Labor and Employment Litigation Update

Wednesday, May 2, 2018 General Session; 1:00 – 3:00 p.m.

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Labor and Employment Law Update

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WAGE AND HOUR

UNDER FLSA "PRIMARY BENEFICIARY" TEST, STUDENT WORKERS AT COSMETOLOGY SCHOOL NOT "EMPLOYEES"

Benjamin v. B&H Education, 877 F.3d. 1139 (9th Cir. 2017).

Cosmetologists are required under California and Nevada law to be individually licensed. This requires that, before applicants may take the licensing exam, they must take part in hundreds of hours of classroom instruction, including observing demonstrations, and practical training that includes performing services on a person or mannequin. Plaintiffs and other students at Marinello Schools of Beauty attended lectures, reviewed course materials, took tests, and practiced cosmetology on customers in the clinic under some instructor supervision, thereby allowing them to earn academic credit toward qualifying them to take the state licensing exam. In the clinic, students not only practiced cosmetology itself, including hair, skin, and nail treatments, but perform selected duties that include sanitizing their work stations, laundering linens, dispensing products, greeting customers, making appointments, and selling products. Plaintiffs were cosmetology students at Marinello who claimed that, rather than properly educating and training them in cosmetology, the school exploited the Plaintiffs for their unpaid labor. Plaintiffs sought payment for minimum and overtime wages, premium wages for missed meal and rest breaks, civil penalties for violating wage laws, restitution of fines, and reimbursement for supply purchases. The trial court granted summary judgment for the defendant.

The court of appeal affirmed, holding that, under the "economic reality" test, the students were not employees under the FLSA even though they alleged that much of their time was spent in menial and unsupervised work. Agreeing with other circuits, the panel held that a "primary beneficiary" analysis, rather than a test formulated by the Department of Labor, applies in the specific context of student workers. The panel concluded that the students, not defendant's schools, were the primary beneficiaries of their own labors because at the end of their training they qualified to practice cosmetology. The panel held that the students also were not employees entitled to be paid under Nevada or California law.

DELIBERATIVE PROCESS AND ATTORNEY WORK PRODUCT PRIVILEGES PRECLUDED DISCLOSURE OF CERTAIN WAGE RECORD INFORMATION

Labor & Workforce Development Agency v. Superior Court, 19 Cal. App. 5th 12 (2018).

A Public Records Act request in this case was made on behalf of *Fowler Packing* Company, *Inc*. (*Fowler*) and Gerawan *Farming, Inc*. (*Gerawan*) in response to the 2015 enactment of Assembly Bill 1513 (AB 1513) codified in Labor Code section 226.2. AB 1513 addressed the issue of minimum wages for employees paid on a piece-rate basis (i.e., paid per task) and included safe-harbor provisions that provided employers with an affirmative defense against wage and hour claims based on piece-work compensation so

long as back pay is timely made. (Lab. Code, § 226, subds. (b)-(f).) However, the safe-harbor provisions contained carve-outs that place the safe-harbor provisions out of reach for several California companies including *Fowler* and *Gerawan*. (Lab. Code, § 226.2, subds. (g)(2) & (g)(5).) The Public Records Act request sought in pertinent part: "Any and all public records referring or relating to communications between the California Labor & Workforce Development Agency, its officers, and its staff and the United Farm Workers of America regarding AB 1513;" "Any and all public records referring or relating to the statutory carve out for any 'claim asserted in a court pleading filed prior to March 1, 2014,' as codified in AB 1513 section 226.2(g)(2)(A);" and, "Any and all public records referring or relating to AB 1513" and *Fowler* and *Gerawan*. The responsive documents would necessarily include the identities of parties who communicated confidentially with the California Labor and Workforce Development Agency (Agency) that took the lead in formulating the policies enacted in AB 1513.

The trial court ordered the Agency to produce "an index identifying the author, recipient (if any), general subject matter of the document, and the nature of the exemption claimed" to justify withholding information in response to a request for documents under the Public Records Act. The Agency petitioned for writ relief to prevent disclosure of the identities of the parties with whom the Agency communicated confidentially in formulating AB 1513, the substance of these communications, and communications with the Office of Legislative Counsel (Legislative Counsel) during the drafting process. The appellate court granted a stay and issued an alternative writ to consider the matter. Based on the California Supreme Court's guidance in *Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325 (*Times Mirror*), the court concluded the trial court's order errs in requiring disclosure of matters protected by the deliberative process and attorney work product privileges. The court of appeals directed the trial court to vacate its order directing the Agency to produce an index disclosing the author, recipient, and general subject matter of documents generated relating to the process of drafting AB 1513. The case was remanded for further proceedings.

