Labor & Employment Litigation Update

LOCC City Attorney Conference
Monterey, CA May 2019

PRESENTED BY

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Agenda

- Discrimination/Harassment/Retaliation
- General Public Agency Employment Issues (PERB, POBR)

Discrimination/Harassment/ Retaliation

EEOC v. Global Horizons

915 F.3d 631 (9th Cir. 2019)

- Global Horizons contracted with Growers to find and provide temporary orchard workers admitted to US as guest workers
- Two workers filed EEOC charges against Growers and Global Horizons alleging poor and unsafe working conditions based on their race and national origin (Thai)
- EEOC sued both Growers and GH under Title VII – "joint employer" issue

EEOC v. Global Horizons

915 F.3d 631 (9th Cir. 2019)

- Trial court granted Growers' motion to dismiss- their orchard-related matters distinct from non-orchard issues (housing, feeding, transportation and pay issues controlled by Global Horizons)
- Ninth Circuit reversed - EEOC's pleading sufficient to establish joint employer liability based on common law agency test

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

- CSO liaison to minority communities was investigated for internal policy violations
- While IA pending, during public event on PD's behalf, she acknowledged hearing complaints of racial profiling
- Admin leave, notice of discipline (4 week suspension), "last chance agreement" followed

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

- LCA said she would not speak or write "anything of a disparaging or negative manner related to the Dep't/City or its employees."
- She refused to sign and was fired; trial court granted MSJ for defendants in her 1st Amendment retaliation/prior restraint case

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

- Ninth Circuit affirmed on retaliation (not protected speech at event)
- Ninth Circuit reversed on prior restraint claim – even if no intent to impact protected speech, **"chilling effect" analysis focuses on employee's perception of the limit**

Practice Tip: "Last Chance Agreements"

- What = last chance (i.e. you are foregoing termination now)
- Point is to obtain waiver of current appeal and future appeals for similar conduct/violation of agreement
- Limited term, narrow definition of prohibited conduct
- Be sure employee has representation prior to executing agreement

Garcia v. Salvation Army

__ F.3d __, 2019 WL 1233216 (9th Cir. 2019)

- Garcia worked as administrative assistant and then social services coordinator
- She and husband "left the church" in 2011 but she kept working for Salvation Army; complaints filed by client
- Fired after taking medical leave, she sued for religious discrimination'

Garcia v. Salvation Army

__ F.3d __, 2019 WL 1233216 (9th Cir. 2019)

- Ninth Circuit upheld MSJ for Salvation Army based on "religious organization exemption" to Title VII
- Court held ROE applies to retaliation and hostile work environment claims, as well as to discrimination claims arising out of hiring/ firing decisions

Huerta v. Kava Holdings, Inc.

29 Cal.App.5th 74 (2018)

- Two restaurant workers sued on several theories after being fired following altercation at work; jury found for defendant on FEHA claims for harassment/discrimination
- On defense motion for fees/costs, court found action was not "frivolous"; but awarded $50k based on defendant's CCP §998 offer
- REVERSED: Effective 1/1/2019, §998 offer doesn't apply to defense motion for fees and costs unless suit is determined to be "frivolous, unreasonable or groundless"

Martinez v. Eatlite One, Inc.

27 Cal.App.5th 1181 (2018)

- In plaintiff's discrimination suit, Eatlite One made $12,001 §998 offer silent on issue of fees and costs
- Jury found for plaintiff, awarded $11,490 in damages
- Both parties filed costs memoranda and plaintiff moved for attorneys' fees – trial court granted (damages+ costs > $12,001)

Martinez v. Eatlite One, Inc.

27 Cal.App.5th 1181 (2018)

- REVERSED: where §998 offer is silent on costs/fees, it automatically means those are added to the offered amount (i.e. plaintiff would have received $12,001 plus costs/fees had she accepted the offer).
- Jury's verdict was less than the §998 offer, so she couldn't recover post-offer fees or costs

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

- Retiree class action challenged County's elimination of its "Retiree Premium Subsidy" under FEHA
- RPS was a benefit that combined active and retired employees into one pool for calculation of medical insurance premiums
- Ninth Circuit affirmed County's motion to dismiss FEHA age-discrimination claim

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

- OK for employer to treat retirees (as a group) differently from active employees (as a group) with respect to medical benefits, taking into account that the cost of providing medical benefits to the retiree group was higher
- KEY: subsidy elimination focused on employment status (i.e. active workers old enough to retire but who had not done so still got the benefit)

General Public Agency and Labor

Bacilio v. City of Los Angeles

28 Cal.App.5th 717 (2018)

- Officer Bacilio alleged to have propositioned and touched party in domestic violence call (incident 3/3/2011) complaint made on 8/4/2011)
- IA (both admin & criminal) investigation ensued; investigators submitted findings to DA 6/3/2013 and sought prosecution for felony sexual battery under color of authority
- Deputy DA interviewed complainant 8/6/2013 & told investigator she "most likely would not be charging"
- 10/3/2013 DA set written notice to Dep't declining to prosecute

Bacilio v. City of Los Angeles

28 Cal.App.5th 717 (2018)

- 9/10/2014 LAPD served notice that discipline would follow; administrative charges brought in Nov 2014
- After unsuccessful administrative appeal hearing, officer filed writ claiming discipline was untimely under POBRA's one-year statute of limitations
- HELD: statute of limitations tolled until DA's official rejection of prosecution

County of Orange

PERB Dec. No. 2611-M (2018)

- 3 County employees/union reps who spent 30 mins distributing union surveys to other employees at their work stations were directed to leave
- HR manager subsequently directed union to stop distributing materials "to employees in work areas during work time"
- Union filed unfair practice charge – PERB held County violated union's access rights

County of Orange

PERB Dec. No. 2611-M (2018)

- Employer's reasonable regulations restricting union access to areas where employees work must be narrowly drawn
- "Work time is for work" rule is ok **IF**
- Union activities aren't singled out for stricter enforcement (cf birthday celebrations, fundraising for workplace parties, etc.)

