Labor and Employment Litigation Update

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Labor and Employment Litigation Update

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ANTI- DISCRIMINATION LAWS

U.S. Supreme Court Concludes That County Forfeited Its Late Objection That an EEOC Complaint Failed to Reference a Protected Status the Employee Pursued in A Title VII Action

Fort Bend County, Texas v. Davis, 139 S.Ct 1843 (2019)

Title VII of the Civil Rights Act of 1964 ("Title VII") prohibits discrimination in employment based on race, color, religion, sex, or national origin. Title VII requires an employee to file a charge with the Equal Employment Opportunity Commission ("EEOC") or a State fair employment agency before commencing a Title VII action in court. Once the EEOC receives a complaint, it notifies the employer and investigates the allegations. The EEOC may then resolve the complaint through informal conciliation, or may sue the employer. If the EEOC chooses not to sue, it issues a right-to-sue notice, which allows the employee to initiate a lawsuit. An employee must have this right-to-sue notice before initiating a lawsuit.

Lois Davis filed an EEOC complaint against her employer, Fort Bend County. She alleged sexual harassment and retaliation for reporting harassment. While the EEOC complaint was still pending, the County fired Davis because she went to church on a Sunday instead of coming to work as requested. Davis attempted to amend her EEOC complaint by handwriting "religion" on an EEOC intake form; however, she never amended the formal charge document. Upon receiving her right-to-sue notice, Davis sued the County in federal court for religious discrimination and retaliation for reporting sexual harassment.

After years of litigation, the County alleged for the first time that the court did not have jurisdiction to decide Davis' religious discrimination claim because that protected status was not included in her formal EEOC charge. The trial court agreed and dismissed the suit. On appeal, the Fifth Circuit reversed and held that an EEOC complaint was not a jurisdictional requirement for a Title VII suit, and therefore, the County forfeited its defense because it waited years to raise the objection. The U.S. Supreme Court then agreed to hear the case.

The U.S. Supreme Court had to decide whether an EEOC complaint is a jurisdictional or procedural requirement for bringing a Title VII action. When a jurisdictional requirement is not met, a court has no authority whatsoever to decide a certain type of case. A procedural requirement, in contrast, is a claim-processing rule that is a precondition to relief that may be waived if there is no timely objection. The Court noted that a key distinction between the two is

that jurisdictional requirements may be raised at any stage of the proceedings, but procedural requirements are only mandatory if the opposing party timely objects.

The Supreme Court concluded that Title VII's complaint-filing requirement is not jurisdictional because those laws "do not speak to a court's authority." Instead, those complaint-filing requirements speak to "a party's procedural obligations." Therefore, the Court found that while filing a complaint with the EEOC or other State agency is still mandatory, the County forfeited its right to object to Davis' failure to mention religious discrimination in her EEOC complaint because the County did not raise the objection until many years into the litigation.

Ninth Circuit Withdraws Its 2018 Opinion and Upholds Probationary Release of Officer for On-Duty Calls and Texts to Paramour-Officer

Perez v. City of Roseville, 926 F.3d 511 (9th Cir. 2019).

Janelle Perez, a probationary police officer, began a romantic relationship with Shad Begley, another officer employed at the same municipal police department. Both officers separated from their respective spouses once they began working together.

The department then received a written citizen's complaint from the male officer's wife, alleging that the two officers were having an extramarital relationship, on-duty sexual contact, and numerous on-duty communications via text and telephone.

The department's internal investigation found no evidence of on-duty sexual relations, but did find that the officers called or texted each other several times while on duty. The investigation ultimately sustained charges that both officers: (i) violated the department's telephone policies; (ii) violated the department's "unsatisfactory work performance" standard; and (iii) engaged in "conduct unbecoming" for their personal, on-duty contact.

On August 16, 2012, the department sent a letter to Begley's wife informing her that its investigation into her citizen complaint was completed. The letter also listed the sustained charges against the officers.