DISCRIMINATION/HARASSMENT/RETALIATION

FEHA ALLOWS EMPLOYEES TO SUE EMPLOYERS FOR SEXUAL HARASSMENT BY NONEMPLOYEES

M.F. v. Pacific Peal Hotel Management LLC, 16 Cal. App. 5th 693 (2017).

M.F. was a housekeeper at a hotel owned by Pacific Pearl Hotel Management LLC. The hotel's engineering manager saw a trespasser on the hotel property one morning who was not a guest of the hotel. The trespasser was intoxicated and was carrying a beer, but the engineering manager did not tell him to leave or report his presence to the housekeeping staff. Later, the trespasser approached one of the housekeepers while she was cleaning a room and tried to give her money in exchange for sexual favors. A maintenance worker who was working nearby overheard and helped the housekeeper to make the trespasser leave the room. The trespasser then went to another hotel room where a housekeeper was cleaning and tried to get into the room. He again offered money for sexual favors. The housekeeper was able to close the door on the man and reported the incident to her

manager. The housekeeping manager used a walkie-talkie to notify the other housekeeping managers about the trespasser. The manager checked on the safety of the housekeepers in one building but not in the one in which M.F. was working. M.F.'s supervisor checked the rooms on one floor but not on the floor in which M.F. was working. The trespasser forced his way into the room that M.F. was working and told her to close the blinds. She refused, and he punched her in the face, knocking her unconscious. He then raped and abused her for two hours. During that time, no one came to check on her whereabouts.

M.F. sued Pacific, alleging nonemployee sexual harassment and failure to prevent the harassment from occurring. In response to a motion filed by Pacific, the trial court dismissed the lawsuit. M.F. appealed the dismissal.

The Court of Appeal reversed, finding that her complaint alleged sufficient facts to state a cause of action under FEHA for nonemployee sexual harassment and for Pacific's failure to stop the conduct from occurring, and remanded the case to the trial court to commence proceedings that were consistent with its ruling. Under FEHA, employers may be liable to employees for sexual harassment by nonemployees if the employers knew or should have known about the conduct and failed to take corrective action immediately. The court noted that M.F. established that the trespasser had been seen by the engineering manager and had harassed several housekeepers before she was assaulted. M.F.'s supervisor failed to check on her safety or to try to find out where she was despite knowing that the trespasser had sexually harassed other housekeepers. Pacific argued that she failed to state a claim under the FEHA because it did not have notice of the trespasser's conduct before he or she entered the property and that it took corrective action immediately upon learning of his conduct towards the other housekeepers. The court found, however, that Pacific had sufficient notice of the trespasser's conduct from his earlier actions and the reports that were made by the other housekeepers. The court determined that whether or not the hotel's corrective actions were sufficient would be a question of fact and thus should be considered by a jury.

MARITAL STATUS DISCRIMINATION TURNS ON <u>STATUS,</u> RATHER THAN ON TO WHOM CLAIMANT IS MARRIED

Nakai v. Friendship House Ass'n of Am. Indians, Inc., 15 Cal. App. 5th 32 (2017).

Plaintiff Orlando Nakai, was employed by defendant Friendship House Association of American Indians, Inc. ("Friendship House"), a drug and alcohol rehabilitation program. Nakai's wife informed Friendship House's CEO that Orlando had a gun, was angry at Friendship House employees, relapsed to using drugs and alcohol and that she had a restraining order against him. Based thereon, the CEO terminated Nakai's employment. The CEO also happened to be Nakai's mother-in-law.

Nakai sued, alleging wrongful termination based upon marital status discrimination and failure to conduct a reasonable investigation upon the report of an alleged threat. The trial court granted Friendship House's motion for summary judgment and Nakai appealed.

The appellate court held that Nakai failed to establish a *prima facie* case of marital discrimination. While laws prohibiting marital status discrimination are meant to prevent discrimination against classes of people, they do not extend to the status of being married to a particular person. The court further noted that Nakai claimed he was treated differently not because he was married, but because he happened to be married to the CEO's daughter, which does not constitute marital discrimination. Finally, Nakai was married to the CEO's daughter for 14 years; if marital status were an issue, Nakai would have been terminated earlier. The appellate court also noted that Nakai's own allegations, namely that his wife informed the CEO that Nakai had a gun, was angry at Friendship House employees, relapsed to using drugs and alcohol and that she had a restraining order against him, constituted legitimate, non-discriminatory business reasons to terminate Nakai's employment. Nakai had no evidence of pretext.

