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LABOR AND EMPLOYMENT LAW UPDATE

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CONSTITUTIONAL RIGHTS & PRIVACY

City of Ontario v. Quon (June 17, 2010) No. 08-1332

Employees for the City of Ontario police department filed a 42 U.S.C. § 1983 and Fourth Amendment lawsuit against the City regarding the police department's review of their City-issued pagers. The City did not have a privacy policy regarding the use of pagers, but did have a general computer usage, internet and email policy. More specifically, the policy stated that the "City of Ontario reserves the right to monitor and log all network activity including e-mail and Internet use, with or without notice," and that "[u]sers should have no expectation of privacy or confidentiality when using these resources." The police department verbally explained to the Plaintiffs that the aforementioned policy applied to their pagers.

Under the City's contract with its wireless service provider, each pager had a monthly character limit, above which the City had to pay additional charges. When Plaintiffs had overages on their account, the police lieutenant who administered the wireless contract reminded Plaintiffs that the text messages were treated as e-mail and could be audited, though it was not his intent to audit the messages to see if the overage was due to work-related transmissions.

During the next months, the department obtained transcripts of the messages from its service provider for a period of two months. An initial review of the transcripts showed that Plaintiffs were using their pagers for extensive personal text messaging. The City disciplined Plaintiffs and, subsequently, Plaintiffs filed the aforementioned lawsuit.

The District Court ruled that the Plaintiffs had a reasonable expectation of privacy in their text messages, but held a trial on the issue of the employer's intent in conducting the search. The jury found that the employer's intent was to determine whether the character limit was appropriate, leading the court to enter judgment in favor of the employer. The Plaintiffs appealed to the Court of Appeals for the Ninth Circuit, who agreed Plaintiffs had a reasonable expectation of privacy in their text messages.

Key Holding: The Supreme Court overruled the Ninth Circuit and held that the City did not violate the Plaintiffs' Fourth Amendment rights because the search was reasonable as it was motivated by a legitimate work-related purpose and was not excessive in scope. The Court ultimately disposed of the case on narrow grounds, preferring to avoid the risks of establishing "far-reaching premises" before the role of technology in society and its Fourth Amendment implications become clear. It acknowledged that rapid changes in communications and the means by which information is transmitted, as illustrated by advancements in technology and what society views as proper behavior, created significant challenges to setting legal standards for the workplace that would survive the test of time. The Court noted, "Prudence counsels caution before the facts of the instant case are used to establish far-reaching premises that define the existence, and extent, of privacy expectations enjoyed by employees when using employer-provided communications devices."

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Anthoine v. North Central Counties Consortium (9th Cir. 2010) 605 F.3d 740

The North Central Counties Consortium ("NCCC") hired Plaintiff as a program analyst. During his 17 years of employment, NCCC issued Plaintiff written performance reviews ranging from average to above average, but also issued him several written notices regarding his unacceptable work product. During his final written notice, NCCC warned Plaintiff that further misbehavior would result in disciplinary action. In January 2005, Plaintiff met with the chairman of NCCC's governing board and reported that the Director had falsely reported that NCCC was in compliance with state data reporting requirements.

Shortly thereafter, the NCCC's Director issued Plaintiff a verbal warning for a pattern of insubordination. The Director then issued Plaintiff an "unsatisfactory" performance evaluation. Shortly thereafter, he informed the NCCC governing board that a decision had been made to discharge Plaintiff, which the board accepted. Plaintiff sued NCCC for, among other things, retaliation in violation of his First Amendment rights. The trial court granted NCCC summary judgment. Plaintiff appealed.

Key Holding: The California Court of Appeals determined that summary judgment was inappropriate as to Plaintiff's First Amendment retaliation claim because (1) his speech qualified as a matter of public concern, (2) there was no evidence in the record that his comments to the chairman were within the scope of his duties, and (3) based on the very close temporal link and evidence of pretext, there was evidence from which a jury could conclude that the adverse actions were taken to retaliate against him for his statements to the chairman. The Court noted that the proximity in time between his protected speech and adverse employment action was sufficient to raise a triable issue of fact.

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Marez v. Bassett (9th Cir. 2010) 595 F.3d 1068

Plaintiff was a business vendor operating under contract with the Department of Water and Power of the City of Los Angeles. He publicly voiced complaints regarding the DWP's procurement process. Thereafter, Plaintiff alleged DWP began taking retaliatory actions against him by misinforming him regarding bids. He filed suit claiming that that City took adverse action against him because of his public criticism of DWP in violation of his First Amendment rights.

