Labor and Employment Litigation Update

Friday, May 10, 2019 General Session; 10:30 a.m. – 12:30 p.m.

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Labor and Employment Litigation Update

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WAGE AND HOUR

STATE MINIMUM WAGE REQUIREMENTS ARE A MATTER OF STATEWIDE CONCERN AND THUS APPLY TO CHARTER CITIES

Marquez v. City of Long Beach, 32 Cal.App.5th 552 (2019)

Plaintiffs Wendy Marquez and Jasmine Smith represented a class that alleged causes of action for violations of the Labor Code and the Industrial Welfare Commission's (IWC) wage orders based on the City's alleged failure to pay workers employed as pages and recreation leader specialists wages at or above the statewide minimum wage. The trial court found the authority to determine employee compensation was reserved to the City as a charter city under article XI, section 5 of the California Constitution, and therefore the state could not impose a minimum wage for the City's employees because the City's compensation of its employees was not a matter of statewide concern. Plaintiffs appealed from a judgment of dismissal entered after the trial court sustained without leave to amend the City's demurrer.

On appeal, plaintiffs contended the Legislature's interest in the provision of a living wage to all workers is a matter of statewide concern, and the minimum wage requirement is appropriately tailored to address that concern. The court noted that this case pits article XI, section 5 of the state Constitution (which grants to charter cities authority over municipal affairs, including "plenary authority" to provide for the compensation of city employees) against article XIV, section 1 of the state Constitution (which provides "[t]he Legislature may provide for minimum wages and for the general welfare of employees . . . .") Despite the century-long history of the home rule doctrine, the California Supreme Court had not squarely resolved whether charter cities must comply with state law minimum wage requirements. The court found that legislation setting a statewide minimum wage, generally applicable to both private and public employees, addresses the state's interest in protecting the health and welfare of workers by ensuring they can afford the necessities of life for themselves and their families. Thus the court concluded, in reversing the trial court, that the Legislature may constitutionally exercise authority over minimum wages, despite the constitutional reservation of authority in charter cities to legislate as to their municipal affairs.

EN BANC DECISION OF NINTH CIRCUIT COURT MUST BE SUPPORTED BY MAJORITY OF THE *EN BANC* PANEL AT TIME DECISION IS ISSUED

Yovino v. Rizo, 586 U.S. ___, 139 S.Ct. 706, 2019 WL 886486 (2019)

Aileen Rizo sued the superintendent and her Fresno County Office of Education employer claiming, among other things, that the county was violating the Equal Pay Act of 1963 by considering her lower, out-of-state salary in setting her entry salary in California. Affirming the district court's denial of summary judgment to the defendant on a claim under the Equal Pay Act, the Ninth Circuit held, *en banc*, that prior salary alone or in combination with other factors cannot justify a wage differential between male and female employees. In so doing, the *en banc* court overruled *Kouba v. Allstate*

Ins. Co., 691 F.2d 873 (9th Cir. 1982). Thus the newly announced rule in *Yovino* was 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).

Like other courts of appeals, the Ninth Circuit takes the position that a panel decision (like *Kouba*) can be overruled only by a decision of the *en banc* court or the Supreme Court (see *Naruto* v. *Slater*, 888 F.3d 418, 421 (2018)). A clear purpose of the *en banc* decision issued on April 9, 2018, was to announce a new binding Ninth Circuit interpretation of the Equal Pay Act issue previously addressed by *Kouba*. A footnote in the *en banc* opinion noted that Judge Reinhardt had participated fully in the case, voted, and written the opinion prior to his death, but the decision was filed and issued 11 days after his death. Without Judge Reinhardt's vote, the opinion attributed to him would have been approved by only 5 of the 10 members of the *en banc* panel who were still living when the decision was filed. Although the other five living judges concurred in the judgment, they did so for different reasons (so Judge Reinhardt's vote made a difference.)

On appeal, the Supreme Court vacated the judgment and remanded, finding that, because Judge Reinhardt was no longer a judge at the time when the *en banc* decision in this case was filed, the Ninth Circuit erred in counting him as a member of the majority. That practice effectively allowed a deceased judge to exercise the judicial power of the United States after his death. "[F]ederal judges are appointed for life, not for eternity."

DISCRIMINATION/HARASSMENT/RETALIATION

COMMON LAW CONTROL TEST DETERMINES WHETHER ENTITIES ARE JOINT EMPLOYERS FOR PURPOSES OF TITLE VII LIABILITY

EEOC v. Global Horizons, 915 F.3d. 631 (9th Cir. 2019)

Green Acre Farms and Valley Fruit Orchards (the "Growers") retained Global Horizons, Inc., a labor contractor, to obtain temporary workers for their orchards. Global Horizons recruited workers from Thailand and brought them to the United States under the H-2A guest worker program. Two of the Thai workers filed discrimination charges against the Growers and Global Horizons with the Equal Employment Opportunity Commission (EEOC). After an investigation, the EEOC brought this action under Title VII of the Civil Rights Act of 1964 alleging, among other things, that the Growers and Global Horizons subjected the Thai workers to poor working conditions, substandard living conditions, and unsafe transportation on the basis of their race and national origin.

The district court entered a default judgment against Global Horizons after it became insolvent and discontinued its defense. That left this case focused solely on the liability of the Growers. Title VII imposes liability for discrimination on "employer[s]." 42 U.S.C. § 2000e-2(a). Thus the threshold question was whether the Growers and Global Horizons were joint employers of the Thai workers for Title VII purposes. The district court granted in part the Growers' Fed. R. Civ. P. 12(b)(6) motions to dismiss. The district court drew a distinction between orchard-related matters (managing, supervising,

and disciplining the Thai workers at the orchards), primarily the responsibility of the Growers, and non-orchard-related matters (housing, feeding, transporting, and paying the workers), primarily the responsibility of Global Horizons. The EEOC appealed.

The panel noted that this case was the first to determine what test to employ for determining whether an entity is a joint employer under Title VII. In reversing the district court's determination that the Growers could not be held liable under Title VII for non-orchard-related matters.

The court of appeals reversed and remanded, holding that the EEOC had plausibly alleged the Growers' liability as a joint employer for the discriminatory conduct of Global Horizons. The panel held that the common-law agency test (rather than the economic reality test) should be applied. Under the common-law test, the principle guidepost is the element of control, and the panel concluded that the EEOC adequately alleged that the Growers' employment relationship with the Thai workers also subsumed non-orchard-related matters. The panel further directed that the district court should then reconsider the disparate treatment claim (and the related pattern-or practice claim) in light of the EEOC's allegations regarding both orchard-related and non-orchard-related matters.

PLEADING THAT DISCRIMINATION WAS A FACTOR IN THE ACTION TAKEN (I.E. MIXED MOTIVE) IS SUFFICIENT TO ALLEGE A VIABLE RACE DISCRIMINATION CLAIM UNDER 42 U.S.C. § 1981

National Association of African American-Owned Media v. Charter Communications, 915 F.3d 617 (9th Cir. 2019)

Entertainment Studios Networks, Inc. (Entertainment Studios), an African American-owned operator of television networks, sought to secure a carriage contract from Charter Communications, Inc. (Charter). (A "carriage contract" is one with operators, from local cable companies to nationwide enterprises, to carry and distribute channels and programming to the operators' television subscribers.) These efforts were unsuccessful, and Entertainment Studios, along with the National Association of African American-Owned Media (NAAAOM), sued, claiming that Charter's refusal to enter into a carriage contract was racially motivated in violation of 42 U.S.C. § 1981. The district court, concluding that Plaintiffs' complaint sufficiently pleaded a § 1981 claim and that the First Amendment did not bar such an action, denied Charter's motion to dismiss. The court then certified that order for interlocutory appeal.

