KEEPING UP WITH STANFORD POLICY AND THE LAW 2010

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May 17, 2010
**Stanford Policy Changes**

**Vacations – AGM 22.5:** Maximum Accrual Rates will change over the next 3 years as follows:

<table>
<thead>
<tr>
<th>Accrual Rate (days/yr)</th>
<th>Max. Accrual 2009</th>
<th>Starting 2010</th>
<th>Starting 2011</th>
<th>Starting 2010</th>
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<td>37.5/300</td>
<td>37.5/300</td>
<td>37.5/300</td>
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<tr>
<td>17</td>
<td>42.5/340</td>
<td>42.5/340</td>
<td>40/320</td>
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<td>24</td>
<td>60/480</td>
<td>50/400</td>
<td>40/320</td>
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</table>
Compensation of Staff Employees – AGM 22.4

- **Special employment circumstances** (e.g. working in more than one job) to be discussed with human resources prior to implementation.

- **Requests to perform additional work** by another department must include formal approval by the supervisor (for non-teaching duties or teaching duties during the employee’s normal work schedule) or written notice to the supervisor (for teaching duties outside the employee’s normal work schedule)

- Confirms that “normal expectations” for exempt staff include
  - Performing “a variety of services apart from those normally considered to be their own regular job duties” and
  - Often being required to work in excess of 40 hours/week

- These situations are **not grounds for additional compensation** or payment to the staff member in excess of 100% of FTE.
Employees on unpaid leave of absence are now billed for their portion of the cost of benefits.

Employees on a leave of absence can cancel benefit coverage by making a request by phone or online.
• **Maximum** amount of staff development program reimbursement an employee can receive **per calendar year is $5250.** (Maximum STAP is $800/fiscal year; maximum STRP is $5250/fiscal year; maximum both is $5,250/calendar year.)

• Requests for reimbursement for STAP must be made within **20 days after completion of the training or prior to the end of the current fiscal year,** whichever is sooner. (Previous rule was 6 months.)
Definition of sexual assault updated to conform with current legal definition:

Under federal and state law, sexual assault includes, but is not limited to, rape, forcible sodomy, forcible oral copulation, sexual assault with an object, sexual battery (e.g., unwanted touching of an intimate body part for purposes of sexual gratification), and threat of sexual assault.

(Previous definition included “forcible fondling” – unwanted touching or kissing for purposes of sexual gratification.)

Medical-Legal Evidence Collection section updated to

- reference applicable law providing for free medical-legal exams to victims of sexual assault, and
- note that the Valley Medical Center (Santa Clara county’s dedicated facility for providing the evidence collection/medical-legal examination) is a “mandated assault reporter under state law and may have legal obligations to provide a report of an assault to a policy agency.”
Revised to comply with 2009 FMLA amendments. Revisions include:

**Expanded definition of “covered service members” to include veterans**

- who are undergoing medical treatment, recuperation, or therapy, for a serious injury or illness
- that was incurred in the line of duty on active duty and
- who was a member of the Armed Forces (including a member of the National Guard or reserves) at any time during the 5 years preceding the medical treatment, recuperation, or therapy.

Practical effect: expands the availability of military caregiver leave (up to 26 weeks of job-protected FMLA leave in a 12-month period). *(Note other FMLA/CFRA leave is 12 weeks in a 12-month period.)* Leave is available on a “per-covered-service member, per injury” basis.

Definition of **“serious injury or illness”** expanded to include injuries or illnesses that are *aggravated* by service in line of duty on active duty for both active military members and covered veterans.

Definition of **“qualifying exigency”** expanded to cover *families of active duty service members* during deployment to a foreign country. *(Originally “qualifying exigency” use of FMLA was limited to family members of the National Guard, reservists, and retirees recalled in support of “contingency” operations, specifically recognizing the disruption to family members created by short notice deployments and the need for them to take off time from work to put their affairs in order.)*
Stanford Identification Cards – AGM 28.4

- **REWRITTEN completely**
  Changes were driven by need to make sure that employee benefits funded by the benefit pool are limited to employees (that is, that the university’s benefit pool funds don’t subsidize benefits for non-employees)
- Changes were also driven by the fact that the previous ID card policy as implemented were haphazard and inconsistent
- **No major changes for most faculty, staff, and student privileges**
  “Due to legal and regulatory constraints” access to campus facilities (libraries, athletic facilities) limited to faculty, staff, students and others who significantly support Stanford’s academic and research mission
- Eliminated visiting scholar and associate cards
Staff Policy on Conflict of Commitment and Interest – AGM 15.2

