

WFB&M SAN FRANCISCO SOFTBALL TEAM CAPTURES 2006 CHAMPIONSHIP

Congratulations to the WFB&M co-ed softball team champions of the 2006 San Francisco Lawyers' League spring softball season! The team was led

by both the dynamic pitching and power hitting of paralegal Valerie Powers. Other contributors included legal assistant Dana Fingado who coupled spectacular glove work in

the outfield with a strong throwing arm, and first baseman/manager, attorney Dan Cortright, who went 36 for 40 (at least the way we keep score he did).

The team finished with a 9 and 1 record, avenging their only loss (to "The Lynch Mob") in the championship game.

RECENT DEVELOPMENTS A continuing column on breaking legal news

Products Liability/ Punitive Damage Awards

• *Bullock v. Philip Morris USA, Inc. (2006)*, California Court of Appeal

Plaintiff alleged that by the late 1950s medical and scientific professionals worldwide "generally agreed" that smoking caused lung cancer. In January 1954, however, Philip Morris and other cigarette manufacturers ran a full-page ad in many US newspapers indicating that there was no proof that cigarette smoking causes cancer, and that they believed that their products were not injurious to health. Until at least the mid-1980s, they continued to issue statements from "scientists" and "reputable" doctors that it was unclear whether smoking was in fact related to lung cancer. Finally, in December 1999, Philip Morris publicly acknowledged the health risks associated with smoking.

Based on these statements and other evidence, a jury found defendants guilty of malice, fraud, and/or oppression, and awarded plaintiff, who started smoking in 1956 and developed lung cancer, \$850,000 in compensatory damages, including \$100,000 in non-economic damages, and \$28 billion in punitive damages. Philip Morris moved for a new trial as to excessive damages. During post-trial motions, the trial court stated that it would deny Philip Morris' motion for a new trial if plaintiff agreed to reduce the punitive damage award to \$28 million. She agreed, and Philip Morris appealed the denial of their motion. The appellate court held "that the extreme reprehensibility of Philip Morris's conduct justify[ed] a ratio of punitive damages to compensatory damages significantly greater than a single-digit." The 33-1 ratio of punitive to compensatory damages was not constitutionally excessive in light of the extreme reprehensibility of the misconduct, including the vast scale and profitability of the course of misconduct.

Employment Discrimination and Harassment

• *Lyle v. Warner Brothers (2006)*, California Supreme Court

A former writer's assistant for the television show, Friends, sued the producers and writers for race and gender discrimination, racial and sexual harassment and retaliation, claiming that the writers' use of sexually coarse and vulgar language and conduct constituted harassment based on sex. Before she was hired, she was warned that the show dealt with sexual matters, and that she would be listening to the comedy writer's sexual jokes and discussions. After four months, plaintiff was fired because of problems with typing and transcription.

The trial court granted defendants' motion

for summary judgment, and she appealed. The Supreme Court held that plaintiff failed to establish a sexually objectionable work environment that was sufficiently severe or persuasive to support a hostile work environment sexual harassment claim. The court noted that the record disclosed that most of the sexually coarse and vulgar language at issue did not involve and was not directed at plaintiff or other women in the workplace. Notably, the court focused on the very specific facts and circumstances presented. In reaching this conclusion, the court did not suggest that the use of sexually coarse and vulgar language in the workplace can never constitute harassment because of sex. Indeed, language similar to that involved in this case might well establish actionable harassment depending on the circumstances.



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WFB&M NEWS



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U. S. SUPREME COURT ESTABLISHES LOW THRESHOLD FOR EMPLOYEE RETALIATION CLAIMS

By: Mary Watson Fisher, Orange Office



Mary Watson Fisher

On June 22, 2006, the United States Supreme Court decided the case of Burlington Northern & Santa Fe Railway Co. v. White, and in doing so, resolved a conflict between lower courts across the country as to the standard for liability against an employer in a retaliation claim. In its decision, the Supreme Court ruled in favor of an employee plaintiff by adopting a more employee-friendly approach than taken in the past by other lower courts.

In the White case, the plaintiff, Sheila White, was the only woman working in Burlington Northern & Santa Fe Railway Company's Maintenance of Way department. Burlington Northern hired Ms. White as a "track laborer." The duties of this job included removing and replacing track components, transporting track material, cutting brush and clearing litter and cargo spillage from tracks. Not long after Ms. White began her employment, her supervisor assigned her to operate the forklift which became her primary responsibility.