Based on the department's custom of terminating probationary officers who violate policies, the Internal Affairs Captain overseeing the investigation recommended that Perez be terminated. The Chief disagreed, and decided that each officer should receive a written reprimand. Both officers appealed the written reprimands. While the appeals were pending, the officers continued their personal relationship. Before the date of Perez's administrative hearing, the Chief received negative comments about Perez's job performance from several sources.

Perez's administrative appeal of her reprimand concluded in September 2012. Based on the evidence, the Chief sustained her reprimand for violating the department's telephone policy. However, based on the recent negative comments about Perez's job performance and the sustained policy violation, the Chief released Perez from probation on September 4, 2012. The Chief confirmed that the officers' affair played no role in his decision to release Perez.

Perez then sued the city, the police department, and individual members of the department. She claimed, among other things, that her release violated her constitutional right to privacy and intimate association because it was impermissibly based in part on management's disapproval of her private, off-duty sexual conduct. The district court granted summary judgment in favor of the city defendants on all claims, and Perez appealed.

In its first decision in this case in 2018, the Ninth Circuit reversed the city defendants' summary judgment victory as to Perez's privacy and intimate association claims. In that 2018 decision, the Ninth Circuit opined that Perez had presented sufficient evidence that "[a] reasonable factfinder could conclude that [the Captain overseeing the investigation] was motivated in part to recommend terminating Perez on the basis of her extramarital affair, and that he was sufficiently involved in Perez's termination that his motivation affected the decision-making process."

Following the death of Judge Stephen Reinhart, who was on the panel that issued the 2018 opinion, the Ninth Circuit withdrew the 2018 opinion and issued a new one. The second opinion gave the summary judgment victory back to the individual defendants based on qualified immunity.

The Ninth Circuit noted that under the doctrine of qualified immunity, courts may not award damages against a government official in his or her personal capacity "unless the official violated a statutory or constitutional right, and the right was clearly established at the time of the challenged conduct." To determine whether there is a violation of clearly established law, courts assess whether any prior cases establish a right that is "sufficiently definite."

The Ninth Circuit first examined *Thorne v. City of El Segundo*, 726 F.2d 459 (9th Cir. 1983), which explicitly rejected a rule that a police department can never consider its employees' sexual relations. Rather, *Thorne* held that a police department could not inquire about or consider a job applicant's past sexual history that was irrelevant to on-the-job considerations.

Similarly, in *Fleisher v. City of Signal Hill*, 829 F.2d 1491 (9th Cir. 1987), the Ninth Circuit held that a police department could fire a probationary police officer over criminal sexual conduct that occurred before he was hired because it "compromised [the officer's] performance as an aspiring police officer" and "threatened to undermine the department's community reputation and internal morale."

The Ninth Circuit held that *Thorne* and *Fleisher* did "not clearly establish that a police department is constitutionally prohibited from considering an officer's off-duty sexual relationship in making a decision to terminate her, where there is specific evidence that the

officer engaged in other on-the-job conduct in connection with that relationship that violated department policy."

The Ninth Circuit held the individual defendants did not violate any clearly established law in terminating Perez because there was evidence from the investigation that Perez's on-duty personal telephone use was a clear violation of department policy that reflected negatively on the department. Therefore, the individual defendants had qualified immunity on the privacy and intimate association claims.

Perez also claimed that the individual defendants violated her constitutional right to due process under the Fourteenth Amendment by failing to: give her adequate opportunity to refute the charges made against her; and allow her to clear her name before she was released from probation. Specifically, Perez argued the department managers violated her right to due process by disclosing the charges sustained against her in the August 16, 2012 letter to the officer's wife.

The Ninth Circuit disagreed. To trigger a procedural opportunity to refute the charges, the employee must show: (i) the accuracy of the charge is contested; (ii) there is some public disclosure of the charge; and (iii) the charge is made in connection with termination of employment. The Ninth Circuit stated that the letter to the officer's wife regarding her citizen's complaint was not made "in connection with termination of employment" because there was an insufficient temporal nexus between that letter and Perez's release 19 days later. Therefore, the Ninth Circuit found the individual defendants had qualified immunity as to Perez's due process claim because they did not violate any clearly established law in terminating her.