The court of appeals affirmed, holding that a plaintiff need not plead that racial discrimination was the but-for cause of a defendant's conduct, but only that racial discrimination was a factor (i.e. a mixed motive) in the decision not to contract such that the plaintiff was denied the same right as a white citizen.

INABILITY TO OBTAIN AND USE PRIVILEGED PRIMARY SOURCE DATA SUCH AS TAX RETURNS NOT FATAL TO WHISTLEBLOWER PLAINTIFF'S PROOF OF POTENTIAL RETALIATION FOR HAVING RAISED TAX COMPLIANCE ISSUES

Siri v. Sutter Home Winery, Inc., 31 Cal.App.5th 598 (2019)

Plaintiff Says Siri was employed as a General Ledger Staff Accountant for Sutter Home Winery (doing business as Trinchero Family Estates, or "TFE"). According to her complaint, her primary duties included filing sales and use tax returns for applicable states, including the State of California. Siri believed that TFE was in noncompliance with state law pertaining to use tax payments, and she claimed she repeatedly voiced her concerns to her direct supervisor and to TFE top management. She also communicated in writing to TFE's general counsel her concerns, and later alerted TFE management that she had consulted the California State Board of Equalization ('BOE'). She told them that the BOE had confirmed that Siri was correct relative to her belief that TFE owed use taxes. Siri claimed that TFE management subsequently retaliated against her by singling her out for special scrutiny, withdrawing duties from her, giving to someone else an office that had been promised to her, treating her as a pariah, and, ultimately, terminating her employment. Siri sued for wrongful termination in violation of public policy and for whistleblower retaliation in violation of Labor Code section 1102.5.

A protracted discovery battle ensued over Siri's ultimately unsuccessful attempts to obtain TFE's tax returns, after which TFE successfully moved for summary judgment. Its theory was that the tax returns were privileged, Siri could not prove her case without them, and she was not permitted to use them. ("When a party cannot litigate a claim without disclosing privileged information, the claim must be dismissed." [*General Dynamics v. Superior Court*, 7 Cal.4th 1164, 1190 (1994)].)

The appellate court reversed, holding that while the tax returns themselves might strengthen her case, even without them Siri could prove she was retaliated against and terminated based on her whistleblowing activity of raising the tax-avoidance issue.

SECTION 998 HAS NO APPLICATION TO COSTS AND ATTORNEY AND EXPERT WITNESS FEES IN A FEHA ACTION UNLESS THE LAWSUIT IS FOUND TO BE "FRIVOLOUS, UNREASONABLE, OR GROUNDLESS" WHEN BROUGHT, OR THE PLAINTIFF CONTINUED TO LITIGATE AFTER IT CLEARLY BECAME SO.

Huerta v. Kava Holdings, Inc. 29 Cal.App.5th 74 (2018)

Defendant Kava Holdings, Inc., dba Hotel Bel-Air (defendant) terminated two restaurant servers after they were involved in an altercation during work. One of the fired employees, plaintiff Felix Huerta, sued on a variety of legal theories, most of which were dismissed before or during trial. The trial court granted defendant's motion for nonsuit as to plaintiff's claim for retaliation under the Fair Employment and Housing Act (FEHA; Gov. Code, § 12900 et seq.), and allowed the jury to decide plaintiff's FEHA causes of

action for harassment based on a hostile work environment, discrimination, and failure to prevent harassment and/or discrimination. The jury returned a verdict for defendant. The trial court then found that plaintiff's action was not frivolous and denied defendant's motion for attorney fees, expert fees and costs under Government Code section 12965, subdivision (b) (section 12965(b)). Based on plaintiff's rejection of defendant's pretrial Code of Civil Procedure section 998 settlement offer, however, the trial court awarded defendant $50,000 in costs and expert witness fees under that statute. Plaintiff appealed.

In the published portion of the opinion, the court reversed. It noted that, effective January 1, 2019, section 998 will have no application to costs and attorney and expert witness fees in a FEHA action unless the lawsuit is found to be "frivolous, unreasonable, or groundless when brought, or the plaintiff continued to litigate after it clearly became so." For litigation that predates the application of the amended version of section 12965(b), the court held section 998 does not apply to nonfrivolous FEHA actions and reversed the order awarding defendant costs and expert witness fees pursuant to that statute. (*Arave v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (2018) 19 Cal.App.5th 525 (*Arave*).)

THE FEDERAL AGE DISCRIMINATION IN EMPLOYMENT ACT APPLIES TO STATE AND LOCAL GOVERNMENT EMPLOYERS REGARDLESS OF THEIR SIZE

Mount Lemmon Fire Dist. v. Guido, 586 U.S. ___, 139 S.Ct. 22, 2018 WL 5794639 (2018)

Faced with a budget shortfall, the Mount Lemmon Fire District laid off two firefighters, John Guido and Dennis Rankin, who also happened to be their oldest firefighters. They filed suit, alleging that the Fire District, a political subdivision in Arizona, terminated their employment as firefighters in violation of the Age Discrimination in Employment Act of 1967 (ADEA). The Fire District successfully moved for summary judgment, arguing that it was too small to qualify as an "employer" under the ADEA, which provides: "The term 'employer' means a person engaged in an industry affecting commerce who has twenty or more employees . . . . The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State . . . ." 29 U.S.C. § 630(b). On appeal, the Ninth Circuit reversed and remanded, holding that the "also means" clause added a new category of employers without restrictions of size. The U.S. Supreme Court took up the petition for review and affirmed.

Initially, both Title VII of the Civil Rights Act of 1964 and the ADEA applied solely to private sector employers, but both were amended (in 1972 and 1974, respectively) to cover state and local governments. The Title VII amendment (to the definition of "persons" engaged in an industry affecting commerce) subjected states and their subdivisions to liability only if they employ a threshold number of workers, currently 15. By contrast, the 1974 ADEA amendment added state and local governments directly to the definition of "employer," and without a size limitation. The Court acknowledged that reading the ADEA's definitional provision to apply to States and political subdivisions regardless of size may give the ADEA a broader reach than Title VII, but found that this

disparity is a consequence of the different language Congress chose to employ. The Court wrote that the better comparator for the ADEA is the FLSA, which also ranks States and political subdivisions as employers regardless of the number of employees they have. The Equal Employment Opportunity Commission has, for 30 years, interpreted the ADEA to cover political subdivisions regardless of size, and a majority of the States impose age discrimination proscriptions on political subdivisions with no numerical threshold. For all these reasons, the court of appeals' decision was affirmed.

ADAAA PLAINTIFF MUST SHOW ONLY THAT HE HAS BEEN SUBJECTED TO A PROHIBITED ACTION BECAUSE OF AN ACTUAL OR PERCEIVED IMPAIRMENT REGARDLESS OF WHETHER OR NOT THE IMPAIRMENT LIMITS OR IS PERCEIVED TO LIMIT A MAJOR LIFE ACTIVITY.

Nunies v. HIE Holdings, 908 F.3d 428 (9th Cir. 2018)

Herman Nunies was a delivery driver for HIE Holdings, Inc. ("HIE"), a company that purchases, sells, and distributes food products for residential and commercial use. Nunies' primary duties included operating HIE's company vehicle; loading, unloading, and delivering five-gallon water bottles; and occasionally assisting in the warehouse. The position required lifting and carrying a minimum of 50 pounds and other physical tasks. Sometime in mid-June 2013, Nunies sought to transfer from his full-time delivery driver position to a part-time warehouse position. The parties dispute the motivation for this switch. Nunies attributed his desire to switch to the pain he had developed in his left shoulder. HIE – through a supervisor, Victor Watabu – contended that Nunies wanted to transfer so that he could focus on his independent side-business. Nunies found a part-time warehouse employee, Sidney Aguinaldo, who agreed to swap positions with him. Watabu contacted HIE's Honolulu office because that office needed to approve the Nunies-Aguinaldo swap. According to Watabu, the Honolulu office "tentatively" approved the switch pending resolution of some pay and duties questions. Nunies asserts that on June 14, 2013, Watabu told him that the switch had been approved.