The Department contended Plaintiff had spoken as a member of the Small and Local Business Advisory Committee, not as a private citizen, and therefore could not assert a constitutional violation pursuant to *Garcetti v. Ceballos*, (2006) 547 U.S. 410. In *Garcetti*, the U.S. Supreme Court held statements made pursuant to an employee's position as a public employee, rather than as a private citizen, are not protected speech under the First Amendment. The district court in the instant case granted summary judgment for the Department. Plaintiff appealed.

Key Holding: The Ninth Circuit vacated summary judgment and remanded, finding that the Department did not employ Plaintiff, who was not paid for services and did not wield any official power. Therefore, the Court found the Department could not apply any defense under *Garcetti*. The Court also determined that Plaintiff's public complaint about the City's procurement process was "expressive conduct" and that there was some evidence that Plaintiff's drop in revenue were, at least in part, a result of the City's retaliation against Plaintiff for publicly criticizing their procedures.

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Rodriguez v. Maricopa County Comty. College Dist. (9th Cir. 2010) 605 F.3d 703

Professor sent three racially-charged emails over a distribution list maintained by the Maricopa County Community College District. Every district employee with an email address received a copy. Plaintiffs, a certified class of the District's Hispanic employees, sued the District, its governing board and two district administrators (the chancellor and the president) claiming that their failure to properly respond to the professor's emails created a hostile work environment in violation of Title VII and the Equal Protection Clause. Plaintiffs argued the college should have used its anti-harassment policy to silence the professor's speech and impose punishment on him. The college administration condemned the emails, but did not punish the professor, saying disciplinary action against him "could seriously undermine [the college's] ability to promote true academic freedom."

The District Court denied Community College's motion for summary judgment, which alleged that they deserved qualified immunity under the Equal Protection Clause.

Key Holding: The Ninth Circuit found that the officials deserved qualified immunity because the Equal Protection clause of the Fourteenth Amendment did not give the Plaintiff employees a right to be free from offensive speech on a college campus. In analyzing the claims, the Ninth Circuit flatly rejected the Plaintiffs' argument that the college may silence the professor based on the offensiveness of his speech.

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Kaye v. Board of Trustees of the San Diego County Public Library (2009) 179 Cal. App. 4th 48

The Board of Trustees of the San Diego County Public Library discharged Plaintiff, a former law librarian, after sending a scathing e-mail criticizing his superiors. When one of Plaintiff's supervisors questioned the manner in which he was invited to a speaking engagement, Plaintiff became disgruntled and sent out a lengthy e-mail to all of his co-workers criticizing his supervisors of "creating a hostile and insulting work environment for everyone" using methods "calculated to destroy any culture of professionalism in the library," as well as violating the California False Claims Act for seeking reimbursement for attendance at a conference.

The day after Plaintiff sent the e-mail, his supervisor placed him on administrative leave. Thereafter, his supervisor notified him that they were going to discharge him for "insubordination and serious misconduct." He appealed to the library's Board of Trustees, which upheld the termination on the basis that the email exhibited a lack of judgment, professionalism and respect for the chain of command.

Plaintiff thereafter filed suit, claiming, among other things that the Board of Trustee had violated his free speech rights under the California Constitution. The trial court granted summary judgment. Plaintiff appealed.

Key Holding: The Court of Appeal affirmed summary judgment in favor of the Board of Trustees. Applying *Garcetti v. Ceballos*, (2006) 547 U.S. 410, the Court stated that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the California Constitution does not insulate their communications from employer discipline. Accordingly, the Court found that Plaintiff had no cause of action based on his employer's reaction to his speech.

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ACCOMMODATION

Brownfield v. City of Yakima (9th Cir. July 27, 2010) No. 09-35628

Plaintiff worked as a police officer for the City of Yakima. In 1999, a year after he began working for the City, he was involved in an off-duty car accident. Beginning in 2005, Plaintiff began displaying erratic behavior, including swearing at supervisors and "losing control" with suspects on routine matters. The City placed him on administrative leave and ordered him to undergo a Fitness for Duty Examination ("FFDE").

The initial examining physician conducted the FFDE and determined Plaintiff was suffering from a mood disorder that manifested itself in "poor judgment, emotional volatility, and irritability" and was unfit to return to work. The City then transferred Plaintiff from administrative to FMLA leave. However, Plaintiff's primary care physician released him to come back to work, but did not address his psychological problems.