- All financial or family relationships that may create the appearance of a conflict of interest must be disclosed in writing – even those that do not rise to the level of Significant Financial Interest (= at least ½ percent of the company’s equity or at least $10,000 in ownership interest)
  - Writing must be retained for the duration of the business relationship (between the University and the entity with which the individual or an immediate family member has any financial or family ties)
- Gratuities and Special Favors – threshold raised from $25 to $50 for acceptance of gratuities or unsolicited gifts
- University owned vehicles and departmental parking permits may not be used “except in purely incidental way” for any purposes other than the performance of the employee’s university employment
- Except in rare instances, cognizant university officers may not delegate their responsibility to review and grant exceptions to the conflict of interest policy
- Consequences section added – failure to adhere to any aspect of the conflict of commitment and interest policy shall subject the involved employees to disciplinary action up to and including termination
Clarifies sick time may be used during Winter Closure “only in limited circumstances” and **with the approval of Liberty Mutual**

“**Limited circumstances**” are:

- Employee was on an approved medical leave due to his/her own disability immediately prior to Winter Closure
- Employee becomes disabled or ill during Winter Closure
- Employee is approved to care for a sick or disabled family member during Winter Closure
No Match Regulations

• Department of Homeland Security had proposed regulations telling employers how to handle “no match” situations – instances where an employee’s name and SSN do not match

• A coalition of labor, immigrants’ rights, and business groups filed a lawsuit in federal district court in San Francisco, asking the judge to issue a restraining order preventing the regulations from taking effect – a restraining order issued

• On November 6, 2009, DHS *rescinded* the proposed regulations
New I-9 Form

- New I-9 form was issued on August 7, 2009
- New form has expiration date of August 31, 2012
COBRA Subsidy

• Stimulus legislation entitles employees who were involuntarily terminated after August 2008 to receive a subsidy of the premium otherwise payable for COBRA continuation coverage

• Eligible individuals pay only 35% of their COBRA premiums; remaining 65% is reimbursed to the employer through a tax credit.

• Subsidy has been extended for employees involuntarily terminated through March 31, 2010

• Congress is considering legislation to extend the subsidy further, through December 31, 2010
Does not create a new protected class (employees with caregiving responsibilities are not protected per se)

Some caregiving responsibilities may be protected under other laws, however (e.g., Title VII, ADA, FMLA, etc.)

Guidance highlights circumstances under which discrimination against workers with caregiving responsibilities might constitute discrimination based on sex, disability, or other protected characteristics, for example by stereotyping caregivers

Reiterates that it is important for employers to follow best practices and train supervisors and managers in all aspects of the employment process – recruitment, hiring, promotion, terms, conditions, and privileges of employment
Federal Law – Cases


- City of New Haven fire department used exam (designed by outside consultant for $100K) to decide who to promote to the rank of lieutenant or captain; those positions were prized and hard won
- Caucasians dramatically outperformed minority candidates on the exam – a “rancorous” public debate ensued
- Because it feared lawsuits from minority candidates, New Haven tossed out the exam
- Ricci on behalf of certain Caucasian and Hispanic firefighters sued for race discrimination because they would have likely been promoted based on their good exam performance
- Both the trial court and the appeals court agreed with the City – no discrimination against Ricci and others by tossing the exam
You Decide:

- **Ricci loses** – City can toss out the exam to protect itself from lawsuits from minority candidates
- **Ricci loses** – City has the right to develop an exam that will result in minority candidates being promoted
- **Ricci wins** – Tossing out the exam after the promotion process and selection criteria are made clear upsets all candidates’ legitimate expectation that they will be treated fairly regardless of their race and violates the disparate impact treatment prohibition of Title VII
And the Answer Is . . .

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Age Discrimination:


- Gross worked for FBL starting in 1971. In 2001 he was the claims administration director. In 2003 (at age 54) he was reassigned to claims project coordinator. A younger woman got his old job duties (but in a new job with a different name).
- Gross sued under ADEA claiming FBL had demoted him because of his age. FBL claimed the reassignment was part of a corporate restructuring and better suited to Gross’s skills.
- District Court ordered jury to enter a verdict for Gross if he proved that he was demoted and his age was a motivating factor in the decision and for FBL if it proved it would have demoted Gross regardless of age.
- Jury verdict for Gross; FBL appealed; 8th Circuit reversed and remanded because jury instruction was not correct for Title VII “mixed motive” cases.
Held:

- ADEA cases are not governed by Title VII decisions. ADEA does not authorize “mixed motive” cases. Mixed motive jury instruction is never proper in an ADEA case.
- To win Gross must prove that his age was the “but for” cause of FBL’s decision to demote him.
Dissent (Justices Stevens, Souter, Ginsburg, and Breyer):
“The Court’s endorsement of a different construction of the same critical language in the ADEA and Title VII is both unwise and inconsistent with settled law. The but-for standard the Court adopts was rejected by this Court in Price Waterhouse and by Congress in the Civil Rights Act of 1991. Yet today the Court resurrects the standard in an unabashed display of judicial lawmaking.”
Disability Discrimination