The appellate court further held that it did not have any duty to investigate before discharging Nakai because he was an at-will employee with no contractual rights to employment. Friendship House could legally discharge Nakai for any reason, so long as it was not a prohibited discriminatory reason.

RETALIATION CLAIMS UNDER FEHA AND SECTION 1981 DO NOT NECESSARILY RESULT IN IMPROPER 'DOUBLE DAMAGES'

Flores v. City of Westminster, 873 F. 3d 739 (9th Circuit 2017).

Plaintiffs were three police officers of Latino descent who sued their city employer and members of the command staff alleging race and national origin discrimination under FEHA, as well as retaliation under FEHA and 42 U.S.C. § 1981. Specifically, they claimed they were denied special assignments that could increase their chances of promotion. Officers Flores and Reyes also alleged that the defendants retaliated against them for filing administrative complaints, in violation of FEHA and 42 U.S.C. § 1981. The jury largely sided with the officers on several counts, and it awarded the officers a total of $3,341,000.00 in general and punitive damages, and the court awarded over $3 million in attorneys' fees. Defendants unsuccessfully moved for a new trial and judgment as a matter of law, and then defendants appealed.

The City argued that Officer Flores had failed to establish the elements of a retaliation claim, but the appellate court rejected this argument, finding that the City subjected him to one or more adverse employment actions, that his protected conduct was a substantial motivating factor behind the adverse employment actions, and that the City's proffered reasons for its actions were pretextual. The panel also rejected the City's argument that Flores had received "double damages," finding that the FEHA damages award did not necessarily overlap with the damages awarded against the defendant police chiefs for their individual retaliatory actions in violation of § 1981.

Finally, the panel held that the district court did not err in denying the officers' discrimination and retaliation claims against the police chiefs under § 1981, which prohibits discrimination in the making and enforcement of contracts by reason of race. The panel held that California law providing that the employment relationship between

the state and its civil service employees is governed by statute rather than contract should not be read to bar public employees from bringing claims under § 1981. The panel distinguished *Judie v. Hamilton*, 872 F.2d 919 (9th Cir. 1989), which predated the 1991 amendments to § 1981 expanding the reach of the statute's "make and enforce contracts" term.

ONLY FEHA AND WAGE CLAIMS DETERMINED TO BE FRIVOLOUS WILL SUPPORT AWARDS OF FEES OR COSTS TO SUCCESSFUL DEFENDANTS

Arave v. Merrill Lynch et al, 18 Cal. App. 5th 1098 (2018).

Plaintiff Arave brought several claims under FEHA against his former employers, Merrill Lynch and Bank of America, as well as against two individual supervisors (collectively, defendants). He sought to recover damages caused by discrimination, harassment, and retaliation based on his membership in the Church of Jesus Christ of Latter-day Saints. He also sought damages for nonpayment of wages (Lab. Code, § 201) and whistleblower retaliation (Lab. Code, § 1102.5). The jury returned a verdict in favor of defendants on all counts that had survived summary judgment and dismissal. The trial court denied Arave's post-trial motions and awarded defendants, as prevailing parties, $54,545.18 in costs, $29,097.50 in expert witness fees, and $97,500 in attorney fees incurred defending against Arave's wage claim. Arave appealed. Defendants cross-appeal, contending the trial court abused its discretion when it determined Arave's FEHA claims were not frivolous and denied them attorney fees on those claims.

The court of appeals affirmed in all but two respects. First, the court concluded the trial court erred by awarding $83,642.68 in costs and expert witness fees though it found Arave's FEHA claims were not frivolous, and therefore reversed the order making the award. However, because a portion of the award could be attributable to Arave's wage claim, the matter was remanded for the trial court to make that apportionment, as appropriate. The appellate court also concluded the trial court erred by awarding $97,500 in attorney fees on the wage claim without determining whether that claim was frivolous. That issue was also remanded for further determination.

PRIOR SALARY IS NOT A "FACTOR OTHER THAN SEX" JUSTIFYING A PAY DISPARITY UNDER THE EQUAL PAY ACT

Rizo v. Yovino, 854 F.3d 1161 (9th Cir.), *reh'g en banc granted*, 869 F.3d 1004 (9th Cir. 2017).