Three months after she began her employment, Ms. White complained to Burlington Northern that her immediate supervisor was making comments that were derogatory toward women. Burlington Northern investigated Ms. White's complaints and ultimately suspended the

supervisor and ordered him to attend sexual harassment classes. Burlington Northern informed Ms. White of the disciplinary action against her supervisor. However, at the same time, it informed Ms. White that she would no longer be operating the forklift; rather, she would perform only the standard track laborer tasks.

A few days later, Burlington Northern suspended Ms. White without pay for insubordination relating to a disagreement with her supervisor. An internal investigation revealed that Ms. White had not been insubordinate, and the company reinstated her with back pay for the 37 days of her suspension.

Ms. White filed suit against Burlington Northern alleging retaliation for complaining about gender discrimination. Following trial, a jury found in Ms. White's favor. Burlington Northern appealed the decision all the way up to the United States Supreme Court.

The United States Supreme Court in the White case held that to prevail against his or her employer, a retaliation plaintiff must show that the conduct by the employer alleged to be retaliatory "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." The Supreme Court held that Ms. White had met this standard because (1) she showed that her employer had reassigned her from the forklift operator duties which were considered to be better than the more typical track laborer duties that were more arduous and dirtier; and, (2) while her employer paid Ms. White back pay for the 37 days she was on suspension, she did not know during the time of the suspension whether or when she would return to work. The Supreme Court concluded that both of these actions were sufficient to deter a

reasonable employee from filing a discrimination claim. Therefore, the Court affirmed the jury's award in Ms. White's favor.

The White decision was under Title 7 of the Federal Civil Rights Act of 1964. While that Act applies to all states, California also has its own anti-discrimination law, the California Fair Employment & Housing Act (FEHA). Just as the United States Supreme Court engaged in a factual analysis in deciding the White case, California courts looking at retaliation claims under FEHA have engaged in often fairly detailed factual analyses in determining whether or not a claim has been stated. What this means is that cases will continue to stand and fall on their own merit, based on the facts peculiar to each case. It also means that it will usually be very difficult to get rid of cases by the use of summary judgment motions, since such motions can only be granted where there is no triable issue of a material fact.

According to court records, retaliation claims nationwide have more than doubled over the past decade, comprising more than 30 percent of the Equal Employment Opportunity Commission's caseload and costing, on average, more than \$130,000 each to resolve. Given the White decision, it is reasonable to expect that there will continue to be more and more retaliation claims. A number of attorneys in both the Orange and San Francisco offices of WFB&M are involved in employment cases including retaliation claims. If you would like additional information regarding WFB&M's employment law practice, please contact any of the firm's attorneys with whom you work or Ferdie Franklin, Mary Watson Fisher or Sage Knauft in the Orange office or Randy Lee or Laurie Sherwood in the San Francisco office.

TRIAL: A BATTLE OF THE EXPERTS? By: Ferdie F. Franklin, Orange Office



Ferdie F. Franklin

It is often said that many trials are "battles of the experts." Some people feel that the side that can hire the best expert will invariably win. Don Henley apparently thought so, but then his opinion may have been shaped by the then recently concluded O.J. Simpson criminal case.

Whatever opinions one may have about the use of expert witnesses in criminal cases, where the defense has the benefit of the jury instruction about "beyond a reasonable doubt," the truth is that in civil trials the successful use of expert witnesses is, like so many other things associated with litigation, a complex subject.

The areas of expertise for expert witnesses are as numerous as are the types of cases. Experts testify concerning the value of real and personal property, accounting issues, soils conditions and construction industry standards, as well as issues in personal injury cases that are sometimes on the cutting edge of science and medicine.

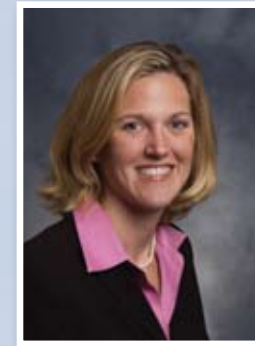
Experts come from a variety of sources, from universities to individuals who make their living entirely on fees received as expert witnesses, to other persons who may never have thought about the possibility of serving as an expert witness until they were contacted by an attorney who had a need in a particular field where that person works.

This month's "Recent Results" section of the newsletter highlights three cases where plaintiffs retained, and presented at trial, expert witnesses with impressive credentials, yet in each case the plaintiff lost. Experts can't work in a vacuum: their opinions must be supported by "reliable" information, including, but not limited to, facts in evidence. The courts also have some authority under the law to limit expert testimony if the judge feels that the expert does not have a reasonable, reliable basis for that testimony. Though judges have

often been reluctant to exercise the authority given to them to curb abuses by some experts, it seems that more and more judges are recognizing that making an independent evaluation of the material relied upon by an expert and a rational decision as to what the expert should be allowed to say is an important part of what a judge is supposed to do at trial.

