Labor and Employment Litigation Update

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Notes:

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Labor and Employment Law Update

League of California Cities

Long Beach, CA

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WAGE AND HOUR

PUBLIC AGENCIES JOINTLY EMPLOYING WORKERS TOGETHER WITH PRIVATE EMPLOYERS ARE NOT SUBJECT TO CALIFORNIA OVERTIME REQUIREMENTS

Morales v. 22nd Dist. Agricultural Ass'n, 1 Cal.App.5th 504 (2018)

Defendant 22nd District Agricultural Association of the State of California (the DAA) is a California public agency that owns and manages the Del Mar Fairgrounds and the Del Mar Horsepark. Plaintiff Jose Luis Morales and a group of other seasonal employees of the DAA filed a putative class action alleging that the DAA failed to pay plaintiffs overtime compensation required by state law under Labor Code section 510 and federal law under the Fair Labor Standards Act of 1938 (29 U.S.C. § 201 et seq.) (FLSA). The trial court sustained, without leave to amend, the DAA's demurrer to plaintiffs' section 510 cause of action. After the trial court conditionally certified the case as a collective action, the DAA asserted an affirmative defense to plaintiffs' FLSA claim. Specifically, the DAA alleged that the employees were exempt from the FLSA overtime compensation requirements pursuant to a statutory exemption (29 U.S.C. § 213(a)(3)) commonly referred to as the "amusement exemption." The trial court held a jury trial on the DAA's affirmative defense to plaintiffs' FLSA claim. The jury rendered a verdict in favor of the DAA and the trial court entered a judgment in favor of the DAA. Plaintiffs timely appealed, alleging error by the trial court in sustaining DAA's demurrer to the overtime claims.

The appellate court affirmed. First, the court acknowledged that public agencies in California are not subject to the state overtime provisions in the Labor Code and Industrial Welfare Commission Wage Orders. Therefore, the court held that a public agency cannot become liable under these state law provisions simply by virtue of entering into a joint employer relationship with a private entity that is itself subject to state law.

CALIFORNIA WAGE ORDER DEFINITIONS OF "EMPLOYEE" APPLY TO DETERMINATION OF EMPLOYEE VERSUS INDEPENDENT CONTRACTOR STATUS

Dynamex Operations West, Inc. v. Superior Court, 4 Cal.5th 903 (2018)

Dynamex is a nationwide same-day courier and delivery service that offers on-demand pickup and delivery services to businesses and the public. It previously classified its California drivers as employees, but as a cost savings measure, converted its drivers to independent contractors prior to the dispute. One of those drivers filed a class action lawsuit alleging various wage and hour claims, including claims under the Industrial Welfare Commission's wage orders. If the drivers were "employees," Dynamex would be subject to various wage order obligations regarding minimum wages, maximum hours, and a number of very basic working conditions (such as meal and rest breaks). The trial court certified a class action embodying a class of Dynamex drivers deemed to have

relevant common legal and factual issues relating to their classification as employees or as independent contractors. Dynamex unsuccessfully moved to decertify the class, and then filed a writ proceeding in the court of appeal, maintaining that two of the alternative wage order definitions of "employ" relied upon by the trial court do not apply to the employee or independent contractor issue. Dynamex contended, instead, that those wage order definitions are relevant only to the distinct joint employer issue. The court of appeal rejected Dynamex's contention, and concluded that the wage order definitions applied by the trial court were applicable to the employee or independent contractor question with respect to obligations arising out of the wage order. Dynamex sought review by the California Supreme Court as to the court of appeal's conclusion that the wage order definitions of "employ" and "employer" applied to the determination employee versus independent contractor status.

The California Supreme Court unanimously affirmed, rejecting a long-standing test for determining whether workers should be classified as employees or independent contractors, in favor of a new standard that heavily favors workers being classified as employees under the California Wage Orders. The Court adopted a broad "ABC Test" that starts with the assumption that a worker is an employee, placing the burden on the employer to establish that the worker is an independent contractor by satisfying all parts of the following three part test:

A. That the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact;

B. That the worker performs work that is outside the usual course of the hiring entity's business; and

C. That the worker is customarily engaged in an independently established trade, occupation or business of the same nature as the work performed for the hiring entity.

Thus, according to the Court, a seamstress hired by a clothing manufacturer to make dresses from cloth and pattern supplied by the company is an employee, as is a decorator contracted to regularly design cakes for a bakery. On the other hand, an outside plumber hired to fix a leak in a bathroom on a one-time basis is still an independent contractor. This new test only applies to classification as an employee for purposes of the Wage Orders. Based on the Court's decision, there is no indication that it changed the tests to determine employee status under other employment statutes related to taxes, unemployment, entitlement to benefits, including workers' compensation insurance, or other state and federal laws relating to wages, hours and working conditions.