Affirming the district court's denial of summary judgment to the defendant on a claim under the Equal Pay Act, the *en banc* court held that prior salary alone or in combination with other factors cannot justify a wage differential between male and female employees.

Overruling *Kouba v. Allstate Ins. Co.*, 691 F.2d 873 (9th Cir. 1982), the *en banc* court held that an employee's prior salary does not constitute a "factor other than sex" upon which a wage differential may be based under the statutory "catchall" exception set forth in 29 U.S.C. § 206(d)(1). "[A]ny other factor other than sex" is limited to legitimate, job-

related factors such as a prospective employee's experience, educational background, ability, or prior job performance. By relying on prior salary, court held that the defendant therefore failed as a matter of law to set forth an affirmative defense. The case was remanded to the district court.

SUMMARY JUDGMENT NOT APPROPRIATE ON FEHA DISABILITY DISCRIMINATION CLAIM WHERE DEFENDANT FAILED TO CARRY BURDEN OF SHOWING OBESITY LACKED PHYSIOLOGICAL CAUSE

Cornell v. Berkeley Tennis Club, 18 Cal. App. 5th 908 (2017).

Plaintiff Cornell was a severely obese woman who was fired from the Berkeley Tennis Club after having worked there for over 15 years in varying capacities. Her performance evaluations and work history had been uniformly positive, and she routinely acted as the "day manager" when the general manager or assistant general manager were out. A new manager (Headley) was hired in 2012 who said he wanted to "change the image of the club" by (among other things) requiring staff to wear uniforms. She informed him of her shirt size on his request, but when uniforms were selected and ordered, the chosen product was not available in her size and the largest size ordered did not fit her. Headley reported to the Personnel Committee that all the staff had begun wearing the uniforms except for Cornell, who "continue[d] to resist this change and ha[d] not been cooperative." Cornell wrote Headley about her desire to comply and asking him to work with her to find an acceptable product, and on a parallel path she obtained a similar shirt from a specialty shop and had the company logo embroidered on it. Headley also hired another employee (a younger, very petite woman) who took over some of Cornell's night duties, and Cornell learned the new employee was being paid more for the same work. Cornell raised her pay concerns with the Personnel Committee, and ultimately the issue of "pay rates for staff" was agendized as part of an upcoming Board of Directors agenda. Headley testified that he found a recording device hidden near the Board table, and some evidence indicated Cornell had been present in the location where it was found (she testified she had been setting up/cleaning up for the meeting.) Cornell was terminated from employment, ostensibly for having attempted to record the Board meeting.

Cornell brought eight claims against the Club: three under the California Fair Employment and Housing Act (FEHA; Gov. Code, § 12900 et seq.), for disability discrimination and failure to accommodate her disability (the discrimination/failure to accommodate claim), disability harassment, and retaliation; three for wrongful discharge in violation of public policy, based on her three FEHA claims; one for intentional infliction of emotional distress; and one for defamation. The trial court granted the Club's motion for summary adjudication of all eight claims, and Cornell appealed.

The court of appeals affirmed in part and reversed in part. Under the law governing motions for summary adjudication, the Club had the initial burden to produce evidence that Cornell cannot establish at least one element of each claim. The Club failed to sustain this burden on the claims requiring Cornell to show that her obesity has a physiological cause (i.e. obesity is not in itself a "disability" requiring accommodation unless it stems from a physiological cause.) As a result, the trial court improperly

granted summary adjudication of the FEHA claims alleging that the Club discriminated against and harassed Cornell and the claim alleging that the Club terminated her in violation of public policy based on the FEHA discrimination claim. However, the court concluded that summary adjudication was proper on the FEHA claims alleging that the Club failed to accommodate Cornell's disability and retaliated against her and the claims alleging that the Club terminated her in violation of public policy based on the FEHA harassment and retaliation claims. Finally, summary adjudication of the claim alleging that the Club intentionally inflicted emotional distress on Cornell was affirmed, but the court ruled a triable issue of material fact remains on the claim alleging that she was defamed.

NINTH CIRCUIT EXTENDS CONSTITUTIONAL PRIVACY AND ASSOCIATIONAL PROTECTIONS TO AN EMPLOYEE'S OFF-DUTY, EXTRAMARITAL AFFAIR WITH A CO-WORKER UNLESS IT NEGATIVELY AFFECTS JOB PERFORMANCE

Perez v. City of Roseville, 882 F.3d 843 (9th Cir. 2018).