Perez's complaint also claimed that her release was due to gender discrimination in violation of Title VII of the Civil Rights Act of 1964 and California's Fair Employment and Housing Act. But she conceded on appeal that the only "gender-related" discrimination she was alleging was based on her relationship with the other officer. The relationship, however, triggered only her rights to privacy and intimate association. In view of Perez's concession, the Ninth Circuit affirmed the grant of summary judgment to the individuals, the city and the department on those claims.

Employee Must Show an Adverse Employment Action Would Not Have Occurred But For a Disability

Murray v. Mayo Clinic (2019) 2019 WL 3939627.

Dr. Michael Murray sued the Mayo Clinic ("Clinic") and various individuals alleging disability discrimination in violation of the federal Americans With Disabilities Act ("ADA") after the Clinic terminated his employment. During the trial, Dr. Murray requested that the district court instruct the jury that he would prevail if he established that his disability "was a *motivating factor*" in the Clinic's decision to terminate his employment. The district court denied Dr. Murray's request and instead instructed the jury that Dr. Murray needed to establish that he "was

discharged *because* of his disability." This is known as the "but for" causation standard. The jury returned a verdict in favor of the defendants. Dr. Murray appealed.

On appeal, Dr. Murray argued that the district court was required to instruct the jury on the "motivating factor" standard rather than the "but for" standard based on the Ninth Circuit precedent stated in the case *Head v. Glacier Northwest, Inc*., 413 F.3d 1053 (9th Cir. 2005.) However, a three-judge panel of Ninth Circuit disagreed.

The court noted that while the Ninth Circuit's decision in *Head* had been consistent with the plain meaning of the ADA and the interpretation of other courts, the U.S. Supreme Court ("USSC") had subsequently issued decisions to change the applicable causation standard. For example, the USSC held that an employee must "prove that age was the 'but-for' cause of the employer's adverse action" in order to prevail on a claim under the federal Age Discrimination in Employment Act in *Gross v. FBL Financial Services Inc.*, 557 U.S. 167 (2009). The USSC declined to extend the "motivating factor" causation standard to Title VII retaliation claims in *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338 (2013). Accordingly, the court noted that the USSC has retreated from the "motivating factor" causation standard.

The court noted that while a three-judge panel generally cannot overrule a prior Ninth Circuit decision, it may overrule prior authority when an intervening USSC case undermines the existing precedent. The court concluded that because the USSC's decisions in *Gross* and *Nassar* were clearly irreconcilable with the Ninth Circuit's decision in *Head*, *Head* was overruled. Thus, the court found that an employee bringing a discrimination claim under the ADA must show that the adverse employment action would not have occurred but for the disability.

This case confirms that California courts should apply the "but for" causation standard when considering ADA discrimination cases. This standard is more generous towards employers than the "motivating factor" causation standard.

California Workplace Nondiscrimination Laws Amended to Protect Traits Historically Associated With Race, Including Hair Texture, Braids, Locks, and Twists

Senate Bill No. 188 (amending California Government Code section 12926)

On July 3, 2019, Governor Gavin Newsom signed into law a bill that extends California's workplace and school discrimination protections to cover race-related traits, including hair. SB-188 expands the definition of "race" under the Fair Employment and Housing Act and the nondiscrimination provisions of the Education Code. Effective January 1, 2020, "race" will include "traits historically associated with race, including, but not limited to, hair texture and protective hairstyles." The law further specifies that "protective hairstyles" "includes, but is not limited to, such hairstyles as braids, locks, and twists." This change in the law includes protection from such discrimination against employees and students.

The bill was introduced by State Senator Holly J. Mitchell, and sponsored by a coalition comprised of the National Urban League, Western Center on Law & Poverty, Color of Change, and personal care brand Dove. Effective January 1, 2020, it amends Government Code section 12926 and adds section 212.1 to the Education Code.