On June 17, 2013, Nunies notified his operations manager and Watabu that he was having shoulder pain. Two days later (on June 19), Watabu told Nunies that HIE would not extend the part-time warehouse position to him and that Nunies' last day would be July 3. Watabu said "[y]ou gotta resign" because "[y]our job no longer exists because of budget cuts." HIE's termination report (dated June 27) identified Nunies' separation as a "resignation," and it said that the reason for the separation was that the "part-time position [was] not available." However, on June 24, 2013, Watabu emailed his HIE colleagues on an email chain about Nunies' last day of employment, and asked, "can you scan a copy for a job opening for a part-time warehouseman ad[?]" Further, Nunies saw an ad for the position in the newspaper on June 26, 2013, one day before HIE completed Nunies' termination report.

Nunies brought a disability discrimination suit against HIE under the ADA and state law, arguing that HIE terminated him because of his shoulder injury. HIE moved for summary judgment, which the district court granted, concluding that Nunies did not have a "disability" under the ADA because he had not established that his shoulder injury

"substantially limited" any "major life activity." The district court also found that Nunies did not establish a record of impairment. Finally, the district court concluded that Nunies had not established that HIE regarded him as having a disability because Nunies did not come forward with any evidence that HIE subjectively believed that Nunies was substantially limited in a major life activity.

On appeal, the Ninth Circuit reversed. The panel held that, under the ADA Amendments Act adopted in 2008 (ADAAA), the scope of the ADA's "regarded-as" definition of disability was expanded. Prior to the ADAAA, to sustain a regarded-as claim, a plaintiff had to provide evidence that the employer subjectively believed the plaintiff was substantially limited in a major life activity. Under the ADAAA, however, the plaintiff must show only that he has been subjected to a prohibited action "because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity." Applying the correct law, and viewing the evidence in the light most favorable to the non-moving party, the panel concluded that Nunies established a genuine issue of material fact as to whether HIE regarded him as having a disability. The panel further held that the district court further erred in concluding that the plaintiff did not meet the definition of an actual disability under the ADA, which requires a showing that the plaintiff has a physical or mental impairment that limits one or more major life activities. The panel also concluded that there was at least a dispute about whether the plaintiff's shoulder injury limited the life activities of working and lifting.

998 OFFER THAT IS SILENT ON COSTS OR FEES MEANS THOSE ARE EXCLUDED FOR PURPOSES OF COMPARISON TO A JURY'S ULTIMATE DAMAGE AWARD TO DETERMINE WHETHER PLAINTIFF OBTAINED A MORE FAVORABLE RESULT THAN THE 998 OFFER.

Martinez v. Eatlite One, Inc., 27 Cal.App.5th 1181 (2018)

Plaintiff Samantha Martinez sued defendant Eatlite One, Inc., for employment discrimination among other things. Eatlite made a 998 offer of $12,001 that was silent on the issue of fees and costs. After the jury later found in favor of plaintiff and awarded $11,490 in damages, both parties submitted competing memoranda of costs, and plaintiff filed a motion for attorney fees. The trial court awarded costs and attorney fees to Martinez, finding that because plaintiff won $11,490 plus costs and fees, the win exceeded Eatlite's 998 offer of $12,001. Eatlite appealed, contending that plaintiff did not obtain a judgment more favorable than defendant's offer to compromise under Code of Civil Procedure section 998.

The appellate court reversed. When a 998 offer is silent as to costs and fees, it automatically means those are added to the numerical offer. Thus if Martinez had accepted, she would have received the $12,001 plus her costs and fees. She did not obtain a more favorable judgment than Eatlite's 998 offer, and thus could not recover her post-offer costs or fees.

RESTRICTIONS IN A "LAST CHANCE" AGREEMENT PRECLUDING ANY SPEECH OF A DISPARAGING OR NEGATIVE NATURE ABOUT THE CITY OR POLICE DEPARTMENT ARE AN IMPERMISSIBLE PRIOR RESTRAINT ON PROTECTED SPEECH

Barone v. City of Springfield, 902 F.3d 1091 (9th Cir. 2018)

Plaintiff Thelma Barone was a community services officer for the police department ("Department") at the City of Springfield, Oregon. Some of her primary duties related to victim advocacy and acting as liaison to the city's minority communities. Throughout her tenure (which dated back to 2003), members of the Latino community complained of racial profiling by the Department, and Barone relayed these complaints to the Department's leadership. These complaints increased in 2013 around the same time as the Department was going through a leadership transition to a new chief.

In 2014, the Department began investigating Barone in connection with two Department-related incidents. The first incident involved a school tour Barone led through the Department, during which she allegedly permitted some students to take photos of photo-restricted areas. In the second incident, Barone was unable to reach a sergeant about a crime a victim reported, but she left a message with the dispatchers and asked the sergeant to return her call. The sergeant never returned her call because he said he did not know the phone call pertained to a possible crime, and the parties disputed whether Barone informed the dispatchers that she wanted to speak to the sergeant about an alleged crime.

While these investigations were still ongoing, in early 2015, Barone spoke at a City Club of Springfield event headlined "Come Meet Thelma Barone from the Springfield Police Department." The Department paid her to attend the event; she wore her uniform; and her supervisor attended. She understood that she attended and participated in the event as a representative of the Department. A member of the audience at the event asked her whether she was aware of increasing community racial profiling complaints. She said that she "had heard such complaints." She was placed on administrative leave shortly thereafter (due to alleged dishonesty in the 2014 investigations). The Department later concluded she had violated code of conduct provisions, issued discipline (a 4-week suspension), and presented her with a last chance agreement ("LCA"). The agreement stated: "Consistent with SPD General Order 26.1.1.XIX, Employee will not speak or write *anything of a disparaging or negative manner related to the Department/ Organization/City of Springfield or its Employees*. Employee is not prohibited from bringing forward complaints she reasonably believes involves discrimination or profiling by the Department." (Emphasis added.) When Barone did not sign the LCA, the Department terminated her employment. She sued the City, the chief, and several other officials for First Amendment retaliation and imposing an unlawful prior restraint. The district court granted defendants motion for summary judgment (including qualified immunity for the individuals), and Barone appealed.

The Ninth Circuit affirmed on the retaliation claim, holding that because she spoke as a public employee at the community event, her speech there was not subject to First

Amendment protections. However, the Court reversed and remanded on the prior restraint claim. The LCA language was deemed an impermissibly broad encroachment into "issues of public concern" beyond the scope of her job that would sweep in any disagreement about the City's services, employees, or elected officials, including speech on topics or individuals that do not overlap with Barone (e.g. critique of the City's cleanliness, water quality, or tax and revenue policies.) The Court rejected argument that the Department may not have intended to restrict protected speech, because intent is not the focus of a prior restraint analysis. Rather, the focus is on the chilling effect created, i.e., whether an employee would perceive or understand a policy to prohibit otherwise protected speech.