Before a pre-termination hearing, Plaintiff submitted an opinion from a third physician, who agreed that Plaintiff was unfit for duty due to his "emotional, cognitive, behavioral, and physical problems." In response, the City adjourned the hearing pending treatment and further evaluation. Plaintiff, however, refused to complete all of the evaluations despite the City's warnings he would be terminated. The City eventually terminated Plaintiff. Plaintiff sued the City for failure to accommodate him under the ADA and FMLA. The District Court granted the City's motion for summary judgment, and Plaintiff appealed.

Key Holding: The Ninth Circuit upheld summary judgment for the City finding that Plaintiff's rights under the ADA were not violated because FFDE was reasonable in light of Plaintiff's repeated volatile behavior. The Court rejected Plaintiff's argument that the FFDE did not satisfy the "business necessity" standard under the ADA saying the business necessity standard "may be met even before an employee's work performance declines if the employer is faced with significant evidence that could cause a reasonable person to inquire as to whether an employee is still capable of performing his job." The Court further explained, "An employee's behavior cannot be merely annoying or inefficient to justify an examination; rather, there must be genuine reason to doubt whether that employee can perform job-related functions."

The Court also rejected the Plaintiff's FMLA claim as being without merit. Under the FMLA regulations, "[n]o second or third opinions on a fitness-for-duty certification may be required." 29 C.F.R. § 825.312(b). Plaintiff argued that Yakima violated this provision by requiring him to submit to the FFDE after Plaintiff's primary care physician allegedly cleared him for duty. However, the Court concluded the City did not seek "second or third opinions" after Plaintiff's primary care physician refused to clarify his emotional state. The Court concluded the FMLA did "not impose liability for such conduct."

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Milan v. City of Holtville (2010) 186 Cal. App. 4th 1028

Plaintiff worked as a water treatment operator for the City of Holtville, a job that required her to perform various physical tasks. In 2002, while moving a large metal angle iron at work, Plaintiff severely injured her neck. She underwent surgery and eventually applied for and received workers' compensation benefits. Her treating physician concluded she would not be able to return to work at the water treatment plant because the job involved significant bending, twisting, and lifting.

The City's workers' compensation administrator sent Plaintiff a letter stating that, in light of the doctor's assessment, Plaintiff was eligible for rehabilitation benefits. It also informed Plaintiff that she could dispute the City's determination by returning a form. Plaintiff subsequently accepted the offered rehabilitation benefits, but did not contact anyone at the City about her condition or plans to return to work. Accordingly, the City terminated her employment because of the doctor's conclusion and because there was no City job that Plaintiff could reasonably perform.

Plaintiff sued the City under the Fair Employment and Housing Act for failing to accommodate her disability. Following a bench trial, the court entered judgment in favor of Plaintiff. The City appealed, arguing it had no obligation to accommodate Plaintiff's disability because she never requested any accommodation or even requested that she be restored to her position.

Key Holding: The California Court of Appeal dismissed Plaintiff's claims on the grounds that: (1) the City did not have to offer plaintiff any accommodation as the record shows that almost one year after she was injured, the City's workers' compensation administrator advised her that its doctor did not believe she would be able to return to her job and offered her rehabilitation and retraining benefits; (2) the City gave Plaintiff given ample opportunity to express interest in retaining her job and for more than 18 months she failed to do so; and (3) because Plaintiff failed to express any interest in retaining her job, the FEHA did not require that the City discuss with her accommodations for her disability.

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A.M. v. Albertsons, LLC (2009) 178 Cal. App. 4th 455

A grocery checker returned to work from medical leave to treat larynx cancer. Her treatment left her with dry mouth, which required that she frequently drink water. As a result, she needed to urinate approximately every 45 minutes. Her employer initially accommodated her needs by modifying its rule about having no beverages at the check-stand. The employer also assigned another employee to cover her post, upon request, when she needed to use the restroom. This worked for a little over a year until the employer hired a new manager. The manager was

unaware of the accommodation and on a single instance refused her request to use the restroom. The employee soiled herself. She was humiliated and became suicidal. She sued under the Fair Employment and Housing Act over the single failure-to-accommodate incident. A jury awarded her $200,000, which the employer appealed.

Key Holding: The Court of Appeal confirmed the verdict, finding that even a single failure to accommodate under the FEHA against a backdrop of a larger pattern of successful accommodation may violate the law. The Court concluded that the trial court properly denied the employer's motion for nonsuit because the employer's argument that its single failure to accommodate was trivial was inconsistent with the FEHA, which does not require that Plaintiff establish a pattern of failure to accommodate.

