

CHAPTER 17

REMEDIES

CONTENTS

	Page
A. EQUITABLE RELIEF	17-2
1. Availability of Equitable Relief	17-2
a. Limitation—no specific performance of personal services contract	17-2
(1) Rationale	17-2
(2) Compare—enjoining breach of certain personal service agreements	17-2
b. Injunctions under anti-discrimination statutes	17-2
2. Enjoining Future Unlawful Practices (“Cease and Desist” Orders).....	17-3
a. Application	17-4
b. Effect of employer’s voluntary discontinuance of unlawful practice	17-4
c. Free speech issues	17-5
(1) Injunction as “prior restraint”	17-5
(2) Compare—after judicial determination of unlawfulness	17-5
(3) Former employee’s right to use employer’s e-mail system to communicate with other employees	17-5
3. Equitable Relief Remedyng Past Unlawful Practices	17-6
a. Reinstatement to former job	17-6
(1) Not available for mere breach of contract	17-6
(2) Not available where “after-acquired evidence” of employee misconduct exists	17-6
(3) Not available where reinstatement not feasible	17-6.1
(a) Hostile relationship	17-6.1
1) Litigation hostility sufficient?	17-7
(b) Position no longer exists	17-7
(c) In-house counsel	17-7
(4) Not available after plaintiff obtains new employment	17-7
b. Backpay	17-7
c. “Front pay” in lieu of reinstatement	17-8

d.	Hiring	17-8
e.	Promotion	17-8
	(1) Rationale	17-8
	(2) Retroactive seniority	17-8
f.	Elevation to partner status	17-9
g.	Academic tenure	17-9
h.	Purging of personnel records	17-9
B.	CONTRACT DAMAGES	17-9
1.	Availability	17-9
2.	Measure of Damages	17-10
	a. Purpose	17-10
	b. "Detriment" caused	17-10
	c. Liquidated damages	17-11
	(1) Presumed valid	17-11
	(2) Factors considered	17-11
3.	Limitations on Contract Damages	17-12
	a. "Proximately caused"	17-12
	b. Reasonably foreseeable	17-12
	(1) Purpose	17-13
	(2) Application	17-13
	(3) Effect of optional termination provision	17-13
	c. "Clearly ascertainable"	17-13
	d. No tort damages	17-14
	(1) No emotional distress damages	17-14
	(2) No punitive damages	17-14
4.	Backpay	17-15
	a. Purpose	17-15
	b. Nature of remedy	17-15
	(1) Not subject to Title VII damages caps	17-15
	(2) Right to jury trial?	17-16
	c. Period covered	17-16
	(1) Effect of employer interference with earnings....	17-16
	(2) Effect of resignation	17-16
	(a) Rationale	17-16
	(b) Compare—where employee cannot be "made whole" while staying on job	17-16
d.	Items recoverable	17-17
	(1) Salary and wages	17-17
	(a) Adjustment for promotions; "lost-chance" damages	17-17
	(b) Including wages that could have been earned if employer had accommodated employee's disability	17-18
	(2) Incentive compensation	17-18
	(3) Tips	17-18
	(4) Health insurance	17-18
	(5) Unused vacation	17-18
	(a) Nonforfeitable	17-18
	(6) Life insurance	17-19
	(a) Where no replacement policy	17-19

(7)	Pension benefits	17-19
(a)	Calculating loss	17-19
(8)	Lost stock options	17-20
(a)	Calculating loss	17-20
1)	Conversion approach	17-20
2)	Breach of contract approach	17-21
(b)	Restricted vs. unrestricted shares	17-21
(9)	Relocation costs	17-21
e.	Limitations and offsets to backpay	17-22
(1)	Severance pay	17-22
(2)	Reduction for absenteeism?	17-22
(3)	Reduction for periodic layoffs	17-22
(4)	Reduction for inability to work	17-22
(5)	Compensation from other employment	17-22.1
(6)	Retirement benefits	17-22.1
(7)	Governmental benefits	17-23
(a)	Impact of "collateral source" rule	17-23
1)	Compare—payments attributable to defendant	17-23
2)	Factors considered	17-24
(b)	Unemployment insurance	17-24
1)	View rejecting offset	17-24
2)	View that offset discretionary	17-24
(c)	Disability benefits	17-25
(d)	Welfare benefits	17-25
(e)	Social security	17-25
(f)	Workers' compensation benefits	17-26
(8)	Undocumented workers?	17-26
(9)	Tax withholding	17-26
(a)	Contra authority	17-27
f.	Events terminating backpay	17-27
(1)	Expiration of contract term	17-27
(2)	Employer out of business	17-27
(3)	Employer's unconditional offer of reinstatement	17-28
(a)	Unconditional	17-28
(b)	Substantially equivalent job	17-28
(c)	Reasonableness of refusal as fact question	17-28
(4)	Effect of failure to retain new job?	17-29
g.	Additional award to cover negative tax consequences of lump-sum backpay award?	17-29
5.	Loss of Future Earnings ("Front Pay")	17-30
a.	Nature of remedy	17-30
(1)	Reinstatement as preferred remedy	17-30
(2)	Compare—lost earning capacity	17-30.1
(a)	Different injuries	17-30.1
(3)	Front pay not subject to Title VII damages caps	17-30.1
b.	Determined by judge in federal court	17-30.1

	(1) Compare—California courts	17-30.2		
c. Measure		17-30.2		
	(1) Limitation—plaintiff's duty to mitigate damages	17-30.2		
	(2) Relevant factors	17-31		
		(a) Projected earnings from new job	17-31	
	(3) Work expectancy	17-31		
		(a) Fixed-term contracts	17-31	
		(b) Contract without definite term	17-32	
			1) Lifetime front pay upheld under FEHA	17-32
			2) Lifetime front pay under Title VII?	17-32
d. Defenses to “front pay” claims		17-34		
	(1) Unconditional offer of reinstatement	17-34		
	(2) Enough time for plaintiff to find comparable employment.....	17-35		
	(3) Speculative	17-35		
		(a) Statutes	17-35	
		(b) FEHC interpretation	17-35	
	(4) “After-acquired” evidence justifying termination	17-36		
	(5) Unclean hands	17-36		
e. Additional award to cover negative tax consequences of lump-sum front pay award?		17-36		
C. EXTRACONTRACTUAL COMPENSATORY DAMAGES (TORT AND STATUTORY)		17-37		
1. General Considerations		17-37		
a. Types of damages recoverable		17-37		
	(1) Backpay	17-37		
	(2) Front pay	17-37		
	(3) Emotional distress, mental suffering, etc.	17-37		
	(4) Other pecuniary damages	17-37		
b. Limitations on extracontractual damages		17-38		
	(1) Statutory damages caps (Title VII and ADA)	17-38		
	(2) Proximate causation	17-38		
	(3) Employee's duty to mitigate	17-39		
	(4) No tort claim based on same facts as contract claim	17-39		
		(a) No tort recovery where contract claim invalid	17-39	
c. Income tax considerations		17-39		
	(1) Economic damages	17-39		
	(2) Physical injury or illness	17-39		
	(3) Emotional distress damages	17-40		
		(a) Compare—medical expenses	17-40	
	(4) Punitive damages	17-41		
	(5) Interest	17-41		
	(6) Deduction of attorney fees and court costs from taxable recovery	17-41		
		(a) Compare—prior law	17-41	

	(b) Not retroactive	17-42
d.	Nominal damages	17-42
	(1) Compare—ADA claims	17-42
2.	Emotional Distress Damages	17-42
a.	Claims supporting recovery	17-43
	(1) Common law tort claims	17-43
	(a) Wrongful termination in violation of public policy	17-43
	(b) Intentional infliction of emotional distress ...	17-43
	1) “Severe” emotional distress required	17-43
	(c) Negligent infliction of emotional distress	17-43
	(d) Defamation	17-43
	(e) Fraud or misrepresentation	17-43
	(f) Limitation—Workers’ Compensation Act preemption	17-44
	(2) Statutory bases	17-44
	(a) Fair Employment and Housing Act (FEHA)	17-44
	1) No cap on damages	17-44
	2) Compare—administrative proceedings pursuant to FEHA	17-44
	(b) Section 1981	17-45
	(c) Title VII.....	17-45
	(d) Americans with Disabilities Act (ADA)	17-45
	(e) Compare—Age Discrimination in Employment Act (ADEA)	17-45
	(3) Objective evidence required?	17-46
b.	Measure of damages for emotional distress	17-46
	(1) Effect	17-46
	(2) Separate awards for separate wrongs	17-46
c.	Effect of plaintiff’s death on recovery	17-47
	(1) Compare—effect on federal claim filed in federal court	17-47
D. PUNITIVE DAMAGES		17-47
1.	Claims Supporting Punitive Damages Awards	17-48
a.	Common law tort actions	17-48
	(1) “Clear and convincing” evidence	17-48
	(2) “Oppression, fraud or malice”	17-48
	(a) “Malice” defined	17-48
	(b) “Oppression” defined	17-49
	(c) “Despicable conduct” defined	17-49
	(3) Employer liability based on acts of agents or employees	17-49
	(a) “Managing agent”	17-50
	1) Authority to hire and fire not enough	17-50
	2) Application	17-50.1
	3) Effect of employer policy forbidding discrimination?	17-50.2
	(b) Knowledge that one employee likely to injure another	17-50.2

1) Advance knowledge	17-50.2
(c) "Clear and convincing" standard of proof	17-50.3
(d) "Actual damages" prerequisite	17-50.3
1) "Actual damages" broadly construed	17-50.3
2) Compare—compensatory damages award essential?	17-50.4
b. Labor Code violations	17-50.4
c. Fair Employment and Housing Act (FEHA)	17-50.5
(1) Compare—administrative proceedings	17-50.5
d. Federal anti-discrimination statutes	17-50.5
(1) 42 USC §1981	17-50.5
(2) Title VII, ADA	17-50.5
(a) Damages caps	17-50.5
1) Effect of joining other claims	17-50.6
(b) Intentional vs. disparate impact discrimination	17-51
(c) "Malice" or "reckless indifference" required	17-51
1) Awareness of illegality	17-51
a) Comment	17-51
b) Application	17-52
c) Evidence negating malice or indifference	17-52
2) Egregious misconduct not essential	17-52
(d) Limitation under ADA—effect of "good faith" effort to comply	17-53
(e) Employer's vicarious liability	17-54
1) "Managerial" employees	17-54
2) "Scope of employment"	17-54
3) Integrated enterprise (affiliated corporations)	17-55
4) Effect of "good faith" employer efforts to comply	17-55
a) Policy should contain bypass mechanism	17-55
b) Written policy alone not enough	17-56
c) Burden of proof on employer	17-56
d) Mitigation of damages by <i>postoccurrence</i> remedial efforts	17-56
5) Compare—managerial employees as employer's "proxy"	17-57
a) Senior management	17-57
b) Supervisor designated by company to remedy harassment	17-57
c) Supervisor supporting harassment by subordinate	17-57
(3) ADEA	17-58
(a) Liquidated damages	17-58

1)	Example	17-58
2)	Not subject to Title VII/ADA damages caps	17-58
(b)	No other punitive damages	17-58
(4)	FLSA	17-59
(a)	Liquidated damages	17-59
1)	Burden on employer	17-59
2)	Presumption favoring employee	17-59
(b)	Remedies for retaliation	17-59
1)	Punitive damages?	17-59
(5)	FMLA	17-60
e.	Effect of no compensatory damages award?	17-60
(1)	View that punitives cannot stand	17-60
(2)	View allowing punitives if constitutional right violated	17-60
(3)	View allowing punitive damages if wage loss shown	17-60
(4)	View allowing punitives to stand alone	17-60
(a)	Limitation—due process	17-60.1
2.	Amount Determined by Trier of Fact; Reasonable Relation to Injury or Harm	17-61
a.	Appellate court's power to modify	17-61
(1)	Effect of reducing compensatory damages?	17-61
3.	Statutory Penalty as Limitation?	17-61
4.	Constitutional Limitations	17-62
a.	"Excessive Fines" Clause	17-62
b.	Procedural due process requirements	17-62
(1)	<i>De novo</i> standard for appellate review	17-62
c.	Substantive due process	17-63
(1)	Indicia of reasonableness	17-63
(a)	Degree of reprehensibility	17-64
1)	Each defendant considered separately	17-64
2)	Factors considered	17-64
a)	Type of wrongdoing	17-65
b)	Type of injury	17-65
1/	Physical harm	17-65
2/	Economic harm	17-65
c)	Isolated vs. repeated wrongdoing	17-66
1/	Similarity of misconduct	17-66
d)	In-state vs. out-of-state conduct	17-66
1/	Compare—out-of-state conduct admissible to prove culpability of in-state conduct	17-67
3)	Compare—harm to others not considered	17-67
a)	No disgorgement of ill-gotten profits obtained from others	17-67
(b)	Ratio to compensatory damages	17-68

1)	Total compensatory damages considered	17-68
2)	Potential harm to plaintiff also considered	17-68
	a) Foreseeability as limitation	17-68
3)	No bright line; reasonableness as key	17-69
	a) Four-to-one in "usual" case?	17-69
	b) One-to-one ratio where large compensatory damages award	17-70
	1/ Particularly where compensatory damages include emotional distress	17-70
4)	Factors justifying higher than normal ratio	17-71
	a) Defendant's wealth	17-71
	b) Personal injury cases	17-71
5)	Effect of damages caps on ratio guidepost	17-71
	(c) Sanctions for comparable misconduct	17-71
	1) Civil fines	17-72
	2) Effect of no comparable civil penalties	17-72
(2)	Defendant's wealth as factor	17-72
	(a) May affect permissible ratio	17-72.1
	(b) Burden on plaintiff	17-72.1
(3)	Application—U.S. Supreme Court cases	17-73
(4)	Application—other cases	17-73
	(a) Employment cases	17-73
	(b) Nonemployment cases	17-74
d.	Compare—California "passion or prejudice" standard	17-74
	(1) Constitutionality?	17-75
	(2) Measurement?	17-75
e.	Other constitutional challenges?	17-75
E.	AFTER-ACQUIRED EVIDENCE OF EMPLOYEE MISCONDUCT AS LIMITATION ON DAMAGES	17-75
1.	Wrongdoing Sufficient for Discharge	17-76
	a. Legal justification not required	17-76
	b. Types of conduct	17-76
2.	As Defense	17-77
3.	As Limitation on Remedies	17-77
	a. No reinstatement or front pay	17-77
	(1) Post-termination misconduct as bar to front pay?	17-77
	b. Backpay awards	17-78
F.	MITIGATION OF DAMAGES (AVOIDABLE CONSEQUENCES DOCTRINE)	17-78
1.	Doctrine	17-78

a.	Limits damages, not liability	17-79
b.	Contract or tort damages	17-79
c.	Under Title VII	17-79
2.	Employer's Burden of Proof	17-79
3.	Availability of "Comparable" Employment.....	17-80
a.	Factors considered—in general	17-80
4.	Same Geographical Area	17-81
5.	"Reasonable Effort" Required to Find and Retain Comparable Job	17-81
a.	Factual vs. legal issue	17-82
b.	Relevant factors	17-82
c.	"Reasonable" efforts suffice	17-82
(1)	Reasonable number of applications	17-82
(2)	Qualified for job applied for	17-82
(3)	Compare—effect of discharge on reemployment prospects	17-83
d.	Employee "ready, willing and able" to return to work	17-83
(1)	Effect of delay in seeking reemployment	17-83
(2)	Effect of illness or disability while unemployed	17-84
(a)	Disability benefits as offset	17-84
(3)	Effect of pregnancy?	17-84
(4)	Effect of imprisonment	17-85
(a)	Compare—reinstatement offered	17-85
(5)	Effect of attending school	17-85
(a)	Compare—job search abandoned to enhance earning potential	17-86
(6)	Effect of starting own business	17-86
(7)	Effect of accepting inferior job	17-87
(a)	Damages reduced by actual earnings	17-87
(b)	No reduction for projected earnings from inferior employment	17-87
G. COSTS		17-88
1.	Under California Law	17-88
a.	Matters recoverable	17-88
(1)	FEHA actions—attorney fees and expert witness fees recoverable	17-88
(2)	Contract actions—expert witness fees not recoverable under contract provision for "fees and costs"	17-88
(3)	Expert witness fees in actions brought on private attorney general theory?	17-88
2.	Under Federal Law	17-89
a.	Limitation in diversity actions	17-89
b.	Items allowable as costs generally	17-89
(1)	Compare—expert witness fees	17-89
c.	Federal Civil Rights Act actions	17-89
(1)	Includes items not allowable as court costs	17-90
(2)	Expert witness fees	17-90

(a) ADEA	17-90
H. ATTORNEY FEES	17-90
1. Authority for Fee Awards	17-90
a. Federal law	17-90
(1) Discretionary fee awards	17-90
(a) Belongs to client, not attorney	17-91
1) Compare—fee awards under California FEHA	17-91
(b) No effect on amount payable under attorney-client fee agreement	17-91
(2) Mandatory fee awards	17-91
(a) ADEA, FLSA	17-91
1) Compare—prevailing defendants	17-91
2) Compare—U.S. as plaintiff	17-92
(b) FMLA	17-92
1) Amount discretionary	17-92
(3) Standards governing fee awards	17-92
(a) Prevailing plaintiffs	17-93
1) Rationale	17-93
2) Pro se litigants ineligible	17-93
(b) Prevailing defendants	17-93
1) Adverse judgment alone not sufficient	17-93
2) Court discretion to deny fees	17-94
3) Effect of joining frivolous and nonfrivolous claims	17-94
(4) Determining whether plaintiff is “prevailing” party	17-94
(a) Court-ordered relief required	17-94
1) Judgment or consent decree	17-95
2) Private settlement insufficient	17-95
3) Voluntary change insufficient	17-95
(b) Effect of “prevailing” on some claims and not others	17-95
1) Related state and federal claims	17-96
(c) Effect of nominal damages	17-97
1) Solely monetary claims	17-97
2) Claims seeking other relief	17-97
(d) Mixed-motives cases	17-97
(5) “Special circumstances” justifying denial of fees?	17-98
(a) Narrowly interpreted	17-99
b. Under California law	17-99
(1) FEHA	17-99
(a) Plaintiff as prevailing party	17-99
1) Absent judgment or consent decree?	17-99
2) Mixed-motives cases?	17-100

3)	Where modest damages could have been recovered in limited jurisdiction court?	17-100
4)	Not where case “over-lawyered”	17-100
(b)	Defendant as prevailing party	17-101
1)	Not routinely granted	17-102
a)	Court must consider plaintiff’s ability to pay	17-102
2)	Lack of merit discovered after suit filed	17-102
3)	Written findings required	17-103
(c)	Fee award belongs to attorney, not party	17-104
(2)	Plaintiffs under “private attorney general” doctrine (CCP §1021.5)?	17-104
(a)	Not in employment litigation generally	17-105
(b)	Compare	17-105
(c)	Fee award belongs to attorney, not party	17-105
(3)	Successful plaintiff in wage claim action	17-105
(a)	Includes salaried employees	17-106
(b)	Not in wage claim proceedings before Labor Commissioner	17-106
(c)	Fees on review of adverse ruling by Labor Commissioner	17-106
	1) Labor Commissioner may represent indigent employees	17-106
(4)	Contractual provisions	17-106
(a)	Effect of claiming fees if employee loses	17-107
(b)	Limitation—collective bargaining agreements governed by LMRA	17-107
(5)	Effect of joinder of causes of action not allowing fee recovery	17-107
	(a) Discretionary	17-108
c.	Interim fee awards?	17-108
(1)	Civil rights cases	17-108
(2)	Rehabilitation Act	17-108
(3)	Compare—not under Title VII	17-108
(4)	Compare—not under state law generally	17-108
	(a) “Private attorney general” statute (CCP §1021.5)	17-108
2.	Determining Amount of Award	17-109
a.	“Lodestar” method	17-109
(1)	Reasonable hours	17-109
(2)	Reasonable rate	17-110
	(a) When measured	17-110
	(b) Different rates for different attorneys	17-110
	(c) Different rates for different activities	17-110
	(d) Contingency fee attorneys	17-111

(e) Out-of-town rates where plaintiff unable to retain local counsel	17-111
b. Adjustments to “lodestar” amount	17-111
(1) Contingency fee risk.....	17-112
(2) Successful result	17-112
(a) Limited to client’s recovery?	17-112
(3) Effect of limited success	17-112
(a) Federal law	17-112
(b) California law	17-113
(c) Compare—successful result but limited damages	17-114
(4) Superior representation	17-114
(5) Difficulty of case	17-115
(6) Delay in receiving fees	17-115
(7) Preclusion of other employment	17-115
c. Effect of nominal damages recovery	17-115
3. Proof Considerations	17-116
a. Court discretion	17-116
I. INTEREST	17-116
1. Prejudgment Interest	17-116
a. Under federal law	17-116
(1) Calculation on backpay awards	17-117
(2) Where liquidated damages awarded?	17-117
(3) Not on punitive damages	17-117
(4) Interest rates	17-118
b. Under California law	17-118
(1) Damages “certain or capable of being made certain by calculation”	17-118
(a) Backpay awards	17-118
(2) Compare—unliquidated contractual claims	17-119
(3) Compare—jury award where “oppression, fraud or malice” shown	17-119
(4) Interest rate (contract claims)	17-119
(5) Effect of defendant’s refusal of CCP §998 offer in personal injury cases	17-119
2. Postjudgment Interest	17-120
a. Under federal law	17-120
b. Under California law	17-120
J. CIVIL PENALTIES (LABOR CODE PRIVATE ATTORNEYS GENERAL ACT) (“PAGA”)	17-120
1. In General	17-120
a. Not exclusive remedy	17-121
b. Exclusions from Act	17-121
(1) Minor violations	17-121
(2) Workers’ compensation penalties	17-121
(3) California Labor and Workplace Development Agency	17-121
2. Who May Maintain Action	17-121
a. “Aggrieved employee”	17-121

b.	Representative action	17-121
(1)	Class action not mandatory	17-122
(2)	Compare—actions under Bus. & Prof.C. §17200	17-122
c.	Nonassignable	17-122
3.	Prerequisites to Civil Action	17-122
a.	Written notice to employer and State	17-122
b.	Agency action	17-123
(1)	Effect of citation	17-123
(2)	Effect of no citation within 158 days	17-123
c.	Compare—workplace safety violations	17-123
(1)	Effect of citation	17-123
(2)	Effect of failure to issue citation	17-123
(3)	Effect of failure to inspect or investigate	17-124
d.	Compare—unspecified violations subject to “cure”	17-124
(1)	“Cure”	17-124
(2)	Time limit	17-124
(3)	Written notice required	17-124
(4)	Limitation	17-124
(5)	Employee may dispute “cure”	17-125
4.	Penalties Recoverable	17-125
a.	Penalties previously recoverable by Labor Commissioner subject to Act	17-125
(1)	Violations for which no penalty specified	17-126
b.	Penalties previously recoverable by employees not subject to Act	17-126
5.	Penalties Discretionary	17-126
a.	Lesser amount proper	17-126
6.	Settlements Subject to Court Approval	17-126
a.	Compare—workplace safety violations	17-127
7.	Sharing of Recovery	17-127
8.	Attorney Fees and Costs Award	17-127
9.	Collateral Estoppel Effect	17-127

RESERVED

REMEDIES

[17:1] **Scope:** This Chapter deals with remedies that may be sought in connection with the employment-based claims discussed in earlier chapters. Those remedies include:

- *Equitable relief* (specific performance, injunctions, reinstatement and other remedies to rectify unlawful practices); see ¶17:2 ff.
- *Contract damages*; see ¶17:80 ff.
- *Extracontractual compensatory damages* (tort and statutory); see ¶17:290 ff.
- *Punitive damages*; see ¶17:360 ff.
- *Civil penalties*; see ¶17:760 ff.
- *Costs*; see ¶17:570 ff.
- *Attorney fees*; see ¶17:600 ff.
- *Interest* (prejudgment and postjudgment); see ¶17:725 ff.

Also discussed are certain important limitations on damage recoveries in employment cases:

- *After-acquired evidence*; see ¶17:470 ff.
- *Mitigation of damages*; see ¶17:490 ff.

State and federal remedies similar: Except as noted, the remedies available under federal and state law are similar (although damage caps exist under Title VII). As a result, state courts often rely on federal case law in determining the scope of appropriate remedies.

Remedies may be implied: Under federal law, “where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.” [Barnes v. Gorman (2002) 536 US 181, 187, 122 S.Ct. 2097, 2102 (emphasis added; internal quotes omitted) (not an employment case)]

Under California law, “(f)or every wrong there is a remedy” (Civ.C. §3523). Plaintiffs may use this statute to seek appropriate remedies if a statute creates a private right but provides no remedy for its enforcement. (If the statute provides a remedy, however, no others may be implied; see Faria v. San Jacinto Unified School Dist. (1996) 50 CA4th 1939, 1947, 59 CR2d 72, 77.) Moreover, “(v)iolation of a *criminal* statute embodying a *public policy* is generally actionable even though no specific civil remedy is provided in the criminal statute.” [Stop Youth Addiction, Inc. v. Lucky Stores, Inc. (1998) 17 C4th 553, 572, 71 CR2d 731, 743 (emphasis added; internal quotes omitted)]

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A. EQUITABLE RELIEF

[17:2] Equitable relief in employment cases may consist of either prohibitory injunctions (e.g., ordering the employer to cease and desist from an unlawful practice) or mandatory injunctions (e.g., directing the employer to reinstate the employee).

1. Availability of Equitable Relief

- a. [17:3] **Limitation—no specific performance of personal services contract:** A contract to perform personal services cannot be specifically enforced, regardless of which party seeks enforcement. [See Civ.C. §3390 (specifying obligations that cannot be specifically enforced); *Scott v. Pacific Gas & Elec. Co.* (1995) 11 C4th 454, 473, 46 CR2d 427, 438]

“In lieu of specific performance, the remedy for breach of a personal service contract is an action for damages.” [*Barndt v. County of Los Angeles* (1989) 211 CA3d 397, 404, 259 CR 372, 377—doctor could not compel specific performance of employment contract with hospital]

- (1) [17:4] **Rationale:** Denying specific performance avoids the friction and social costs likely to result when employer and employee are reunited in a relationship that has already failed. [*Barndt v. County of Los Angeles*, *supra*, 211 CA3d at 404, 259 CR at 376]
- (2) [17:5] **Compare—enjoining breach of certain personal service agreements:** However, a court may enjoin the breach of a written contract to render personal services “of a *special, unique, unusual, extraordinary, or intellectual character*, which gives it peculiar value, the *loss of which cannot be reasonably or adequately compensated in damages* in an action at law,” provided the compensation meets a statutory minimum. [Civ.C. §3423 (emphasis added); CCP §526(b)(5) (emphasis added); see also Lab.C. §2855]
 - (a) [17:6] **Comment:** These statutes are usually invoked by employers to enjoin a “unique” employee’s refusal to perform (e.g., an entertainer refuses to appear). But employees apparently may also invoke them to prevent an employer’s breach of contract (e.g., to prevent employer from replacing the entertainer with another performer).

- b. [17:7] **Injunctions under anti-discrimination statutes:** Injunctive relief (e.g., decrees compelling hiring, reinstatement or promotion) may be available for violation of state or federal anti-discrimination statutes, including:

- [17:8] *FEHA*: Under the Fair Employment and Housing Act, if the Commission finds a violation it "shall issue . . . an order requiring the (violator) to cease and desist from the unlawful practice *and to take such action*, including, but not limited to . . . hiring, reinstatement, or upgrading of employees . ." to effectuate the statute's purpose. [Gov.C. §12970(a) (emphasis and parentheses added); see *Commodore Home Systems, Inc. v. Sup.Ct. (Brown)* (1982) 32 C3d 211, 213, 185 CR 270, 271]
- [17:9] *Title VII*: Title VII explicitly authorizes courts to "enjoin the (employer) from engaging in an unlawful employment practice, and order such affirmative action as may be appropriate." [42 USC §2000e-5(g) (parentheses added)]

This authorization gives district courts broad equitable power to fashion remedies to make discrimination victims whole by putting them where they would have been but for the employer's unlawful conduct. [See *League of United Latin American Citizens (LULAC), Monterey Chapter 2055 v. City of Salinas Fire Dept.* (9th Cir. 1981) 654 F2d 557, 559—retroactive promotion appropriate remedy where discrimination was cause of fireman's failure to be promoted, and City failed to prove he would not have obtained position even absent discrimination]

- [17:10] *ADEA*: In an action to enforce the Age Discrimination in Employment Act "the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes" of the Act, "including without limitation judgments compelling employment, reinstatement or promotion . ." [29 USC §626(b)]
- [17:11] *USERRA*: Similarly, the court is authorized to issue temporary or permanent injunctions "to vindicate fully the rights or benefits of persons" under the Uniformed Services Employment and Reemployment Rights Act (USERRA). [38 USC §4323(e); see *Bedrossian v. Northwestern Mem. Hosp.* (7th Cir. 2005) 409 F3d 840, 843-844—preliminary injunction refused where no threat of "irreparable harm" shown]

[17:12-19] *Reserved.*

2. [17:20] **Enjoining Future Unlawful Practices ("Cease and Desist" Orders):** Upon finding a Title VII or FEHA violation, the court has a "duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." [*Albemarle Paper Co. v. Moody* (1975) 422 US 405, 418, 95 S.Ct. 2362, 2372 (internal

quotes omitted); see also *Donald Schriver, Inc. v. Fair Employment & Housing Comm'n* (1986) 220 CA3d 396, 409-410, 46 CR2d 440, 446-447—FEHA's express purpose is "to provide effective remedies" to eliminate discriminatory practices]

- a. [17:21] **Application:** The following are examples of employment practices that courts have enjoined because of their unlawful discriminatory effect:

- [17:22] *Height and weight requirements with discriminatory effect.* [See *Independent Union of Flight Attendants v. Pan American World Airways, Inc.* (ND CA 1987) 50 FEP (BNA) 1698, 1706—enjoining maximum weight guidelines and "appearance checks" that discriminated against women; *United States v. Commonwealth of Virginia* (4th Cir. 1980) 620 F2d 1018, 1024—enjoining height and weight requirements for state troopers that effectively eliminated 98% of women, absent showing of need for these requirements]
- [17:23] *Tests with discriminatory impact.* [See *United States v. Commonwealth of Virginia*, supra, 620 F2d at 1024—enjoining written tests used by state police to fill dispatcher positions that had adverse impact on blacks and no valid correlation to job performance; *Vulcan Pioneers, Inc. v. New Jersey Dept. of Civil Service* (3rd Cir. 1987) 832 F2d 811, 816-817—injunction against promotion process based on test scores that adversely impacted minority applicants and had no correlation to job performance; *Easley v. Anheuser-Busch, Inc.* (8th Cir. 1985) 758 F2d 251, 255-256—injunction against preemployment test with racially discriminatory impact]
- [17:24] *Educational requirements with discriminatory impact.* [*Carpenter v. Stephen F. Austin State Univ.* (5th Cir. 1983) 706 F2d 608, 622-623—employer ordered to reevaluate its educational standards for promotion; *James v. Stockham Valves & Fittings Co.* (5th Cir. 1977) 559 F2d 310, 354-355—enjoining high school diploma requirement for apprenticeship program that excluded minority applicants absent showing that requirement was necessary for plant safety or efficiency]

[17:25-29] *Reserved.*

- b. [17:30] **Effect of employer's voluntary discontinuance of unlawful practice:** Courts usually reject arguments by employers that equitable relief is unnecessary because they have ceased the offending conduct. An injunction is proper unless the employer proves that *no reasonable probability* exists of further noncompliance:

“(P)rotestations of repentance and reform timed to anticipate or blunt the force of a lawsuit offer insufficient assurance that the practice sought to be enjoined will not be repeated.” [James v. Stockham Valves & Fittings Co., supra, 559 F2d at 354-355 (internal quotes omitted); EEOC v. Hacienda Hotel (9th Cir. 1989) 881 F2d 1504, 1519— injunctive relief proper unless employer proves it is unlikely to repeat challenged practice]

- c. [17:31] **Free speech issues:** Verbal harassment in the workplace is not protected by the First Amendment and may constitute employment discrimination in violation of Title VII and the FEHA. Of course, not every racial epithet or similarly offensive language is a violation. The utterances must be so pervasive and severe as to create a hostile or abusive work environment. [See Aguilar v. Avis Rent A Car System, Inc. (1999) 21 C4th 121, 141-142, 87 CR2d 132, 147-148]
 - (1) [17:32] **Injunction as “prior restraint”:** Generally, a defendant may only be punished after the fact for unlawful spoken words. An injunction against *future* utterances may be challenged as an unconstitutional “prior restraint” of speech. [See Near v. State of Minnesota ex rel. Olson (1931) 283 US 697, 713, 51 S.Ct. 625, 630]
 - (2) [17:33] **Compare—after judicial determination of unlawfulness:** But once a court determines that a specific pattern of speech is unlawful, an order prohibiting the repetition, perpetuation or continuation of that practice is not a prohibited “prior restraint” of speech. [Aguilar v. Avis Rent A Car System, Inc., supra, 21 C4th at 143, 87 CR2d at 148—upholding injunction barring supervisor from directing racial epithets at Hispanic employees *following a jury verdict* holding company liable for employment discrimination]
 - (3) [17:34] **Former employee’s right to use employer’s e-mail system to communicate with other employees:** A former employee could *not* be enjoined on a *trespass to chattels* theory from using his former employer’s e-mail system to send messages critical of the employer to other employees. There was no actual or threatened injury to the employer’s property because the employer “connected its e-mail system to the Internet and permitted its employees to make use of this connection both for business and, to a reasonable extent, for their own purposes . . . (*Former Employee*) did *nothing but use the e-mail system for its intended purpose*—to communicate with employees . . .” [Intel Corp. v. Hamidi (2003) 30 C4th 1342, 1359, 1 CR3d 32, 46 (emphasis and parentheses added)]

Because the injunction was improper, the Supreme Court did not decide whether an injunction against communicating with the other employees would violate the former employee's "free speech" rights. [*Intel Corp. v. Hamidi*, *supra*, 30 C4th at 1363, 1 CR3d at 50]

[17:35-44] Reserved.

3. [17:45] **Equitable Relief Remedying Past Unlawful Practices:** Courts may order employers to take certain affirmative steps (mandatory injunction) to remedy past unlawful employment practices:

- a. [17:46] **Reinstatement to former job:** Reinstatement with full seniority rights is usually an available remedy for unlawful employment discrimination. [See 42 USC §2000e-5(g) (Title VII §706(g)); Gov.C. §12970(a) (FEHA)]

"The Act is intended to make the victims of unlawful employment discrimination whole, and (this) requires that (they be) . . . so far as possible, restored to a position where they would have been were it not for the unlawful discrimination." (Under most collective bargaining agreements, seniority rights affect promotions, layoff, transfer, shift assignments, etc.) [*Franks v. Bowman Transp. Co., Inc.* (1976) 424 US 747, 764, 96 S.Ct. 1251, 1264 (parentheses added; internal quotes omitted)]

"Reinstatement" requires restoration of the employee's former salary, duties and responsibilities; restoration of title and salary alone is not enough. [See *Norton v. San Bernardino City Unified School Dist.* (2008) 158 CA4th 749, 760-761, 69 CR3d 917, 925-926]

- (1) [17:47] **Not available for mere breach of contract:** However, the employer's "obligation to employ another in personal service" may *not* be specifically enforced where the termination is merely a breach of contract (i.e., no discrimination involved). [See Civ.C. §3390, discussed at ¶17:3]

- (2) [17:48] **Not available where "after-acquired evidence" of employee misconduct exists:** Reinstatement of an employee who has been discriminated against may not be ordered where, *after* termination, it is discovered that the employee has engaged in wrongdoing that would have justified the termination: "It would be both inequitable and pointless to order the reinstatement of someone the employer would have terminated, and will terminate, in any event and upon lawful grounds." [*McKennon v. Nashville Banner Pub. Co.* (1995) 513 US 352, 362, 115 S.Ct. 879, 886] (Nor may "front pay" be awarded in such cases; see ¶17:470 ff.)

- (3) [17:49] **Not available where reinstatement not feasible:** Nor is reinstatement an available remedy for employment discrimination where it is not feasible:
- (a) [17:50] **Hostile relationship:** A court may deny reinstatement if it finds such hostility between plaintiff and his or her supervisors, coworkers, etc. as to make reinstatement impractical. [See *Cassino v.*

(Text cont'd on p. 17-7)

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Reichhold Chemicals, Inc. (9th Cir. 1987) 817 F2d 1338, 1347; see ¶17:60]

- 1) [17:51] **Litigation hostility sufficient?** According to some cases, friction arising from the litigation process is not alone sufficient to deny reinstatement because “a court might deny (reinstatement) in virtually every case if it considers the hostility engendered from litigation as a bar to relief.” [*Dickerson v. Deluxe Check Printers, Inc.* (8th Cir. 1983) 703 F2d 276, 281 (parentheses added)]
 - (b) [17:52] **Position no longer exists:** Likewise, reinstatement may be denied where the job no longer exists (e.g., due to layoffs justified by economic conditions). [See *Cassino v. Reichhold Chemicals, Inc.*, supra, 817 F2d at 1347; see ¶17:60]
 - (c) [17:53] **In-house counsel:** Clients have the absolute right to be represented by counsel of their choice and therefore to terminate an existing attorney-client relationship. This right applies to clients who employ in-house counsel. Such employers therefore may not be compelled to reinstate a discharged in-house attorney. [*General Dynamics Corp. v. Sup.Ct. (Rose)* (1994) 7 C4th 1164, 1177, 32 CR2d 1, 9—discharged in-house attorney suing for breach of contract is limited to damage action]
 - (4) [17:54] **Not available after plaintiff obtains new employment:** An employer’s responsibility to reinstate a wrongfully-discharged employee ceases when the employee obtains a new job. Such is the case even if the employee later resigns from that job and seeks to be reinstated to the position from which he or she was wrongfully discharged. [*Fine v. Ryan Int’l Airlines* (7th Cir. 2002) 305 F3d 746, 756—“It makes no sense to make (defendant) her employer of last resort for life, if it bears no responsibility for the actions of later employers” (parentheses added)]
 - b. [17:55] **Backpay:** Backpay is characterized as an equitable remedy, because it is a form of restitution and the award is committed to the trial court’s discretion. [*Curtis v. Loether* (1974) 415 US 189, 197, 94 S.Ct. 1005, 1010; *Lutz v. Glendale Union High School* (9th Cir. 2005) 403 F3d 1061, 1068] (Backpay is discussed further at ¶17:135 ff.)
Characterizing backpay as an equitable remedy impacts the right to *jury trial*; see discussion at ¶19:847 ff.
- [17:56-59] *Reserved.*

- c. [17:60] **“Front pay” in lieu of reinstatement:** Although reinstatement is the preferred remedy in discriminatory discharge cases, it may not be feasible where the relationship between the parties is hostile or the former position is no longer available due to a reduction in workforce (see above). Under such circumstances, an award of damages for future lost pay and benefits (“front pay”) *in lieu of reinstatement* furthers the remedial goals of anti-discrimination laws “by returning the aggrieved party to the economic situation he would have enjoined but for the defendant’s illegal conduct . . . Thus, front pay is an award of future lost earnings to make a victim of discrimination whole.” [*Cassino v. Reichhold Chemicals, Inc.* (9th Cir. 1987) 817 F2d 1338, 1347]

Cross-refer: See detailed discussion at ¶7:1130 and 17:220 ff.