FAIR EMPLOYMENT AND HOUSING ACT DOES NOT PRECLUDE PUBLIC EMPLOYER FROM TREATING RETIREES AS A GROUP DIFFERENTLY, WITH REGARD TO MEDICAL BENEFITS, THAN EMPLOYEES AS A GROUP

Harris v. County of Orange, 902 F.3d 1061 (9th Cir. 2018)

This is the latest decision in a series of cases between the County of Orange and its retirees. The County restructured two retiree benefits: the Retiree Premium Subsidy (which combined active and retired employees into a single unified pool for purposes of calculating medical insurance premiums); and the so-called "Grant Benefit" (providing retired employees with a monthly grant to defray the cost of health care premiums). The retirees contended that the County's decision in 2006 to eliminate the Retiree Premium Subsidy and to reduce the Grant Benefit increased their health care costs significantly. Their class action suit alleged (1) the reduction in the Grant Benefit breached the County's implied contractual obligations and deprived them of vested rights; and (2) that the elimination of the Retiree Premium Subsidy violated California's Fair Employment and Housing Act ("FEHA") prohibitions against age discrimination. The trial court granted defendants' motion to dismiss, and the retirees appealed.

First, the Ninth Circuit held that the retirees' second amended complaint set forth sufficient allegations regarding the continuation of the Grant Benefit during the employees' lifetime to survive a motion to dismiss. The panel noted that the retirees alleged the existence of annual memorandum of understanding between the union and the County, establishing a right to the Grant Benefit; and the retirees' specific allegations plausibly supported the conclusion that the County impliedly promised a lifetime benefit, which could not be eliminated or reduced. The panel thus reversed the district court's order as to the retirees' contract claims regarding the Grant Benefit.

As to the FEHA claim, the panel noted that California law did not fault the County for offering different benefits to retirees and to active employees at the outset, absent a FEHA violation. Given the novel nature of this theory, the court looked to federal cases interpreting employment discrimination and civil rights for guidance. The panel held that the federal Age Discrimination in Employment Act (ADEA) applied to retirees. The panel further held that changes in retirees' health benefits were covered by FEHA, despite the fact that they were not active employees. The County's elimination of the subsidy did not discriminate among retirees based on age, nor did the subsidy elimination

distinguish among active employees based on age, or against active employees who are old enough to retire but had not. The panel concluded that the County, under the ADEA, and so, under California's FEHA age discrimination provisions, may treat retirees as a group differently, with regard to medical benefits, than employees as a group, taking into account that the cost of providing medical benefits to the retiree group was higher because the retirees were on average older. Thus the court affirmed dismissal of the FEHA claim.

ARTISTIC CHOICE OF MUSICIANS FALLS WITHIN AMBIT OF FREE SPEECH RIGHTS FOR PURPOSES OF AN ANTI-SLAPP MOTION TO STRIKE

Symmonds v. Mahoney, 31 Cal.App.5th 1096 (2019).

Edward Mahoney is a singer and songwriter who performs in concerts across the country. In 2015, he terminated his drummer of 41 years, plaintiff Glenn Symmonds, who subsequently sued Mahoney and his production company for discrimination on the basis of age, disability, and medical condition. Defendants filed an anti-SLAPP motion arguing that Mahoney's decision as to which musicians performed with him was an act in furtherance of the exercise of his constitutional right of free speech in connection with an issue of public interest, and thus protected under Code of Civil Procedure section 425.16. The trial court denied the motion, finding that Symmonds' cause of action arose from defendants' discriminatory conduct, not the decision to terminate him, and thus Symmonds' claim did not implicate Mahoney's free speech rights. Defendants appealed.

The appellate court reversed, holding that defendants met their burden to establish that Mahoney's decision to terminate Symmonds was protected conduct. Specifically, "a singer's selection of the musicians that play with him both advances and assists the performance of the music, and therefore is an act in furtherance of his exercise of the right to free speech." The court remanded so the trial court could conduct the second step of the anti-SLAPP analysis and determine whether Symmonds demonstrated a probability of prevailing on the merits of his claim.

TITLE VII CLAIMS OF RETALIATION AND HOSTILE WORK ENVIRONMENT ARE SUBJECT TO THE "RELIGIOUS ORGANIZATION EXEMPTION" IN THE SAME WAY THAT HIRING AND FIRING DECISIONS ARE EXEMPT

Garcia v. Salvation Army, __ F.3d __, 2019 WL 1233216 (9th Cir. 2019)

Founded in London in 1865, the Salvation Army describes itself as "an evangelical part of the universal Christian church," whose professed mission is "to preach the gospel of Jesus Christ and to meet human needs in His name without discrimination." It operates in the U.S. through 501(c)(3) nonprofit corporations. Ann Garcia's relationship with the Salvation Army dated to 1999, when she began attending religious services at the Estrella Mountain Corps in Avondale, Arizona. In 2002, the Corps hired her to work as an assistant to the pastor, a position she held until July 2010, when Arlene and Dionisio Torres became the new pastors. No longer in need of an assistant, Arlene Torres

reassigned Garcia to the position of social services coordinator in January 2011. In that role, Garcia aided clients under the supervision of Arlene Torres. In late 2011, Garcia and her husband "left the Church" and stopped attending the Salvation Army's religious services, but Garcia continued her work as social services coordinator. Afterward, her relationship with Torres began to deteriorate.

Tensions reached new heights in July 2013, when a client filed a lengthy complaint letter against Garcia, claiming that she "refused to provide help to [the client's] family." Garcia filed an internal grievance of her own against Torres regarding the handling of the complaint, claiming that she "fe[lt] discriminated against and excluded and isolated" at work ever since leaving the church. She filed charges with the EEOC and Arizona state authorities for religious discrimination and retaliation. Following a lengthy period of medical leave, the Salvation Army fired Garcia after she failed to report to work despite being cleared by her doctor. Garcia then filed a second complaint with the EEOC and state authorities alleging that the Salvation Army failed to accommodate her disability.

After right-to-sue letters issued, Garcia brought suit alleging claims under Title VII of the Civil Rights Act of 1964 (Title VII) and the Americans with Disabilities Act (ADA). In sum, Garcia alleged that the Salvation Army subjected her to a hostile work environment because she stopped attending religious services and retaliated against her for filing an internal grievance complaining of religion-based mistreatment. The resulting stress allegedly precipitated health problems that the Salvation Army failed to accommodate. The district court granted summary judgment to the Salvation Army, holding that Title VII's religious organization exemption (ROE) protects the Salvation Army from suit (even though it had originally failed to timely assert the defense.) Garcia appealed.

The Ninth Circuit affirmed. The party seeking benefit of the ROE bears the burden of proving that it is "..a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities." It does not suffice that an institution be "merely 'affiliated' with a religious organization." *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 617 (9th Cir. 1988). Rather, an institution must show that its "purpose and character are primarily religious" based upon "[a]ll significant religious and secular characteristics." The court held that the Salvation Army met its burden. It holds regular religious services. It offers social services to customers regardless of their religion "to reach new populations and spread the gospel." The Ninth Circuit held that such exemption applies to retaliation and hostile work environment claims under Title VII, as well as to claims regarding its hiring and firing decisions.

PUBLIC AGENCY

USE OF FORCE POLICIES REMAIN A MATTER OF MANAGERIAL PREROGATIVE NOT SUBJECT TO BARGAINING, ALTHOUGH SUCH POLICIES MAY HAVE EFFECTS REQUIRING NEGOTIATIONS

San Francisco Police Officers' Ass'n v. San Francisco Police Comm'n, 27 Cal.App.5th 676 (2018)

The Association is the recognized employee organization within the meaning of the Meyers-Milias-Brown Act (MMBA) representing SFPD police officers. (See § 3501(b).) Under the San Francisco Charter, the San Francisco Police Commission has authority to "prescribe and enforce any reasonable rules and regulations that it deems necessary to provide for the efficiency of the [SFPD]...." In late 2015, the Commission announced that it planned to revise SFPD's use of force policy and began meeting with use of force policy experts, community members, and other stakeholders, seeking to build public trust and engagement and to ensure that the policy reflected the best practices in law enforcement. The Association requested that the City meet and confer regarding the Commission's proposed policy, the City stated that "[w]hile the formation of the policy is a managerial right outside the scope of bargaining, we welcome the [Association's] participation as a stakeholder in this preliminary process." The City did agree to meet with the Association once the new policy was approved, "to consider the negotiable impacts that the policy may have."

