



# *HOT* LEGAL TOPICS

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# The Latest About

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- Disparate Impact
  - *Take It to the Limit (Paige v. CHP and Cal.)*
  
- Americans With Disabilities Act (ADA)
  - *Wrist Action (Toyota Motors v. Williams)*
  - *Age Before Disability (U.S. Airways v. Barnett)*
  - *Hire Me, Hurt Me (Chevron v. Echazabal)*
  - *Can't Touch Me (Barnes v. Gorman)*
  
  - *I Believe! (2 perception cases)*
  
- Privacy Rights
  - *I Heard It Through The Grapevine (County of Riverside v. Superior Court/Madrigal)*



# The Latest About

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- Disparate Impact
  - *Paige vs. California Highway Patrol, State of California and CHP Commissioner (9<sup>th</sup> Cir.)*
    - Class Acts
    - Proxy Groups
    - Aggregation
- Americans With Disabilities Act (ADA)
  - *Toyota Motors v. Williams (U.S.)*
  - *U.S. Airways v. Barnett (U.S.)*
  - *Chevron v. Echazabal (U.S.)*
  - *Barnes v. Gorman (U.S.)*
  - *Hernandez v. Hughes Missile Co. (9<sup>th</sup> Cir.)*
  - *Fogleman v. Mercy (3<sup>rd</sup> Cir.)*
- Privacy Rights
  - *City of Riverside v. Superior Court (Cal.)*



## Disparate Impact - *Paige Case*

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- ISSUES:
- Which pool of applicants to use in discrimination in promotion case?
- Class Certification – All non-whites
- Aggregation
  - Events that Predate the Limitations Period
  - Data across examinations - “Single Pool”
- Incorrect Data Analysis
- COUNTER ISSUE: Business Related Promotion Practices:?



## Paige - Chronology

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- January 1994 – lawsuit filed in District Court
  - Class certified
  - Mutual Motions for Partial Summary Judgment
- March 1995 – Plaintiff's M/PSJ granted, Defendants' M/PSJ denied
- December 20, 1996 – *Paige I* decisions
  - Plaintiff's M/PSJ reversed
  - Case remanded



## *Paige* – Chronology (cont'd.)

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- On Remand -
  - Additional Discovery
  - Mutual Motions for Partial Summary Judgment
- August 1998 – Plaintiffs' M/PSJ granted, Defendants' denied
- January 2002 – Oral Argument
- May 31, 2002 – *Paige II* decision
- June 14, 2002 – Petition for Rehearing en banc by defendants on issue of Aggravation



## *Paige - Facts*

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- CHP promotion practices:
  - Initial hire as Cadets
  - CHP Academy (6-months), then CHP Officer
  - Cal Vehicle Code: all supervisory vacancies within CHP must be filled by officers promoted from the next lower rank.
  - Application for advancement
  - Testing
    - Sergeant: multiple choice written and oral interview
    - Lieutenant: multiple-choice written and oral interview
    - Captain: In-Basket and oral interview
  - Eligibility List is compiled and published.



- District Court Findings:
  - Disparate Impact –
    - There exists a statistically significant disparity between minority representation in CHP supervisory ranks and minority representation in supervisory peace officer positions
  - Use of *external census data* to evaluate CHP's promotion practices was appropriate, and the use of *internal applicant flow data* was not because of "dearth"
  - "Dearth" of internal applicants attributed to:
    - statutory requirement of "appointing officers only from within CHP", and
    - fact that minority representation in entry-level officer rank was less than minority representation in entry-level ranks statewide, as measured by 1990 Cal. Census Code.
  - Ruling is "not a finding regarding the propriety of [CHP's] *hiring* practices under Title VII." (emphasis added.)