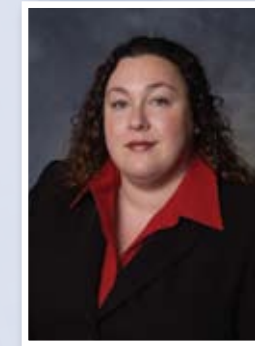
In upcoming newsletter articles, we will delve in greater depth into the interesting subject of the use of expert witnesses, especially at the time of trial. We will include discussions of specific areas where the Firm frequently encounters specific types of expert witnesses, issues relating to retention and use of experts, and limitations on the testimony that experts are allowed to give. We hope that our readers will find these articles at least half as interesting as we find working with (and against) expert witnesses.

NOT JUST PLAYING AROUND: COMMUNITY PROVIDES SAFE PLACE FOR CHILDREN TO PLAY By: Dana L. Burch, San Francisco Office



Jennifer Cormier

Jennifer Cormier, a partner in WFB&M's San Francisco office, found a fun and rewarding way to meet her neighbors in the North Bay town of Mill Valley. Over five days in June 2006, Jennifer and a pool of 500 volunteers worked to renovate Sycamore Park Playground. During the 1950s,



Dana L. Burch

Sycamore Park housed a popular playground as well as Mill Valley's first Little League field. However, in recent years, Sycamore Park had fallen into a state of disrepair and had become unsafe for children.

Jennifer's involvement with this project started well before the five

day build in June. Jennifer said that she wanted to "give something back to the community" and felt that the Sycamore Park Playground project was "an important project that would benefit not only my child but future generations." Jennifer served as Co-Chair of Art and Design on the Park Steering Committee, where she worked to raise both community funds and involvement. She also found creative ways to enhance the playground with native animals, birds and flowers which incorporate the heritage of Mill Valley. What makes Sycamore Park Playground unique is that it was designed by local children and built by the community. The designer, Leathers and Associates, met with local 3rd grade classes to create their playground "wishlists," which resulted in the creation of a mosaic sandbox, a caterpillar tunnel and an elephant slide.

To raise the \$200,000 needed to renovate the playground, the committee held a raffle and silent auction in conjunction with the Rotary Club. WFB&M attorneys and staff were quick to lend a hand by donating items for the raffle, purchasing raffle tickets and volunteering to assist with the physical construction of the playground. In addition to her extensive planning efforts, Jennifer personally labored during four days of the build. All of her hard work and dedication paid off when Sycamore Park Playground had its grand opening ceremony on June 25, 2006. In addition to having a beautiful new playground in her neighborhood, Jennifer was able to get to know her neighbors and provide a lasting tribute to the power of community involvement.

RECENT RESULTS



Nicholas Cipiti

Jury Awards Punitive Damages Against Multiple Manufacturer Defendants for Groundwater Contamination: WFB&M Client Exonerated

The City of Modesto sued numerous defendants, including several chemical and equipment manufacturers, for perchloroethylene contamination of the City's water wells. One of the defendants, a local drycleaner, was represented by WFB&M, along with another firm.

In June, 2006, after a four month trial, the jury found in favor of the plaintiff against a number of the defendants and awarded \$3,100,000 in compensatory damages and \$175,000,000 in punitive damages. Consistent with the law on punitive damages as established by the United States Supreme Court (see WFB&M newsletters Volume 4, Issue 1, and Volume 5, Issue 1), the punitive damage award was reduced to \$12.7 million dollars. The jury found that the evidence did not support a finding that WFB&M's client had contributed to the contamination of the wells. In spite of efforts by the highly compensated expert



Andrew Nelson

witnesses called by a nationally known plaintiffs' lawyer representing the City to opine that the drycleaner was liable for the contamination, the jurors obviously agreed that the evidence to support such opinions was lacking.

WFB&M was represented at trial by Andrew Nelson of its San Francisco office. Andy was assisted by a number of attorneys and staff from the San Francisco office.

City's Cleanup Claim Against WFB&M Client Defeated

In another case where a City (in this instance, Pomona) was attempting to recover cleanup expenses for known contamination, WFB&M successfully defended its client in a federal court trial.

WFB&M's client for many years operated a bulk storage and distribution facility where a number of chemicals were handled. It was undisputed at the time of trial that the property was substantially contaminated, especially with perchloroethylene (PCE). The City claimed that this contamination,



Thomas Scully

or at least much of it, resulted from the operation of the facility by the client. WFB&M pointed to an accident some years ago wherein a City truck attempted to cross railroad tracks in front of an oncoming train. The train hit the truck, knocking it into a large tank on the property where PCE was stored, resulting in a spill. This, according to the defense, was the cause of the contamination, not the operations by WFB&M's client.