In June 2016, the Commission voted unanimously to adopt the revised policy, subject to "meet and confer" with the Association. Over the following five months, the City met nine times with the Association. From the outset, the City stated that it was reserving "all rights related to its management rights and what matters, if any, fell within the scope of representation." The City ultimately concluded it could not agree to the Association's proposed exceptions to the provision that prohibited carotid holds and shooting at moving vehicles. The City therefore determined that any further discussion of that issue would be futile and declared impasse. The Association filed a grievance under the MOU, alleging that the City had declared impasse prematurely and had failed to negotiate in good faith. The City reconsidered its position, ultimately concluding that it would no longer negotiate regarding "out-of-scope management rights" and that four of the five remaining areas of disagreement "were outside the scope of representation and clearly management rights." These included, inter alia, the strict prohibition against shooting at moving vehicles and the ban of the use of the carotid restraint. The only remaining issues the City believed were within the scope of representation were related to training and discipline. On November 3, the City sent a letter to the Association explaining its position, and the parties subsequently reached agreement on training and discipline under the new policy.

On December 20, 2016, the Association sought a temporary restraining order and a preliminary injunction preventing implementation of the use of force policy and further seeking an order compelling arbitration under the MOU and a writ of mandate ordering the City to participate in impasse resolution procedures under the City Charter or state

law. The next day, the Commission voted unanimously to adopt the revised use of force policy, which included the provisions prohibiting the carotid hold and shooting at moving vehicles challenged by the Association. The Association filed another application for a temporary restraining order and preliminary injunction to stay implementation of the new policy pending arbitration of its grievance. The trial court denied the requested relief based on its findings that (1) the Association was unlikely to prevail on the merits at trial because under California law, a use of force policy is a managerial decision, regarding which the City was not subject to meet and confer requirements, and (2) "the balancing of 'interim harm' " favored the City. The Association then filed a petition to compel arbitration, which the trial court rejected, and the Association appealed.

The appellate court held that the duty to meet and confer did not apply to the Commission's revised use of force policy because the policy fell within the City's exclusive managerial authority and was not subject to arbitration under the MOU with the Association. Where an action is taken pursuant to a fundamental managerial or policy decision, it is within the scope of representation only if the employer's need for unencumbered decision-making in managing operations is outweighed by the benefits to employer-employee relations of bargaining about the action in question. According to the court, that is not the case with revisions to use of force policies as these policies mainly concern public safety as opposed to wages, hours and working conditions. While it could impinge on conditions of employment, the court found that it could only impinge indirectly and as such, the policy was considered a fundamental managerial decision outside the scope of representation and not subject to arbitration.

"AIR TIME" BENEFITS UNDER THE CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT LAW ARE NOT VESTED RIGHTS AND THUS MAY BE LEGISLATIVELY ALTERED

Cal Fire Local 2881 v. California Public Employees' Retirement System, __ Cal. __ (2019), 244 Cal.Rptr.3d 149 (March 4, 2019)

Plaintiffs challenged the elimination of "airtime" benefits due to enactment of the Public Employees' Pension Reform Act, or PEPRA, in 2013. Previously, CalPERS permitted eligible members to purchase up to five additional years of airtime. The plaintiffs challenged the application of Government Code section 7522.46 by filing a petition for writ of mandate and injunctive relief seeking the court to order CalPERS to continue permitting classic members, who otherwise meet the service credit eligibility requirements, to continue to purchase airtime. After losing at the trial and appellate court levels, the plaintiffs filed a petition for review with the California Supreme Court.

The California high court ruled that the ability to purchase airtime was not a vested right, and as such was subject to the Legislature's alteration. In deciding the question narrowly, the court declined to address the so-call "California Rule" (aka vested rights doctrine) which recognizes that public employees obtain a vested contractual right to pension benefits as soon as they begin employment that may not be destroyed, once vested, without impairing a contractual obligation. The court did not rule on to what extent, if at all, a vested right may be impaired, but note that not all public employment benefits are

pension rights, even though they may affect the pension benefit that is paid to an employee upon retirement. The special protection extended to vested pension rights is rooted in the understanding that pension rights are a form of deferred compensation granted in exchange of services rendered, but not paid until a future date.

STATUTORILY REQUIRED PRECURSORS TO DISCIPLINARY ACTION UNDER THE EDUCATION CODE WERE PROPERLY CONSIDERED IN A CLOSED SESSION WITHOUT 24-HOUR NOTICE TO THE EMPLOYEE

Ricasa v. Office of Admin. Hearings, 31 Cal.App.5th 262 (2018)

After Arlie Ricasa was criminally charged for accepting gifts (such as dinners and a scholarship for her daughter) she did not report on Form 700s, the Southwestern Community College District (Southwestern) demoted Arlie Ricasa from an academic administrator position to a faculty position on the grounds of moral turpitude, immoral conduct, and unfitness to serve in her then-current role. Ricasa filed two petitions for writs of administrative mandamus in the trial court seeking, among other things, to set aside the demotion and reinstate her as an academic administrator. The trial court denied the petitions, and on appeal, Ricasa argued that the demotion occurred in violation of the Ralph M. Brown Act (the Brown Act) (Gov. Code, § 54950 et seq.) because Southwestern failed to provide her with 24 hours' notice of the hearing at which it heard charges against her, as required by Government Code section 54957. She further argued that the demotion was unconstitutional because no nexus exists between her alleged misconduct and her fitness to serve as academic administrator. Southwestern also appealed, arguing that the trial court made two legal errors when it: (1) held that Southwestern was required to give 24-hour notice under the Brown Act prior to conducting a closed session at which it voted to initiate disciplinary proceedings, and (2) enjoined Southwestern from committing future Brown Act violations.

The court of appeal concluded that, based on the intersection between the Education Code and the Brown Act, Southwestern had not violated the Brown Act (and that substantial evidence supported Ricasa's demotion.) Specifically, Education Code section 87671 required that the Board hold the May meeting before it could demote Ricasa. Section 87669 allowed the Board to impose an immediate penalty. Section 87671 required that Dr. Nish, the District's president and superintendent, present her recommendation to the Board at a Board meeting, along with copies of specified documents. Southwestern took all these required steps in a closed session with the agenda description of “Public Employee Discipline/Dismissal/Release.” As such, the 24-hour notice required for the presentation of specific complaints or charges was deemed not to apply.

COURT CAN REGULATE ITS OWN EMPLOYEES' DRESS AND INSIGNIA IN PUBLIC AREAS IN ORDER TO ENSURE THE APPEARANCE OF IMPARTIALITY FOR PARTIES INVOLVED IN CASES THERE

Superior Court v. Public Employment Relations Board, 30 Cal.App.5th 158 (2018)

The Superior Court of Fresno County PERB that certain Court personnel rules and regulations (Personnel Rules) violated the Trial Court Employment Protection and Governance Act (Gov. Code, § 71600 et seq.) and, thus, constituted unfair labor practices. The Personnel Rules in question prohibited Court employees from (1) wearing clothing or adornments with writings or images, including pins, lanyards and other accessories; (2) soliciting during working hours for any purpose without prior Court approval; (3) distributing literature during nonworking time in working areas; and (4) displaying writings or images not published by Court in work areas visible to the public. Ruling on a challenge filed by Service Employees International Union Local 521, PERB found several aspects of the rules improper with respect to Union members. Specifically, PERB concluded rules prohibiting employees from wearing certain clothing anywhere in the courthouse and from displaying images that are not published by Court in work areas visible to the public overly broad and interfered with rights protected by the Trial Court Act. It also determined the restriction on soliciting during work hours and the ban on distributing literature in working areas were ambiguous and overly broad. Relatedly, PERB considered and upheld its authority to remedy these violations and ordered Court to rescind the rules. The court sought review via writ petition.