Perez, a probationary police officer, was released from probation approximately nine months into her tenure with the City. During her employment, the City conducted an internal affairs investigation into a citizen complaint that Perez had been involved in a romantic relationship with a fellow officer (some activities were alleged to have occurred on duty). The investigation determined no on-duty misconduct had occurred beyond excessive texting and calling one another. Both Perez and the officer received written reprimands, however Perez was released from probation a few weeks later following the Police Chief's discovery of some other issues of concern. Perez sued the City and three members of the police command staff, claiming gender discrimination and, pursuant to 42 U.S.C. § 1983, that her termination violated her constitutional rights to privacy and intimate association because it was impermissibly based in part on disapproval of her private, off-duty sexual conduct. The trial court granted summary judgment for the City as to all claims.

The appellate court affirmed summary judgment for defendants on plaintiff's gender and due process claims, but reversed as to the Section 1983 privacy claim against the individual defendants. Disagreeing with the Fifth and Tenth Circuits, the panel held that the constitutional guarantees of privacy and free association prohibit the State from taking adverse employment action on the basis of private sexual conduct unless it demonstrates that such conduct negatively affects on-the-job performance or violates a constitutionally permissible, narrowly tailored regulation. Because a genuine factual dispute existed as to whether the defendants terminated the officer at least in part on the basis of her extramarital affair, the panel concluded that she put forth sufficient evidence to survive summary judgment. Moreover, the rights of privacy and intimate association were determined to be clearly established such that any reasonable official would have been on notice that, viewing the facts in the light most favorable to her, the officer's termination was unconstitutional. The panel therefore reversed the district court's grant of qualified immunity on the privacy claim and remanded for further proceedings.

NEW TRIAL LIMITED TO THE ISSUE OF NONECONOMIC DAMAGES WAS APPROPRIATE WHERE JURY'S DETERMINATION OF DISCRIMINATION LIABILITY AND CONSTRUCTIVE DISCHARGE WAS SUPPORTED BY THE EVIDENCE AT TRIAL

Simers v. LA Times Communications, 18 Cal. App. 5th 1248 (2018).

Plaintiff T.J. Simers was a well-known and sometimes controversial sports columnist for Los Angeles Times Communications, LLC. He had held that position since 2000, receiving uniformly favorable and often exceptional performance reviews from defendant. In March 2013, plaintiff, then 62 years old, suffered a neurological event with symptoms similar to a "mini-stroke." He recovered quickly and resumed writing his thrice-weekly column. In June 2013, The Times reduced plaintiff's columns to two per week, to "give [him] more time to write on [his] columns." His editors expressed the dissatisfaction of upper management with several recent columns, and stated "they had been having problems with [his] writing for the past 18 months." Shortly thereafter the Times learned from an article in another publication that a Hollywood producer (who had just filmed a 90-second video that had "gone viral," in connection with one of plaintiff's columns) was apparently developing a television show loosely based on plaintiff's life. Viewing this as a possible ethical breach, the Times suspended the column pending an investigation. The investigation was completed in August, after which the Times issued a "final written warning" that removed plaintiff from his position as a columnist and made him a senior reporter, albeit with no reduction in salary "for now." Plaintiff's lawyer informed defendant plaintiff could not work in that environment and considered himself to have been constructively terminated.

Plaintiff sued the Times, and after a 28-day trial in the fall of 2015, the jury found for plaintiff on his claims of disability and age discrimination, and on his claim of constructive termination. The jury awarded plaintiff $2,137,391 in economic damages for harm caused by his constructive termination and $5 million in noneconomic damages. The parties had agreed to give the jury a special verdict form that instructed them to fill in the blanks for past and future economic damages only if they found plaintiff was constructively terminated. The special verdict form allowed the jury to award past and future noneconomic damages without identifying which noneconomic damages were caused by the constructive termination and which were caused by the discrimination.

The trial court granted defendant's motion for judgment notwithstanding the verdict (JNOV) on plaintiff's constructive termination claim, and otherwise denied JNOV, finding substantial evidence supported the verdict on plaintiff's age and disability discrimination claims. The court also granted defendant's motion for a new trial on all damages, economic and noneconomic, finding it was not possible to determine what amount of noneconomic damages the jury awarded because of the discrimination but not because of the constructive discharge. Both parties appealed.

The court of appeals affirmed, holding that the jury's determination on liability was supported by the evidence. The Times failed to demonstrate how a new trial solely on

the issue of noneconomic damages would cause prejudice to it, and therefore there was no error in the trial court's order limiting the new trial to that issue.

