at the parties’ request and asked for supplemental briefing and argument on the issues the Supreme Court left unanswered: interest and costs.”

“Because the evidentiary and legal bases for the original judgment of punitive damages have not been overruled, we award interest on the final judgment of \$507.5 million, at the statutorily set

rate of 5.9%, to run from the date of the original judgment, September 24, 1996. Because the amount of the original \$5 billion judgment has been substantially reduced, we order that each party bear its own costs.

The case is remanded to the district court for entry of the final judgment in accordance with this opinion.”

Cousins v. Lockyer, 07-17216 (June 15, 2009) “William Henry Cousins appeals from the dismissal of his 42 U.S.C. § 1983 complaint against several California state officials, in which he alleges that he was wrongfully imprisoned for an additional nineteen months after a California appellate court overturned the statute under which he was incarcerated. He argues that the officials breached their alleged duties to monitor whether his sentence was void under the invalidated statute and to take steps to effectuate his release. He also asserts that the district court erred in determining that the former Attorney General is entitled to absolute prosecutorial immunity, and that the remaining defendants are entitled to qualified immunity.

We affirm the district court’s judgment regarding Cousins’ federal claims because they fall within the scope of the former Attorney General’s duties as a criminal prosecutor, and because Cousins cannot show that any federal constitutional right that may have been violated by the remaining defendants was clearly established in law. However, we reverse and remand Cousins’ state causes of action. His state false imprisonment claim is not subject to any state statutory immunity; his remaining state claims are all derivative of that claim; and none of his state claims is subject to the federal common law doctrine of qualified immunity.”

NINTH CIRCUIT CASES

City of Las Vegas v. FAA, 07-70121 (June 12, 2009) “In 2006, the Federal Aviation Administration (FAA) issued a Finding of No Significant Impact (FONSI)/Record of Decision (ROD) approving the modification of the departure route at Las Vegas McCarran International Airport that would direct a third of the eastbound flights departing west from one of the runways to complete a turn to the north of the airport instead of the south. The City of Las Vegas and other communities to the north of the airport, as well as individual residents of those communities, have filed a petition for review challenging the FONSI/ROD under the Administrative Procedure Act (APA), the National Environmental Policy Act (NEPA), and the Clean Air Act (CAA). We deny the petition.”

“We conclude that the FAA did not act arbitrarily or capriciously by issuing a FONSI/ROD that approves the northern turn from the Las Vegas McCarran Airport. We grant the petitioners’ request for judicial notice of Federal Register Notices. We do not consider the requests for judicial notice that are not referred to in this opinion, nor do we consider the FAA’s Motion to Supplement to the Certified Index to the Administrative Record with Document 328 because none of the materials are necessary for resolving the issues that we reach. PETITION FOR REVIEW IS DENIED.”

San Diego Police Officers’ Association v. San Diego City Employees’ Retirement System, 07-56483 (June 10, 2009) “San Diego Police Officers’ Association appeals the district court’s orders granting summary judgment to the City of San Diego, San Diego City Employees’ Retirement System and various individuals on Association’s constitutional claims. In addition, Association and Appellees cross-appeal from the dis-

trict court’s final order addressing the possible award of attorneys’ fees.

Association’s lawsuit charged that (1) Appellees’ involvement in approving and enacting a city ordinance that reduced City’s contributions to the employees’ retirement fund violated Association’s contractual right to an actuarially sound pension system and (2) City’s imposition of its last, best and final offer (‘Final Offer’) after the breakdown of 2005 labor negotiations between City and Association violated the latter’s vested contractual rights. After extensive briefing by the parties, the district court found that none of the alleged actions affected Association’s constitutionally protected rights. It therefore granted summary judgment to Appellees and relatedly entered a final order in which it awarded costs to Appellees as prevailing parties but denied an award of attorneys’ fees to any party. We affirm in all respects except for the attorneys’ fees issue, which we remand to the district court.”

Citizens for Better Forestry v. USDA, 07-16077 (June 9, 2009) “The United States Department of Agriculture, which includes the Forest Service, appeals the district court’s award of attorneys’ fees to Citizens for Better Forestry and eleven other environmental groups under the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A). In the underlying action, Citizens sought declaratory and injunctive relief against the USDA for its promulgation of a new national forest management rule. We reversed the district court’s dismissal of Citizens’ suit on standing and ripeness grounds and remanded for a ruling on Citizens’ motion for injunctive relief. Before the district court could reconsider the motion, the USDA withdrew the contested rule. Citizens then stipulated to dismiss its case and moved for attorneys’ fees. Because Citizens received no

NINTH CIRCUIT CASES

relief from any court, it does not qualify as a ‘prevailing party’ under the EAJA and, therefore, is not entitled to fees.

“There was not a material alteration in the parties’ legal relationship sufficient to make Citizens a ‘prevailing party’ under the EAJA. Accordingly, we reverse the award of attorneys’ fees. REVERSED.”

