



EMPLOYERS AND
LAWYERS

Elimination of Bias in the Legal Profession

Presented By:

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Ogletree
Deakins





Agenda for Today

Bias in the legal profession

- **Preventing bias in the legal profession**
- **Preventing bias by promoting diversity in the legal profession**
- **Best practices and model legal departments**

BIAS IN THE LEGAL PROFESSION





- **CA Rule of Professional Conduct 2-400**

- (B) In the management or operation of a law practice, a member shall not unlawfully discriminate or knowingly permit unlawful discrimination on the basis of **race, national origin, sex, sexual orientation, religion, age or disability** in:
 - hiring, promoting, discharging, or otherwise determining the conditions of employment of any person; or
 - accepting or terminating representation of any client.

History of Gender Bias

- 1875: Wisconsin Chief Justice says that “the natural law destines and qualifies the female sex for the bearing and nurture of children of our race and for the custody of the homes of the world...”
- 1879: First female admitted to practice before U.S. Supreme Court
- 1944: U.S Supreme Court accepts first female law clerk (for Justice Douglas)
- 1950: Harvard Law School accepts first female student

History of Gender Bias

- 1960: Only 3% of attorneys are female
- 1972: Washington and Lee is the last law school to accept female students
- 1981: Sandra Day O'Connor is first female Justice appointed to U.S. Supreme Court
- 1993: Janet Reno becomes first female U.S. Attorney General
- 1996: ABA elects first female president



Justice O'Connor

- Top graduate of Stanford Law School in 1952
- A large California firm offered her only a secretarial position
- She refused the job and instead took a job as a deputy county attorney



Justice Ginsburg

- Top graduate of Columbia Law School in 1959
- She did not receive a job offer from any New York law firm
- Some law firms said she should apply to work as a secretary



Justice Kagan

- In 1986 graduated first in class at Harvard Law School
- In 1988 became law clerk for Justice Marshall
- In 2003 named first female Dean of Harvard Law School
- In 2009 named first female Solicitor General

Gender Bias Study

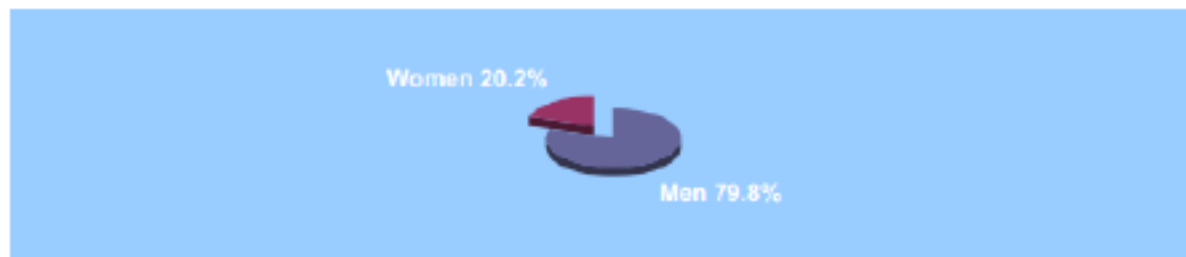
- 73% of female attorneys reported gender bias in legal workplaces as a major or moderate problem
 - The two examples of gender bias women agreed occurred most:
 - 70% - comments are made about the physical appearance or apparel of female attorneys when no such comments are made about male attorneys
 - 69% - asked if they are attorneys when male attorneys are not
- 61% of women somewhat or strongly disagreed that they are able to advance as far as male attorneys in the legal profession
- 67% of female respondents perceived there was less gender bias against women today than over the preceding five years

Gender Bias Today

- Women comprise:
 - 54% of population
 - 47% of law students
 - 31% of all lawyers
 - 46% of law firm associates
 - 20% of law firm partners
 - 15% of equity law firm partners
 - 31% of corporate attorneys
 - 20% of Fortune 500 General Counsel
 - 27% of federal & state judgeships

