



# EMPLOYMENT LITIGATION NEWS

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## GENDER DISCRIMINATION

### Walmart faces multi-billion dollar class action

*Dukes et al. v. Wal-Mart Stores Inc.*, Nos. 04-16688 and 04-16720, 2010 WL 1644259 (9th Cir. Apr. 26, 2010).

A sharply divided federal appeals court has given female Walmart employees the right to sue the retail giant for systematic sex discrimination, in what may be the largest class action in history.

The 9th U.S. Circuit Court of Appeals voted 6-5 to affirm a District Court decision to grant class status to the estimated 1.5 million women who would be eligible for damages, which could exceed \$1 billion.

Walmart, the world's largest private employer, will have to face the claims of Betty Dukes and other female employees that it pays women less than it pays

(See *GENDER DISCRIMINATION* on page 7)

## MILITARY LEAVE

### Calif. county settles suit over reservist's job rights

*Faapouli v. County of Fresno*, No. 09-CV- 00907, *settlement announced* (E.D. Cal. Feb. 26, 2010).

A California county will pay a Naval reservist \$57,000 to resolve the Justice Department's allegations that it refused to rehire him after he returned from active military duty.

The complaint, filed last May in the U.S. District Court for the Eastern District of California, alleged the county violated the Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. § 4301, by refusing to rehire reservist Porotesano Faapouli.

USERRA bars employers from discriminating against workers because of their military obligations. It also requires them to offer service members their old jobs or comparable positions when they return from military duty.

(See *MILITARY LEAVE* on page 8)

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## WORKPLACE INJURY

### California appeals court refuses retrial of toxic-tort claim

*Helm et al. v. Lincoln Air Conditioning Corp.*, No. A124410, 2010 WL 828348 (Cal. Ct. App., 1st Dist. Mar. 10, 2010).

Three air traffic controllers who allege they suffered personal injuries from exposure to toxic fumes from a sealant are not entitled to a retrial, a California appeals court has ruled.

The 1st District Court of Appeal said an alleged mistake in professional judgment committed by the plaintiffs' counsel does not justify a new trial.

Daniel Helm and two other air traffic controllers at the San Jose International Airport filed suit in the Alameda County Superior Court against Lincoln Air Conditioning Corp.

Lincoln worked on an air conditioning unit at the airport's air traffic control tower in November 2006.

The plaintiffs claimed they suffered permanent injuries to their vision and respiratory systems after being exposed to toxic fumes from a sealant the Lincoln employees used.

After a three-week trial, the state court jury determined that Lincoln was not negligent and had not engaged in any intentional misconduct.

The trial court entered judgment for Lincoln in December 2008.

The plaintiffs filed a motion for a new trial, arguing that their lawyer was preoccupied during the trial by his father's ill health. The trial court denied the motion Feb. 24, 2009, and the plaintiffs filed a notice of appeal.

While the appeal was pending, the plaintiffs, for a second time, filed a motion for a new trial, alleging jury misconduct. The trial court again denied the motion for a new trial Oct. 16.

In briefing the appeal, the plaintiffs argued that they were challenging both trial orders denying their motions for a new trial.

The appeals panel said it lacked jurisdiction to consider a review of the plaintiffs' renewed motion for a new trial and the resulting trial court order.

"It has long been settled that an order denying a motion for a new trial is not independently appealable and may be reviewed only on appeal from the underlying judgment," the panel said.

As for the trial court's Feb. 24 order, the panel affirmed the judgment.

The trial court made an offer to the plaintiffs' counsel to continue the trial, but that offer was refused, the appeals court noted.

The panel said the trial court's ruling (that any mistake in professional judgment by the party's own attorney is not an irregularity in the proceedings that would justify a new trial) was supported by *In re Marriage of Liu*, 197 Cal. App. 3d 143 (Cal. Ct. App., 6th Dist. 1987).

In that case, the appellate court rejected a party's argument that she was entitled to a new trial because her attorney failed to call a key witness or to introduce crucial evidence during trial.

"The *Liu* decision establishes that the negligence of trial counsel is not a ground upon which a new trial may be granted," the 1st District said.

See Chin, Wiseman, Callahan & Exelrod, CAL. PRAC. GUIDE: EMPLOYMENT LITIGATION (The Rutter Group 2009):

19:1220 (post-trial motion for a new trial)

19:1235-1236 (post-trial motion for a new trial due to jury misconduct)

13:991 (criminal violations of workplace safety)

1:53 (torts)

## AGE DISCRIMINATION

### Federal judge tosses age-bias claims against Lucas Film

*Klausner v. Lucas Film Entertainment Ltd. et al.*, No. 09-03502 CW, 2010 WL 1038228 (N.D. Cal. Mar. 19, 2010).

A California federal judge has thrown out state-law-based discrimination and retaliation claims brought by a digital artist who said Lucas Film Enterprises fired him for protesting the way the company treated him.

U.S. District Judge Claudia Wilken of the Northern District of California said the federal enclave doctrine barred the plaintiff's state law claims.

The enclave doctrine is based on the authority enjoyed by a geographic territory that the United States purchased from a state, usually for use as a fort. The doctrine bars the state from exercising any legislative authority with respect to that territory.

In this case, the doctrine was invoked with respect to the Presidio in San Francisco, a former Army post where defendants Lucas Film and Industrial Light & Magic are located. ILM is a division of Lucas Film.

Judge Wilken dismissed the state law claims but ordered the defendants to answer the remaining claims based on federal law.

#### Employee worked in 2 locations

According to the opinion, Drew Klausner was hired by Lucas Film and ILM in 1994, at age 39. From the time of his hiring until September 2005, he worked in Marin County, Calif., but moved to his employers' new location in the Presidio in fall 2005.

That year the defendants agreed to modify Klausner's schedule so he could care for his seriously ill daughter. However, his annual performance review said he lacked "flexibility with his schedule."

Beginning in January 2008, Klausner's daughter's health improved to the point that he could work full time and overtime when necessary, the opinion said.

In April 2008 the defendants laid off Klausner and four others for "lack of work." Although he was rehired in July 2008, during his laid-off period, Klausner filed a grievance through his union as well as claims with the Equal Employment Opportunity Commission and the U.S. Department of Labor, alleging age discrimination and violation of the Family and Medical Leave Act, 29 U.S.C. § 2601.

In September 2008 Klausner filed a retaliation claim with California's Department of Fair Employment and Housing, alleging he was terminated for "participating in protected activities."

The defendants fired Klausner when he was 53, and he sued Lucas Film and ILM, asserting five state law claims and two under federal law.

Judge Wilken granted the defendants' motion to dismiss the state law claims, citing the enclave doctrine.

In 1897 California ceded the Presidio to the United States, and exclusive jurisdiction over that area was conferred to the federal government, the judge explained. The ceding means the state surrendered "every possible claim of right to exercise" authority within the Presidio.