## Paige I – The Decisions

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- Two Opinions issued -
  - Published Opinion (procedure and jurisdiction)
  - Unpublished Opinion (105 F.3<sup>d</sup> 666 - merits of District Court's orders):
    - Affirmed Class Certification
    - Reversed granting of plaintiffs' M/PSJ
    - Vacated Preliminary Injunction
    - *Created confusion*



# Paige I – Confusing Unpublished Opinion

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- Court noted it could not say “whether or not justification exists in fact for looking to the external pool”
- It added *dicta*:
  - use of proxy for the actual pool could be justified by “evidence . . . that the CHP discriminated in *hiring, or of any employment practice* that deterred non-white, non-supervisory officers from applying for promotion.”
  - an internal pool of minority applicants that is smaller than expected is not illegitimate “in the absence of a practice that explicitly or implicitly deters non-white officers from *joining the CHP or applying for promotions.*”



## On Remand

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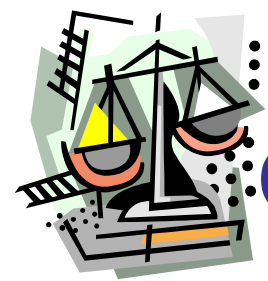
- Plaintiffs' M/PSJ:
  - Motion did not rely on an *external proxy*, but relied instead on statistical comparisons that utilized only *internal* applicant flow data.
  - Offered an "alternative employment practice" analysis: permitting individuals not employed by the department to apply for the supervisory vacancies would test for the same things and would not result in disparate impact.



## On Remand (cont'd)

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- Defense argument:
  - Plaintiffs' statistical analysis were flawed
    - Improperly included events that predated the statutory limitations period
    - Improperly combined different minority groups into a single "non-white" category
    - Relied upon improper statistical techniques to aggregate data from different promotion examinations and supervisory ranks
    - Included inaccurate data.
  - Defendants' expert showed that when errors corrected, CHP promoted minority officers at rates approximating or exceeding their application rates, and that no statistically significant disparity existed.
  - Defendants also submitted declarations from 2 experts that explained how the written tests for sergeant and lieutenant were job-related and consisted with business necessity.



## On Remand (cont'd)

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- Supplemental Declaration from plaintiffs' expert introduced 2 new arguments:
  - Cal. Vehicle Code Sec. 2251 implicitly and explicitly deters non-whites from applying to CHP supervisory positions.
  - Identified "inhibiting factors" in the CHP hiring process that reduced the proportion of non-whites who were hired as cadets and became officers.



# District Court Order

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- FINDING:
  - “Inhibiting factors” in the *hiring* process made the internal pool of actual promotional applicants “inappropriate” as a measure.
  - “External proxy” was the appropriate measure for evaluating DI in CHP promotions.
  - No identification of which ‘external proxy’ it considered to be appropriate and did not actually use any to make the analysis comparison



## District Court Order (cont'd)

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- ORDER:
  - Aggregation of data across promotion examinations, supervisory ranks and minority groups "is more probative" than unaggregated data
  - A significant disparity for the sergeant and lieutenant written tests had been shown to exist even when the flawed data was removed from the analysis
  - Inclusion of data that predate the statutory limitations period was allowed.
  - Therefore, plaintiffs established existence of statistically significant disparities in the defendants' written examinations.



## District Court Order (cont'd)

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- ORDER:
  - Defendants had not demonstrated how the sergeant and lieutenant written tests “validate the skills required for the job”.
  
- ORDER:
  - PSJ to pls. “on the issue of disparate impact resulting from the use of written examinations for promotion eligibility.”





## District Court Order (cont'd)

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- ORDER:
  - Denied MPSJ to pls. on issue of Vehicle Code and ruled that the plaintiff class, consisting solely of incumbent CHP officers, was not affected by the statute and lacked standing to challenge it.
  
- ORDER:
  - Granted defendants' Motion to Strike Expert's Supp. Dec. in that contents were outside scope of pls. original MPSJ and because it "discussed the justification of the external proxy pool."



## District Court Order (cont'd)

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- Preliminary Injunction: CHP enjoined from administering *any* promotion examinations until it develops new examinations under the supervision of a monitor and demonstrates their validity.