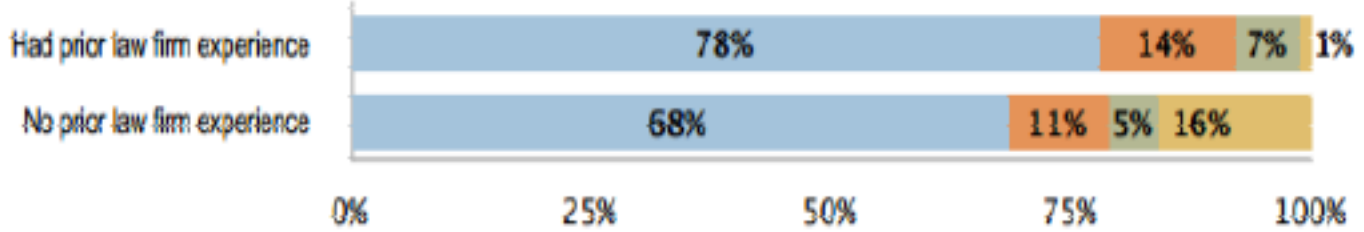
Women in Corporations

Fortune 500 General Counsel



Caucasian	African American	Hispanic	Asian American/ Pacific Islander	Middle Eastern
85.1%	8.9%	3%	2%	1%

Figure 1. Work-life balance in-house



- I think I am better able to balance work and non-work responsibilities as in-house counsel
- I think my ability to balance work and non-work responsibilities as in-house counsel is about the same as attorneys at law firms
- I think I am less able to balance work and non-work responsibilities as in-house counsel as compared to attorneys at law firms
- Don't know

Had prior law firm experience N=296; No prior firm experience N=19

History of Racial Bias

- 1865: First African-American admitted to practice before U.S. Supreme Court
- 1868: Harvard Law School accepts first African-American student
- 1948: U.S. Supreme Court accepts first African-American law clerk (for Justice Frankfurter)
- 1961: Reynaldo Guerra Garza is first Hispanic-American to be appointed to the Federal Bench (Southern District of Texas)
- 1967: Thurgood Marshall is first African-American Justice appointed to U.S. Supreme Court
- 1971: Herbert Young Cho Choy is first Asian-American (Korean-American) to be appointed to the Federal Bench (9th Circuit)
- 1994: Billy Michael Burrage is first Native-American to be appointed to the Federal Bench (District of Oklahoma)
- 2002: ABA elects first African-American president



Justice Marshall

- He was the grandson of a slave
- Denied admission to the University of Maryland Law School because he was African-American
- Attended Howard University Law School and graduated first in his class in 1933

Justice Sotomayor

- In 1978, firm of Shaw, Pittman, Potts & Trowbridge suggested during recruiting dinner she was at Yale only as a result of affirmative action
 - Formal complaint filed with law school
 - Firm's apology in December of 1978 made news in the *Washington Post*
- In 1991, first Hispanic federal judge in New York / first Hispanic female judge in U.S.



Racial Bias Study

- 77% of minority attorneys reported racial bias in legal workplaces as a major or moderate problem
- 63% of minority attorneys believe current law school graduates of color do not have the same opportunity for employment in legal community as Caucasian graduates
- 31% of minority attorneys reported they have been denied employment, equal pay, benefits, promotion, or another employment related opportunity within the past five years

ABA Report: Minority Women

- Missing out on desirable assignments
 - 44% = minority women
 - 39% = Caucasian women
 - 25% = minority men
 - 2% = Caucasian men
- Would have liked more and/or better mentoring by senior attorneys or partners
 - 67% = minority women
 - 55% = Caucasian women
 - 52% = minority men
 - 32% = Caucasian men
- Limited access to client development and relationship opportunities
 - 55% = Caucasian women
 - 43% = minority women
 - 24% = minority men
 - 3% = Caucasian men

Racial Bias Today

- **Minorities comprise:**
 - **30% of population**
 - 20% of law students
 - 10% of all lawyers
 - 4% African-American
 - 3.3% Hispanic
 - 2.3% Asian
 - .2% American Indian
 - **20% of law firm associates**
 - 7% of law firm partners
 - **14% of corporate attorneys**
 - 8% of Fortune 500 General Counsel

Minority General Counsel

- 2012 *Fortune* 500 Survey of Minority GCs:
 - 47 (9.4 percent) = minorities
 - Increase of 4
 - 28 = African American
 - 11 = Asian American
 - 6 = Hispanic American
 - 2 = Middle Eastern

Sexual Orientation Bias

- 32% of GLBT attorneys agreed it was safe for GLBT attorneys to be open about their sexual orientation at work
- 84% of GLBT attorneys reported bias in legal workplaces as a major or moderate problem
- 70% of GLBT attorneys have hidden their sexual orientation or identified themselves as heterosexual because of concern that revealing their orientation might negatively impact their careers
- 36% of GLBT attorneys believe they have the same chance of promotion as heterosexual attorneys

