

Ninth Circuit, this one written by notorious scofflaw Justice Stephen Reinhardt. In 1991, a technician working Hughes Missile Systems in Tucson, Joel Hernandez, was forced to quit when he tested positive for cocaine use. After going through a substance abuse recovery program, Hernandez re-applied for his former job in 1994, but Hughes rejected him based on a company policy not to rehire employees terminated for misconduct. Hernandez sued Hughes under the ADA, claiming that the refusal to rehire him was motivated by an impermissible reason — his former drug usage — which is a protected disability. The Ninth Circuit agreed. Reinhardt's decision stated that "a policy that serves to bar the reemployment of a drug addict despite successful rehabilitation violates the ADA." Hughes contends that this ruling gives drug and alcohol abusers preferential treatment, since they cannot be barred from rehire, whereas employees terminated for other types of misconduct — stealing, fighting, and so forth — can be. Once again, the U.S. Supreme Court will have to decide whether the ADA compels this absurd result.

Good intentions do not necessarily result in good public policy, and this is certainly true with the ADA. Yet, despite the abusive lawsuits and the wacky judicial rulings, no one in Washington, D.C., seriously advocates repeal or even reform. Can it be that the unfounded appearance of compassion is more important

to a politician than justice or common sense? Or that no one in Congress is willing to own up to the fact that the ADA was seriously flawed? Our Declaration of Independence proclaims that "all men are created equal," defined as having been endowed by our Creator with certain unalienable rights. But all men are not equally endowed with health, intelligence, and physical attributes. Only massive and continuous coercion by an overweening government can mask the inherent differences among men in ability, achievement, and performance. To the extent that the ADA aspires to eliminate these innate differences, it is both misguided and doomed to failure.

Regardless whether the ADA is abandoned as a failed social experiment — and I harbor no illusions about the chances of that happening — Congress should at least revise the statute to eliminate some of the absurd results: for example, clarifying that drug addiction is not protected, that parole decisions are not covered, that the law applies only to government programs and services, not all government functions (such as sidewalks), that employers can determine job qualifications, and that non-discriminatory treatment does not mean treating everyone exactly the same. Until the ADA is fixed, the courts will continue to be mired in pointless lawsuits, producing senseless decisions, slowly but surely disabling America.

CEB

THOSE IN POWER OVER US

When a Tort is *not* a Tort

When it is being visited on you by the Franchise Tax Board, or so the FTB's tax collector zealots seem to think.

M . D A V I D S T I R L I N G

THE U.S. SUPREME COURT will soon address a serious question of abuse of government power, in *California Franchise Tax Board v. Hyatt*. In *Hyatt*, California's taxing agency asserts that its sovereign authority permits it to commit intentionally tortious acts in Nevada against a resident of that state — one Gilbert P. Hyatt, formerly of California — while investigating whether he paid sufficient California income taxes. (An "intentionally tortious

act" is a civil, in contrast to criminal, injury, such as, for example, falsely and maliciously portraying someone as having engaged in illegal or immoral conduct, or deliberately revealing confidential information to third parties, thus destroying someone's business and social relationships.) The Nevada Supreme Court, upholding Hyatt's suit against the California FTB, ruled that Nevada had the sovereign responsibility to protect its residents from intentional torts committed by California

tax agents in Nevada. The U.S. Supreme Court heard the case in February and is expected to issue a ruling in the late spring or early summer. A win by California will empower state taxing agents to go into another state and deliberately abuse its residents with impunity.

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GILBERT P. HYATT is a world-class inventor, researcher, and patent licensor. Both professionally and personally, he is a very private person. With a gentle, soft-spoken manner, he mostly works alone, creating and developing his inventions. For several years he lived in a modest neighborhood of a middle-class southern California community, his valued privacy often dictating the terms of his personal life. But the 1990 licensing of patents on certain of his computer technology inventions changed Gil Hyatt's world. Almost overnight, his personal and business affairs became the focus of a flood of intrusive and unsolicited public and media attention. He decided it was time for a change. On September 26, 1991, he said goodbye to California and moved to Las Vegas, Nevada.

Hyatt's move to Nevada contained all the legal indicia of permanent residency, *e.g.*, an apartment, sale of the California home, opening banks accounts, voter registration, a Nevada driver's license, and joining a religious organization. After a period of searching, he purchased both a home and a facility to house his research lab. He placed the lab facility's title in the name of another party to keep its address confidential. In April 1992, Hyatt filed a "Part-Year" income tax return with the California FTB for the period January 1 through September 26, 1991.