- Pathologist requested reduced work schedule due to disability (depression)
- Employer insisted that he take full time leave instead until his “status was resolved”
- After 6 months leave, he returned to work under an agreement that reduced his salary and changed his job duties
- Lawsuit claimed retaliation, interference with FMLA rights, denial of CFRA rights, disability discrimination, and failure to provide reasonable accommodation for a disability
Result:

Jury unanimously awarded damages of $505,457

**Lessons Learned:** Do not insist employee take a leave of absence to address disability when the employee proposes an accommodation that will involve continued work; be sure to engage in an interactive process when accommodations are requested.
Privacy

Sporer v. UAL Corporation, 2009 U.S. Dist. LEXIS 76852

- Sporer = UAL employee since 1987; supervisor since 1998; UAL is an at will employer
- UAL’s e-mail policy says it is “strictly prohibited” to transmit or store messages or data that contains offensive language or graphics . . . harasses or violates the legal rights of others”
- UAL’s computers’ start-up screen alerts employees that their e-mail may be monitored and that they have no right of privacy on e-mail transmitted on the company system
- In 2007 Sporer received an email from a friend entitled “Amazing oral talent !!!!!!!!!!!”.
- The e-mail contained a pornographic movie.
More Facts

- Sporer forwarded the e-mail to his personal e-mail account and responded to his friend: “Thank you for the spiritual lift. However, I need you to use my home E-mail address . . . Apparently United Air Lines, Inc. has a strict computer security policy and these babies will get me fired.”
- The e-mail was discovered in a routine UAL audit
- Sporer also sent a second inappropriate e-mail from work to his personal account (this one entitled “Skeleton Fun”)
- During UAL’s investigation Sporer admitted that this was his second violation, that he was aware of UAL’s zero tolerance policy, that he had signed UAL’s computer security agreement, and that he knew that the title of the e-mail “Amazing oral talent !!!!!!!!!!” was suggestive
- **UAL fired Sporer:** Sporer sued for invasion of privacy; UAL moved for summary judgment
You Decide:

- **Sporer wins** (= can have his case heard by a jury) – the privacy of e-mail is always protected and UAL’s policy is against the law; besides, Sporer’s long service with UAL meant that UAL needed to follow progressive discipline before Sporer could be fired

- **Sporer loses** – his employment was at will; he knew the rules and broke them twice
Sporer loses – his employment was at will; he knew the rules and broke them twice
Wage and Hour:

Commuting Time and Work Performed at Home: Rutti v. Lojack, 2010 U.S. App. LEXIS 4278 (9th Cir. 2010)

- Rutti = technician who commuted to work in a company-owned vehicle; Lojack = employer
- Rutti sued for compensation for (1) commuting to work in the employer’s vehicle, and (2) pre- and postliminary activities
- Pre-liminary activities included receiving his work assignments for the day, prioritizing them, and mapping his route to them
- Post-liminary activities including uploading data about his work to Lojack by connecting a portable data terminal owned by Lojack to a modem provided by Lojack
More Facts:

- Rutti could not use Lojack’s vehicle for personal errands, could not take passengers, could not use cell phone while driving, had to go directly to and from home, but was free to determine when he left his home and work and free to decide what route to take along the way.
- Rutti’s sending the required transmission took only minutes when all went well – could watch TV, eat, sleep, etc. while the transmission was in progress; delays caused by transmission failures could up the time to 15 minutes to complete.
- District court concluded that none of the time was compensable – commute not compensable as a matter of law and preliminary/postliminary activities not compensable because they were either not integral to Rutti’s principal activities or were de minimus.
Result:

- **Rutti lost** (=summary judgment affirmed) on the preliminary activities issue (de minimus)
- **Rutti won** (=summary judgment reversed and case remanded) on the post-liminary data transmission issue – data transmission activity is an integral part of Lojack’s principal activities; however there is a question of material fact as to whether Rutti’s time spent on that activity is de minimum
- **Rutti won** (=summary judgment reversed and case remanded) on the commute time issue – commute time can be compensable if the employer exercises significant control over the employee during his/her commute
Computer Use Policies

LVRC Holdings, LLC v. Brekka, 581 F.3d 1127 (2009)

- LVRC operates a residential treatment program for addicted persons; Brekka was employed by LVRC to conduct internet marketing programs (among other things); Brekka commuted between the company’s offices in Nevada and his own home in Florida.
- LVRC did not have a computer use policy that addressed whether employees could e-mail LVRC documents to their personal computers.
- Brekka frequently e-mailed work documents to himself at his personal computer.
- In 2003 Brekka and LVRC discussed Brekka acquiring an ownership interest in the company; Brekka e-mailed to his personal e-mail account a copies of the company’s financial statement, marketing budget, admissions reports for patients, and a master admissions report which included names of past and current patients.
More Facts:

