

## CASE LAW REVIEW | February 2010

includes only employees who are customarily tipped. Woody Woo filed a motion to dismiss Plaintiff's Complaint, and argued that this interpretation of the FLSA is only applicable to employers who claim a "tip credit." If a cash wage is less than the federal minimum wage, the employer can make up the difference with the employee's tips, which is the "tip credit." The district court dismissed the complaint for failure to state a claim.

**HOLDING:** Affirmed. Woody Woo did not claim a "tip credit" because Plaintiff's cash wages were higher than the federal minimum wage. Thus, its tip-pooling arrangement was valid because it was not attempting to use tips to make up the difference between the paid cash wage and the legal minimum wage.

**INTERNET: DEFAMATION**• **Phan v. Pham**

**FACTS:** Defendant, a Vietnam veteran, received an email accusing Plaintiff of being disciplined for abusive behavior at the end of the Vietnam War. Defendant forwarded the email to at least one fellow veteran. However, to the email he added the phrase: "Everything will come out to the daylight, I invite you and our classmates to read the following comments..." Plaintiff filed a complaint for defamation against Pham. The case proceeded to trial, after which the trial court granted Pham's Motion for Nonsuit. The appellate court looked at whether Defendant's addition of the introductory line was a "material contribution" to the email, meaning that a Defendant's "own acts must materially contribute to the illegality of the internet message."

**HOLDING:** Affirmed. Defendant's addition of the introductory line did not make a material contribution to the alleged defamatory email. The only defamatory content was found in the original email, which was not "created" by Defendant.

**ARBITRATION AGREEMENT**• **Dotson v. Amgen**

**FACTS:** When Amgen hired attorney Dotson, the parties entered into an employment contract. The contract contained an arbitration provision for the resolution of any potential dispute and an appendix containing arbitration procedures. One of the procedures allowed each party to take only one non-expert deposition. When Amgen later terminated Dotson's employment, Dotson filed a complaint for wrongful termination. Amgen moved to compel arbitration pursuant to the employment contract. The trial court found the arbitration agreement unenforceable, noting that the provision allowing for just one deposition was a "substantial flaw." Although it found the arbitration clause was otherwise unobjectionable, the court declined to sever the deposition provision from the agreement and enforce the remainder of the arbitration agreement.

**HOLDING:** Reversed. Dotson's education and ability to understand the arbitration agreement limited the procedural unconscionability. There was no substantive unconscionability because arbitration is a streamlined procedure: reducing the number of depositions is one way to achieve that. The arbitrator may allow more depositions upon a showing it is necessary. Finally, the trial

**Content**

**ARBITRATION AGREEMENT**  
*Dotson v. Amgen*  
California Court of Appeal,  
Second District  
Case No. B212965  
February 3, 2010

**ADA: ATTORNEYS FEES**  
*Jankey v. Lee*  
California Court of Appeal,  
Fourth District  
Case No. A123006  
February 5, 2010

**LABOR LAW:**  
**LABOR CODE § 233**  
*McCarthy v. Pacific Telesis  
Group*  
California Supreme Court  
Case No. S164692  
February 18, 2010

**LABOR LAW: WAGES**  
*Cumbie v. Woody Woo, Inc.*  
9th Circuit Court of Appeal  
Case No. 08-35718  
February 23, 2010

**INTERNET: DEFAMATION**  
*Phan v. Pham*  
California Court of Appeal,  
Fourth District  
Case No. G041666  
February 25, 2010

court should have severed the provision and enforced the remainder of the arbitration agreement.

### ADA: ATTORNEY FEES

#### • Jankey v. Lee

**FACTS:** Plaintiff Jankey filed a lawsuit under the ADA, Unruh Civil Rights Act (including Civil Code § 55), the CA Disabled Persons Act, and Health & Safety Code § 19955, alleging that a four-inch step located at the entry of Lee’s K & D Market was an architectural barrier preventing him and other wheelchair bound individuals from “wheeling directly into the store.” Lee’s motion for summary judgment was granted and he brought a motion to recover his attorney fees under Civil Code § 55. In ruling on the fee motion, the parties disagreed as to the applicable law. Jankey argued that the court should require Lee to show that his claims were frivolous, unreasonable or groundless, as required under the ADA (based on Hubbard v. SoBreck, LLC, 554 F.3d 742). Lee argued that the fees were automatically available to a prevailing defendant under Section 55, regardless of the characterization of Plaintiff’s claims, and the ADA does not preempt such an award (based on Molski v. Arciero Wine Group, 164 Cal.App.4th 786.) The trial court applied Molski and awarded Lee his attorneys’ fees under Section 55. Jankey appealed.

**HOLDING:** Affirmed. The mandatory fee award under Civil Code § 55 is not preempted by the discretionary standard under the ADA. Civil Code § 55 exposes a plaintiff to an adverse fee award because if it is not enforced, plaintiffs might take a “scorched earth” approach to litigation with no consequences.

### LABOR LAW: LABOR CODE § 233

#### • McCarther v. Pacific Telesis Group

**FACTS:** PTG employees are allowed an uncapped number of compensated days off for their own illnesses. However, PTG does not maintain a policy to pay employees for absences to care for ill

family members. PTG’s attendance policy has a progressive discipline scheme, but absences are excluded from discipline if they constitute protected leave under workers compensation or FMLA. Plaintiffs filed a complaint alleging PTG failed to provide paid leave under Labor Code § 233, which allows an employee to use accrued sick leave to attend to an ill family member. PTG filed a motion for summary judgment and Plaintiffs filed a motion for summary adjudication seeking a determination whether PTG’s sickness absence policy constituted “sick leave” within the meaning of § 233. The trial court granted PTG’s motion for summary judgment on the basis that PTG’s sickness absence policy did not constitute “sick leave” pursuant to § 233. Plaintiffs appealed and the appellate court reversed, holding that PTG’s sickness absence policy did constitute “sick leave” within the meaning of § 233.

**HOLDING:** Reversed. Labor Code § 233 applies to “accrued and available sick leave.” It does not apply to paid sick leave policies that provide for an uncapped number of days off. Where sick leave is not accrued, it is impossible to determine how much sick leave an employee is entitled to and how much could be used to attend to an ill family member. Employees had other types of leave available to use to care for family members.

### LABOR LAW: WAGES

#### • Cumbie v. Woody Woo, Inc.

**FACTS:** As a waitress, Plaintiff earned the state minimum wage (which was more than the federal minimum wage) and a portion of her daily tips. Woody Woo, Inc. required its servers to contribute their tips to a “tip pool,” which was redistributed to all restaurant employees. Most of the tip pool was given to kitchen staff members, who are not traditionally tipped in the restaurant industry. 30-45% of the tip pool was returned to the servers in proportion to their hours worked. Plaintiff filed a complaint alleging that Woody Woo’s tip-pooling arrangement violated the minimum-wage provisions of the Fair Labor Standards Act. She argued that an employee must be allowed to keep all of her tips unless the “tip pool” is “valid,” or