ARGUMENT THAT AN EMPLOYER'S DECISION WAS BASED UPON THE RACE OF A THIRD PARTY WAS IMPROPER AND SHOULD NOT HAVE BEEN CONSIDERED WHEN DETERMINING WHETHER RACE DISCRIMINATION OCCURRED

Diego v. City of Los Angeles, 15 Cal. App. 5th 338 (2017).

Two Hispanic police officers brought action against the City of Los Angeles, alleging they suffered race discrimination within the city police department following their involvement in fatal shooting of young, unarmed African-American civilian who was apparently autistic. They claim they were "benched" after the incident, resulting in lost promotional opportunities and off-work duty, because of their race. They also claimed that the city retaliated against them for filing the lawsuit. The jury found in favor of the officers and awarded nearly $4 million in damages. The City appealed, arguing that the evidence was not sufficient to support the verdict.

The appellate court reversed the jury's verdict because the officers' claims were based on an improper legal theory. The officers claimed that they suffered disparate treatment because they are Hispanic *and* the victim was African-American. Thus, the officers' theory was that the jury could and should consider whether the officers were treated differently, not simply because of their race, but because of the race of their victim. Evidence showed the City assessed the risk management implications of returning officers *of any race* to the streets of Los Angeles who had been involved in a fatal shooting of an innocent, unarmed and autistic African-American man, and doing so did not result in race discrimination in violation of FEHA. The jury should have been instructed that they could not consider the race of the victim in support of their determination of the officers' claims. While the officers claimed that African-American officers would have been treated differently, but they did not introduce any competent evidence to support that claim.

The court held that the officers also did not provide evidence sufficient to support their claim that the City retaliated against them for filing the lawsuit. The City provided evidence—which was supported in important respects by the officers' own evidence and argument—that the officers were "benched" because of the political sensitivity of the shooting in which they were involved and the possible devastating consequences to the City if they were to be involved in a future controversial incident. The fact that the "benching" continued, even for the five-year period that the officers identify as unusual, is fully consistent with that justification and cannot itself support a conclusion that the City's motives changed after the lawsuit was filed.

PUBLIC AGENCY

LABOR CODE SECTION 244 LIMITATION ON REQUIREMENT TO EXHAUST ADMINISTRATIVE REMEDIES BEFORE BRINGING A CIVIL ACTION (I.E. THE *CAMPBELL* RULE) APPLIES ONLY TO CLAIMS BEFORE THE LABOR COMMISSIONER

Terris v. County of Santa Barbara, 20 Cal. App. 5th 551 (2018).

Plaintiff Shawn Terris appealed a summary judgment in favor of her former employer, defendant County of Santa Barbara (County), in her wrongful termination action. Terris was laid off as part of a significant reduction in force by the County, and she attempted to "bump down" to a lower level position. However, the County determined that the new position (First 5 Program/Business Leader) was one requiring special skills Terris did not possess, and thus she was laid off. Terris challenged the decision by filing a complaint with the County's Civil Service Commission (Commission). She alleged her termination procedure violated her seniority rights, and she argued the County and County Executive Officer had engaged in discrimination against her for exercising her rights as a County employee, as an elected Santa Barbara County Employees Retirement Board Trustee, and for filing a Claim Against Public Entity. The Commission ruled that 1) it could decide whether the County followed the proper procedures for terminating Terris's employment, but 2) it could not decide Terris's discrimination claims because she had not exhausted her administrative remedy of filing a discrimination complaint with the Equal Employment Opportunity Office (EEO). Terris did not file an EEO complaint. She urged the Commission to decide only whether the County followed the proper procedures in terminating her employment. One month later, the Commission ruled the special skills designation was appropriate, the layoff was authorized, and the County complied with all required procedures.

Terris then sued alleging she had been fired both in retaliation for asserting protected rights and because of her sexual orientation (in violation of FEHA). Specifically, Terris claimed the County's discriminatory employment action included: 1) terminating her employment to interfere "with her holding an elected office as a Retirement Board Trustee" (§ 1101); 2) attempting to coerce "and influence" her "political activity as a Retirement Board Trustee" (§ 1102); and 3) retaliating against her because of her "complaints about violations of her activity directed to labor organizing County workers" (§ 1102.5). The trial court granted the county's motion for summary judgment, holding Terris did not exhaust her administrative remedies on her whistleblower retaliation claims, and that there were no triable issues of fact on Terris's claim that she was terminated because of her sexual orientation. The trial court went on to award the County costs on the FEHA claim.