- d. [17:61] **Hiring:** The court may order an employer that discriminated in the hiring process to hire the plaintiff. [See 42 USC §2000e-5(g) (Title VII §706(g)); Gov.C. §12970(a) (FEHA); see also *Franks v. Bowman Transp. Co., Inc.* (1976) 424 US 747, 763-764, 96 S.Ct. 1251, 1264; *State Personnel Board v. Fair Employment & Housing Comm’n* (1985) 39 C3d 422, 429, 217 CR 16, 20]
- e. [17:62] **Promotion:** In appropriate cases, the court may order the plaintiff promoted as a remedy for past discrimination, in order to make plaintiff whole. [*Dyer v. Workers’ Comp. Appeals Bd.* (1994) 22 CA4th 1376, 1382, 28 CR2d 30, 34]

This remedy, however, is a matter of discretion, not of right. [*Dyer v. Workers’ Comp. Appeals Bd.*, supra, 22 CA4th at 1382, 28 CR2d at 34]

- (1) [17:63] **Rationale:** The court’s broad equitable power to order reinstatement (¶17:46) includes the power to order remedial placement in a different or advanced position (referred to as “instatement”). [*Dyer v. Workers’ Comp. Appeals Bd.*, supra, 22 CA4th at 1382, 28 CR2d at 34]
- (2) [17:64] **Retroactive seniority:** Plaintiffs who have been denied merit promotions because of employment discrimination may be “deemed promoted” with seniority retroactive to the dates when they were wrongfully denied promotion. [*Lucich v. City of Oakland* (1993) 19 CA4th 494, 497, 23 CR2d 450, 451]
- (3) [17:65] **Comment:** Courts are more likely to order promotion where the only qualification is length of service. Where other factors are involved, courts are usually reluctant to order that an injured party be promoted

because this action usurps management prerogatives in determining and applying the qualifications for promotion. [Dyer v. Workers' Comp. Appeals Bd., supra, 22 CA4th at 1382-1383, 28 CR2d at 34]

- f. [17:66] **Elevation to partner status:** The common law rule denying specific performance (¶17:3) does not limit a court's power under Title VII to fashion appropriate remedies for employment discrimination. Partnership admission decisions are subject to Title VII's reach: "(N)othing in the change in status that advancement to partnership might entail means that partnership consideration falls outside the terms of (Title VII)." [Hishon v. King & Spalding (1984) 467 US 69, 77, 104 S.Ct. 2229, 2234-2235 (parentheses added)]
 - [17:67] An accounting firm's refusal to elevate a female employee to partnership status solely because of gender was remedied by an order requiring the firm to admit her into the partnership. [Hopkins v. Price Waterhouse (DC Cir. 1990) 920 F2d 967, 981]
- g. [17:68] **Academic tenure:** An educational institution that denies tenure to a professor or teacher because of unlawful discrimination may be ordered to provide tenure . . . even if this remedy "mandates a lifetime relationship between the University and the professor." [Brown v. Trustees of Boston Univ. (1st Cir. 1989) 891 F2d 337, 359; Kunda v. Muhlenberg College (3rd Cir. 1980) 621 F2d 532, 535, 546-551—college instructor, upon completion of master's degree within 2 years, should be awarded retroactive tenure]
- h. [17:69] **Purging of personnel records:** As a remedy for discriminatory criticism, a court may order modification or expungement of negative evaluations and other adverse material in plaintiff's personal file, especially where the criticism caused plaintiff no specified financial loss. [Nolan v. Cleland (9th Cir. 1982) 686 F2d 806, 814—no further relief could be granted for discriminatory evaluations by plaintiff's supervisor after such evaluations were ordered removed from plaintiff's personnel file; Independent Union of Flight Attendants v. Pan American World Airways, Inc. (ND CA 1987) 50 FEP (BNA) 1698, 1708—order expunging all adverse notations in personnel records]

[17:70-79] Reserved.

B. CONTRACT DAMAGES

- 1. [17:80] **Availability:** Damages for breach of contract may be awarded against the employer for wrongful termination of an employment contract. [See Chyten v. Lawrence & Howell Investments (1993) 23 CA4th 607, 615, 46 CR2d 459, 465 (ordered published 9/22/94, 34 CR2d 555)—wrongfully discharged in-house attorney entitled to salary under employment contract;

Scott v. Pacific Gas & Elec. Co. (1995) 11 C4th 454, 474, 46 CR2d 427, 439—employer's breach of implied contract not to demote without good cause entitled employee to resulting pecuniary loss]

2. [17:81] **Measure of Damages:** The measure of damages for breach of contract "is the amount which will compensate the party aggrieved for all the detriment *proximately caused* thereby, or which, in the ordinary course of things, would be *likely to result* therefrom." [Civ.C. §3300 (emphasis added)]
 - a. [17:82] **Purpose:** Damages are awarded in a breach of contract action "to give the injured party the benefit of his bargain and insofar as possible to place him in the same position he would have been in had the promisor performed the contract." [*Martin v. U-Haul Co. of Fresno* (1988) 204 CA3d 396, 409, 251 CR 17, 23]
 - b. [17:83] **"Detriment" caused:** In employment cases, the "detiment proximately caused" consists of the various elements that make up an employee's compensation, including salary, bonus, overtime pay, sick leave, life insurance, medical and dental insurance, pension and retirement benefits, etc. There may also be noncash perquisites and benefits to consider: automobiles, dependent care, vacation facilities, country club dues, etc.

► [17:84] **PRACTICE POINTER:** Identifying the various damage elements in employment litigation is often easier than quantifying them. If plaintiff seeks long-term damages, expert opinion testimony is usually needed to quantify the claimed loss. Potential issues include:

- *Salary loss:* The length of the salary loss must be computed. This computation is easy where the employment was for a fixed term. But where the employment was for an indefinite term, the jury must determine the date plaintiff obtained or could have obtained comparable employment, which involves application of rules governing mitigation of damages (see ¶17:490 ff.).
- *Promotions:* The salary last paid does not reflect raises plaintiff would have received in the future. Expert opinion testimony may be required to prove such raises. The expert may base an opinion on the average raise that employees in plaintiff's industry are likely to receive. (Defendants may testify, of course, that plaintiff's performance was deficient so that his or her chance of a raise was below average.)

Another method to prove salary loss is to consider the salary paid to plaintiff's replacement or substitute employee, assuming he or she has comparable experi-

ence, skill, productivity, etc. (Defendants who hire a younger worker at a lower salary will want to use this method.)

- **Bonus and profit-sharing loss:** Expert opinion testimony may also be required to prove damages for loss of bonuses and profit-sharing. The employer's earnings history and future growth prospects must be considered.
 - **Present value of future earnings:** Earnings payable in the future must be discounted to their *present value* in order to account for the time value of money—i.e., to reflect the interest that can be earned on the award. Present value thus depends on an assumed interest rate. (Plaintiff's experts usually opt for a conservative rate; e.g., current interest rate on three-year Treasury Bills.)
- c. [17:85] **Liquidated damages:** Employment contracts may include provisions for liquidated damages (e.g., for breach of the employee's agreement not to disclose the employer's trade secrets following termination of employment).
- (1) [17:86] **Presumed valid:** Liquidated damages provisions are *presumed valid* (except in certain consumer transactions and residential leases). The burden is on the party seeking to avoid the liquidated damages to show that "the provision was unreasonable under the circumstances existing at the time the contract was made." [Civ.C. §1671(b)]
 - (2) [17:87] **Factors considered:** Relevant factors include:
 - whether the liquidated damages provision was included in a form contract;
 - the relative equality of the parties' bargaining power;
 - whether the parties anticipated that proof of actual damages would be costly or inconvenient;
 - the relationship the liquidated damages bear to the range of harm that reasonably could be anticipated at the time the contract was made;
 - the difficulty of proving causation and foreseeability; and
 - whether the parties were represented by counsel when they made the contract. [See *Weber, Lipshie & Co. v. Christian* (1997) 52 CA4th 645, 654-655, 60 CR2d 677, 681-682—partnership agreement provided liquidated damages for expelled partner's

breach of covenant not to service partnership clients]

[17:88-94] Reserved.

3. Limitations on Contract Damages

- a. [17:95] **“Proximately caused”:** Damages for breach of contract must have been “proximately caused” by the breach (Civ.C. §3300, above).

This requirement is generally interpreted to mean that recovery is allowed only if:

- the damages would not have occurred “but for” the breach (i.e., cause-in-fact); and
- the breach was a “substantial factor” in causing the damage (i.e., there was no independent intervening event or superseding cause). [See *Greenfield v. Insurance Inc.* (1971) 19 CA3d 803, 810-811, 97 CR 164, 168—not an employment case]

(1) Application

- [17:96] Employee was wrongfully discharged but later ordered reinstated. He was thereafter discharged a second time because he was imprisoned and unable to report for work. His damage claim from the wrongful discharge was cut off when he was reinstated. He had no damage claim based on the second discharge because it was not wrongful (i.e., he was not ready, willing and able to work; see ¶17:545). [*Dean v. Trans World Airlines, Inc.* (9th Cir. 1991) 924 F2d 805, 812]
- [17:97] *Compare:* The result may be different where the employer *refuses to reinstate* a wrongfully discharged employee. In such cases, backpay damages may continue *despite* the employee’s imprisonment (i.e., it is immaterial whether the employee is still ready, willing and able to work if the employer refuses to reemploy; see ¶17:545).

[17:98-104] Reserved.

- b. [17:105] **Reasonably foreseeable:** The Civil Code allows recovery for detriment proximately caused “or which, in the ordinary course of things, would be likely to result (from the breach of contract).” [Civ.C. §3300 (parentheses added)]

This provision embodies the common law rule of *Hadley v. Baxendale* (1854) 9 Ex. 341, 156 Eng. Rep. 145, that a promisor need not compensate a promisee for injuries the promisor had no reason to foresee as the probable result of his or her breach when the contract was made.

As the California Supreme Court stated: "Contract damages are generally limited to those within the contemplation of the parties when the contract was entered into or at least reasonably foreseeable by them at that time; *consequential damages beyond the expectations of the parties are not recoverable.*" [Applied Equip. Corp. v. Litton Saudi Arabia Ltd. (1994) 7 C4th 503, 515, 28 CR2d 475, 481 (emphasis added)—not an employment case]

(1) [17:106] **Purpose:** "This limitation on available damages serves to encourage contractual relations and commercial activity by enabling parties to estimate in advance the financial risks of their enterprise." [Applied Equip. Corp. v. Litton Saudi Arabia Ltd., *supra*, 7 C4th at 515, 28 CR2d at 481]

(2) **Application**

- [17:107] Employee was wrongfully discharged from his position as a radio announcer. Employer paid his salary but refused to reinstate him to his former position. Plaintiff was entitled to prove that *his reputation* was damaged: "(T)he parties are deemed to have contracted on the assumption that the employee was to be given opportunities for the exercise of his abilities . . . an anticipated benefit of which was the *acquisition of a reputation* in the public eye." [Colvig v. RKO General, Inc. (1965) 232 CA2d 56, 67-68, 42 CR 473, 480-481 (emphasis added; internal quotes omitted)]

[17:108-109] *Reserved.*

(3) [17:110] **Effect of optional termination provision:** A contract provision giving both parties the right to terminate upon notice to the other may limit the employer's liability for consequential damages: "Parties who agree that a contract may be terminated for any reason, or no reason, upon the giving of the specified notice *could not reasonably anticipate* that damages could exceed that notice period." [Martin v. U-Haul Co. of Fresno (1988) 204 CA3d 396, 409, 251 CR 17, 24 (emphasis added)—U-Haul's dealership contract with plaintiff gave it the right to terminate on 30 days' written notice, or without notice if other party violated the contract]

c. [17:111] **"Clearly ascertainable":** "No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin." [Civ.C. §3301]

(1) **Application**

- [17:112] An employee wrongfully discharged solely because of his age was entitled to recover his

salary from date of discharge until retirement age. No recovery was allowed, however, for *future bonuses*; their existence was “merely speculative” under the facts of the case (bonuses were entirely discretionary and based on job performance, which was disputed). [*Neufeld v. Searle Laboratories* (8th Cir. 1989) 884 F2d 335, 342]

- [17:113] *Compare*: Where an employee’s compensation is based on the employer’s “net profits,” *anticipated future profits* may be recoverable for breach of an employment contract. [*Brawthen v. H & R Block, Inc.* (1975) 52 CA3d 139, 147, 124 CR 845, 850—manager employed to open new offices for employer was to receive 50% of each office’s net profits]

Any uncertainties as to the *amount* of the employer’s profits will be resolved against the employer, as the party causing the breach. [*Brawthen v. H & R Block, Inc.*, *supra*, 52 CA3d at 147-148, 124 CR at 850-851]

[17:114-119] *Reserved.*

- d. [17:120] **No tort damages:** The contract measure of damages generally does not include certain types of damages that may be recoverable in tort cases:

- (1) [17:121] **No emotional distress damages:** Damages for mental suffering and emotional distress are generally not recoverable in a breach of contract action. [*Erlich v. Menezes* (1999) 21 C4th 543, 558, 87 CR2d 886, 896; *Applied Equip. Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 C4th 503, 516, 28 CR2d 475, 481]

Exceptions exist only for contracts the *express object* of which is the mental and emotional well-being of one of the parties (e.g., care of infants, corpses, family heirlooms). [See *Erlich v. Menezes*, *supra*, 21 C4th at 559, 87 CR2d at 897]

- (a) [17:122] **Comment:** Employment contracts do *not* fall in this exceptional category. That employment contracts “carry a lot of emotional freight” does *not* necessarily make them one for the emotional well-being of the employee, and therefore does not justify an award of emotional distress damages for breach.

- (2) [17:123] **No punitive damages:** Similarly, *punitive or exemplary damages* are not recoverable for breach of contract: “In the absence of independent tort, punitive damages may not be awarded for breach of contract

even where the defendant's conduct in breaching the contract was wilful, fraudulent, or malicious." [Applied Equip. Corp. v. Litton Saudi Arabia Ltd., *supra*, 7 C4th at 516, 28 CR2d at 481 (emphasis added; internal quotes omitted); see also Civ.C. §3294—punitive damages authorized only in actions "for breach of an obligation not arising from contract" (emphasis added)]

[17:124-134] Reserved.

4. [17:135] **Backpay:** Prevailing plaintiffs in an employment termination case are generally entitled to backpay, or lost compensation, in the amount that they would have received but for the termination, less sums obtained through mitigation. [*Parker v. Twentieth Century-Fox Film Corp.* (1970) 3 C3d 176, 181, 89 CR 737, 740]

"(B)ack pay refers to the amount that plaintiff would have earned but for the employer's unlawful conduct, minus the amount that plaintiff did earn or could have earned if he or she had mitigated the loss by seeking or securing other comparable employment." [*Lowe v. California Resources Agency* (1991) 1 CA4th 1140, 1144, 2 CR2d 558, 560, fn. 3; *Brady v. Thurston Motor Lines, Inc.* (4th Cir. 1985) 753 F2d 1269, 1278]

- a. [17:136] **Purpose:** In discrimination cases, a backpay order is a reparation order designed to vindicate the laws' purpose of making employees whole for losses suffered. [*Ofsevit v. Trustees of Cal. State Univ. & Colleges* (1978) 21 C3d 763, 776, 148 CR 1, 9, fn. 14]

"The injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed." [*Albemarle Paper Co. v. Moody* (1975) 422 US 405, 418-419, 95 S.Ct. 2362, 2372]

[17:136.1-136.4] Reserved.

- b. [17:136.5] **Nature of remedy:** Despite its *equitable* nature, backpay is "a presumptive entitlement of a plaintiff who successfully prosecutes an employment discrimination case." [*Johnson v. Spencer Press of Maine, Inc.* (1st Cir. 2004) 364 F3d 368, 379; also see *Lutz v. Glendale Union High School* (9th Cir. 2005) 403 F3d 1061, 1067-1069]

- (1) [17:136.6] **Not subject to Title VII damages caps:** Backpay is not an element of "compensatory damages" under 42 USC §1981a, and therefore is not subject to the §1981a(b)(3) caps on compensatory and punitive damages (¶17:296). [42 USC §1981a(b)(2); see *Johnson v. Spencer Press of Maine, Inc.*, *supra*, 364 F3d at 379]

[17:136.7-136.9] Reserved.

- (2) [17:136.10] **Right to jury trial?** Backpay remains an equitable remedy awarded in the court's discretion in *Title VII* cases, so that claims for backpay are not jury triable (see ¶19:848). [*Spencer v. Wal-Mart Stores, Inc.* (3rd Cir. 2006) 469 F3d 311, 315; *Lutz v. Glendale Union High School* (9th Cir. 2005) 403 F3d 1061, 1069—same result in ADA cases]

Compare—where backpay award mandatory: A right to jury trial may exist, however, for claims under statutes making backpay awards mandatory (e.g., FLSA); see discussion at ¶19:849 ff.

- c. [17:137] **Period covered:** Both Title VII and the FEHA provide for an award to successful plaintiffs of "backpay" from the time of the adverse action *until the date of judgment*. [42 USC §2000e-5(g); Gov.C. §12965]

[17:137.1-137.4] *Reserved.*

- (1) [17:137.5] **Effect of employer interference with earnings:** In calculating backpay, the jury may consider plaintiff's earnings before the employer's discriminatory acts depressed plaintiff's earnings, rather than earnings at the time of termination. [See *Palasota v. Haggar Clothing Co.* (5th Cir. 2007) 499 F3d 474, 484—in calculating backpay in ADEA case, jury could use Employee's peak earnings rather than lower earnings at time of termination caused by Employer's deliberate effort to get rid of older employees]

- (2) [17:138] **Effect of resignation:** But employees who resign after being discriminated against may not recover backpay under Title VII for the period following their resignation, unless they were *constructively discharged*. [See *Hertzberg v. SRAM Corp.* (7th Cir. 2001) 261 F3d 651, 659; *Satterwhite v. Smith* (9th Cir. 1984) 744 F2d 1380, 1381, fn. 1]

The result under the FEHA is unclear. [See *Richards v. CH2M Hill, Inc.* (2001) 26 C4th 798, 824, 111 CR2d 87, 107, fn. 5]

- (a) [17:139] **Rationale:** Employees should not be encouraged to quit at the first sign of discrimination. Restricting backpay awards encourages them to work within the existing employment relationship to overcome resistance and eradicate discrimination. [See *Thorne v. City of El Segundo* (9th Cir. 1986) 802 F2d 1131, 1134]

- (b) [17:140] **Compare—where employee cannot be "made whole" while staying on job:** Even absent constructive discharge, post-termination

backpay and front pay awards may be allowed (subject to mitigation of damages) where the harm the discrimination caused *cannot be resolved within the working relationship*. In such cases, the employee cannot be “made whole” by staying on the job and therefore no reason exists to limit postresignation damages. [*Cloud v. Casey* (1999) 76 CA4th 895, 908, 90 CR2d 757, 765—award under FEHA, relying on federal cases]

- [17:141] A female employee was denied a promotion to company controller because of gender discrimination. *Because no comparable*

(Text cont'd on p. 17-17)

RESERVED

- position was available*, she could not be “made whole” by staying on the job. An award of post-resignation backpay and front pay damages was therefore proper (subject to duty to mitigate damages). [*Cloud v. Casey*, *supra*, 76 CA4th at 908, 90 CR2d at 765]
- d. [17:142] **Items recoverable:** Backpay includes “not only the periodic monetary earnings of the employee but also the other benefits to which he is entitled as part of his compensation.” [*Wise v. Southern Pac. Co.* (1970) 1 C3d 600, 607, 83 CR 202, 207]
- (1) [17:143] **Salary and wages:** Past earnings include regular wages plus, if applicable, overtime, shift-differential pay, and premium pay; i.e., the “stream of income” the worker would have received. [*Local Joint Exec. Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.* (9th Cir. 2001) 244 F3d 1152, 1157; see *Kossman v. Calumet County* (7th Cir. 1988) 849 F2d 1027, 1028—overtime wages included in backpay; see also *Ofsevit v. Trustees of Cal. State Univ. & Colleges* (1978) 21 C3d 763, 776, 148 CR 1, 9—wrongfully discharged teachers entitled to salary from date of dismissal to date of reinstatement]
- (a) [17:143.1] **Adjustment for promotions; “lost-chance” damages:** Backpay may be increased to take into account promotions the employee was *likely* to have received. [See *Bishop v. Gainer* (7th Cir. 2001) 272 F3d 1009, 1015-1016]
- Where the likelihood of promotion cannot be determined (e.g., because the employee would have had to compete with others for the promotion), the court may in appropriate cases award “lost-chance” damages—i.e., multiplying the additional pay that the employee would have earned from promotion times the percentage chance that the employee would have received the promotion. [*Bishop v. Gainer, supra*, 272 F3d at 1016-1017]
- [17:143.2] For example, where three employees vie for promotion to the same position involving a \$5,000 annual pay raise, one who is discriminatorily eliminated from consideration may receive “lost-chance” damages by multiplying the additional backpay the employee would have earned in the position (\$5,000 per year) by the chance he or she had of receiving the promotion (all other things being equal, 33 1/3%). [*Bishop v. Gainer, supra*, 272 F3d at 1016]
- [17:143.3-143.4] *Reserved.*

- (b) [17:143.5] **Including wages that could have been earned if employer had accommodated employee's disability:** Where an employer discharges an employee disabled by pregnancy instead of reasonably accommodating her disability by a temporary transfer to a less strenuous or dangerous position, backpay may be owed for the period in which the plaintiff *could have been employed* in the less strenuous position. [See *SASCO Elec. v. California Fair Employment & Housing Comm'n* (2009) 176 CA4th 532, 543-544, 97 CR3d 482, 490-491 (pregnancy discrimination case)]
- (2) [17:144] **Incentive compensation:** Incentive compensation such as bonuses and commissions may be recoverable as contract damages, if the employee's right thereto can be proved with reasonable certainty. [*Brawthen v. H & R Block, Inc.* (1975) 52 CA3d 139, 148, 124 CR 845, 851—wrongfully discharged employee entitled to receive 50% of employer's "net profits" from certain operations; *Smith v. Brown-Forman Distillers Corp.* (1987) 196 CA3d 503, 518, 241 CR 916, 924—\$230,000 compensatory damages for 4 years upheld where wrongfully discharged employee's pay was \$27,000 plus bonuses, last bonus was \$10,000, and bonuses would have been higher in later years because of employer's increased profits]
- (3) [17:145] **Tips:** Where an employee's earnings include tips, "backpay" may include what the employee would have received in tips. [*Local Joint Exec. Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, supra, 244 F3d at 1157—action for WARN Act violation; see ¶16:165]
- (4) [17:146] **Health insurance:** Health insurance received as a fringe benefit of employment is recoverable as part of a backpay award. Recovery may be allowed for the *replacement cost* to the plaintiff (premiums plaintiff must pay to obtain substitute coverage), not merely the amount it would have cost the employer to provide such coverage. [*Wise v. Southern Pac. Co.* (1970) 1 C3d 600, 607-608, 83 CR 202, 207]
- (5) [17:147] **Unused vacation:** Payment for unused vacation time is recoverable as part of backpay. Vacation pay constitutes additional compensation for services rendered. [*Henry v. Amrol, Inc.* (1990) 222 CA3d Supp. 1, 4-5, 272 CR 134, 136]
- (a) [17:148] **Nonforfeitable:** California law prohibits employers from enforcing a "use it or lose it"

vacation policy (unused vacation time not compensable and cannot be carried over to following year): “(W)henever a contract of employment . . . provides for paid vacations, and an employee is terminated without having taken off his vested vacation time, all vested vacation shall be paid to him as wages . . .” [Lab.C. §227.3; see *Henry v. Amrol, Inc.*, supra, 222 CA3d Supp. at 4-5, 272 CR at 136]

Compare: A “use it or lose it” policy may be enforceable in other states, however. In such states, recovery for unused vacation time may be denied. [See *Bonura v. Chase Manhattan Bank, N.A.* (SD NY 1986) 629 F.Supp. 353, 358-359]

- (6) [17:149] **Life insurance:** Where the employer provided life insurance, the measure of damages includes the *face value of the policy* that would have been in effect at the wrongfully discharged employee’s death. But that amount must be *reduced* by the proceeds of a substitute policy that the wrongfully discharged employee obtained or *could have obtained* in an effort to mitigate damages. [*Sposato v. Electronic Data Systems, Corp.* (9th Cir. 1999) 188 F3d 1146, 1148 (applying Calif. law)]
- (a) [17:150] **Where no replacement policy:** If the employee chose *not* to obtain replacement insurance after his or her discharge, the measure of damages is apparently limited to the amount of the *premiums* the employer would have paid had the termination not occurred. [*Farris v. Lynchburg Foundry* (4th Cir. 1985) 769 F2d 958, 966; and see *Sposato v. Electronic Data Systems, Corp.*, supra, 188 F3d at 1148]
- (7) [17:151] **Pension benefits:** Lost pension and other deferred compensation benefits may be recoverable as backpay. [*County of Alameda v. Fair Employment & Housing Comm’n* (1984) 153 CA3d 499, 509, 200 CR 381, 386—fringe benefits properly included in backpay award (citing *United States v. Lee Way Motor Freight, Inc.* (10th Cir. 1979) 625 F2d 918, 945—“A normal part of the backpay award should have been the inclusion of the company’s health, welfare and pension benefits”); *Ackerman v. Western Elec. Co., Inc.* (ND CA 1986) 643 F.Supp. 836, 855, aff’d (9th Cir. 1988) 860 F2d 1514—plaintiff entitled to full backpay award, which includes pension benefits]
- (a) [17:152] **Calculating loss:** No widespread consensus exists on how to calculate these lost ben-

efits. [See *Baker v. North Central Dialysis Ctr.*, S.D. (ND IL 1987) 48 FEP 31, 36—cut-off when plaintiff obtains other employment; *Ventura v. Federal Life Ins. Co.* (ND IL 1983) 571 F.Supp. 48, 50-51—pen-sion paid through normal retirement date; *Blum v. Witco Chem. Corp.* (3rd Cir. 1987) 829 F2d 367, 374—lost pension benefits may be calculated as part of “front pay”]

- (8) [17:153] **Lost stock options:** A wrongfully discharged employee who was entitled to participate in the employer's stock option plan (e.g., having been awarded options to purchase a specified number of shares of employer's stock at the end of each employment year) is entitled to compensation for the lost stock option rights. [*Scully v. US WATS, Inc.* (3rd Cir. 2001) 238 F3d 497, 506-507 (applying federal, New York and Pennsylvania law); *Haft v. Dart Group Corp.* (D DE 1995) 877 F.Supp. 896, 903 (decided under Delaware law)]
- (a) [17:154] **Calculating loss:** Calculating the employee's loss is difficult because it cannot be known whether and when the employee would have exercised such options if they had been issued. Courts have basically taken two different approaches . . . either of which or a combination of which may be used in a particular case. [See *Scully v. US WATS, Inc.*, supra, 238 F3d at 510-512 (same result under federal, New York and Pennsylvania law)]
- 1) [17:155] **Conversion approach:** One approach measures plaintiff's lost profit by comparing the stock option's exercise price to the *higher* of:
- the stock's value when plaintiff was wrongfully discharged (i.e., the date of conversion); or
 - the highest intermediate stock price between the date of discharge and a reasonable time thereafter during which the stock could have been replaced. [See *Schultz v. Commodity Futures Trading Comm'n* (2nd Cir. 1983) 716 F2d 136, 139-141; *Haft v. Dart Group Corp.*, supra, 877 F.Supp. at 902]

This approach allows a plaintiff who was wrongly denied a stock option a limited recovery for his or her lost opportunity to enjoy a reduced risk of loss and a greater likelihood of

profit. [*Scully v. US WATS, Inc.*, supra, 238 F3d at 512]

- 2) [17:156] **Breach of contract approach:** Another approach measures plaintiff's lost profit simply by the difference between the stock option's exercise price and the market price of the same stock at the time of breach. [*Scully v. US WATS, Inc.*, supra, 238 F3d at 512]

According to one court, this approach avoids the speculativeness and hindsight problems attendant to the conversion theory, above. [*Scully v. US WATS, Inc.*, supra, 238 F3d at 512]

- a) [17:157] **Comment:** The criticism of the contract approach is that if the stock is selling at or near the option price, the wrongfully discharged employee loses any upside potential. The employer thus is arguably "rewarded" for its breach because the employee is not fully compensated for his or her loss. [See *Scully v. US WATS, Inc.*, supra, 238 F3d at 511]

- (b) [17:158] **Restricted vs. unrestricted shares:** That the optioned shares are "restricted" (may not be sold until a future date) has been held not to affect the above valuation approaches. Measuring damages as of the end of the restricted period would be unduly speculative because there is no way to know whether the employee would have sold the shares at that time or whether the stock price would be higher or lower than its market price at breach date. [*Scully v. US WATS, Inc.*, supra, 238 F3d at 513 (same result under federal, New York and Pennsylvania law)]

- (9) [17:159] **Relocation costs:** The costs a wrongfully discharged employee incurs in relocating to find other employment may be treated as detriment "proximately caused" by the employer's breach within the meaning of Civ.C. §3300.

Although no known California authority exists on this question, such recovery has been permitted in other states. [See *Graffius v. Control Data Corp.* (Minn. Ct. App. 1989) 447 NW2d 215, 217—discharged plaintiff entitled to compensation for moving expenses incurred as direct result of wrongful termination]

[17:160-169] *Reserved.*

- e. [17:170] **Limitations and offsets to backpay:** The amount of any backpay award may be reduced by payments or benefits the wrongfully discharged employee received, as discussed below.

Defendant has the burden of showing that an otherwise appropriate backpay award should be limited. [*Richardson v. Restaurant Mktg. Assocs., Inc.* (ND CA 1981) 527 F.Supp. 690, 697; *SASCO Elec. v. California Fair Employment & Housing Comm'n* (2009) 176 CA4th 532, 543, 97 CR3d 482, 491]

- (1) [17:171] **Severance pay:** Backpay awards must be reduced by the amount of any severance or separation pay plaintiff receives from the defendant employer. [*Ryan v. Raytheon Data Sys. Co.* (D MA 1984) 601 F.Supp. 243, 253; *Berndt v. Kaiser Aluminum & Chem. Sales, Inc.* (ED PA 1985) 604 F.Supp. 962, 964, aff'd (3rd Cir. 1986) 789 F2d 253; *Grundman v. Trans World Airlines, Inc.* (SD NY 1990) 54 FEP 224]
- (2) [17:172] **Reduction for absenteeism?** According to some courts, the backpay award to a plaintiff with a record of absenteeism should be offset by the estimated period plaintiff would have been absent. [*Syvock v. Milwaukee Boiler Mfg. Co., Inc.* (7th Cir. 1981) 665 F2d 149, 161 (overruled on other grounds in *Coston v. Plitt Theatres, Inc.* (7th Cir. 1988) 860 F2d 834)—plaintiff's backpay award discounted to account for plaintiff's 12% absenteeism rate]
- (3) [17:173] **Reduction for periodic layoffs:** The backpay award to a plaintiff whose employment was subject to periodic layoffs should be reduced by the percentage of the year that plaintiff would not have been working because of such layoffs. [*Johnson v. Ryder Truck Lines, Inc.* (WD NC 1980) 30 FEP 659—plaintiff was an “extra board” truck driver who lacked seniority and therefore would have been laid off periodically throughout year]

The employer has the burden of proving the circumstances supporting such a reduction, including *the unavailability of any reasonable accommodation* that would have enabled the plaintiff to continue working. [See *SASCO Elec. v. California Fair Employment & Housing Comm'n*, supra, 176 CA4th at 543, 97 CR3d at 490-491, discussed at ¶17:143.5]

- (4) [17:173.1] **Reduction for inability to work:** A backpay award may be reduced by an amount representing the period of time a wrongfully discharged (or demoted)

employee was unable to work due to a non-job related illness or disability. [See *Davis v. Los Angeles Unified School Dist. Personnel Comm'n* (2007) 152 CA4th 1122, 1134, 62 CR3d 69, 77—employee wrongfully demoted]

- (5) [17:174] **Compensation from other employment:** Courts uniformly reduce backpay awards by the amount of any wages, paid vacations, sick pay and other fringe benefits plaintiff obtains on a new job. [See *Naton v. Bank of Calif.* (9th Cir. 1981) 649 F2d 691, 700; *Tanner v. California Physicians' Service* (ND CA 1978) 27 FEP 593—fringe benefits of new job offset if fringe benefits of old job are included in damages sought]
- (6) [17:175] **Retirement benefits:** Courts differ on whether to reduce a backpay award by retirement or pension benefits a wrongfully discharged employee receives from the employer after discharge:
- [17:176] One view is that because the purpose is to restore the employee to the status quo, pension benefits *should be deducted* from a backpay award, since plaintiff would not have received such payments had he or she not been discharged. [*McMahon v. Libbey-Owens-Ford Co.* (6th Cir. 1989) 870 F2d 1073, 1079; see *Cline v. Roadway Express, Inc.* (4th Cir. 1982) 689 F2d 481, 490—where plaintiff received upon discharge the full amount of

(Text cont'd on p. 17-23)

RESERVED

stock credited to his retirement account, backpay was reduced by the value of that stock at time of transfer, to prevent “windfall” to plaintiff]

- [17:177] Other courts *refuse* any deduction for payments from pension and retirement plans. Plaintiff should not have to exhaust retirement benefits to which he or she was entitled when “but for the wrongful termination (he or) she would have received regular wages.” [*Blake v. J.C. Penney Co., Inc.* (8th Cir. 1990) 894 F2d 274, 282 (parentheses added); *Davis v. Odeco, Inc.* (5th Cir. 1994) 18 F3d 1237, 1244—because employee is already contractually entitled to fringe benefits, reducing backpay award would provide employer with “undeserved windfall”]

[17:178-179] *Reserved.*

- (7) [17:180] **Governmental benefits:** Anti-discrimination statutes typically authorize awards of “such legal or equitable relief as may be *appropriate* to effectuate the purposes” of the statute (see ¶17:8). It is unsettled whether it is “appropriate” to reduce backpay awards by the amount of governmental benefits plaintiff receives (e.g., social security, unemployment insurance, disability insurance, welfare benefits, etc.).

- (a) [17:181] **Impact of “collateral source” rule:** Most courts hold that benefits an injured party receives from a source *wholly independent of the wrongdoer* (a “collateral source”—e.g., unemployment insurance benefits) should not be deducted from damages. [See *Naton v. Bank of Calif.* (9th Cir. 1981) 649 F2d 691, 699; *Hamlin v. Charter Township of Flint* (6th Cir. 1999) 165 F3d 426, 435—disability pension benefits from source independent of employer did not reduce front pay award against employer under ADA; *Doyne v. Union Elec. Co.* (8th Cir. 1992) 953 F2d 447, 451-452—pension payments received from source independent of employer did not reduce front pay award against employer in age discrimination case]

- 1) [17:182] **Compare—payments attributable to defendant:** The collateral source rule generally does not apply, however, when the payment comes from the defendant or a source identified with defendant (e.g., disability insurance benefits provided by employer). In such cases, payments plaintiff receives must be used to offset defendant’s liability because “it is

as if the tortfeasor himself paid.” [Green v. Denver & Rio Grande Western R. Co. (10th Cir. 1995) 59 F3d 1029, 1032]

- 2) [17:183] **Factors considered:** In determining whether benefits are from a “collateral” source, courts consider whether:
 - the employee personally contributed to fund the plan;
 - the plan arises under a collective bargaining agreement;
 - the plan covers both work-related and nonwork-related injuries;
 - payments from the plan are contingent upon the employee’s length of service; and
 - the plan itself contemplates a setoff of benefits paid against recovery in a tort action or other proceedings. [See Hamlin v. Charter Township of Flint (6th Cir. 1999) 165 F3d 426, 435]

- (b) [17:184] **Unemployment insurance:** Courts disagree on whether unemployment insurance payments are a “collateral source” because employers contribute to the fund from which such benefits are paid. [See Naton v. Bank of Calif., supra, 649 F2d at 699-700]

- 1) [17:185] **View rejecting offset:** Some courts hold unemployment benefits received by a successful employment discrimination plaintiff are *not* offsets against a backpay award. [Rasimas v. Michigan Dept. of Mental Health (6th Cir. 1983) 714 F2d 614, 627; Kauffman v. Sidereal Corp. (9th Cir. 1982) 695 F2d 343, 346—no deduction of unemployment benefits from Title VII backpay award]

- a) [17:186] **Rationale:** Allowing such deduction would relieve the employer of its obligation to make the wrongfully discharged plaintiff whole, and would force plaintiffs to exhaust benefits they otherwise might have used in the future. [Monroe v. Oakland Unified School Dist. (1981) 114 CA3d 804, 810-812, 170 CR 867, 870-871]

- 2) [17:187] **View that offset discretionary:** Other cases hold that even if such payments come from a “collateral source,” the court has *discretion* to deduct the amount received from any award of backpay. [Naton v. Bank of Calif.