DISCRIMINATION/HARASSMENT/RETALIATION

ADMINISTRATIVE PROCEEDINGS OF THE REQUISITE JUDICIAL CHARACTER CAN RESULT IN AN ADMINISTRATIVE DECISION THAT IS BINDING IN A LATER CIVIL ACTION BROUGHT IN SUPERIOR COURT

Wassman v. South Orange County Comm. College Dist., 24 Cal.App.5th 825 (2018)

Carol E. Wassmann was terminated for cause from her employment as a tenured librarian with the South Orange County Community College District ("District") in April 2011. A five-day administrative hearing was conducted in accordance with Education Code section 87660 et seq., which governs "the evaluation of, the dismissal of, and the imposition of penalties on, community college faculty." After hearing testimony, receiving documentary evidence, and reviewing written arguments, the administrative law judge issued a 20-page decision in August 2012, upholding the District's decision and determining there was cause for dismissing Wassmann. In October 2012, Wassmann filed a petition for writ of mandate, alleging that the ALJ's findings were not supported by the weight of evidence. (Notably, she did not raise any issues regarding race discrimination, age discrimination or harassment.) The trial court denied the petition in August 2013, finding the record to be "replete with instances of repeated violations of rules, multiple conflicts with supervisors and numerous failures to perform assignments."

In December 2013, Wassmann filed a charge of race and age discrimination, as well as harassment, with the California Department of Fair Employment and Housing (DFEH). The charge named several of her former supervisors as respondents, and while it did not name the District, she later amended the charge to add two coworkers in her employee association who had represented her in her performance management and disciplinary proceedings. She requested a right-to-sue letter, and subsequently sued the District and the individuals named in the charge, alleging, among other things, claims for racial discrimination, age discrimination, and harassment in violation of the California Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.), and for intentional infliction of emotional distress. The trial court granted motions for summary judgment on the ground the FEHA claims were barred by res judicata, collateral estoppel, or failure to exhaust administrative remedies, and the intentional infliction of emotional distress cause of action was barred by res judicata, collateral estoppel, or the statute of limitations. Wassmann appealed.

The court of appeal affirmed. The process required under the Education Code affords an employee a robust platform of due process from which to challenge adverse employment actions, concluding with an evidentiary hearing before an administrative law judge. The ALJ's determination is then subject to judicial review via petition for writ of mandate, where the trial court exercises independent judgment on the evidence. Where these sorts of administrative proceedings possess the requisite judicial character, the resulting administrative decision is binding in a later civil action brought in superior court. *See, e.g., Runyon v. Board of Trustees*, 48 Cal.4th 760 (2010); *Johnson v. City of Loma Linda*, 24 Cal.4th 61 (76). The appellate court here determined that Wassermann's unsuccessful challenge to the ALJ's decision had preclusive effect under principles of res judicata and

collateral estoppel. Wassmann could have challenged the District's action "on any ground" (both from the outset and in her writ petition), but failed to raise concerns about discrimination or harassment, and thus she failed to exhaust her administrative remedy. The appellate court also found her claims time-barred, given that the latest date of any potential discriminatory or harassing conduct would have been her termination date in April 2011. Neither her one-year DFEH deadline, nor the two-year statute of limitations on her IIED claim, were tolled during her pursuit of administrative remedies with the District. Thus her subsequent DFEH charge and lawsuit in December 2013 were untimely.

THE 90-DAY PERIOD FOR FILING A CIVIL ACTION BEGINS WHEN A CLAIMANT IS GIVEN NOTICE OF THE RIGHT TO SUE BY THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Scott v. Gino Morena Enters., 888 F3d 1101 (9th Cir. 2018)

Scott began working for Gino Morena Enterprises ("GME") in April 2011 at a barbershop located on the United States Marine Corps Base Camp Pendleton. There she was responsible for providing customers with haircuts and selling hair products. She alleged that two female GME managers sexually harassed and retaliated against her by treating her poorly for declining their advances. On November 13, 2013, while still employed by GME, Scott filed a charge with the California Department of Fair Employment and Housing ("DFEH"). Six days later, the DFEH transferred the duty to investigate Scott's charge to the EEOC (pursuant to a work sharing agreement between the DFEH and the EEOC) and issued her a right-to-sue letter on November 25, 2013. The DFEH letter explained that: (1) a civil action under California's Fair Employment and Housing Act (the "FEHA") "must be filed within one year from the date of this letter"; (2) Scott's DFEH charge "is dual filed with the [EEOC]" and Scott "ha[s] a right to request EEOC to perform a substantial weight review of [DFEH's] findings . . . within fifteen (15) days of . . . receipt of this notice"; (3) "[a]lthough DFEH has concluded that the evidence and information did not support a finding that a violation occurred, the allegations and conduct at issue may be in violation of other laws"; and (4) Scott "should consult an attorney as soon as possible regarding any other options and/or recourse [she] may have regarding the underlying acts or conduct."

Scott alleged that on December 22, 2013, after being issued a warning letter by one of the managers, she decided to quit. On October 15, 2014, Scott spoke with someone at the EEOC, who confirmed that Scott's complaint was being processed and gave her a claim number. She filed a second charge with the DFEH on November 17, 2014. The second charge recounted the allegations leading to her first DFEH charge, and then additionally stated that she had been constructively discharged due to the intolerable harassment by her managers. Scott received a second DFEH right-to-sue letter on the same date she filed the second charge. The letter stated that Scott's case was being closed because an immediate right-to-sue notice was requested and that the DFEH would take no further action on the charge. The letter also stated: "To obtain a federal Right to Sue notice, you must visit the U.S. Equal Employment Opportunity Commission (EEOC) to file a

complaint within 30 days of receipt of this DFEH Notice of Case Closure or within 300 days of the alleged discriminatory act, whichever is earlier."