Meanwhile, in Sacramento, the executive officer of the FTB was exhorting his staff to a more aggressive pursuit of tax collections. His message introducing the taxing agency's new "Strategic Plan" (January 1992) stated: "With severe fiscal problems, a highly diverse and rapidly growing population, unmet social needs and an uncertain economic future, our elected officials have turned to those of us who are responsible for administering the state's tax programs ... to ensure that tax dollars are promptly, effectively, and efficiently col-

M. David Stirling is vice president of Pacific Legal Foundation, a public interest legal organization that submitted a friend-of-the-court brief supporting Hyatt's position in the U.S. Supreme Court. He previously served eight years as Chief Deputy Attorney General of California. He can be reached at mds@pacificlegal.org PLF website: www.pacificlegal.org

lected to keep vital state programs and services running. Clearly, this is not a new assignment, *but it has taken on an unprecedented level of urgency and attention* I am confident that the outstanding talent and team spirit we have at FTB will enable us to fulfill the expectations and responsibilities assigned to us." (*author's italics*)

There is little doubt that the FTB staff got the message. In June 1993 — some 21 months after Hyatt became a Nevada resident, he received notice of an FTB audit of his 1991 Return. Such notices state that a taxpayer undergoing audit should expect "courteous treatment by FTB employees, ... confidential treatment of any personal and financial information that you provide to us, (and) completion of the audit within a reasonable amount of time." Now, 10 years later, not only does the audit dispute continue, but the FTB's treatment of Gil Hyatt has become a matter of national concern.

Upon receipt of the audit notice, Hyatt, through his tax attorney, immediately conveyed to the FTB auditor his intention to cooperate fully. In exchange, he required the agency's assurance that it would comply with California privacy statutes and its own confidentiality regulations by honoring Hyatt's overriding need for privacy and treat all personal and business information he provided with utmost confidentiality. Due to the sensitive nature of his business, and past experience with industrial espionage and the theft of trade secrets, Hyatt's attorney made it clear to the FTB that Hyatt could not risk public disclosure of any of his confidential information. With the FTB's assurances received, Hyatt provided the FTB with the vast amount of information it sought.

The specific issue triggering the audit, according to the FTB, is whether Hyatt really did, as he claims, become a permanent resident of Nevada when he says he did. That issue is being argued in a separate tax case in Superior Court. The issue in the case before the U.S. Supreme Court, however, involves FTB actions as it pursued its "audit." After receiving Hyatt's answers, and over the course of the next three years, the FTB:

* directed multiple investigative inquiries concerning Hyatt, using official FTB stationery, to numerous Nevada state, local government, and utility district offices, and to three area newspapers, disclosing his secret Las Vegas research lab address (following 40 such unauthorized disclosures of Hyatt's lab address, some of his most sensitive trade secrets appeared in publications and in others' commercial products);

* issued official, subpoena-like documents called "Demand[s] to Furnish Information," (citing FTB's *California authority* to issue subpoenas) to numerous Nevada business and professional entities and individual residents, demanding that they furnish the FTB information concerning Hyatt (in fact, the FTB has no authority to issue such demands in Nevada);

* beginning in March 1995, sent agents into Nevada on three separate forays where they — unannounced — confronted and questioned many of Hyatt's current and former neighbors, the employees of businesses and stores he patronized, and other Las Vegas residents — even his trash collector — concerning personal details of Hyatt's life (FTB personnel disclosed in deposition testimony that during an investigative visit to Hyatt's Las Vegas home, one agent opened and rummaged through Hyatt's curbside mailbox, and then did the same with his trash container);

* with information Hyatt provided about Japanese corporate licensees of his patents, including Hitachi and Matsushita, the FTB sent excerpts from the licensing agreements to those companies, disclosing not only that Hyatt was under investigation for tax evasion, but suggesting that Hyatt's disclosures to the FTB violated the agreements' confidentiality provisions.

IN ADDITION, the FTB "bombarded" individuals, businesses, trade groups, licensees, Nevada government officials, and others (numbering in the thousands) with some 90 pieces of correspondence containing personal and confidential information about Hyatt. As a result, Hyatt's patent licensing business was destroyed and his royalty income from new licensees dropped to zero.

Yet, the FTB's treatment of Gil Hyatt has an even more sinister side. FTB personnel revealed in depositions that the FTB's approach is to target high-income, former California residents, and to reward personnel who produce excessively-bloated estimates of the taxes, interest, and penalties the taxpayer could be charged with, while penalizing personnel whose cost-benefit analysis suggests pursuing the taxpayer would cost the agency more than it would recover.



Depositions further describe how, through a very simple technique, an audit can be made to show the strongest possible case against the audit target — namely, deliberately gathering and focusing exclusively on information favorable to the FTB's position, while completely ignoring documentary evidence and witness statements supportive of the taxpayer's position. Indeed, FTB personnel testified in deposition that early in the Hyatt audit, a key FTB employee made the statement, "I'm going to get that Jew bastard." Later, that employee admitted in deposition that not only did she disregard evidence favorable to Hyatt, but even destroyed key notes and bank records favorable to him. Another FTB employee opined in deposition that the FTB audit "created an entire fiction about" Gil Hyatt. A Nevada court commissioner even suggested that the FTB's "bury(ing)" of information favorable to Hyatt might constitute fraud.