(9th Cir. 1981) 649 F2d 691, 699-700; *Guthrie v. J.C. Penney Co., Inc.* (5th Cir. 1986) 803 F2d 202, 209]

- 3) [17:188] **Comment:** In a different context, the U.S. Supreme Court has affirmed the NLRB's decision *not to deduct* unemployment compensation benefits from a backpay award obtained from an employer who discriminated based on union membership. [*NLRB v. Gullett Gin Co.* (1951) 340 US 361, 364, 71 S.Ct. 337, 339-340]
- (c) [17:189] **Disability benefits:** California cases hold disability benefits paid to a wrongfully discharged employee are a proper offset to the employer's liability for lost wages. [*Mayer v. Multistate Legal Studies, Inc.* (1997) 52 CA4th 1428, 1434, 61 CR2d 336, 339; *see also* ¶17:535]

But at least one federal court holds such disability benefits are from a "collateral source" and do not reduce the employer's liability for lost wages. [*Whatley v. Skaggs Cos., Inc.* (10th Cir. 1983) 707 F2d 1129, 1138]
- (d) [17:190] **Welfare benefits:** It is not clear whether public assistance benefits should be deducted from a backpay award.
 - [17:191] One case holds welfare benefits may not be treated as a nondeductible "collateral source" because plaintiff has made no payments into a special fund to provide for such benefits. [*Dillon v. Coles* (3rd Cir. 1984) 746 F2d 998, 1007—backpay reduced by welfare payments received under state statute treating such payments as a *loan* to be repaid]
- (e) [17:192] **Social security:** Courts disagree on whether social security benefits should be deducted from a backpay award or whether they are nondeductible under the "collateral source" rule. [See *Flowers v. Komatsu Mining Systems, Inc.* (7th Cir. 1999) 165 F3d 554, 558—courts have discretion whether to deduct social security disability payments from ADA backpay award; *Guthrie v. J.C. Penney Co., Inc.* (5th Cir. 1986) 803 F2d 202, 209—court has discretion *not to deduct* social security benefits from backpay award under ADEA; *EEOC v. Wyoming Retirement System* (10th Cir. 1985) 771 F2d 1425, 1431-1432—court has discretion to *de-*

duct social security benefits from backpay to avoid “burdening the public treasury to finance a windfall to the plaintiffs”]

- (f) [17:193] **Workers' compensation benefits:** A disabled worker who is wrongfully discharged may seek both workers' compensation benefits and a backpay award against the employer. No deduction from backpay is allowed for workers' compensation benefits paid while plaintiff was *unable to work*. But, consistent with the rule that an employee must *mitigate damages* (¶17:490 *ff.*), a deduction is proper for any portion of such benefits that represents salary or wages plaintiff *could have earned* when able to return to work. [See *Bevli v. Brisco* (1989) 211 CA3d 986, 994, 260 CR 57, 62; see also *Moysis v. DTG Datanet* (8th Cir. 2002) 278 F3d 819, 828]

[17:194-198] *Reserved.*

- (8) [17:199] **Undocumented workers?** The policy expressed in federal immigration law precludes the NLRB from awarding backpay to undocumented aliens who are not legally authorized to work in the United States. [*Hoffman Plastic Compounds, Inc. v. NLRB* (2002) 535 US 137, 149, 122 S.Ct. 1275, 1283—workers laid off after supporting union-organizing campaign]

Although *Hoffman* deals only with NLRB remedies, the EEOC has announced that it will no longer seek reinstatement or backpay for undocumented workers for periods after discharge. (This does not, however, affect the EEOC's enforcement of federal anti-discrimination laws that otherwise protect undocumented workers.) [EEOC Directives Transmittal No. 915.002, 6/27/02]

But payment for *work performed* is still governed by federal wage and hour laws. Moreover, state labor and employment laws may be enforceable *regardless* of an employee's immigration status. *See discussion at ¶11:1224 ff.*

- (9) [17:200] **Tax withholding:** The employer is required to withhold sums for social security taxes (FICA) and income taxes from a backpay award to a former employee. Even though an employer-employee relationship no longer exists, the award constitutes “remuneration for employment,” or “wages” (26 CFR §31.3121 (a)-(1)(i)), and therefore is subject to tax withholding. [*Rivera v. Baker West, Inc.* (9th Cir. 2005) 430 F3d 1253, 1259; *Gerbec v. United States* (6th Cir. 1999) 164 F3d 1015, 1026]

(a) [17:200.1] **Contra authority:** A California state court has held withholding is *not required* for payments “not made within the context of an ongoing employment relationship.” The withholding statutes “do not place upon a former employer the obligation to withhold taxes from an award of damages paid to a former employee not for services already performed but for breach of the employment contract.” [*Lisec v. United Airlines, Inc.* (1992) 10 CA4th 1500, 1507, 11 CR2d 689, 693]

[17:200.2] **Comment:** *Lisec* does not cite or mention the contrary federal cases on what is basically an issue of federal tax law. When cases settle, many companies ignore *Lisec* and routinely require tax withholding.

[17:201] *Reserved.*

- f. [17:202] **Events terminating backpay:** Any of the following events terminate plaintiff’s right to recover backpay:
- (1) [17:203] **Expiration of contract term:** In an action based on a *fixed-term* employment contract (e.g., five years), backpay is determined by calculating lost wages over the balance of the contract term (see ¶17:143). Liability for backpay thus terminates when the contract term expires. [See *Smith v. Brown-Forman Distillers Corp.* (1987) 196 CA3d 503, 518, 241 CR 916, 924—damages awarded until agreed retirement date; *Drzewiecki v. H & R Block, Inc.* (1972) 24 CA3d 695, 705, 101 CR 169, 175—where employment contract provided for “*automatic renewal*” from year to year as long as employee was performing competently, damages awarded for 10 years from date of wrongful discharge, which was held to be a reasonable period for duration of employment]
- (a) [17:204] **Rationale:** “Once there has been a finding of unlawful discrimination, backpay should not be denied for a reason that, if applied generally, would frustrate Title VII’s purpose of eradicating discrimination and making whole those who suffer because of it.” [*Richardson v. Restaurant Mktg. Assocs., Inc.* (ND CA 1981) 527 F.Supp. 690, 696]
- (2) [17:205] **Employer out of business:** Absent a fixed employment term, a wrongfully discharged employee’s recovery of backpay is cut off when the employer goes out of business, because plaintiff’s employment would have terminated in any event at that time. [See *Richardson v. Restaurant Mktg. Assocs., Inc.*, supra, 527 F.Supp. at 697]

- (3) [17:206] **Employer's unconditional offer of reinstatement:** Plaintiff has a *duty to mitigate damages* flowing from the employer's wrongful acts, and failure to do so may terminate the employer's liability for backpay (see ¶17:490 ff.). Thus, "(a)bsent special circumstances, rejection of an employer's unconditional job offer ends the accrual of potential backpay liability." [Ford Motor Co. v. EEOC (1982) 458 US 219, 241, 102 S.Ct. 3057, 3070—involved Title VII claims, but consistent with California law; Albert v. Smith's Food & Drug Ctrs., Inc. (10th Cir. 2004) 356 F3d 1242, 1253-1254; see Boehm v. American Broadcasting Co., Inc. (9th Cir. 1991) 929 F2d 482, 485]
- (a) [17:207] **Unconditional:** To have this effect, the employer's offer of reinstatement must be unconditional. [See Ford Motor Co. v. EEOC, supra, 458 US at 232, 102 S.Ct. at 3066, fn. 18]
- [17:208] A reinstatement offer that *requires settlement* of any part of plaintiff's claim against the employer is not unconditional and does not cut off backpay. [Odima v. Westin Tucson Hotel (9th Cir. 1995) 53 F3d 1484, 1497]
- (b) [17:209] **Substantially equivalent job:** The former employer must prove that the reinstatement offer is for a job "substantially equivalent to the position from which (the plaintiff) was wrongfully discharged." [Boehm v. American Broadcasting Co., Inc. (9th Cir. 1991) 929 F2d 482, 485 (parentheses added)—jury found that job requiring wrongfully discharged executive to report to the person who had replaced him was not "substantially equivalent" to former job]
- (c) [17:210] **Reasonableness of refusal as fact question:** "Special circumstances" may justify the employee's refusal to accept reinstatement. The trier of fact must consider the circumstances under which the reinstatement offer was made in determining the reasonableness of the employee's refusal. [Ortiz v. Bank of America Nat'l Trust & Sav. Ass'n (9th Cir. 1987) 852 F2d 383, 386; Abuan v. Level 3 Communications, Inc. (10th Cir. 2003) 353 F3d 1158, 1176-1178]
- [17:211] Plaintiff's refusal to accept Bank's reinstatement offer did not cut off her right to backpay where doctors testified she should never work again for this employer and the jury found her mental condition made reinstatement an *unreasonable alternative*. [Ortiz v. Bank of

- [17:211.1] Plaintiff's reluctance to accept reinstatement in a new position, ultimately leading to Employer's withdrawing reinstatement offer, was reasonable in view of the animosity that developed between Plaintiff and Employer resulting from the lawsuit. Hence, the trial court did not abuse its discretion in concluding that reinstatement was not feasible. [*Abuan v. Level 3 Communications, Inc.*, supra, 353 F3d at 1176-1178 (case involved front pay but same principles applied to backpay)]
- (4) [17:212] **Effect of failure to retain new job?** Courts differ on whether plaintiff is entitled to recover backpay after termination of a subsequent employment:
 - [17:213] Some courts hold, as a matter of law, that if plaintiff either voluntarily quits or is fired from a new job, the amounts plaintiff *could* have earned on the new job should be deducted from any backpay award. [See *Stanchfield v. Hamer Toyota, Inc.* (1995) 37 CA4th 1495, 1502, 44 CR2d 565, 568; *J.H. Rutter Rex Mfg. Co., Inc. v. NLRB* (5th Cir. 1973) 473 F2d 223, 241]
 - [17:214] Other courts state the defendant employer's backpay liability continues if the subsequent employment terminates *without compelling or justifying reasons*. [*EEOC v. Delight Wholesale Co.* (8th Cir. 1992) 973 F2d 664, 670—"a voluntary quit does not toll the backpay period when it is motivated by unreasonable working conditions or an earnest search for better employment"; *Brady v. Thurston Motor Lines, Inc.* (4th Cir. 1985) 753 F2d 1269, 1278-1280]
 - [17:214.1] Another court has held an employee entitled to back pay even if *fired for misconduct* on the new job: "Had there been no discrimination at employer A, the employee would never have come to work (or have been fired) from employer B." [*Johnson v. Spencer Press of Maine, Inc.* (1st Cir. 2004) 364 F3d 368, 381-383]
- g. [17:215] **Additional award to cover negative tax consequences of lump-sum backpay award?** To accomplish the "make whole" purpose of backpay awards (¶17:136),

Cross-refer: Mitigation of damages is discussed further at ¶17:490 ff.

some courts in their discretion may award an additional amount to cover the higher income tax plaintiff must pay on receipt of a lump-sum payment (putting plaintiff in a higher tax bracket than if paid in due course). [*Eshelman v. Agere Systems, Inc.* (3rd Cir. 2009) 554 F3d 426, 443—\$6,893 awarded to compensate for higher taxes payable on receipt of \$170,000 backpay award; see also *Sears v. Atchison, Topeka & Santa Fe Ry., Co.* (10th Cir. 1984) 749 F2d 1451, 1456; *EEOC v. Joe's Stone Crab, Inc.* (SD FL 1998) 15 F.Supp.2d 1364, 1380]

Other courts refuse to enhance backpay to cover increased tax liability resulting from a lump-sum award. [*Dashnaw v. Pena* (DC Cir 1994) 12 F3d 1112, 1116; *Hukkanen v. International Union of Operating Engineers, Hoisting & Portable Local No. 101* (8th Cir. 1993) 3 F3d 281, 287; *Best v. Shell Oil Co.* (ND IL 1998) 4 F.Supp.2d 770, 776; see *Bryant v. Aiken Regional Med. Ctrs., Inc.* (4th Cir. 2003) 333 F3d 536, 549, fn. 5—no abuse of discretion in denying additional award]

[17:216-219] Reserved.

5. [17:220] **Loss of Future Earnings (“Front Pay”):** Damages may include, in addition to backpay, an award of the salary and benefits a wrongfully discharged plaintiff would have earned from the employment *after* the time of trial. [See *Pollard v. E.I. du Pont de Nemours & Co.* (2001) 532 US 843, 848, 121 S.Ct. 1946, 1949; *Smith v. Brown-Forman Distillers Corp.* (1987) 196 CA3d 503, 518, 241 CR 916, 924]
 - a. [17:221] **Nature of remedy:** “Front pay” is simply money awarded for lost compensation during the period between judgment and reinstatement or in lieu of reinstatement: “A front pay . . . award is the monetary equivalent of the equitable remedy of reinstatement.” [*Pollard v. E.I. du Pont de Nemours & Co.*, supra, 532 US at 853, 121 S.Ct. at 1952, fn. 3 (internal quotes omitted); see discussion at ¶17:1130 ff.]
 - (1) [17:222] **Reinstatement as preferred remedy:** Front pay may be awarded *only when reinstatement is inappropriate*, such as when there is no position available or hostility pervades the employer-employee relationship (see ¶17:211.1). [*Passantino v. Johnson & Johnson Consumer Products, Inc.* (9th Cir. 2000) 212 F3d 493, 512—“Front pay may be awarded whenever the antagonism between the plaintiff and her employer is such that it would be inappropriate to expect her to return to work”; *Kucia v. Southeast Arkansas Community Action Corp.* (8th Cir. 2002) 284 F3d 944, 948—front pay awarded “in situations where reinstatement is impracticable or impossible”]

- (2) [17:223] **Compare—lost earning capacity:** In addition to “front pay,” Title VII authorizes an award for lost earning capacity (which is a “nonpecuniary loss” within the meaning of 42 USC §1981a(b)(3) and hence subject to damage caps; see ¶17:296).

To recover for lost earning capacity, plaintiff must produce competent evidence suggesting that his or her injuries “have narrowed the range of economic opportunities available to him (or her).” Plaintiff must show the injury has caused “a diminution in his (or her) ability to earn a living.” [Williams v. Pharmacia, Inc. (7th Cir. 1998) 137 F3d 944, 952 (emphasis and parentheses added)]

- (a) [17:224] **Different injuries:** The two awards compensate for different injuries:

- Front pay gives the employee the earnings he or she would have received from the defendant employer had he or she been reinstated to his or her old job or the likely period of time it will take to secure comparable employment;
- The award for lost earning capacity “compensates (plaintiff) for a lifetime of diminished earnings (from other employers) resulting from the reputational harms (he or) she suffered as a result of (employer’s) discrimination.” [Williams v. Pharmacia, Inc., supra, 137 F3d at 953 (emphasis and parentheses added)]

- (3) [17:225] **Front pay not subject to Title VII damages caps:** Front pay is not an element of “compensatory damages” under 42 USC §1981a and therefore is not subject to the §1981a(b)(3) caps on compensatory and punitive damages (see ¶17:296). [Pollard v. E.I. du Pont de Nemours & Co. (2001) 532 US 843, 848, 121 S.Ct. 1946, 1949]

- (a) [17:226] **Rationale:** Although in the abstract front pay might be considered compensation for future pecuniary loss, legislative history makes clear that Congress did not intend to limit the availability of such awards in §1981a. [Pollard v. E.I. du Pont de Nemours & Co., supra, 532 US at 852-853, 121 S.Ct. at 1951-1952]

[17:227-229] Reserved.

- b. [17:230] **Determined by judge in federal court:** As a remedy “in lieu of reinstatement,” front pay is an *equitable remedy* determined by the court, not the jury, in statutory employment discrimination actions in federal courts. The trial judge is given considerable discretion in determining

both whether, and how much, front pay should be awarded. [*Rodriguez-Torres v. Caribbean Forms Manufacturer, Inc.* (1st Cir. 2005) 399 F3d 52, 67; *Abuan v. Level 3 Communications, Inc.* (10th Cir. 2003) 353 F3d 1158, 1176-1177; *EEOC v. W&O, Inc.* (11th Cir. 2000) 213 F3d 600, 618]

According to some cases, the trial court must “temper the use of front pay by recognizing the potential for windfall to the plaintiff.” [*Dotson v. Pfizer, Inc.* (4th Cir. 2009) 558 F3d 284, 300 (emphasis added; internal quotes omitted); *Caudle v. Bristow Optical Co., Inc.* (9th Cir. 2000) 224 F3d 1014, 1020]

- (1) [17:231] **Compare—California courts:** Front pay has been treated as a damage issue for the trier of fact (jury) in employment discrimination actions under the FEHA in California courts. [See *Cloud v. Casey* (1999) 76 CA4th 895, 910, 90 CR2d 757, 766-767—concluding without analysis that in FEHA actions “the trier of fact must determine the amount and extent of backpay and front pay necessary to make (plaintiff) whole” (parentheses added)]

[17:232-234] Reserved.

- c. [17:235] **Measure:** Front pay is intended to be a transitional remedy that is *temporary* in nature and measured by the employee’s projected earnings and benefits over the period of time until he or she is *likely to become reemployed*. [See *Anastasio v. Schering Corp.* (3rd Cir. 1988) 838 F2d 701, 709-710—measured by period of time until plaintiff was likely to retire; *Williams v. Pharmacia, Inc.* (7th Cir. 1998) 137 F3d 944, 954—“only until such time that the employee can reasonably be expected to have moved on to similar or superior employment”]

The U.S. Supreme Court has cited with apparent approval lower court cases upholding front pay awards “equal to the estimated present value of lost earnings that are reasonably likely to occur between the date of the judgment and the time when the employee can assume his new position.” [*Pollard v. E.I. du Pont de Nemours & Co.*, supra, 532 US at 850, 121 S.Ct. at 1950 (emphasis added; internal quotes omitted)]

The amount awarded may also reflect the *cost of training or relocating* to obtain another position. [See *Caudle v. Bristow Optical Co., Inc.* (9th Cir. 2000) 224 F3d 1014, 1020]

- (1) [17:236] **Limitation—plaintiff’s duty to mitigate damages:** An award of front pay in lieu of reinstatement

ment "does not contemplate that a plaintiff will sit idly by and be compensated for doing nothing, because the duty to mitigate damages by seeking employment elsewhere significantly limits the amount of front pay available." [Whittlesey v. Union Carbide Corp. (2nd Cir. 1984) 742 F2d 724, 728; Cassino v. Reichhold Chemicals, Inc. (9th Cir. 1987) 817 F2d 1338, 1347; Anastasio v. Schering Corp., supra, 838 F2d at 709—purpose is not to guarantee every plaintiff "an annuity to age 70"; Suggs v. ServiceMaster Ed. Food Mgmt. (6th Cir. 1996) 72 F3d 1228, 1234—front pay not meant to be a "windfall"]

- (2) [17:237] **Relevant factors:** A claimant's work and life expectancy are pertinent factors in calculating front pay. [See Anastasio v. Schering Corp., supra, 838 F2d at 709]

Plaintiff's age is also an important factor, of course. But many other factors bear on plaintiff's reemployment potential, including gender, health, marital status and job tenure; all affect the statistical likelihood of an employee remaining in the workplace.

- (a) [17:238] **Projected earnings from new job:** That plaintiff may earn more from a new job than he or she was earning at the time of the wrongful discharge does not automatically bar an award of future damages, because plaintiff may have received promotions and salary increases had he or she not been terminated at the former employment. This issue is for the trier of fact. [Nelson v. United Technologies (1999) 74 CA4th 597, 616, 88 CR2d 239, 252]

[17:239-244] Reserved.

- (3) [17:245] **Work expectancy:** Plaintiff's work expectancy may depend on his or her employment contract as well as the employer's solvency:

- (a) [17:246] **Fixed-term contracts:** Where the parties have agreed on employment for a specified period of time, plaintiff may recover for lost earnings through the remaining term of the contract. [See Smith v. Brown-Forman Distillers Corp. (1987) 196 CA3d 503, 518, 241 CR 916, 924—affirming award until retirement date one year beyond trial where the parties had agreed on employment for that period; Drzewiecki v. H & R Block, Inc. (1972) 24 CA3d 695, 705, 101 CR 169, 175—awarding future contract damages for 10-year period under written employment agreement expressly providing for automatic renewals]

(b) [17:247] **Contract without definite term:** Where plaintiff proves an express or implied agreement for employment termination only for cause, but no fixed length of employment exists, damages are based on projected earnings over the *period of time plaintiff is likely to have remained employed*, as determined by the trier of fact. [*Rabago-Alvarez v. Dart Indus., Inc.* (1976) 55 CA3d 91, 97, 127 CR 222, 225—upholding trial court's finding that 4 years from date of termination was reasonable period for duration of plaintiff's employment; see also *Drzewiecki v. H & R Block, Inc.*, *supra*, 24 CA3d at 705, 101 CR at 175—evidence of plaintiff's age, physical condition and excellent employment record supported finding plaintiff would have remained with employer another 10 years; *Toscano v. Greene Music* (2004) 124 CA4th 685, 694-695, 21 CR3d 732, 738-739 (*discussed at ¶17:255.1*)]

1) [17:248] **Lifetime front pay upheld under FEHA:** An award of front pay that compensated plaintiff for the remainder of her entire working life has been upheld under California's FEHA. [See *Bihun v. AT&T Information Systems, Inc.* (1993) 13 CA4th 976, 996-997, 16 CR2d 787, 797-798—damage award upheld based on finding that plaintiff would have remained with AT&T "indefinitely" but for sexual harassment (disapproved on other grounds in *Lakin v. Watkins Associated Industries* (1993) 6 C4th 644, 25 CR2d 109); see also *Hope v. California Youth Auth.* (2005) 134 CA4th 577, 594, 36 CR3d 154, 168—\$917,000 award upheld based on evidence that, but for unlawful harassment, plaintiff would have been employed by state until retirement age]

2) [17:248.1] **Lifetime front pay under Title VII?** Federal courts have been cautious about lengthy front pay awards under Title VII. The employee's stated intent to continue working for the employer until retirement does *not* by itself support a front pay award for the remainder of the employee's work life. The court must consider other factors, including the employee's age, the length of time employees in similar positions stay working for that employer and other comparable employers, *the employee's duty to mitigate damages* and the time reasonably required to secure similar employment: "The longer a proposed front pay period, the

more speculative the damages become.” [Peyton v. DiMario (DC Cir. 2002) 287 F3d 1121, 1128-1129 (internal quotes omitted)]

- [17:248.2] Front pay awards have been considered “unduly speculative” where the discharged employee is in his or her forties. [Stafford v. Electronic Data Systems Corp. (ED MI 1990) 749 F.Supp. 781, 789; see also Peyton v. DiMario, supra, 287 F3d at 1130]

➡ [17:249] **PRACTICE POINTER—Arguments pro and con for lifetime front pay:** Plaintiffs may argue for lifetime front pay based on a factual finding that, but for the defendant employer’s unlawful act, employment with defendant would have continued until plaintiff’s retirement or death. In such case, lifetime front pay, *reduced to a present value and subject to estimated future mitigation*, establishes the value of what plaintiff would have received “but for” wrongful termination.

Employers will argue in response that lifetime or extended duration front pay awards violate traditional damage mitigation principles (see ¶17:236); and that quite apart from mitigation of damages, front pay awards for extended future periods are *speculative* and violate statutes limiting contract damages. [Civ.C. §3301 (“No damages can be recovered for a breach of contract which are not clearly ascertainable both in their nature and origin”); and Civ.C. §3359 (“Damages must, in all cases, be reasonable, and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice, no more than reasonable damages can be recovered”)]

[17:250-254] *Reserved.*

(4) Application

- [17:255] Employee was 43 years old with an expected working life of 22 years to normal retirement age of 65. Her salary at the time she was discriminated against was \$71,500; but a new employer would pay only between \$50,000-60,000. If her career had not been cut short by Employer’s discrimi-

RESERVED



nation, she had a potential for promotion to \$94,000, plus cash bonuses, stock bonuses and stock options. The difference between what she earned at the time she was discriminated against (without even considering the pay cut she would have to take on leaving) and what she could have earned over the balance of her expected work life exceeded \$2 million. [See *Passantino v. Johnson & Johnson Consumer Products, Inc.* (9th Cir. 2000) 212 F3d 493, 512—upholding \$2 million front pay award under Title VII]

- [17:255.1] Plaintiff left his first job and went to work for Defendant, relying on Defendant's fraudulent promise of higher compensation. When paid less than promised, Plaintiff complained and was fired. He eventually found a third job but it paid less than he was earning at his first job. In a promissory fraud suit against Defendant, Plaintiff recovered front pay equal to the difference between the amount he was earning on his third (current) job and the pay and benefits an economic expert testified he would have received had he remained at his first job until age 61—a period of about 14 years. These damages were *not speculative or remote* because his first boss testified he was "sad to see him go and would have rehired him except for the company's strict no-rehire policy." [*Helmer v. Bingham Toyota Isuzu* (2005) 129 CA4th 1121, 1128-1131, 29 CR3d 136, 141-144]
- [17:255.2] *Comment:* Although his first employer was "sad to see him go and would have rehired him," the plaintiff in *Helmer* was apparently an at-will employee and had no definite expectation he would work for that employer for 14 years. It is unclear therefore on what basis plaintiff's expert concluded he would work there until age 61.
- [17:255.3] Plaintiff quit his at-will job to accept a position with Defendant, but before he arrived, Defendant withdrew its employment offer. Plaintiff could recover on a promissory estoppel theory the wages he would have received at his at-will job. However, front pay for 16 years until his intended retirement was deemed "*too speculative*" because "plaintiff had no definite expectation of continued employment" at his former job for any particular period of time. [*Toscano v. Greene Music* (2004) 124 CA4th 685, 694-697, 21 CR3d 732, 738-741 (remanded for new trial on front pay); see ¶17:273]

- [17:256] Other cases have limited front pay awards based on findings that plaintiff's employment was *not likely to continue* or that plaintiff was *likely to find a replacement job* within a reasonable period of time. [See *Williams v. Pharmacia, Inc.* (7th Cir. 1998) 137 F3d 944, 953—former employee's front pay award appropriately limited to one year in employment discrimination action, where she would have lost her position by then in any event because of a merger; *Dominic v. Consolidated Edison Co. of New York, Inc.* (2nd Cir. 1987) 822 F2d 1249, 1258—2 years is reasonable time for 48-year-old executive to find comparable position; *Rabago-Alvarez v. Dart Indus., Inc.* (1976) 55 CA3d 91, 97, 127 CR 222, 225-226—4 years of damages permitted following termination; *Horsford v. Board of Trustees of Calif. State Univ.* (2005) 132 CA4th 359, 388, 33 CR3d 644, 666—jury award of 10 years' front pay reduced where employee testified he planned to leave job in 5 years]

[17:257-259] Reserved.

►[17:260] **PRACTICE POINTER:** “Front pay” claims usually engender a battle of experts. Plaintiffs call economists to project the compensation and benefits (including retirement benefits) plaintiffs would have received “but for” the discharge, minus the compensation and benefits to be received from alternative employment. Such projections, if accepted by the jury, can support large awards.

To rebut such testimony, employers usually call experts to attack the calculations of plaintiff's experts, including the underlying assumption that plaintiff would have remained employed indefinitely.

[17:261-269] Reserved.

d. **Defenses to “front pay” claims**

- (1) [17:270] **Unconditional offer of reinstatement:** Reinstatement is the preferred remedy in discrimination cases (see ¶17:46), rather than a front pay award. Thus, where reinstatement is feasible, the employer's unconditional offer of reinstatement may be a defense to any front pay claim in a discriminatory discharge case. [See *Ford Motor Co. v. EEOC* (1982) 458 US 219, 241, 102 S.Ct. 3057, 3070—dealing with backpay liability; see also *Abuan v. Level 3 Communications, Inc.* (10th Cir. 2003) 353 F3d 1158, 1176-1177—same considerations

governing reinstatement in cases involving backpay
[¶17:206] applied to front pay claim]

- (2) [17:271] **Enough time for plaintiff to find comparable employment:** Front pay is generally limited to the period of time reasonably necessary for plaintiff to secure alternative comparable employment. [See *Goss v. Exxon Office Systems Co.* (3rd Cir. 1984) 747 F2d 885, 889-891—upholding front pay award of 4 months to cover expected period of job loss; *Berndt v. Kaiser Aluminum & Chem. Sales, Inc.* (3rd Cir. 1986) 789 F2d 253, 255, 261—upholding front pay award of 6 months]

► [17:272] **PRACTICE POINTER:** Age discrimination plaintiffs may claim front pay until retirement age, arguing that they will be unable to find comparable work due to their age.

The defendant employer may counter by presenting evidence of comparable available employment and, depending on plaintiff's age, empirical data or expert testimony showing that persons of plaintiff's age succeed in finding employment within statistically foreseeable periods of time.

- (3) [17:273] **Speculative:** Front pay awards for lengthy time periods may be challenged as being inherently speculative: "The longer a proposed front pay period, the more speculative the damages become." [*Peyton v. DiMario* (DC Cir. 2002) 287 F3d 1121, 1128 (internal quotes omitted); *Rodgers v. Fisher Body Div., General Motors Corp.* (6th Cir. 1984) 739 F2d 1102, 1106-1107—front pay award that included projected income for 13 years reversed as "extremely speculative"; *Toscano v. Greene Music* (2004) 124 CA4th 685, 695-697, 21 CR3d 732, 739-741 (*discussed at ¶17:255.1*)]

- (a) [17:274] **Statutes:** "No damages can be recovered for breach of contract which are not *clearly ascertainable* in both their nature and origin." [Civ.C. §3301 (emphasis added)]

Moreover, "damages must, in all cases, be *reasonable*." [Civ.C. §3359 (emphasis added)]

- (b) [17:275] **FEHC interpretation:** California decisions from the Fair Employment and Housing Commission similarly limit damages for purported future pay losses. [See *Department of Fair Employment & Housing v. Centennial Bancorp, FEHC* (1987) Precedent Decision No. 87-03—rejecting claim for 20 years of projected compensation losses in favor of 2-year front pay award ("at best, a front pay award

of one to two years could be justified"); *Department of Fair Employment & Housing v. Smitty's Coffee Shop*, FEHC (1984) Precedent Decision No. 84-25—expressly adopting federal court view that front pay should be limited and recommending "fixed period," such as a year or two]

- (4) [17:276] **"After-acquired" evidence justifying termination:** Where, after termination, the employer discovers the employee had engaged in wrongdoing justifying termination, "*neither reinstatement nor front pay* is an appropriate remedy. It would be both inequitable and pointless to order the reinstatement of someone the employer would have terminated, and will terminate, in any event and upon lawful grounds." [See *McKennon v. Nashville Banner Pub. Co.* (1995) 513 US 352, 362, 115 S.Ct. 879, 886 (emphasis added); and ¶17:470 ff.]
- (5) [17:277] **Unclean hands:** Front pay is an equitable remedy and thus subject to the equitable defense of unclean hands. [*Fogg v. Gonzales* (DC Cir. 2007) 492 F3d 447, 456—front pay denied to former U.S. deputy marshal who misrepresented himself as a deputy marshal on his website and in testimony before Congress]
- e. [17:280] **Additional award to cover negative tax consequences of lump-sum front pay award?** Although there is some authority for enhancing backpay awards for the added tax burden of receiving a lump-sum award (¶17:215), there is very little authority for increasing a front pay award to reflect the added tax burden of receiving payment in a single year.
 - [17:280.1] *Argument favoring award:* According to one court, the argument for an enhanced award "is particularly compelling in the case of front pay, since the plaintiff has already had his front pay recovery reduced to present value, on the assumption that he can now invest the money and receive a yearly return equal to his lost wages. However, if the plaintiff must pay a higher tax on the present value of his earnings, this leaves less for investment." [*O'Neill v. Sears, Roebuck and Co.* (ED PA 2000) 108 F.Supp.2d 443, 447]
 - [17:280.2] *Argument against award:* Employers argue that an increased award for tax liability is a windfall for the plaintiff because the lump-sum payment eliminates future risks such as job loss, not included in the calculation of the present value of the future payment stream plaintiff supposedly would have received.

C. EXTRACONTRACTUAL COMPENSATORY DAMAGES (TORT AND STATUTORY)

1. [17:290] **General Considerations:** Where a tort or statutory theory of recovery is established, plaintiff is not limited to the contract measure of damages (damages “which, in the ordinary course of things, would be likely to result (from the breach)”; see Civ.C. §3300 (parentheses added), ¶17:81). Foreseeability is no longer the test.

Under the *tort* measure of damages, plaintiff may recover: “. . . the amount which will compensate for all the detriment proximately caused thereby, *whether it could have been anticipated or not.*” [Civ.C. §3333 (emphasis added)]

Similarly, in Title VII cases, courts may fashion remedies that provide “the most complete relief possible” to victims of workplace discrimination. The Act “requires that persons aggrieved by the . . . unlawful employment practice be, so far as possible, restored to the position where they would have been were it not for the unlawful discrimination.” [Albemarle Paper Co. v. Moody (1975) 422 US 405, 421, 95 S.Ct. 2362, 2373 (internal quotes omitted)]

- a. [17:291] **Types of damages recoverable:** Extracontractual damages in employment litigation may include:

- (1) [17:292] **Backpay:** See discussion at ¶17:135 ff.
- (2) [17:293] **Front pay:** See discussion at ¶17:220 ff.
- (3) [17:294] **Emotional distress, mental suffering, etc.:** See discussion at ¶17:320 ff.

[17:294.1-294.4] Reserved.

- (4) [17:294.5] **Other pecuniary damages:** Pecuniary losses recoverable in Title VII cases “include, for example, moving expenses, job search expenses, medical expenses, psychiatric expenses, physical therapy expenses, and *other quantifiable out-of-pocket expenses that are incurred as a result of the discriminatory conduct.*” [EEOC Decision No. 915.002 (1992 WL 189089, *4) (emphasis added)]

Thus, in an appropriate case, the victim of a Title VII violation may recover:

- [17:294.6] *Lost future earnings* due to impaired earning capacity resulting from his or her discriminatory discharge (e.g., injury to employee’s professional standing, character and reputation). [Williams v. Pharmacia, Inc. (7th Cir. 1998) 137 F3d 944, 952-953]
- [17:294.7] Compensation for *extra commuting time and cost* incurred as a result of plaintiff having

to drive a longer distance to his or her new job. [*Van Horn v. Specialized Support Services, Inc.* (SD IA 2003) 241 F.Supp.2d 994, 1014-1015]

- [17:294.8] Contributions the employer would have made to plaintiff's §401(k) plan until he or she became eligible for the new employer's retirement plan. [See *Rivera v. Baccarat, Inc.* (SD NY 1999) 34 F.Supp.2d 870, 876-877]
 - [17:294.9] Additional income taxes the employee will have to pay because lump-sum recovery of front and backpay in a single year increased his or her tax bracket. [See *O'Neill v. Sears, Roebuck & Co.* (ED PA 2000) 108 F.Supp.2d 443, 447]
- b. [17:295] **Limitations on extracontractual damages:** Several important limitations exist on tort and statutory damages:
- (1) [17:296] **Statutory damages caps (Title VII and ADA):** The total that may be awarded in Title VII and ADA cases for compensatory and punitive damages may not exceed:
 - \$50,000 in the case of an employer with 15 to 100 employees;
 - \$100,000 in the case of an employer with 101 to 200 employees;
 - \$200,000 in the case of an employer with 201 to 500 employees; and
 - \$300,000 in the case of an employer with 501 or more employees. [42 USC §1981a(b)(3)(A)-(D)]

Backpay and front pay are not treated as "compensatory damages" and thus are not subject to these damages caps. [*Pollard v. E.I. du Pont de Nemours & Co.* (2001) 532 US 843, 848, 121 S.Ct. 1946, 1949; *Johnson v. Spencer Press of Maine, Inc.* (1st Cir. 2004) 364 F3d 368, 378]

Cross-refer: See detailed discussion at ¶17:1181 ff. (Title VII) and ¶9:1470 ff. (ADA).

- (2) [17:297] **Proximate causation:** Although foreseeability is not required (see above), it must be shown in each case that the particular damages claimed would not have been suffered "but for" the employer's tortious conduct or statutory violation, and that there was no intervening, superseding cause; see ¶17:95.
 - [17:298] Plaintiff could not maintain an action for intentional infliction of emotional distress against her former employer where uncontested evidence indicated that the proximate cause of her

emotional distress was a serious automobile accident, rather than the employer's conduct. [Green v. American Broadcasting Cos., Inc. (D DC 1986) 647 F.Supp. 1359, 1364]

- (3) [17:299] **Employee's duty to mitigate:** The employee's duty to mitigate damages applies to extracontractual damages as well as contract damages. Thus, a tortfeasor need not compensate a victim for damages the victim could have avoided with reasonable effort. *See discussion at ¶17:490 ff.*
- (4) [17:300] **No tort claim based on same facts as contract claim:** Only *contract remedies* are available in actions based on alleged breach of an express or implied employment contract. [See *Foley v. Interactive Data Corp.* (1988) 47 C3d 654, 699, 254 CR 211, 239]

Plaintiffs may not evade this limitation on available remedies by affixing "tort labels" to conduct actionable as a breach of contract. I.e., causes of action for intentional infliction of emotional distress, fraud, defamation, etc. may not be sustained where *based on the same underlying facts* that give rise to alleged breach of contract claims (e.g., employer terminated plaintiff without just cause). [*Soules v. Cadam, Inc.* (1991) 2 CA4th 390, 404, 3 CR2d 6, 14 (disapproved on other grounds in *Turner v. Anheuser-Busch, Inc.* (1994) 7 C4th 1238, 32 CR2d 223)]

- (a) [17:301] **No tort recovery where contract claim invalid:** The same rule applies *a fortiori* where the contract claim fails (e.g., because employment was terminable at employer's will). Employer conduct that is not a breach of contract may not be made actionable as a tort (i.e., there is no action for "fraudulent" breach of contract). [See *Foley v. Interactive Data Corp.*, supra, 47 C3d at 699, 254 CR at 239]

[17:302-304] Reserved.

c. Income tax considerations

- (1) [17:305] **Economic damages:** Generally, plaintiffs must report as gross income for income tax purposes any portion of a settlement or judgment representing economic damages (e.g., lost wages, backpay and front pay). [See 26 USC §61(a)—"income from whatever source derived"]
- (2) [17:306] **Physical injury or illness:** All damages (other than punitive damages) received "on account of personal physical injuries or physical sickness" are exempt income. [26 USC §104(a)(2); see *Polone v. Com-*

missioner of Internal Revenue (9th Cir. 2007) 505 F3d 966, 969-970—payments received for defamation after effective date of amended §104(a)(2) not exempt (injury to reputation not a physical injury)]

- (3) [17:307] **Emotional distress damages:** Settlement sums allocated to emotional distress are also taxable income to plaintiff: “(E)motional distress shall *not* be treated as a physical injury or physical sickness” for purposes of the §104(a)(2) exemption. [26 USC §104(a), penultimate sent. (emphasis added)]

“Emotional distress” damages include damages for *physical symptoms* such as insomnia, headaches and stomach disorders resulting from the emotional distress.

Because California adopts by reference the federal law governing taxability of income, such damages are probably also taxable as ordinary income for California income tax purposes. [Rev. & Tax.C. §17131]

- (a) [17:308] **Compare—medical expenses:** Damages recovered for medical expenses in treating emotional distress are excluded from taxable income. [See 26 USC §104(a), last sent.]
- (b) [17:309] **Effect:** Unless plaintiff can claim a *physical injury apart from* insomnia, headaches and stomach disorders, any recovery for emotional distress in excess of medical costs will probably be treated as taxable income under both federal and state law.

►[17:309.1] **PRACTICE POINTER:** To reduce taxes, plaintiff’s counsel may seek to allocate a large share of any settlement to “physical injury or physical sickness” (exempt income) rather than to lost wages (taxable income).

Employers should use caution when considering how much of a settlement to allocate as payment for lost wages (e.g., backpay or front pay) and how much to allocate for other types of alleged damages (e.g., emotional distress). While employers have a *duty to withhold payroll taxes* on that portion of a settlement representing lost wages, they have no duty to withhold taxes on emotional distress damages. Indeed, the employer’s failure to collect and account for payroll taxes is a *felony*. [See 26 USC §7202; see also *United States v. Easterday* (9th Cir. 2009) 564 F3d 1004, 1007—although 26 USC §7202 “is a fairly rarely invoked provision,” its enforcement is not unheard of]

As part of the settlement, employers can ask the employee to indemnify it for any tax liability incurred as a result of such allocations. Such indemnification will be subject to laws prohibiting indemnification for penalties; and in any case, is not likely to have much practical value.