Kearns v. Ford Motor Company, 07-55835 (June 8, 2009) “William Kearns’s Third Amended Complaint claimed violations of California’s Consumers Legal Remedies Act, Cal. Civ. Code §§ 1750-1784, and California’s Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200-17210. Those state claims are subject to Rule 9(b) of the Federal Rules of Civil Procedure which requires that allegations of fraud be pleaded with particularity. See Fed. R. Civ. P. 9(b). Because we find that Kearns’s claims were all grounded in fraud, his failure to plead the TAC with particularity merited its dismissal, and we must affirm the district court. As the TAC was properly dismissed, we need not reach the moot issue of whether the district court abused its discretion by striking the first footnote.”

“The requirement in Rule 9(b) of the Federal Rules of Civil Procedure that allegations of fraud be pleaded with particularity applies to claims which are made in federal court under the CLRA and UCL. We hold that Kearns’s entire TAC was grounded in fraud. Thus, under Rule 9(b), Kearns’s failure to plead his claims with particularity merited that complaint’s dismissal. We therefore must affirm the district court. As the TAC was properly dismissed, we need not reach the moot issue of whether the district court abused its discretion by striking

the first footnote. AFFIRMED.”

Coalition for ICANN Transparency, Inc. v. Verisign, Inc., 07-16151 “This appeal is about whether the plaintiff, Coalition for ICANN Transparency, Inc., using antitrust statutes drafted in the late 19th century, has successfully stated claims in connection with the administration of the Internet domain name system, so essential to the operation of our sophisticated 21st century communications network. The district court ruled that the plaintiff failed. With the benefit of extensive briefing, collegial discussions and amicus participation on appeal from other players in the domain name system, we hold that the plaintiff has stated claims under both Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1-2. We reverse and remand for further proceedings.

Plaintiff Coalition for ICANN Transparency is an organization composed of participants in the Internet domain name system, including website owners. The heart of the IT industry is located in the Silicon Valley, which lies within the Northern District of California. CFIT filed its complaint in 2005 in the Northern District against defendant VeriSign, the corporation that acts as the sole operator of the ‘.com’ and ‘.net’ domain name registries.

VeriSign operates each registry pursuant to a contract with the Internet Corporation for Assigned Names and Numbers, a non-profit oversight body that coordinates the DNS on behalf of the United States Department of Commerce. Pursuant to these contracts, VeriSign receives a certain price for registering each domain name. It is not disputed that there can only be one operator for each domain name registry at any one time. Therefore, the only viable competition can take place in connection with obtaining a new contract after expiration of the old one. The .com agreement entered into by

NINTH CIRCUIT CASES

ICANN and VeriSign in 2006, after no competitive bidding, provides that the price of domain names can increase by seven percent over four of the six succeeding years. The .net agreement, which was entered into as a result of competitive bidding, contained price caps that were set to expire on December 31, 2006, leaving no limitation on the price that could be charged for .net names. Each contract has a presumptive renewal provision.

CFIT's complaint endeavored to state claims against VeriSign under Section 1 of the Sherman Act and under California's counterpart, the Cartwright Act, for conspiracy in restraint of trade in connection with the terms of the .com and .net contracts' pricing and renewal provisions. In essence, CFIT sought to show that the prices were artificially high and that the renewal provisions wrongfully restrained competition for successor contracts.

The complaint also endeavored to state claims under Section 2 of the Sherman Act, alleging that VeriSign's conduct in obtaining the anti-competitive provisions constituted monopolization or attempted monopolization of the .com and .net registration markets. In addition, the complaint sought an injunction against VeriSign's proposed service for registration of expiring domain names, on the ground it constituted an attempted monopolization of that allegedly separate market.

The district court, after some discovery and several opportunities for CFIT to amend the complaint, dismissed the action with prejudice for failure to state claims under state or federal law in connection with either the .com or the .net contract. It held that CFIT had not sufficiently alleged that either the terms of the contracts or

VeriSign's conduct in obtaining the contracts amounted to antitrust violations. The court also held that CFIT failed sufficiently to allege that a market for expiring domain names existed separate and apart from the market for newly registered domain names.

In this appeal, CFIT contends that the district court failed to appreciate the seriousness of the allegations of anticompetitive conduct and that, in rejecting the existence of a separate market for expiring domain names, the district court improperly relied on already outdated authority from earlier in this young century. We now agree with CFIT, at least with respect to the claims challenging the terms and award of the .com contract and asserting the existence of a separate market for expiring domain names. We therefore reverse."

Catholic League v. City and County of San Francisco, 06-17328 (June 3, 2009) "Appellants, Catholic League for Religious and Civil Rights, Dr. Richard Sonnenshein, and Valerie Meehan, appeal the dismissal of their civil rights action under 42 U.S.C. § 1983 for failure to state a claim. At issue is the constitutionality of a non-binding resolution adopted by the Board of Supervisors of the City and County of San Francisco concerning the adoption of children by same-sex couples and the Catholic Church's position against such adoptions. Catholic League argues that in adopting the resolution the Board expressed disapproval of the Catholic religion in violation of the First Amendment's Establishment Clause. Because we conclude that the resolution passes constitutional scrutiny, we affirm."

"[I]t is inevitable that the secular interests of government and the religious interests of various sects and their adherents will frequently intersect, con-

(Continued on Page 11)

Former Fire Union President Indicted For Tape Recording Fire Chief

From The Associated Press, June 3

SYCAMORE, IL – A firefighter in the northern Illinois community of Sycamore has been charged with eavesdropping.

