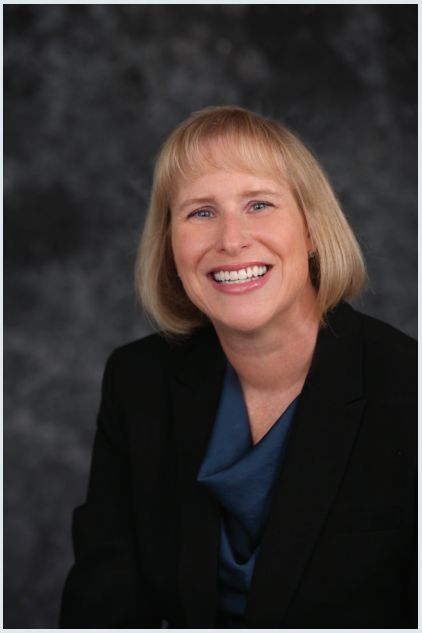
SPRING/SUMMER 2016

atissue

A STONE | DEAN PUBLICATION

Connecting you to trending and relevant legal developments in California

inside this issue:



Q&A with Amy W. Lewis

We sat down for an interview with our Senior Associate, Amy W. Lewis, so that our clients can come to know and value her as much as we do!

Describe yourself in three words. Organized, efficient and agreeable.

What do you believe differentiates you from your opponents? I have a more laid back litigation style and don't like to be overly adversarial. I find that trying to work with the other side is more beneficial to the parties and tends to lead to a quicker resolution.

What is the most important lesson that law school taught you? How to spot issues.

What is the most important lesson that practicing law has taught you? How to balance a lot at once.

Which area of law do you find the most interesting, and why? I enjoy personal injury litigation. It's challenging and often filled with entertaining characters.

If a student who was about to enter law school came to you for advice, what would you tell him/her? It's a great education and will prepare you for any number of careers, including the practice of law.

How do you prepare before a trial? I am a note taker. I tend to have outlines for examination as well as opening and closing to avoid forgetting anything important.

Do you have a signature snack you enjoy while in trial? I enjoy chocolate anytime, whether in trial or not.

What do you enjoy most about working for Stone | Dean? It is a really nice group of individuals. I find the attorneys very good at what they do and a good source of information and support.

How do you think your co-workers would describe you? Hard working and effective.

What would you say is your main motivation as an attorney? To obtain the best result for my client.

What is your favorite place in the world to visit, and why? That's a tough one. I love to travel, and my bucket list is full of additional places I would like to visit. I do love Paris. There are so many great museums and amazing food, and I love the history and architecture.

If you had to pick the most interesting case you've ever heard of, which would it be and why? I've always found *Roe v. Wade* an interesting and ground-breaking case. As a woman, I have always felt that the right to privacy under the 14th Amendment gives women control over their bodies and the decision to bring a child into the world. It's also one of the few Supreme Court cases that I've known to have a direct impact on a personal acquaintance.

After becoming an attorney, what surprised you the most about your new career? That law school didn't really teach me anything about practicing law. While I learned how to spot issues in cases and do legal research, litigating is more about investigation and negotiation which I think you learn with experience.

Do you keep a cluttered workspace, or do you prefer everything neat and clean? I am organized, so my work space tends to be pretty neat and clean.

Which activities do you enjoy doing in your spare time? I have two teenage children who are very active in music and dance. I try to go to as many of their competitions and events as possible. When they are away at college (very soon) I hope to catch up on my reading and also visit them as often as I can.

What is the best part about being a lawyer? It is intellectually challenging and also allows me to have a flexible schedule and work-life balance.

Learn more about Amy on our website at: stonedeanlaw.com/our-people/attorneys/amy-w-lewis/

Q&A with Gregg Garfinkel

We are pleased to welcome Gregg S. Garfinkel as a Partner to our growing firm. Gregg is a nationally recognized expert in transportation law and represents his diverse client base in all aspects of civil litigation. Gregg has represented the nation's largest transportation companies, and is personally responsible for some of the most important legal precedents in the 9th Circuit Court of Appeals. Gregg is a frequent lecturer at loss prevention seminars, offering insight on current issues and legal developments in the transportation and logistics industry. He has published numerous articles in local and national legal publications and has been recognized as a Southern California Super Lawyer from 2005 – 2016.