The appellate court reversed on all but one issue. It held that the superior court has a substantial interest in regulating its workforce to ensure that the judicial process appears impartial to all appearing before it. Under the existing law and the facts presented regarding interactions with the public in the relevant courthouses, the court of appeals held this interest is sufficient to justify the broad restrictions on employee clothing adopted in this case. Furthermore, the court ruled that the bans on soliciting during working hours and displaying images in areas visible to the public were not ambiguous and thus were properly adopted. However, the court did agree with PERB that the regulations prohibiting the distribution of literature in working areas were ambiguous as to the meaning of "working areas," and therefore, despite separation of powers concerns PERB was permitted to impose a remedy with respect to that regulation.

POBRA'S ONE-YEAR STATUTE OF LIMITATIONS IS TOLLED DURING A CRIMINAL INVESTIGATION UNTIL FORMAL NOTIFICATION THAT CRIMINAL CHARGES WILL NOT BE FILED

Bacilio v. City of Los Angeles, 28 Cal.App.5th 717 (2018)

Edgar Bacilio was an officer with the LAPD. He and his partner (Escobar) responded to a domestic dispute on March 30, 2011, which resulted in arresting the father and placing the minor child with the wife. Later in the shift they conducted a welfare check of the child at the wife's apartment, and Bacilio later reported he and Escobar spent 115 minutes at the apartment during the shift, but other records including the unit log placed

Bacilio there 12 minutes and Escobar 86 minutes. On August 4, 2011, the mother filed a report alleging that Escobar had spent 90 minutes in her apartment and, while there, had kissed her, touched her breasts and vaginal area over her clothes, and propositioned her for sex. The wife later picked Escobar out of a photo spread, indicating that she was 60 to 70 percent sure he was the one who sexually assaulted her. The Internal Affairs Division commenced an investigation (both criminal and administrative) into both officers' conduct.

The IA investigators presented findings to the District Attorney June 3, 2013, and sought prosecution of Escobar for felony sexual battery under color of authority. The deputy DA interviewed the wife August 6, 2013, and immediately after the interview told the IA investigator she most likely would not be filing charges and that it was "ok to do the administrative interviews" with Bacilio and a third officer as they were not criminally involved. October 3, 2013, the DA's office sent written notification to the LAPD declining to prosecute the three officers.

On September 10, 2014, the LAPD served Bacilio with notice that Internal Affairs was seeking an official reprimand against him based on the underlying incident. In November 2014, the LAPD brought 11 administrative charges against Escobar, Bacilio, and the third LAPD officer. The LAPD alleged two counts of misconduct against Bacilio: (1) "fail[ing] to maintain an accurate daily field activities report (DFAR)" during his March 30, 2011 shift, and (2) making "misleading statements" during his two interviews with Internal Affairs on September 27, 2013, and February 17, 2014. The LAPD sustained the first charge against Bacilio but found the second charge "Not Resolved." Following an evidentiary hearing on Bacilio's appeal, the hearing officer issued a written ruling finding that the LAPD had initiated administrative disciplinary proceedings against Bacilio in a timely manner because POBRA's one-year limitations period was tolled from the time of the wife's initial report until the DA formally declined prosecution on October 3, 2013. Bacilio challenged his discipline via writ petition, arguing that the discipline was barred by the statute of limitations. The trial court agreed with the hearing officer that the discipline had been timely due to the criminal investigation tolling the statute of limitations. Bacilio appealed.

The Public Safety Officers Procedural Bill of Rights Act (POBRA), Government Code section 3300 et seq., requires public agencies investigating misconduct by a public safety officer to complete their investigation and notify the officer of any proposed discipline within one year of discovering the misconduct. (§ 3304(d)(1).) If the possible misconduct "is also the subject of a criminal investigation or criminal prosecution," the one-year period is tolled while the "criminal investigation or criminal prosecution is pending." (§ 3304(d)(2)(A).) This case turned on the issue of when a criminal investigation is no longer "pending" The court of appeals held that a criminal investigation is no longer pending—and section 3304, subdivision (d)(2)(A)'s tolling period ends—when a final determination is made not to prosecute all of the public safety officers implicated in the misconduct at issue. Applying this definition, the court concluded that the tolling period did not end until the Los Angeles County District Attorney officially rejected prosecution of all three officers investigated in this case. Consequently, the investigation and discipline in this case was timely.

PUBLIC EMPLOYMENT RELATIONS BOARD DECISIONS

PUBLIC EMPLOYER MAY NOT SUBJECT UNION ACTIVITIES TO SPECIAL RESTRICTIONS AS TO WHETHER THEY MAY BE CONDUCTED ON WORKING TIME.

County of Orange, PERB Dec. No. 2611-M (2018)

On April 23, 2014, three County employees who were Local 2076 site representatives spent approximately 30 minutes distributing Union surveys to employees at their work stations in a Social Services Agency (SSA) building. An SSA manager directed the three employees to leave. Later that day, the County's human resources manager directed Local 2076 to immediately stop distributing surveys "to employees in work areas during work time." Following a hearing on the union's unfair practice charge, the ALJ found that this interfered with protected rights, and the full PERB Board agreed.

The Meyers-Milias-Brown Act affords both employee and non-employee representatives of employee organizations access to areas in which employees work, subject to reasonable employer regulation. Any such regulation must be both necessary to the employer's efficient operations or safety of employees or others, and narrowly drawn to avoid overbroad, unnecessary interference with the exercise of statutory rights. Because "work time is for work," an employer may restrict non-business activities during work time but "it may not single out union activities for special restriction, or enforce general restrictions more strictly with respect to union activities." Moreover, an employer's otherwise lawful access restrictions may nevertheless interfere with protected rights when applied discriminatorily against unions or protected activity. The Board pointed to evidence in the record that the county "disparately" enforced restrictions on employee activities, while allowing allowed "employee-run social committees to fundraise for office parties, birthday celebrations, and other social events or team-building activities during other employees' work time."

MMBA'S "PUBLIC HEARING" REQUIREMENT REQUIRES AT LEAST NOTICE TO THE PUBLIC OF THE POTENTIAL IMPOSITION OF TERMS AND THE TAKING OF PUBLIC COMMENT PRIOR TO AGENCY ACTION

City of Yuba City, PERB Decision No. 2603-M (2018)

Local 1 and the City began negotiations in March 2014. The City opened with one-year and two-year proposals, also presented to its other units, which sought to move employees toward paying 50 percent of normal pension cost, eliminating a furlough resulting from the prior bargaining cycle, capping the City's healthcare premium contributions at the current contribution rate, eliminating a me-too clause, and eliminating layoff protections. Following several weeks of meetings without significant progress, Local 1 declared impasse on September 23, 2014.

On a parallel path in the summer of 2014, the City had reached agreement with three of its other units that eliminated the furlough in two steps, phased out the employer paid member contributions (EPMC) over two years; split total healthcare premiums 80/20, and

provided two floating holidays. In September 2014, the City Council approved the similar terms for three more groups.