Authorities contend 42-year-old Kurt Mathey recorded a conversation between his fire chief and an assistant chief without their knowledge.

Mathey is out on bond after being indicted on one count of felony eavesdropping. He's on administrative leave from the department.

Mathey is the former president of Sycamore's firefighters union, which has been in heated negotiations with the city for several months. Earlier this year, an arbitrator recommended a wage increase and city officials said that to meet it, the city would have to lay off two firefighters.

The topic of the fire officials' conversation hasn't been made public.

City officials won't comment on the situation.



NINTH CIRCUIT CASES

flict, and combine.’ *Wallace v. Jaffree*, 472 U.S. 38, 69 (1985) (O’Connor, J., concurring in judgment). Invalidating government action where this incidental overlap is present would create ‘chaos,’ *id.* at 70, and cripple the government’s ability to take ‘action that affect[s] [all] potentially religious issues, including abortion, alcohol use, [and] other sexual issues.’ *American Family Ass’n*, 277 F.3d at 1123. The rights of same-sex families are no different.

Properly contextualized, the Resolution does not have the purpose or primary effect of expressing hostility towards Catholic religious beliefs, and it does not foster excessive government entanglement with the Catholic Church. Accordingly, the judgment of the district court is AFFIRMED.”

Corales v. Bennett, 07-55892 (June 1, 2009)
“On March 28, 2006, Anthony Soltero, Annette Prieto, and two other students walked out of De Anza Middle School with the intent to participate in protests in their neighborhood against then-pending immigration reform measures. Two days later, they were disciplined for their one-day absence from school by Vice Principal Gene Bennett, who took away one of their year-end activities and lectured them harshly regarding the possible legal consequences of truancy, including police involvement, a \$250 fine, and a juvenile hall sentence. Tragically, Anthony committed suicide after school that day. Anthony’s parents and one of the other students brought this action against Bennett, Principal Kathleen Kinley, and the Ontario-Montclair School District, alleging violations of the students’ and parents’ civil rights under 42 U.S.C. § 1983; violations of California’s Unruh Act; intentional infliction of emotional distress, and negligently causing Anthony’s suicide. The district court granted summary judgment to Defendants. Be-

cause Bennett did not violate the students’ constitutional rights, there is no evidence that Bennett intended to harm the students, and because Anthony’s death was not proximately caused by Bennett’s actions, we affirm.”

Tibetts v. Kulongoski, 07-36067 (May 29, 2009)
“Defendant-Appellant Oregon Governor Theodore Kulongoski appeals from the district court’s order denying his motion for summary judgment on the ground of qualified immunity. Plaintiffs-Appellees, who are former employees of the State Accident Insurance Fund, brought this action pursuant to 42 U.S.C. § 1983, alleging, among other claims, that Governor Kulongoski violated their Fourteenth Amendment due process rights by making stigmatizing statements about them in two press releases without providing them name-clearing hearings.

Because the relevant parameters of a Fourteenth Amendment right to a name-clearing hearing were not clear at the time of the allegedly stigmatizing statements, we conclude that a reasonable official in the Governor’s position would not have been aware of his alleged obligation to provide Plaintiffs name-clearing hearings. We therefore reverse the district court and hold that Governor Kulongoski is entitled to qualified immunity in this suit.”

“Although cases need not be ‘fundamentally similar’ in order to put an official on notice that his conduct violates established law, *Hope v. Pelzer*, 536 U.S. 730, 741 (2002), if the parameters of the right are not clearly established by case law, the official is entitled to qualified immunity. *See Hunter*, 502 U.S. at 229 (qualified immunity affords government officials the benefit of the doubt in close calls, since ‘officials should not err always on the side of caution’ because they fear

NINTH CIRCUIT CASES

being sued); *see also Hill v. Borough of Kutztown*, 455 F.3d 225, 244 (3d Cir. 2006) (holding that government officials should have been granted qualified immunity even when the court determined that they had violated the plaintiff's constitutional right to a name-clearing hearing, as the law was not sufficiently clear on the parameters of the right at the time).

Here, it cannot be said that a reasonable person in Governor Kulongoski's position would have known that he was violating Plaintiffs' Fourteenth Amendment due process rights under the circumstances of this case. Even if we assume, *arguendo* that the statements in the Releases were stigmatizing to Plaintiffs, it was not then established whether the stigmatizing statements satisfied the 'temporal nexus' requirement of *Campanelli*, nor that the Governor could be found to have 'caused' Plaintiffs' terminations. Accordingly, we reverse the district court's denial of summary judgment to Governor Kulongoski. REVERSED and REMANDED with instructions to enter judgment in favor of Governor Kulongoski."

National Association of Optometrists & Opticians LensCrafters, Inc. v. Brown, 07-15050 (May 28, 2009) "In this case we consider whether portions of certain California statutes and regulations violate the dormant Commerce Clause. The challenged laws prevent licensed opticians from having specified business relationships with or offering services in the same locations as licensed optometrists and ophthalmologists."

"The Commerce Clause as written is an affirmative grant of power to Congress to regulate interstate commerce, but from it courts have long inferred a prohibition on state actions limiting in-

terstate commerce. *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 87 (1984). This inference, commonly referred to as the dormant Commerce Clause, promotes a national market and the free flow of commerce between the states by preventing them from adopting economic protectionist policies. *See Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 299-300 (1997); *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994).