City of Yuba City

PERB Dec. No. 2611-M (2018)

- City Council's post-factfinding agenda listed item called "Local 1 Imposition," which was accompanied by staff report recommending imposition of last, best and final offer items
- Staff presented the report, mayor "opened the public hearing," public comment was taken (including from Local 1 business agent)
- Mayor "closed the public hearing" and Council voted to impose LBFO terms less advantageous than those City agreed to with other units

City of Yuba City

PERB Dec. No. 2611-M (2018)

- Local 1 filed unfair practice charge, in part alleging City had not held a "public hearing" as required by Meyers-Milias-Brown Act
- ALJ and Board rejected Local 1's argument. "Public hearing" not defined in MMBA – minimum requirement is for agency to inform public it intends to consider imposition and allow public comment about it

State of CA (Dept. of Corrections & Rehab)
PERB Dec. No. 2598-S (2018)

- Ximenez was psych tech for CDCR
- Signed form acknowledging rule against bringing drugs/contraband to the prisons and consenting to search at any time on CDCR grounds
- Stopped her at gate, she consented to vehicle & bag search conducted (based on inmate tip)
- Ximenez asked for union rep or supervisor to be present for strip search

State of CA (Dept. of Corrections & Rehab)
PERB Dec. No. 2598-S (2018)

- Rep denied because (a) only a search (no questioning) and (b) previous consent (form)
- Union filed unfair practice charge based on denial of representation

- HELD: employees have *Weingarten* right to rep before being required to submit to invasive search (e.g. reasonable suspicion drug/alcohol test, this kind of strip search)

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

- Supervisor questioned CSO about his whereabouts during shift

- After answering some questions, CSO requested rep

- Supervisor said no more questions, just write us a memo explaining where you were; put him in room alone to write.

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

- CSO had phone access but made no call to get representation before writing the memo
- Union filed unfair practice charge
- HELD: employee has right to requested union representation prior to submitting a written statement as part of investigative interview

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

- Supervisor directed employee to provide memo explaining why he failed to follow her prior directions
- Employee requested union rep – supervisor said you don't need one; employee refused to provide memo without one
- Supervisor put him on administrative leave and started an IA; suspended for insubordination

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

- ALJ dismissed Union's unfair practice charge because employee never did submit memo and County had shown legitimate, non-discriminatory reason for discipline
- HELD: reversed – representation rights under PERB-administered statutes are broader than, and not limited by, *Weingarten* requirements

County of Santa Clara

PERB Dec. No.2613-M (2018)

- County and SCPOA negotiating for new contract in mid-2015
- During roughly same time, County started IA about allegations against 3 deputies, one of whom was POA president/chief negotiator (Scimeca)

County of Santa Clara

PERB Dec. No.2613-M (2018)

- Scimeca placed on admin leave, ordered not to discuss the matter "with any witnesses, potential witnesses, the complainant, or any other employee of the Sheriff's office"
- POA objected that order prevented Scimeca from conducting meet and confer duties/discussions with members – County said ok to do those but maintained rest of the order

County of Santa Clara

PERB Dec. No.2613-M (2018)

- HELD: blanket "gag order" violated both his right to communicate with other employees about working conditions and union's right to represent the deputy
- HELD: County didn't carry burden to explain why confidentiality was needed in this case
- KEY: blanket "gag orders" during IA are <u>out</u>

Los Angeles Unified Sch. Dist.

PERB Dec. No. 2588-E (2018)

- CBA had "access" section stating union reps have right of reasonable access to District facilities, including teacher mailboxes, for purposes of contacting e'ees/doing union business
- Bargaining unit members had District email addresses
- District's email policy said network access is provided primarily for education and District business, with incidental use permitted during personal time

Los Angeles Unified Sch. Dist.

PERB Dec. No. 2588-E (2018)

- Union sent District an email asserting union's right to use District mailboxes, bulletin boards, etc. Requested District to send the document to all unit members at their District email addresses
- District declined; union proposed side letter language relating to use of District emails
- After month passed, Union filed a charge

Los Angeles Unified Sch. Dist.

PERB Dec. No. 2588-E (2018)

- HELD: union can use employer's email system (it is the fundamental forum for present day employee communications) - recall Napa Comm. College decision last year

BUT

- District not required to send union's emails out

Chula Vista Elem. Sch. Dist.
PERB Dec. No. 2586-S (2018)

- Union president resigned to take District's HR Director position
- Teacher/union VP Yvellez used District email to send email criticizing new union president and HR Director as having conflict of interest
- District started investigation of Yvellez' email use; Yvellez filed unfair practice charge for interference with protected union activity/speech

Chula Vista Elem. Sch. Dist.
PERB Dec. No. 2586-S (2018)

- Held: **new standard for union speech**– speech between employees on "matters of legitimate concern to employees as employees" is protected **unless the speech is "maliciously untrue"**

Thank you for attending.

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