The bill appears primarily intended to prevent unequal treatment related to natural African-American hairstyles. The bill includes a legislative declaration that "Despite the great strides American society and laws have made to reverse the racist ideology that Black traits are inferior, hair remains a rampant source of racial discrimination with serious economic and health consequences, especially for Black individuals." The declaration also states that "Workplace dress code and grooming policies that prohibit natural hair, including afros, braids, twists, and locks, have a disparate impact on Black individuals as these policies are more likely to deter Black applicants and burden or punish Black employees than any other group."

Although the bill specifically references Black hairstyles, the statutory changes it establishes may be broader. For example, under the new statutory language, it appears employers and schools are prohibited from discriminating based on any trait "historically associated with race." The parameters of this standard, i.e. whether a particular trait qualifies as "historically associated with race" will be subject to debate. In addition, although the findings and declarations speak to Black hairstyles, the new statutory language does not limit protection to African American individuals with traditionally Black hairstyles.

PERB Rules Employer Has No Obligation to Provide Union or Employee With Written Complaint Until After Initial Investigatory Interview

Contra Costa Community College District (2019) PERB Decision No. 2652.

The Public Employment Relations Board found that the Contra Costa Community College District ("District") did not violate the Educational Employment Relations Act when it withheld copies of written discrimination complaints against two faculty members in advance of investigatory interviews.

PERB found that a union has a right to reasonable notice of the alleged wrongdoing before the investigatory interview, but the union does not have a right to a copy of the written complaint until after the initial investigatory interview is completed.

The District received two student complaints against two faculty members, and subsequently hired an attorney to investigate the complaints. The District required the two accused faculty members to attend investigatory interviews. The faculty members requested union assistance in connection with the interviews, and the union agreed to assist them. The union then requested copies of the complaints prior to the interviews. The District, through its attorney, informed the union that its policy was not to provide copies of complaints before an

interview. The District asserted the need to protect the integrity of the investigation and the complainants' privacy rights as primary reasons for denying requests for copies of the complaints.

PERB held that the employer must provide reasonable notice of the alleged misconduct. This must be timely and include sufficient information about the alleged wrongdoing "to enable a union representative to represent an employee in a meaningful manner during the interview." Whether an employer has met this obligation is a case-by-case determination. However, "the employer has no obligation to provide the underlying written complaint until after the employer conducts an initial investigatory interview."

Notice is timely if it gives the accused employee enough time to consult with his or her representative. Notice is sufficient if it provides the accused employee and his or her representative with enough information about the allegations to allow for representation in a meaningful manner during the interview.

PERB also explained that after an investigatory interview, the employer may not deny the union's request for information on the basis that a disciplinary meeting or proceeding falls outside the scope of the bargaining agreement or on the basis that the union has no duty of fair representation.

Similarly, the employer may not deny the union's request for information by simply asserting a third party's right to privacy. PERB reaffirmed the rule that after the employer raises the legitimate privacy rights of a third party, such as a student, the employer cannot simply refuse to provide any information. Rather, the employer must meet and confer in good faith to reach an accommodation of both the union's and the accused employee's right to obtain the information and the third party's right to privacy. Such accommodations could include redacting information that is not relevant, or entering into agreements limiting use of the information.

Statements Made During Internal Investigation Were Protected Under Anti-SLAPP Statute, But University's Decision to Investigate Was Not

Laker v. Board of Trustees of California State University, 32 Cal.App.5th 745 (2019).

Dr. Jason Laker is a professor at San Jose State University. A student told Dr. Laker that the then-Chair of his department sexually and racially harassed her. The student brought a formal Title IX complaint against the Chair, and after investigation, the University sustained the charges against the Chair. The University disciplined the Chair, and later, the University announced it was looking into how the matter was handled.

University administrators received an e-mail a few months later from the student. She stated she experienced ongoing stress and anxiety relating to the issue. The student noted the investigative report stated that at least two professors were aware of the behavior before her

complaint. The Associate Vice President responded to the student and agreed it was concerning that other faculty members appeared to have received information regarding troubling behavior and did not notify administrators. Laker was one of those faculty members. Separately, the University received and investigated three complaints into Laker's alleged conduct.