Under the dormant Commerce Clause, *LensCrafters* seeks declaratory and injunctive relief, arguing that portions of the California statutes and regulations are protectionist measures because they favor in-state optometrists and ophthalmologists at the expense of opticians and optical companies headquartered out of state. The State responds that the California laws do not violate the dormant Commerce Clause because they are not impermissible economic protectionism; instead, these laws prevent optometrists and ophthalmologists, as health care providers, from being unduly influenced by commercial interests, like *LensCrafters*."

"*LensCrafters* contends one-stop shopping provides a significant business advantage in the sale of eyewear. It also asserts that opticians are largely out-of-state businesses, whereas optometrists and ophthalmologists are largely in-state individuals or firms. Thus, *LensCrafters* argues the California laws have a discriminatory effect on out-of-state businesses because they prevent out-of-state opticians from offering one-stop shopping while allowing in-state optometrists and ophthalmologists to do so."

"Here through the challenged laws, California has sought to protect optometrists and ophthalmologists as health care professionals from being

NINTH CIRCUIT CASES

affected by subtle pressures from commercial interests. The pressures of co-ownership and profit sharing prohibited by the statutes are more obvious, but potentially even a landlord-tenant relationship could undermine health care quality if the landlord required a certain level of performance to maintain the lease. It is true that an optometrist or ophthalmologist would still be bound by professional and ethical standards. However, it is the subtle pressure to conform to commercial desires that the statutes seek to avoid. These subtle pressures would be difficult to regulate as violations of professional or ethical standards. Thus, the California laws in this case are health regulations designed to prevent health care providers from being unduly affected by commercial interests. We must give deference to the State's choice to protect its citizens in this way."

"We note that despite LensCrafters' claims that the ability to offer one-stop shopping affords a sales advantage to optometrists and ophthalmologists, there are other sales advantages enjoyed by LensCrafters by virtue of their size, such as lower cost purchasing and the ability to offer a wider selection of eyewear. It is important that LensCrafters is not precluded from operating in California, which is the situation for out-of-state entities in some dormant Commerce Clause cases. LensCrafters is only deprived of one eyewear sales method."

"The district court erred in concluding that the California statutes discriminate against out-of-state entities in violation of the dormant Commerce Clause. We reverse and remand to the district court to apply the Pike balancing test. REVERSED AND REMANDED."

Browning v. United States, 07-35557 (May 22,

2009) "We address the issue of whether a district court's refusal to give a permissive jury instruction regarding pretext in an employment discrimination case is reversible error. We reaffirm that so long as the jury instructions set forth the essential elements that the plaintiff must prove, a district court does not abuse its discretion in declining to give an instruction explicitly addressing pretext."

"In sum, the district court's jury instructions 'set forth the essential elements that [Browning] had to prove in order to prevail,' and Browning was free to explain those elements to the jury in order to make clear that finding the IRS's proffered reasons for Browning's demotion pretextual could justify the jury finding the IRS had discriminated against Browning. *Cassino*, 817 F.2d at 1345; cf. *Conroy v. Abraham Chevrolet-Tampa, Inc.*, 375 F.3d 1228, 1235 (11th Cir. 2004) ('The charge to the jury gave instructions on drawing inferences from the evidence and weighing the credibility of witnesses. This was sufficient to allow the jury to find discrimination or retaliation so long as they disbelieved Abraham Chevrolet's explanation for Conroy's termination. We also find it significant that Conroy's counsel made good use of his opportunity to argue pretext to the jury in closing statements . . .'). The district court did not abuse its discretion in rejecting Browning's more explicit pretext instruction. AFFIRMED."

United States v. Price, 05-30323 (May 21, 2009) "Delray Price was convicted of being a felon in possession of a firearm after Portland police officers found a gun hidden beneath the driver's seat of a car in which he was riding in the rear. Although the government presented circumstantial evidence that Price placed the firearm under the seat as the car was being pulled over, the evi-

NINTH CIRCUIT CASES

dence that sealed his fate at trial was testimony from a witness named Antoinette Phillips. Phillips testified that approximately fifteen minutes before Price was pulled over he was with her and some friends at her aunt's home when she saw a gun tucked into the waistband of his pants. Price's defense attorney vigorously attacked other aspects of the government's case at trial, but he could not overcome this direct evidence of Price's guilt. Price was convicted and sentenced to nearly eight years in prison.

What Price and his attorney did not know is that Antoinette Phillips has a lengthy history of run-ins with the Portland police that suggests that she has little regard for truth and honesty. In addition to being convicted of theft, she has been arrested multiple times for shoplifting and police records show at least one act of 'theft by deception.' She has also been convicted several times for fraudulently using false registration tags on her vehicle — a violation she continued to commit after each conviction, stopping only when a frustrated police officer finally scraped the false tags off of her license plates himself.