Welcome, Gregg. Now, what exactly is transportation law? Generally speaking, transportation law refers to any legal issue impacting a motor, rail, ocean, or air carrier. It is definitely not limited to truck accidents or the loss of Uncle Ernie's ashes. For the past 25 years, I have focused my practice on the defense of motor carriers in state and federal court and handled cargo loss and damage claims, employment law matters, tariff charge disputes, agency disputes between van lines and their affiliates, lien enforcement, warehouse thefts, and personal injury matters. I would estimate that I have handled at least 1,500 matters arising under the Carmack Amendment to the Interstate Commerce Act.

You mentioned the Carmack Amendment. Wasn't Carmack a character on the Johnny Carson show? I understand your confusion. Many practitioners — and even some judges — have never heard of it. Actually, the Carmack Amendment has been on the books since 1906. It was adopted to achieve uniformity in the rules governing interstate shipment. The Carmack Amendment spells out the rights, duties and liabilities of shippers and carriers when it comes to cargo loss. Carmack provides legitimate motor carriers with many important defenses to claims arising in interstate commerce.

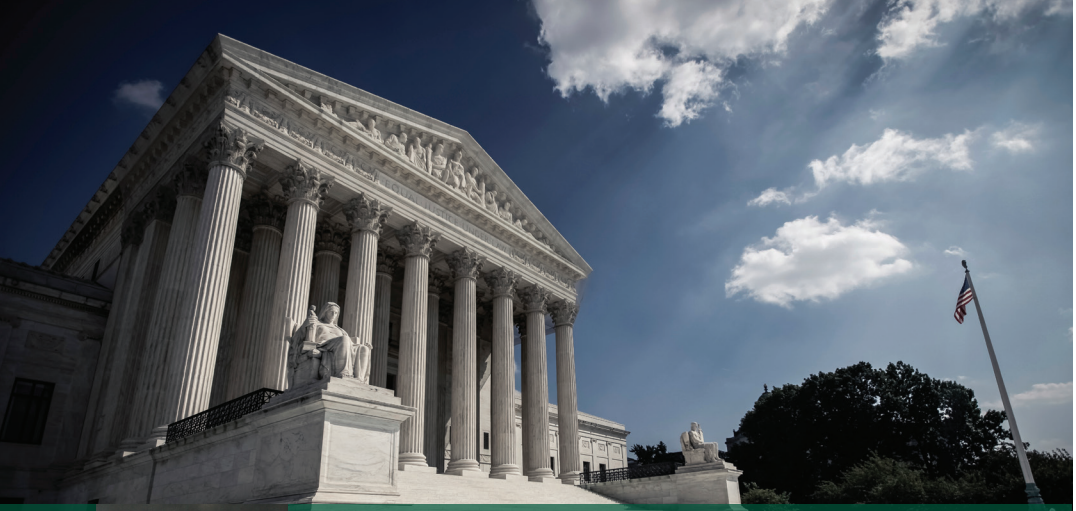
What has been your most memorable experience as an attorney? Without a doubt, it was arguing *Hall v. North American Van Lines* in the 9th Circuit Court of Appeals in San Francisco. The courthouse was the most beautiful building I have ever been in, with marble and mahogany everywhere you looked. The panel of justices were extremely well prepared, which resulted in a very spirited oral argument. The fact that my client prevailed made the experience even more memorable. The decision remains as one of the most frequently cited Carmack Amendment cases in the 9th Circuit.

What was the most difficult case you handled? We were retained to defend a lawsuit where the plaintiff sought to recover for the loss of her household goods and certain "important pictures." It turned out that the plaintiff was a Holocaust survivor, and the photographs were the last remaining physical memories she had of her family that perished during the Holocaust. Needless to say, we settled that case quickly.

What life experience prepared you the most for the practice of law? I played — and continue to play — baseball since I was 8 years old. I pitched all the way until college. Being a pitcher is very much like being a litigator. You need to know your opponents' strengths and weakness, to be comfortable being in the spotlight, to be able to think on your feet, and to channel your stress into a positive outcome. I think that I chose to become a lawyer because it was most like playing baseball. I still get the same feeling going to court as I do when I play baseball.