After exhausting administrative remedies, Laker filed a lawsuit against the University and the Associate Vice President for defamation and retaliation arising from the internal investigations. Laker alleged he was falsely accused of knowing about the sexual harassment and failing to report it. Laker also alleged the Associate Vice President and other University officials called him a "liar" when he said other students had complained of sexual harassment by the Chair. Laker also argued the University and others retaliated against him because he both opposed the Chair's harassment and assisted the student with her complaint.

The University responded to Laker's lawsuit with an anti-SLAPP motion, which is a special motion that allows a court to strike a lawsuit that attacks the defendant's protected free speech in connection with a public issue. The University argued Laker's complaint should be stricken because his claims arose from protected activity under the Anti-SLAPP law, and Laker had no probability of prevailing on either claim.

Courts evaluate anti-SLAPP motions using a two-step process: 1) whether the nature of the conduct that underlies the allegations is protected under California's anti-SLAPP statute; and 2) whether the plaintiff can show likely success on the merits of the claim.

The University argued that Laker's defamation claim arose from the statements made by the Associate Vice President and others during the investigation into the complaint against the Chair. The University claimed that Laker's retaliation claim arose from the University's investigation of the three complaints against Laker. Laker argued, in part, that the anti-SLAPP statute did not protect the University's decision to pursue three investigations into his conduct.

The Court of Appeal concluded Laker's defamation claim involved conduct protected under the anti-SLAPP statute. The statements, including the Associate Vice President's email response to the student, were made during and in connection with the ongoing internal investigation and were protected as an "official proceeding authorized by law." Furthermore, these statements formed the crux of Laker's defamation claim. The Court of Appeal concluded Laker could not demonstrate a probability of success on the merits of his defamation claim because statements made during the investigation were privileged under Civil Code section 47. Thus, the University met its burden as required by the anti-SLAPP statute to strike this part of Laker's claims.

The Court of Appeal concluded the University could not show that the part of Laker's retaliation claim, which was based on the allegations that the University pursued three meritless investigations of him, arose from any protected conduct. As a result, the University could not defeat this part of Laker's retaliation claim using the anti-SLAPP statute. The Court noted that this part of the retaliation claim was based on the University's decisions to investigate and not on communicative statements by University officials.

California Supreme Court Holds That Anti-SLAPP Statute Can be Used to Screen Claims Alleging Discrimination and Retaliation

Wilson v. Cable News Network, Inc., 7 Cal.5th 871 (2019).

Plaintiff Stanley Wilson, who is African-American and Latino, worked at CNN for over 17 years, covering matters of general public importance, including multiple presidential elections and Hurricane Katrina. In his lawsuit, he alleged that after raising concerns about the network's treatment of African-American men, and after taking a five-week paternity leave, the network gave him menial assignments and denied him promotions in favor of less experienced Caucasian candidates. The network fired him after he drafted a story covering the unexpected retirement of Los Angeles County Sheriff Lee Baca and an editor reviewing the draft flagged several passages that appeared similar to another news organization's published story.

In Wilson's lawsuit, he asserted multiple causes of action alleging that CNN discriminated and retaliated against him. CNN filed an anti-SLAPP motion, arguing that the discrimination and retaliation causes of action arose from CNN's decision to terminate his employment, and that that decision arose from CNN's right to determine who should speak on its behalf on matters of public interest. The trial court agreed with those arguments and granted the anti-SLAPP motion.

A divided Court of Appeal reversed. The majority reasoned that discrimination and retaliation do not qualify as protected activity. The dissent disagreed, pointing out that the claims arose from CNN's decision about who would report the news on its behalf, a decision in furtherance of CNN's exercise of free speech rights. The Court of Appeal's decision "added to a growing divide over whether, in an employment discrimination or retaliation case, the employer's alleged [wrongful] motive … eliminates any anti-SLAPP protection that might otherwise attach to the employer's … practices." (Opinion, page 5.) The Supreme Court therefore took review to resolve the split.