- (4) [17:310] **Punitive damages:** Punitive damages are taxable as ordinary income, including punitive damages awarded in personal injury cases. (The exemption for damages for physical injury or physical sickness specifically does *not* apply to punitive damages.) [See 26 USC §104(a)(2)]
- (5) [17:311] **Interest:** Similarly, prejudgment and postjudgment interest received as part of a damages award is taxable as ordinary income. [See 26 USC §104(a)(2); *Rozpad v. Comm'r* (1st Cir. 1998) 154 F3d 1, 5-6]

[17:312-313] *Reserved.*

- (6) [17:314] **Deduction of attorney fees and court costs from taxable recovery:** In computing their taxable income, plaintiffs may deduct attorney fees and costs incurred "in connection with any action involving a *claim of unlawful discrimination*," which is defined broadly to include:
 - various federal anti-discrimination statutes (including specific provisions of the ADA, ADEA, WARN Act, FMLA, etc.);
 - any federal whistleblower statute; and
 - any *federal, state or local* law "providing for the enforcement of civil rights" or "*regulating any aspect of the employment relationship*, including claims for wages, compensation, or benefits, or prohibiting the discharge of an employee, the discrimination against an employee, or any other form of retaliation or reprisal against an employee for asserting rights or taking other actions permitted by law." [26 USC §62(a)(19),(e) (emphasis added)]
- (a) [17:314.1] **Compare—prior law:** Before the above provision was enacted (10/22/04), attorney fees paid with respect to a taxable discrimination award could be deducted only as a *miscellaneous itemized deduction* (see 26 USC §63(d)). The value of this deduction was seriously undermined by two factors:
 - The 2% income floor on "below-the-line deductions" (i.e., the fees were deductible only to the

extent aggregate miscellaneous itemized deductions exceeded 2% of plaintiff's adjusted gross income); and

- The deduction did not apply in computing income for *alternative minimum tax* purposes. [26 USC §§5-56, 67; see *Commissioner of Internal Revenue v. Banks* (2005) 543 US 426, 433, 125 S.Ct. 826, 830-831]
- (b) [17:314.2] **Not retroactive:** The pre-10/22/04 tax treatment *continues* with respect to recoveries on discrimination claims before that date, as well as to taxable recoveries *not attributable* to "unlawful discrimination" as above defined. [See *Commissioner of Internal Revenue v. Banks*, supra, 543 US at 433, 125 S.Ct. at 831—26 USC §62(a)(19) & (e) not retroactive]
- d. [17:315] **Nominal damages:** Nominal damages are appropriately awarded where a Title VII violation is proved even if no actual damages are proved. [*Barber v. T.D. Williamson, Inc.* (10th Cir. 2001) 254 F3d 1223, 1227]
- (1) [17:316] **Compare—ADA claims:** To recover nominal (or compensatory) damages under the ADA, plaintiff must show the employer engaged in unlawful *intentional*/discrimination that resulted in tangible *injury* to the employee (42 USC §1981a(a)(2)). A mere technical violation (e.g., asking a job applicant a prohibited question in violation of 42 USC §12112(d)(2)(A)) is not enough; plaintiff must show proof of intentional discrimination and resulting harm. [*Griffin v. Steeltek, Inc.* (10th Cir. 2001) 261 F3d 1026, 1028-1029]

[17:317-319] *Reserved.*

2. [17:320] **Emotional Distress Damages:** In appropriate cases, an employer may be held liable for emotional distress, mental anguish and other "psychic" injury an employee suffers as a result of employer wrongdoing. Although "less susceptible of precise measurement than more tangible pecuniary losses or physical injuries would be, (emotional distress) is no less real or worthy of compensation." [*Agarwal v. Johnson* (1979) 25 C3d 932, 953, 160 CR 141, 154 (disapproved on other grounds in *White v. Ultramar, Inc.* (1999) 21 C4th 563, 88 CR2d 19) (parentheses added)]

Thus, for example, in a sexual harassment case, plaintiff may claim symptoms such as headaches, dizziness, vomiting, diarrhea, weight loss, sleep disturbance, teeth grinding, a facial twitch, crying spells, depression and loss of enjoyment of life. Such "psychic" injuries need not be permanent. [*Bihun v. AT&T*

Information Systems, Inc. (1993) 13 CA4th 976, 986, 16 CR2d 787, 791 (disapproved on other grounds in *Lakin v. Watkins Associated Industries* (1993) 6 C4th 644, 25 CR2d 109)]

For certain tort claims, however, a showing of “severe” emotional distress is required (see ¶17:325).

- a. [17:321] **Claims supporting recovery:** Compensatory damages for emotional distress may be recovered for a variety of employment-related torts or pursuant to specific statutory authority.

Compare—breach of contract: Conduct that is simply a breach of contract (e.g., normal employment termination) will not support an award of emotional distress damages, even if it was foreseeable that the breach was likely to cause such damages. [See *Erlich v. Menezes* (1999) 21 C4th 543, 552, 87 CR2d 886, 892; and ¶17:121]

- (1) [17:322] **Common law tort claims:** The following tort claims may support an award of emotional distress damages in employment litigation:

(a) [17:323] **Wrongful termination in violation of public policy:** [See *Tameny v. Atlantic Richfield Co.* (1980) 27 C3d 167, 178, 164 CR 839, 846; and discussion of this tort at ¶15:2 ff.]

(b) [17:324] **Intentional infliction of emotional distress:** [See *Agarwal v. Johnson*, supra, 25 C3d at 946, 160 CR at 149; and discussion of this tort at ¶15:270 ff.]

1) [17:325] **“Severe” emotional distress required:** This tort requires a showing of “severe” emotional distress: “(S)evere means . . . emotional distress of such substantial quantity or enduring quality that no reasonable (person) in a civilized society should be expected to endure it.” [*Fletcher v. Western Nat'l Life Ins. Co.* (1970) 10 CA3d 376, 397, 89 CR 78, 90 (parentheses added; internal quotes omitted) (insurance case); see also CACI 1604; BAJI 12.73]

(c) [17:326] **Negligent infliction of emotional distress:** [See *Kelly v. General Tel. Co.* (1982) 136 CA3d 278, 287, 186 CR 184, 188; and discussion of this tort at ¶15:330 ff.]

(d) [17:327] **Defamation:** [See *Agarwal v. Johnson*, supra, 25 C3d at 946, 160 CR at 149; and discussion of this tort at ¶15:370 ff.]

(e) [17:328] **Fraud or misrepresentation:** [See *Lazar v. Sup.Ct. (Rykoff-Sexton, Inc.)* (1996) 12

C4th 631, 638-639, 49 CR2d 377, 381; and discussion of this tort at ¶15:485 ff.]

- (f) [17:329] **Limitation—Workers' Compensation Act preemption:** The Workers' Compensation Act provides the "exclusive remedy" for work-related injuries (see Lab.C. §3602). This exclusivity bars claims for emotional distress resulting from employer conduct that was "within the compensation bargain" (e.g., resulting from termination, demotions, job criticism, etc.). [Shoemaker v. Myers (1990) 52 C3d 1, 276 CR 303; Fermino v. Fedco, Inc. (1994) 7 C4th 701, 30 CR2d 18; see detailed discussion at ¶15:505 ff.]

[17:330-334] Reserved.

- (2) [17:335] **Statutory bases:** Damages for emotional distress may be recovered under both state and federal anti-discrimination statutes:

- (a) [17:336] **Fair Employment and Housing Act (FEHA):** Compensatory damages, including emotional distress damages, are recoverable in civil actions for FEHA violations. [See Gov.C. §12970; State Personnel Board v. Fair Employment & Housing Comm'n (1985) 39 C3d 422, 434, 217 CR 16, 23]

1) [17:337] **No cap on damages:** Unlike Title VII and the ADA (see ¶17:296), the FEHA has no cap on damages in civil actions.

2) [17:338] **Compare—administrative proceedings pursuant to FEHA:** Alternatively, the Fair Employment and Housing Commission may:

- Award damages for emotional injuries and other nonpecuniary losses in an amount not to exceed \$50,000 (\$150,000 if the employer conduct involved violence or threats of violence because of race, ancestry, sexual orientation, etc.). [See Gov.C. §12970(a)(3),(c)-(d); Civ.C. §51.7]
- In determining the amount, consider how the employer's discrimination affected the employee's physical and mental well-being, personal integrity, dignity and privacy; ability to work and career advancement potential; personal and professional reputation; family relationships; and access to the job and ability to associate with peers and co-workers. Also, "the duration of the emo-

tional injury, and whether that injury was caused or exacerbated by (the employee's) knowledge of (the employer's) failure to respond adequately to, or to correct, the discriminatory practice or by the egregiousness of the discriminatory practice." [Gov.C. §12970(b) (parentheses added); see *SASCO Elec. v. California Fair Employment & Housing Comm'n* (2009) 176 CA4th 532, 544, 97 CR3d 482, 491]

- (b) [17:339] **Section 1981:** An individual who prevails on a civil rights cause of action under 42 USC §1981 may recover damages for emotional distress. [*Johnson v. Railway Express Agency, Inc.* (1975) 421 US 454, 459-460, 95 S.Ct. 1716, 1720—racial discrimination] (Section 1981 claims are discussed at ¶17:1270 ff.)
- (c) [17:340] **Title VII:** For a violation of Title VII of the Civil Rights Act of 1964 (42 USC §2000 et seq.), the court may award emotional distress and other compensatory damages in cases of "unlawful intentional discrimination" (but *not* in cases of disparate impact, or where the party can otherwise recover under §1981). [42 USC §1981(a)(1)-(2)]

Compensatory damages include damages "for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses." [42 USC §1981a(b)(3)] (Title VII claims are discussed in detail in *Ch. 7, Employment Discrimination—In General.*)

- (d) [17:341] **Americans with Disabilities Act (ADA):** The provisions of the Civil Rights Act authorizing emotional distress damages also apply to the Americans with Disabilities Act (42 USC §12112 et seq.). [42 USC §1981(a)(2)] (ADA claims are discussed in detail in *Ch. 9, Disability Discrimination.*)

Neither emotional distress nor other compensatory damages may be recovered, however, if the employer demonstrates that it made a good faith effort reasonably to accommodate plaintiff's disability. [42 USC §1981(a)(3)]

- (e) [17:342] **Compare—Age Discrimination in Employment Act (ADEA):** The enhanced remedy provisions of the Civil Rights Act do not apply to actions under the Age Discrimination in Employment Act (ADEA) (29 USC §621 et seq.). Thus,

emotional distress and other compensatory damages (e.g., for pain and suffering) are *not* available under the ADEA. [*Naton v. Bank of Calif.* (9th Cir. 1981) 649 F2d 691, 698; *Collazo v. Nicholson* (1st Cir. 2008) 535 F3d 41, 45; see 18:657.5] (ADEA claims are discussed in detail in *Ch. 8, Age Discrimination*.)

- (3) [17:343] **Objective evidence required?** Courts disagree whether “objective evidence” of emotional distress is required to support an emotional distress damages award:

- [17:344] Several courts hold that because emotional distress damages are “essentially subjective,” they may be proved by plaintiff’s testimony alone, observations by others, or appropriate inference from circumstances. [*Zhang v. American Gem Seafoods, Inc.* (9th Cir. 2003) 339 F3d 1020, 1040; see also *Carey v. Piphus* (1978) 435 US 247, 264, 98 S.Ct. 1042, 1052, fn. 20]
- [17:345] Other courts require evidence of emotional distress that is “demonstrable, genuine, and adequately explained.” [*Price v. City of Charlotte, N.C.* (4th Cir. 1996) 93 F3d 1241, 1251]

[17:346-349] Reserved.

- b. [17:350] **Measure of damages for emotional distress:** There is no precise standard for measuring damages from emotional distress. Instead, jurors are instructed to “use your judgment to decide a reasonable amount based on the evidence and your common sense.” Emotional distress includes “suffering, anguish, fright, horror, nervousness, grief, anxiety, worry, shock, humiliation, and shame” that plaintiff *has suffered* and is “reasonably certain to suffer” in the future. [See CACI 1604, 3905A; also see BAJI 12.88]

- (1) [17:351] **Effect:** The effect is that the jury (trier of fact) determines whether to award damages for emotional distress and the amount of any award: “(I)t is the members of the jury who . . . are in the best position to assess the degree of the harm suffered and to fix a monetary amount as just compensation therefor.” [*Agarwal v. Johnson* (1979) 25 C3d 932, 953, 160 CR 141, 154 (disapproved on other grounds in *White v. Ultramar, Inc.* (1999) 21 C4th 563, 88 CR2d 19); see *Webner v. Titan Distribution, Inc.* (8th Cir. 2001) 267 F3d 828, 836-837 (discrimination claim under ADA)]
- (2) [17:352] **Separate awards for separate wrongs:** Plaintiffs may not receive a double recovery for the

same harm. But a plaintiff asserting related state and federal claims may recover emotional distress damage awards on each claim if it compensates for a *separate wrong*. [Moysis v. DTG Datanet (8th Cir. 2002) 278 F3d 819, 828—ADA award compensated for emotional distress arising from *fact* of termination, while award for intentional infliction of emotional distress under state law compensated for distress arising from *manner* of termination]

[17:353-354] Reserved.

- c. [17:355] **Effect of plaintiff's death on recovery:** Under California law, where plaintiff dies before final adjudication of his or her claim, the action may be prosecuted by decedent's estate or successor in interest (see CCP §§377.11, 377.21); and damages suffered by the decedent (including punitive damages) remain recoverable except damages for decedent's "*pain, suffering or disfigurement*" (including emotional distress). [CCP §377.34; *County of Los Angeles v. Sup. Ct. (Schonert)* (1999) 21 C4th 292, 295-296, 87 CR2d 441, 443-444]

- (1) [17:356] **Compare—effect on federal claim filed in federal court:** There are no federal statutes governing whether a lawsuit survives the plaintiff's death or, if it does, what damages the personal representative of plaintiff's estate can recover in the survival action. Federal courts therefore are directed to apply the statutes and case law of the forum state (California) "so long as not inconsistent with the Constitution and laws of the United States." [42 USC §1988]

California's denial of predeath emotional distress damages in survival actions is not inconsistent with federal law, and hence remains the rule in federal civil rights actions brought in *state or federal court* in California. [*County of Los Angeles v. Sup. Ct. (Schonert)*, supra, 21 C4th at 297-309, 87 CR2d at 444-453; but see *Williams v. City of Oakland* (ND CA 1996) 915 F.Supp. 1074, 1077 (contra)—predeath pain and suffering damages are "at the very heart" of a federal civil rights action and hence are recoverable in federal court]

[17:357-359] Reserved.

D. PUNITIVE DAMAGES

[17:360] Punitive damages are designed to punish the defendant and to deter others from similar conduct. Where legally authorized, punitive damages are recoverable in addition to compensatory damages:

- "Although compensatory damages and punitive damages are typically awarded at the same time by the same decisionmaker,

they serve distinct purposes. The former are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct . . . The latter, which have been described as 'quasi-criminal' . . . operate as 'private fines' intended to punish the defendant and to deter future wrongdoing. A jury's assessment of the extent of a plaintiff's injury is essentially a factual determination, whereas its imposition of punitive damages is an expression of its moral condemnation." [Cooper Industries, Inc. v. Leatherman Tool Group, Inc. (2001) 532 US 424, 432, 121 S.Ct. 1678, 1683; see also State Farm Mut. Auto. Ins. Co. v. Campbell (2003) 538 US 408, 416, 123 S.Ct. 1513, 1519]

Discretionary: Even where punitive damages are recoverable (below), the award is always discretionary. Plaintiffs have no "right" to punitive damages. Plaintiffs are presumptively made whole by the compensatory damages award. [See *State Farm Mut. Auto. Ins. Co. v. Campbell*, *supra*, 538 US at 519, 123 S.Ct. at 1521; *Ferguson v. Lieff, Cabraser, Heimann & Bernstein, LLP* (2003) 30 C4th 1037, 1051, 135 CR2d 46, 56]

1. [17:361] **Claims Supporting Punitive Damages Awards:** Punitive damages may be recovered under certain circumstances in common law tort actions and in some statutory actions:

a. [17:362] **Common law tort actions:** In tort actions, where defendant is shown "by *clear and convincing evidence*" to have acted with "oppression, fraud or malice," plaintiff may recover, in addition to compensatory damages, "damages for the sake of example and by way of punishment." [Civ.C. §3294(a) (emphasis added)]

(1) [17:363] **"Clear and convincing" evidence:** "Clear and convincing" evidence means evidence of such convincing force that it demonstrates *a high probability of the truth* of the facts of which it is offered as proof (as opposed to the preponderance of evidence standard, which means more likely than not). [See CACI 201; BAJI 2.62]

(2) [17:364] **"Oppression, fraud or malice":** These terms are stated in the disjunctive ("or") so that a punitive damage case is made out if any one of these types of conduct is proved. [See Civ.C. §3294(c)]

(a) [17:364.1] **"Malice" defined:** "Malice" means either:

- *defendant intended to cause injury* to plaintiff;
or
- defendant's conduct was "*despicable*" and carried on with a *willful and conscious disregard* of

the rights and safety of others. [Civ.C. §3294(c) (1); see CACI 3940, 3941, 3943-3948]

- (b) [17:364.2] **“Oppression” defined:** “Oppression” is “despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person’s rights.” [Civ.C. §3294(c)(2)]
- (c) [17:364.3] **“Despicable conduct” defined:** “Despicable conduct” is conduct that is “so vile, base, contemptible, miserable, wretched or loathsome that it would be looked down upon and despised by ordinary decent people.” [Scott v. Phoenix Schools, Inc. (2009) 175 CA4th 702, 715, 96 CR3d 159, 170 (internal quotes omitted)—conduct having “the character of outrage frequently associated with crime”]

[17:364.4] *Reserved.*

(d) **Application**

- [17:364.5] Employer’s *fabricating evidence* to justify discharging Employee would constitute clear and convincing evidence of a “willful and conscious disregard” for Employee’s rights. [Brandon v. Rite Aid Corp., Inc. (ED CA 2006) 408 F.Supp.2d 964, 982]

[17:364.6-364.9] *Reserved.*

- [17:364.10] *Compare:* A breach of fiduciary duty alone, without “malice, fraud or oppression,” does *not* permit an award of punitive damages. [See Scott v. Phoenix Schools, Inc., *supra*, 175 CA4th at 715, 96 CR3d at 170]
- [17:364.11] Wrongful termination, without more, will not sustain a finding of “malice” or “oppression.” Firing an employee is not such “despicable conduct” that would support an award of punitive damages; nor does it show a “conscious disregard” of plaintiff’s interests. [Scott v. Phoenix Schools, Inc., *supra*, 175 CA4th at 716, 96 CR3d at 170—teacher fired for refusing to violate state laws limiting class size]

- (3) [17:365] **Employer liability based on acts of agents or employees:** Under California law, an agent’s or employee’s acts in the course and scope of employment are attributed to the employer for purposes of tort liability under the doctrine of respondeat superior. On the other hand, that an agent or employee acted with “oppression,

fraud or malice" toward plaintiff is *not* alone enough to render the employer liable for punitive damages. [See Civ.C. §3294(b)]

Punitive damages may be imposed upon an employer for acts of an employee or agent only if the employer (or if the employer is a corporation, an *officer, director or managing agent* of the corporation):

- Had *advance knowledge* that the agent or employee was *likely to inflict injury* on others and employed him or her with *conscious disregard* for the rights or safety of others; or
- *Authorized or ratified* the agent's or employee's wrongful acts; or
- Was *personally guilty* of "oppression, fraud or malice" toward plaintiff. [See Civ.C. §3294(b); CACI 3943-3948; BAJI 14.73; see *Flores v. Autozone West, Inc.* (2008) 161 CA4th 373, 386, 74 CR3d 178, 188]

Not vicarious liability: Civil Code §3294(b) imposes punitive damages liability where the corporate employer *itself* acted egregiously or knowingly failed to act in connection with its wrongdoing employee. The employer is *not* punished for the employee's wrongful act but rather for *its own* wrongful conduct. [*Weeks v. Baker & McKenzie* (1998) 63 CA4th 1128, 1151, 74 CR2d 510, 524]

(a) [17:366] **"Managing agent":** "Managing agent" includes only those corporate employees vested with *substantial discretionary authority* over decisions that ultimately determine corporate policy *regarding the matter* as to which punitive damages are sought. The scope of authority is a question of fact in each case. [*White v. Ultramar, Inc.* (1999) 21 C4th 563, 566-567, 88 CR2d 19, 22; see *Gelfo v. Lockheed Martin Corp.* (2006) 140 CA4th 34, 63, 43 CR3d 874, 897—question of law where facts undisputed; see CACI 3943-3948]

1) [17:367] **Authority to hire and fire not enough:** The mere ability to hire and fire others is generally not enough to make a supervisory employee a corporate employer's "managing agent" for punitive damages purposes. But supervisors may be so classified if they have broad discretionary authority over decisions that ultimately determine corporate policy *regarding the matter* in question. [*White v.*

2) Application

- [17:368] A “zone manager” responsible for managing eight retail stores and 65 employees was held to be a “managing agent” in a wrongful termination case because her *superiors had delegated to her most of the responsibility* for running these stores. She thus made significant decisions affecting company policy regarding these stores, exposing the company to punitive damages liability based on her wrongfully terminating an employee. [*White v. Ultramar, Inc.*, supra, 21 C4th at 576, 88 CR2d at 29]
- [17:368.1] A corporate vice president who was responsible for day-to-day operations and strategy was found to be the corporation’s managing agent. The fact that he had authority to relocate and punish district managers, and that his acts were not repudiated by the board of directors, supported the finding that he was a managing agent. [*Wysinger v. Automobile Club of So. Calif.* (2007) 157 CA4th 413, 428-429, 69 CR3d 1, 13]
- [17:369] But a corporation that owned a chain of retail stores was not subject to punitive damages based on tortious acts of a “loss prevention supervisor” at one of its stores. He was not a managing agent because he was subordinate to the store manager and his discretionary authority was limited to detaining and prosecuting shoplifters (i.e., he had no authority over corporate policies or rules of general application). [*Cruz v. HomeBase* (2000) 83 CA4th 160, 168, 99 CR2d 435, 440]
- [17:370] Supervisor was the highest-ranking person in the employer’s Southern California offices and had immediate and direct control over the plaintiff, including authority to terminate her employment. Nevertheless, he was *not* a “managing agent” within the meaning of Civ.C. §3294 because he did not have authority to

change or set *corporate* policy established at employer's headquarters. [*Kelly-Zurian v. Wohl Shoe Co., Inc.* (1994) 22 CA4th 397, 421, 27 CR2d 457, 501; see also *Myers v. Trendwest Resorts, Inc.* (2007) 148 CA4th 1403, 1437, 56 CR3d 501, 527]

[17:371-374] *Reserved.*

- 3) [17:375] **Effect of employer policy forbidding discrimination?** The California Supreme Court has suggested that an employer's *written policy* specifically forbidding the discrimination or other unlawful conduct a managerial agent commits "may operate to limit corporate liability for punitive damages, as long as the employer implements the written policy in good faith." [*White v. Ultramar, Inc.* (1999) 21 C4th 563, 568, 88 CR2d 19, 23, fn. 2 (emphasis added)]

In effect, what the company *does* to prevent illegal discrimination is more important than what it simply says in a stated or written policy.

Conversely, one case states an employer's *failure* to have a written policy specifically forbidding sexual harassment or discrimination does *not* itself show "oppression, fraud or malice" to create punitive damages liability. [*Mathieu v. Norrell Corp.* (2004) 115 CA4th 1174, 1190-1191, 10 CR3d 52, 64-65 (dictum)]

- (b) [17:376] **Knowledge that one employee likely to injure another:** An employer may be subject to punitive damages if it has advance knowledge that one of its employees is likely to sexually harass others and fails to take reasonable steps to prevent such conduct. Its failure to act demonstrates "conscious disregard" for the rights and safety of the persons harassed. This liability is not vicarious; the award is based on the employer's *own* wrongful conduct. [*Weeks v. Baker & McKenzie* (1998) 63 CA4th 1128, 1159, 74 CR2d 510, 529]

[17:376.1-376.4] *Reserved.*

- 1) [17:376.5] **Advance knowledge:** It must appear that the employer had advance knowledge of the employee's *propensity to perform the type of act* committed against the plaintiff. [See *Flores v. Autozone West, Inc.* (2008) 161 CA4th 373, 385-386, 74 CR3d 178, 187—

employer's knowledge that employee had inappropriately raised his voice to a customer did not constitute advance knowledge that employee would *physically assault* another customer 3 years later]

- (c) [17:377] **"Clear and convincing" standard of proof:** The "clear and convincing" standard of proof required for recovery of punitive damages under Civ.C. §3294(a) (117:363) also applies to an employer's punitive damages liability for wrongful acts of agents and employees under §3294(b). Thus, "clear and convincing" evidence is required of:
- the employer's advance knowledge of the employee's unfitness and conscious disregard for the safety of others; or
 - the employer's *authorization or ratification* of the employee's wrongful acts;
 - and, where a corporate employer is involved, the employee's status as an "officer, director or managing agent." [See Civ.C. §3294(b); *Barton v. Alexander Hamilton Life Ins. Co. of America* (2003) 110 CA4th 1640, 1644, 3 CR3d 258, 261]

[17:378-379] *Reserved.*

- (d) [17:380] **"Actual damages" prerequisite:** Civ.C. §3294(a) authorizes an award of punitive damages "in addition to the actual damages." Punitive damages therefore are not recoverable "independent of a showing which would entitle the plaintiff to an award of actual damages." [*Mother Cobb's Chicken Turnovers, Inc. v. Fox* (1937) 10 C2d 203, 206, 73 P2d 1185, 1186; *Kizer v. County of San Mateo* (1991) 53 C3d 139, 147, 279 CR 318, 322—"actual damages are an absolute predicate for an award of punitive damages"; see also *Trujillo v. First American Registry, Inc.* (2007) 157 CA4th 628, 638, 68 CR3d 732, 739]

- 1) [17:381] **"Actual damages" broadly construed:** The Civ.C. §3294(a) requirement of "actual damages" as a prerequisite to a punitive damages award has been broadly construed to include:
- *nominal damages*;
 - restitution;
 - an offset; and
 - damages presumed by law (e.g., from publications held defamatory *per se*). [See

Berkley v. Dowds (2007) 152 CA4th 518, 532, 61 CR3d 304, 316 (collecting cases)]

- 2) [17:382] **Compare—compensatory damages award essential?** A number of cases require that any award of exemplary damages be accompanied by an actual award of compensatory damages (even nominal damages). Thus, a jury award of “\$0.00” compensatory damages precludes a punitive damages award. [*California v. Altus Finance, S.A.* (9th Cir. 2008) 540 F3d 992, 1001 (applying Calif. law)—allowing punitive damages “if the jury awards \$1, but no punitive damages if the jury awards nothing, may seem harsh”; see also *Cheung v. Daley* (1995) 35 CA4th 1673, 1675-1676, 42 CR2d 164, 166]

Other cases, however, hold an award of compensatory damages is *not necessary*; plaintiff need only prove that he or she suffered harm as a result of defendant’s tortious act. [See *Topanga Corp. v. Gentile* (1967) 249 CA2d 681, 691-692, 58 CR 713, 719—because plaintiff was “indeed damaged” by defendant’s fraud, “the fact that plaintiffs were not given a grant of monetary damages of a certain amount is not determinative”; *Wayte v. Rollins Int’l, Inc.* (1985) 169 CA3d 1, 16, 215 CR 59, 68; *Gagnon v. Continental Cas. Co.* (1989) 211 CA3d 1598, 1603, 260 CR 305, 307, fn. 5; see also CACI 3940(b) (referring to plaintiff’s “harm”)]

Still other cases allow punitive damages where there is an award of compensatory damages *or its equivalent*, such as restitution, an offset, damages presumed by law or nominal damages. [*Berkley v. Dowds*, *supra*, 152 CA4th at 530, 61 CR3d at 314; see ¶17:381]

- b. [17:383] **Labor Code violations:** Where the Labor Code merely codifies a preexisting common law cause of action, “all forms of relief granted to civil litigants generally, including appropriate punitive damages, are available unless a contrary legislative intent appears.” [*Brewer v. Premier Golf Properties* (2008) 168 CA4th 1243, 1252, 86 CR3d 225, 232 (internal quotes omitted)]

But where the Labor Code creates new rights and obligations not previously existing in the common law, the express statutory remedy is generally the exclusive remedy available for statutory violations. [*Brewer v. Premier Golf Properties*,

supra, 168 CA4th at 1252, 86 CR3d at 232—Labor Code provides *exclusive* remedy (no punitive damages) for pay-stub and minimum wage violations, or for meal-break and rest-break violations]

[17:384] *Reserved.*

- c. [17:385] **Fair Employment and Housing Act (FEHA):** Punitive damages may be awarded in civil actions for FEHA violations, without any “cap” on the amount awardable. [*Commodore Home Systems, Inc. v. Sup.Ct. (Brown)* (1982) 32 C3d 211, 221, 185 CR 270, 276; *Myers v. Trendwest Resorts, Inc.* (2007) 148 CA4th 1403, 1435-1436, 56 CR3d 501, 525-526]

Such awards are based, however, on the standards set forth in Civ.C. §3294, above (including the requirement of “clear and convincing evidence”). [*Weeks v. Baker & McKenzie* (1998) 63 CA4th 1128, 1147-1148, 74 CR2d 510, 521]

- (1) [17:386] **Compare—administrative proceedings:** The FEHC has no authority to award punitive damages as a remedy for employment discrimination. [Gov.C. §12970(d) (last para.); see *Dyna-Med, Inc. v. Fair Employment & Housing Comm'n* (1987) 43 C3d 1379, 1383, 241 CR 67, 68; and ¶17:747 ff.]

d. **Federal anti-discrimination statutes**

- (1) [17:387] **42 USC §1981:** *Unlimited* punitive damages are available under the Civil Rights Act against private parties for discriminatory acts that impair the civil rights of another. [42 USC §1981(c); *Johnson v. Railway Express Agency, Inc.* (1975) 421 US 454, 460, 95 S.Ct. 1716, 1720—remedies available under Title VII and under 42 USC §1981 are separate, distinct and independent]

- (2) [17:388] **Title VII, ADA:** *Limited* punitive damages are also available under Title VII and the ADA where “the respondent engaged in a discriminatory practice or discriminatory practices with *malice or with reckless indifference* to the federally protected rights of an aggrieved individual.” [See 42 USC §1981a(b)(1) (emphasis added)]

The Commission, however, may impose an *administrative fine* on employers based on findings of “oppression, fraud or malice.” [Gov.C. §12960(c),(d); see *SASCO Elec. v. California Fair Employment & Housing Comm'n* (2009) 176 CA4th 532, 543, 97 CR3d 482, 492]

- (a) [17:389] **Damages caps:** The statutory limits on ADA and Title VII damages awards (based on

number of employees, see ¶9:1470, 17:296) apply to both compensatory and punitive damages. [42 USC §1981a(b)(3)(A)-(D)]

- 1) [17:390] **Effect of joining other claims:** Where other claims are joined on which no damages cap exists, an award of punitive damages exceeding the Title VII cap will be attributed to those other claims. [See *Pavon v. Swift Transp. Co., Inc.* (9th Cir. 1999) 192 F3d 902, 910; *Passantino v. Johnson & Johnson* (9th Cir. 2000) 212 F3d 493, 510; *Rodriguez-Torres v. Caribbean Forms Manufacturer, Inc.* (1st Cir. 2005) 399 F3d 52, 65-66]

(Text cont'd on p. 17-51)

The same rule applies where a capped ADA claim is joined with a corresponding uncapped state law claim. [*Gagliardo v. Connaught Laboratories, Inc.* (3rd Cir. 2002) 311 F3d 565, 570-572—such apportionment allows verdict winner to get maximum amount of legally available jury award]

[17:391-393] Reserved.

- (b) [17:394] **Intentional vs. disparate impact discrimination:** Punitive damage awards are allowed only in cases of “intentional discrimination”—i.e., cases that do not rely on the “disparate impact” theory of discrimination. [42 USC §1981a(a)(1); *Kolstad v. American Dental Ass’n* (1999) 527 US 526, 534, 119 S.Ct. 2118, 2124; see also *Zhang v. American Gem Seafoods, Inc.* (9th Cir. 2003) 339 F3d 1020, 1041; *Fine v. Ryan Int’l Airlines* (7th Cir. 2002) 305 F3d 746, 755]
- (c) [17:395] **“Malice” or “reckless indifference” required:** Not every instance of intentional discrimination justifies a Title VII or ADA punitive damage award. It must be shown that the employer acted with “malice” or “reckless indifference” to the employee’s federally protected rights. [42 USC §1981a(b)(1); *Kolstad v. American Dental Ass’n*, supra, 527 US at 536, 119 S.Ct. at 2125]
 - 1) [17:396] **Awareness of illegality:** Thus, “malice” and “reckless indifference” pertain to the employer’s knowledge that it may be acting in violation of federal law: “(A)n employer must at least discriminate in the face of a *perceived risk* that its actions will violate federal law to be liable in punitive damages.” [*Kolstad v. American Dental Ass’n*, supra, 527 US at 536, 119 S.Ct. at 2125 (emphasis added); *Bryant v. Aiken Regional Med. Ctrs., Inc.* (4th Cir. 2003) 333 F3d 536, 548]
 - a) [17:397] **Comment:** Plaintiffs may argue that this proof requirement allows plaintiff to introduce evidence of risks the employer “perceived”; e.g., training given to managers and supervisors.
Defendant employers may argue that such evidence should be permitted only where the employer offers proof of good faith affirmative steps taken to avoid harm, and then only where the evidence of internal training

would support a reasonable inference that the employer's representative charged with misconduct received such training.

b) **Application**

- [17:397.1] Manager's acknowledgment that he had *received training* in "hiring practices and equal opportunity" permitted an inference that he was aware his acts violated Title VII. [*Zimmermann v. Associates First Capital Corp.* (2nd Cir. 2001) 251 F3d 376, 385]
 - [17:397.2] Managers' description of coworker's remarks as "inappropriate," "incorrect" and/or "offensive" permitted inference that managers understood such comments might be *illegal*. [*Hertzberg v. SRAM Corp.* (7th Cir. 2001) 261 F3d 651, 662]
 - [17:397.3] Employer's written policies, posted on bulletin boards throughout the workplace, specifically prohibited sexual harassment. This and other factors (e.g., supervisors' memos to management warning of detriment caused by fellow supervisor's inappropriate sexual comments) showed Employer "was fully aware of Title VII's prohibitions against sexual harassment." [*Chavez v. Thomas & Betts Corp.* (10th Cir. 2005) 396 F3d 1088, 1097-1099]
- c) [17:398] **Evidence negating malice or indifference:** Evidence explaining *why* the employer acted as it did may be relevant both to its state of mind and the size of any appropriate punitive award. [*EEOC v. Indiana Bell Tel. Co., Inc.* (7th Cir. 2001) 256 F3d 516, 524 (en banc)]—terms of CBA and employer's experience in prior grievance arbitrations were relevant to explain employer's delay in firing alleged sexual harasser (negating inference that delay reflected "reckless indifference" to risk to female employees)]
- 2) [17:399] **Egregious misconduct not essential:** An employer's conduct need not be in-

dependently egregious to support a Title VII punitive damages award. But proof of the employer's egregious misconduct may serve as evidence supporting an inference of the employer's "malicious" or "reckless" state of mind. [*Kolstad v. American Dental Ass'n*, supra, 527 US at 538, 119 S.Ct. at 2126; *Zhang v. American Gem Seafoods, Inc.* (9th Cir. 2003) 339 F3d 1029, 1041]

- [17:399.1] Unmarried female Employee suffered pregnancy discrimination in violation of Title VII. Evidence showed Employer was "recklessly indifferent" to her federal rights because it *viewed her unwed pregnancy with contempt* and failed to respond to problems she had reported. [*Caudle v. Bristow Optical Co., Inc.* (9th Cir. 2000) 224 F3d 1014, 1027]
- [17:400] *Compare:* Night shift Employee suffering from insomnia and depression asked for transfer to an available day shift job, as her therapist recommended. Employer's failure to accommodate her disability violated the ADA but did *not* demonstrate the "reckless indifference" required for punitive damages. It only "amounted to negligence" because Employer misunderstood Employee's difficulties and incorrectly believed she was not disabled. [*Gile v. United Airlines, Inc.* (7th Cir. 2000) 213 F3d 365, 375-376]

[17:401-404] *Reserved.*

- (d) [17:405] **Limitation under ADA—effect of "good faith" effort to comply:** Punitive damages may not be recovered under the ADA if the employer made a reasonable "good faith" effort to comply with the ADA and accommodate plaintiff's disability. [42 USC §1981a(a)(3)]

- 1) [17:406] **Comment:** If the employer raises this as a defense, plaintiffs may seek discovery on the employer's efforts to comply with the ADA, including information about any other discrimination charges or settlements with other plaintiffs.

Employers may argue that its response to other ADA claimants through other supervisors is irrelevant and not discoverable because the sub-

ject matter of the litigation is the employer's response, through particular supervisors or other representatives, to the plaintiff's particular situation.

- (e) [17:407] **Employer's vicarious liability:** Common law agency principles apply in determining an employer's vicarious liability for punitive damages under Title VII. Thus, punitive damages may be based on misconduct by agents or employees if:

- The employer *authorized or ratified* its agent's act;
- The employer acted *recklessly in employing* the agent; or
- The misconduct was committed by a "managerial employee" acting within the "scope of employment" . . . unless such misconduct was *contrary* to the employer's good faith efforts to comply with Title VII. [*Kolstad v. American Dental Ass'n*, supra, 527 US at 544-545, 119 S.Ct. at 2129; see also *Bryant v. Aiken Regional Med. Ctrs., Inc.* (4th Cir. 2003) 333 F3d 536, 548]

- 1) [17:408] **"Managerial" employees:** Whether the agent was acting in a "managerial capacity" is a fact-intensive inquiry that depends on "the type of authority that the employer has given to the employee, the amount of discretion that the employee has in what is done and how it is accomplished." [*Kolstad v. American Dental Ass'n*, supra, 527 US at 543, 119 S.Ct. at 2128 (internal quotes omitted); see *Bryant v. Aiken Regional Med. Ctrs., Inc.*, supra, 333 F3d at 548, fn. 4—hospital's Director of Surgical Services, Director of Human Resources, and manager in charge of nurse hiring, all qualified as "managerial agents" under *Kolstad*; *Bains LLC v. Arco Products Co., Div. of Atlantic Richfield Co.* (9th Cir. 2005) 405 F3d 764, 776-777]

- 2) [17:409] **"Scope of employment":** Acts are within the agent's "scope of employment" if of the kind he or she was hired to perform and if motivated at least in part by a purpose to serve the employer. [*Kolstad v. American Dental Ass'n*, supra, 527 US at 527, 119 S.Ct. at 2121]

- 3) [17:409.5] **Integrated enterprise (affiliated corporations):** Several circuits use the “integrated enterprise” test (common management, integrated operations, centralized control, common ownership; see ¶7:48 ff.) to charge a parent corporation with Title VII vicarious liability for discriminatory acts by a subsidiary. [*Romano v. U-Haul Int'l* (1st Cir. 2000) 233 F3d 655, 665 (collecting cases); *Childs v. Local 18, IBEW*(9th Cir. 1983) 719 F2d 1379, 1382]
- 4) [17:410] **Effect of “good faith” employer efforts to comply:** An employer who has undertaken good faith efforts at Title VII compliance cannot be said to be acting in reckless disregard of federally-protected rights. Thus, the employer’s *adoption and good faith implementation* of a *written policy* against workplace discrimination may shield it from punitive damages liability for discriminatory acts by its managers. [See *Kolstad v. American Dental Ass'n*, supra, 527 US at 544, 119 S.Ct. at 2129; *Bryant v. Aiken Regional Med. Ctrs., Inc.*, supra, 333 F3d at 548-549—defendant’s “widespread anti-discrimination efforts” of implementing written policies and training programs precluded punitive damages against employer; see also *Davey v. Lockheed Martin Corp.* (10th Cir. 2002) 301 F3d 1204, 1209]

►[17:410.1] **PRACTICE POINTER:** This rule creates a potential for conflict between employers and their managers and may require *separate legal representation* for the individual manager or supervisor (even if the employer pays the cost involved; see ¶2:155).