What do you do to relax? I am the single parent of two young boys, so I have little time to relax. However, there is nothing better than watching/coaching my sons play baseball. I am also an avid saltwater fisherman and enjoy taking my Boxer dog on long hikes.

Why did you chose to join Stone | Dean? This is my second go-around with the good people at Stone | Dean. I previously worked here from 1999 until 2009. The decision to come back was an easy one. The firm is still comprised of a diverse group of collegial, supportive, and accomplished attorneys and staff. There are few areas of law that we cannot handle effectively and efficiently. The firm's "go for it" philosophy made "taking my talents back to Woodland Hills" an easy decision.



The Vacant Chair:
How Justice Scalia's Life and Death Impact American Law

By Kori Macksoud

To understand the gravity of the loss of Justice Scalia, we must understand who he was, and how his judicial perspective shaped decisions handed down by the Supreme Court of the United States. Justice Scalia graduated magna cum laude from Harvard Law School in 1960 and began his legal career as an associate in the international law firm Jones, Day, Cockley and Reavis in Cleveland, Ohio. He left after six years because he believed he was better suited to teach law rather than practice it. He became Professor of Law at the University of Virginia in 1967. In the early 1970's, Justice Scalia transitioned into the public sector holding various positions in the Nixon and Ford administrations, eventually as an Assistant Attorney General. In 1982 he was appointed by President Ronald Regan to the Court of Appeals for the District of Columbia. In 1986, President Reagan nominated him as an Associate Justice of the U.S. Supreme Court and he was confirmed upon the retirement of Chief Justice Warren Burger and the nomination of Associate Justice William Rehnquist to Chief Justice. At the time of his death, Justice Scalia was the longest serving Justice on the court.

Justice Scalia observed the judicial philosophy of originalism, which holds that the Constitution should be interpreted in terms of what it meant at the time it was ratified, over 200 years ago. Justice Scalia is quoted as saying, "The Constitution that I interpret and apply is not living but dead, or as I prefer to call it, enduring. It means today not what current society, much less the court, thinks it ought to mean, but what it meant when it was adopted." For example, because there is nothing in the Constitution that protects a woman's right to an abortion, the Supreme Court should not recognize any such right and leave the issue to the states. While his philosophy lent to a typically conservative stance, Justice Scalia's steadfast commitment to originalism occasionally led him to arguably liberal opinions. Regardless of his philosophy, Justice Scalia was a brilliant writer; colorful, entertaining and at times, scathing.

Can President Obama appoint a new Supreme Court Justice so close to the end of his own term?

Pursuant to Article II, section 2 of the U.S. Constitution, the President "…shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Councils, Judges of the Supreme Court, and all other Officers of the United States…"

There is no deadline, or amount of time that a President must have left in his term to exercise his authority to appoint a Supreme Court Justice, so President Obama theoretically could appoint a new Justice. However, advice and consent of the Senate is required. Just as there is no deadline for President Obama to exercise his authority, there is no deadline for the Senate to consent. It will likely be very difficult for President Obama to get a (presumably liberal) Supreme Court appointee confirmed by the Republican-controlled Senate, especially when the Senate can hold off on confirming an nominee until after the upcoming presidential election with the optimism that a Republican candidate will enter office and appoint his (presumably conservative) replacement.

Does it really matter who is appointed to replace Justice Scalia?

Absolutely. If Justice Scalia is replaced with a liberal judge, it would cause a shift in the Supreme Court to a 5-4 liberal majority, opposite of what it has been for the past 45 years or so. This could have a great impact upon the final decision in many upcoming cases, and the possibility of prior decisions being overturned, especially in the type of matters that resulted in a split decision. Due to the entanglement of politics and the Supreme Court, a liberal shift is ideal for Democrats, and a worst-case-scenario for Republicans.

What happens to cases currently before the Supreme Court if Justice Scalia is not replaced until after a new President is inaugurated?

The Court will continue functioning, with the eight sitting Justices. Cases that receive a majority (five or more Justices concurring) opinion will have the same result as they would with nine justices. However, if the Court divides evenly on a case that is pending before it, which is quite possible considering the polarized nature of the Court, the lower court's order will stand, and there will be no nationwide effect. Therefore, it will be as if the Justices never heard the case. Some important issues that are currently before the court include immigration, unions, women's rights and affirmative action.