The Supreme Court began its analysis by pointing out that whether an act is unlawful often depends on whether the person has a good reason for doing it, "or, at least, has no bad reason for doing it." (Opinion at p. 9.) The Court noted that it is permissible for an employer to decide to fire an employee, but not permissible to make that decision based on the employee's protected status or protected activity. The Supreme Court then noted that the Court of Appeal had reasoned that because CNN's adverse actions against Wilson would have been lawful in the absence of the allegedly illegal motives (discrimination and retaliation), Wilson's claims were not actually based on CNN's exercise of free speech rights.

The Supreme Court stated that the Court of Appeal's view "cannot be squared with either the statutory text or our precedent in interpreting it." Even if a plaintiff's claim is based on an employer's alleged illegal motives, if the claim is also based on the employer's conduct that

meets the definition of protected activity under the anti-SLAPP statute, then the anti-SLAPP protections apply.

The Court then analyzed whether CNN's decisions regarding Wilson met the definition of protected activity. It explained that not every staffing decision a news organization makes is done in furtherance of its exercise of free speech rights. The Court held that because Wilson's written work was vetted and reviewed by others, and because he did not have authority to decide, on his own, what would appear on CNN's website, and he did not appear on air, CNN's decisions about his employment had no substantial relationship to CNN's ability to speak on matters of public concern. Therefore, the adverse actions fell outside the protection of the anti-SLAPP statute. But, the Court held that to the extent CNN's decision to terminate Wilson was based on its belief that he had committed plagiarism, that was protected activity, because preventing plagiarism is a decision that "protects the ability of a news organization to contribute credibly to the discussion of public matters."

RETALIATION

Prosecutor Engaged in Protected Activity by Disclosing What He Reasonably Believed to Be Noncompliance With Laws Regarding Criminal Prosecutions

Ross v. County of Riverside, 36 Cal.App.5th 580 (2019).

Plaintiff Christopher Ross worked for Riverside County as a deputy district attorney, assigned to the homicide unit. Ross was assigned a case that had been initially handled by another attorney. That other attorney told Ross that she believed the defendant was innocent, and that his confession to the crime had been coerced. The other attorney gave Ross a memo recommending dismissing the case for those reasons.

Based on the memo Ross received from the other attorney, he emailed his supervisor stating that he did not believe the District Attorney's ("DA") office could prove the case beyond a reasonable doubt, and he recommended further DNA testing. Two days later, he sent additional evidence out for DNA testing, and again emailed his supervisor about the weakness of the case, recommending that it be dismissed. Though Ross believed that the DA's office was violating the defendant's due process rights by engaging in a malicious prosecution, he never expressly informed his supervisor that he believed the DA's office was violating any law.

Five months later, Ross received the DNA testing results, which exculpated the defendant. Ross turned the results over to defense counsel. A year later, Ross received "corrected" DNA results that exculpated the defendant with further certainty; he turned those over to defense counsel as well. Ross informed his supervisor and the Assistant District Attorney ("ADA") about the DNA results and again recommended dismissing the case. The ADA told Ross not to provide the results to defense counsel, and appeared upset when Ross told him he had already done so.

Several months after that, Ross learned of a new witness in the case. The witness was interviewed and stated that the defendant was innocent and that the defendant's roommate had committed the murder. In recorded phone calls that the roommate had made while in jail, he admitted committing the murder. Ross had the evidence sent to defense counsel. A few days later, the ADA asked Ross whether he had provided the phone call evidence to defense counsel. Ross answered by asking the ADA if he wanted Ross to turn the information over. The ADA said he would take care of that, and would take over the case. (By this point, Ross had been transferred to a different unit.) The District Attorney's office ultimately dismissed the case against the defendant.

Around the same time these events were occurring, Ross asked for accommodations of a medical condition. A lengthy disability interactive process occurred. Ross asked to be removed from certain assignments due to an asserted medical need to avoid stress and take time for medical testing regarding neurological conditions and auto-immune disorders. Ross missed several weeks of work to attend out-of-state medical appointments. Ross never provided the County with any documentation from a health care provider regarding any work restrictions or limitations on his ability to perform his duties. The interactive process broke down and Ross resigned.