Sexual Orientation Bias

Law Firms

- Human Rights Campaign – Corporate Equality Index
 - 2006 = 12 law firms earned top rating of 100%
 - 2012 = 55 law firms earned top rating of 100%
 - Written non-discrimination policy covering sexual orientation & transgender
 - Offer inclusive health insurance, bereavement and family leave policies to employees with same-sex partners
 - Offer diversity training
 - Have LGBT employee groups
 - Engage in appropriate and respectful advertising to the LGBT community
 - Contribute to LGBT community organizations
 - Decline to engage in any activities that would undermine the goal of equal rights for lesbian, gay, bisexual, and transgender people

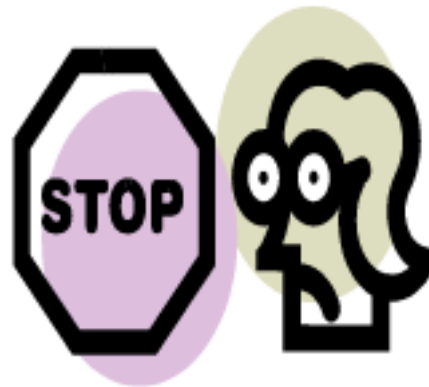
Disability Bias Study

- 66% of disabled attorneys considered bias against attorneys with disabilities in legal workplaces to be a major or moderate problem
- 72% of disabled attorneys reported their employers have made reasonable accommodations
- 27% of disabled attorneys reported they have been denied employment, equal pay, benefits, promotion, or another employment-related opportunity within the past five years because of their disabilities

Disability Bias

- 2011 Report
 - 19% of Americans have a disability
 - 6% of attorneys reported having a disability
 - 3.4% of law students requested accommodation for a disability
 - 7.6% lower employment rate
- ABA Commission on Disability Law explains:
 - Disability is not viewed as an issue of diversity and is not promoted as aggressively as issues with women and minorities
 - Stigmas attached to being disabled may discourage attorneys from reporting their disabilities

PREVENTING BIAS IN THE LEGAL PROFESSION





Preventing Bias:

Understand Barriers

- “Like me” syndrome
- Stereotypes
- Negative perception by those who feel threatened by EEO practices
- Ignorance of laws
- Outright prejudice



Preventing Bias:

Commitment by Management

- Anti-bias policies
- Training & education
- Mentoring programs
- Work-life balance



Preventing Bias:

Anti-bias Policies

- Create & enforce anti-bias policies'
- Respond to complaints
- Encourage use of employee hotline
- Audit employment decisions
- Conduct investigations
- Take remedial actions
- Follow up on remedial measures



Preventing Bias:

Training & Education

- CA law
 - After January 1, 2006, employer covered by this section shall provide sexual harassment training / education to each supervisory employee once every two years
 - Supervisory employees outside CA must be trained as long as they directly supervise CA employees
 - e-learning, both by webinars and by self-study methods, is permissible
 - Now requires training on bullying and abusive conduct, as well as gender identity, gender expression, and sexual orientation



Preventing Bias:

Mentoring

- Formal mentoring
 - Appoint someone to provide oversight to a mentoring program
 - Provide written guidelines / training / support
 - Clearly spell out goals and expectations
 - Expose mentees to successful women and minority lawyers
 - Impact lawyers at earliest possible entry
 - Uphold confidentiality



Preventing Bias:

Mentoring

- Informal mentoring
 - Workplace socialization
 - Build a sense of connection to the organization
 - Skills building
 - Help develop competency to practice law
 - Confidence building
 - Serve as role model / emotional support
 - Career advancement
 - Advice on career options / advocacy for promotion

PREVENTING BIAS BY PROMOTION DIVERSITY IN THE LEGAL DEPARTMENT



BEST PRACTICES & MODEL LEGAL DEPARTMENTS





10 Best Practices for Corporate Law Departments

1. **General Counsel is committed to diversity**

- Demonstrates dedication through ongoing support and evaluation of internal and external diversity efforts
- “For legal departments, the commitment of the general counsel is essential. It is clear that the higher up in the organization the commitment to diversity, the more pervasive it becomes throughout the organization.”