## Paige II

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Paige v. State of California,  
California Highway Patrol, CHP  
Commissioner (9th Cir. May 31,  
2002) 2 Cal. Daily Op. Svc. 4730



# The Appeal

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- Defendants:
  - Inappropriate to use an external pool
  - Plaintiffs erroneously group all non-white officers together rather than analyzing the data according to each separate minority group;
  - They improperly aggregated data from the various written examinations; and
  - They improperly included data from before the beginning of the liability period



# The Comparative Group

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- Defendants
  - Use the actual applicant pool.
- Plaintiffs
  - Use an 'external pool'
    - Similarly skilled peace officers in the State of California. The internal pool is not an accurate due to CHP's discrimination in *hiring*: it is not a reflection of the number of qualified non-white candidates who *should* be eligible and *would* apply for promotions.
- COURT:
  - Not an 'external pool' as suggested by plaintiffs. PSJ reversed, but we cannot grant PSJ to defendants, as there are disputed issues of material fact. Action must proceed to trial.
  - However, case is 8 yrs. old and has come back twice



# Grouping of Non-Whites

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- COURT (cont'd):
  - Grouping all non-white minorities together is appropriate
  - No need “to disaggregate the data into subgroups which are smaller than the groups which may be presumed to have been similarly situated and affected by common policies.”
    - Employment practices have the identical discriminatory effect upon members of all minority groups, and those practices unlawfully benefit solely the members of the white majority



# Aggregation of Data

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- COURT:
  - Plaintiffs improperly aggregated data from the various written examinations;
  - Aggregated statistical data may be used where it is more probative than subdivided data. It is appropriate where small sample size may distort the statistical analysis and may render any findings not statistically probative
    - Some suggest that 'stratification' should be upheld only if employer can show that it is appropriate and that it is business justified



# Aggregation of Examinations

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- COURT (cont'd):
  - Grouping data from various written exams for the supervisory ranks is more probative than subdivided data
    - Sufficient commonality among the duties and skills required by the various supervisory positions to justify aggregation.
    - Defendants themselves group supervisory positions together for purposes of their reports to the State Personnel Board and the EEOC.
    - This has been done in other Title VII race discrimination cases.
  - Captain's 'in-basket' exam is a 'written test', like the sergeant's and lieutenant's
    - Commander of the CHP's Selections and Examination Section says that it is a 'written exam'.





## *Paige* – Effect

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- What does it mean
- Where are Courts going
- What is its practical effect
- Educated guesses



# ADA – Defining Limits

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- U.S. Supreme Court 2001-02 term:
  - *Toyota Motors v. Williams*  
00-1089 (Jan. 8, 2002)
  - *U.S. Airways v. Barnett*  
00-1250 (April 29, 2002)
  - *Chevron v. Echazabal*  
00-1406 (June 10, 2002)
  - *Barnes v. Gorman*  
(June 17, 2002)



## *Toyota Motors v. Williams (Jan. 2002)*

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- Facts -
  - worker with carpal tunnel could not perform essential job functions of that job
- Issue –
  - whether “disabled” in terms of ADA protection
- Holding - not ADA disabled
- Rationale –
  - could perform other life functions
- Court narrowed definition of disability



## *U.S. Airways v. Barnett (April 2002)*

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- Facts –
  - Worker injured back in 1990 while working as baggage handler at SFO, moved temporarily to mailroom but lost job after 2 others with seniority sought it
- 9<sup>th</sup> Circuit sided with Barnett
- Issue –
  - Whether decision violated ADA requirement of “reasonable accommodation” to disabled workers
- Employer – upsetting established seniority system is an unreasonable accommodation



## *U.S. Airways v. Barnett (cont'd)*

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- Holding –
  - Presumption that with established seniority systems, seniority should trump disability
- Rationale –
  - Typical seniority system is disability-neutral workplace rule; provides important employee benefits by creating and fulfilling, employee expectations of fair, uniform treatment
- Downside for employers: presumption could be overcome if there have been exceptions to seniority rule in the past