On November 20, 2014, Scott filed a complaint in the Orange County Superior Court asserting FEHA claims, and GME moved the case to federal court. In mid-2015, Scott requested, and obtained, a right-to-sue notice from the EEOC (associated with her first administrative charge). That notice, which was issued on June 3, 2015, stated that "[m]ore than 180 days have passed since the filing of this charge" and "[t]he EEOC is terminating its processing of this charge." Id. The notice also stated that Scott's "lawsuit under Title VII . . . must be filed in a federal or state court WITHIN 90 DAYS of . . . receipt of this notice; or [the] right to sue based on this charge will be lost." Scott then amended her complaint to assert only federal Title VII-based discrimination and harassment claims. After the parties subsequently engaged in discovery on the issue of equitable tolling, GME filed a motion for summary judgment. The district court granted the motion, ruling that all of Scott's claims were time-barred and equitable tolling did not apply. Scott timely appealed.

The Ninth Circuit Court affirmed in part and reversed in part. Claims based on Scott's second charge were deemed untimely, as she had not obtained a federal right-to-sue letter by the earlier of 30 days of the DFEH's closure letter or 300 days of the alleged discriminatory act. As to claims based on her first charge, the dispute turned on whether the 90-day period to file a civil action begins when the plaintiff receives a right-to-sue notice from the EEOC or 180 days after the charge is filed with the EEOC, regardless of when the EEOC issues a right-to-sue notice. The panel held that, under 42 U.S.C. § 2000e-5(f)(1), the 90-day period for filing a civil action, following exhaustion of administrative remedies, begins when the aggrieved person is given notice of the right to sue by the Equal Employment Opportunity Commission, rather than when the person becomes eligible to receive a right-to-sue notice from the EEOC. Accordingly, Scott's claims based on her first administrative charge were timely. The panel further held that she could base her Title VII claims on the defendant's alleged acts occurring after she filed her first administrative charge to the extent she could show such acts were part of a single hostile work environment claim (i.e. a continuing violation).

VIABLE RETALIATION CLAIM UNDER FEHA REQUIRES DEMONSTRATION OF EMPLOYMENT ACTION REASONABLY LIKELY TO ADVERSELY AND MATERIALLY AFFECT AN EMPLOYEE'S JOB PERFORMANCE OR OPPORTUNITY FOR CAREER ADVANCEMENT

Meeks v. AutoZone, Inc., 24 Cal.App.5th 855 (2018)

Meeks was hired at AutoZone as a customer sales representative in March 2006, and she later received a number of promotions, eventually becoming a store manager. From early in her employment, she had regular encounters with a co-worker (Fajardo) who had similarly worked his way up from service representative to store manager. Meeks claimed Fajardo regularly subjected her to sexual harassment in various forms, both while she was a customer sales representative and after she was promoted into management. Meeks alleged that: he would comment on her body and clothes; he would

ask her to go out with him, or more directly suggest that they have sex; he would send her text messages with sexual content, including images and video, and he forcibly attempted to kiss her three times, succeeding once in pressing his lips to hers. She claimed he also suggested that he could facilitate her advancement and promotion within AutoZone, through his position as one of the "favorites" of the district manager (and their supervisor in common), Ledesma. He also told Meeks that he would get her fired if she reported his conduct.

Meeks first reported Fajardo's conduct to AutoZone in October 2009. According to Meeks, Ledesma told her that when she talked to Fajardo about it, he had "just kind of laughed it off and said, 'Oh, it was all a misunderstanding. It's a joke. It's no big deal.'" Meeks testified that Ledesma told her that she (Meeks) should "just squash it," because Ledesma did not want to "lose three managers" (referring to Meeks, Meeks' husband, who was also an AutoZone employee, and Fajardo). She instructed Meeks to tell the investigator from the human resources department that "everything had been taken care of." Meeks further testified that Ledesma threatened to fire Meeks and her husband if Meeks took her complaints higher. Meeks sued AutoZone and Fajardo, alleging sexual harassment, failure to prevent sexual harassment, and retaliation. The trial court granted summary adjudication in favor of AutoZone on the retaliation claim. The jury returned defense verdicts on the remaining claims, and Meeks appealed, arguing (a) that certain evidentiary rulings at trial constitute prejudicial error, requiring reversal, and (b) that the summary adjudication on her retaliation claim was erroneous.