- Negotiations broke down; Brekka stopped working for LVRC; his LVRC computer was used by other people; his user name and password were deactivated 2004.
- In 2005, someone logged in to LVRC’s system using Brekka’s user name and password; evidence was insufficient to show that Brekka was responsible for the log in.
- LVRC filed a report with the FBI and sued Brekka claiming that he had violated the Computer Fraud and Abuse Act and various state tort laws by e-mailing LVRC documents to himself and by accessing their computer system after he was no longer an LVRC employee.
- To win LVRC must show that Brekka entered its computer system without authorization or that he exceeded authorized access.
You Decide:

- LVRC wins – employee cannot take employer’s documents (by e-mailing them to himself)
- LVRC loses – Brekka was authorized to use LVRC’s computer system and to e-mail documents to himself when he was LVRC’s employee (since there was no policy to the contrary)
LVRC loses – Brekka was authorized to use LVRC’s computer system and to e-mail documents to himself when he was LVRC’s employee (since there was no policy to the contrary)

Lessons Learned?
- Important to have and communicate clear computer use policies and guidelines
- Important to let your IT department know when someone terminates employment
Interesting Settlement: JP Morgan Chase & Co. (Chase)

- Employer had a **blanket policy** – employees who return to work from a disability leave within 6 months were reinstated. (Employer was Bank One Corporation that later merged with Chase.) Employees whose leave exceeded 6 months were given 30 days to find another position or were terminated.

- **EEOC sued** Chase because the **ADA requires employers to individually assess whether additional leave will assist employees in returning to work without placing an undue hardship on the company.** Interactive process is required so employer can determine whether additional leave or other accommodations are appropriate. Employer’s policy didn’t consider each employee’s situation individually.
$2.2 million dollar settlement reached with Chase. Chase also agreed to train all managers, human resources professionals, and employees of its Disability Management Services department on the ADA and its revised policy.

- Employer may propose a menu of alternative workweek options
- Menu may include 8 hour days with overtime payable for hours in excess of 8/day, 40/week (former law was that 8 hour days could not be included because they were not an “alternative” schedule)
- Employees who adopt a menu of work schedule options may, with employer consent, move from one schedule option to another on a weekly basis
Leaves of Absence – Civil Air Patrol Duty (AB 485)

- Applies to employers with more than 15 employees
- Applies to employees who have been employed for at least 90 days immediately preceding the commencement of the leave
- Applies to employees who are volunteer members of the California Wing of the Civil Air Patrol (a US Air Force civilian auxiliary)
- Prohibits employment discrimination against Civil Air Patrol members
- Grants “not less than 10 days”/calendar year leave of absence beyond any leave benefits otherwise available “to an employee responding to an emergency operational mission of the California Wing of the Civil Air Patrol”; single emergency operational mission not to exceed 3 days unless extension of time is granted by the authorizing governmental entity and the extension of the leave is approved by the employer
Civil Air Patrol Leave cont.

- Employee must give **as much notice as possible** of the dates when the leave will begin and end; must provide documentation/certification if employer requires.
- At the end of the leave, **employer must restore the employee to his/her position** or a position with equivalent seniority, status, benefits, pay, and other terms and conditions of employment.
- Employer not required to grant the leave to an employee who is already required to respond to the same or a simultaneous emergency as a first responder or disaster worker.
Private postsecondary institutions may seek temporary restraining orders on behalf of a student who has been the subject of violence or a threat of violence

- Any chief administrative officer or officer/employee designated by the chief administrative officer can seek the TRO
- **Student’s written permission is required**
- (Existing law authorizes employers to seek TROs on behalf of an employee who has suffered unlawful violence or a credible threat of violence which can reasonably be construed to be carried out in the workplace)
Deductions for Partial Day Absences for Exempt Employees

- Deductions from an exempt employee’s leave balances for partial or full day absences due to vacation or sickness are permissible (if employer has a policy requiring vacation to be used when sick leave is not available, that can include a deduction from vacation if the employee has no sick leave balance)
- Deductions from an exempt employee’s salary for partial day absences is not permitted
- Deductions from an exempt employee’s salary for full day absences is permitted when no leave accrual is available (because deductions from salary permissible when employee is absent from work for one or more full days for personal reasons other than sickness or disability and for one or more full days due to sickness or disability if employer has a bona fide plan, practice, or policy of providing compensation for sickness and disability)
- “4 hour or more” rule is permissible as an employer policy, but is not required by law
- (New DLSE Opinion Letter, November 23, 2009)
Reduction in Work Week (& therefore pay) of Exempt Employees

- In view of current difficult economic environment, employer sought to avoid layoffs by cutting exempt employees’ workweek to 4 days with commensurate reduction in pay; asked DLSE if that reduction would violate the “salary basis” test for exempt employees
- Employer stressed that the reduction would be temporary; as soon as business conditions permit employees will be restored to 5 days/week and full pay
- DLSE opinion letter okayed the reduction in the exempt employees’ work schedules and pay in these circumstances provided that the employees’ still meet the salary test by earning a monthly salary equal to no less than two time the state minimum wage for full time employment
- (New DLSE Opinion Letter, August 19, 2009)
DFEH Renaissance