Price did not know about Phillips' multiple acts of fraud or dishonesty reflected in police reports, as well as in her police record — and therefore could not impeach her with that information — because the prosecutor never disclosed it to defense counsel. Price's counsel explicitly requested from the prosecutor 'any evidence that any prospective Government witness has engaged in any criminal act, whether or not resulting in conviction,' but all he received was evidence of Phillips' single conviction for second-degree theft. It is not clear whether the prosecutor himself ever possessed information that would have revealed Phillips' various acts of misconduct; at Price's new trial hearing, the prosecutor testified only that he

did not 'have [a] specific recollection' as to what information he personally possessed. However, what is clear is that, regardless of his own personal knowledge, the prosecutor utterly failed in his 'duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police.' *Kyles v. Whitley*, 514 U.S. 419, 437 (1995) (emphases added). There is no doubt that the prosecutor instructed his lead investigative agent, a member of the Portland Police Department, 'to run a criminal history check on Ms. Phillips.' It is also beyond doubt that, in the prosecutor's own words, 'the Portland Police Data System, generally will reflect any police contacts that [an] individual has had.' However, as the prosecutor's testimony further reveals, he did not know or recall the results of the investigation that he directed his agent to undertake. Rather, when asked if the agent had in fact uncovered the details of Phillips' criminal history, the prosecutor could only respond, 'He may have . . . I can't say for sure.'"

Under longstanding principles of constitutional due process, information in the possession of the prosecutor and his investigating officers that is helpful to the defendant, including evidence that might tend to impeach a government witness, must be disclosed to the defense prior to trial. It is equally clear that a prosecutor cannot evade this duty simply by becoming or remaining ignorant of the fruits of his agents' investigations. Because, here, the prosecutor failed to fulfill his duty to learn of and disclose favorable evidence that likely was in the possession of his lead investigating officer, and because the evidence of Phillips' criminal history is material, we hold that the prosecutor violated Price's rights under *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny. Accordingly, we reverse the denial of

NINTH CIRCUIT CASES

Price's motion for a new trial."

Nichols v. Dancer, 07-15654 (May 18, 2009)

"This appeal presents the question of whether the patronage dismissal doctrine immunizes public employers who terminate employees on the basis of perceived lack of personal loyalty. We conclude that it does not and remand for further proceedings."

"Under certain circumstances, a public employer is permitted to take adverse employment action against an employee for engaging in speech that is normally protected by the First Amendment, and the court need not conduct a Pickering balancing test. For example, the patronage dismissal doctrine allows public employers to terminate certain public employees on the basis of their political beliefs and loyalties. *See generally Branti v. Finkel*, 445 U.S. 507 (1980). Here, the district court found that Nichols was a confidential employee and that her termination was a patronage dismissal. Accordingly, the district court granted summary judgment without conducting a full First Amendment examination or a Pickering balancing analysis. However, because Nichols was

terminated for a perceived lack of personal loyalty, rather than political loyalty, we conclude that the patronage dismissal doctrine does not apply to her termination. We therefore must vacate the summary judgment and remand the case to the district court so that it may conduct a traditional First Amendment analysis.

"Because the patronage dismissal doctrine does not apply, we must remand to the district court for re-consideration of the claims under the traditional First Amendment government employee analysis. Although the parties invite us to conduct such an examination ourselves, we decline to do so. The district court did not reach that issue and we are not confident that the record is complete. Thus, the inquiry is more appropriate for the district court. We remand to allow the district court to conduct such an analysis in the first instance. We do not prejudice the outcome of that inquiry. REVERSED AND REMANDED."



New York Governor Vetoes Police, Fire Pension Bill, Drawing Fire Union's Wrath

From The New York Times, June 3

ALBANY, NY – Gov. David A. Paterson said Wednesday that he vetoed legislation that would have allowed new police officers and firefighters across the state to enroll for a category of pension benefits that was phased out for other public employees in the 1970s.

His veto drew immediate praise from Mayor Michael R. Bloomberg and was slammed by a top firefighters union.

The legislation, which would have allowed newly hired police officers and firefighters to enroll for so-called “Tier II” pension benefits, has been routinely reauthorized since 1981. Mr. Paterson, however, has been trying to lower pension costs by persuading lawmakers and public employee unions to accept a new fifth pension tier with lesser benefits.

Under his “Tier V” bill, police officers and firefighters would have to be at least 50 to retire and have put in at least 25 years of work, instead of the current 20. Civilian employees would not be able to retire until the age of 62, instead of the current 55. They would also have to start making their own contributions into the pension system after 10 years of service.

“Nothing says ‘business as usual’ like a temporary fix that lasts 28 years,” the governor said in a statement. “Instead of a rubber stamp on a temporary fix, we need to move forward with real reform to the pension system.”

Mr. Bloomberg called the veto “a gutsy decision” that “demonstrated his commitment to fiscal responsibility.”

But Charles J. Morello, president of the New York State Professional Firefighters Association, said “no previous governor has treated labor so badly.”

“We are shocked by this veto, which was accomplished without discussion or other communications with those affected,” he added.