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DISCRIMINTION, HARASSMENT & RETALIATION

Lewis v. City of Chicago (2010) 130 S. Ct. 2191

In July of 1995, the City of Chicago administered a written examination to more than 26,000 applicants seeking to serve in the City's fire department. The City then announced in January of 1996 that it would select applicants to proceed to the next phase by drawing randomly from the group of applicants who scored 89 or above on the written test (whom the city labeled "well qualified"). Those who scored below 65 were informed by letter that they had failed the test and would not be considered for a position.

On March 31, 1997, Plaintiff, an African-American applicant who scored in the "qualified" range and had not been selected as a candidate, and five others, filed charges of discrimination with the Equal Employment Opportunity Commission. After receiving right-to-sue letters, the applicants filed suit under Title VII of the 1964 Civil Rights Act, as amended, alleging that the City's practice of selecting only applicants who scored 89 and higher had a disparate impact on African-Americans. The district court certified a class of more than 6,000 African-Americans who scored in the "qualified" range on the 1995 examination, but had not been hired.

In 2004, the District Court held that the City violated Title VII of the Civil Rights Act of 1964. On appeal, the Seventh Circuit held that the Plaintiffs' suit was untimely and dismissed. The Court stated that the 300 day limit for filing such a claim began when the Plaintiffs learned that they had been placed in the "qualified" category and that the City would be hiring those in the "well qualified" category. The Seventh Circuit reasoned that because there was no fresh act of discrimination, the time for filing a Title VII claim began when the discriminatory decision was made and not when it was executed.

Key Holding: The Supreme Court unanimously reversed the Seventh Circuit, holding that "a plaintiff who does not file a timely charge challenging the *adoption* of a practice … may assert a disparate-impact claim in a timely charge challenging the employer's later *application* of that practice." The Court noted that the focus was not whether the charges were timely but whether the use of the employment practice of hiring only from the "well qualified" list could be the basis for a claim at all. The Court focused on the language of 42 U.S.C. § 2000e-2(k) and determined that a plaintiff establishes a prima facie disparate impact cause of action by demonstrating that the employer "*uses* a particular employment practice that causes a disparate impact." The Court found that the City's exclusion of "qualified" applicants met this standard because it used its practice in each round of hiring.

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Reid v. Google (Aug. 5, 2010) No. S158965

In June 2002, Plaintiff (then age 52) was hired by California-based Google, Inc.'s Vice-President of Engineering (then age 55), as director of operations and director of engineering. When Plaintiff was fired less than two years later, he sued the company for age discrimination based on statutory and common law, including the California Fair Employment and Housing Act and California's unfair competition law. He claimed the company's stated reason for his termination was pretextual, presenting as support alleged statistical evidence of discrimination and discriminatory comments made by co-workers and decision makers.

The company moved for summary judgment. It argued that the Plaintiff's evidence of comments made by co-workers and company decision makers were irrelevant "stray remarks" that should be excluded in the court's consideration of the summary judgment motion. The trial court granted summary judgment for the employer. In so doing, the trial court did not rule on the company's evidentiary objections. Plaintiff appealed.

The Court of Appeal reversed, holding the trial court erred in granting summary judgment. The employer then appealed to the California Supreme Court.

Key Holding: The California Supreme Court refused to adopt the federal "stray remark" doctrine and upheld the Court of Appeals. It gave four reasons. The Court argued that although stray remarks may not be direct evidence of discriminatory animus, they can be probative of discrimination, tending to prove or persuade one of the existence of discrimination. In addition, strict application of the doctrine would be contrary to California Code of Civil Procedure Section 473c (c), which maintains that at the summary judgment stage, courts "shall consider all the evidence set forth in the papers … and all inferences reasonably deducible from the evidence." The Court also noted that while stray remarks, without more, are not enough to prove actionable discrimination, "when combined with other evidence of pretext," they may "create an ensemble that is sufficient to defeat summary judgment." Finally, the Court argued that without a "precise definition of who is a decision maker or what constitutes remarks made outside of the decisional process in the employment context," the probative value of a "challenged remark" turns on the facts of the case.

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Reeves v. MV Transportation (Cal. Ct. App. Jul. 9, 2010) No. A125927

Plaintiff applied for a position as a labor and employment attorney with defendant employer. Although Plaintiff had extensive labor law experience, he was not hired for the position. In fact, he was not even interviewed. At the time of his rejection, Plaintiff was 56 years old. Instead, the employer hired a 40-year-old attorney for the position. The employer's General Counsel and Chief Legal Officer later testified that he interviewed the attorney who was hired based on a

recommendation from an attorney he knew, and because he was impressed by her credentials and experience.