## *Chevron v. Echazabal (June 2002)*

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- Facts -
  - worker with Hepatitis C, after 20 yrs. wanted to work for Chevron; exposure to hydrocarbons and other substances could be fatal
- 9<sup>th</sup> Cir. rejected Chevron's threat-to-self defense
- Issue -
  - whether ADA requires employers to hire disabled job applicants when the sought-after job poses a direct threat to the applicant's life or health
- Possibility of suing over workplace injuries
- Tension between express language of ADA defense related to posing a direct threat to others, and EEOC regulations interpreting Act



## *Chevron v. Echazabal (cont'd)*

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- Disabilities Rights Advocates –
  - 9<sup>th</sup> Cir. Faithfully read ADA's language and enforced its purpose, to end 'paternalism' in the workplace, which is a major reason for disability discrimination
  - ADA drafted to mirror Rehabilitation Act which does contain express provision re harm-to-self, by not including it Congress rejected the threat-to-self defense
  - ADA to be interpreted just as Title VII was in 1991 case involving gender discrimination case: women cannot be excluded from jobs solely because of concerns for their own safety



## *Chevron v. Echazabal (cont'd)*

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- Business groups –
  - EEOC regulations consistent with ADA language and legislative history
  - Provides reasonable balance job opportunities for disabled with business needs of employer
  - Makes sense; obvious outcome
- Court – EEOC reg stands
  - not carte blanche to claim that cannot do job due to health reasons – each case much be evaluated on its own, using the latest medical guidelines





## *Barnes v. Gorman (June 2002)*

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- Facts –
  - Wheelchair prisoner taken off wheelchair, propped up on bench in van and tied with his belt, transported and injured
  - meds and lost income \$1million
  - \$1.2 million in punitive damages against Kansas City
- 8<sup>th</sup> Cir. allowed punitives
- Issue –
  - Whether municipal government can be forced to pay punitive damages in private lawsuits claiming ADA (or Rehab Act) violations



## *Barnes v. Gorman (cont'd)*

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- Holding – no punitives but can be sued to pay actual damages and to make changes in accommodations
- Rationale –
  - unorthodox and indeterminate liability for recipients of federal funds



# ADA – Circuit Acts

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- Circuits test the limits
  - *Hernandez v. Hughes Missile Sys. Co.*  
9<sup>th</sup> Circuit Court of Appeals  
No. 01-15512 (June 11, 2002)
  - *Fogleman v. Mercy*  
3<sup>rd</sup> Circuit Court of Appeals  
(June 2002)



# ADA – 9<sup>th</sup> Circuit Court of Appeals

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- 9<sup>th</sup> Circuit Decision -
  - *Hernandez v. Hughes Missile Sys. Co.*  
(June 11, 2002)
    - Issue
      - “perception” of a disability brings case within ADA protection
    - Interesting facts
      - Triggering factors: application for re-hire denied; earlier resignation in lieu of discharge for failing a drug test
      - Case limit: unwritten Company policy not to rehire where violation of its code of conduct



# ADA – 3<sup>rd</sup> Circuit Court of Appeals

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- 3<sup>rd</sup> Circuit Decision –
  - *Fogleman v. Mercy*  
(June 2002)
    - Issues
      - 3<sup>rd</sup> party
        - Anti-retaliation provision of ADA
        - “perceived” to be engaging in protected activity
          - Focus on employer’s reasons
    - Interesting facts



# Interesting Privacy Case

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- *County of Riverside v. Superior Court (Madrigal)*  
(March 2002) 27 Cal.4<sup>th</sup> 793
  - Rulings:
    - Probationary police officers have right to see information gathered during employment Background Investigations
    - Cal. Public Safety Officer's Procedural Bill of Rights Act guarantees officers the right to view adverse comments in their personnel files
  - Limit:
    - Contractual Waiver enforceable
  - Effect:
    - Chill on 3<sup>rd</sup> party confidences
    - Thoroughness and reliability of B/I compromised