On appeal, the court reversed as to the cost award, but affirmed in all other respects. Costs are not typically awarded against merely unsuccessful plaintiffs under FEHA, and the court recognized that the chilling effect of awarding such costs disfavored making such awards. On the issue of administrative remedies, the court noted that *Campbell v. Regents of University of California* (2005) 35 Cal.4th 311 holds that public employees

must pursue appropriate internal administrative remedies before filing a civil action against their employer. While Labor Code section 244 does not require a litigant to exhaust administrative remedies before bringing a civil action, the court held that section applies only to claims before the Labor Commissioner, and that it had no impact on the *Campbell* rule's application to other civil claims.

FBOR SECTION 3254(C) PROCEDURES AND PROTECTIONS APPLY ONLY TO FIRE CHIEF WHO IS HEAD OF THE FIRE AGENCY AND NOT TO SUBORDINATE CHIEF EMPLOYEES.

Corley v. San Bernardino County Fire Prot. Dist., 21 Cal. App. 5th 390 (2018).

Plaintiff Corley was a battalion chief with the San Bernardino County Fire Protection District (the District) who had positive evaluations and no significant disciplinary history. In 2011, a fairly new Fire Chief assigned Corley to several new duties, and was dissatisfied with Corley's performance, which led to his decision to terminate Corley's employment for incompatible management style among other reasons. Following his termination, Plaintiff Corley sued the District on several theories including age discrimination (he was 58 at the time of his termination, and he was replaced by a 48-year-old worker.) Following trial on his age discrimination claim, the jury found Corley's age was a substantial motivating reason for the District's termination of his employment and awarded damages for lost earnings. The trial court subsequently entered a judgment in favor of Corley against the District awarding Corley $597,629 in damages, $853,443 in attorney fees, and $40,733 in costs.

The District appealed, arguing *inter alia* that the trial court erred in denying its request to instruct the jury pursuant to a provision in the Firefighters' Procedural Bill of Rights (§ 3254, subd. (c)). Specifically, the District sought to have the jury instructed that:

> A fire chief shall not be removed by a public agency or appointing authority without providing that person with written notice, the reason or reasons for removal, and an opportunity for administrative appeal.
>
> "The removal of a fire chief by a public agency or appointing authority, for the purpose of implementing the goals or policies, or both, of the public agency or appointing authority, or for reasons including, but not limited to, incompatibility of management styles or as a result of a change in administration, shall be sufficient to constitute 'reason or reasons.'

The District argued that Corley had been given the rights afforded under this section, which the jury should have been instructed that these procedural protections were sufficient. The court of appeals affirmed holding that section 3254, subdivision (c) applies only to the actual head of the agency Fire Chief, rather than to subordinate battalion chiefs, and concluded that the trial court did not err in refusing to instruct the jury pursuant to this provision.

FIRST DISTRICT COURT OF APPEAL HOLDS THAT DETRIMENTAL CHANGES TO PUBLIC PENSION BENEFITS OF "LEGACY MEMBERS" IS ONLY JUSTIFIED BY COMPELLING EVIDENCE THAT THE REQUIRED CHANGES MANIFEST A MATERIAL RELATION TO THE SUCCESSFUL OPERATION OF THE PENSION SYSTEM

Alameda County Deputy Sheriff's Ass'n v. Alameda County Employees' Retirement Ass'n, 19 Cal. App. 5th 61, *rev. granted,* 230 Cal. Rptr. 3d 681 (March 28, 2018).

Following adoption of the Public Employee Pension Reform Act of 2013 (PEPRA), labor organizations representing county employees in Alameda, Contra Costa and Merced counties sued challenging the constitutionality of excluding pay items previously considered "compensation earnable" under the County Employees Retirement Law of 1937 (CERL). They argued their members hired before PEPRA was adopted had a "vested right" to pension benefits under pre-PEPRA law. Their suits were consolidated into one action, in which the trial court rejected their claims, and appeals followed.

The First District Court first held that individual retirement boards lack discretion to include pay items within the scope of "compensation earnable" that go beyond those provided for in the CERL. Next, the court ruled that various PEPRA sections substantively changed CERL, particularly with respect to the exclusion of on-call and standby pay, as well as exclusion of compensation "paid to enhance a member's retirement benefit." Finally, the court declined to follow the decision in *Marin Ass'n of Public Employees v. Marin County Employees' Retirement Ass'n* (currently on appeal to the California Supreme Court), which had held that public pension system members are not entitled to an immutable pension benefit, but only to a "reasonable" pension. Instead, the *Alameda* court held that applying detrimental changes to pension benefits of "legacy members" is only justified by compelling evidence that the required changes manifest a material relation to the successful operation of the pension system. It remanded for the trial court to address that required vested rights analysis and for further proceedings.