The appellate court reversed on the evidentiary claims (exclusion of various types of evidence deemed prejudicial) and remanded for a new trial. However, the court upheld summary adjudication of the retaliation claim because there was no evidence of adverse action following her complaint. The term "adverse employment acts" encompasses not only 'ultimate' employment actions, such as hiring, firing, demotion or failure to promote," but also "the entire spectrum of employment actions that are reasonably likely to adversely and materially affect an employee's job performance or opportunity for career advancement." (*Jones v. Department of Corrections & Rehabilitation* 152 Cal. App. 4th 1367, 1380-1381 (2007). On the other hand, minor or relatively trivial adverse actions or conduct by employers or fellow employees that, from an objective perspective, are reasonably likely to do no more than anger or upset an employee and cannot properly be viewed as materially affecting the terms, conditions, or privileges of employment and are not actionable. Meeks continued to be employed at AutoZone, experienced no loss or reduction in her classification, position, salary, benefits and work hours; and her employment was not terminated. She did not contend she suffered working conditions so intolerable or aggravated as to constitute constructive discharge, that her performance evaluations suffered, or that she was ever denied any promotion or assignment that might have led to promotion. Meeks testified that Ledesma threatened her with an adverse employment action – to fire her and her husband, if she did not "squash" her complaint about Fajardo – but there is no evidence that the threat was carried out.

MISLEADING AN APPLICANT TO BELIEVE THAT NO EMPLOYMENT OPENING EXISTS CAN BE SUFFICIENT EVIDENCE OF INTENTIONAL PREGNANCY DISCRIMINATION TO DEFEAT SUMMARY JUDGMENT ON A FEHA CLAIM

Abed v. Western Dental Servs., Inc., 23 Cal. App. 5th 726 (2018)

Western Dental operates dental offices and clinics throughout California, including one in Napa. The company accepts student externs from schools that have dental assistant programs. Western Dental had a practice of posting job openings for a dental assistant on its website, both to solicit applications for current openings and to create a pool of candidates for positions to be filled in the future. In March 2015, an open requisition for a dental assistant in the Napa office was approved, and a solicitation for applications was publicly posted. Abed obtained an externship in Western Dental's office in Napa, the city where she wanted to live, and she began on May 18, 2015. At the time, she was pregnant, which she did not disclose to anyone at Western Dental. The managing dentist, Dr. Andrew Rivamonte, told her to treat the externship as "a four-to six-week working interview" and try to learn as much as possible because historically such externs were ultimately hired on full-time.

At some point during her externship, Abed hung her purse in the employee break room. The purse was partially open and it contained a bottle of prenatal vitamins. Abed's supervisor, Strickling, saw them and asked whose they were, and another coworker indicated the purse was Abed's. Strickling later told another dental assistant (DeHaro) she thought Abed may be pregnant, and DeHaro said something to the effect that "if [Abed] were pregnant, it would not be convenient for the office." Abed later testified that she overheard a conversation about her pregnancy between Strickling and DeHaro. According to Abed, Strickling said, "[W]ell, if she's pregnant, I don't want to hire her." Strickling testified that approximately two weeks after the discovery of Abed's pregnancy, her supervisor asked Strickling to tell Abed there were no open positions for a dental assistant in Napa, but that there was one in Vacaville. Abed did not apply for a position in the Napa office because Strickling had told her there were no openings there. But before her externship was over, Abed learned that an opening in the Napa office was posted on Western Dental's website.

Abed completed her externship June 20, 2015. Less than a week later, a recruiter emailed Western a form for an extern candidate who could start July 6, and in late July, Western Dental extend her an offer to become a dental assistant in the Napa office. Shortly afterward, that candidate was hired for the position created by the open requisition approved the previous March. Abed filed an action in September 2015, bringing claims for pregnancy discrimination under the FEHA and invasion of privacy. Western Dental successfully moved for summary judgment, arguing that Abed's failure to apply for a position was dispositive.

On appeal, the court reversed. In most cases alleging a failure to hire for discriminatory reasons, the prima facie case includes a showing that the plaintiff applied for the job. However, Abed was not required to show that she submitted an application because

Western Dental falsely telling her no position was available (and thereby causing her not to apply for one) was sufficient evidence of intentional pregnancy discrimination.

PUBLIC AGENCY

NON-CONSENTING PUBLIC EMPLOYEES CANNOT BE REQUIRED TO PAY AGENCY FEES TO UNION REPRESENTING THEIR BARGAINING UNIT

Janus v. American Federation of State, County and Muni. Employees, 585 U.S. ___ , 138 S.Ct. 2448 (2018)

Janus, a public sector employee in Illinois, challenged on First Amendment grounds an Illinois statute that required employees who choose not to join the union to still pay an "agency fee" (here, 78% of full membership fees) that covers the union's cost of representing employees during negotiations and other related matters. Janus claimed that the distinction between an agency fee designed to cover the costs of negotiations and additional amounts designed to cover political and ideological projects was irrelevant because the issues the union advanced in negotiations were also political and ideological. The trial court granted the union's motion to dismiss, and the Seventh Circuit Court of appeal affirmed based on *Abood* v. *Detroit Bd. of Ed.*, 431 U. S. 209 (1977). *Abood* had held that a permissible agency fee may cover union expenditures attributable to those activities "germane" to the union's collective – bargaining activities (chargeable expenditures), but may not cover the union's political and ideological projects (nonchargeable expenditures).

The Supreme Court agreed with Mr. Janus. In a 5-4 decision, the Court found that forcing employees to endorse ideas and positions they believed to be objectionable violated their First Amendment right to free speech. In that regard, positions advanced by a union in negotiations often dealt with import issues of public concern, like the public agency's budget, taxes, the level of services provided and how to prioritize competing issues of public concern. The Court also determined that the union's justifications for agency fees, that they promote labor peace and avoid the "free rider" risk where employees can enjoy the benefits of collective bargaining without having to pay their fair share of the costs, were insufficient to justify the intrusion those fees imposed on the employees' free speech rights.