Ross sued the County for whistleblower retaliation in violation of Labor Code section 1102.5, and various disability-related causes of action. The County moved for summary judgment on the retaliation claim, asserting that Ross had not engaged in protected activity. The trial court granted the motion.

On appeal, Ross argued that his recommendation to dismiss the homicide case was based on his belief that continuing the case would violate the defendant's due process rights as well as a prosecutor's ethical obligations under state law. The Court of Appeal held that Ross' unexpressed belief that a law was being violated was enough to establish a cause of action under section 1102.5. The court stated that section 1102.5 does not require such an express statement; it only requires that an employee disclose information and that the employee reasonably believe the information discloses unlawful activity.

EVALUATING AND DISCIPLINING EMPLOYEES

Sheriff's Sergeant Not Entitled to an Administrative Appeal For Release From Probationary Promotion

Conger v. County of Los Angeles, 36 Cal.App.5th 262 (2019).

On November 1, 2015, the Los Angeles County Sheriff's Department (Department) promoted Thomas Conger from sergeant to lieutenant, subject to a six-month probation period. A few months later, the Department informed Conger that he was under investigation for events occurring before his promotion. Shortly thereafter, the Department relieved Conger of duty,

placed him on administrative leave, and extended his probationary period indefinitely due to his "relieved of duty" status.

On May 20, 2016, the Department notified Conger that it was releasing him from his probationary position of lieutenant based on investigatory findings that he had failed to report a use of force while he was still a sergeant. The Department provided Conger with a "Report on Probationer" (Report), which indicated that on May 21, 2015, Conger and two deputy sheriffs moved a resisting inmate from one cell into an adjacent cell. The Report said that Conger violated Department policy by failing: to report the use of force; to document the incident, and to direct his subordinates who used or witnessed the use of force to write the required memorandum. The Report concluded that Conger did not meet the standards for the position of lieutenant, and recommended Conger's release from probation and demotion back to the sergeant.

Subsequently, Conger filed a written appeal with the County's human resources office and a request for a hearing pursuant to the Public Safety Officers' Procedural Bill of Rights Act, at Government Code section 3304 subdivision (b), with the County's Civil Service Commission. Section 3304, subdivision (b) provides that "[n]o punitive action, nor denial of promotion on grounds other than merit, shall be undertaken by any public agency against any public safety officer who has successfully completed the probationary period that may be required by his or her employing agency without providing the public safety officer with an opportunity for administrative appeal." Section 3303 defines "punitive action" as "any action that may lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment."

After both the human resources office and the Civil Service Commission denied Conger's requests, Conger petitioned the trial court for an order directing the County to provide him with an administrative appeal. Conger argued that releasing him from his probation based on alleged pre-promotion misconduct constituted a "denial of promotion on grounds other than merit" under section 3304, subdivision (b), and entitled him to an administrative appeal. The trial court denied the petition, ruling that the Department could properly consider Conger's pre-probationary conduct in rescinding his promotion and that the decision to rescind was merit-based due to Conger's failure to report a use of force. Conger appealed.

The Court of Appeal affirmed. First, the court determined whether Conger's release from his probationary promotion was a "denial of promotion" or a "demotion." The court noted that this was an important distinction because under section 3304, subdivision (b), an employer can deny a promotion without triggering the appeal right, so long as the denial is based on merit. The court concluded that the Department's decision was indeed a denial of a promotion. The court noted that Conger had not completed his probationary period at the time the Department returned him to his previous rank because the Department had extended the probationary period indefinitely. Therefore, Conger did not yet have a vested property interest in the lieutenant position. Because Conger lacked permanent status as a lieutenant, his release from his probationary promotion constituted a denial of promotion rather than a demotion.