Once again, the plaintiff attempted to shore up problems with its factual case by bringing in highly compensated expert witnesses to opine that the contamination resulted, at least in significant part, from the operation of the site, and not just from the toxic spill. The federal judge found that the plaintiff had not met its burden and granted a judgment in favor of the WFB&M client, with costs awarded.

Nick Cipiti of the Orange County office of WFB&M acted as first chair at the trial, assisted by Cyrus Chen. Nick and Cyrus were ably assisted and supported by other attorneys and staff in the Orange office.

WFB&M Client Defeats Lung Cancer Case

In yet another case where the plaintiffs' expert witnesses tried to bridge the gap between allegations and facts, a WFB&M client was defending itself in a case brought by the unfortunate sufferer of lung cancer, who claimed to have developed his cancer as a result of alleged exposure to asbestos. The Firm defeated the claim on a motion for non-suit at the close of the plaintiffs' case. As is typical of asbestos cases, the plaintiffs sued many defendants, including the WFB&M client. As is also typical of asbestos cases, a number of those defendants settled before trial but trial proceeded as to several who had not settled. During the trial, counsel for plaintiffs attempted to offer expert testimony that the product manufactured by WFB&M's client was a substantial factor in causing the lung cancer. Thomas G. Scully, of WFB&M's Orange County office, successfully objected that the evidence did not support the expert's opinion and the jury was never allowed to hear the expert testify that, in his opinion, the product from the WFB&M client was a substantial factor in causing plaintiff's disease. Therefore, without opinion to support causation, Tom moved for, and was granted, a non-suit. In other words, the case (at least as to the WFB&M client) never went to the jury. The remaining defendants settled before verdict. Tom was assisted at trial by Anne Gritzer, also of the Orange County office. Tom and Anne were supported by a number of attorneys and staff members from both the Orange County and San Francisco offices of WFB&M.



SEAN P. MARTIN. Sean joins WFB&M with extensive civil litigation experience including work in construction defect litigation. His educational background includes a Bachelor of Science degree in Business Administration and Accounting from Western New England College in Springfield, Massachusetts. Prior to pursuing his legal career, Sean worked as supervising senior accountant at KPMG in Hartford, Connecticut. Sean received his legal education from Pepperdine University School of Law in Malibu, California. He is also a member of the Robert A. Banyard Inn of Court. Please join us in welcoming Sean to our Orange County office.



CHRISTOPHER M. MCDONALD. Christopher joins our Orange County office with extensive litigation experience in product and premises liability. Christopher's academic background includes a Bachelor of Arts in Political Science from the University of California at Los Angeles where he completed the College of Letters & Sciences Honors Program and graduated magna cum laude and Phi Beta Kappa. He also received his legal education from UCLA where he participated in the Moot Court Honors Program. Christopher's accomplishments include work as an extern for the Honorable Samuel L. Bufford of the United States Bankruptcy Court. Please join us in welcoming him to WFB&M.



SARAH C. PASTRAN. Sarah, the newest member of our San Francisco office, is a member of both the California and New Mexico state bars. Sarah received her undergraduate degree in Philosophy from Santa Clara University where she was a member of the National Honor Society. She earned her law degree from the University of San Francisco Law School, where she served as Senior Associate Literary Editor of the Maritime Law Journal. Before joining WFB&M, Sarah worked as a clerk for New Mexico Supreme Court Chief Justice Richard Bosson and for the Office of the State Public Defender in San Francisco.



EDWARD R. ULLOA. Ed comes to WFB&M with extensive experience in products liability and toxic tort litigation on behalf of automobile manufacturers. Ed honed his trial skills while working as a Deputy City Attorney for the Cities of Hesperia, Orange and Ventura, California. Ed boasts an undergraduate degree from California State University in Long Beach. He received his legal education from Pepperdine University where he was a member of the Trial Advocacy Team and a recipient of the Terry M. Giles Honor Scholarship. Ed will be working in our Orange County office.



JENNIFER Y. WILLIAMS. Jennifer's work experience includes an externship with the Commonwealth's Attorney for the County of Roanoke, Virginia where she prosecuted both misdemeanor and felony cases. Jennifer received her juris doctorate from Washington and Lee Law School in Lexington, Virginia. During law school, Jennifer served as alumni relations chair of the Sports and Entertainment Law Society, was a moot court winner and a merit scholarship recipient. Jennifer received her Bachelor of Arts in Political Studies from Pitzer College in Claremont, California. We are pleased to welcome Jennifer to our Orange County office.