Accordingly, the Court ruled that public sector employers and their unions could no longer require non-consenting employees to pay an agency fee. Specifically, "neither an agency fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay." In California, the adoption of SB 866 nearly simultaneously with the Court's ruling further impacts how agency employers may communicate with their employees about the *Janus* impacts.

UNIONIZED PUBLIC AGENCY EMPLOYEES HAVE RIGHT TO USE EMPLOYER EMAIL SYSTEMS FOR COMMUNICATIONS REGARDING WORKING CONDITIONS

Napa Valley Comm. Coll. Dist., PERB Dec. No. 2563-E (May 25, 2018)

On September 9, 2015, the Napa Valley College Faculty Association (Association) President sent an e-mail to all full-time and part-time faculty reminding them of an Association meeting scheduled for the following day. A part-time faculty member replied to all stating that adjunct instructors should get paid on the same salary scale as full-time instructors and arguing that an increase in adjunct faculty pay would not require more money from taxpayers, but a more equal distribution between full-time and adjunct faculty. Part-time adjunct instructor Eric Moberg later responded to all faculty, suggesting: "How about we take some money from the bloated Pentagon budget that funds death and destruction instead of education and enlightenment."

Another faculty member (Shea) responded directly to Moberg that, as the mother of a soldier killed in Iraq, she was disturbed by Moberg's e-mail. Shea also sent her message to Department Chair, the Dean of Human Resources, and the Vice President of Instruction. Subsequent emails from administration said that issues of compensation and working conditions should be brought to the leadership of the Faculty Association since that body is the official representative of the faculty. The Association President replied soon after, cancelling the Association meeting and stating that the chain of emails using the employer's system was not sanctioned by the Faculty Association and would not be considered the work of the Association. Moberg filed a grievance, which was rejected. Later his offer to teach in the following spring term was revoked on grounds that he had misrepresented information on his application for employment.

Moberg filed an unfair labor practice charge with PERB alleging that his offer had been revoked in retaliation for the protected organizing activity he had engaged in using the college's email system. The Office of General Counsel dismissed the charge, finding that the use of the email system had not constituted protected activity that could support a retaliation charge.

The Board disagreed and adopted the stance of the National Labor Relations Board's *Purple Communications* decision from 2014. In that case, the NLRB had ruled that, because e-mail "has effectively become a 'natural gathering place,' pervasively used for employee-to-employee conversations," private sector unionized employees must be permitted to use employer e-mail systems to engage in organizing activities during non-working hours PERB actually extended *Purple Communications*, finding that California's labor relations statutes provide even greater protections for public employees. PERB held that "employees who have rightful access to their employer's e-mail system in the course of their work have a right to use the e-mail system to engage in EERA protected communications on nonworking time." An employer may only rebut this presumption by demonstrating "special circumstances" to justify restricting its employees' rights. The same rule would apply under similar California labor statutes including the Meyers-Milias-Brown Act.

THE CALPERS BOARD MUST ADJUDICATE ADMINISTRATIVE APPEALS OF THE CALPERS EXECUTIVE OFFICE'S INTERPRETATIONS OF PEPRA BEFORE JUDICIAL REVIEW CAN BE SOUGHT

Public Employees' Retirement System v. Santa Clara Valley Transp. Auth., 23 Cal. App. 5th 1040 (2018)

When the California Legislature enacted the California Public Employees' Pension Reform Act of 2013 (PEPRA) (Gov't Code § 7522 et seq.), the federal government disputed the application of the PEPRA to transit workers as an interference with federal law, and sought to withhold transportation grants. In response, the Legislature enacted section 7522.02(a)(3) as an urgency measure in October 2013, exempting transit workers from the PEPRA until January 1, 2015, or until there was a federal district court ruling that the PEPRA did not interfere with federal law, whichever came first. The State of California also sued the federal Department of Labor in a federal district court, obtaining summary judgment in its behalf. Soon thereafter, the CalPERS executive office announced in a circular letter that the exemption in section 7522.02(a)(3) had expired by its own terms. Under the circular letter, the CalPERS executive office would treat all transit workers hired between January 1, 2013, and December 29, 2014, as accruing benefits under the old system during that period, and thereafter accruing the new limited PEPRA pension benefits starting on December 30, 2014 (along with those hired on or after Dec. 30).

Over 400 of transit employees filed administrative appeals challenging the administrative action and interpretation of PEPRA. Several employee associations raised the same challenges on behalf of their members, and the Santa Clara Valley Transit Authority (Santa Clara VTA) also filed an administrative appeal on behalf of its employees. The CalPERS Board did not conduct administrative hearings, but instead, the CalPERS executive office simply sought a judicial declaration that its interpretation of the effect of the statutory temporary exemption was correct. Santa Clara VTA demurred on the basis of CalPERS' failure to exhaust the administrative remedy to which it was entitled under the CalPERS regulations, and the trial court agreed. It concluded the CalPERS executive office could not disregard the CalPERS regulations giving an entitlement to an appeal to the CalPERS board, and that the CalPERS executive office had failed to establish that the CalPERS board would adhere to the executive office's statutory interpretation.