- **Vision:** “To SOAR as the nation’s top state civil rights agency”
  - Service, Outreach, Advocacy, Resources
- **Case grading,** triage to determine whether cases will be handled as priority or standard cases; immediate pairing of investigators and attorneys for priority cases
- **Expanded outreach;** expanded web resources; on Facebook; on Twitter
- In 2009, handled 18,666 cases; 17,617 employment (remainder housing, Unruh Act, hate violence).
- Of the employment cases, 7466 disability, 6527 retaliation, 3834 sex harassment, 2269 other sex discrimination, 1054 pregnancy discrimination
- 909 cases settled for over $9 million
Wrongful Termination:

- Scott = Pre-school teacher; Phoenix Schools = at will employer
- Job duties included assigning personnel in compliance with state regulations re minimum teacher-student ratios for child care centers
- Potential customer dropped in, was given mini-tour, was told that her child would be wait-listed pending space becoming available
- Parent returned (with husband), got tour by administrative staff member, was told there was an immediate opening
- Parents complained about Scott; school suspended her and fired her for poor performance for failing to enroll the child
- Scott sued claiming violation of public policy since Phoenix fired her for not taking action that would violate state regulations on pupil-staff ratios
You Decide:

- **Scott loses** – Phoenix is an at will employer, they can fire Scott if they want

- **Scott wins** – Phoenix fired her in violation of the public policy that creates specified pupil-teacher – if she had accepted the child, Phoenix would have had too many students
And the Answer Is . . .

Scott wins BIG -- $1,108,247
PLUS $750,000 in punitive damages
(=$1,858,247)
Roby v. McKesson Corporation, 47 Cal.4th 686 (2009)
- Charlene Roby worked for McKesson from 1975 until 2000 when she was fired pursuant to McKesson’s new (in 1998) complicated attendance policy
- Roby suffered from unpredictable panic attacks resulting in her being absent from work on short or no notice
- Medication she took for her disability caused her to have an unpleasant body odor
- She also developed a nervous disorder that caused her to dig her fingernails into the skin of her arms producing open sores
More Facts:

- Her supervisor was aware of her disability but even so **made negative comments** about Roby’s body odor, called her “disgusting” because of the sores on her arms and her excessive sweating.
- Supervisor **ostracized her openly**: ignored her at staff meetings; refused to return her greetings; did not include her when handing out food items, holiday gifts, and travel trinkets; excluded her from office parties by requiring her to cover the phones while others attended; demeaned the value of her job and her contributions to the company.
- Roby was **disciplined** for her attendance issues notwithstanding the fact that all of her absences were due to her disability.
Still More Facts:

- Supervisor promised Roby a “new start” if she had no absences between October 22 and January 1, but she did not get a new start – discipline continued and she was fired.
- Following her termination, Roby depleted her bank account, lost her medical insurance, developed agoraphobia, became suicidal, and (in 2001) was determined to be completely disabled.
- Roby sued claiming wrongful termination, harassment, discrimination, and failure to accommodate her disability.
Result:

- **Roby won**, damages were imposed including $15 million for punitive damages against the employer; the employer appealed
- On appeal, the damages were reduced and **Roby was awarded**:
  - $1,405,000 compensatory damages
  - $500,000 compensatory damages for harassment
  - $3,000 punitive damages against her supervisor
  - $1,905,000 in punitive damages
  - = $3,813,000
Disability Discrimination


- Carmine Scotch sued his former employer, The Art Institute of California, for disability discrimination and failure to make a reasonable accommodation for his disability
- Scotch taught 5 course sections per term (the number required for full time employment)
- The Art Institute required its teachers to meet certain degree/certification requirements
- Scotch did not have an advanced degree but had agreed to enroll in a master’s degree program
More Facts:

- Scotch was HIV-positive but had not informed his employer of that fact.
- Scotch received a 2.25 (out of 5) rating on his performance evaluation, in part because he had not enrolled in the master’s program.
- Scotch disclosed that he had a health condition, but did not say what it was; he was directed to HR and confided his HIV-positive status; HR kept his disability confidential.
- Scotch’s supervisor proposed that he enroll in a 3 year (instead of 2 year) program to obtain his master’s in view of his health issues; he did not enroll.
Still More Facts:

- In 2006 the employer told Scotch he was being reduced to part time based on his performance rating score and other operational considerations (including greater emphasis on following the accreditation requirement that faculty who taught upper-division courses have master’s degrees); part-time status meant Scotch would not have medical benefits.
- **No decision maker knew about Scotch’s HIV-positive status**
- In all 10 faculty members were reduced from full- to part-time and 7 faculty members were asked to leave based on their failure to enroll in master’s programs.
- Scotch protested in writing that he was being discriminated against based on his disability and in July 2006 he resigned his employment and thereafter sued.
Result:

- Employer was granted summary judgment – its reasons for reducing Scotch to part-time were not because of his disability, but because of his performance rating and his lack of a master’s degree and failure to enroll in a master’s program coupled with its other operational needs.
- Employer did not fail to accommodate Scotch – the only “accommodation” he proposed was that he be given priority status in being assigned courses so that he could continue to teach 5 courses and keep his medical benefits.