As a result, Plaintiff filed a charge of age discrimination with the Department of Fair Employment and Housing in which he alleged he was not selected for an interview or hired for the staff attorney position because of his age. After Plaintiff received a right to sue letter, he filed a lawsuit against the employer for age discrimination. The trial court granted summary judgment in favor of the employer. Plaintiff appealed.

Key Holding: The California Court of Appeals held that Plaintiff failed to state a claim for employment discrimination because he did not have "clearly superior paper credentials" in comparison to the attorney who was hired and the employer did not offer inconsistent justifications for its hiring decision. The Court explained that Plaintiff "cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent." The Court continued that where a candidate's qualifications are challenged, the employee must demonstrate that he was "significantly better qualified for the job."

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Chavez v. City of Los Angeles (2010) 47 Cal. 4th 970

The City of Los Angeles hired Plaintiff as a police officer. During his employment, Plaintiff was accused of stealing payroll checks and, although he was exonerated, he subsequently experienced difficulties with his supervisors, leading to transfers, suspensions and multiple lawsuits.

In 2004, Plaintiff sued the City for alleged racial and perceived disability discrimination, harassment and retaliation under the California Fair Employment and Housing Act. Following a trial, the jury awarded Plaintiff damages in the amount of $11,500, consisting of $1,500 in unpaid overtime and $10,000 in compensatory damages on his retaliation claim. The award was less than half of the $25,000 jurisdictional limit for a limited civil case.

Chavez sought an award of $871,000 in attorney's fees under the FEHA, which allows reasonable attorney's fees and costs to a prevailing party. The trial court rejected the fee application, instead applying Section 1033 of the California Civil Code, which permits trial courts to deny fees in cases where the recovery could have been obtained in a limited civil case. Chavez appealed, and the Court of Appeal reversed, holding that Section 1033 of the California Civil Code did not apply in FEHA actions and that the trial court abused its discretion by denying the fee application. The City appealed.

Key Holding: The California Supreme Court held that a trial court may deny attorney's fees in cases under the California Fair Employment and Housing Act ("FEHA") where the

compensatory damages award could have been recovered in a "limited civil case." Accordingly, the Court reversed the Court of Appeal's judgment permitting an employee to recover $871,000 in attorney's fees and found that the trial court did not abuse its discretion in denying the fee application pursuant to Section 1033 of the California Civil Code.

WAGE AND HOUR

Bamonte v. City of Mesa (9th Cir. 2010) 598 F.3d 1217

Plaintiffs were current and former police officers for the City of Mesa, Arizona. They contended that the City violated the Fair Labor Standards Act by failing to compensate them for the time it took them to put on and take off their uniforms and gear at the beginning and end of their shift, a process referred to as "donning and doffing." The City argued that although it required every patrol officer to wear a proper uniform, the City imposed no restriction on where each officer put on or took off that uniform and gear. Therefore, because officers were not required to put on their uniform exclusively at work, the City had no legal obligation to pay for the time devoted to donning and doffing.

Key Holding: The Court concluded that because the employer did not require that the donning and doffing be done on its premises, the activity was arguably not work. It went on to conclude, however, that even if the activity was "work" because the uniforms and special equipment were required by the employer, and though the uniform and equipment were themselves integral to the job, the donning and doffing was not integral because it could be done at home.

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LABOR RELATIONS

City of San Jose v. Operating Engineers Local Union No. 3 (2010) 49 Cal. 4th 597

The City of San Jose and the Operating Engineers Union were negotiating a new labor contract. The negotiations reached an impasse, and per agreement, the union gave the City seventy-two hours notice of its intent to engage in a work stoppage. The City responded by seeking a court order to prohibit employees who perform "services essential to public health and safety" from engaging in the strike. The union opposed, as did the Public Employee Relations Board, arguing that the City had acted improperly because it had not exhausted its administrative remedies by first seeking relief from PERB before going to court. The trial court agreed, concluding that PERB had exclusive initial jurisdiction over the labor dispute. The Sixth District Court of Appeal affirmed this decision. The City appealed.

Key Holding: In affirming the lower courts' decisions, the California Supreme Court stated, "a claim by a public entity that a proposed strike by public employees who perform services essential to the public welfare is generally subject to PERB's initial jurisdiction." The Court found that a public employer may bypass PERB, however, and seek relief directly from the Superior Court if it can establish a recognized exception to the doctrine of exhaustion of administrative remedies. Those exceptions include when the administrative remedy is inadequate, irreparable harm would result, or seeking such an administrative remedy would be futile. However, the Court found that such exceptions were not established in the present case.