U.S. SUPREME COURT CASES

Montejo v. Louisiana, No. 07–1529 (May 26, 2009) “At a preliminary hearing required by Louisiana law, petitioner Montejo was charged with first-degree murder, and the court ordered the appointment of counsel. Later that day, the police read Montejo his rights under *Miranda v. Arizona*, 384 U. S. 436, and he agreed to go along on a trip to locate the murder weapon. During the excursion, he wrote an inculpatory letter of apology to the victim’s widow. Upon returning, he finally met his court-appointed attorney. At trial, his letter was admitted over defense objection, and he was convicted and sentenced to death. Affirming, the State Supreme Court rejected his claim that the letter should have been suppressed under the rule of *Michigan v. Jackson*, 475 U. S. 625, which forbids police to initiate interrogation of a criminal defendant once he has invoked his right to counsel at an arraignment or similar proceeding. The court reasoned that *Jackson*’s prophylactic protection is not triggered unless the defendant has actually requested a lawyer or has otherwise asserted his Sixth Amendment right to counsel; and that, since Montejo stood mute at his hearing while the judge ordered the appointment of counsel, he had made no such request or assertion.”

Held: *Michigan v. Jackson* should be and now is overruled.

Caperton v. A. T. Massey Coal Co., Inc., No. 08–22 (June 8, 2009). “After a West Virginia jury found respondents, a coal company and its affiliates (hereinafter Massey), liable for fraudulent misrepresentation, concealment, and tortious interference with existing contractual relations and awarded petitioners (hereinafter Caperton) \$50 million in damages, West Virginia held its 2004 judicial elections. Knowing the

State Supreme Court of Appeals would consider the appeal, Don Blankenship, Massey’s chairman and principal officer, supported Brent Benjamin rather than the incumbent justice seeking reelection. His \$3 million in contributions exceeded the total amount spent by all other Benjamin supporters and by Benjamin’s own committee. Benjamin won by fewer than 50,000 votes. Before Massey filed its appeal, Caperton moved to disqualify now-Justice Benjamin under the Due Process Clause and the State’s Code of Judicial Conduct, based on the conflict caused by Blankenship’s campaign involvement. Justice Benjamin denied the motion, indicating that he found nothing showing bias for or against any litigant. The court then reversed the \$50 million verdict. During the rehearing process, Justice Benjamin refused twice more to recuse himself, and the court once again reversed the jury verdict. Four months later, Justice Benjamin filed a concurring opinion, defending the court’s opinion and his recusal decision.”

Held: In all the circumstances of this case, due process requires recusal.



KROLLONTRACK.COM eDISCOVERY CASES

Court "Very Troubled" by Defendant's Efforts to Thwart Court Resolution

Hohider v. United Parcel Serv., Inc., 2009 WL 1163931 (W.D.Pa. Apr. 28, 2009). In this litigation, the defendant filed an emergency motion to stay the court's order requiring in camera review of alleged work product documents withheld by the defendant. Noting it was "very troubled by defendant's efforts to delay or stop the court's resolution" of the defendant's potential preservation failures, the court determined an in camera review was necessary. The court was also troubled by the defendant's request to the court of appeals to stay the special master's investigative actions and believed this action raised suspicions about the defendant's motives. Accordingly, the court denied the defendant's motion and directed the special master to submit his report and recommendation regarding the privilege assertions. The court also noted that an argument against in camera review by a trial court was unprecedented because this review is often the only way to determine whether documents are privileged.

Court Denies Sanction Request Citing Party's Routine Deletion Policy

Patterson v. Goodyear Tire & Rubber Co., 2009 WL 1107740 (D.Kan. Apr. 23, 2009). In this employment litigation, the plaintiff sought production of various electronic employee records and policies, and an adverse inference instruction alleging spoliation of attendance records. The defendant argued electronic copies no longer existed due to the routine document deletion every 12 months, but that all records were preserved and produced in hard copy. Denying the motion to compel as untimely, the court noted "both parties neglected the issue of

ESI from the outset of this litigation" in violation of their obligations under Rule 26 of Kansas' Guidelines for Discovery of Electronically Stored Information. Because many of the documents sought were contained on backup tapes, if available at all, the court was hesitant to intervene at the late time, but ordered the defendant to search two backup tapes pursuant to its offer to do so. The court denied the adverse inference instruction request, determining there was no evidence the attendance records were intentionally destroyed given the defendant's routine deletion system.

Court Grants Motion for Hearing on Spoliation Citing Possible Application of Zubulake Exception

Forest Labs., Inc. v. Caraco Pharm. Labs., Ltd., 2009 WL 998402 (E.D. Mich. Apr. 14, 2009). In this patent litigation, the defendants moved for a hearing on sanctions for spoliation alleging the plaintiffs intentionally or recklessly destroyed backup tapes. Opposing the motion, the plaintiffs denied misconduct claiming they preserved electronic records pursuant to their standard operating procedures but admitted they did not halt all backup tape recycling. Thus, the court determined that potentially relevant evidence was destroyed after the duty to preserve arose. However, the court also determined the backup tapes were inaccessible and there is no duty to preserve inaccessible backup tapes beyond a company's normal retention period unless the Zubulake exception applies. The Zubulake exception requires the preservation of backup tapes containing documents of "key players" if the information is not otherwise available. *Zubulake v. UBS Warburg, LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003). The court granted the defendants' motion and ordered a hearing to determine whether the Zubulake exception applies and, if so, whether the plaintiffs

KROLLONTRACK.COM eDISCOVERY CASES

acted with the requisite culpability and whether the spoliated evidence was relevant.