On appeal, the court affirmed, holding that the CalPERS executive office has a prescribed administrative route for enforcing its interpretation of section 7522.02(a)(3) against transit workers hired in 2013 and 2014. That route is through an appeal to the CalPERS Board to adjudicate a precedential administrative opinion either upholding or rejecting it, after a review by an independent hearing officer from the Office of Administrative Hearings (§ 11502). Then that ruling can be applied in the remainder of the pending appeals. But until the CalPERS executive office completes that process, the appellate court held that the "doors of the courthouse are closed to it" because there is no jurisdiction in the trial court to award declaratory relief regardless of which party prematurely sought it.

STATE LAW RESTRICTIONS PRECLUDE USE OF WIRETAP RECORDINGS IN ADMINISTRATIVE PROCEEDINGS ABSENT COURT ORDER

County of Los Angeles v. Los Angeles County Civil Serv., 22 Cal. App. 5th 473 (2018)

Arellano was hired by the Sheriff's Department in 1989. He later joined the Narcotics Unit. In March 2009, the high intensity drug trafficking area (HIDTA) task force began investigating Arellano to determine if he was engaged in any criminal activity. In April 2009, HIDTA obtained several court-ordered state wiretaps, and among the intercepted calls were 26 calls discussing illegal narcotics activity. Two of the calls were believed to involve Arellano. On June 25, 2009, the Sheriff's Department Internal Criminal Investigations Bureau (ICIB) opened a criminal investigation into Arellano. On November 30, 2009, while the ICIB investigation proceeded, the District Attorney moved the court for an order releasing wiretap recordings, and transcripts of those recordings, to the Sheriff's Department for use against Arellano. The application further stated that the "evidence derived therefrom [the intercepted recordings] are relevant to an internal investigation by the Los Angeles County Sheriff Department." The judge signed an order authorizing the disclosure of those records pursuant to the application for use in the investigation. After the ICIB closed its investigation without filing criminal charges, the matter was referred to the Sheriff's Department Internal Affairs Bureau (IAB) based on Arellano's alleged violations of multiple departmental policies. The IAB began its investigation in August 2010 and ended it a year later. As part of the IAB investigation, the Sheriff's Department had access to the wiretapped calls. In August 2011, the Sheriff's Department issued its notice of intent to discharge Arellano from his position of Deputy Sheriff, and a final notice of termination followed. During a subsequent appeal hearing before the civil service commission, Arellano moved to suppress the wiretapped calls. The hearing officer granted the motion after finding that the court order permitting the wiretap evidence to be released did not expressly provide that the evidence could be used for administrative purposes. He ultimately recommended that Arellano only receive a five day suspension without pay, and the civil service commission adopted the recommendation. The County then filed a petition for writ of administrative mandamus in superior court, which the trial court denied.

The appellate court affirmed. The court order did not authorize disclosure or use of the wiretap evidence in an administrative proceeding. Instead, the order cited Penal Code sections 629.82, subdivision (b), and 629.78, neither of which provides for disclosure or use of such evidence in an administrative proceeding. In other words, although the order permitted release of the intercepted calls to the Sheriff's Department, its cited statutory parameters limited disclosure of and testimony about the calls to a criminal court or grand jury proceeding pursuant to section 629.78. Therefore, the order did not authorize disclosure or use of the wiretap evidence in any other kind of proceeding, including an administrative hearing before the civil service commission, which could involve more public disclosure than an internal departmental investigation.

POBR STATUTE OF LIMITATIONS RUNS FROM TIME A PERSON AUTHORIZED TO INITIATE AN INVESTIGATION OF THE ALLEGATION OF MISCONDUCT LEARNS OF THE POTENTIAL MISCONDUCT.

Ochoa v. County of Kern, 22 Cal.App.5th 235 (2018)

On March 22, 2013, Deputy Chaidez heard from a complainant who accused Deputy Ochoa of having harassed her, and Chaidez submitted an interoffice memorandum documenting the allegation to Sergeant Bittle, Ochoa's superior. On March 25, 2013, Bittle received Chaidez's memorandum and "started an investigation" "to determine what the nature of the complaint was." After a few weeks of unsuccessful attempts at contact, Bittle spoke to the complainant and her brother who further explained the allegations. Bittle detailed the conversation in an April 8, 2013, interoffice memorandum to a superior. On April 9, 2013, a criminal investigation of Ochoa was initiated "for assault under color of authority and annoying/molesting a child under the age of 18 years old." On May 6, 2013, Chief Deputy Zimmerman signed a "Personnel Complaint" authorizing internal affairs to investigate the harassment claim against Ochoa. Over the next several months, the Department made requests of, and worked with, the District Attorney's office regarding investigation issues with potential criminal ramifications. Ultimately, the District Attorney decided not to prosecute Ochoa, the latest determination being made July 7, 2014. On August 11, 2014, the Department served Ochoa with a Notice of Proposed Termination. Following a *Skelly* hearing, Ochoa was terminated effective October 7, 2014.