Mediation and factfinding did not resolve the impasse between the City and Local 1. In April, 2015, Local 1 membership voted to authorize a strike. In early May 2015, the City issued the agenda for the May 19 City Council meeting. The agenda included a closed session followed by a "Regular Meeting," at which the public was "welcome and encouraged to participate," with "[p]ublic comment . . . taken on items listed on the agenda when they are called." Item 13 on the agenda for the regular meeting was titled "Local 1 Imposition," and included a summary of the staff recommendation that the Council implement the last best and final offer (LBFO). Local 1's business agent later testified he regularly received City Council meeting agendas and reviewed attached materials on the City's website. He admitted that he had sufficient time to review the agenda materials for the May 19 meeting, discuss them with Local 1 leaders, and prepare for the Council meeting. At the meeting, staff presented its report, and the Mayor then "open[ed] up the public hearing" and invited public comment. Local 1's agent spoke and opposed implementation of the proposed terms. At the conclusion of the public hearing, the City Council voted to adopt a resolution implementing the LBFO term – these terms were less advantageous than those achieved by the other units who previously had reached 2-year agreements with the City. Local 1 filed unfair practice charge challenging (among other things) that the City had not held a "public hearing" regarding the impasse between the parties before it implementing its LBFO.

The ALJ and later the Board rejected the union's arguments. The Board noted that the "public hearing" requirement is not defined in the MMBA. At a minimum, the employer must provide adequate notice to the public that it intends to consider imposing terms and conditions on employees, and to allow public comment concerning the proposed imposition. The Board held the City had met these requirements.

RIGHT TO REQUESTED UNION REPRESENTATION ATTACHES PRIOR TO INVASIVE BODY "STRIP" SEARCH EVEN WHERE NO QUESTIONS ARE BEING ASKED OF THE SUBJECT BEING SEARCH

State of California (Dept. of Corrections & Rehabilitation), PERB Dec. No. 2598-S (2018)

Amy Ximenez went to work as a psychiatric technician for the California Department of Corrections and Rehabilitation (CDCR) in 2005. In order to obtain her CDCR identification, Ximenez signed a preprinted form (Form 894-A) acknowledging the departmental rule against bringing any drug or other contraband into a prison or making any such items accessible to an inmate, and further acknowledging that she is subject to search at any time while on CDCR grounds. Her CDCR career took her to an assignment at the California State Prison (CSP) Sacramento, where she worked as a group facilitator, assisting mental health inmates with coping skills and anger management.

In late June 2015, CSP investigate service members received an inmate tip that on July 1, Ximenez was going to bring narcotic powder into the prison. An "exigent" criminal

investigation was initiated, and two investigators were assigned to search Ximenez's person, bags, and vehicle when she reported for work on July 1. In preparation for the search and in order to demonstrate to Ximenez that she had authorized the search, they obtained a copy of Ximenez's signed Form 894-A.

Investigators stopped Ximenez at the gate on July 1, on her way in to work. She was visibly upset and repeatedly asked why the agents wanted to speak with her and asking whether they were going to "walk her off the grounds." They told her they were conducting a criminal investigation into an allegation that she was smuggling contraband into the prison and they were going to search her bags, her vehicle, and her person. Ximenez consented to the search of her bags, placing them on the table for the agents to go through them. She also consented to the search of her truck. Two female officers prepared to search her person, and they told Ximenez that she needed to remove her clothes for an unclothed body search. Ximenez stood up, pointed her finger down toward the ground, and demanded the presence of a union representative, a supervisor, or someone from peer support. One of the investigators told Ximenez that she did not have a right to a union representative because: (1) she was "only being searched, not questioned," and (2) she signed a consent to search, Form 894-A, when she was first hired. She was required to disrobe for a naked body search including visual inspection of her anal area. No drugs were found. Later that month, the California Association of Psychiatric Technicians filed an unfair practice charge (charge) against the CDCR as to denial of requested union representation prior to the search. After hearing, an administrative law judge found that Ximenez reasonably believed the search might result in disciplinary action and requested a representative, and that denial of her request violated the Dills Act and unlawfully violated the union's right to represent its members.

The Board upheld the ALJ's decision, citing various NLRB decisions holding that employees have a right to a *Weingarten* representative before being required to submit to a reasonable suspicion drug test. Further, the Board noted that both it and California courts, have recognized that, in at least several respects, the language of our state collective bargaining laws is "considerably broader than the federal law on which *Weingarten* rests." The Board went on to state that here, as in a drug testing situation, an invasive body search is such an unusual and stressful situation that an employee is likely to volunteer information in an effort at self-defense, and therefore has a right to union representation even if the employer does not intend to ask questions. The right to union representation therefore attaches before an employee is invasively searched, just as it attaches before an employee takes a drug or alcohol test. Once an employee communicates a request for representation, the employer must: "(1) grant the request; (2) dispense with or discontinue the interview; or (3) offer the employee the choice of continuing the interview unaccompanied by a union representative or of having no interview at all, and thereby dispensing with any benefits which the interview might have conferred on the employee."

RIGHT TO REQUESTED REPRESENTATION ATTACHES TO DIRECTIVE TO PROVIDE WRITTEN MEMO PRIOR TO LEAVING FOR THE DAY DURING INQUIRY INTO EMPLOYEE'S WHEREABOUTS DURING WORK HOURS

San Bernardino Community College Dist., PERB Dec. No. 2599-E (2018)

Adam Lasad was a community services officer in the District's police department who was questioned by his supervisor regarding his whereabouts during his work shift. Lasad, after answering some of Tamayo's questions, requested a union representative. The department's command staff agreed that Lasad had a right to a representative, but directed the supervisor to have Lasad draft a written statement before he was relieved of duty. The supervisor then told Lasad, "[W]e're not going to question you anymore," but "I just need a memo from you explaining where you were." Lasad was then placed alone in an office to draft his statement. In the room, he had his personal cell phone and a landline phone, and the contact information of at least one union representative, but he did not attempt to secure representation before drafting his statement. After evidentiary hearing on an unfair practice charge brought by the California School Employees Association (CSEA), the administrative law judge (ALJ) determined that the District violated the Educational Employment Relations Act (EERA) by denying Lasad his right to be represented in an investigatory interview.

With respect to the representation issue, the Board agreed, holding that an employee has the right to a union representative before submitting a written statement as part of an investigatory interview. The same reasons for providing a union representative during an oral interview apply to a request for a written statement. An employer faced with a valid request for representation has three options. It may: (1) grant the request; (2) discontinue the interview; or (3) offer the employee the choice of proceeding with the interview without union representation or having no interview at all. But the employer may not continue the interview without granting the requested union representation "unless the employee 'voluntarily agrees to remain unrepresented after having been presented by the employer with the choices' described above or 'is otherwise made aware of these choices.'" Here, the Board determined it was incumbent on Lasad's supervisor to act upon Lasad's request, either by granting it or terminating the interview unless it was clear that Lasad was waiving his right to union representation. The requested memo was deemed to be simply a continuation of the interview without doing so.

RIGHT TO REQUESTED REPRESENTATION ATTACHES TO DIRECTIVE TO PROVIDE WRITTEN MEMO WHERE EMPLOYEE REASONABLY BELIEVES DISCIPLINE MAY RESULT FROM THE MEMO AND HAS REQUESTED REPRESENTATION

County of San Joaquin, PERB Decision No. 2619-M (2018).