Court of Appeals Affirms Trial Court's Award of Monetary Sanctions and Admission of Expert Forensic Testimony

Oz Optics Ltd. v. Hakimoglu, 2009 WL 1017042 (Cal. App. 1 Dist. Apr. 15, 2009). In this employment dispute, both parties appealed the denial of their respective motions for judgment notwithstanding the verdict (JNOV). The defendant argued that the court improperly allowed expert forensic testimony alleging it was "devoid of substance" and improperly awarded \$90,000 in monetary sanctions based on the defendant's hard drive file scrubbing. The plaintiff argued that the court abused its discretion by limiting sanctions to \$90,000. The court of appeals affirmed the trial court on all grounds. First, the court rejected the defendant's argument that the forensic testimony was prejudicial, citing the defendant's inability to demonstrate why the testimony was inappropriate. Second, the court affirmed the sanctions as reasonable compensation for attorney's fees, costs and expenses incurred as a result of the defendant's discovery misconduct. In affirming, the court rejected the defendant's argument that the spoliation was unintentional, determining that intent is not required for monetary sanctions under the California Code of Civil Procedure. The court also rejected the plaintiff's argument that the monetary sanctions did not provide full compensation for reasonable expenses, finding the plaintiffs failed to establish the amount awarded was "arbitrary, capricious or whimsical."

Court Orders Further Discovery and Forensic Examination, Finding Party's Discovery

Conduct Grossly Negligent

Preferred Care Partners Holding Corp. v. Humana, Inc., 2009 WL 982460 (S.D.Fla. Apr. 9, 2009). In this litigation alleging a confidentiality agreement breach, the plaintiffs sought sanctions based on the defendant's "document dump" of 10,000 documents two months after the close of discovery and deletion of documents pursuant to a "print and purge" directive from defense counsel. Finding the defendant clearly failed to carry out its discovery obligations by acting in a grossly negligent manner, the court imposed sanctions. First, the court ordered further depositions regarding several categories of documents at cost to the defendant. The court then ordered additional limited discovery in relation to several document categories. According to the court, these sanctions were intended to compensate the plaintiffs as well as to punish and deter any further breaches of discovery obligations. The court also determined the defendant's counsel's decision to print and purge electronic documents without consulting opposing counsel or the court was an exercise in bad judgment constituting a breach of the defendant's duty to preserve. Accordingly, the court ordered that the plaintiffs shall be permitted to conduct a forensic examination of the defendant's electronic data backup system to verify all e-mails were produced. In addition, the court ordered that the plaintiffs shall be permitted to conduct a forensic examination to ensure the reduction of the 60,000 data set to 35 documents (produced in a supplemental production) was appropriate. Finally, the court determined default judgment sanctions were not appropriate because the plaintiffs failed to demonstrate severe prejudice and the defendant did not act in bad faith.

Court Orders Additional Keyword Search but

KROLLONTRACK.COM eDISCOVERY CASES

Notes the Inadequacy of this Searching Method

Asarco, Inc. v. United States Envtl. Prot. Agency, 2009 WL 1138830 (D.D.C. Apr. 28, 2009). In this environmental litigation, the plaintiff filed a motion to take discovery. The plaintiff contended that the defendant's keyword search was conducted in bad faith, as evidenced by the fact it used only one search term. Finding the plaintiff's argument persuasive, the court ordered an additional keyword search utilizing four additional key terms. Notably, the court stated that "keyword searches are no longer the favored methodology." The court concluded by recommending summary judgment on the merits in favor of the defendant after the second search is completed, determining that there is no genuine issue of material fact whether additional defendant data exist.

Court Orders Affidavit Addressing Party's Document Retention Policy and Search Efforts

Newman v. Borders, Inc., 2009 WL 931545 (D.D.C. Apr. 6, 2009). In this racial discrimination litigation, the plaintiff requested an additional Fed.R.Civ.P. 30(b)(6) deposition seeking information about the defendant's e-mail retention policy. Frustrated with the high costs and time spent on discovery that the court determined "will dwarf the potential recovery," the court denied the plaintiff's request and ordered the submission of an affidavit after determining a party's document retention policy was discoverable. The affidavit was to address the defendant's e-mail systems, deletion policies and search efforts.

Practice Points: Update – Has Federal Rule

of Evidence 502 Healed the Heartache of Inadvertent Disclosure?

Preventing inadvertent disclosure of privileged documents has long been a priority for counsel. However, the proliferation of technology has led to a rapid increase in the amount of electronically stored information and increased the probability that privileged documents will be accidentally produced. To combat this growing phenomenon, Federal Rule of Evidence 502 was signed into law on September 19, 2008.

Since that time, several cases have addressed and applied this much anticipated rule. However, does Fed. R. Evid. 502 really provide sufficient protection against inadvertent disclosure? Fed. R. Evid. 502 is titled "Attorney-Client Privilege and Work Product, Limitations on Waiver" and is intended to govern the disclosure of information that is protected by privilege. In other words, Rule 502 provides waiver protection when parties take "reasonable steps" to prevent the inadvertent disclosure of privileged information. The application of this rule also makes determinations and orders regarding privilege binding on state courts and, in some cases, state court decisions binding on federal courts. The two main objectives of Rule 502's enactment are the reduction of costs and predictability.