- a) [17:411] **Policy should contain bypass mechanism:** An anti-harassment policy requiring employees to report incidents of sexual harassment to their manager should contain a bypass mechanism where their manager is the harasser (see ¶10:340).

Even absent such a provision, however, the *policy and its implementation* (e.g., training seminars) may protect the employer from punitive damages liability because “common sense should have led (employee) to report the harassment to someone superior

to (harasser) in the chain of command.” [Cooke v. Stefani Mgt. Services, Inc. (7th Cir. 2001) 250 F3d 564, 569 (parentheses added)]

- b) [17:412] **Written policy alone not enough:** Mere posting of an anti-discrimination policy is not enough. The employer must follow up with a real effort to *train* managers and others in the chain of corporate command on how to comply with federal anti-discrimination law and *enforce* compliance by appropriate action. [Swinton v. Potomac Corp. (9th Cir. 2001) 270 F3d 794, 810-811; Hall v. Consolidated Freightways Corp. of Del. (6th Cir. 2003) 337 F3d 669, 675-676; see EEOC v. Wal-Mart Stores, Inc. (10th Cir. 1999) 187 F3d 1241, 1249]
- c) [17:413] **Burden of proof on employer:** Most courts hold this “good faith” effort is an affirmative defense for which the employer (defendant) bears the burden of proof. [See Passantino v. Johnson & Johnson Consumer Products, Inc. (9th Cir. 2000) 212 F3d 493, 516; Romano v. U-Haul Int’l (1st Cir. 2000) 233 F3d 655, 670; Zimmermann v. Associates First Capital Corp. (2nd Cir. 2001) 251 F3d 376, 385; Deffenbaugh-Williams v. Wal-Mart Stores, Inc. (5th Cir. 1999) 188 F3d 278, 286; but see Davey v. Lockheed Martin Corp., *supra*, 301 F3d at 1209—finding it “unclear” which party bears burden of proof on good-faith-compliance issue]
- d) [17:413.1] **Mitigation of damages by postoccurrence remedial efforts:** A court may, in its *discretion*, allow evidence of the employer’s remedial conduct following discovery of prohibited workplace discrimination, to mitigate the employer’s liability for punitive damages. [Swinton v. Potomac Corp., *supra*, 270 F3d at 814]

Such evidence may be admissible where the employer undertook *appropriate* remedial measures *promptly upon discovery* of the discriminatory conduct. [Swinton v. Potomac Corp., *supra*, 270 F3d at 815—it

is then up to the jury to decide if employer's efforts were mere "window dressing"]

On the other hand, such evidence may be excluded where the remedial measures were minor and undertaken well after plaintiff filed an EEOC complaint and/or a lawsuit ("too little, too late"). [Swinton v. Potomac Corp., supra, 270 F3d at 815]

- 5) [17:414] **Compare—managerial employees as employer's "proxy":** A corporate employer may be directly liable for discriminatory acts by corporate directors and management-level officers or employees:
 - a) [17:415] **Senior management:** Individuals *sufficiently senior* in the corporation may be treated as the corporation's "proxy" for purposes of liability, even if the corporation has promulgated and implemented anti-discrimination policies. [See Kolstad v. American Dental Ass'n, supra, 527 US at 546, 119 S.Ct. at 2130—employer liable for discriminatory acts of its executive director (highest officer) if he acted with "malice or reckless indifference"; see also Passantino v. Johnson & Johnson Consumer Products, Inc., supra, 212 F3d at 517]
 - b) [17:416] **Supervisor designated by company to remedy harassment:** Even a relatively low-level supervisor may be an employer's "proxy" if he or she was *responsible under company policy for receiving and acting upon discrimination* complaints and failed to take remedial action in response to the offensive conduct. This is so even where the supervisor did not actually perpetrate the conduct. [Swinton v. Potomac Corp. (9th Cir. 2001) 270 F3d 794, 810, 818]
 - c) [17:417] **Supervisor supporting harassment by subordinate:** An employer may be held vicariously liable for punitive damages where a supervisor backs up a racist employee's racially-motivated conduct instead of protecting the victim from the employee . . . "even if the supervisor's motivation was non-racial, such as loyalty to his subordinates or a desire to avoid conflict within the company." [See Bains LLC v.

Arco Products Co., Div. of Atlantic Richfield Co. (9th Cir. 2005) 405 F3d 764, 773-774

[17:418-422] Reserved.

- (3) [17:423] **ADEA:** The scope of recoverable damages under the ADEA includes:
- liquidated (double) damages for “willful violations”; and
 - “such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter . . .” [29 USC §626(b)]
- (a) [17:424] **Liquidated damages:** The liquidated damages provision is intended to be punitive in nature and is therefore available only if “the employer . . . knew or showed *reckless disregard* for the matter of whether its conduct was prohibited by the ADEA.” [*Trans World Airlines, Inc. v. Thurston* (1985) 469 US 111, 126, 105 S.Ct. 613, 624; see *Brooks v. Hilton Casinos Inc.* (9th Cir. 1992) 959 F2d 757, 767—backpay must be doubled for willful violation of ADEA]
- 1) [17:424.1] **Example:** Employing a general manager who did not know age discrimination in employment is illegal was such an “extraordinary mistake” as to permit the jury to infer the employer’s “reckless disregard” of ADEA. [*Mathis v. Phillips Chevrolet, Inc.* (7th Cir. 2001) 269 F3d 771, 778]
 - 2) [17:424.2] **Not subject to Title VII/ADA damages caps:** The caps on compensatory and punitive damage caps applicable in Title VII and ADA cases (¶17:296) do not apply to ADEA liquidated damages. Moreover, in appropriate cases, ADEA liquidated damages may be awarded *in addition to* punitive damages awarded under Title VII and the ADA. [See *Abuan v. Level 3 Communications, Inc.* (10th Cir. 2003) 353 F3d 1158, 1170]
- (b) [17:425] **No other punitive damages:** Notwithstanding the broad language above (“such legal or equitable relief as may be appropriate”), the ADEA does *not* authorize punitive damages awards: “The provisions for liquidated damages for willful violation of the Act and its silence as to punitive damages . . . (indicates) that the omission of any reference thereto was intentional.” [*Dean v. American Security Ins. Co.* (5th Cir. 1977) 559 F2d 1036, 1039 (parentheses added)]

(4) [17:426] **FLSA:** The Fair Labor Standards Act provides the following remedies in addition to recovery of wages due:

(a) [17:427] **Liquidated damages:** Liquidated damages (twice the unpaid minimum wages) are *mandatory* for FLSA violations *unless* the court finds that the defendant employer acted in "good faith" and "reasonably believed" its conduct was consistent with the law. [29 USC §216(b); see also 29 USC §260]

1) [17:428] **Burden on employer:** The employer bears the burden of proving both its good faith and reasonable belief. [*Shea v. Galaxie Lumber & Const. Co., Ltd.* (7th Cir. 1998) 152 F3d 729, 733—employer cannot avoid doubling by showing that lower-level employees were responsible for the violation]

2) [17:429] **Presumption favoring employee:** Doubling is the norm, not the exception; a strong presumption exists in favor of doubling. [*Shea v. Galaxie Lumber & Const. Co., Ltd.*, supra, 152 F3d at 733]

(b) [17:430] **Remedies for retaliation:** For violation of the FLSA anti-retaliation provision (29 USC §215(a)(3)), an employer shall be liable for "*such legal or equitable relief as may be appropriate . . .* including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages." [29 USC §216(b) (emphasis added)]

1) [17:431] **Punitive damages?** Courts are split on whether the broad language above authorizes a punitive damages award against an employer who retaliates against an employee for exercising his or her FLSA rights. [See *Travis v. Gary Community Mental Health Ctr., Inc.* (7th Cir. 1990) 921 F2d 108, 111-112—upholding punitive damages for retaliatory discharge under FLSA; *Snapp v. Unlimited Concepts, Inc.* (11th Cir. 2000) 208 F3d 928, 933—no punitive damages because statute is intended to compensate employee, not penalize employer]

Cross-refer: See further discussion of FLSA remedies in Ch. 11, Compensation, at ¶11:20 ff.

- (5) [17:432] **FMLA:** Liquidated damages are also available under the Family and Medical Leave Act. [See 29 USC §2617(a)(1)(A)(iii)]
- e. [17:433] **Effect of no compensatory damages award?** Although many states (including California) do not allow punitive damages without a compensatory damages award, federal courts are split in several ways on whether such an award is proper. (42 USC §1981(a) does not mention such a prerequisite, and there is no uniform common law rule on this subject.)
- (1) [17:434] **View that punitives cannot stand:** Some courts flatly hold that a punitive damages award cannot stand without compensatory damages. [*People Helpers Found., Inc. v. City of Richmond*, Va. (4th Cir. 1993) 12 F3d 1321, 1327; *Kerr-Selgas v. American Airlines, Inc.* (1st Cir. 1995) 69 F3d 1205, 1214-1215]
- (2) [17:435] **View allowing punitives if constitutional right violated:** Other courts hold that punitive damages may be awarded without a compensatory or nominal damages award only where there has been a violation of constitutional rights. [See *Louisiana ACORN Fair Housing v. LeBlanc* (5th Cir. 2000) 211 F3d 298, 303; *Alexander v. Riga* (3rd Cir. 2000) 208 F3d 419, 430; *Searles v. Van Bebber* (10th Cir. 2001) 251 F3d 869, 880-881]
- (3) [17:436] **View allowing punitive damages if wage loss shown:** Still other courts hold that punitive damages may be awarded under 42 USC §1981a(b)(1) if there is an award of backpay because backpay awards serve a purpose similar to compensatory damage awards. [*Provencher v. CVS Pharmacy, Div. of Melville Corp.* (1st Cir. 1998) 145 F3d 5, 11-12; *Corti v. Storage Technology Corp.* (4th Cir. 2002) 304 F3d 336, 342; *Hennessy v. Penril Datacomm Networks, Inc.* (7th Cir. 1995) 69 F3d 1344, 1352; *EEOC v. W&O, Inc.* (11th Cir. 2000) 213 F3d 600, 615]
- Similarly, punitive damages may be awarded where only front pay is awarded. [*Salitos v. Chrysler Corp.* (8th Cir. 2002) 306 F3d 562, 575]
- (4) [17:437] **View allowing punitives to stand alone:** The most liberal position permits a 42 USC §1981a (b)(1) punitive damages award *without* compensatory damages or backpay. [*Timm v. Progressive Steel Treating, Inc.* (7th Cir. 1998) 137 F3d 1008, 1010; *Cush-Crawford v. Adchem Corp.* (2nd Cir. 2001) 271 F3d 352, 357; *Abner v. Kansas City Southern R.R. Co.* (5th Cir.

2008) 513 F3d 154, 165—rejecting “ceremonial anchor of nominal damages”]

- (a) [17:438] **Limitation—due process:** But the ratio between compensatory and punitive damages may be important for *due process* purposes; see ¶17:451.20 ff.

[17:439-444] *Reserved.*

(Text cont'd on p. 17-61)

RESERVED

2. [17:445] **Amount Determined by Trier of Fact; Reasonable Relation to Injury or Harm:** California law currently provides no fixed standards as to the amount of punitive damages. Rather, the jury must be instructed to consider:
- the *reprehensibility* of defendant's conduct;
 - the amount of punitive damages that will have a *deterrent effect* on defendant in light of defendant's *financial condition*; and
 - that the punitive damages award must bear a *reasonable relation to the injury, harm or damages suffered by plaintiff*. [See *Neal v. Farmers Ins. Exch.* (1978) 21 C3d 910, 925, 928, 148 CR 389, 397, 399; *Adams v. Murakami* (1991) 54 C3d 105, 111-112, 284 CR 318, 320-321]

Subject to these guidelines—and the federal constitutional standards discussed below—the award amount is left to the jury's sound discretion, exercised *without passion or prejudice*. [See also CACI 3942, 3943, 3945, 3947, 3949—"There is no fixed standard for determining the amount of punitive damages and you are not required to award any punitive damages"; BAJI 14.71(3), 14.72.2]

- a. [17:445.1] **Appellate court's power to modify:** Federal appellate courts may modify an excessive punitive damages award by reducing it to the maximum amount constitutionally permissible. [See *Leatherman Tool Group, Inc. v. Cooper Indus., Inc.* (9th Cir. 2002) 285 F3d 1146, 1152]

California appellate courts may also reduce an excessive award to the maximum constitutionally permitted; or order reversal of the judgment and a new trial unless *plaintiff consents* to a corresponding reduction in the judgment. [See *Notrica v. State Comp. Ins. Fund* (1999) 70 CA4th 911, 952-953, 83 CR2d 89, 117-118]

- (1) [17:445.2] **Effect of reducing compensatory damages?** It is not clear whether an appellate court has the power to modify a punitive damages award when it has reduced the accompanying award of compensatory damages.

Caution: Whether an appellate court must remand to the trial court for a new determination of punitive damages in light of a reduced compensatory damages award is presently before the California Supreme Court in *Roby v. McKesson HBOC*, Case No. S149752, rev.grntd. 4/18/07.

[17:445.3-445.4] *Reserved.*

3. [17:445.5] **Statutory Penalty as Limitation?** Ordinarily, recovery of a statutory penalty (e.g., treble damages) for a particular wrongful act does *not* preclude recovery of punitive dam-

ages in a tort action based on the same act where the necessary malice or oppression is shown. [*Greeneberg v. Western Turf Ass'n* (1903) 140 C 357, 364, 73 P 1050, 1052; see *Marshall v. Brown* (1983) 141 CA3d 408, 418-419, 190 CR 392, 399]

But the result is different where the statute violated is viewed as having a *punitive purpose*, to deter violations and encourage private enforcement. A penalty awarded under such statutes precludes recovery of punitive damages in a tort action based on the same conduct. Plaintiff must *elect prior to entry of judgment* whether “to have judgment entered in an amount which reflects either the statutory trebling, or the compensatory and punitive damages.” [*Marshall v. Brown*, supra, 141 CA3d at 419, 190 CR at 400—statutory treble damages under Lab.C. §1054 (for improper use of employee’s fingerprints or photograph) barred punitive damage award against employer based on the same misconduct; see *Shore v. Gurnett* (2004) 122 CA4th 166, 174, 18 CR3d 583, 589]

4. [17:446] **Constitutional Limitations:** Several constitutional challenges have been raised to large punitive damages awards:

- a. [17:447] **“Excessive Fines” Clause:** The “Excessive Fines Clause” of the Eighth Amendment applies only to government-imposed penalties. It does not directly apply to a punitive damages award in a civil case between private parties. [*Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.* (1989) 492 US 257, 262-276, 109 S.Ct. 2909, 2913-2920]

However, the Fourteenth Amendment Due Process Clause imposes substantive limits on the states’ discretion (below), making the Eighth Amendment’s prohibition against “excessive” fines applicable to the states and prohibiting them from imposing “grossly excessive” punishments on tortfeasors. [*Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* (2001) 532 US 424, 433-434, 121 S.Ct. 1678, 1684]

- b. [17:448] **Procedural due process requirements:** The Fourteenth Amendment Due Process Clause requires that “meaningful and adequate” postverdict review of punitive damages awards be available both in the trial court and by subsequent appellate review. [*Pacific Mut. Life Ins. Co. v. Haslip* (1991) 499 US 1, 20, 111 S.Ct. 1032, 1043; *Honda Motor Co., Ltd. v. Oberg* (1994) 512 US 415, 420, 114 S.Ct. 2331, 2335]

- (1) [17:449] ***De novo* standard for appellate review:** Where a punitive damages award is challenged on appeal as “grossly excessive,” a *constitutional issue* is raised (because substantive due process limits such awards; see below). Because the meaning of “grossly excessive” cannot be articulated with precision, *de novo*

appellate review of the constitutional principle is necessary to maintain control of, and to clarify, the governing legal principles. The appellate court, however, must defer to findings of fact unless they are clearly erroneous. [*Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, supra, 532 US at 436, 121 S.Ct. at 1685]

Compare—compensatory damages: Compensatory damages awards raise no constitutional issue and therefore are subject to the more deferential abuse of discretion standard of review. [*Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, supra, 532 US at 437, 121 S.Ct. at 1686]

- c. [17:450] **Substantive due process:** The Fourteenth Amendment Due Process Clause also imposes a *substantive limit* on the amount of punitive damages awards. Although no bright line exists, a “general concern of reasonableness properly enters into the constitutional calculus”; “grossly excessive” awards are prohibited. [*BMW of North America, Inc. v. Gore* (1996) 517 US 559, 574-575, 116 S.Ct. 1589, 1598-1599; *Honda Motor Co., Ltd. v. Oberg*, supra, 512 US at 420, 114 S.Ct. at 2335; see *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 US 408, 417, 123 S.Ct. 1513, 1519—grossly excessive awards further “no legitimate purpose” and constitute “an arbitrary deprivation of property”]

This limitation incorporates the Eighth Amendment’s prohibition against “excessive” fines, thus prohibiting “grossly excessive” punishments against tortfeasors. [*Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, supra, 532 US at 433-434, 121 S.Ct. at 1684; *State Farm Mut. Auto. Ins. Co. v. Campbell*, supra, 538 US at 416-417, 123 S.Ct. at 1519-1520]

- (1) [17:451] **Indicia of reasonableness:** The following “guideposts” or “indicia of reasonableness” determine whether a punitive damages award is “grossly excessive”:

- the *reprehensibility of defendant’s conduct* (the severity of the offense—“perhaps the most important” guidepost);
- the *ratio between the amount of punitive damages awarded and the harm actually suffered* or potential harm likely to result from defendant’s conduct (recognizing that higher ratios may be proper where, for example, a particularly egregious act has resulted in only a small amount of economic damage, or the damage is hard to detect or measure); and
- *sanctions for comparable misconduct* (civil or criminal fines and penalties in comparable cases). [*BMW*

of North America, Inc. v. Gore, supra, 517 US at 574-575, 116 S.Ct. at 1598-1599; *State Farm Mut. Auto. Ins. Co. v. Campbell*, supra, 538 US at 418, 123 S.Ct. at 1520]

- (a) [17:451.1] **Degree of reprehensibility:** A plaintiff is presumed to have been made whole by compensatory damages, “so punitive damages should only be awarded if the defendant’s culpability, after having paid compensatory damages, is *so reprehensible as to warrant the imposition of further sanctions* to achieve punishment or deterrence.” [*State Farm Mut. Auto. Ins. Co. v. Campbell*, supra, 538 US at 419, 123 S.Ct. at 1521 (emphasis added); *BMW of North America, Inc. v. Gore*, supra, 517 US at 575, 116 S.Ct. at 1599]
- 1) [17:451.1a] **Each defendant considered separately:** Where punitive damages are sought against several defendants (e.g., in respondeat superior cases), the reprehensibility of each must be evaluated separately. [*Bell v. Clackamas County* (9th Cir. 2003) 341 F3d 858, 867—reprehensibility of each defendant’s misconduct must be determined “individually, as opposed to *en masse*”]
 - 2) [17:451.2] **Factors considered:** The U.S. Supreme Court has instructed courts to determine the reprehensibility of a defendant’s conduct by considering whether:
 - the harm caused was physical as opposed to economic;
 - the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others;
 - the target of the conduct had financial vulnerability;
 - the conduct involved repeated actions or was an isolated incident; and
 - the harm was the result of intentional malice, trickery or deceit, or mere accident.[*State Farm Mut. Auto. Ins. Co. v. Campbell*, supra, 538 US at 419, 123 S.Ct. at 1521]

That any one of these factors weighs in favor of plaintiff does *not necessarily* justify a punitive damages award. But absence of *all* of them “renders any award suspect.” [*State Farm Mut. Auto. Ins. Co. v. Campbell*, supra, 538 US at 419, 123 S.Ct. at 1521]

- a) [17:451.3] **Type of wrongdoing:** Some wrongs are more blameworthy and deserving of greater punishment than others. E.g., wrongs involving violence are more reprehensible than nonviolent wrongs; trickery and deceit are more reprehensible than the omission of a material fact or mere negligence. [*BMW of North America, Inc. v. Gore*, *supra*, 517 US at 575, 579, 116 S.Ct. at 1599, 1601]

[17:451.4] *Reserved.*

b) **Type of injury**

- 1/ [17:451.5] **Physical harm:** The nature and seriousness of physical injury determine reprehensibility. Lesser punishment is justified when the bulk of the harm is in the nature of *emotional* injury, rather than threats to life and limb. [*Gober v. Ralphs Grocery Co.* (2006) 137 CA4th 204, 220, 40 CR3d 92, 105—employer's failure to deal with harasser's earlier misbehavior subjected plaintiffs to potential physical harm, creating "modest degree of reprehensibility"]

- 2/ [17:451.6] **Economic harm:** *Purely economic harm* may warrant less punishment than harm to the health or safety of individuals (see above). [*BMW of North America, Inc. v. Gore*, *supra*, 517 US at 576, 116 S.Ct. at 1599]

[17:451.7] But economic harm *resulting from intentional discrimination* has been held to be "a different kind of harm, a serious affront to personal liberty . . . Freedom from discrimination on the basis of race or ethnicity is a fundamental human right . . . and the intentional deprivation of that freedom is highly reprehensible conduct." [*Zhang v. American Gem Seafoods, Inc.* (9th Cir. 2003) 339 F3d 1020, 1043]

[17:451.8] Additionally, economic harm caused to *financially vulnerable plaintiffs* may result in a higher puni-

tive damages award. [*Gober v. Ralphs Grocery Co.*, supra, 137 CA4th at 220, 40 CR3d at 105]

[17:451.9] Reserved.

- c) [17:451.10] **Isolated vs. repeated wrongdoing:** Also relevant is whether defendant has repeatedly engaged in the prohibited conduct: "(A) recidivist may be punished more severely than a first offender . ." [*BMW of North America, Inc. v. Gore*, supra, 517 US at 576, 116 S.Ct. at 1599; *Philip Morris USA v. Williams* (2007) 549 US 346, 358, 127 S.Ct. 1057, 1066; see *Johnson v. Ford Motor Co.* (2005) 35 C4th 1191, 1206, 29 CR3d 401, 413. fn. 6—increased punishment for repeat offenders as "stiffened penalty for the last crime"]
 - 1/ [17:451.10a] **Similarity of misconduct:** The only conduct relevant in assessing reprehensibility, however, is conduct *similar to that which harmed the plaintiff*: "(I)n the context of civil actions courts must ensure the conduct in question replicates the prior transgressions." [*State Farm Mut. Auto. Ins. Co. v. Campbell*, supra, 538 US at 423, 123 S.Ct. at 1523—evidence of defendant's misconduct involved dissimilar conduct, out-of-state conduct and conduct that was lawful where it occurred]
- d) [17:451.11] **In-state vs. out-of-state conduct:** At least with respect to *economic* wrongdoing, a punitive damages award must relate to conduct occurring within the state. The penalty must be supported by the forum state's interest in protecting its own consumers and economy. Therefore, a punitive damages award may not be based on defendant's *lawful* conduct outside the state that impacts only nonresidents. [*BMW of North America, Inc. v. Gore*, supra, 517 US at 574, 116 S.Ct. at 1597; *State Farm Mut. Auto. Ins. Co. v. Campbell*, supra, 538 US at 421, 123 S.Ct. at 1522]

For the same reason, the forum state does not generally have a legitimate concern in

imposing punitive damages to punish a defendant for *unlawful* acts committed outside its jurisdiction. [*State Farm Mut. Auto. Ins. Co. v. Campbell*, supra, 538 US at 422, 123 S.Ct. at 1523—federalism allows each state alone to “determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction”]

1/ [17:451.12] **Compare—out-of-state conduct admissible to prove culpability of in-state conduct:** However, out-of-state conduct may be admissible to prove the deliberateness and culpability of defendant’s actions within the forum state, if that conduct has a sufficient “nexus to the specific harm suffered by the plaintiff.” [*State Farm Mut. Auto. Ins. Co. v. Campbell*, supra, 538 US at 421-422, 123 S.Ct. at 1522-1523—appropriate limiting jury instruction required]

[17:451.13-451.14] *Reserved.*

3) [17:451.15] **Compare—harm to others not considered:** Punitive damages may be awarded only for conduct that harmed the plaintiff, not for harm inflicted on other persons who are not parties to the suit: “A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business. Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties’ hypothetical claims against a defendant under the guise of the reprehensibility analysis. . .” [*State Farm Mut. Auto. Ins. Co. v. Campbell*, supra, 538 US at 423, 123 S.Ct. at 1523; see also *Philip Morris USA v. Williams* (2007) 549 US 346, 354, 127 S.Ct. 1057, 1063]

a) [17:451.16] **No disgorgement of ill-gotten profits obtained from others:** Defendant may be ordered to disgorge ill-gotten gains obtained *from the plaintiff*. But due process forbids a punitive damages award based on profits made through similar torts against *other individuals*: “An award of disgorgement of all profits from a group of transactions similar to that which harmed the plaintiff (but not defined

through the procedural limits of a class action) is therefore likely to be *disproportionate to the individual plaintiff's compensatory award.*" [Johnson v. Ford Motor Co. (2005) 35 C4th 1191, 1210, 29 CR3d 401, 416 (parentheses in original; emphasis added)]

[17:451.17-451.19] Reserved.

- (b) [17:451.20] **Ratio to compensatory damages:** The second, and perhaps most commonly cited, guidepost is that the punitive damages award must bear a *reasonable relationship* to the actual harm already inflicted on plaintiff and any harm likely to result from defendant's conduct. [BMW of North America, Inc. v. Gore, *supra*, 517 US at 581, 116 S.Ct. at 1602]
- 1) [17:451.20a] **Total compensatory damages considered:** The "actual harm" inflicted refers to the *total compensatory tort damages*—including both economic damages (such as lost wages) and noneconomic damages (such as emotional distress). [See State Farm Mut. Auto. Ins. Co. v. Campbell, *supra*, 538 US at 426, 123 S.Ct. at 1524; Pavon v. Swift Transp. Co., Inc. (9th Cir. 1999) 192 F3d 902, 909-910 (Title VII racial harassment and wrongful termination case); see also Bardis v. Oates (2004) 119 CA4th 1, 17-18, 14 CR3d 89, 101—compensatory damages for purpose of punitive damages calculation included prejudgment interest but not attorney fees and costs (non-employment law case)]
 - 2) [17:451.20b] **Potential harm to plaintiff also considered:** It is also appropriate to consider the harm "the defendant's conduct would have caused to its intended victim *if the wrongful plan had succeeded*" in assessing the punitive damages to harm ratio. [TXO Production Corp. v. Alliance Resources Corp. (1993) 509 US 443, 460, 113 S.Ct. 2711, 2721 (emphasis added)]
 - a) [17:451.20c] **Foreseeability as limitation:** But potential harm that was *not a foreseeable result* of defendant's tortious conduct toward plaintiff is not a proper consideration in assessing punitive damages. [See Simon v. San Paolo U.S. Holding Co., Inc. (2005) 35 C4th 1159, 1177-1178, 29 CR3d 379, 391-392—where defendant

fraudulently misrepresented its willingness to sell certain property to plaintiff, the loss of \$400,000 profit plaintiff might have made on resale was *not* a foreseeable result of the fraud because *plaintiff had no enforceable right to purchase the property*]

- 3) [17:451.21] **No bright line; reasonableness as key:** There is no mathematical bright line as to what is a constitutionally acceptable ratio between compensatory and punitive damages. Rather, a “general concern of reasonableness properly enters into the constitutional calculus.” [*BMW of North America, Inc. v. Gore*, *supra*, 517 US at 582-583, 116 S.Ct. at 1602—“breath-taking 500 to 1 ratio must surely raise a suspicious judicial eyebrow”]

Even so, few awards exceeding a *single-digit ratio* between punitive and compensatory damages will be held to satisfy due process. [*State Farm Mut. Auto. Ins. Co. v. Campbell*, *supra*, 538 US at 425-426, 123 S.Ct. at 1524—145 to 1 ratio clearly violated due process]

This has been interpreted to establish a *presumption*: Ratios “significantly greater than nine or 10 to one are *suspect* and, absent special justification (by, for example, *extreme reprehensibility or unusually small, hard-to-detect or hard-to-measure compensatory damages*), cannot survive appellate scrutiny under the due process clause.” [*Simon v. San Paolo U.S. Holding Co., Inc.*, *supra*, 35 C4th at 1182, 29 CR3d at 395 (emphasis added)]

- a) [17:451.22] **Four-to-one in “usual” case?** Although it did not adopt a bright-line ratio, the U.S. Supreme Court has stated an award of more than four-to-one “might be close to the line of constitutional impropriety.” [*State Farm Mut. Auto. Ins. Co. v. Campbell*, *supra*, 538 US at 425, 123 S.Ct. at 1524; see *Wysinger v. Automobile Club of So. Calif.* (2007) 157 CA4th 413, 429, 69 CR3d 1, 13—punitive award less than 4 times compensatory damages “falls within the range of multipliers that are commonly used to achieve the goals of punitive damages”]

[17:451.23-451.24] *Reserved.*

- b) [17:451.25] **One-to-one ratio where large compensatory damages award:** When compensatory damages are *substantial*, a lesser ratio, perhaps one-to-one, may "reach the outermost limit of the due process guarantee." [*State Farm Mut. Auto. Ins. Co. v. Campbell*, *supra*, 538 US at 425, 123 S.Ct. at 1524; see *Simon v. San Paolo U.S. Holding Co., Inc.*, *supra*, 35 C4th at 1182-1183, 29 CR3d at 395]
- 1/ [17:451.26] **Particularly where compensatory damages include emotional distress:** The one-to-one ratio may be even more appropriate where

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compensatory damages include a large amount for emotional distress because such an award *may contain a punitive element*: "(T)here is no clear line of demarcation between punishment and compensation and a verdict for a specified amount frequently includes elements of both." [State Farm Mut. Auto. Ins. Co. v. Campbell, *supra*, 538 US at 426, 123 S.Ct. at 1525 (internal quotes omitted); see also Grassilli v. Barr (2007) 142 CA4th 1260, 1290, 48 CR3d 715, 738]

[17:451.27-451.29] Reserved.

- 4) [17:451.30] **Factors justifying higher than normal ratio:** A higher than normal ratio may be constitutionally permissible where:
 - a particularly egregious act has resulted in only a small amount of economic damage; or
 - the injury is hard to detect or measure; or
 - the monetary value of noneconomic harm is hard to determine. [*BMW of North America, Inc. v. Gore*, *supra*, 517 US at 582, 116 S.Ct. at 1602]
- a) [17:451.31] **Defendant's wealth:** See ¶17:452-452.1.
- b) [17:451.32] **Personal injury cases:** Thus, a higher ratio may be justified where defendant deliberately or recklessly caused physical injury. [See *Boeken v. Philip Morris Inc.* (2005) 127 CA4th 1640, 1691-1692, 26 CR3d 638, 678]
- 5) [17:451.33] **Effect of damages caps on ratio guidepost:** Where punitive and compensatory damages are capped at a relatively low amount, as in Title VII and ADA cases (¶17:296), "the ratio of punitive to compensatory damages in a particular award ceases to be an issue of constitutional dignity"—i.e., the cap already provides some protection against excessive punitives. [*Lust v. Sealy, Inc.* (7th Cir. 2004) 383 F3d 580, 590; *Romano v. U-Haul Int'l* (1st Cir. 2000) 233 F3d 655, 673]

[17:451.34] Reserved.

- (c) [17:451.35] **Sanctions for comparable misconduct:** The final guidepost is the comparison be-

tween the punitive damages award and *civil or criminal penalties* that could be imposed for comparable misconduct. [*BMW of North America, Inc. v. Gore*, supra, 517 US at 572-573, 116 S.Ct. at 1597-1598]

- 1) [17:451.35a] **Civil fines:** Reviewing courts should use as a constitutional benchmark any *realistically available* civil penalty for defendant's conduct toward the plaintiff, but not speculative or hypothetical "doomsday" penalties. [See *State Farm Mut. Auto. Ins. Co. v. Campbell*, supra, 538 US at 428, 123 S.Ct. at 1526—where most flagrant civil penalty under state law was \$10,000, multi-million dollar punitive damages award could not be supported by speculation about defendant's potential loss of its business license, disgorgement of profits, and possible imprisonment based on dissimilar conduct toward others]

Under California law, a \$2,500 civil penalty may be assessed for "any unlawful, unfair or fraudulent business act or practice" (see Bus. & Prof.C. §§17200, 17206(a)). Where ongoing wrongful conduct is involved, each act may be punished as a separate violation, calling for a separate \$2,500 penalty. [See *Boeken v. Philip Morris Inc.* (2005) 127 CA4th 1640, 1699, 26 CR3d 638, 683-684]

- 2) [17:451.36] **Effect of no comparable civil penalties:** When civil penalties for the type of conduct for which the defendant is held liable do not exist, punitive damages "caps" under analogous statutes may be considered. Rationale: Such caps represent a "legislative judgment similar to the imposition of a civil fine." [*Zhang v. American Gem Seafoods, Inc.* (9th Cir. 2003) 339 F3d 1020, 1045—Title VII punitive damages cap applied to 42 USC §1981 case]

- (2) [17:452] **Defendant's wealth as factor:** Evidence of defendant's wealth or net worth does not make up for lack of evidence of other factors, such as reprehensibility (¶17:451.1 *ff.*). "The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." [*State Farm Mut. Auto. Ins. Co. v. Campbell*, supra, 538 US at 428, 123 S.Ct. at 1525; *BMW of North America, Inc. v. Gore*, supra, 517 US at 585, 116 S.Ct. at 1604]

Nevertheless, states may levy punitive damages awards that serve important state interests, such as providing a *meaningful deterrent* against misconduct by wealthy corporations and other persons. Thus, a court may give "some consideration" to defendant's financial condition. [*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 C4th 1159, 1186, 29 CR3d 379, 398; see *State Farm Mut. Auto. Ins. Co. v. Campbell*, *supra*—consideration of defendant's wealth not "unlawful or inappropriate"]

- (a) [17:452.1] **May affect permissible ratio:** The California Supreme Court has noted that in some cases, defendant's financial condition may combine with *high reprehensibility* and a low compensatory damages award to justify an "extraordinary ratio" between compensatory and punitive damages. [*Simon v. San Paolo U.S. Holding Co., Inc.*, *supra*, 35 C4th at 1186, 29 CR3d at 398]

Conversely, in other cases, "especially those involving substantial compensatory awards," the level of deterrence may be satisfied by imposing a smaller ratio of punitive damages. State interests in punishment and deterrence must yield to federal constitutional limits, because even wealthy defendants are entitled to due process. [*Simon v. San Paolo U.S. Holding Co., Inc.*, *supra*, 35 C4th at 1185-1187, 29 CR3d at 398-399; see *Bardis v. Oates* (2004) 119 CA4th 1, 25-26, 14 CR3d 89, 108—9-to-1 ratio awarded because proposed lesser sum (4-to-1 ratio) less than 1% of D's net worth ("tantamount to a slap on the wrist")]

[17:452.2-452.4] *Reserved.*

- (b) [17:452.5] **Burden on plaintiff:** Plaintiff's failure to produce "meaningful evidence" of defendant's financial condition or ability to pay precludes an award of punitive damages as to that defendant. [*Kelly v. Haag* (2006) 145 CA4th 910, 917-918, 52 CR3d 126, 130]

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RESERVED



(3) Application—U.S. Supreme Court cases

- [17:453] In *Haslip*, supra, the U.S. Supreme Court held a punitive damages award that was approximately four times the compensatory award was “close to the line” but did not contravene due process. [*Pacific Mut. Life Ins. Co. v. Haslip*, supra, 499 US at 23, 111 S.Ct. at 1046]
- [17:454] Later, the Court upheld a \$10 million punitive damages award that was 526 times the amount of the compensatory damages but less than 10 times the potential harm that would have ensued if the tortious plan had succeeded. [*TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 US 443, 454, 113 S.Ct. 2711, 2718]
- [17:455] In *BMW of North America*, supra, the U.S. Supreme Court held that a \$2 million punitive damages award was “grossly excessive” because:
 - the harm inflicted was *purely economic* (no physical injuries) and did not involve deliberate misconduct;
 - it was a “breathtaking” 500 times the amount of actual harm plaintiff suffered; and
 - the award was substantially greater than the maximum statutory fine (\$2,000) available for such conduct. [*BMW of North America, Inc. v. Gore*, supra, 517 US at 583, 116 S.Ct. at 1602]
- [17:455.1] In *Campbell*, supra, the U.S. Supreme Court reversed a \$145 million punitive damages award against a liability insurer whose bad faith failure to settle for the insured’s policy limits resulted in \$1 million emotional distress damages. Neither the degree of reprehensibility nor the ratio of compensatory to punitive damages satisfied due process. Also, the trial court had erroneously admitted evidence of defendant’s out-of-state conduct so that the insurer was being punished improperly for its nationwide policies. [*State Farm Mut. Auto. Ins. Co. v. Campbell*, supra, 538 US at 428-429, 123 S.Ct. at 1526]

(4) Application—other cases

(a) Employment cases

- [17:456] In a sexual harassment case in which several employees sued their supervisor and their corporate employer, a punitive damages award of an approximate 54-to-one punitive to compensatory damages ratio was reduced on remand to a six-to-one ratio as the

"absolute constitutional maximum that could possibly be awarded under these particular facts." [Gober v. Ralphs Grocery Co. (2006) 137 CA4th 204, 223, 40 CR3d 92, 107-108]

(b) **Nonemployment cases**

- [17:457] A \$1.7 million punitive damages award in a promissory fraud case was reduced to \$50,000 (a 10-to-one ratio of punitive to compensatory damages). [Simon v. San Paolo U.S. Holding Co., Inc. (2005) 35 C4th 1159, 1188, 29 CR3d 379, 400]
- [17:457.1] A \$10 million punitive damages award in a fraud case involving a defective used car was clearly excessive (a 56-to-one ratio to compensatory damages), but the lower court was ordered to reconsider defendant's recidivism (see ¶17:451.10) in determining a proper award. [Johnson v. Ford Motor Co. (2005) 35 C4th 1191, 1213, 29 CR3d 401, 418-419]

On remand, the lower court increased the punitive damages award to \$175,000 (just less than a 10-to-one punitive to compensatory damages ratio). [Johnson v. Ford Motor Co. (2005) 135 CA4th 137, 150, 37 CR3d 283, 294-295]

- [17:457.2] In a racial discrimination case involving \$50,000 in compensatory damages, a \$5 million punitives award was reduced to between \$300,000 and \$450,000. [Bains LLC v. Arco Products Co., Div. of Atlantic Richfield Co. (9th Cir. 2005) 405 F3d 764, 776]

➡ [17:458] **PRACTICE POINTER:** Although *Campbell* and single-digit awards is the conventional wisdom, attorneys seeking or defending against punitive damage awards should base their arguments on the *specific and unique facts in the record*, framed by awards made in published cases as establishing the high and low watermarks (i.e., what has been upheld and what has been reduced).