At this point, the effects of Justice Scalia's passing can only be speculated, but Scalia's legacy will live on long past his death as a committed originalist and the longest-serving member of the Supreme Court in modern history.

The Most Expensive Tree You Ever Pay for Might Just Be Your Neighbor's

By Gregory E. Stone

If you mistakenly cut down your neighbor's tree thinking the tree was on your property, it could cost you two times the value to replace. If you knew the tree was not on your property, it could cost you three times the value (treble damages).

In some circumstances you might even be ordered to pay your neighbor's attorney's fees. In addition, the person or company that actually cut down the tree can also be held liable under various common law claims such as negligence, trespass, conversion, intentional infliction of emotional distress and fraud.

California *Civil Code* section 833, provides if the trunk of a tree stands wholly on the land of one landowner, that landowner owns the tree regardless of whether its roots, foliage, or branches have grown onto the land of another. *Civil Code* section 834 provides if the trunk of a tree stands partly on the land of two adjoining landowners, then both landowners own the tree.

Generally, the law considers shrubbery, foliage and branches that encroach onto the land of another a nuisance. The owner of the land encroached upon may abate the nuisance by trimming the overhanging foliage, branches and limbs so long as the owner acts reasonably so as not to seriously injure or kill the tree causing the nuisance. However, if a landowner cuts foliage that is not encroaching onto his property and does not have the permission of the tree's owner to trim, the person cutting the foliage may be liable to the adjoining landowner for up to triple the amount of the damage caused by the wrongful cutting. If the damage is accidental or based on a mistaken belief, damages may be limited in the court's discretion to double the value of the wrongful cutting, as set forth in *Civil Code* section 3346.

Although adjoining landowners have an almost unfettered right to trim encroaching limbs, branches and foliage, that is not the case with tree roots. If roots encroach under adjacent property, you can sever the roots but only if the roots are in fact causing damage and then only if done reasonably (which may mean by a professional). If the tree roots of an adjoining landowner do in fact cause damage and the encroached-upon landowner acts reasonably to sever the roots causing damage, the owner of the encroaching tree is liable for the actual out-of-pocket expenses incurred as a direct result of his tree's encroaching roots.

If the adjoining landowner negligently severs tree roots and in turn seriously injures or kills a tree, the owner of the tree may sue. In *Booska v. Patel* (1994), the plaintiff claimed his neighbor negligently cut the roots of his tree which in turn necessitated the tree's removal. The neighbor claimed he had an "absolute right" to cut the tree roots any way he wanted (in this case 3 feet deep) because they were uprooting his driveway. The appellate court disagreed and held that a homeowner's right to manage his own land must be tempered by his duty to act reasonably.

Civil Code section 3346 and *Code of Civil Procedure* section 733 provide that the injured tree owner is entitled to a mandatory doubling (with certain exceptions), and at the discretion of the judge, treble damages for wrongful injury to trees or vegetation. In *Rony v. Costa* (2012), a property owner sued a neighbor. The neighbor hired an unlicensed day laborer to trim a tree which was encroaching over his property. But the worker also cut (i.e., hacked with a chainsaw) substantial parts of the tree and that were on the tree owner's land.

The property owner sued for wrongful injury to timber and won the trial. The court awarded damages for the replacement value of the part of tree that was cut on the tree owner's property. Further, damages were awarded for tree's loss of aesthetic value. Total actual damages equaled $22,530. The trial court then doubled the actual damages which it had authority to do per *Civil Code* section 3346. Now the property owner's damages totaled $45,060. Then, on top of that, the court awarded attorney's fees per *Code of Civil Procedure* section 1029.8, allowing an award of fees when hiring unlicensed individuals who cause injury performing a service that requires a license. On appeal, the appellate court agreed with the trial court except it did not agree that attorney's fees should have been awarded because the subject code section did not apply on the facts of this case for technical reasons.