10 Best Practices for Corporate Law Departments

2. Interpret diversity very broadly

- Include not only race and gender, but also ethnicity/national origin, age group, sexual preference, veteran status, disabilities, parental status, lifestyle, and educational background

10 Best Practices for Corporate Law Departments

3. Metrics to measure progress

- Plan is implemented by a diversity committee or task force comprised of members of the department
- “Majority of law departments interviewed have developed some form of written ‘diversity action plan’ that includes diversity initiatives, goals, and metrics in key areas, such as staffing and outside spending”
- “People who work in the legal field like structure and formality...They believe you are serious about it and more committed to it if you have it in writing. You also hold yourself more accountable if you have a written strategy and set written metrics.” (GC Gap, Inc.)

10 Best Practices for Corporate Law Departments

4. Innovative recruiting techniques

- Announce all open positions – via Internet / on-campus
- Require internal / external recruiters to present diverse candidates
- Establish policies for handling applications and standardize the interview process
- Ask women and minorities in the department to play active roles

10 Best Practices for Corporate Law Departments

5. Focused retention efforts to reduce attrition

- Establish formal mentorship program
- Provide networks of communication through committees / periodic meetings
- Create an environment in which people want to stay
 - Feel secure and accepted
 - Included as part of the team
 - Have others like them in leadership positions as role models
 - Have mentors who are interested in their success

10 Best Practices for Corporate Law Departments

6. Key promotion and career development opportunities

- Review / formalize promotion plan
- Effective evaluation and promotion processes
- Formal management training / development program
- Increase opportunities for career development through rotational job assignments
- Announce all promotional opportunities
- Include those involved with equal employment opportunities (EEO) in all promotional processes



10 Best Practices for Corporate Law Departments

7. Tie compensation to diversity objectives

- Percentage of compensation tied directly to diversity objectives and measurable results
- Microsoft pays bonuses for outside counsel diversity – to both the firms / senior in-house attorneys who work with them



10 Best Practices for Corporate Law Departments

8. Influence diversity in outside law firms

- By requesting and measuring diverse counsel representation on legal matters
- By developing preferred partner relationships based in part on diversity progress of outside firms
- “Measuring diversity of outside law firms was one of the most notable changes found in the latest research. Many legal departments view their dollars spent with outside firms as a major way to increase legal work done by minorities and women.”



10 Best Practices for Corporate Law Departments

9. Sponsor / invest in “pipeline” programs

- Programs aimed at helping develop the career path for a greater number of diverse attorneys
- Partner with selected law schools
- Establish summer intern programs
- Establish multicultural and achievement scholarships
- Participate with local high schools (e.g., Career Day functions)



10 Best Practices for Corporate Law Departments

10. Network with other organizations that share the company's diversity values

- Minority bar associations and diverse business groups
- Way to advance the diversity principles of the law department and cultivate a network of diverse lawyers for future internal hiring or outside counsel retention
- “Many of those interviewed encourage staff not to just join, but to also become active members. Many noted that specific staff held leadership roles in these organizations and help direct the diversity initiatives of the organizations.”



Resources for Corporate Law Departments

- **Association of Corporate Counsel (ACC)**
 - Corporate Legal Diversity Pipeline Program
 - www.acca.com
- **Minority Corporate Counsel Association (MCCA)**
 - In-House Resources
 - www.mcca.com
- **American Bar Association (ABA)**
 - Member Services
 - www.abanet.org

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6. "Men's Temper Tantrums That Bother Women May Be Sex Discrimination," A.S.A.P. (September 2005)
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Ogletree
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Thomas ("Tom") McInerney, the Managing Shareholder of the San Francisco office of Ogletree Deakins, has extensive employment litigation experience in complex litigation matters, with an emphasis on class actions, multi-plaintiff cases, and trade secret and other complex business disputes. He has tried to verdict several cases in both state and federal courts, and represents clients in a wide-range of fields, including technology, financial services, insurance, construction, energy/utility, healthcare, transportation and logistics, and personal services.

Tom's expertise is in dealing with complex or novel issues, including sex and race discrimination and harassment, wage and hour class actions, alleged theft of trade secrets, and breach of contract. Tom also has significant experience in appellate matters, including litigating cases in the California Court of Appeal, the California Supreme Court, and the U.S. Court of Appeals for the Ninth Circuit. Arbitrations and mediations are also a large part of Tom's practice. Tom has assisted clients in developing arbitration and mediation programs, and he has represented a wide variety of clients in these alternative dispute resolution proceedings.