Joel Madarang worked as a Custody Recreation Supervisor at the County of San Joaquin's jail, where he supervised inmate recreation programs including bingo games for the female general population inmates on Thursday afternoons. His supervisor,

Kristen Hamilton, emailed him directing him to change the start time of the bingo games to 10:30 a.m. to make room for a new mental health program in the afternoon that was designed to decrease the recidivism rate. In the following months, Madarang held numerous bingo games in the morning, but three times he held bingo games in the afternoon. Madarang later acknowledged Hamilton had directed him to move the time of the bingo game, but he also believed he had discretion to make changes to the recreation schedule. He did not seek Hamilton's authorization before holding bingo in the afternoon.

Hamilton learned that the bingo in the afternoon was affecting the attendance at the mental health program, and she emailed him asking why he was holding bingo in the afternoon when she had directed him to hold them in the morning. After Madarang explained verbally, Hamilton sent a follow-up email stating she had "just about had it" with him continuously undermining what she was telling him to do, and she directed him to write a memo explaining why he failed to follow her directions and bring it to her office. Madarang told Hamilton he wanted to speak to a union representative first. Hamilton replied that he did not need a union representative for this and that he should just write the memo so she could get his side of the story and correct his behavior. He continued to request a union representative prior to writing the memo. Hamilton consulted with the jail's captain, who told her that if Madarang wanted to speak with a representative, he should be allowed to bring one when he delivered Hamilton the requested memo. Instead, however, Hamilton requested an internal affairs investigation regarding Madarang's refusal. The County placed Madarang on paid administrative leave and investigated the allegations against him. Madarang received a 10-day suspension for insubordination (later reduced after arbitration to five days).

Service Employees International Union Local 1021 (Local 1021) filed an unfair practice charge alleging that the Sheriff's Department violated the Meyers-Milias Brown Act (MMBA) by: (1) denying Madarang's right to be represented and Local 1021's right to represent him before submitting a written memorandum that he believed could result in discipline; and (2) taking adverse action against Madarang because he requested a representative. The ALJ dismissed the complaint because, ultimately, Madarang did not submit the memorandum, and the ALJ concluded that the County had demonstrated it had disciplined Madarang for a legitimate, non-discriminatory reason.

The Board reversed the dismissal, noting that the representational rights under PERB-administered statutes are considerably broader and are not limited by the requirements of *Weingarten*. "Employees have a right to representation where an employer seeks to elicit incriminating evidence that could potentially impact the employment relationship, either by conducting an investigatory interview or by requesting a written statement." (Citations omitted.) The fact that he did <u>not</u> submit a memo without representation was not determinative. The Board found that Hamilton's order to write and bring it to her, notwithstanding his repeated requests for a representative, was well outside an employer's permissible responses to an employee requesting a representative. "It was incumbent upon Hamilton to act upon Madarang's request, either by granting it or terminating the interview unless it was clear that Madarang was waiving his right to representation."

EMPLOYEE ASSOCIATIONS HAVE RIGHT TO USE EMPLOYER EMAIL SYSTEMS FOR COMMUNICATIONS WITHIN THE SCOPE OF REPRESENTATION

Los Angeles Unified School District, PERB Decision No. 2588-E (2018)

United Teachers Los Angeles (UTLA) represents LA Unified School District's certificated bargaining unit. UTLA and the District were parties to a collective bargaining agreement (CBA) that described UTLA rights entitled "Access." That section stated: "[a]ny authorized UTLA representative shall have the right of reasonable access to District facilities, including teacher mailboxes, for the purpose of contacting employees and transacting UTLA matters." The District assigned an "lausd.net" e-mail address to nearly every member of UTLA's bargaining unit, and it had adopted an Acceptable Use Policy governing employees' use of all computer and network systems, including its e-mail system. Employees were required to agree to the policy upon activating or updating their LAUSD e-mail accounts. The policy described both acceptable and unacceptable uses of LAUSD computer systems. Although network access "is provided primarily for education and District business[,]" employees could also "use the Internet, for incidental personal use during duty-free time." The policy prohibited activity such as unauthorized collection of e-mail addresses, "spamming," spreading viruses, and using threatening, profane, or abusive language.

On August 14, 2013, the UTLA President sent the District's Director of Labor Relations John Bowes an e-mail message "formally asserting [the union's] right to use of institutional bulletin boards, mailboxes and other means of communication to communicate with members of the UTLA bargaining unit." The message went on to request that the District "[p]lease send this document to the lausd.net email accounts of all UTLA bargaining unit members," and it included the text of the requested announcement. The District reviewed and rejected the request. Nothing in the CBA at that time explicitly addressed whether LAUSD must e-mail bargaining unit members on UTLA's behalf, nor was there evidence that LAUSD had previously e-mailed bargaining unit members on UTLA's behalf. UTLA proposed side-letter language regarding the union's use of the District's email system "for the purpose of District-wide announcements concerning Internal Union business, such as meeting schedules and announcements of organizational activities and special events, and on other legitimate communications concerning the exercise of rights guaranteed by the EERA[.]" The request said such union emails would be: (1) subject to the District's use policy; (2) sent only to District e-mail accounts; (3) subject to the content limitations used for other forms of authorized communication; (4) e-mailed to District staff relations at least one day in advance by designated UTLA contacts; (5) limited to 150 kilobytes; and (6) sent by the District between 6:00 p.m. and 3:00 a.m. to avoid interference with District business. However, when over a month passed without a response from the District, the union filed an unfair practice charge. The ALJ ruled that EERA section 3543.1, subdivision (b), gives the organization access to the employer's email system and obligates the employer to send e-mails to employees on the employee organization's behalf.

The Board agreed in part and disagreed in part. First, the Board acknowledged that "e-mail is a fundamental forum for employee communication in the present day," and referenced its decision in early 2018 holding that employees with 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. Similarly, the Board wrote that under EERA, employee organizations have the right to use institutional bulletin boards, mailboxes, and other means of communication, and that this right includes use of the employer's internal mail delivery system, which is an "other means of communication" under EERA. As such, the union had a right to use the email system just as it could a bulletin board. However, the Board declined to require the District to send emails to union members at UTLA's request, finding that the employer's participation is not necessary for an employee organization to fully exercise its statutory right to communicate with employees via the employer's e-mail system. Employee email addresses are available to the union through information requests or the Public Records Act, and once they are obtained, the union can send emails to unit members without assistance from the District.

TEACHER'S STATEMENTS TO OTHER TEACHERS ON DISTRICT EMAIL ALLEGING THAT THE UNION PRESIDENT AND HR DIRECTOR HAD A CONFLICT OF INTEREST WERE PROTECTED UNLESS "MALICIOUSLY UNTRUE"

Chula Vista Elementary School District, PERB Dec. No. 2586-E (2018)

In 2012, the President of the Chula Vista Educators (CVE) union resigned to become the school district's Human Resources Director. Manuel Yvellez, a kindergarten teacher and VP of the union sent a message to other teachers at the Chula Vista Elementary School District ("District") using his District email address criticizing the new union president and HR director as having a conflict of interest: *"I am deeply dismayed by your letter describing your ascendency to President of CVE. It does not appear in any way to convey the offense the union should take at what I believe is a clear case of a breach of fiduciary duty by our past President …*"

The District Superintendent ordered an investigation on Yvellez's email misuse and for defamation. In turn, Yvellez filed an unfair practice claim alleging interference and discrimination because of protected activities under the EERA.

Upon review, PERB held that Yvellez's statements were protected and that employees have a right to use district emails for employment related matters, citing Napa Valley Community College District (2018) PERB Dec. No. 2563-E. PERB found that speech between employees on "matters of legitimate concern to employees as employees" is protected unless the speech is "maliciously untrue." Because Yvellez's statements were not found to have risen to the "maliciously untrue" standard enunciated PERB, his statements were protected.