- Hillsides is a private residential facility for child victims of neglect and abuse
- Someone had been accessing pornographic websites from certain of Hillsides computers after hours
- One of the computers that was accessed was in the office shared by Hernandez and Lopez
- Hillsides set up a hidden camera aimed at the computer that had been used to access pornography
More Facts:

- The camera did not operate during business hours when Hernandez and Lopez were at work; the camera was in place for 21 days.
- When Hernandez and Lopez discovered the camera, they were upset, even though none of the images from the camera showed either of them.
- Hernandez and Lopez sued for invasion of privacy.
- Employer won summary judgment at the trial court, which was reversed by the court of appeal; Hernandez and Lopez appealed to the California Supreme Court.
You Decide:

- **Hernandez and Lopez win** – employees have a reasonable expectation of privacy in their offices and Hillside violated their privacy by installing the surveillance camera.

- **Hillside wins** – even though employees have a reasonable expectation of privacy in their offices, Hillside’s narrowly tailored limited surveillance was more than justified because of its motive to protect the children living at the facility.
Hillside wins – even though employees have a reasonable expectation of privacy in their offices, Hillside’s narrowly tailored limited surveillance was more than justified because of its motive to protect the children living at the facility.

- Benson = Injured Worker; Permanente Medical Group = Employer
- Benson had two separate workers’ compensation claims – one for a specific neck injury and one for cumulative trauma (repetitive stress injury) sustained in performing her file clerk job
- The agreed medical examiner (AME) found that each of these injuries was equally responsible for her disability, and that she should receive 31 percent award for each injury at the rate of $24,605 per injury payable at the rate of $185/week for 133 weeks
- The administrative law judge (ALJ) combined the awards into a 62 percent award, giving Benson $185/week for 362.5 weeks (injuries that have a higher percentage rating are compensated at a higher rate, so compensation for a 62 percent injury does not equal 2x the compensation for a 31 percent injury)
- Applicable law says that a worker who sustains multiple work-connected injuries receives separate awards for each injury (that is, does not receive cumulative awards); law was intended as a protection for employers
- Employer appealed
Result:

Benson loses – 62 percent would be a cumulative award rather than a separate award for each injury as contemplated by the law
Pregnancy Discrimination


- Johnson had been with the employer since November 2004 and had recently (in May 2005) been promoted from caregiver to counselor.
- Johnson said that a supervisor had praised her work, said clients were happy with her, and told her she would be getting a raise; the employer said Johnson had work performance issues and that her work had been unsatisfactory on approximately 12 occasions.
- In July 2005 Johnson disclosed that she was pregnant and needed to seek medical attention related to her pregnancy; Johnson’s physician said she needed to be off work until August 8, 2005.
- When she returned to work on August 9, she was fired.
More Facts:

- Johnson claimed her employer fired her because she was pregnant.
- Employer claimed it fired her because she falsified her time records (employer had looked into her time records for a particular day because she was not at a client’s residence when she said she would be there).
- Superior court granted summary judgment in favor of the employer because it had a legitimate reason for firing her.
Still More Facts:

- Johnson denied having falsified time records; had never previously been counseled concerning her time records; and also submitted “me too” declarations from other employees who were fired after telling the employer that they were pregnant (or knew someone who was, or knew someone who was dishonest but not pregnant who wasn’t fired)
- Employer argued that the “me too” declarations should not have been considered
You Decide:

- **Johnson loses** – you can’t falsify your time records even if you’re pregnant
- **Johnson loses** – a court cannot properly consider “me too” evidence from people who are not part of the lawsuit and whose evidence is probably untrustworthy since they were fired
- **Johnson wins** (=gets a jury to hear her case) – there is a question concerning whether her termination was because she had falsified time records or because she was pregnant; the “me too” declarations can be considered as evidence of the employer’s intent or motive for its actions
Johnson wins (=gets a jury to hear her case) – there is a question concerning whether her termination was because she had falsified time records or because she was pregnant; the “me too” declarations can be considered as evidence of the employer’s intent or motive for its actions.
Pregnancy Discrimination


- Scherl = experienced mariner who was hired as the deckhand and second captain on a yacht; Sasco = Scherl’s former employer, electrical contractor that owns a 70 foot yacht used to entertain guests