[17:459] *Reserved.*

- d. [17:460] **Compare—California “passion or prejudice” standard:** Under California law, a punitive damages

award may be set aside only where it is “so grossly disproportionate as to raise a presumption that it is the result of passion or prejudice.” [Adams v. Murakami (1991) 54 C3d 105, 118, 284 CR 318, 326, fn. 9 (internal quotes omitted)]

- (1) [17:461] **Constitutionality?** It is presently unclear whether California’s “passion or prejudice” standard satisfies the heightened standard of review for punitive damages awards required by the Fourteenth Amendment Due Process Clause (¶17:449).
- (2) [17:462] **Measurement?** No precise formula exists for determining when a punitive damages award is so large as to suggest “passion or prejudice.” [See *Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.* (1984) 155 CA3d 381, 388, 202 CR 204, 208-209]

But at least two justices of the California Supreme Court have proposed a rule that punitive damages should “rarely” exceed compensatory damages by more than a 3-to-1 ratio “and then only in the most egregious circumstances.” [See *Lane v. Hughes Aircraft Co.* (2000) 22 C4th 405, 420, 93 CR2d 60, 71 (J. Brown concur.opn., joined by J. Chin)]

[17:463-464] *Reserved.*

- e. [17:465] **Other constitutional challenges?** Employers may continue to challenge large punitive damage awards on other constitutional grounds, including:

- Vagueness of jury instructions under which punitive damages awarded (see Justice O’Connor’s dissent in *Pacific Mut. Life Ins. Co. v. Haslip*, supra, 499 US at 63, 111 S.Ct. at 1067);
- First Amendment grounds in defamation cases (i.e., chilling effect on freedom of speech); and
- Eighth Amendment (“Excessive Fines”) grounds where the *government* is the plaintiff.

[17:466-469] *Reserved.*

E. AFTER-ACQUIRED EVIDENCE OF EMPLOYEE MISCONDUCT AS LIMITATION ON DAMAGES

[17:470] **In General:** The after-acquired-evidence doctrine comes into play when, after the employee’s allegedly wrongful termination, the employer learns of employee wrongdoing that *would have resulted in termination* had the employer known the facts at the time of the termination. Such evidence does *not* shield an employer from discrimination liability. But it may *limit the type and extent of*

relief available to a prevailing employee. [See *McKennon v. Nashville Banner Pub. Co.* (1995) 513 US 352, 356-359, 115 S.Ct. 879, 884-886—ADEA case; *Rivera v. NIBCO, Inc.* (9th Cir. 2004) 364 F3d 1057, 1070-1072 & fn. 15—Title VII case; *Rooney v. Koch Air, LLC* (7th Cir. 2005) 410 F3d 376, 382—ADA case]

California case law relies in part on analyses by federal courts of the same or similar issues regarding after-acquired evidence. The U.S. Supreme Court has held that after-acquired evidence does not shield an employer from liability under the Age Discrimination in Employment Act (the “ADEA”), although it may *limit the type and extent of relief* available to a prevailing plaintiff. [*McKennon v. Nashville Banner Pub. Co.*, supra, 513 US at 356-359, 115 S.Ct. at 884-886; see *Rivera v. Nibco, Inc.*, supra, 364 F3d at 1070-1072 & fn. 15—after-acquired-evidence doctrine applies in Title VII cases]

1. [17:471] **Wrongdoing Sufficient for Discharge:** The employee’s misconduct must be “of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge.” [*McKennon v. Nashville Banner Pub. Co.*, supra, 513 US at 362, 115 S.Ct. at 886-887—after filing ADEA suit, employer discovered that employee had copied confidential employer documents and taken them home “for protection”; see *Rivera v. Nibco, Inc.*, supra, 364 F3d at 1072—discovery re discharged plaintiffs’ immigration status properly denied because employer failed to prove it would actually have fired them had it known that they were undocumented]
- a. [17:472] **Legal justification not required:** It need not be shown that the employer would have been legally *justified* in terminating the employee on the basis of the after-acquired evidence. It is enough that the employer *would have made the decision to do so* had it known the facts: “Proving that the same decision would have been justified is not the same as proving that the same decision would have been made.” [*McKennon v. Nashville Banner Pub. Co.*, supra, 513 US at 360, 115 S.Ct. at 885; *Thompson v. Tracor Flight Systems, Inc.* (2001) 86 CA4th 1156, 1174, 104 CR2d 95, 108]
- b. [17:473] **Types of conduct:** Employee wrongdoing that may result in discharge generally falls into one of two categories:
 - Resumé fraud (e.g., material misrepresentations on a resumé or job application) (see *Rivera v. Nibco, Inc.*, supra, 364 F3d at 1072—suggesting employer may avoid liability to employees who misrepresent their immigration status if employer can prove it would not have hired undocumented aliens); or

- *Post-hire, on-the-job misconduct* (e.g., stealing confidential employer data). [*Camp v. Jeffer, Mangels, Butler & Marmaro* (1995) 35 CA4th 620, 632, 41 CR2d 329, 335; see *Thompson v. Tracor Flight Systems, Inc.*, supra, 86 CA4th at 1173, 104 CR2d at 107]
2. [17:474] **As Defense:** After-acquired evidence is an equitable defense related to the traditional defense of “unclean hands.” [*Camp v. Jeffer, Mangels, Butler & Marmaro*, supra, 35 CA4th at 638, 41 CR2d at 340—under California law, “unclean hands” is a defense to both legal and equitable claims, and also to statutory discrimination claims; see discussion at ¶16:570 ff.]
 3. [17:475] **As Limitation on Remedies:** Even if not an absolute bar to liability, after-acquired evidence of employee wrongdoing may limit otherwise available remedies. I.e., as a result of the employee’s wrongdoing, the employer has “corresponding equities” that must be taken into account in determining appropriate remedies on a case-by-case basis. [*McKennon v. Nashville Banner Pub. Co.* (1995) 513 US 352, 362, 115 S.Ct. 879, 886; *Murillo v. Rite Stuff Foods, Inc.* (1998) 65 CA4th 833, 843, 77 CR2d 12, 18]
 - a. [17:476] **No reinstatement or front pay:** As a general rule in cases of this type, neither reinstatement nor front pay is an appropriate remedy: “It would be both inequitable and pointless to order the reinstatement of someone the employer would have terminated, and will terminate, in any event and upon lawful grounds.” [*McKennon v. Nashville Banner Pub. Co.*, supra, 513 US at 361, 115 S.Ct. at 886]
 - (1) [17:476.1] **Post-termination misconduct as bar to front pay?** Some cases hold *post-termination misconduct* that renders the employee *ineligible for reinstatement* is ground to deny a front pay award. For example, where a criminal record would disqualify plaintiff from employment, a post-termination conviction would be ground to deny front pay: “Simple common sense tells us that it would be inequitable to award her front pay in lieu of reinstatement where she had rendered herself actually unable to be reinstated.” [*Sellers v. Mineta* (8th Cir. 2004) 358 F3d 1058, 1063-1064; see also *Medlock v. Ortho Biotech, Inc.* (10th Cir. 1999) 164 F3d 545, 554-555—recognizing “possibility that in appropriate circumstances the logic of *McKennon* may permit certain limitations on relief based on post-termination conduct”]

Other courts hold an employer may *not* use post-termination misconduct to limit damages caused by its own discriminatory (or other wrongful) acts. The after-acquired evidence doctrine “presupposes that there was

an employer-employee relationship at the time the misconduct occurred.” [Ryder v. Westinghouse Elec. Corp. (WD PA 1995) 879 F.Supp. 534, 537 (emphasis added); Sigmon v. Parker Chapin Flattau & Klimpl (SD NY 1995) 901 F.Supp. 667, 682-683]

- b. [17:477] **Backpay awards:** The proper measure of backpay must give proper recognition to the fact that an unlawful discrimination has occurred that must be deterred and compensated without undue infringement upon the employer's rights and prerogatives. Liability for backpay must be adjusted to take into account the employer's lawful prerogatives arising from the employee's wrongdoing:
 - First, backpay may be calculated from the date of the unlawful discharge *to the date the new information was discovered*;
 - Then, the court may also consider “extraordinary equitable circumstances that affect the legitimate interests of either party.” [McKennon v. Nashville Banner Pub. Co., *supra*, 513 US at 361, 115 S.Ct. at 886 (emphasis added)]
- (1) [17:478] **Comment:** Defendant employers may argue that where plaintiff actively *concealed* the after-acquired evidence, backpay should be cut off at the point the concealed misconduct took place, not at later discovery. Moreover, where the misconduct was committed by a corporate officer or other high-ranking individual with a *fiduciary duty* to the employer, any backpay should be cut off when the breach of fiduciary duty occurred, whether concealed or not. [See *Bancroft-Whitney Co. v. Glen* (1966) 64 C2d 327, 345, 49 CR 825, 838-839—recognizing duty “to protect the interests of the corporation committed to his charge”; *J.C. Peacock, Inc. v. Hasko* (1961) 196 CA2d 353, 358, 16 CR 518, 522—employee who breaches fiduciary duty to employer “forfeits all rights to compensation for his services” following breach, without need for employer to show harm resulting from breach]

[17:479-489] Reserved.

F. MITIGATION OF DAMAGES (AVOIDABLE CONSEQUENCES DOCTRINE)

- 1. [17:490] **Doctrine:** In civil actions generally, the right to recover damages is qualified by the common law doctrine of avoidable consequences. Under this doctrine, “a person injured by another's wrongful conduct will not be compensated for damages that the injured person could have avoided by reasonable effort or expenditure.” [State Dept. of Health Services v. Sup.Ct.

(*McGinnis*) (2003) 31 C4th 1026, 1043, 6 CR3d 441, 451; see ¶10:360]

- a. [17:491] **Limits damages, not liability:** The doctrine limits the *amount* of damages recoverable; it is not a defense to liability or the existence of a cause of action. [*State Dept. of Health Services v. Sup. Ct. (McGinnis)*, supra, 31 C4th at 1045, 6 CR3d at 452-453; see ¶10:361]
- b. [17:492] **Contract or tort damages:** The doctrine applies both in contract and tort actions, including workplace torts. [*State Dept. of Health Services v. Sup. Ct. (McGinnis)*, supra, 31 C4th at 1043, 6 CR3d at 451; *Parker v. Twentieth Century-Fox Film Corp.* (1970) 3 C3d 176, 181-182, 89 CR 737, 740]
- c. [17:493] **Under Title VII:** In computing backpay awardable against an employer for violating federal equal employment opportunity laws, “(i)n~~e~~ri~~m~~ earnings or amounts *earnable with reasonable diligence* by the person or persons discriminated against shall operate to *reduce* the back pay otherwise allowable.” [42 USC §2000e-5(g)(1) (emphasis added)]

The doctrine applies equally to recovery of front pay: “A Title VII claimant seeking either back pay or front pay damages has a duty to mitigate those damages by exercising reasonable diligence to locate other suitable employment and maintain a suitable job once it is located.” [*Excel Corp. v. Bosley* (8th Cir. 1999) 165 F3d 635, 639; see also ¶17:236]

[17:494] *Reserved.*

2. [17:495] **Employer’s Burden of Proof:** In employment cases, the burden is on the defendant employer to show:
 - that “*comparable*” or “*substantially similar*” employment was available to the plaintiff employee;
 - that plaintiff failed to use “*reasonable efforts*” to *obtain and retain* such employment throughout the period for which backpay (or front pay) is sought; and
 - the amount that the employee earned or with reasonable efforts might have earned from other employment. [See *Parker v. Twentieth Century-Fox Film Corp.*, supra, 3 C3d at 181-182, 89 CR at 740 (under common law); *Cassino v. Reichhold Chemicals, Inc.* (9th Cir. 1987) 817 F2d 1338, 1345 (under ADEA); *Broadnax v. City of New Haven* (2nd Cir. 2005) 415 F3d 265, 270 (under Title VII); *Anastasio v. Schering Corp.* (3rd Cir. 1988) 838 F2d 701, 708 (backpay and front pay under ADEA); *Hope v. California Youth Auth.*

(2005) 134 CA4th 577, 595, 36 CR3d 154, 168 (under FEHA)]

➡ [17:495.1] **PRACTICE POINTERS:** Defense counsel may serve a *subpoena duces tecum* on plaintiff's new employer to obtain records relating to plaintiff's present employment (e.g., job application, personnel file, time cards, etc.). These records will establish plaintiff's present earnings and other payroll information. They may also provide other information relevant to plaintiff's lawsuit (e.g., to discover what plaintiff said on his or her job application about his or her former employment).

This is a controversial area because job applicants sometimes exaggerate or falsify their qualifications and experience, which may cast doubt on the credibility of their claims. To avoid this, plaintiff's counsel should consider moving to limit discovery of the new employer's personnel records to plaintiff's payroll information and object to discovery of other information on relevancy and privacy grounds.

[17:496] Reserved.

3. [17:497] **Availability of "Comparable" Employment:** The employer must prove the availability to plaintiff of employment that was "comparable" or "substantially similar" to the terminated employment. [*Cassino v. Reichhold Chemicals, Inc.*, supra, 817 F2d at 1345]

"(B)efore projected earnings from other employment opportunities not sought or accepted by the discharged employee can be applied in mitigation, the employer must show that *the other employment was comparable, or substantially similar*, to that of which the employee has been deprived; the employee's rejection of or failure to seek other available employment of a different or inferior kind may not be resorted to in order to mitigate damages." [*Parker v. Twentieth Century-Fox Film Corp.*, supra, 3 C3d at 182, 89 CR at 740; *Hope v. California Youth Auth.*, supra, 134 CA4th at 595, 36 CR3d at 168]

"(T)he unemployed or underemployed claimant need not go into another line of work, accept a demotion, or take a demeaning position." [*Ford Motor Co. v. EEOC* (1982) 458 US 219, 231, 102 S.Ct. 3057, 3065 & fn. 16—discharged plaintiff need not accept a "demeaning position" or one that is "substantially more onerous than his previous position"]

- a. [17:498] **Factors considered—in general:** Substantially equivalent employment "affords *virtually identical* promotional opportunities, compensation, job responsibilities, working conditions and status as the position from which (plaintiff) has been terminated." [*Sellers v. Delgado College*

(5th Cir. 1990) 902 F2d 1189, 1193 (emphasis and parentheses added)]

- b. [17:499] **Application:** A plaintiff does not violate the mitigation duty in refusing a job that is either “different from or inferior to” the terminated job:

- [17:500] Actress agreed to perform as a dancer and singer in a motion picture musical to be filmed in Los Angeles. Studio decided not to proceed with the musical and offered her instead a straight dramatic role in a western to be filmed in Australia. By “no stretch of the imagination” was this “substantially similar” employment. [*Parker v. Twentieth Century-Fox Film Corp.*, *supra*, 3 C3d at 183, 89 CR at 742]
- [17:501] Actress’ original contract gave her the right to approve director and screenplay. She was offered instead a contract that eliminated that right. This proposal was an offer of “inferior employment” that she need not

(Text cont'd on p. 17-81)

RESERVED



accept. [*Parker v. Twentieth Century-Fox Film Corp.*, supra, 3 C3d at 184, 89 CR at 742]

- [17:502] A job offer that requires work every weekend is “inferior” to one that does not, even if the pay is the same. [*EEOC v. Exxon Shipping Co.* (5th Cir. 1984) 745 F2d 967, 979-980]

[17:503-514] Reserved.

4. [17:515] **Same Geographical Area:** Plaintiffs may properly refuse employment that is inconveniently located or unreasonably distant. [See *Cunningham v. Retail Clerks Union* (1983) 149 CA3d 296, 307, 196 CR 769, 775—plaintiff need not accept a job that would require her to rent another place to live, move away from the community where she lived for 25 years, and bear other financial burdens; see also *NLRB v. Westin Hotel* (6th Cir. 1985) 758 F2d 1126, 1130—employee need not seek employment in city 25 miles from home and requiring commute by car that she could not afford]

a. **Application**

- [17:515.1] Television investigative reporter was discharged in violation of the ADEA. He made telephone calls and sent letters to other television stations in his city but did not attempt to find a comparable job on the national market because he did not wish to relocate his family. His failure to look for a similar job out of state did not mean that he had not made a reasonable effort to mitigate damages. [*Minshall v. McGraw Hill Broadcasting Co., Inc.* (10th Cir. 2003) 323 F3d 1273, 1287]

- b. [17:516] **Comment:** Geographical considerations may be less of a factor for executives or professionals whose employers *routinely relocate* their top employees. In such cases, a wrongfully discharged plaintiff's failure to accept a job offer solely because it requires moving to a different location may be held to be a failure to mitigate damages. [*Hopkins v. Price Waterhouse* (D DC 1990) 737 F.Supp. 1202, 1213-1214, aff'd on other grounds (DC Cir. 1990) 920 F2d 967—managerial employee wrongfully discharged by national accounting firm must consider jobs out of the area because national firms routinely ask and expect managers to transfer offices]

5. [17:517] **“Reasonable Effort” Required to Find and Retain Comparable Job:** A wrongfully discharged employee need make only a “reasonable effort” to find comparable employment. The burden is not onerous and does not mandate that plaintiff be successful in finding such employment. [*Mathieu v. Gopher News Co.* (8th Cir. 2001) 273 F3d 769, 784; *NLRB v. Westin Hotel* (6th Cir. 1985) 758 F2d 1126, 1130]

“(A) claimant is not, under the law, entitled to back-pay to the extent that she (1) *fails to remain in the labor market* during the period for which back-pay is claimed, (2) refuses to accept substantially equivalent employment, (3) fails to search diligently for alternative work, or (4) voluntarily quits alternative employment.” [J.H. Rutter Rex Mfg. Co., Inc. v. NLRB (5th Cir. 1973) 473 F2d 223, 241 (emphasis added)]

- a. [17:517.1] **Factual vs. legal issue:** Whether an employee used reasonable diligence to obtain comparable employment is a question of *fact* (on which the employer has the burden of proof, see ¶17:495). However, where the facts are undisputed and permit only one conclusion, the issue is one of *law*. [West v. Bechtel Corp. (2002) 96 CA4th 966, 985, 117 CR2d 647, 662—employee who declined comparable employment failed as matter of law to mitigate damages; Ortiz v. Bank of America Nat'l Trust & Sav. Ass'n (9th Cir. 1987) 852 F2d 383, 387 (applying Calif. law)]
- b. [17:518] **Relevant factors:** The “reasonableness” of plaintiff’s effort to obtain comparable employment “should be evaluated in light of the individual’s background and experience and the relevant job market.” [NLRB v. Westin Hotel, supra, 758 F2d at 1130]
- c. [17:519] **“Reasonable” efforts suffice:** Wrongfully discharged workers are not held to the highest standard of diligence in their efforts to secure comparable employment. Reasonable diligence requires only an *ongoing, good faith* effort. [Minshall v. McGraw Hill Broadcasting Co., Inc., supra, 323 F3d at 1287]

The reasonableness of plaintiff’s efforts “must be judged in light of the situation existing at the time and not with the benefit of hindsight.” [State Dept. of Health Services v. Sup.Ct. (McGinnis) (2003) 31 C4th 1026, 1043-1044, 6 CR3d 441, 451-452]

- (1) [17:520] **Reasonable number of applications:** Merely going through the motions of a job search by contacting a few potential employers is not enough. [See NLRB v. Mercy Peninsula Ambulance Service, Inc. (9th Cir. 1979) 589 F2d 1014, 1018—average of 3 attempts per month over 9-month period not reasonable diligence; Sellers v. Delgado College (5th Cir. 1990) 902 F2d 1189, 1195—average of less than one job application per month over 3-year period is insufficient response to large number of advertisements for substantially equivalent jobs]
- (2) [17:521] **Qualified for job applied for:** Applying for jobs for which plaintiff was clearly *not qualified* by training or experience does not constitute reasonable dili-

gence to find comparable employment. [See *Sellers v. Delgado College*, supra, 902 F2d at 1195]

- (3) [17:522] **Compare—effect of discharge on reemployment prospects:** A failure to apply for certain jobs may not be unreasonable where it is shown that the wrongful discharge has limited plaintiff's reemployment prospects.

- [17:523] It was not unreasonable for a cocktail waitress who had been wrongfully discharged from the Westin Hotel not to seek a similar job in other local hotels since she was *apprehensive about being refused employment* because of being discharged by Westin. Nor need she have sought a job in non-hotel cocktail lounges that were not of comparable quality, nor in Detroit, which would have required a commute by car that she could not afford. [*NLRB v. Westin Hotel*, supra, 758 F2d at 1130]
- [17:524] Plaintiff's failure to obtain a new job until more than a year-and-a-half after his wrongful discharge was not unreasonable "(g)iven the effect of the discharge on (his) work record and the employment market at the time." [*Muldrew v. Anheuser-Busch, Inc.* (8th Cir. 1984) 728 F2d 989, 992 (emphasis and parentheses added)]
- [17:525] Plaintiff's decision not to pursue comparable employment as a car salesperson was reasonable where her former employer had threatened to "blackball" her in the car business and there were few other women in that business locally. [*Wheeler v. Snyder Buick, Inc.* (7th Cir. 1986) 794 F2d 1228, 1234]

[17:526-529] Reserved.

- d. [17:530] **Employee "ready, willing and able" to return to work:** The employee's duty to exercise due diligence to obtain and retain comparable employment is a *continuing obligation* throughout the entire period for which plaintiff seeks backpay: "An employee cannot recover for a willful loss of earnings and thus such things as a failure to remain in the labor market, a refusal to accept or quitting other employment, and a failure to diligently search for work will preclude recovery." [*Dyer v. Workers' Comp. Appeals Bd.* (1994) 22 CA4th 1376, 1386, 28 CR2d 30, 36; *Sangster v. United Air Lines, Inc.* (9th Cir. 1980) 633 F2d 864, 868]

- (1) [17:531] **Effect of delay in seeking reemployment:** Prolonged periods of inactivity in seeking a new job may support a finding that plaintiff failed to mitigate damages.

- [17:532] Flight attendant remained idle for eight years after voluntarily quitting her job because of unlawful discrimination. Her unwillingness to seek a job with other airlines was *not* justified by her claim that her position with United was unique because, given her seniority, she could adapt her schedule to her pilot-husband's while being assigned to the same geographic area. [*Sangster v. United Air Lines, Inc.*, *supra*, 633 F2d at 868]
- [17:533] *Compare:* Plaintiff's taking a three-week vacation after she was wrongfully discharged did not constitute inadequate mitigation where she had three weeks of vacation pay due. [*Jacobson v. Pittman-Moore, Inc.* (D MN 1984) 582 F.Supp. 169, 178]

(2) [17:534] **Effect of illness or disability while unemployed:** A wrongfully discharged employee's illness or disability does not bar recovery from the employer of wages lost during the period of such illness or disability. [*Mayer v. Multistate Legal Studies, Inc.* (1997) 52 CA4th 1428, 1434, 61 CR2d 336, 339]

(a) [17:535] **Disability benefits as offset:** But state *disability benefits received* by the wrongfully discharged employee during that period reduce the employer's liability for lost wages. [*Mayer v. Multistate Legal Studies, Inc.*, *supra*, 52 CA4th at 1434-1435, 61 CR2d at 339]

Compare: A federal case treats disability benefits as payments from a "collateral source" that do *not* reduce the employer's liability for lost wages. [*Whatley v. Skaggs Cos., Inc.* (10th Cir. 1983) 707 F2d 1129, 1138]

[17:536] *Reserved.*

(3) [17:537] **Effect of pregnancy?** Courts disagree whether a backpay award should be reduced to reflect periods during which plaintiff could not work because of pregnancy or maternity:

- [17:538] Some courts deny backpay awards for periods during which plaintiff's pregnancy rendered her unable to work. [See *Beck v. Quiktrip Corp.* (D KS 1981) 27 FEP 776, aff'd (10th Cir. 1983) 708 F2d 532—no backpay for 6 weeks' maternity leave]
- [17:539] Other courts refuse to limit recovery of backpay, reasoning that pregnant women do not voluntarily remove themselves from the labor market. [See *Harper v. Thiokol Chem. Corp.* (5th Cir.

1980) 619 F2d 489, 493—where plaintiff did not become pregnant until at least 6 months after her wrongful discharge, and had made serious efforts to obtain employment, it was proper to award backpay for 10-month period during which she could not work because of pregnancy]

[17:540-544] Reserved.

- (4) [17:545] **Effect of imprisonment:** Where the employer has not offered to reinstate a wrongfully discharged employee, the employer's liability for backpay is not affected by the employee's imprisonment on unrelated charges. The employer, being in breach of its duty to offer reinstatement, may not take advantage of the "fortuitous circumstance" that the employee is unable to work while in jail: "The wrongful discharge of and persistence in refusal to reinstate respondent was the legal cause of respondent's failure to perform the duties of his position from the day he was discharged until the day he was reinstated." [*Carroll v. Civil Service Comm'n* (1973) 31 CA3d 561, 567, 107 CR 557, 560] (Any earnings in jail, however, are a legitimate offset to backpay liability.)
- (a) [17:546] **Compare—reinstatement offered:** The result is different, of course, where the employee was offered reinstatement before being imprisoned. In that event, the employer "would then have been in a position to claim mitigation after (employee) had had a reasonable opportunity to accept the offer of reinstatement but was unable or unwilling to do so." [*Carroll v. Civil Service Comm'n*, supra, 31 CA3d at 567, 107 CR at 560; see ¶17:96]
- (5) [17:547] **Effect of attending school:** Wrongfully discharged plaintiffs may argue that they do not fail to mitigate damages merely because they return to school (full time or part time); i.e., *as long as they continue a diligent search* for comparable employment and appear willing to leave school to accept such employment, their return to school does not affect the right to backpay. [*Dailey v. Societe Generale* (2nd Cir. 1997) 108 F3d 451, 457, fn. 1; *Miller v. AT & T Corp.* (4th Cir. 2001) 250 F3d 820, 838; *Killian v. Yorozu Automotive Tenn., Inc.* (6th Cir. 2006) 454 F3d 549, 556—"we cannot fault her for embarking upon a new career when there were no comparable positions available in her old one"]

Comment: There is no known case in point under California law. It is to be noted, however, that the California Workers' Compensation Board has denied workers'

compensation benefits where injured workers returned to school.

(a) [17:548] **Compare—job search abandoned to enhance earning potential:** The result is different, however, where plaintiff voluntarily withdraws from an *active job market* because he or she believes *ultimate earning potential will be enhanced* with the benefit of further education: “(W)hen an employee opts to attend school, curtailing present earning capacity in order to reap greater future earnings, a back pay award for the period while attending school . . . would be like receiving a double benefit.” [*Taylor v. Safeway Stores, Inc.* (10th Cir. 1975) 524 F2d 263, 267-268; *Miller v. Marsh* (11th Cir. 1985) 766 F2d 490, 492—full-time law student found unavailable for other employment while pursuing law degree; *Currieri v. City of Roseville* (1975) 50 CA3d 499, 506-507, 123 CR 314, 318-319]

(6) [17:549] **Effect of starting own business:** Where a wrongfully discharged employee goes into business for himself or herself, it is a question of fact whether such self-employment constitutes a failure to mitigate damages so as to terminate the employer’s backpay obligation. [*Cline v. Roadway Express, Inc.* (4th Cir. 1982) 689 F2d 481, 488]

If the self-employment is held to be a “reasonable effort” to mitigate damages, an award of backpay may be offset by either the profits of the enterprise or the reasonable value of the services rendered. [*Armstrong v. Index Journal Co.* (4th Cir. 1981) 647 F2d 441, 449—backpay award reduced by “the reasonable value of (plaintiff’s) services for which she did not receive any specific salary” (parentheses added)]

- [17:550] After making reasonable efforts to secure another job, Employee obtained a realtor’s license and entered the real estate business. Nothing indicated his decision was not bona fide. Because he earned substantially less in his new occupation than he had previously earned, a backpay award for the difference in earnings was proper. [*Cline v. Roadway Express, Inc.*, supra, 689 F2d at 489]
- [17:551] A wrongfully-discharged television reporter made unsuccessful efforts to locate comparable positions. He then obtained employment to teach media training, but quit that job approximately one year later to work as a self-employed media

trainer. Doing so did not constitute a failure to mitigate damages as a matter of law. [*Minshall v. McGraw Hill Broadcasting Co., Inc.* (10th Cir. 2003) 323 F3d 1273, 1287-1288]

- [17:552] *Compare*: After Police Officer was wrongfully discharged, he went into business for himself selling equipment used by law enforcement personnel. The business failed. He was *not* entitled to backpay for the period of time he was self-employed because he had *voluntarily removed himself from the job market* for the type of employment for which he was trained. His undertaking to learn and develop a different means of livelihood was *not a "reasonable effort"* to obtain comparable employment. [*Johnson v. Memphis Police Dept.* (WD TN 1989) 713 F.Supp. 244, 249]

[17:553-554] *Reserved.*

- (7) [17:555] **Effect of accepting inferior job:** Accepting an inferior job does *not* waive plaintiff's right to decline such employment in the future and hold the defendant employer liable for the full salary lost. By "lowering their sights" and accepting what appears to be the best job available, employees do all that the law requires by way of mitigation. [*J.H. Rutter Rex Mfg. Co., Inc. v. NLRB* (5th Cir. 1973) 473 F2d 223, 242; *Rabago-Alvarez v. Dart Indus., Inc.* (1976) 55 CA3d 91, 99, 127 CR 222, 227]

- (a) [17:556] **Damages reduced by actual earnings:** Net earnings from a lower-paying, inferior job reduce the backpay to which the employee is entitled. [*Priest v. Rotary* (ND CA 1986) 634 F.Supp. 571, 580—accepting part-time employment did not waive employee's right to backpay but reduced recoverable damages]

- (b) [17:557] **No reduction for projected earnings from inferior employment:** Plaintiffs may argue that projected future earnings from such employment should *not* reduce the employer's liability because the employee has the right to decline such employment altogether. [*Rabago-Alvarez v. Dart Indus., Inc.*, supra, 55 CA3d at 99, 127 CR at 227]

Comment: Employers may argue that such a rule would be contrary to public policy favoring reemployment and would permit unreasonable damage awards, contrary to Civ.C. §3359 ("Damages must in all cases be reasonable . . .").

[17:558-569] *Reserved.*

G. COSTS

1. [17:570] **Under California Law:** The “prevailing party” in an action may claim costs of suit as *a matter of right* under California law. [See CCP §1032; see also Gov.C. §12965(b)—reasonable attorney fees and costs awardable to prevailing party in FEHA actions]

The court has discretion to deny costs, however, where plaintiff recovers judgment in an unlimited civil case that could have been rendered in a limited civil case; or where plaintiff in a limited civil case recovers less than the jurisdictional limit of the small claims court. [See CCP §1033]

Cross-refer: For detailed discussion of this topic, see Wegner, Fairbank, Epstein & Chernow, *Cal. Prac. Guide: Civil Trials & Evidence* (TRG), Ch. 17.

- a. [17:571] **Matters recoverable:** CCP §1033.5 specifies the items allowable as costs of suit, including filing, motion and jury fees; service of process fees; cost of depositions, etc.; and “(a)ttorney fees when authorized by . . . contract, statute, or law.” [CCP §1033.5(a)(10)]

Expert witness fees are *not* recoverable as court costs “(e)xcept when expressly authorized by law.” [CCP §1033.5(b)(1)]

- (1) [17:572] **FEHA actions—attorney fees and expert witness fees recoverable:** In actions brought under the FEHA (other than actions brought by the DFEH), the court, in its discretion, may award to the prevailing party “reasonable attorney’s fees and costs, *including expert witness fees . . .*” [Gov.C. §12965(b) (emphasis added); see *Anthony v. City of Los Angeles* (2008) 166 CA4th 1011, 1017, 83 CR3d 306, 310—affirming award of expert witness fees]
- (2) [17:573] **Contract actions—expert witness fees not recoverable under contract provision for “fees and costs”:** In light of the express prohibition against inclusion of expert witness fees within a costs award (above), such fees are not recoverable as costs under a *contract* provision for “fees and costs” to the prevailing party. Such a provision may not be read to include nonstatutory costs. [*Robert L. Cloud & Assocs., Inc. v. Mikesell* (1999) 69 CA4th 1141, 1154, 82 CR2d 143, 146]
- (3) [17:574] **Expert witness fees in actions brought on private attorney general theory?** Expert witness fees and other nonstatutory costs have been allowed as

costs in an age discrimination action brought under a private attorney general theory to benefit the public (CCP §1021.5). Rationale: Section 1021.5 was designed to adopt federal cases that award expert witness fees and similar expenses in private attorney general

(Text cont'd on p. 17-89)

RESERVED



cases. [Beasley v. Wells Fargo Bank (1991) 235 CA3d 1407, 1420-1422, 1 CR2d 459, 466-467]

However, the California Supreme Court has not decided this issue. [See Davis v. KGO-T.V., Inc. (1998) 17 C4th 436, 446, 71 CR2d 452, 458, fn. 5]

[17:575-584] Reserved.

2. [17:585] **Under Federal Law:** Under federal law, the prevailing party may claim statutory costs under normal cost provisions: "(C)osts other than attorneys' fees shall be allowed as of course to the prevailing party *unless the court otherwise directs.*" [FRCP 54(d)(1) (emphasis added)]

Cross-refer: For a detailed discussion of costs recovery in federal court, see Jones, Rosen, Wegner & Jones, *Rutter Group Prac. Guide: Federal Civil Trials & Evidence* (TRG), Ch. 19.

- a. [17:586] **Limitation in diversity actions:** In diversity actions, if plaintiff recovers *less than \$75,000*, plaintiff may not recover costs (and must pay defendant's costs). [28 USC §1332(b)]
- b. [17:587] **Items allowable as costs generally:** Certain fees and disbursements are taxable as costs in civil actions generally, including the clerk's filing fees, fees for service of summons and complaint, fees for service of subpoenas, witness fees, etc. [See 28 USC §§1920 & 1821; and *Hogan v. General Elec. Co.* (ND NY 2001) 144 F.Supp.2d 138, 143—costs may include reasonable out-of-pocket expenses normally charged to clients if not part of ordinary overhead]
 - (1) [17:588] **Compare—expert witness fees:** Expert witness fees are *not* among the cost items allowed by statute, and hence are generally *not* recoverable as costs (except where a specific statute allows for their recovery, or the expert is appointed by court order). [See 28 USC §1920(6); *West Virginia Univ. Hosps., Inc. v. Casey* (1991) 499 US 83, 86-88, 111 S.Ct. 1138, 1141-1142]
- c. [17:589] **Federal Civil Rights Act actions:** In actions under 42 USC §1981, or for *intentional* employment discrimination under §1981a, the court has *discretion* to award "a reasonable attorney's fee as part of the costs . . . (and) may include expert fees as *part of the attorney's fee.*" [42 USC §1988(b),(c) (emphasis and parentheses added)]

This authorization permits recovery as part of an attorney fee award of those out-of-pocket expenses that *would normally be charged to a fee-paying client* and not built into the attorney's hourly rate. [See *Missouri v. Jenkins by Agyei*

(1989) 491 US 274, 288, 109 S.Ct. 2463, 2471; *Harris v. Marhoefer* (9th Cir. 1994) 24 F3d 16, 19]

- (1) [17:590] **Includes items not allowable as court costs:** Items not otherwise recoverable as court costs under FRCP 54(d), above, may be recovered as part of the "attorney's fee," including:

- investigator's fees,
- photocopying,
- computer-assisted legal research,
- long-distance telephone charges, and
- paralegal fees,

as long as these are billed to the client in the ordinary course of business. [*Harris v. Marhoefer*, supra, 24 F3d at 19-20; *Missouri v. Jenkins by Agyei*, supra, 491 US at 288, 109 S.Ct. at 2471—paralegal work may be billed at market rate rather than at cost where this is the prevailing practice in relevant market]

- (2) [17:591] **Expert witness fees:** The court also has discretion to include expert witness fees as part of the attorney fee award in actions brought pursuant to Title VII and the ADA (42 USC §§2000e-5(k), 12117(a)) and §1981 of the Civil Rights Act. [42 USC §1988(c); see *Harris v. Marhoefer*, supra, 24 F3d at 20—upholding fee award to expert witness who aided in deposing opposing party's expert]

- (a) [17:592] **ADEA:** Courts disagree whether expert witness fees are recoverable under the ADEA. [See *Ryther v. KARE 11* (D MN 1994) 864 F.Supp. 1525, 1533-1534 (fees of testifying expert witnesses recoverable under ADEA); compare *James v. Sears, Roebuck & Co., Inc.* (10th Cir. 1994) 21 F3d 989, 996-997 (contra) (expert witness fees not recoverable under ADEA)]

[17:593-599] Reserved.

H. ATTORNEY FEES

1. Authority for Fee Awards

- a. [17:600] **Federal law:** Court authority to award attorney fees under federal law depends on the nature of the action:

- (1) [17:601] **Discretionary fee awards:** A court has *discretion* to award reasonable attorney fees and costs to the *prevailing party* in actions under:

- Title VII (42 USC §2000e-5(k));
- Section 1981 of the Civil Rights Act (42 USC §1988);
- the ADA (42 USC §12205); and
- ERISA (29 USC §1132(g)).

(a) [17:602] **Belongs to client, not attorney:** It is the prevailing party, not the attorney, who is eligible for fees under these statutes. The attorney lacks standing to pursue the award on his or her own behalf. After the client exercises the right to receive fees, the attorney may seek payment from the client. [*Evans v. Jeff D.* (1986) 475 US 717, 730, 106 S.Ct. 1531, 1539, fn. 19; *Pony v. County of Los Angeles* (9th Cir. 2006) 433 F3d 1138, 1142 (fees under 42 USC §1988)]

1) [17:602.1] **Compare—fee awards under California FEHA:** Unless attorney and client have agreed otherwise, fee awards under the FEHA belong to the attorney not the client. See discussion at ¶17:649.20.

(b) [17:602.2] **No effect on amount payable under attorney-client fee agreement:** The federal fee-shifting statutes (¶17:601) requiring defendant to pay the attorney fees of a prevailing party plaintiff do *not* affect the enforceability of a fee agreement between plaintiff and his or her attorney. The statutes control “what the losing defendant must pay, not what the prevailing plaintiff must pay his lawyer.” [*Gobert v. Williams* (5th Cir. 2003) 323 F3d 1099, 1100—Title VII attorney fee award to plaintiff did not bar enforcement of 35% contingent-fee provision in retainer agreement with her attorney]

Consistent with the above, case law regarding the reasonableness of fee awards under the fee-shifting statutes (¶17:685 ff.) does *not* apply to determine the reasonableness of the amount payable under a contingency-fee agreement. [*Gobert v. Williams*, *supra*, 323 F3d at 1100]

(2) [17:603] **Mandatory fee awards:** Some federal statutes *mandate* an award to prevailing plaintiffs:

(a) [17:604] **ADEA, FLSA:** The Age Discrimination in Employment Act (ADEA) incorporates selected provisions of the Fair Labor Standards Act (FLSA), including those pertaining to attorney fee awards. An award of attorney fees is *mandatory* (rather than discretionary) to a successful *plaintiff* (rather than to the “prevailing party”). [See 29 USC §626(b), incorporating FLSA attorney fees provision, 29 USC §216(b)]

1) [17:605] **Compare—prevailing defendants:** The FLSA attorney fees provision does not address whether or under what circumstances

fees may be awarded to a prevailing defendant. Such awards have been held proper only upon a finding that plaintiff litigated in *bad faith*. [*Turlington v. Atlanta Gas Light Co.* (11th Cir. 1998) 135 F3d 1428, 1437—relying on court's "inherent power" to assess attorney fees for bad faith in litigation]

Cross-refer: A district court's inherent power to sanction bad faith conduct is discussed in Schwarzer, Tashima & Wagstaffe, *Cal. Prac. Guide: Federal Civ. Pro. Before Trial* (TRG), Ch. 17.