Ochoa petitioned for a peremptory writ of mandate and other extraordinary relief pursuant to Code of Civil Procedure section 1085 and Government Code section 3309.5, respectively. Ochoa claimed the Department violated Government section 3304(d) by failing to complete an administrative investigation of his alleged misconduct and notify him of the proposed disciplinary action within one year of the public agency's discovery by a person authorized to initiate said investigation. The superior court denied the petition.

On appeal, the court affirmed. In the published portion of its opinion, the court concluded section 3304, subdivision (d)(1), requires the investigation to be completed within one year of the public agency's discovery by a person authorized to initiate an investigation of the allegation of misconduct. Although the sergeant could not initiate an internal affairs investigation, he was "a person authorized to initiate an investigation" of the allegation within the meaning of that statute. Therefore, the one-year limitations period commenced March 25, 2013. In the unpublished portion of the opinion, however, the court found the termination was timely because the first criminal investigation had sufficiently tolled the limitations period.

POBR STATUTE OF LIMITATIONS RUNS FROM DISCOVERY OF INFORMATION BY THOSE AUTHORIZED TO INVESTIGATE AND IS TOLLED BY PENDING CRIMINAL PROCEEDINGS

Daugherty v. City and County of San Francisco, 24 Cal.App.5th 928 (2018)

A criminal corruption investigation of officers in the San Francisco Police Department (SFPD) began in 2011 led by the United States Attorney's Office (USAO), with the assistance of select members of the criminal unit of SFPD's Internal Affairs Division (IAD-Crim). During the course of the investigation, search warrants of the cellphone records of former SFPD Sergeant Ian Furminger – the central figure in the corruption scheme – led to the discovery in about December 2012 of racist, sexist, homophobic, and anti-Semitic text messages between Furminger and nine SFPD officers. The criminal case resulted in convictions of Furminger and a codefendant for conspiracy to commit theft, conspiracy against civil rights and wire fraud. Three days after the verdict, on December 8, 2014, the text messages were released by the USAO to the administrative unit of SFPD's Internal Affairs Division (IAD-Admin). After IAD-Admin completed its investigation of the text messages, the chief of police issued disciplinary charges against respondents in April 2015.

While the disciplinary proceedings were pending, Officer Rain O. Daugherty filed a petition for writ of mandate and complaint for extraordinary relief, seeking to rescind the disciplinary charges on the grounds that they were untimely. The trial court granted the writ petition and complaint, finding the one-year statute of limitations began to accrue in December 2012 when the misconduct was discovered, and thus, the investigation of respondents' misconduct was not completed in a timely manner.

The appellate court reversed, concluding that the one-year statute of limitations did not begin to run until the text messages were released by the USAO to IAD-Admin. Before then, the alleged misconduct was not and could not be discovered by the "person[s] authorized to initiate an investigation" for purposes of Government Code section 3304, subdivision (d)(1). The court also concluded that the one-year statute of limitations would have been tolled until the verdict in the criminal corruption case because the text messages were the "subject" of the criminal investigation within the meaning of section 3304, subdivision (d)(2)(A). Thus, the April 2015 notices of discipline were timely.

GRIEVANCE CHALLENGING EMPLOYER'S LANGUAGE IN JOB POSTING THAT HAD NEVER BEEN APPLIED TO UNION APPLICANT WAS NOT RIPE FOR DETERMINATION

Metropolitan Water Dist. v. Winograd, 24 Cal.App.5th 881(2018)

AFSCME and the Metropolitan Water District ("District") were parties to two labor agreements pertaining to District employees. Some of these agreements related to recruitment and selection processes, including a defined "Employment Testing" process. In addition, the District maintained its own recruitment and selection procedures for job vacancies, under which internal applicants who met minimum requirements would be

interviewed first for any position that is part of a bargaining unit." The District's 2012 recruitment procedure publication added a procedure referred to as "comparative analysis." Pursuant to this procedure, the Hiring Manager reviews resumes and codes each candidate as: "Recommend to proceed - Invited to interview," "Possible Candidate - Hold for now (no action taken at this point)," and "Recommend Not to Proceed - (no action taken at this point)."

AFSCME filed a grievance challenging the District's use (in postings and processing) of the comparative analysis to determine who would be invited to test for vacancies. The District denied the grievance, taking the position that the term "comparative analysis" is simply another term for a "review of records," and that a review of records is a permitted "test" as set forth in the MOU. The union elevated the grievance through Levels II and III to review by a hearing officer's (Winograd). For hearing, the District and AFSCME stipulated: (1) that the grievance procedures had been followed to that point, (2) that the comparative analysis test was not applied to any union candidate, and (3) that the issue was whether the District violated the negotiated agreements by including the following language in a specific job posting: "Based on a comparative analysis, only those candidates demonstrating the strongest backgrounds will be invited to participate in a written test and oral panel interview." In its post-hearing brief, the District argued (in addition to its contract interpretation theory) that the matter was not ripe for decision, as AFSCME had not presented any evidence of harm. However, in sustaining the grievance, the hearing officer stated that the District had confirmed its intent to use a 'comparative analysis' in the future, and that, in effect, AFSCME was seeking declaratory relief.