Tom brings a practical business perspective to his practice, formed in part by his experience working with large, medium-size, and small business clients throughout California and elsewhere. Tom also serves on the Ogletree Deakins Management and Pro Bono Committees. Prior to joining the firm he was a labor and employment partner with another national law firm. Tom is also very active in the local San Francisco Bay Area community, and is an elected official in Marin County, California.

Admitted to Practice

- California
- U.S. District Court, Central, Eastern, Northern and Southern Districts of California
- U.S. Court of Appeals, Ninth Circuit

Education

- J.D., Santa Clara University School of Law, 1992
- B.A., University of California, Berkeley, 1986

Honors and Awards



The College
of Labor and
Employment
Lawyers

LEADERSHIP FOR GREATER PURPOSE

Ogletree
Deakins

- Fellow – The College of Labor and Employment Lawyers (2016)
- *Best Lawyers in America* (2018)
- *Super Lawyers* of Northern California
- The Justice & Diversity Center of the Bar Association of San Francisco's "2014 Outstanding Volunteer In Public Service Award"
- The Legal 500 United States 2015: Recommended in "Labor and employment - Labor and employment litigation" category
- Selected to the AV Preeminent list, issued by Martindale-Hubbell

Practice and Industry Groups

- › Employment Law
- › Litigation
- › Traditional Labor Relations
- › Unfair Competition and Trade Secrets

Experience

Tom has experience in jury and bench trial on behalf of employers in sex harassment, age discrimination, and complex contract dispute cases. He also has directed all aspects of litigation, including pre-trial discovery and law and motion practice, involving claims of discrimination (sex, race, national origin, sexual orientation, religion, disability, and others), tort (defamation, assault, battery, infliction of emotional distress, false imprisonment, and others), and breach of contract.

Tom has also developed an expertise in wage and hour defense, including in class actions asserting failure to pay overtime, failure to provide meal breaks, and other alleged violations of California and federal law.

Tom has led the defense in arbitrations involving a wide range of claims, including for breach of contract, discrimination, and violations of the California Labor Code.

Tom has also argued a large number of appellate matters, including briefing and arguing cases before the California Supreme Court, the Ninth Circuit, and other state and federal courts in California and elsewhere. Examples of Tom's published cases include:

- *Guz v. Bechtel National, Inc.*, 24 Cal. 4th 317 (2000), a landmark Supreme Court decision addressing California state law for claims of discrimination, breach of employment contract, and breach of the implied covenant of good faith and fair dealing
- *Greene v. Marin County Flood Control and Water Conservation District*, 49 Cal.4th 277 (2010), a unanimous California Supreme Court decision upholding the legality of a flood fee election raising millions of dollars for flood protection in Marin County.
- *Stiefel v. Bechtel Corp.*, 624 F.3d 1240 (9th Cir. 2010), a Ninth Circuit decision involving novel substantive and procedural issues for disability discrimination claims.

- *Conley v. Pacific Gas & Electric Co.*, 131 Cal. App. 4th 260 (2005), a Court of Appeal decision rejecting opinion letters from the California Labor Commissioner involving class certification and vacation pay.
- *West v. Bechtel Corporation*, 96 Cal. App. 4th 966 (2002), a decision overturning a jury verdict in which the plaintiff had asserted state discrimination laws applied to employment overseas.
- *Application Group, Inc. v. The Hunter Group*, 61 Cal. App. 4th 881 (1998), a landmark decision addressing conflicts of law as applied to noncompetition clauses.

Professional Activities and Speeches

Professional Activities:

- Member of the Town Council of the Town of San Anselmo, California (Mayor in 2012 and 2014)
- Chair, Central Marin Police Council
- Chair, Marin County Flood Control District 9 Advisory Board
- Ross Valley Fire District Board Member
- State Bar of California (Labor and Employment Section)
- Federal Bar Association, Northern District of California
- American Bar Association
- Bar Association of San Francisco
- Barack Obama Delegate, 2008 Democratic National Convention, Denver, CO
- John Kerry Delegate to the Rules Committee, 2004 Democratic Convention, Boston, MA
- Campaign Field Director – Dukakis for President Campaign (1987-1988)
- Campaign Organizer – Clinton/Gore Campaign, Los Angeles, CA (1992)

Speeches:

- Ogletree Deakins Workplace Strategies Seminar - "Classify This: Emerging Employment Relationships" - San Diego - May 04, 2017
- Ogletree Deakins Navigating California Employment Law Seminar - "I Wish I Knew Then What I Know Now" - Lessons Learned From Defending California Wage and Hour Class Actions" - Napa - March 02, 2017
- Strafford Webinar: Minimizing Wage and Hour Risks With an Evolving On Demand Workforce - "Wage & Hour Risks with the On-Demand Workforce" - San Francisco - November 24, 2015
- Ogletree Deakins Corporate Labor and Employment Counsel Exclusive - "The "Gig Economy": Flexibility for Workers, Legal Issues for Employers" - Phoenix - November 12 - November 14, 2015
- Ogletree Deakins Managing a Workforce in 2016 Seminar - "The Right Things To Do To Avoid Wrongful Termination Claims" - San Francisco - October 2015
- Ogletree Deakins Corporate Labor and Employment Counsel Exclusive Seminar - "In-House Pressure Points: Top 10 High Intensity Issues" - Dana Point - September 2014

- Ogletree Deakins Webinar - "The San Francisco Family Friendly Workplace Ordinance and San Francisco Fair Chance Ordinance (Ban the Box)" - June 2014
- Ogletree Deakins Workplace Strategies Seminar - "No Hire Agreements—Are They Worth the Risk?" - Las Vegas - May 2014
- Ogletree Deakins Workplace Strategies Seminar - "Striking Gold—Wage and Hour Issues in California" - Las Vegas - May 2014
- Ogletree Deakins Navigating California Employment Law - "No Need to Hit the Panic Button—Best Practices and Strategies for Managing Litigation in California" - Silverado - March 01, 2014
- Ogletree Deakins Workplace Strategies Seminar - "Wage and Hour Litigation—California Style!" - New Orleans - May 2013
- Ogletree Deakins Webinar - "Protecting Trade Secrets and Balancing Employee Rights in California" - San Francisco - November 15, 2011
- Ogletree Deakins Workplace Strategies Seminar - "Cyber Sabotage by Employees: Practical Prevention and Legal Strategies" - Chicago - May 2011
- Ogletree Deakins Workplace Strategies Seminar - "Portable Devices Freeze Employers in their Tracks" - Las Vegas - May 06, 2010
- Ogletree Deakins Workplace Strategies Seminar - "Latest Developments in California Employment Law 2009" - Miami - May 2009
- Ogletree Deakins Workplace Strategies Seminar - "Latest Developments in California Employment Law 2008" - New Orleans - May 2008

Our Insights

- National Implications From Settlement of High-Profile Employee Raiding Case - April 26, 2014
- California Governor Signs Bill Limiting Attorneys' Fees for Employers in Wage Cases - September 06, 2013
- One-Sided Arbitration Agreement Found Unconscionable by California Court - April 29, 2013

Media

Media Quotes

- August 31, 2017 - Marin Independent Journal - "San Anselmo councilman makes 'Best Lawyers' list"
- August 08, 2017 - Law360 - "Google Asks Judge To Keep Hiring Info Private In Bias Case"
- December 01, 2016 - Law360 - "Lyft Nears OK On \$27M Wage Deal Amid Driver Objections"
- November 17, 2016 - Law360 - "Class Wants Final OK For Lyft Driver Misclassification Deal"
- August 04, 2015 - Practical Law Company - "Expert Q&A: Labor and Employment Issues in the On-demand Economy"
- February 27, 2015 - Ogletree Deakins Publications - "California Court Rules on Whether to Compel Arbitration Where Employer Could Not Authenticate Employee's Electronic Signature"

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- August 28, 2014 - Ogletree Deakins Publication - "California Supreme Court: Holding Franchisor Liable as Employer Depends on Level of Control Over Day-to-Day Employment Decisions"
 - August 08, 2014 - Daily Journal - "Employment Case Claims Against Lyft Tossed"
 - August 07, 2014 - The Recorder - "Lyft Licks Nationwide Employment Class Action"
 - July 30, 2014 - Ogletree Deakins Publication - "Ninth Circuit Allows Deputies to Proceed with Sex Discrimination Suit"
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 - February 28, 2014 - Ogletree Deakins Publication - "California Appellate Court Holds Substantial Motivating Factor Required in Wrongful Termination Case"
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 - November 10, 2008 - Law360 - "California Gay Marriage Ban Brings Workplace Confusion"
 - March 10, 2008 - Business Insurance Magazine - "Court Rules for Employers in Retaliation Case"
 - February 29, 2008 - Marin Independent Journal - "Tom McInerney: One Attorney's Take on Greene's Flood Vote Suit"