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San Francisco Housing Authority v. SEIU Local 790 (2010) 182 Cal. App. 4th 933

Grievant, who worked as a distribution specialist for the San Francisco Housing Authority, previously worked as an administrative clerk. During the time she was out of the position, the SFHA reclassified the administrative clerk position to including a “senior administrative clerk,” which the grievant never held.

In 2005, grievant was suspended pending an investigation for misconduct. The employee was then laid off. The Union requested that the SFHA allow grievant to occupy the senior administrative clerk position because she had bumping rights into that position under the parties’ memorandum of understanding. The SFHA refused on the grounds that she had never worked in the job. The arbitrator upheld the grievance finding that the grievant had a right to bump back as a senior administrative clerk.

The SFHA appealed the arbitrator’s decision on the grounds that he had exceeded his authority under the memorandum of understanding. The trial court agreed and vacated the award.

Key Holding: The Court of Appeals overturned the trial court and upheld the arbitrator's decision finding that the trial court could not vacate the arbitrator's award simply because they disagreed with the merits. The Court, instead, held that if the arbitrator's award bore some "rational relationship" to his authority under the memorandum of understanding, then the award should not be vacated.

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Sonoma County Law Enforcement Ass'n. v. County of Sonoma (2010) PERB Dec. No. 2100M

County of Sonoma and the Union were negotiating a successor memorandum of understanding regarding health benefits, and salary and cost of living adjustments. The parties reached impasse and proceeded to mediation, which was unsuccessful. The County then implemented changes similar to its last, best and final offer. More specifically, County incorporated existing language from the previous MOU, and County changed the employee dental insurance contribution language from $9.00 in the County's proposals to $11.00. The union filed an unfair practice charge with the Public Employment Relations Board alleging that the County violated its duty to bargain in good faith under the Meyers-Milias-Brown Act.

Key Holding: The administrative law judge dismissed the charge, and the Board affirmed. The Board found that the employer does not have to implement changes identical with its last offer. But the unilateral adoptions must be "reasonably comprehended" within the pre-impasse proposals.

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San Diego Firefighters, Local 145 v. City of San Diego (Office of the City Attorney) (2010) PERB Decision No. 2013-M

The City of San Diego and the union were party to a memorandum of understanding that authorized employees to purchase service credits at a price set by the retirement system. The retirement system, however, failed to sufficiently price the service credits to keep the retirement program fully funded and, as a result, suffered a severe funding crisis.

In order to address the problem, the City Attorney issued a press release to City employees notifying them that the underpriced service credits were unlawful and violated the City's charter. The City Attorney went on to state that employees would be permitted to rescind their purchase of service credits via the City's website. The City Attorney, however, issued the publication without bargaining with the union.

The union filed a charge with the Public Employees Relations Board claiming that the City Attorney was engaged in direct dealing with its employees.

Key Holding: PERB found that the City impermissibly engaged in direct dealing with City employees when it bypassed the union and went directly to the employees to seek their rescission of waiver credit benefits. PERB rejected the City Attorney's contention that the speech was protected because it did not constitute a threat of reprisal or a promise of a benefit, or because he was an official charged with enforcing the City's laws. However, PERB did clarify that an "attempt" to change a policy is insufficient to constitute a unilateral change.

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EMPLOYEE DISICPLINE/ DUE PROCESS

County of Los Angeles Dep't of Health Serv. v. Civil Service Comm'n of the County of Los Angeles (2009) 180 Cal. App. 4th 391

The County of Los Angeles suspended without pay an assistant nursing director for "inappropriate activity in connection with the reporting of patient acuity levels." The Department then discharged her, which Plaintiff appealed to the Civil Service Commission of the County of Los Angeles

The Commission's hearing officer concluded that the Department erred in suspending the assistant nursing director without pay and ruled that the appropriate discipline should have been a 30-day suspension rather than discharge. The full Commission ultimately rendered its decision, which was to demote the assistant nursing director without a suspension.

Subsequently, before the Commission hearing officer finished taking evidence, the assistant nursing director retired, without advising the Department or Commission. In turn, the Department notified the Commission of her retirement and requested that her appeal be dismissed. However, the Commission rejected the dismissal and adopted the hearing officer's findings.

The Department filed a petition for a writ of administrative mandamus challenging the Commission's decision. The trial court approved the Department's writ. The Commission appealed.

Key Holding: The Court of Appeals affirmed the trial court's decision. The Court held that, where civil service rules vested a civil service commission with jurisdiction over an employee's appeal of his or her discharge, including an attendant claim for a resulting loss of pay, the employee's retirement during the pendency of civil service proceedings divested the Commission's jurisdiction over the civil service appeal. The Court reasoned that the Commission only had authority to address matters involving a member of the civil service, which did not include retirees.