The District successfully sought a petition for writ of administrative mandate seeking to set aside the hearing officer's decision. The trial court granted the petition on grounds that the hearing officer: (1) had granted relief on an issue that was not ripe; and (2) had exceeded the scope of the issue before him. The court of appeal agreed that the matter was not ripe and affirmed.

Ripeness typically has a two-step analysis: first, whether the issue is appropriate for immediate judicial resolution; and second, whether the complaining party will suffer a hardship from a refusal to entertain its legal challenge. Under the first test, courts will decline to adjudicate a dispute if "the abstract posture of the proceeding makes it difficult to evaluate the issues, if the court is asked to speculate on the resolution of hypothetical situations, or if the case presents a "contrived inquiry." Under the second test, courts generally will not consider issues based on speculative future harm. Applying that analysis to this case, the court found the grievance issue was framed as a question of whether the District violated the MOU in a particular job posting that had never been applied to a union applicant. Thus, under the first prong of the ripeness test, there was no actual controversy, and the hearing officer was asked to speculate on the resolution of the hypothetical situation where a union applicant, meeting minimum requirements for the position, would be subjected to the comparative analysis procedure. That the District said it would continue to apply comparative analysis in the future was deemed not to render the effect of doing so any less speculative. Further, the court noted that AFSCME would suffer no actual hardship, and that if one of its members was screened out under the

comparative analysis in the future, the union could file a grievance at that time. Finally, the court also found the hearing officer had exceeded his authority because the MOU limited his role to hearing the specified grievance. The parties had narrowed the issue to the District using the disputed language in a single job posting, but the hearing officer directed the District to cease using all forms of comparative analysis prior to an interview in future job recruitments.

INTERVIEWS WITH PEACE OFFICERS FORMERLY EMPLOYED AT FACILITY SUBJECT TO OVERSIGHT REVIEW BY THE INSPECTOR GENERAL WERE NOT "INTERROGATIONS" TRIGGERING A RIGHT OF REPRESENTATION UNDER THE POBR

Blue v. California Office of the Inspector General, 23 Cal.App.5th 138 (2018)

As a part of its typical oversight function, the Office of the Inspector General (OIG) conducted interviews with five correctional officers who previously worked at High Desert State Prison as part of an investigation into that institution's practices regarding excessive use of force against inmates and the internal reviews of such incidents. The OIG understood the Senate Rules Committee's request for an investigation as calling for a broad inquiry into policies and practices in place at High Desert State Prison and overall staff culture and attitudes at the prison. The OIG decided, in addition to reviewing facility rules and policies, to interview former High Desert State Prison staff. Current employees were seen as potentially reluctant to speak openly with OIG staff out of fear that they would be subjected to retaliation for cooperating with the review. In addition, the OIG wanted to steer clear of witnesses in parallel internal affairs investigations being conducted by the California Department of Corrections (CDCR). The OIG's process involved monitoring approximately 19 parallel IA investigations and reviewing various CDCR policies and High Desert State Prison policies, incident reports and other records. The OIG also conducted interviews with former inmates at the prison and former staff members who had transferred to another CDCR prison or were no longer state employees. In advance of such staff interviews, the OIG communicated that the former High Desert State Prison employees to be interviewed were not considered "subjects of an investigation" and would not be asked questions about ongoing investigations. At the conclusion of its review, the OIG issued a report summarizing its review of High Desert State Prison and making policy recommendations for additional training and support services and steps designed to prevent staff from serving in high stress assignments for extended periods of time. The report contained no statements indicating any of the staff interviewed had engaged in or were suspected of engaging in misconduct, nor did it even identify any names of persons interviewed.

The California Correctional Peace Officers Association (CCPOA) and several of the former High Desert staff who had been interviewed sued the OIG alleging, among other things, a violation of the officers' rights under the Peace Officers Procedural Bill of Rights. Specifically, they alleged that refusing to allow them representation at their OIG interviews violated their interrogation rights under Government Code section 3303. OIG filed an anti-SLAPP motion to strike, arguing plaintiffs' claims arose from protected activity (i.e. they challenged defendants' communicative conduct, i.e., denial of plaintiffs'

requests for representation, "made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law). The trial court denied the motion, finding that although defendants carried their threshold burden of demonstrating the causes of action arose from protected activity, the plaintiffs had established a probability of prevailing on the merits of these claims.

The court of appeal reversed in part. The court agreed that defendants had carried the burden of showing the claims arose from protected activity. However, the court ruled the plaintiffs could not show a likely success on the merits of their POBR claim. None of the individual correctional officer plaintiffs who were interviewed in connection with the OIG's review of High Desert State Prison were "under investigation" for anything, let alone something "that could lead to punitive action." (Gov. Code, § 3303.) Thus even assuming their interviews could reasonably be considered "interrogation" at all, the court found they were was not the sort of interrogations focusing on matters that are likely to result in punitive action" against the officers being interviewed. The OIG was not investigating specific allegations of employee misconduct, nor would the OIG have had statutory authority to conduct such an investigation. The court reversed the portion of the trial court's order denying the anti-SLAPP motion with respect to the first and second causes of action and remanded the matter to the trial court with directions to enter a new order granting the motion in its entirety and dismissing the complaint.