Reducing Costs

According to the Judicial Conference Rules Committee, the primary purpose of Rule 502 is to control the rising costs of e-discovery, particularly during document review. The rule aims to achieve this goal by narrowing the circumstances under which subject matter waiver can occur, in addition to prohibiting the automatic waiver that formally occurred in certain jurisdictions. In *Spieker*

KROLLONTRACK.COM eDISCOVERY CASES

v. Quest Cherokee, 2008 WL 4758604 (D. Kan. Oct. 30, 2008), the defendant objected to the plaintiffs' request for production of ESI claiming the costs would equal \$375,000, while the plaintiffs' claim allegedly amounted to \$100,000 or less. Although the court denied the plaintiffs' motion, it left open the possibility for the plaintiffs to refile the motion to compel. In so doing, the court advised the parties to consider Rule 502 in future discussions, noting the rule was enacted "to reduce the costs of exhaustive privilege reviews of ESI."

Predictability

Another intention of Rule 502 is to provide predictability by creating a previously nonexistent federal standard to govern privilege waiver. The rule aims to achieve this goal by regulating the scope of waiver, when inadvertent disclosure justifies waiver and the effect of protective orders. Federal courts now analyze privilege waiver under Rule 502(b) which provides that disclosure is not a waiver if: (1) the disclosure was inadvertent, (2) reasonable steps were taken to prevent disclosure and (3) reasonable steps were taken to rectify the error. Additionally, the rule is intended to focus on the disclosure of privileged information – not discovery abuses. See *Laethem Equipment Co. v. Deer and Co.*, 2008 WL 4997932 (E.D. Mich. Nov. 21, 2008).

Courts may still look to other factors outside of Rule 502 in determining whether a waiver of privilege is appropriate. In *Rhoads Indus. Inc. v. Bldg. Materials Corp. of America*, 2008 WL 4916026 (E.D. Pa. Nov. 14, 2008), the Eastern District of Pennsylvania held that the traditional five-factor common law test to determine waiver should be applied in cases where the reasonableness remains disputed. These five fac-

tors are: (1) reasonableness of precautions taken to prevent, (2) number of inadvertent disclosures, (3) extent of disclosure, (4) delay and measures taken to rectify disclosure and (5) whether overriding interests of justice would be served. The Rhoads court found the first four factors to be in favor of the defendants and the fifth factor to strongly favor the plaintiff and held there was no waiver of privilege of the remaining documents. This case supports the notion that when precautionary reasonableness is in dispute, courts may look to interests of justice and other factors in determining whether privilege is waived.

As the above cases illustrate, in the past six months the application of Rule 502 has already gained traction in federal courts across the country. Attorneys are using this rule in an effort to defend against discovery mishaps that may cost their client dearly. Courts' application of this rule is creating a more uniform standard in determining whether waiver is appropriate. Despite the many protections Rule 502 may provide, the Rule does not erase the uncomfortable reality that inadvertent disclosure provides the opponent with potentially case-damaging information. As U.S. Magistrate Judge John M. Facciola stated in a recent case, it is "difficult to unlearn something once it is learned." *D'Onofrio v. SFX Sports Group, Inc.*, 2009 WL 859293 (D.D.C. Apr. 1, 2009). Preparing for e-discovery and employing smart technologies throughout the process can potentially help counsel prevent inadvertent disclosures, in turn decreasing reliance on a rule that may not provide absolute protection in circumstances where privileged documents are accidentally produced.



Your Fiancée Can Get You Fired

Law.com

Your employer cannot fire you because you pursue your rights under Title VII. That is unlawful retaliation. But can you get fired because someone close to you -- to wit, your fiancée -- filed a Title VII claim? That is the unique issue decided this week by the 6th U.S. Circuit Court of Appeals in .

The short answer, as decided by the court, is that Title VII does not protect the person who did not directly engage in protected activity. But as Ross Runkel recounts at , it took a panel of 16 circuit judges to come up with that short answer, and they split 10 to 6, with three different dissenting opinions filed.

The plaintiff, Eric Thompson, claimed he was fired in retaliation for his fiancée's discrimination charge. Thompson met the woman, Miriam Regalado, at work in 2000. In 2002, Regalado filed a charge with the EEOC alleging that she was discriminated against because of her gender. Three weeks after the employer received notice of the charge, it fired Thompson.

The issue for the 6th Circuit was whether Title VII created a cause of action for third-party re-

taliation. Runkel explains how the court came down:

Because Thompson did not allege he himself engaged in any statutorily protected activity (i.e., did not oppose an unlawful employment practice, make a charge, testify, assist, or participate in an investigation), the court found by the plain language of the statute that Thompson was not included in the class of persons for whom Congress created a retaliation cause of action. The 3rd, 5th, and 8th circuits agreed. The court distinguished the recent Supreme Court's decision in , 129 SCt 846 (2009), (which abrogated the 6th Circuit's view that the opposition clause required active, consistent behavior), by stating that Crawford involved involuntary testimony while Thompson did not engage in any protected activity.

The dissent focused on the anti-retaliation law's prohibition of discrimination against anyone who "has opposed" an unlawful employment practice." Oppose" is a broad word that could arguably have encompassed the plaintiff's actions in this case, the dissent argued.