- 2) [17:606] **Compare—U.S. as plaintiff:** Also, where the suit was brought by the U.S. government, a prevailing defendant in an ADEA action may seek fees under the Equal Access to Justice Act (EAJA). That Act makes the U.S. liable for fees to the same extent a party would be liable at common law. [28 USC §2412(b); see *EEOC v. Hendrix College* (8th Cir. 1995) 53 F3d 209, 211—recognizing court's inherent power to award fees against U.S. where EEOC acted "in bad faith, vexatiously, wantonly, or for oppressive reasons"]

- (b) [17:607] **FMLA:** The Family and Medical Leave Act (FMLA) states that if plaintiff recovers *judgment*, the court "shall . . . allow a reasonable attorney's fee . . . to be paid by the defendant." [29 USC §2617(a)(3)]

This language *mandates* an award of fees when plaintiff wins a judgment in any amount, even for nominal damages. [*McDonnell v. Miller Oil Co., Inc.* (4th Cir. 1998) 134 F3d 638, 640]

- 1) [17:608] **Amount discretionary:** Although an award is mandatory, the court may adjust the amount to reflect the *degree* of plaintiff's success. [*McDonnell v. Miller Oil Co., Inc.*, supra, 134 F3d at 640]
- (3) [17:609] **Standards governing fee awards:** Two different standards govern fee awards under federal civil rights statutes providing for attorney fees to the "prevailing party." These differing standards reflect the policy of encouraging private litigation to enforce important civil rights. [*Christiansburg Garment Co. v. EEOC* (1978) 434 US 412, 422, 98 S.Ct. 694, 701, fn. 20]

These standards apply in employment discrimination cases. [See *Hawkins v. 1115 Legal Service Care* (2nd

Cir. 1998) 163 F3d 684, 694-695 (Title VII case); *Hannon v. Chater* (ND CA 1995) 900 F.Supp. 1276, 1284, fn. 23 (same); *Roepsch v. Bentsen* (ED WI 1994) 846 F.Supp. 1363, 1370 (ADEA case)]

(a) [17:610] **P**revailing plaintiffs: A prevailing plaintiff “should ordinarily recover an attorney’s fee unless special circumstances would render such an award unjust.” [*Newman v. Piggie Park Enterprises* (1968) 390 US 400, 401, 88 S.Ct. 964, 966; *Hensley v. Eckerhart* (1983) 461 US 424, 429, 103 S.Ct. 1933, 1937; see *Barrios v. California Interscholastic Federation* (9th Cir. 2002) 277 F3d 1128, 1134—same standard in ADA actions; and ¶17:635]

- 1) [17:611] **R**ationale: “If successful plaintiffs were routinely forced to bear their own attorneys’ fees, few aggrieved parties would be in a position to advance the public interest. . . .” [*Newman v. Piggie Park Enterprises*, supra, 390 US at 402, 88 S.Ct. at 966]
- 2) [17:612] **P**ro se litigants ineligible: The U.S. Supreme Court has held that pro se litigants, including pro se attorney litigants, are not entitled to a fee award in federal civil rights actions under 42 USC §1988. [*Kay v. Ehrler* (1991) 499 US 432, 437-438, 111 S.Ct. 1435, 1437-1438]

Rationale: Section 1988 fee-shifting is designed to enable plaintiffs to obtain competent counsel to ensure effective prosecution of meritorious claims. That policy is best served by a rule creating the incentive to retain counsel in every case. [*Kay v. Ehrler*, supra, 499 US at 437-438, 111 S.Ct. at 1437-1438]

(b) [17:613] **P**revailing defendants: In contrast, a *prevailing defendant* is entitled to fees only if plaintiff’s lawsuit “was unreasonable, frivolous, or vexatious” or “plaintiff continued to litigate after it clearly became so.” [*Christiansburg Garment Co. v. EEOC* (1978) 434 US 412, 421, 98 S.Ct. 694, 700—Title VII action; *Summers v. A. Teichert & Son, Inc.* (9th Cir. 1997) 127 F3d 1150, 1154—same standard in ADA actions]

- 1) [17:614] **A**dverse judgment alone not sufficient: An action is *not* unreasonable or groundless simply because plaintiff ultimately lost: “Even when the law or the facts appear questionable or unfavorable at the outset, a

plaintiff may have an entirely reasonable ground for bringing the suit.” [*Christiansburg Garment Co. v. EEOC*, supra, 434 US at 421, 98 S.Ct. at 700; see also *Tutor-Saliba Corp. v. City of Hailey* (9th Cir. 2006) 452 F3d 1055, 1060 (not an employment case); *Quintana v. Jenne* (11th Cir. 2005) 414 F3d 1306, 1310-1312—fees could be awarded under Title VII for defending against one frivolous claim but not for defending against another claim that, while unsuccessful, was not frivolous]

- 2) [17:615] **Court discretion to deny fees:** Notwithstanding a finding of frivolousness, the district court retains discretion to deny or reduce fee requests after considering all the nuances of a particular case. [*Thomas v. City of Tacoma* (9th Cir. 2005) 410 F3d 644, 650-651]
- 3) [17:616] **Effect of joining frivolous and nonfrivolous claims:** A partial award of attorney fees and costs is permissible when frivolous and nonfrivolous claims are joined in the same action but the frivolous claims are *distinct*. The court must weigh and assess the amount of fees attributable to the frivolous claim. [*Tutor-Saliba Corp. v. City of Hailey*, supra, 452 F3d at 1063-1064]

It is unclear whether a partial fee award is proper, however, when the interrelated frivolous and nonfrivolous claims are *not sufficiently distinct*. [*Tutor-Saliba Corp. v. City of Hailey*, supra, 452 F3d at 1064, fn. 4]

[17:617-619] Reserved.

- (4) [17:620] **Determining whether plaintiff is “prevailing” party:** Plaintiffs “prevail” when actual relief on the merits of their claim *materially alters the parties’ legal relationship* in a way that directly benefits plaintiffs. [*Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health & Human Resources* (2001) 532 US 598, 603-604, 121 S.Ct. 1835, 1839-1840]
- (a) [17:620.1] **Court-ordered relief required:** Plaintiff secures a “material alteration of the parties’ legal relationship” where plaintiff “has prevailed on the merits of at least *some* of his claims.” [*Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health & Human Resources*, supra, 532 US at 603, 121 S.Ct. at 1839 (emphasis added)]

1) [17:621] **Judgment or consent decree:** The relief may be in the form of a judgment on the merits or a settlement enforced through a consent decree. [*Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health & Human Resources*, supra, 532 US at 604, 121 S.Ct. at 1840; see *Smyth ex rel. Smyth v. Rivero* (4th Cir. 2002) 282 F3d 268, 276-277—in \$1983 civil rights case, grant of preliminary injunction insufficient to render plaintiff “prevailing party”]

2) [17:622] **Private settlement insufficient:** But a private settlement alone does not make plaintiff the “prevailing” party: “Private settlements do not entail the judicial approval and oversight involved in consent decrees.” [*Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health & Human Resources*, supra, 532 US at 604, 121 S.Ct. at 1840, fn. 7; but see *Barrios v. California Interscholastic Federation* (9th Cir. 2002) 277 F3d 1128, 1134-1135 & fn. 5—ADA plaintiff “prevails” by entering into legally enforceable settlement (contrary language in *Buckhannon* treated as dictum)]

3) [17:623] **Voluntary change insufficient:** Nor do plaintiffs “prevail” where their lawsuit simply acted as a “catalyst” for a voluntary change in defendant’s conduct. [*Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health & Human Resources*, supra, 532 US at 605, 121 S.Ct. at 1840]

[17:624] *Reserved.*

(b) [17:625] **Effect of “prevailing” on some claims and not others:** Plaintiff is the “prevailing party” if he or she succeeds “on *any* significant issue in litigation which achieves *some of the benefit* the parties sought in bringing suit.” [*Hensley v. Eckerhart* (1983) 461 US 424, 433, 103 S.Ct. 1933, 1939 (emphasis added)]

Where plaintiff succeeds on some claims and not others, the court must determine whether the successful and unsuccessful claims are *related* (i.e., a common core of facts based on related legal theories). [*Hensley v. Eckerhart*, supra, 461 US at 434, 103 S.Ct. at 1940]

- If the claims were *distinctly different*, no fees may be awarded for time spent on unsuccessful claims;

- If the claims were *related*, fees must reflect the *overall level of success* achieved; i.e., full compensation for all hours spent may be excessive where only “partial or limited” relief was obtained. [*Thomas v. City of Tacoma* (9th Cir. 2005) 410 F3d 644, 649-650; *Schwarz v. Secretary of Health & Human Services* (9th Cir. 1995) 73 F3d 895, 902; see also *Harman v. City & County of San Francisco* (2006) 136 CA4th 1279, 1307-1308, 39 CR3d 589, 610]

[17:625.1-625.4] *Reserved.*

- 1) [17:625.5] **Related state and federal claims:** Plaintiffs who assert related state and federal claims and win on both are entitled to a fee award under the federal statute even if the jury awards *damages only on the state law claim*. It is enough that the operative facts were determined in plaintiff’s favor on the federal claim. [See *Hall v. Western Production Co.* (10th Cir. 1993) 988 F2d 1050, 1055-1057—plaintiff prevailed both on breach of contract and ADEA claims but jury awarded zero damages on ADEA claim and substantial damages on breach of contract claim]

But if plaintiffs *lose* on the federal claim, the fact that they win on a related state law claim should not support a fee award under the federal statute. [See *Mateyko v. Felix* (9th Cir. 1990) 924 F2d 824, 828—plaintiff who lost §1983 civil rights action but won state law battery claim could *not* recover attorney fees under 42 USC §1988; see also *McFadden v. Villa* (2001) 93 CA4th 235, 237, 241-242, 113 CR2d 80, 81, 84-85]

On the other hand, when plaintiffs are only *partially successful* on the state claim, an apportionment of a fee award between the state and federal claim is *not* necessarily required if:

- the claims are “virtually interchangeable”;
- there was no “gross disproportion” in the time expended by counsel on the two claims; and
- only a small percentage of the total hours expended on the entire matter was attributable to the state claim. [*EI-Hakem v. BJY Inc.* (9th Cir. 2005) 415 F3d 1068, 1075-1076—no apportionment made where par-

tially successful state law wage claim required little more in way of factual development or legal analysis than that required for federal discrimination claim; see also ¶17:710]

(c) [17:626] **Effect of nominal damages:** A plaintiff who recovers only nominal damages may be the “prevailing party” in a technical sense, but courts have discretion to consider the *extent of success* in calculating a fee award. A “proportionality” concept applies. [*Farrar v. Hobby* (1992) 506 US 103, 114-115, 113 S.Ct. 566, 575]

- 1) [17:627] **Solely monetary claims:** When the *sole* purpose of a civil rights claim is recovery of damages, an award of nominal damages indicates failure to prove actual, compensable injury. In such cases, plaintiffs may deserve to receive no attorney fees at all. [*Farrar v. Hobby*, *supra*, 506 US at 115, 113 S.Ct. at 575]
- 2) [17:628] **Claims seeking other relief:** But the result is different where the suit achieves significant results despite a nominal damages award: “If the lawsuit achieved other tangible results—such as sparking a change in policy or establishing a finding of fact with potential collateral estoppel effects—such results will, in combination with an enforceable judgment for a nominal sum, support an award of fees.” [*Wilcox v. City of Reno* (9th Cir. 1994) 42 F3d 550, 555—\$66,535 fee award upheld although plaintiff recovered only \$1 in damages in police brutality action against City, because litigation precipitated City’s discipline of officer and modification of its use of force policy]
 - [17:629] As stated by another court, a nominal damages recovery precludes an attorney fee award “*only when the action serves no public purpose.*” [*Gudenkauf v. Stauffer Communications, Inc.* (10th Cir. 1998) 158 F3d 1074, 1078 (emphasis in original)]

(d) [17:630] **Mixed-motives cases:** Where illegal discrimination was only one of several reasons motivating the employer’s action, and the other reasons are lawful (e.g., poor job performance by employee), the court has *discretion* to award attorney fees “directly attributable” to the pursuit of the

unlawful employment practice claim. [See 42 USC §2000e-5(g)(2)(B)(i)]

Effect: The employer's success in its mixed-motives defense avoids liability for damages but does not necessarily bar an award of attorney fees. That matter is left to the district court's discretion. [*Norris v. Sysco Corp.* (9th Cir. 1999) 191 F3d 1043, 1051—plaintiff who was denied promotion in part because of her gender could not recover damages for Title VII violation because there were other lawful reasons for employer's action; but court still had *discretion* to award her fees]

- [17:631] Some cases state a fee award to plaintiff is proper whenever impermissible discrimination was a factor in discharge: "(A) fee award is the only form of redress available to make the victim whole for *vindicating society's interest* in a discrimination-free workplace." [*Gudenkauf v. Stauffer Communications, Inc.*, supra, 158 F3d at 1078, 1082 (emphasis added); *Forrest v. Stinson Seafood Co.* (D ME 1998) 990 F.Supp. 41, 45—plaintiff who was denied employment in part because of her gender could recover attorney fees because her lawsuit was of *significant public service* in opening careers closed to women]
- [17:632] But more courts consider the relationship between the fees and the *degree* of plaintiff's success (utilizing the "proportionality" test espoused by the U.S. Supreme Court in *Farrar v. Hobby*, ¶17:626). Thus, fees may be denied where "relief to the plaintiff is otherwise trivial and the lawsuit promotes few public goals." [*Sheppard v. Riverview Nursing Ctr., Inc.* (4th Cir. 1996) 88 F3d 1332, 1336; see *Norris v. Sysco Corp.*, supra, 191 F3d at 1051-1052]
- [17:633] Attorney fee awards have been held improper in *dual motive retaliation* cases because a finding of dual motives exonerates the employer (see ¶17:840 ff.). [*Garner v. Missouri Dept. of Mental Health* (8th Cir. 2006) 439 F3d 958, 961]

[17:634] Reserved.

- (5) [17:635] **"Special circumstances" justifying denial of fees?** Because an attorney fee award is *discretionary* under both Title VII and §1981, it may be denied where "special circumstances exist that would make an

award unjust.” [See *Hensley v. Eckerhart* (1983) 461 US 424, 430, 103 S.Ct. 1933, 1937 (internal quotes omitted)]

- (a) [17:636] **Narrowly interpreted:** A fee award’s purpose is to encourage injured individuals to seek judicial relief. Thus, the discretion to deny a fee award to a prevailing plaintiff has been interpreted *very narrowly*. Fee awards have consistently been upheld against claims that “special circumstances” make the award unjust. [See *New York Gaslight Club, Inc. v. Carey* (1980) 447 US 54, 70, 100 S.Ct. 2024, 2034, fn. 9—fee award upheld although plaintiffs were represented without charge by a public interest group; *Barlow-Gresham Union High School Dist. No. 2 v. Mitchell* (9th Cir. 1991) 940 F2d 1280, 1286—fee award upheld although defendant was willing to enter into early settlement; see also *National Ass’n for Advancement of Colored People v. Town of East Haven* (2nd Cir. 2001) 259 F3d 113, 118-121—abuse of discretion for court to deny fees on speculative ground that plaintiff could have achieved its objectives without filing suit]

[17:637-644] *Reserved.*

- b. [17:645] **Under California law:** Under California law, attorney fees are recoverable from the opposing party only as specifically provided by *statute or contract*. [See CCP §1021]

- (1) [17:646] **FEHA:** The court in its discretion may award fees and costs to the “prevailing party” in FEHA actions. [Gov.C. §12965(b)]

California courts have relied upon federal cases interpreting Title VII and the ADEA in determining the standards governing FEHA fee recoveries. [See *Linsley v. Twentieth Century Fox Film Corp.* (1999) 75 CA4th 762, 766, 89 CR2d 429, 431]

- (a) [17:647] **Plaintiff as prevailing party:** Although the statute provides that the court “may” award fees, cases hold a prevailing plaintiff is entitled to fees “absent circumstances that would render the award unjust.” [*Stephens v. Coldwell Banker Comm’l Group, Inc.* (1988) 199 CA3d 1394, 1406, 245 CR 606, 613 (disapproved on other grounds in *White v. Ultramar, Inc.* (1999) 21 C4th 563, 88 CR2d 19); *Horsford v. Board of Trustees of Calif. State Univ.* (2005) 132 CA4th 359, 394, 33 CR3d 644, 671]

- 1) [17:648] **Absent judgment or consent decree?** Some cases state fee awards to plain-

tiffs are proper where the employee's lawsuit was a "catalyst" motivating the employer to provide the relief sought voluntarily. [See *Westside Community for Independent Living, Inc. v. Obledo* (1983) 33 C3d 348, 353, 188 CR 873, 876]

[17:648.1-648.4] Reserved.

- 2) [17:648.5] **Mixed-motives cases?** It is not clear if fees may be awarded under the FEHA when the employer proves it would have taken the same action even in the absence of an impermissible motivating factor. [See *Shaw v. City of Sacramento* (9th Cir. 2001) 250 F3d 1289, 1294]

Compare—federal rule: Federal courts have discretion to award fees and costs attributable to a Title VII violation even if the employer proves it would have taken the same action in the absence of a discriminatory motive. [42 USC §2000e-5(g)(2)(B); see ¶17:630]

[17:648.6-648.9] Reserved.

- 3) [17:648.10] **Where modest damages could have been recovered in limited jurisdiction court?** To encourage litigation in the appropriate forum, courts of *unlimited jurisdiction* (CCP §88) may deny attorney fees outright where the damages recovered could have been obtained in a court of *limited jurisdiction* (CCP §85). [See CCP §1033(a)] (Cross-refer: Limited vs. unlimited jurisdiction courts are discussed in Weil & Brown, *Cal. Prac. Guide: Civ. Pro. Before Trial* (TRG), Ch. 3.)

Whether this statute allows courts to deny fees to a successful plaintiff in FEHA cases is presently unclear. (If it does, it may discourage low-value FEHA claims because the employees' attorneys will not be assured of recovering the full measure of reasonable fees.)

Caution: This issue is presently before the California Supreme Court in *Chavez v. City of Los Angeles*, Case No. S162313 (rev.grntd. 5/14/08).

[17:648.11-648.14] Reserved.

- 4) [17:648.15] **Not where case “over-lawyered”:** The FEHA authorizes only rea-

sonable fee awards. Thus, fees may be limited where “there is no way on earth this case justified the hours purportedly billed by (plaintiff’s lawyers.” [See *Harrington v. Payroll Entertainment Services, Inc.* (2008) 160 CA4th 589, 594, 72 CR3d 922, 925 (parentheses added)]

- (b) [17:649] **Defendant as prevailing party:** In contrast, a prevailing defendant is entitled to fees under the FEHA only if plaintiff’s discrimination claim is “*frivolous, unreasonable or groundless.*” [*Cummings v. Benco Building Services* (1992) 11 CA4th 1383, 1389, 15 CR2d 53, 57 (emphasis added) (adopting standards set forth by U.S. Supreme Court in *Christiansburg Garment Co. v. EEOC*, see ¶17:613); *Jersey v. John Muir Med. Ctr.* (2002) 97 CA4th 814, 831, 118 CR2d 807, 820].

Moreover, whether plaintiff’s claim was so groundless as to warrant a fee award must be evaluated with respect to the *entire complaint*, not just the FEHA cause of action. [*Jersey v. John Muir Med. Ctr.*, supra, 97 CA4th at 832, 118 CR2d at 821]

Compare—defense costs: A prevailing FEHA defendant may recover ordinary litigation costs (¶17:570) even if lawsuit was *not* frivolous, unreasonable or groundless. [*Perez v. County of Santa Clara* (2003) 111 CA4th 671, 681, 3 CR3d 867, 876; but see *Cummings v. Benco Building Services*, supra, 11 CA4th at 1387, 15 CR2d at 55—fees and costs recoverable only if litigation frivolous, etc.]

Compare—attorney fees and costs under CCP §998: Normally, a defendant who prevails after making an unaccepted CCP §998 offer may recover its postoffer attorney fees and costs (including expert witness fees) if otherwise recoverable by statute or contract. But in litigation under the FEHA and similar laws, the trial court must consider the employee’s financial resources. The court may be required “*to ‘scale’ (the §998 award) downward* to a figure that will not unduly pressure modest or low income plaintiffs into accepting unreasonable offers.”[*Seever v. Copley Press, Inc.* (2006) 141 CA4th 1550, 1562, 47 CR3d 206, 214 (emphasis and parentheses added); see also *Mangano v. Verity, Inc.* (2008) 167 CA4th 944, 951, 84 CR3d 526, 531-532—CCP §998 does not trump FEHA requirement that prevailing defendant entitled to attorney fees only if action “unreasonable, frivolous or meritless”]

- 1) [17:649.1] **Not routinely granted:** It is an abuse of discretion to award fees to a defendant in a FEHA action solely because plaintiff loses the action. "This kind of hindsight logic could discourage all but the most airtight claims . . ." [*Rosenman v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro* (2001) 91 CA4th 859, 865, 110 CR2d 903, 907 (internal quotes omitted)]

Rather, it must appear that plaintiff's conduct was "egregious," or that his or her case was "patently baseless for objective reasons." [*Cummings v. Benco Building Services*, *supra*, 11 CA4th at 1389-1390, 15 CR2d at 57]

Thus, "where the plaintiff presents a colorable claim, and particularly where the adverse jury verdict is less than unanimous, such an award is inappropriate in light of the very strong public antidiscrimination policy embodied in FEHA. Any other standard would have the disastrous effect of closing the courtroom door to plaintiffs who have meritorious claims but who dare not risk the financial ruin caused by an award of attorney fees if they ultimately do not succeed." [*Rosenman v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro*, *supra*, 91 CA4th at 873-874, 110 CR2d at 914]

- a) [17:649.2] **Court must consider plaintiff's ability to pay:** The plaintiff's ability to pay must be considered before awarding attorney fees in favor of the defendant in a FEHA action. [*Villanueva v. City of Colton* (2008) 160 CA4th 1188, 1203, 73 CR3d 343, 356—\$40,000 fee award to City upheld where City Employee earning \$25 per hour failed to offer any evidence of inability to pay]

[17:649.3-649.4] Reserved.

- 2) [17:649.5] **Lack of merit discovered after suit filed:** Where plaintiff discovers the weakness of his or her claims *after* filing suit (e.g., during discovery), continuation of the suit may be deemed "frivolous, unreasonable or groundless." In such cases, a FEHA fee award to prevailing defendants is proper from the time plaintiff was aware of facts demonstrating the absence of discrimination. [See *Rosenman v. Christensen, Miller, Fink, Jacobs, Glaser, Weil*

& *Shapiro*, supra, 91 CA4th at 873, 110 CR2d at 913, citing *Moss v. Associated Press* (CD CA 1996) 956 F.Supp. 891, 894 (applying Calif. law); *EEOC v. United Parcel Service, Inc.* (9th Cir. 2005) 424 F3d 1060, 1078 (applying Calif. law)]

- 3) [17:649.6] **Written findings required:** To ensure that the public policy served by FEHA actions is not thwarted, written findings are required showing why plaintiff's discrimination claim was "frivolous, unreasonable or groundless." Failure to make such findings is reversible error. [*Rosenman v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro*, supra, 91 CA4th at 868, 110 CR2d at 909-910; *Jersey v. John Muir Med. Ctr.*, supra, 97 CA4th at 831, 118 CR2d at 820-821]

[17:649.7-649.9] Reserved.

4) **Application**

- [17:649.10] An employment discrimination action was "frivolous, unreasonable and groundless" where plaintiff pursued the action after executing a valid release of all claims arising from employment. [*Linsley v. Twentieth Century Fox Film Corp.* (1999) 75 CA4th 762, 766, 89 CR2d 429, 431]
- [17:649.11] The mere fact that summary judgment is granted in favor of the employer in an FEHA action for sex discrimination does not entitle the employer to an award of attorney fees. There must be a showing that the action was "frivolous, unreasonable, or groundless." [*Jersey v. John Muir Med. Ctr.*, supra, 97 CA4th at 831, 118 CR2d at 820]
- [17:649.11a] Conversely, the fact that plaintiff's case survived a motion for summary judgment and a motion for nonsuit does not necessarily preclude awarding fees to the employer. The evidence at trial may nevertheless disclose the frivolity of the claims. [See *Rosenman v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro*, supra, 91 CA4th at 866, 110 CR2d at 908]
- [17:649.12] The fact that plaintiff's witnesses are not credible does *not* itself show the claim is frivolous. An "airtight" claim is

not a prerequisite to bringing suit. [See *Rosenman v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro*, supra, 91 CA4th at 872, 110 CR2d at 912]

- [17:649.13] Where plaintiff's pregnancy discrimination claim was supported by independent and expert testimony as well as her own testimony (although she ultimately lost), the mere fact that plaintiff was impeached at trial with respect to one matter (date of job assignments) did not show her FEHA claim was frivolous. [*Rosenman v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro*, supra, 91 CA4th at 873, 110 CR2d at 913]
- [17:649.14] On the other hand, a fee award to prevailing defendants may be supported by proof of fabricated evidence or "blatant perjury" as to the *essential facts* on which the FEHA claim was based (i.e., plaintiff lied about what occurred to her). [*Saret-Cook v. Gilbert, Kelly, Crowley & Jennett* (1999) 74 CA4th 1211, 1229-1230, 88 CR2d 732, 745]

[17:649.15-649.19] Reserved.

- (c) [17:649.20] **Fee award belongs to attorney, not party:** Although Gov.C. §12965(b) authorizes fees "to the prevailing party," as between the prevailing party and his or her attorney, a FEHA fee award belongs to the attorney *unless* the parties have agreed otherwise. [*Flannery v. Prentice* (2001) 26 C4th 572, 577, 110 CR2d 809, 813—plaintiff who recovered \$250,000 verdict for employer's FEHA violations was not entitled to any portion of \$1 million fee award]

Compare—Title VII fee awards: The rule is *contra* under Title VII; fee awards belong to the client, not the attorney (see ¶17:602).

- (2) [17:650] **Plaintiffs under "private attorney general" doctrine (CCP §1021.5)?** California courts have equitable power to award fees in private actions where:

- the litigation results in "enforcement of an important right affecting the *public interest* ";
- a significant benefit (whether or not pecuniary) has been conferred on the general public or a *large class* of persons;

- the *financial burden* of private enforcement makes a fee award appropriate; and
- *justice requires* that such fees be paid by defendant rather than out of any recovery in the litigation. [CCP §1021.5; see *Press v. Lucky Stores, Inc.* (1983) 34 C3d 311, 318-319, 193 CR 900, 903-904—not limited to plaintiffs who prevail in “landmark” cases]

- (a) [17:651] **Not in employment litigation generally:** Fees may not be awarded under CCP §1021.5 where the primary effect of the employment litigation is *to advance or vindicate the plaintiff's personal economic interest* (as opposed to enforcing a right affecting the public interest). [*Weeks v. Baker & McKenzie* (1998) 63 CA4th 1128, 1170, 74 CR2d 510, 536-537; *Flannery v. California Highway Patrol* (1998) 61 CA4th 629, 635, 71 CR2d 632, 635-636; *Shaw v. City of Sacramento* (9th Cir. 2001) 250 F3d 1289, 1295 (applying Calif. law)]
- (b) [17:652] **Compare:** But §1021.5 awards have been upheld in a few cases involving *governmental employers*:

- [17:653] A §1021.5 fee award was proper to California Public Utilities Commission employees who won an age discrimination suit against the agency. The court found their victory would deter the PUC and other state agencies from discriminating in the future. [*Crommie v. State of Calif. Public Util. Comm'n* (ND CA 1994) 840 F.Supp. 719, 722, aff'd (9th Cir. 1995) 67 F3d 1470; see also *Jabola v. Pasadena Redevelop. Agency* (1981) 125 CA3d 931, 936, 178 CR 452, 454 (disapproved on other grounds in *Cranston v. City of Richmond* (1985) 40 C3d 755, 221 CR 779)—same]
 - (c) [17:654] **Fee award belongs to attorney, not party:** As with FEHA fee awards (¶17:649.20), as between attorney and client, a CCP §1021.5 fee award belongs to the attorney for whose services the award was made unless the parties have agreed otherwise. [*Flannery v. Prentice* (2001) 26 C4th 572, 590, 110 CR2d 809, 823; *Lindelli v. Town of San Anselmo* (2006) 139 CA4th 1499, 1509-1510, 43 CR3d 707, 715-716]
- [17:655-660] *Reserved.*
- (3) [17:661] **Successful plaintiff in wage claim action:** A successful plaintiff in a civil action to recover unpaid

wages or other forms of employee compensation is entitled to recover his or her attorney fees. [Lab.C. §§98.2(c), 218.5, 1194(a); see *Winterrowd v. American Gen. Annuity Ins. Co.* (9th Cir. 2009) 556 F3d 815, 820]

[17:661.1-661.4] Reserved.

(a) [17:661.5] **Includes salaried employees:** The Lab.C. §218.5 attorney fees provision applies to nonhourly employees, including salaried corporate executives. [*On-Line Power, Inc. v. Mazur* (2007) 149 CA4th 1079, 1085-1086, 57 CR3d 698, 702-703]

(b) [17:662] **Not in wage claim proceedings before Labor Commissioner:** A wage claim proceeding before the Labor Commissioner is not a “civil action” within the meaning of Lab.C. §1194. Therefore, an employee may not recover attorney fees incurred in such proceedings from the employer. [*Sampson v. Parking Service 2000 Com, Inc.* (2004) 117 CA4th 212, 223, 11 CR3d 595, 604; see *Bell v. Farmers Ins. Exch.* (2004) 115 CA4th 715, 746, 9 CR3d 544, 570]

(c) [17:662.1] **Fees on review of adverse ruling by Labor Commissioner:** If either party seeks judicial review of the Labor Commissioner’s ruling on the wage claim, the court may order the unsuccessful party to pay reasonable attorney fees to the “successful” party on the appeal. The employee is “successful” if he or she recovers any amount greater than zero. [Lab.C. §98.2(c); see ¶11:1425]

1) [17:662.2] **Labor Commissioner may represent indigent employees:** Where the employer appeals the Labor Commissioner’s ruling on a wage claim, indigent employees may ask the Labor Commissioner to represent them on the appeal (see Lab.C. §98.4). If the employer’s appeal is “unsuccessful,” the court may award attorney fees to the Labor Commissioner. [Lab.C. §98.2(c); see *Lolley v. Campbell* (2002) 28 C4th 367, 375-376, 121 CR2d 571, 576-577; and ¶11:1480]

(4) [17:663] **Contractual provisions:** Attorney fee awards may also be authorized by contract (e.g., the employment agreement). By statute, a one-sided attorney fee provision operates reciprocally: i.e., if the contract gives one party (the employer) the right to recover attorney fees in actions arising out of the contract, the

other (the employee) is entitled to fees upon prevailing in the action. [See Civ.C. §1717]

An award under Civ.C. §1717, however, is limited to fees incurred to "enforce the contract." No award can be made under §1717 for fees incurred in connection with *tort* claims (e.g., wrongful discharge in violation of public

(Text cont'd on p. 17-107)

RESERVED



policy). [*Casella v. SouthWest Dealer Services, Inc.* (2007) 157 CA4th 1127, 1162, 69 CR3d 445, 471]

- (a) [17:663.1] **Effect of claiming fees if employee loses:** Where the employee claims a contract allows fees and prevails, the employee is entitled to recover fees. But where the employee claims a contract allows fees *and loses*, the employer may be entitled to recover fees from the employee. Rationale: "A pleader should not be permitted to threaten a litigant with the prospect of an adverse attorney fees award and avoid the same fate if unsuccessful." [*International Billing Services, Inc. v. Emigh* (2000) 84 CA4th 1175, 1191, 101 CR2d 532, 543]

- (b) [17:664] **Limitation—collective bargaining agreements governed by LMRA:** Where a fee award is sought and authorized under a collective bargaining agreement (CBA), Civ.C. §1717 is *pre-empted* by the Labor Management Relations Act. Federal labor policy demanding *uniformity* in interpreting CBAs would be defeated by applying 50 different state laws on the issue of attorney fees. [*Roy Allen Slurry Seal v. Laborers Int'l Union of No. America Hwy. & Street Stripers/Road & Street Slurry Local Union 1184, AFL-CIO* (9th Cir. 2001) 241 F3d 1142, 1146]

Cross-refer: Fee awards under contractual attorney fees provisions are discussed in Weil & Brown, *Cal. Prac. Guide: Civ. Pro. Before Trial* (TRG), Ch. 1.

- (5) [17:665] **Effect of joinder of causes of action not allowing fee recovery:** When a cause of action for which attorney fees are provided by statute is joined with other causes for which attorney fees are *not* permitted, attorney fees are recoverable *only on the statutory cause of action*. [*Akins v. Enterprise Rent-A-Car Co. of San Francisco* (2000) 79 CA4th 1127, 1133-1134, 94 CR2d 448, 452-453]

This generally requires the trial court to *apportion* the fees so that the losing party is required to pay only for such fees as were incurred in prosecuting or defending the *statutory action*. [See *Bell v. Vista Unified School Dist.* (2000) 82 CA4th 672, 687, 98 CR2d 263, 273 (non-employment law case)]

However, apportionment is not required when the claims for relief are so *intertwined* that it would be impracticable, if not impossible, to separate the attorney's time into compensable and noncompensable units. [*Akins v. Enterprise Rent-A-Car Co. of San Francisco*, *supra*, 79 CA4th at 1133, 94 CR2d at 452]

- (a) [17:666] **Discretionary:** Apportionment of fees in such cases rests within the trial court's sound discretion; its exercise of discretion is abused only when its ruling "exceeds the bounds of reason, all of the circumstances before it being considered." *[Bell v. Vista Unified School Dist.*, supra, 82 CA4th at 687, 98 CR2d at 273 (internal quotes omitted)]
- [17:667-669] *Reserved.*
- c. [17:670] **Interim fee awards?** Because of the financial drain of protracted litigation, plaintiffs sometimes seek interim awards of attorney fees. Whether such an award is authorized depends on the nature of plaintiff's claims:
- (1) [17:671] **Civil rights cases:** Courts have discretion under the federal Civil Rights Attorney's Fee Act (42 USC §1988) to award attorney fees before a civil rights case is completed. Entry of *any order that determines substantial rights* of the parties may be an appropriate occasion upon which to consider awarding attorney fees. *[Hanrahan v. Hampton* (1980) 446 US 754, 756-757, 100 S.Ct. 1987, 1989; see also *Bradley v. School Bd. of City of Richmond* (1974) 416 US 696, 723, 94 S.Ct. 2006, 2022, fn. 28—school desegregation litigation]
 - (2) [17:672] **Rehabilitation Act:** The attorney fees provision of the Rehabilitation Act, "like the analogous provision of the Civil Rights Act," has been liberally construed to permit interim fee awards where plaintiff has prevailed on "significant legal principles affecting the substantive rights of the parties." *[Mantolete v. Bolger* (9th Cir. 1986) 791 F2d 784, 787-788]
 - (3) [17:673] **Compare—not under Title VII:** But interim fee awards in Title VII cases are awardable only to parties who have "prevailed" on the merits of their claims; interim fee awards are generally *improper*. *[Grubbs v. Butz* (DC Cir. 1976) 548 F2d 973, 975-976—no interim fees under Title VII; *Sperling v. United States* (3rd Cir. 1975) 515 F2d 465, 485—same]
 - (4) [17:674] **Compare—not under state law generally:** Most California statutes do *not* authorize interim fee awards. Fee awards are an element of "costs" awardable only upon a final judgment. [See Civ.C. §1717; CCP §1033.5(a)(10); *Bell v. Farmers Ins. Exch.* (2001) 87 CA4th 805, 833, 105 CR2d 59, 79—reversing interim fee award under Lab.C. §1194]
 - (a) [17:675] **"Private attorney general" statute (CCP §1021.5):** However, an exception is recognized for fee claims under CCP §1021.5, which

authorizes fee awards for litigation enforcing important rights in the *public interest* (¶17:650). Case law supports interim attorney fee awards in such cases. [See *Laurel Heights Improvement Ass'n v. Regents of Univ. of Calif.* (1988) 47 C3d 376, 428, 253 CR 426, 454-455]

[17:676-684] Reserved.

2. [17:685] **Determining Amount of Award:** The U.S. Supreme Court has described the “lodestar” method as the “guiding light” of “fee-shifting jurisprudence,” and has “established a ‘strong presumption’ that the lodestar represents the ‘reasonable’ fee . . .” [City of Burlington v. Dague (1992) 505 US 557, 562, 112 S.Ct. 2638, 2641]

The following standards generally apply in all cases in which an award of fees is authorized to a “prevailing party.” [See *Hensley v. Eckerhart* (1983) 461 US 424, 433, 103 S.Ct. 1933, 1939, fn. 7]

- a. [17:686] **“Lodestar” method:** The starting point in the attorney fee analysis is the lodestar figure, which is calculated using the *reasonable rate* for comparable legal services in the local community for noncontingent litigation of the same type, multiplied by the *reasonable number of hours spent* on the case. [Ketchum v. Moses (2001) 24 C4th 1122, 1131-1132, 104 CR2d 377, 384; Nichols v. City of Taft (2007) 155 CA4th 1233, 1242-1243, 66 CR3d 680, 687]

It is irrelevant to the “lodestar” calculation whether the parties’ fee agreement contemplates a fixed hourly rate or a contingency fee. [See *Blanchard v. Bergeron* (1989) 489 US 87, 93, 109 S.Ct. 939, 944—contingency fee agreement not a cap on attorney fee award]

- (1) [17:687] **Reasonable hours:** The number of hours reasonably worked is determined by looking at the time reasonably spent on a matter, including time spent drafting and revising pleadings, meeting with clients, preparing the case for trial, and handling an appeal. [See *Hensley v. Eckerhart*, *supra*, 461 US at 430, 103 S.Ct. at 1938, fn. 4; *Serrano v. Priest* (1977) 20 C3d 25, 48-49, 141 CR 315, 328, fn. 23]

- [17:688] Reasonable hours may also include *fee-related services*—i.e., time spent preparing and litigating the fee application. [*Hemmings v. Tidyman's Inc.* (9th Cir. 2002) 285 F3d 1174, 1200; *Serrano v. Unruh* (1982) 32 C3d 621, 639, 186 CR 754, 766]

- [17:689] Reasonable hours may include time spent by *more than one attorney* on a particular issue or task, provided there is no duplication of

effort. If there is duplication, the court may reduce the total hours claimed accordingly. [*Davis v. City & County of San Francisco* (9th Cir. 1992) 976 F2d 1536, 1544 (modified on other grounds at 984 F2d 345); *Horsford v. Board of Trustees of Calif. State Univ.*, supra, 132 CA4th at 396, 33 CR3d at 673—not necessary that plaintiffs have 3 attorneys present for much of the trial and 2 attorneys for many of the depositions]

- [17:690] Time spent by *paralegals and law clerks* may be included where the prevailing practice in the community is for attorneys to bill *separately* for paralegal and law clerk services (billed at market rate for such services; see below). [*Missouri v. Jenkins by Agyei* (1989) 491 US 274, 286, 109 S.Ct. 2463, 2471; *United Steelworkers of America v. Phelps Dodge Corp.* (9th Cir. 1990) 896 F2d 403, 407; *Guinn v. Dotson* (1994) 23 CA4th 262, 269, 28 CR2d 409, 414]

- (2) [17:691] **Reasonable rate:** In determining a reasonable rate for the attorney's services, courts usually consider:

- the prevailing rate charged by attorneys of similar skill and experience for comparable legal services in the community;
- the nature of the work performed; and
- the attorney's customary billing rates. [See *Serrano v. Unruh* (1982) 32 C3d 621, 643, 186 CR 754, 769; *Kerr v. Screen Extras Guild, Inc.* (9th Cir. 1975) 526 F2d 67, 69; *Bihun v. AT&T Information Systems, Inc.* (1993) 13 CA4th 976, 997, 16 CR2d 787, 798 (disapproved on other grounds in *Lakin v. Watkins Associated Industries* (1993) 6 C4th 644, 664, 25 CR2d 109, 122)]

- (a) [17:692] **When measured:** Most courts look to rates at the time of the prevailing party's fee application rather than rates charged at the time the litigation began. [*Gates v. Deukmejian* (9th Cir. 1992) 987 F2d 1392, 1406]

- (b) [17:693] **Different rates for different attorneys:** Where several attorneys file a joint petition for fees, the court may find it necessary to use different rates for the different attorneys. [*Municipal Court v. Bloodgood* (1982) 137 CA3d 29, 47, 186 CR 807, 817]

- (c) [17:694] **Different rates for different activities:** The "reasonable rate" for the hours spent may de-

pend on the activity involved; e.g., different rates for in-court and out-of-court legal work. [See *Municipal Court v. Bloodgood*, supra, 137 CA3d at 47, 186 CR at 817; *Lindy Bros. Builders, Inc. of Philadelphia v. American Radiator & Standard Sanitary Corp.* (3rd Cir. 1973) 487 F2d 161, 167]

- (d) [17:695] **Contingency fee attorneys:** Market rates charged by attorneys of comparable skill and experience should be used to calculate fees even for attorneys who handle cases on a contingency basis and have no billing rate. [See *Blanchard v. Bergeron* (1989) 489 US 87, 96, 109 S.Ct. 939, 946—"contingent-fee model . . . is inappropriate for the determination of fees under §1988"]
- (e) [17:696] **Out-of-town rates where plaintiff unable to retain local counsel:** The comparison is usually made to the billable rates of attorneys "in the community" (see ¶7:691). However, where plaintiffs have made a good faith effort to find local counsel and have been unsuccessful, they may retain an attorney from another area (frequently a major city) having higher billable rates; and such out-of-town counsel is not limited to fees determined at local hourly rates. [*Horsford v. Board of Trustees of Calif. State Univ.* (2005) 132 CA4th 359, 398-399, 33 CR3d 644, 674-675; compare *Nichols v. City of Taft* (2007) 155 CA4th 1233, 1243-1244, 66 CR3d 680, 688—plaintiff failed to prove inability to obtain local counsel]

[17:697-704] Reserved.