Case law also provides some ammunition to obtain damages for diminution in value. In *Kallis v. Sones* (2012), the plaintiff's neighbor cut down a 70 foot tall pine tree which straddled the boundary line between their two properties. The court awarded $107,256 in damages and the judgment was affirmed on appeal. The court noted there are two alternate measures of damage for this type of tort. The first is the cost to replace the tree, and the second is the reduction in the market value of the plaintiff's property after the tree was cut as compared with the value of the property before it was cut. Because the trial judge found that plaintiff was likely to replant the tree similar in kind to the one destroyed, the appellate court held the "cost of replacement" was the proper approach. Had the property been for sale, plaintiff would have likely received damages equal to the reduction in the value of his property.

Bottom-line, if you have issues with your neighbor's tree(s), try to work it out with your neighbor and memorialize your agreement in writing. If your neighbor does not cooperate, consult with a legal professional before you consider taking drastic steps with trees on the edge of your property. If you wrongfully cut your neighbor's tree, the cost damages could be as high as a multiple of three.

New Rules Regarding Employers' Duty to Prevent Harassment and Discrimination

By Amy Lewis

California has adopted several significant amendments to the Fair Employment and Housing Act (FEHA) regulations which take effect April 1, 2016. The FEHA covers the civil rights laws in California and specifically those laws which protect workers in California from unlawful discrimination and harassment in the work place while also providing other rights, such as leaves of absence.

While the new amendments cover a wide range of topics, of special significance are the new rules which mandate an employer's affirmative duty to take reasonable steps to prevent, and promptly correct, harassment and discrimination and emphasize the requirement that mandatory harassment, discrimination and retaliation prevention policies be in writing and that specific provisions must be included in such policies. (2 *Cal. Code of Regs.* §11023).

Although employers with five or more employees are covered by California's non-discrimination laws, all California employers are covered by FEHA's anti-harassment provision and its duty to prevent discrimination. (*Government Code* §12940(j)).

Assume an employer in California is sued for sexual harassment. Even if the employee cannot prove he was harassed, if there is evidence that the employer did not take preventive measures, such as implementing a harassment prevention policy, the Department of Fair Employment and Housing (DFEH)[1] can assess "non-monetary preventative remedies" against the employer for failing to prevent the underlying harassment. This is true even though no evidence of harassment was found. A preventative remedy could include mandatory training of the employer's entire workforce.

If, however, an employer is able to show that all necessary reasonable steps were taken to prevent or correct harassment, and an employee unreasonably failed to use the employer-provided preventive or corrective measures, this may help to decrease the employer's liability for harassment claims. (See, *State Department of Health Services v. Superior Court of Sacramento County* (2003) 31 Cal.4th 1026.)

Under the new rules, in order to meet the employer's obligation to prevent harassment, discrimination and retaliation, the employer must first implement a written harassment, discrimination and retaliation prevention policy that must be distributed to all employees and acknowledged as received and understood by each employee.

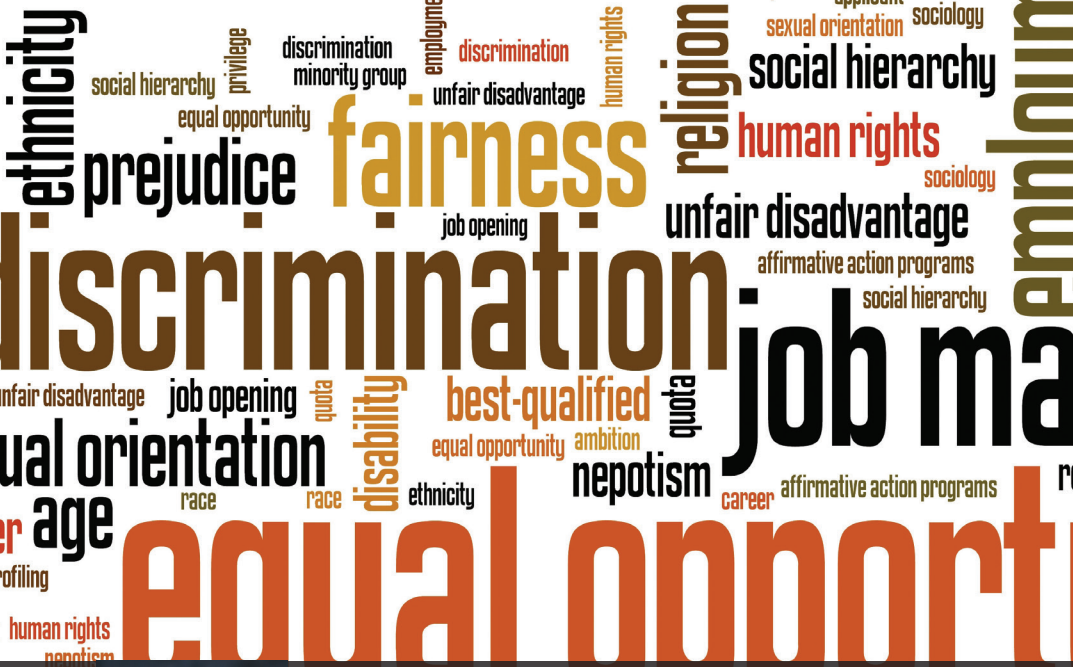
In addition, the employer must take steps to create adequate methods for employees to bring complaints which include alternatives in that a direct supervisor could be the source of the harassment and/or discrimination. Under the new rules, complaints must be:

1. Designated as confidential, to the extent possible;
2. Responded to in a timely manner;
3. Investigated in a timely and impartial manner by qualified personnel;
4. Documented and tracked for reasonable progress;
5. Provided appropriate options for remedial action and resolutions; and
6. Closed in a timely manner.

Finally, the employer's prevention policy must ensure that supervisors receive mandatory sexual harassment prevention training that meets all legal requirements. The training requirements that apply to employers with 50 or more employees have been updated to include new documentation and recordkeeping requirements and new content requirements, including addressing the negative effects of abusive conduct in the workplace; supervisors' obligation to report misconduct and the steps that can be taken to correct and remedy harassing behavior.

All California employers should take this opportunity to revisit their anti-harassment and non-discrimination policies to ensure they are consistent with the new amendments.

[1] DFEH enforces the FEHA. Employees can bring complaints of discrimination, harassment and retaliation before the DFEH



New Law Makes It Easier to File a Discrimination Claim

By Robyn M. McKibbin

If ever there was a time to review your salary rates and job descriptions, it's now. California's Fair Pay Act (SB 358) is intended to increase requirements for wage equality and transparency. Studies show that a white woman working full-time in 2014 earned $0.84 for every dollar a white man earned. The gap worsened for women of color: African American and Latina women working full-time earn $0.64 and $0.44/dollar, respectively. The disparity increases dramatically in certain professions like technology. Men with graduate or professional degrees earned 40-73% more than equally educated women in 2012, according to the Silicon Valley Index.

New Standard

California has prohibited gender-based wage discrimination since 1949. Under that law, the standard was "equal pay, for equal work." It was unlawful for employers to pay an employee less than the rate paid to an opposite-sex employee "for equal work on jobs the performance of which requires equal skill, effort and responsibility and which are performed under similar working conditions," in the same establishment. The Act sets a new "substantially similar" standard and prohibits an employer from paying any of its employees less than employees of the opposite sex for "substantially similar work."

"Substantially similar work" does not mean the same job; it can be a different position or title. The new law also eliminates the comparison against employees in the same office or location. Now, employees can compare jobs and pay rates at other locations, even across the country.

The new law also changes the burden of proof. The original law required employees to bear the burden of proving gender-based pay inequities. The new law requires employers to affirmatively show that any wage differential is not unlawful but is instead based entirely and reasonably upon one or more acceptable factors:

- seniority;
- a merit system;
- a system that measures earnings by quality or quantity of production;
- or other "bona fide factor other than sex" plus a showing of "business necessity"
  - education
  - training
  - experience

The last factor shall only apply if the employer demonstrates the factor is (1) not based on or derived from a sex-based differential in compensation, (2) is job-related with respect to the position in question, and (3) is consistent with a business necessity. An employee can defeat this defense by proving that an alternative business practice exists that would serve the same business purpose without producing a wage differential.

Increased Wage Transparency

Supporters of the Act contend that pay secrecy also contributes to the gender wage gap because women cannot challenge wage discrimination that they know do not exists. Employers cannot prohibit employees from disclosing their wages, discussing the wages of others or asking about another employee's wages, or terminate, discriminate or retaliate against an employee for exercising his/her rights or assisting others exercise theirs. Alternatively, neither an employee nor an employer is required to disclose the pay rates of others if asked.