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George v. Cal. Unemployment Ins. Appeals Bd. (2009) 179 Cal. App. 4th 1475

The California Unemployment Insurance Appeals Board employed Plaintiff as an administrative law judge ("ALJ") out of its Fresno office. Plaintiff, a female, claimed the office's two male ALJs were given preference in travel assignments. Plaintiff expressed her concerns with Betsey Temple, a fellow ALJ, who told her she would be "sorry" if she pursued her complaints. Nevertheless, Plaintiff filed a charge with the California Department of Fair Employment and Housing, which was eventually resolved.

The Agency subsequently promoted Temple to presiding ALJ. Throughout the next two years, Temple allegedly began subjecting Plaintiff to adverse employment actions, including a written warning and the three suspensions. Plaintiff appealed her suspensions to the State Personnel Board, which found the first suspension was not supported, reduced the second to a one-week suspension, and upheld the third.

Thereafter, Plaintiff filed a second complaint with DFEH claiming she was being retaliated against for having objected to the Agency's prior travel scheduling practices. After exhausting her administrative remedies, Plaintiff filed suit against the Agency in 2005 alleging that the disciplinary actions constituted retaliation in violation of the Fair Employment and Housing Act (FEHA) and sought lost wages, recovery of attorney fees to defend the third suspension, and emotional distress damages. The Agency unsuccessfully moved for summary judgment on the grounds that the action was barred by the doctrines of *res judicata* and/or collateral estoppel. The jury returned a verdict in Plaintiff's favor. The Agency appealed.

Key Holding: The Court of Appeal held that the administrative proceeding did not preclude the FEHA suit. The Court stated that even though both actions challenged the suspensions, case law recognizes two distinct rights at stake when a civil service employee challenges discipline or termination on retaliation grounds. It held that the right protected by the state civil service system is the right to continued employment, while FEHA protects the right to be free from retaliation for opposing discrimination.

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PEACE OFFICERS' PROCEDURAL BILL OF RIGHTS

Guinn v. County of San Bernardino (2010) 184 Cal. App. 4th 941

Plaintiff was employed by the County of San Bernardino. Plaintiff received a promotion to probation supervisor, subject to a nine-month probationary period. The promotion occurred in May 2005. Plaintiff's probationary period had to be extended by three months because he received unsatisfactory performance reviews. In May 2006, Plaintiff's probation was terminated because of unsatisfactory performance and he was demoted to his previous position. The County allegedly never offered Plaintiff a formal hearing.

Plaintiff and the San Bernardino County Safety Employees' Benefit Association filed a lawsuit alleging that Plaintiff, who was a sworn peace officer and a public safety officer, was entitled to an administrative appeal to contest his demotion. The trial court found in favor of County. Plaintiff appealed.

Key Holding: The Court of Appeal held the trial court did not err in concluding that Plaintiff was not entitled to an administrative appeal. The question before the court was whether the Public Safety Officers Procedural Bill of Rights Act, specifically Government Code section 3304, subdivision (b), mandates that an administrative hearing be held when an officer is demoted after a probationary promotion period. The Court held that it did not stating Plaintiff was not demoted but rather was denied a promotion because he did not satisfactorily perform during his probationary period. The Court found that a "[d]enial of promotion is not a punitive action within the meaning of section 3304(b)."

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Wences v. City of Los Angeles (2009) 177 Cal. App. 4th 305

Plaintiff officer received an official reprimand from the police department for using unauthorized tactics and inappropriately drawing his weapon during the course of an off-duty, officer-involved shooting. Plaintiff then filed an administrative appeal, which was denied. He then filed a petition for writ of administrative mandamus and argued that the independent judgment test should apply because, irrespective of the level of discipline imposed, the Department's action impaired the Plaintiff officer's fundamental right to defend his home and family from a criminal threat. The trial court denied the petition on the grounds that there was substantial evidence to support the administrative decision. Plaintiff appealed.

Key Holding: The California Court of Appeal concluded that because the disciplinary proceedings against the Plaintiff officer substantially affected his fundamental vested right in his employment, the trial court was required to exercise the independent judgment test on the evidence. The Court held that the reprimand could be considered in future personnel actions and

could adversely affect the officer's future opportunities for career advancement. It therefore concluded that the discipline implicated a right that was important to the officer in his life situation even in the absence of an immediate economic impact.