NO VESTED RIGHT TO PARTICULAR MEDICAL BENEFIT CREATED WITHOUT CLEAR CONTRACT LANGUAGE OR EXTRINSIC EVIDENCE OF INTENT TO CREATE SUCH A RIGHT

Vallejo Police Officers Ass'n v. City of Vallejo, 15 Cal. App. 5th 601 (2017).

Following its bankruptcy proceedings in 2008-2009, the City and the Vallejo Police Officers Association (VPOA) agreed on a contract (2009 Agreement) that reduced the City's contribution to health insurance benefits to coverage capped at 100% of the CalPERS Kaiser plan. In 2012, the City began negotiating with the VPOA to further reduce its liability for retiree medical costs to $300 per month. The VPOA rejected this change, arguing that employees and retirees had a vested right to the benefit provided in the 2009 Agreement. The negotiations resulted in impasse, after which the City imposed its $300 per month retiree medical contribution. The VPOA petitioned the superior court for a writ of mandate alleging that the City of Vallejo (City) engaged in bad-faith bargaining in violation of state law and then unilaterally imposed contract terms that

impaired VPOA members' vested rights to retiree medical benefits that covered insurance premiums up to the full cost of a Kaiser health plan. The superior court denied the petition, concluding that VPOA had not shown its members had a vested right to the full Kaiser premium and that the City had not bargained in bad faith; the court therefore declined to order the City to start new contract negotiations or to reinstate retirement medical benefits at the level previously provided to VPOA members. The union appealed.

The appellate court affirmed, noting first the legal assumption that an MOU does not create a vested right absent a "clear showing" of the entity's intent to create such a right, either from clear contract language or convincing extrinsic evidence. The court held the 2009 Agreement had no such language intending to create a vested right. The court went on to reject various declarations by VPOA signatories to the 2009 Agreement attesting to their subjective understandings of the 2009 Agreement's intent. The court ruled that these declarations did not represent the City's intent, which must be demonstrated by admissible evidence to prove intent to create a vested right. Finally, the court held that the mere fact that the City had paid the full cost of retiree medical premiums over a period of years was not proof that the right to such payments would continue.

"STALE COMPLAINT" TIME LIMITATION IN EVIDENCE CODE SECTION 1045(B) DID NOT BAR DISCLOSURE OF PROMOTIONAL PERSONNEL RECORDS RELEVANT TO DISCRIMINATION AND RETALIATION ACTION BY UNSUCCESSFUL APPLICANT

Riske v. Superior Court, __ Cal. App. 5th __, 2018 WL 1789937 (April 16, 2018).

Retired LAPD officer Robert Riske sued the City of Los Angeles alleging the Department had retaliated against him for protected whistleblower activity by failing to assign or promote him to several positions, and selecting instead less qualified candidates. In discovery, Riske sought personnel records relied on by the City in making assignment and promotion decisions. The superior court erroneously ruled those records were not subject to discovery because the officers selected for the positions Riske sought were innocent third parties who had not witnessed or caused Riske's injury, a ruling reversed on appeal. *See Riske v. Superior Court*, 6 Cal. App. 5th 647, 664-665 (2016). The trial court was directed to vacate its order denying Riske's discovery motion and to enter a new order requiring the City to produce those records for an *in camera* inspection in accordance with section 1045.

The superior court reviewed the records and ordered them to be produced in accordance with the parties' protective order. However, citing Evidence Code section 1045(b)(1), the court ordered they be redacted to exclude disclosure of "[i]nformation consisting of complaints concerning conduct occurring more than five years before the event or transaction that is the subject of the litigation" in which discovery or disclosure is sought. Thus the court ordered redaction of all items in those reports concerning conduct that had occurred more than five years before Riske filed his complaint.

Riske again petitioned for a writ of mandate directing the superior court to order the City to produce those records without redaction. Riske and the City agreed that, if the five-year disclosure bar applied at all, it is measured from the date each officer was promoted instead of Riske—the alleged adverse employment action at issue in the litigation—and not from the date Riske filed his complaint, as the superior court ruled. Riske argued, and the appellate court agreed, that section 1045(b), which prohibits disclosure of stale complaints against police officers, had no application to the personnel reports sought in this case.