- b. [17:705] **Adjustments to "lodestar" amount:** Under both California and federal law, the court may enhance or reduce the lodestar amount to determine an appropriate fee award. [*Hensley v. Eckerhart* (1983) 461 US 424, 434, 103 S.Ct. 1933, 1940; *Press v. Lucky Stores, Inc.* (1983) 34 C3d 311, 321-322, 193 CR 900, 906]

Federal and state laws differ somewhat on the factors that courts may consider in adjusting the lodestar amount. [See *Weeks v. Baker & McKenzie* (1998) 63 CA4th 1128, 1173, 74 CR2d 510, 539]

Under California law, the lodestar fee "may be adjusted by the court based on factors including (1) the novelty and difficulty of the questions involved, (2) the skill displayed in presenting them, (3) the extent to which the nature of the litigation precluded other employment by the attorneys, (4) the contingent nature of the fee award." [*Ketchum v. Moses* (2001) 24 C4th 1122, 1132, 104 CR2d 377, 384]

(1) [17:706] **Contingency fee risk:** Attorneys representing plaintiffs in employment cases usually work on a contingency fee basis. There is thus no set hourly rate chargeable to the client.

- [17:707] California courts may consider the contingency fee risk as a factor to *enhance* the lodestar amount where deemed appropriate to attract attorneys to cases of significant public interest and to compensate for the risk of loss and delay in payment inherent in contingency fee cases. [*Serrano v. Priest* (1977) 20 C3d 25, 48, 141 CR 315, 327 (not an employment case); *Horsford v. Board of Trustees of Calif. State Univ.* (2005) 132 CA4th 359, 395, 33 CR3d 644, 672]
- [17:708] Federal courts do *not* enhance the lodestar amount for contingency “unless the applicant can establish that without an adjustment for risk the prevailing party would have faced substantial difficulties in finding counsel in the local or other relevant market.” [*City of Burlington v. Dague* (1992) 505 US 557, 562, 112 S.Ct. 2638, 2641]
 - [17:708.1] Nevertheless, the court has discretion to compensate a contingency fee attorney for *delay in payment* by adding a prime rate enhancement (see ¶17:714). [See *Welch v. Metropolitan Life Ins. Co.* (9th Cir. 2007) 480 F3d 942, 947]

(2) [17:709] **Successful result:** California courts arguably may consider a lodestar enhancement to reflect a law firm’s role in the success of the litigation. [See *Serrano v. Priest*, supra, 20 C3d at 49, 141 CR at 328]

Federal courts recognize that an enhanced award may be justified in cases of “exceptional success.” But the lodestar amount is *presumed to be* the reasonable fee; and “results obtained” are generally subsumed within other factors used to calculate a reasonable fee. [*Blum v. Stenson* (1984) 465 US 886, 900, 104 S.Ct. 1541, 1549-1550]

(a) [17:709.1] **Limited to client’s recovery?** Some federal cases state a fee award exceeding damages is “rarely justified.” [*Cooke v. Stefani Mgmt. Services, Inc.* (7th Cir. 2001) 250 F3d 564, 570]

(3) **Effect of limited success**

(a) [17:710] **Federal law:** Under federal law, the *degree* of success obtained is “the most critical factor” in determining the reasonableness of a fee

award. Thus, where plaintiff achieves only partial or limited success, an award based on the number of hours spent multiplied by a reasonable hourly rate may be excessive, and some reduction from the lodestar amount may be required. [*Hensley v. Eckerhart* (1983) 461 US 424, 436, 103 S.Ct. 1933, 1941 (fee award under Civil Rights Attorney's Fees Awards Act, 42 USC §1988); see also *Harman v. City & County of San Francisco* (2006) 136 CA4th 1279, 1312-1316, 39 CR3d 589, 613-617—lodestar may be reduced to reflect limited relief obtained in comparison to scope of litigation as whole]

On the other hand, if plaintiff has obtained *excellent results*, his or her attorney should recover a fully compensatory fee. Normally, this will encompass all hours reasonably expended on the litigation. In these circumstances, the fee award “*should not be reduced* simply because the plaintiff failed to prevail on every contention raised in the lawsuit.” [*Hensley v. Eckerhart*, *supra*, 461 US at 435, 103 S.Ct. at 1940 (emphasis added)]

- [17:710.1] Plaintiff sued former employer for retaliatory discharge, sexual harassment and sex discrimination. Although plaintiff prevailed on the retaliation claim only, she was considered “fully successful” because she received all the monetary relief she could have gotten had she won on every claim. Nonetheless, the district court’s reduction of plaintiff’s award by 10 percent, an apparent reflection of “its view that counsel wasted time pursuing less promising theories of liability,” was not an abuse of discretion. [*Fine v. Ryan Int’l Airlines* (7th Cir. 2002) 305 F3d 746, 756-757]
- (b) [17:711] **California law:** Plaintiffs may argue that California law does not favor such reductions and that an attorney who successfully litigates an FEHA case should ordinarily receive full compensation for every hour spent litigating the claim: “Only in the unusual case in which there are special circumstances [rendering] such an award . . . *unjust* does California FEHA law permit a lodestar reduction for results obtained.” [*Beaty v. BET Holdings, Inc.* (9th Cir. 2000) 222 F3d 607, 612 (emphasis added; internal quotes omitted) (applying Calif. law); *Vo v. Las Virgenes Mun. Water Dist.* (2000) 79 CA4th 440, 446, 94 CR2d 143, 148—lodestar fee award of \$470,000 proper despite recovery of less

than \$40,000 on harassment claim and failure to prove other discrimination and retaliation claims]

Employment discrimination cases usually involve several claims *arising from the same set of facts*. “Where a lawsuit consists of related claims, and the plaintiff has won substantial relief, a trial court has discretion to award all or substantially all of the plaintiff’s fees even if the court did not adopt each contention raised.” [Wysinger v. Automobile Club of So. Calif. (2007) 157 CA4th 413, 431, 69 CR3d 1, 15 (internal quotes omitted)]

- [17:711.1] A lodestar fee award should not be reduced simply because plaintiff fails to prevail on every issue in the lawsuit. [*Feminist Women’s Health Ctr. v. Blythe* (1995) 32 CA4th 1641, 1674, 39 CR2d 189, 207-208, fn. 8]

[17:711.2-711.4] Reserved.

- (c) [17:711.5] **Compare—successful result but limited damages:** Because damages awards do not fully reflect the *public benefit advanced by civil rights litigation*, reasonable attorney fees *need not* be proportionate to an award of money damages. [See *City of Riverside v. Rivera* (1986) 477 US 561, 576, 106 S.Ct. 2686, 2695]

Thus, where *successful* litigation exposes conduct that the civil rights statutes were enacted to deter, “a trial court does not abuse its discretion simply by awarding fees in an amount higher, *even very much higher*, than the damages awarded.” [Harman v. City & County of San Francisco (2007) 158 CA4th 407, 428, 69 CR3d 750, 769-770 (emphasis added)—fee award exceeding \$1 million where only \$30,300 compensatory damages recovered was not abuse of discretion in action under 42 USC §1983]

It is not uncommon for attorney fees to exceed compensatory damages in FEHA cases: “Gov.C. §12965 fees are intended to provide fair compensation to the attorneys involved in the litigation at hand and encourage litigation of claims that in the public interest merit litigation.” [Flannery v. Prentice (2001) 26 C4th 572, 584, 110 CR2d 809, 868]

- (4) [17:712] **Superior representation:** California courts arguably may consider “the novelty and difficulty” of the litigation and the skill displayed in presenting the case in enhancing or reducing the lodestar amount. [See *Serrano v. Priest*, *supra*, 20 C3d at 49, 141 CR at

Federal courts hold that the quality of representation is reflected in the attorney's hourly rate and should not be a factor in adjusting the lodestar amount. In rare cases, however, a plaintiff may obtain an enhancement by showing that the quality of service rendered was superior compared to the hourly rate charged. [See *Blum v. Stenson*, *supra*, 465 US at 899, 104 S.Ct. at 1549]

- (5) [17:713] **Difficulty of case:** Although the rule in California is unclear, federal courts may *not* enhance the lodestar amount based on the difficulty of establishing the merits of a case, because that *difficulty is already reflected in the lodestar amount* "either in the higher number of hours expended to overcome the difficulty, or in the higher hourly rate of the attorney skilled and experienced enough to do so." [*City of Burlington v. Dague* (1992) 505 US 557, 562, 112 S.Ct. 2638, 2641]
- (6) [17:714] **Delay in receiving fees:** Both federal and California courts may enhance the lodestar amount for long delay in payment in wrongful termination cases that span years before the attorney can collect fees. [*In re Washington Pub. Power Supply System Secur. Litig.* (9th Cir. 1994) 19 F3d 1291, 1305; *Downey Cares v. Downey Comm. Develop. Comm'n* (1987) 196 CA3d 983, 997, 242 CR 272, 281]
- (7) [17:715] **Preclusion of other employment:** Both federal and California courts may consider counsel's preclusion from accepting other employment as a factor to be considered in enhancing the lodestar amount. [*Serrano v. Priest*, *supra*, 20 C3d at 49, 141 CR at 328; *Clark v. City of Los Angeles* (9th Cir. 1986) 803 F2d 987, 991]

[17:716-719] Reserved.

- c. [17:720] **Effect of nominal damages recovery:** The U.S. Supreme Court has stated that when a plaintiff recovers only nominal damages *because of failure to prove an essential element of the claim* (such as actual, compensable injury), "the only reasonable attorney's fee is usually no fee at all." [*Farrar v. Hobby* (1992) 506 US 103, 115, 113 S.Ct. 566, 575]

But plaintiffs will argue that a concurring opinion in *Farrar* states two other factors should also be considered:

- first, the *significance of the legal issue* on which plaintiff claims to have prevailed; and

- second, the accomplishment of some public goal. [*Farrar v. Hobby*, supra, 506 US at 121-122, 113 S.Ct. at 578-579 (J. O'Connor concur.opn.)]

Later federal cases have adopted this concurring opinion and thus may uphold fee awards to plaintiff's counsel based on either of the factors stated above although only nominal damages were recovered by plaintiff. [*Barber v. T.D. Williamson, Inc.* (10th Cir. 2001) 254 F3d 1223, 1230-1231; *Wilcox v. City of Reno* (9th Cir. 1994) 42 F3d 550, 555—a public purpose would be served if plaintiff's suit achieved "tangible results—such as sparking a change in policy or establishing a finding of fact with potential collateral estoppel effects"]

3. [17:721] **Proof Considerations:** The party seeking an award of attorney fees normally bears the burden of submitting evidence of "the hours worked and the rates claimed." [*Webb v. Board of Ed. of Dyer County, Tenn.* (1985) 471 US 234, 242, 105 S.Ct. 1923, 1928]

In addition, that party has the burden to prove that the rate charged is in line with the "prevailing market rate of the relevant community." [*Carson v. Billings Police Dept.* (9th Cir. 2006) 470 F3d 889, 891]

- a. [17:722] **Court discretion:** Although a fee request ordinarily should be documented in detail, the absence of complete time records and billing statements does not affect the trial court's power to make its own evaluation of the reasonable value of the work done in light of the nature of the case. [See *Weber v. Langholz* (1995) 39 CA4th 1578, 1587, 46 CR2d 677, 683]

[17:723-724] Reserved.

I. INTEREST

1. Prejudgment Interest

- a. [17:725] **Under federal law:** Generally, federal courts have *discretion* to award plaintiff prejudgment interest in a civil rights action. [See *West Virginia v. United States* (1987) 479 US 305, 310, 107 S.Ct. 702, 706—prejudgment interest is "an element of complete compensation"; *Loeffler v. Frank* (1988) 486 US 549, 558, 108 S.Ct. 1965, 1971—Title VII authorizes court to award prejudgment interest as part of backpay remedy in suits against private employers; *Domingo v. New England Fish Co.* (9th Cir. 1984) 727 F2d 1429, 1446 (modified on other grounds, 742 F2d 520)—prejudgment interest properly refused where amount of backpay was not readily determinable and court evaluated many subjective factors in determining amount of damages; *Criswell v. Western Airlines, Inc.* (9th Cir. 1983) 709 F2d 544,

556-557—upholding prejudgment interest under ADEA on portion of damages representing actual loss, but not liquidated damages]

Compare—award mandatory under FMLA: Under the FMLA, an employer “shall be liable” for prejudgment interest on the amount of “any wages, salary, employment benefits, or other compensation denied or lost to (an employee) by reason of the (FMLA) violation.” [29 USC §2617(a)(1)(A) (parentheses added); see *Hite v. Vermeer Mfg. Co.* (8th Cir. 2006) 446 F3d 858, 869; *Dotson v. Pfizer, Inc.* (4th Cir. 2009) 558 F3d 284, 301; and ¶12:1354]

- (1) [17:725.1] **Calculation on backpay awards:** Prejudgment interest on backpay awards is calculated from the date the employee sustains monetary injury. The plaintiff suffers monetary injury *incrementally* as each pay period passes. Thus, prejudgment interest should be calculated *from the date of each pay period* to the date of judgment. [*Reed v. Mineta* (10th Cir. 2006) 438 F3d 1063, 1066-1067]

[17:725.2-725.9] *Reserved.*

- (2) [17:725.10] **Where liquidated damages awarded?** Courts disagree whether prejudgment interest is recoverable where statutory liquidated damages have been awarded (e.g., under the FLSA):

- [17:725.11] Some circuits hold that where liquidated damages have been recovered, an award of prejudgment interest would constitute an impermissible double recovery. [*Shea v. Galaxie Lumber & Const. Co., Ltd.* (7th Cir. 1998) 152 F3d 729, 733]
- [17:725.12] Other courts hold liquidated damages and prejudgment interest serve different purposes, and therefore both may be awarded in the same case. [*Criswell v. Western Airlines, Inc.* (9th Cir. 1983) 709 F2d 544, 556-557; *Starceski v. Westinghouse Elec. Corp.* (3rd Cir. 1995) 54 F3d 1089, 1101-1102]

[17:725.13-725.14] *Reserved.*

- (3) [17:725.15] **Not on punitive damages:** Allowing prejudgment interest on punitive damages would only serve to further punish defendant when the jury has already determined the amount necessary to sufficiently punish defendant. [See *Fine v. Ryan Int'l Airlines* (7th Cir. 2002) 305 F3d 746, 757 (dictum because plaintiff did not seek interest on punitive damages and defendant belatedly raised the issue)]

- (4) [17:726] **Interest rates:** Unless a statute provides otherwise, the court may utilize various rates, including:
- [17:727] The IRS adjusted “prime rate.” [*EEOC v. O’Grady* (7th Cir. 1988) 857 F2d 383, 391-392—awarding prejudgment interest at IRS adjusted prime rate instead of state’s postjudgment rate not an abuse of discretion]
 - [17:728] The forum state’s statutory rate (“legal rate of interest”). [*Gelof v. Papineau* (D DE 1986) 648 F.Supp. 912, 929, aff’d in part and vacated in part (3rd Cir. 1987) 829 F2d 452]
 - [17:729] The postjudgment interest rate under 28 USC §1961 (¶17:750), which focuses on the T-bill rate payable when the judgment was entered. [*Hogan v. General Elec. Co.* (ND NY 2001) 144 F.Supp.2d 138, 141; *Metz v. Transit Mix, Inc.* (ND IN 1988) 692 F.Supp. 987, 990—court resolved parties’ dispute over rate applicable to prejudgment by reference to postjudgment rate]
 - [17:730] Some courts refine the previous approach by looking to the T-bill rate at the end of each year covered by the award rather than at the date of judgment. [*O’Neill v. Sears, Roebuck & Co.* (ED PA 2000) 108 F.Supp.2d 443, 446]
- b. [17:731] **Under California law:** Whether under California law, an award of prejudgment interest is discretionary or due as a matter of right depends on whether the amount of damages is sufficiently “certain”:
- (1) [17:732] **Damages “certain or capable of being made certain by calculation”:** If plaintiff’s recoverable damages are “certain or capable of being made certain by calculation,” plaintiff is *entitled* as a matter of law to prejudgment interest from the date the right to recover vested. [Civ.C. §3287(a); but see *Imperial Merchant Services, Inc. v. Hunt* (2009) 47 C4th 381, 395, 97 CR3d 464, 475 (not an employment case)—§3287(a) not applicable where claim asserted under statute that *implicitly precludes* award of prejudgment interest]
 - (a) [17:733] **Backpay awards:** An action to recover backpay is an action for damages within the meaning of §3287(a). Interest is recoverable on each salary or pension payment from the date it was due. [*Currie v. Workers’ Comp. Appeals Bd.* (2001) 24 C4th 1109, 1115, 104 CR2d 392, 397-398]

The statute also applies to backpay awards by administrative agencies (e.g., FEHC or WCAB). [*Currie v. Workers' Comp. Appeals Bd.*, supra, 24 C4th at 1115, 104 CR2d at 397-398—backpay WCAB award under Lab.C. §132a (prohibiting discrimination against employee seeking workers' comp benefits)]

"(W)ithout prejudgment interest the backpay remedy may lose a significant portion of its value, and the employee left less than fully reimburse(d) . . . for his or her lost wages." [*Currie v. Workers' Comp. Appeals Bd.*, supra, 24 C4th at 1117, 104 CR2d at 399 (internal quotes omitted)]

- (2) [17:734] **Compare—unliquidated contractual claims:** If the claim is based upon a cause of action in contract where the claim is unliquidated, the court has *discretion* to award plaintiff prejudgment interest, but from a date no earlier than the date the cause of action was filed. [Civ.C. §3287(b)]
- (3) [17:735] **Compare—jury award where “oppression, fraud or malice” shown:** In *noncontract* actions (i.e., tort claims), “and in every case of oppression, fraud, or malice,” prejudgment interest may be given in the *discretion* of the jury. [Civ.C. §3288]

However, Civ.C. §3288 prejudgment interest is available *only* on that portion of the award representing *economic* damages. [*Greater Westchester Homeowners Ass'n v. City of Los Angeles* (1979) 26 C3d 86, 102-103, 160 CR 733, 741]

- (4) [17:736] **Interest rate (contract claims):** Unless the contract specifies a different rate, the interest rate for *causes of action based on contract* is 10% per year after a breach. [Civ.C. §3289(b); see *Bell v. Farmers Ins. Exch.* (2006) 135 CA4th 1138, 1150, 38 CR3d 306, 315]
- (5) [17:737] **Effect of defendant's refusal of CCP §998 offer in personal injury cases:** In personal injury actions, if defendant refuses a pretrial settlement offer that complies with CCP §998 and fails to obtain a “more favorable” judgment at trial, prejudgment interest accrues at the rate of 10% per year from the date of the CCP §998 offer. [Civ.C. §3291]
 - [17:738] An action for sexual harassment in the workplace under the Fair Employment and Housing Act is an action for personal injury within the meaning of Civ.C. §3291. [*Lakin v. Watkins Associated Industries* (1993) 6 C4th 644, 657, 25 CR2d 109, 117]

- [17:739] *Emotional distress* is personal injury for purposes of Civ.C. §3291. [*Lakin v. Watkins Associated Industries*, *supra*, 6 C4th at 657, 25 CR2d at 117, fn. 8]
- [17:740] *Compare—wrongful termination actions:* Civ.C. §3291 does *not* apply to a tortious wrongful termination claim because it primarily involves the infringement of *property* rights, not personal injury, even where the wrongful termination caused plaintiff to sustain extensive personal injuries. [*Holmes v. General Dynamics Corp.* (1993) 17 CA4th 1418, 1435-1437, 22 CR2d 172, 183-184]

[17:741-749] *Reserved.*

2. Postjudgment Interest

- a. [17:750] **Under federal law:** Federal law requires postjudgment interest to be paid on any money judgment at a rate equal to the coupon issue yield equivalent of the average accepted auction price of U.S. Treasury bills over the last 52 weeks immediately before the date of the judgment. [See 28 USC §1961; *O'Neill v. Sears, Roebuck & Co.* (ED PA 2000) 108 F.Supp.2d 443, 448]
- b. [17:751] **Under California law:** The interest rate on a money judgment rendered in any state court is 10% per year on the principal amount of the unsatisfied portion of the judgment. [CCP §685.010(a)]

[17:752-759] *Reserved.*

J. CIVIL PENALTIES (LABOR CODE PRIVATE ATTORNEYS GENERAL ACT) (“PAGA”)

1. [17:760] **In General:** Because state labor law enforcement agencies are unable to prosecute every Labor Code violation, the Legislature has determined it is in the public interest to allow aggrieved employees to sue their employers to recover civil penalties for such violations upon the conditions stated below. [See Lab.C. §2698, Preface, creating “Labor Code Private Attorneys General Act of 2004”; see *Caliber Bodyworks, Inc. v. Sup.Ct. (Herrera)* (2005) 134 CA4th 365, 370, 374-375, 36 CR3d 31, 33, 36-37]

As discussed below, the aggrieved employee generally gets only 25% of any recovery. The balance goes to the state’s labor law enforcement agency (the California Labor and Workforce Development Agency) for education and enforcement purposes (see ¶17:830).

The Labor and Workforce Development Agency is authorized to promulgate regulations to implement PAGA [Lab.C. §2699(n)]

- Because PAGA imposes no new or different liabilities, it applies to claims and lawsuits pending at the time of its enactment in 2003. [*Amaral v. Cintas Corp.* No. 2 (2008) 163 CA4th 1157, 1198, 78 CR3d 572, 604]
- a. [17:761] **Not exclusive remedy:** PAGA does not limit the employee's right to pursue other remedies available under state or federal law "either separately or concurrently with an action taken under this part." [Lab.C. §2699(g)(1); *Caliber Bodyworks, Inc. v. Sup.Ct. (Herrera)*, supra, 134 CA4th at 375, 36 CR3d at 38]

[17:762-764] *Reserved.*
 - b. **Exclusions from Act**
 - (1) [17:765] **Minor violations:** No action lies under PAGA for violating a "posting, notice, agency reporting, or filing requirement" of the Labor Code *except mandatory payroll or workplace injury reporting*. [Lab.C. §2699(g)(2)]

[17:766-769] *Reserved.*
 - (2) [17:770] **Workers' compensation penalties:** No action lies under PAGA to recover administrative and civil penalties in connection with workers' compensation proceedings. [Lab.C. §2699(m)]
 - (3) [17:771] **California Labor and Workplace Development Agency:** No civil penalty is recoverable where the alleged violation is the California Labor and Workplace Development Agency's failure to act. [Lab.C. §2699(f)(3)]

[17:772-774] *Reserved.*
 2. [17:775] **Who May Maintain Action:** An "aggrieved employee" may maintain a civil action to recover civil penalties for Labor Code violations "on behalf of himself or herself *and* other current or former employees against whom one or more of the alleged violations was committed." [Lab.C. §2699(g)(1) (*emphasis added*)]
 - a. [17:776] **"Aggrieved employee":** "Aggrieved employee" means anyone who was employed by the alleged violator and against whom one or more of the alleged violations was committed. [Lab.C. §2699(c); see *Amalgamated Transit Union, Local 1756, AFL-CIO v. Sup.Ct. (First Transit, Inc.)* (2009) 46 C4th 993, 1004-1005, 95 CR3d 605, 613—labor unions lack standing to sue under PAGA even if their members are "aggrieved employees"]
 - b. [17:777] **Representative action:** Any suit under PAGA is a representative action. Plaintiff must sue "on behalf of

himself or herself and other current or former employees” injured by the employer’s violations. [Lab.C. §2699(g)(1)]

- (1) [17:777.1] **Class action not mandatory:** Although PAGA actions *may* be brought as class actions, it is not mandatory. I.e., plaintiff may maintain a representative suit under PAGA *without satisfying class action requirements* (see ¶19:771.1). [*Arias v. Sup.Ct. (Angelo Dairy)* (2009) 46 C4th 969, 981-982, 95 CR3d 588, 596-597]

➡ [17:777.2] **PRACTICE POINTER:** It may be easier for plaintiffs to sue under PAGA but recovery is *limited to civil penalties* for Labor Code violations. Plaintiffs cannot utilize PAGA where other remedies are sought (e.g., damages for discrimination).

- (2) [17:777.3] **Compare—actions under Bus. & Prof.C. §17200:** Any suit under Bus. & Prof.C. §17200 (unfair competition law) seeking relief on behalf of others must be brought as a class action (see ¶19:811). [*Amalgamated Transit Union, Local 1756, AFL-CIO v. Sup.Ct. (First Transit, Inc.)*, supra, 46 C4th at 945, 95 CR3d at 614]

- c. [17:778] **Nonassignable:** Because the right to recover a statutory penalty is nonassignable, an aggrieved employee cannot assign a claim for statutory penalties under PAGA. [*Amalgamated Transit Union, Local 1756, AFL-CIO v. Sup.Ct. (First Transit, Inc.)*, supra, 46 C4th at 1003, 95 CR3d at 612—nonassignable to labor union]

[17:779] Reserved.

3. [17:780] **Prerequisites to Civil Action:** A civil action under §2699 may not be commenced (or a pending action amended to include a §2699 claim) until the following requirements have been met:

- a. [17:781] **Written notice to employer and State:** The aggrieved employee must give written notice *by certified mail* to the employer and the Labor and Workforce Development Agency (“Agency”) specifying the Labor Code provisions violated, “including the facts and theories to support the alleged violation.” [Lab.C. §2699.3(a)(1); *Caliber Bodyworks, Inc. v. Sup.Ct. (Herrera)* (2005) 134 CA4th 365, 370, 375, 36 CR3d 31, 34, 37—notice allows Agency to act first on more serious violations, such as wage and hour violations, and gives employers opportunity to cure less serious violations]

Failure to plead compliance with this prelawsuit notice requirement is *fatal* to claims for civil penalties under Lab.C.

§2699.5. [*Caliber Bodyworks, Inc. v. Sup.Ct. (Herrera)*, supra, 134 CA4th at 381-382, 36 CR3d at 43]

- b. [17:782] **Agency action:** If the Agency does not intend to investigate the alleged violation, it must so notify the aggrieved employee and the employer by certified mail within 30 days after the employee's notice was postmarked. The aggrieved employee may file a §2699 action upon receipt of the Agency's notice; or if the Agency *fails to provide notice*, within 33 days after the employee's notice was postmarked. [Lab.C. §2699.3(a)(2)(A)]

If the Agency intends to investigate the alleged violation, it must so notify the aggrieved employee and the employer within 33 days after the employee's notice was postmarked. It then has 120 days to issue a citation. [Lab.C. §2699.3 (a)(2)(B)]

- (1) [17:783] **Effect of citation:** No private action may be commenced by an aggrieved employee where the Agency cites the employer for the same violations, or initiates wage collection proceedings under Lab.C. §98.3, within the 158-day period described above. [Lab.C. §2699(h)]

- (2) [17:784] **Effect of no citation within 158 days:** If the Agency decides not to issue a citation, it must notify the aggrieved employee and employer within five days after the 120-day period (i.e., within 158 days after the employee's notice was postmarked). If the Agency fails to provide timely notice, the aggrieved employee may file suit under §2699 at the end of the 158-day period. [Lab.C. §2699.3(a)(2)(B)]

[17:785-789] *Reserved.*

- c. [17:790] **Compare—workplace safety violations:** Where the alleged Labor Code violations relate to occupational health and safety standards (Lab.C. §6300 et seq.), a copy of the aggrieved employee's notice must also be mailed to the Division of Occupational Safety and Health ("Division"). That Division must then inspect or investigate the alleged violation as required by law (see ¶13:371 ff.). [Lab.C. §2699.3(b)(1)]

- (1) [17:791] **Effect of citation:** Issuance of a citation bars any private action under §2699. [Lab.C. §2699.3 (b)(2)(A)(i)]

- (2) [17:792] **Effect of failure to issue citation:** The time for completion of investigation is governed by Lab.C. §6317 (see ¶13:431 ff.). At the end of that period, if the Division fails to issue a citation, the aggrieved employee may challenge that decision in court. But if the

court finds a citation should have issued and orders the Division to do so, no action can be maintained under §2699. [Lab.C. §2699.3(b)(2)(A)(ii)]

- (3) [17:793] **Effect of failure to inspect or investigate:** If the Division fails to inspect or investigate the alleged violation, the aggrieved employee may commence an action under §2699, except where the Division has already entered into an agreement with the employer to abate the violation or ameliorate the condition in question. [Lab.C. §2699.3(b)(2)(B) & (b)(3)(B)]

[17:794-799] *Reserved.*

- d. [17:800] **Compare—unspecified violations subject to “cure”:** Most of the important Labor Code provisions governing compensation, working hours, and employee rights and privileges, and workplace safety violations covered by Lab.C. §6300 (above) are *not subject to “cure.”* [See Lab.C. §2699.3(c)—exempting more than 100 Labor Code provisions listed in Lab.C. §§2699.5 and 6300 et seq.]

With regard to other, unspecified Labor Code violations, however, the employer has the right to “cure” the violation and thereby preclude a §2699 civil action. [Lab.C. §2699.3(c)]

Examples of violations thus subject to “cure” include:

- Lab.C. §515 (classification of employees as exempt from overtime pay requirements);
- Lab.C. §6401.7 (failure to adopt injury and illness prevention program).

(1) [17:801] **“Cure”:** “Cure” means the employer abates each violation alleged in the aggrieved employee’s notice (¶17:781), is in compliance with the Labor Code provisions specified in that notice *and the employee is made whole.* [Lab.C. §2699(d)]

(2) [17:802] **Time limit:** The employer may cure the alleged violation within 33 days after the employee’s notice is postmarked. [Lab.C. §2699.3(c)(2)(A)]

(3) [17:803] **Written notice required:** The employer must give written notice by certified mail to the employee and the Agency within the 33-day period that the alleged violation has been cured, including a description of the action taken. [Lab.C. §2699.3(c)(2)]

(4) [17:804] **Limitation:** An employer may not avail itself of the notice and “cure” provisions more than three times in a 12-month period for the same violations, regardless of the location of the worksite. [Lab.C. §2699.3 (c)(2)(B)]

(5) [17:805] **Employee may dispute “cure”:** If the aggrieved employee disputes that the alleged violation has been cured, he or she must provide written notice to the employer and Labor and Workforce Development Agency specifying the facts. The Agency then has 17 days to review the employer's actions to cure the alleged violation and notify the employee and employer of its finding by certified mail; and may grant an additional three business days to cure the violation. [Lab.C. §2699.3(c)(3)]

If the Agency determines the Employer has not cured the alleged violation or if the Agency fails to act or to provide timely notice, the employee may proceed with a §2699 action. [Lab.C. §2699.3(c)(3)]

If the Agency determines the violation has been cured but the employee still disagrees, the employee may appeal the determination to the superior court. [Lab.C. §2699.3(c)(3)]

[17:806-809] *Reserved.*

4. [17:810] **Penalties Recoverable:** The Labor Code Private Attorneys General Act's prerequisites to suit (¶17:780) apply only where plaintiff seeks recovery of a “civil penalty *to be assessed and collected by* the *Labor Commissioner* (Lab.C. §2699(a)) for violation of one of the provisions listed in Lab.C. §2699.5 (Lab.C. §2699.3). [*Caliber Bodyworks, Inc. v. Sup. Ct. (Herrera)* (2005) 134 CA4th 365, 378, 36 CR3d 31, 40; *Dunlap v. Sup. Ct. (Bank of America, N.A.)* (2006) 142 CA4th 330, 340, 47 CR3d 614, 620-621]

One must “distinguish between a request for statutory penalties provided by the Labor Code for employer wage-and-hour violations, which were recoverable directly by employees well before the (Private Attorneys General Act) became part of the Labor Code, and a demand for ‘civil penalties,’ *previously enforceable only by the State’s labor law enforcement agencies.*” [*Caliber Bodyworks, Inc. v. Sup. Ct. (Herrera)*, supra, 134 CA4th at 377, 36 CR3d at 39 (emphasis and parentheses added)]

a. [17:811] **Penalties previously recoverable by Labor Commissioner subject to Act:** Civil penalties previously recoverable only by the Labor Commissioner are specified in Lab.C. §225.5, which provides that an employer who unlawfully withholds wages is subject to a civil penalty in an enforcement action initiated by the Labor Commissioner in the sum of \$100 per employee for the initial violation and \$200 per employee for subsequent or willful violations. [See *Caliber Bodyworks, Inc. v. Sup. Ct. (Herrera)*, supra, 134 CA4th at 377, 36 CR3d at 39]

- (1) [17:812] **Violations for which no penalty specified:** For Labor Code violations for which no civil penalty is specified, a civil penalty (assessable and collectible by the Labor Commissioner) is imposed as follows: \$100 for each aggrieved employee per pay period for the initial violation, \$200 for subsequent violations. [Lab.C. §2699(f)(2)]

[17:813-814] *Reserved.*

- b. [17:815] **Penalties previously recoverable by employees not subject to Act:** The Act's prerequisites to suit *do not apply* in actions for statutory penalties that were recoverable directly by the employee before the Act. This includes many wage and hour violations:

- [17:815.1] Lab.C. §203 obligates an employer who willfully fails to pay wages due an employee who is discharged or quits *to pay the employee*, in addition to the unpaid wages, a penalty equal to the employee's daily wages for each day, not exceeding 30 days, that the wages are unpaid (see ¶11:1458). [See *Caliber Bodyworks, Inc. v. Sup.Ct. (Herrera)*, supra, 134 CA4th at 377, 36 CR3d at 39]
- [17:815.2] Lab.C. §226(e) obligates an employer who fails to maintain employment records in accordance with Lab.C. §226(a) (see ¶11:445) *to pay the employee* \$100 per pay period up to a maximum of \$4,000. [See *Dunlap v. Sup.Ct. (Bank of America)* (2006) 142 CA4th 330, 335, 47 CR3d 614, 617]
- [17:815.3] Lab.C. §226.7(b) obligates an employer who fails to provide mandated meal or rest periods to pay each employee one additional hour of pay for each work day that the meal or rest period is not provided (see ¶11:861). [See *Dunlap v. Sup.Ct. (Bank of America)*, supra, 142 CA4th at 335, 47 CR3d at 617]

[17:816-819] *Reserved.*

5. [17:820] **Penalties Discretionary:** Whenever the Labor Code gives the Labor Commissioner discretion to assess a civil penalty, the court has the same discretion. [Lab.C. §2699(e)(1)]

- a. [17:821] **Lesser amount proper:** The court may award less than the maximum penalty authorized if, under the facts and circumstances of the case, a greater amount would be "unjust, arbitrary and oppressive, or confiscatory." [Lab.C. §2699(e)(2)]

[17:822-824] *Reserved.*

6. [17:825] **Settlements Subject to Court Approval:** A superior court must review and approve any penalties sought as part

of a proposed settlement agreement pursuant to §2699. [Lab.C. §2699(l)]

- a. [17:826] **Compare—workplace safety violations:** Where the alleged Labor Code violations relate to occupational health and safety standards (Lab.C. §6300 et seq.), a copy of the proposed settlement must be mailed to the Division of Occupational Safety and Health, and the Division's views must be accorded appropriate weight. The court must ensure that the settlement of alleged violations is "at least as effective as the protections or remedies provided by state and federal law or regulation for the alleged violation." [Lab.C. §2699.3(b)(4)]

[17:827-829] *Reserved.*

7. [17:830] **Sharing of Recovery:** Penalties recovered by aggrieved employees must be distributed as follows:

- 75% to the Labor and Workforce Development Agency "for education of employers and employees about their rights and responsibilities under this Code"; and
- 25% to the aggrieved employees. [Lab.C. §2699(i); see *Caliber Bodyworks, Inc. v. Sup.Ct. (Herrera)* (2005) 134 CA4th 365, 370, 36 CR3d 31, 33-34]

- a. [17:831] **Exception:** Plaintiffs do not share in the \$500 penalty imposed where there were no employees at the time of violation. The penalty must be distributed *entirely* to the Labor and Workforce Development Agency. [Lab.C. §2699(j)]

[17:832-834] *Reserved.*

8. [17:835] **Attorney Fees and Costs Award:** A prevailing employee is entitled to an award of reasonable attorney fees and costs incurred in the action. [Lab.C. §2699(g)(1)]

9. [17:836] **Collateral Estoppel Effect:** Because an aggrieved employee's action under PAGA functions as a substitute for an action by the government itself, a judgment is binding not only on the plaintiff but also on government agencies and *any other aggrieved employee not a party to the proceeding*. Thus, non-party employees *cannot* sue to recover additional *civil penalties* for the same Labor Code violations (but may sue for damages or other remedies for the same violations). [*Arias v. Sup.Ct. (Angelo Dairy)* (2009) 46 C4th 969, 986, 95 CR3d 588, 600]

RESERVED