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WHISTLEBLOWER

Lloyd v. County of Los Angeles (2009) 172 Cal. App. 4th 320

Plaintiff worked for the County of Los Angeles as a heat and frost insulator. The County laid him off in 2003 due to a reduction in workforce, but re-hired him in 2004 as a temporary employee. In 2006, the County laid him off again due to a lack of work.

Following his termination, Plaintiff sued the County for whistleblower retaliation, arguing that he was laid off in retaliation for his refusing to remove asbestos without being duly certified and his complaints about the County's unlawful asbestos removal in violation of Labor Code section 1102.5. The County presented evidence that his termination from permanent employment resulted from budget cuts and that his subsequent termination from temporary employment resulted from lack of work.

Key Holding: The California Court of Appeal dismissed the claim noting that a wrongful discharge claim can only be asserted against an employer. The Court also maintained that the County had provided legitimate justifications for its employment decisions and Plaintiff failed to raise a triable issue with respect to whether the County's reasons were pretextual.

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PUBLIC EMPLOYEES' COMPENSATION

Local city officials have recently come under fire for large severance agreements, settlements, and salary payments. For example, in November 2009, a California Court of Appeal ruled that Miracosta Community College District crossed the line by agreeing to pay roughly $1.6 million to the District's college president in exchange for her resignation and release of all claims. *Page v. Miracosta Community College District* (2009) 180 Cal. App. 4th 471. In that case, the president had not filed a formal complaint in superior court for any causes of action. Nonetheless, the District struck a settlement agreement with her, which included—in exchange for her resignation—18 months of continued salary, plus attorney's fees and "damages." The Court of Appeal, on a lawsuit filed by a private citizen, found such payments to be in excess of the amounts permitted under California Government Code sections 53260 and 53261.

The City of Bell was recently in the news for spending $1.6 million annually on three City employees, and nearly $100,000 for each part-time City Councilmember. As a result, California Controller John Chiang recently announced that he will require cities and counties to report to him the salaries of elected officials and public employees for publication on his website. The Controller also ordered an audit of Bell's finances. Controller Chiang's move follows a call from Governor Arnold Schwarzenegger for all local governments to post the salaries of their top officials on their websites.

Even more recently, in the City of Vernon, it was reported that its prior City Administrator earned seven figures during the last four years. The City Administrator was also working as the Deputy City Attorney. It was also reported that other City officials were paid in the high six figures.

In light of these revelations, the political climate has caused the California legislature to consider the passing of several bills to create more transparency, accountability and limitations in payments to appointed and elected city officials. The following is a summary of the "Bell-inspired" proposed legislation.

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AB 192, Public Employees Retirement Bill

Under this bill, CalPERS contracting agencies that pay "excessive compensation" will become solely responsible for the increased retirement costs for unrepresented employees. "Excessive compensation" in the bill is described as "in excess of 15 percent of the salary paid by the prior contracting agency, as adjusted for actuarial increases in that salary."

AB 194, Retirement Bill

The bill would establish a cap on the total compensation that may be used to calculate pension benefits. More specifically, the state cap would be 125% of the Governor's salary as of December 7, 2009 (i.e., $217,483) and would apply to any public employee who retires after January 1, 2011.

AB 827, Local Public Employees Bill

AB 827 proposes to prohibit in a local, unrepresented employee's employment contract from including an evergreen provision, severance payments greater than 12 months of salary, and automatic compensation increases that exceed the cost of living adjustment. Currently, the law limits cash settlements for contract employees to not exceed 18 months, such as in the *Page* case. The bill essentially seeks to modify these types of settlements.

AB 1955, City Officials' Compensation

This bill would require cities—identified as "excess compensation cities"—to provide the state controller with compensation information for its council members. "Excess compensation cities" are defined as "any city, including a charter city, that compensates any member of that city council in excess of the amounts" as spelled out in section 36516 of the California Government Code. The bill would also require contracts of employment be ratified by in an open session of the legislative body and that a tax rate of 50% apply to that portion of the gross income of a city council member who makes in excess of the allowable amount permitted under section 36516.

AB 2064, State and Local Government: Salary Disclosure

AB 2064 proposes that each general law or charter city, county, city, special district, school district, and joint powers agency annually post on its website the salary information for each of its elected and appointed officials. The bill also requires that California State Assembly Members, Senators, and other employees of the legislature post their salaries on their respective websites.

SB 501, Local Government Compensation Disclosure

The bill requires that elected and appointed officers, and certain employees of all cities, including charter cities, file a compensation disclosure form. The California Secretary of State would develop the form, which would require that the person filling it out include information regarding their salary, stipends, and the employer's cost of providing these benefits.

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