The law allows employees to file an administrative claim or civil lawsuit. Administratively, employees can anonymously report concerns about gender-based salary inequities to the Division of Labor Standards Enforcement, which can investigate and order corrective measures. The DLSE can prosecute a civil case on behalf of employee or group of employees. An employer who violates the new law is liable for the difference in pay rates, interest and an equal amount as liquidated damages. In a civil action, the employee can also recover attorney's fees and costs.

Concerns

There are various nondiscriminatory reasons why employees receive different pay rates for similar positions. Employers often pay more for experience and talent while less experienced applicants will take less for an opportunity to learn and grow. Applicants get paid more when the position needs to be filled ASAP, some people are just better negotiators, and some people are just more likeable. These decisions are now all subject to scrutiny.

Action Plan

Employers should perform a thorough analysis of their pay practices and policies. Review pay rates, job classifications, job descriptions, and bonus plans. Ensure there are no policies that prohibit restraints on employee communications about wages. Train supervisors and managers who have authority to make decisions about pay rates and bonus compensation. If you find pay differentials, evaluate whether they are reasonable and necessary and based on legitimate business factors. Contact Stone | Dean if you need guidance.

STONE | DEAN LLP
ATTORNEYS AT LAW

21600 Oxnard Street
Upper Lobby – Suite 200
Woodland Hills, CA 91367

PRSRT STD
U.S.POSTAGE
PAID
VAN NUYS, CA
Permit No. 2929

NEWS & ANNOUNCEMENTS

➔ Congratulations to Greg Stone who defended a client on a breach of construction contract case. Through a cross complaint he was able to prove fraud and obtain funds from the plaintiff's bond resulting in the dismissal of the complaint.

➔ Congratulations to Robyn McKibbin for obtaining a six-figure arbitration award on behalf of a wrongfully terminated employee.

➔ SD participated in IIABA-LA's Annual I-Day Insurance Industry Conference at the Sheraton, Universal City. We enjoyed seeing everyone there and look forward to next year's I-Day.

➔ Greg Stone, as a mediator, successfully resolved a multi-party automobile claim resulting in a complete resolution.

➔ Leslie Blozan obtained summary judgment for a client accused of allowing a cow to wander on to a roadway and cause a serious truck accident. The Plaintiff could not prove the erring cow belonged to our client.

➔ After months of complex negotiations, Kristi Dean and Leslie Blozan settled a multi-party case involving wage and hour, financial and physical elder abuse claims.

➔ Stone | Dean is the proud sponsor of the IBA-Burbank, Glendale Pasadena Industry Appreciation Night on June 9, 2016 at BowlMore Lanes in Pasadena.

➔ Kristi Dean and Robyn McKibbin presented a seminar on employment law to the CIWA in February entitled "Employee from Hell: Survival Tactics." They will be making a repeat performance to attendees of the American Association of Managing General Agents in August.

➔ Gregg Garfinkel recently presented a transportation and warehousing storage law seminar at the 19th Annual Mandatory CLE Marathon at the Braemar Country Club in Los Angeles, California. The program was designed to provide an overview of the nuances of transportation and storage law, and can be tailored to the experience level of the audience.

➔ Congratulations to Sue Feffer on her 10-year anniversary as a member of the Board of Directors for the Northridge ASA Girls Softball League. Sue coaches 7 and 8 year old All-Star girls on the softball team "The Northridge Nightmares" throughout SoCal. Go girls!

STONE | DEAN LLP
21600 Oxnard Street
Upper Lobby – Suite 200
Woodland Hills, CA 91367
T: (818) 999-2232
F: (818) 999-2269

Questions or Comments:
Marleigh Green – Editor
mgreen@stonedeanlaw.com

Contributions By:
Matthew Harvey

VISIT US ONLINE:
www.stonedeanlaw.com

STONE | DEAN is a full service law firm focused on solving problems. We represent individuals and businesses in all aspects of litigation and business transactions.

atissue is the newsletter of STONE | DEAN and is comprised entirely of material researched, developed, and written by the attorneys, clerks, staff, and friends of the firm. The articles are of a general nature and are not intended to be interpreted as advice on specific legal issues. The mere receipt of the newsletter does not create an attorney-client relationship.