Without question, the most troubling abuse in this sordid story is the way such trumped-up, predetermined audit results are used to leverage the taxpayer. This phase of the process has two steps. The first step is the FTB's report of the tax owing — in Hyatt's case, \$5.5 million. On top of this sum, the FTB arbitrarily imposed a \$9 million penalty for his alleged fraud in claiming Nevada residency. The second step in the process closely resembles extortion. Indeed, the FTB instructs its personnel how to use the fraud penalty as a "bargaining chip" to "persuade" the taxpayer to pay the FTB's assessed tax. In Hyatt's case, FTB personnel went even further, "suggesting" to Hyatt's tax representative that settling for the \$5.5 million then would avoid public revelation of Hyatt's personal and financial information, a deliberate scheme exposed by deposition testimony acknowledging Hyatt's unique and special concern for privacy.

California's Franchise Tax Board is urging the Supreme Court to give high recognition to its tax-collection mission, and to discount the seriousness of intentional torts it commits against individuals while pursuing that mission. That attitude, combined with the FTB's current budget plan of hiring 123 additional audit and collection personnel, should cause concern to all who value individual and economic freedom. We should hope this concern is not lost on the Supreme Court.

DEF.

The 'myth' of a biased media

Big city journalists hold conservatives in contempt, wouldn't invite them to their homes, consider them yahoos — but, dear me, what's all this talk about bias?

G E O R G E N E U M A Y R

LOS ANGELES TIMES media critic David Shaw writes dismissively of "Ranters on the Right." What about ranters on the left? They don't appear to trouble him so much. In a March column, Shaw showcased the new book of Eric Alterman, a bonified ranter on the left who serves as a left-wing hatchet man for such publications as *The Nation*. Shaw said he lunched with the radical author and found that his book *What Liberal Media?* makes a "persuasive case that there really isn't a pervasive liberal bias in the media."

But apparently Alterman couldn't stay on message during his lunch with Shaw. He acknowledged, Shaw relates, that "most big-city journalists are liberal ... I don't have to my house for dinner anyone who's not pro-choice, pro-gun control ... pro-campaign finance reform." Alterman also confessed to Shaw that conservatives who believe "the mainstream media hold them and their way of life in contempt" are correct. "Dan Rather and Peter Jennings and Tom Brokaw want nothing to do with the people who listen to talk radio and drive pickup trucks," Alterman said. "In the high levels of the New York media, these people are regarded as yahoos." And Shaw and Alterman continue to scratch their heads over the "persistence and widespread acceptance" of the "myth" that the media is liberal? Alterman should read his own quotes.

Like Alterman, Shaw considers journalists far too disciplined and fastidious to allow ideological bias to creep into their work. The yahoos have no cause for concern. These people are professionals. Liberal media bias is certainly a popular "perception," writes Shaw. But it is not a reality. Conservatives, he says, just don't understand that "journalists are skeptical, confrontational, and iconoclastic, which means they challenge

the establishment, while conservatives want to conserve it. So the better journalists do their job, the more likely conservatives are to see them as liberal." Shaw admits that this theory "may be every bit as self-serving as Alterman's." (Shaw dissents from Alterman's contention that a vast right-wing conspiracy exists in the media.) That's big of him. But the larger problem with his theory is that it ignores an obvious fact: much of the establishment has been under liberal management for decades. Conservatives don't want the liberal establishment conserved; they want it questioned, and Shaw's supposedly skeptical media almost never question it.

Why Shaw finds the perception of liberal media bias so maddeningly mysterious is itself a mystery. Surely he has taken a look at his own paper. Clear out the *Times'* stable of ranters on the left, Mr. Shaw, and that "perception" will diminish. A paper without a single conservative columnist invites it. A paper with a book review section that contains paeans to communists, socialists, and liberal icons invites it. A paper *unskeptical* and *nonconfrontational* toward the liberal culture it spreads in Southern California invites it. Ever since former publisher Otis Chandler tried to ape the *New York Times* in the 1970s, the *Los Angeles Times* has proudly projected an image of liberalism. Is it really astonishing that Americans have finally perceived it?

"I've not only had a couple of anti-gun control friends to my house. I've gone on vacation with one of them. Twice," says a defensive Shaw. Quite a boast from a liberal media critic. Can the *Times* keep him?

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The late *San Francisco Chronicle* columnist Herb Caen billed San Francisco as "Baghdad by the Bay." Patriotic Americans reading the paper's steady stream of antiwar articles would agree. While the *Chronicle* has

George Neumayr is California Political Review's press critic.