- When Scherl got the company’s executive director said, “Whatever you do, don’t get pregnant”
More Facts:

-- When Scherl got pregnant, her boss, the captain, expressed disappointment since he believed that mothers didn’t want to stay in the boating business and also said her desire to keep working as long as possible during her pregnancy was “cavalier”
-- Captain also expressed liability concerns and told Scherl she would need a medical release for the annual fishing trip to Mexico (which lasts from late April to late July)
Still More Facts:

- Captain also told other employees about his liability concerns (that Scherl might slip and miscarry; that she might be exposed to chemicals and fumes)
- Said he would need to find someone else for the Mexico trip; said the Mexico trip was not safe for a pregnant woman; told Scherl to hold off getting the medical release
- Told Scherl she was being laid off for budgetary reasons and then . . .
Even Still More Facts:

. . . gave her an (unsolicited!) glowing reference calling her “the **hardest working, responsible, boat savvy individual to work with me during my seventeen years on this vessel**”. Captain also told a co-worker that Scherl was “the **best he had ever seen**”.

- When Scherl called the captain to ask for more information about her lay off, he told her **she had done nothing wrong and would not have been terminated had she not been pregnant**.

- Also told a co-worker he had to get rid of two people “and she’s pregnant”.

Captain then replaced Scherl with two men who had no prior boating experience.

Scherl filed an administrative claim for pregnancy discrimination; FEHA awarded her backpay plus $85,000 in damages plus fined the company $25,000; the company appealed.

Part of the company’s argument was that the $25,000 fine was not justified because the imposition of an administrative fine requires (and the facts do not establish) “clear and convincing evidence of oppression, fraud, or express or implied malice.”
You Decide:

- **Scherl loses** – company does not have to risk the liability of having a pregnant deckhand and second captain on a fishing trip to Mexico
- **Scherl loses** – the company has the right to replace one experienced woman with two inexperienced men
- **Scherl wins but the company wins too** – the company’s various comments about pregnancy to Scherl and other employees show a clear connection between her pregnancy and her termination (so she gets to keep the backpay and damages) but the company was sincere in believing a pregnant woman couldn’t do the job so they shouldn’t have to pay a fine
- **Scherl wins completely** – by contriving Scherl’s layoff for budgetary reasons and then replacing her with two other employees the company demonstrated willful, intentional and purposeful pregnancy discrimination
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Breast Feeding

DFEH v. Acosta Tacos (FEHC 2009)

- Marina Chavez was employed as a cashier by Acosta Tacos, a taqueria chain in the Los Angeles area. She started working there in October 2004.
- On April 30, 2007, Chavez had a baby (one month premature) and was on leave until May 30.
- When she returned to work on the night shift (5 pm-midnight) on June 1, Chavez nursed her baby in her car during her meal break.
- On June 2, Acosta told Chavez he didn’t want her working there as long as she was breastfeeding and said he would call her back to work once she stopped lactation. Chavez declined to wait. Acosta fired her because he didn’t like her “attitude”.
More Facts:

1. Chavez was extremely upset to lose her job; worried about how to support her family (she had 3 other children); developed multiple physical symptoms (insomnia, intense headaches); could not find other work except a 1x/month housecleaning job that paid $60.
2. Chavez filed a complaint with the DFEH for failing to reinstate her to her previous position in violation of pregnancy leave laws, discrimination based on her sex (pregnancy or related medical condition), and retaliation.
**DFEH Held:**

- **Chavez wins ON EVERY ISSUE** – Acosta was obligated to reinstate her; it discriminated against her on the basis of her sex by terminating her for breastfeeding her newborn baby during her lunch hour; and it retaliated against her by terminating her when she insisted on her protected right to return to work following her pregnancy disability leave.

- **Remedy** – Back pay ($21,645) plus interest; emotional distress damages ($20,000); administrative fine ($5,000) = $46,645
Sexual Harassment – Statute of Limitations

DFEH v. Hudson (Ford) (FEHC 2009)

FEHC held in a sexual harassment case involving a 16-year-old employee that "minors may bring an action until their 18th birthday" no matter when the harm occurred.
Wage & Hour – Statute of Limitations


- Former employees sued RHI for unpaid overtime, commissions, meal periods, etc.
- RHI said claims were barred because employment agreements shortened the applicable statute of limitations to 6 months
- Court said employment agreement provisions were unenforceable and contrary to strong public policy – their statutory rights were unwaivable
Incentive Compensation: Schachter v. Citigroup, 47 Cal. 4th 610 (2009)

- Employees could buy stock at a reduced price in lieu of a portion of their cash compensation
- Stock vested if employee remained employed for 2 years following the stock purchase
- Schacter bought stock but quit before shares vested
- Law requires prompt payment of final wages on termination
- Schacter sued (class action) when Citigroup did not include in his final pay the amount he had spent buying the stock that had not vested
You decide:

- **Schacter wins** – employer can’t refuse to pay wages the employee has earned; stock purchase never took effect so Schacter needs to be paid

- **Schacter loses** – by participating in Citigroup’s restricted stock plan (including the forfeiture provisions) Schacter renegotiated his terms of employment and agreed to receive a lower annual salary so no wages are owed
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On call pay:


- Employees were service representatives for Lincare, a company that provides respiratory services and medical equipment setup to patients in their houses.
- Employees worked 40 hours/week; their jobs included driving vehicles with oxygen.
- They were also required to carry pagers or cell phones and be “on call” after hours and on weekends to resolve customer questions by phone; they were required to call patients back within 30 minutes and be able to respond to patient calls in person within 2 hours; employees were restricted from drinking alcohol while on call but otherwise could do whatever they wanted.
More Facts:

- Employees were **not paid to be “on call”**
- Paid regular straight time rates per the employer’s policy for those times when they made service calls in person to respond to customers’ problems (no pay if the issue could be resolved by telephone without a service visit)
- Overtime rates applied if the employee’s work hours exceeded 40/week or 8/day
- Employees sued claiming (among other things) **they should be paid for all on call hours**
- Case also had an issue about whether the employees were exempt from overtime laws as drivers of vehicles containing hazardous materials (oxygen) – we won’t look at that issue
You Decide:

- **Employees win** – employer required them to carry pagers/cell phones, they should be paid for all hours spent “on call” whether or not they are answering customers’ problems or making service calls.

- **Employer wins** – employees activities were not unduly restricted; they could use the on call hours primarily for their own personal activities.

- **Employees win** for the hours they are actually called back to work, including time spent responding to patients’ problems by phone; **but** employer does not have to compensate them for hours they are “on call” but not working.
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Vacation Accrual


- Owen = former sales associate; Macy’s = employer
- Owen worked at a Robbins-May store from 1990 until Macy’s acquired the store in 2005; in 2006 Macy’s closed the store;
- Macy’s vacation policy imposed a 6-month waiting period before new employees began to earn paid vacation
- Labor Code § 227.3 requires that accrued, unused vacation be treated as wages and paid to employees immediately upon termination
- Owen’s final pay did not include any accrued vacation; Owen sued
You Decide:

- **Owen wins** – she worked for Macy’s predecessor since 1990 so the 6 month rule for new employees should not apply to her.

- **Owen loses** – Macy’s can have whatever vacation policy it wants (in fact, doesn’t have to pay vacation at all!); a policy saying that no vacation is earned during the first 6 months of employment (or any period of time) is permissible.
And the Answer Is . . .

**Owen loses** – Macy’s can have whatever vacation policy it wants (in fact, doesn’t have to pay vacation at all!); a policy saying that no vacation is earned during the first 6 months of employment (or any period of time) is permissible.
Reimbursement for Work Related Expenses


- Stuart used his personal vehicle to make intercompany store transfers; RadioShack had constructive notice of that Stuart had incurred this expense because the transfers were recorded in the company’s data base.
- Cal. Labor Code § 2802 requires employers to indemnify employees for all necessary expenditures or losses incurred in the discharge of his/her duties.
- **Stuart never sought reimbursement for the expenses** but sued because RadioShack had not reimbursed him.
Held:

- Court rejected Stuart’s argument (that obligation to pay arose as soon as the expense was incurred) and also rejected RadioShack’s argument (that obligation was triggered only when Stuart put in for reimbursement pursuant to the company’s reimbursement policy)
- Court said that duty to reimburse arises when the employer has actual or constructive notice that the employee has incurred the expense; “Once the employer has such knowledge, then it has the duty to exercise due diligence and take any and all reasonable steps to ensure that the employee is paid for the expense.”

Lesson Learned:
- Make sure to follow up and insure proper reimbursement when we have knowledge that employees have incurred expenses in the course of their employment
Be a Manager, Go to Jail


- Owners of residential cleaning service found to have **wrongly classified** some 385 current and past home and carpet cleaners as independent contractors; also **failed to pay them minimum wage and overtime hours**
- Federal court ordered payment of **$3.5 million in back wages PLUS interest, fines, and liquidated damages**
- Owners failed to comply with the court’s order; US Department of Labor filed civil contempt charges
- Court ordered daily fines of $2000 against the company PLUS $200 per day from each of the owners PLUS almost $230,000 in post-judgment interest
- Owners still wouldn’t pay
- On October 30, 2009, **owners were jailed for 4 days**
PENDING (or Pending STILL . . . )

Federal
- EFCA (Employee Free Choice Act)
- ADAAA Proposed Regulations (Americans with Disabilities Act Amendments Act)
- GINA Regulations (Genetic Information and Non-Discrimination Act)

California
- Wage and Hour – must an employer ensure that employees take meal breaks or simply provide breaks that employees may take at their option (Brinker/Brinkley)