Next, the Court of Appeal considered whether the Department denied Conger's promotion on merit-based grounds. The court noted that because lieutenants are high-level supervisors in the Department, complying with Department procedures and ensuring that subordinates do so as well is substantially related to successful performance in that position. The court reasoned that Conger did not demonstrate competence as a supervisor when he failed to report a use of force or instruct his subordinates to do so. Further, the court noted that nothing in section 3304, subdivision (b) suggests that the term "merit" should be limited to the merit of an officer's performance during the probationary period. Thus, the court concluded that the Department's grounds for denying Conger's promotion were merit-based.

Finally, the court evaluated whether Conger was entitled to an administrative appeal because the Report could lead to future adverse consequences. Conger argued that he was entitled to an administrative appeal because the Department placed the Report in his personnel file and could rely on it in future personnel decisions that could lead to punitive action. The court said that the mere fact that a personnel action may lead to a denial of promotion on merit grounds does not transform it into a punitive action for purposes of section 3304. Moreover, Conger did not provide any evidence that the Report would lead to punitive action or affect his career because the only action the Report recommended was release from the promotion.

PRIVACY AND PERSONNEL RECORDS

Law Enforcement Agencies May Disclose Particular "Brady List" Officers to Prosecutors Despite *Pitchess* Statutes

Association for Los Angeles Deputy Sheriffs v. Superior Court (Los Angeles County Sheriffs Department), No. S243855 (August 26, 2019).

The California Supreme Court held that the Los Angeles County Sheriff's Department (LASD) could share with prosecutors the names of deputies on its "*Brady* list" in particular cases without seeking a court order after a *Pitchess* motion. In particular, Court held that the LASD would not violate *Pitchess* "by sharing with prosecutors the fact that an officer, who is a potential witness in a pending criminal prosecution, may have relevant exonerating or impeaching material in that officer's confidential personnel file." In so holding, the Court decided a novel question of constitutional and statutory law.

The theoretical background of the case is as follows. Under the U.S. Supreme Court's holding in *Brady v. Maryland*, the prosecution in a criminal case must disclose to the defense all exculpatory evidence in the prosecution's possession. This includes impeachment evidence of a police witness, which is sometimes found in the officer's personnel file. Indeed, prosecutors have a duty under *Brady* and its progeny to inquire whether the relevant law enforcement department is in possession of exculpatory evidence.

At the same time, California Penal Code sections 832.7 and 832.8 afford confidential status to officer personnel records and impose an obligation on law enforcement agencies to maintain the

confidentiality of such records – and information contained therein. These statutes, along with others in the Evidence Code, provide procedures for a criminal defendant to access information relevant to his or her defense from an officer's personnel file. To do so, the criminal defendant must file a written motion, supported by declarations or affidavits, demonstrating good cause for the disclosure. If the motion is granted, the trial court privately reviews the officer's personnel records and directs the custodian of records to provide the defendant any relevant information. The same requirements apply to a prosecutor seeking evidence from an officer's personnel file. The relevant statutory sections are commonly referred to as the "*Pitchess* statutes," after *Pitchess v. Superior Court*, the California Supreme Court case on which they are based. Likewise, motions filed pursuant to these statutes are known as "*Pitchess* motions."

Against this backdrop, the LASD here compiled a so-called "*Brady* list," consisting of names and serial numbers of deputies whose personnel files contained sustained allegations of misconduct that could subject the deputies to impeachment in a prosecution. Many police agencies across the state maintain such lists, which typically include officers found to have engaged in dishonesty or other acts of moral turpitude.

In an effort to comply with *Brady*, the LASD proposed an internal policy under which it would disclose its *Brady* list to the district attorney's office and other prosecutorial agencies. In turn, if an LASD deputy was a witness in a criminal case, the prosecution would know to file a *Pitchess* motion to obtain relevant information from the deputy's personnel file, or alternatively to alert the defense so it could file its own *Pitchess* motion. Under the policy, details of investigations or portions of the deputies' personnel files would only be disclosed in response to a formal *Pitchess* motion and accompanying court order.

The LASD transmitted a letter to deputies, notifying them of the proposed policy. The Association for Los Angeles County Deputy Sheriffs (ALADS), a union representing non-supervisory deputies, opposed the proposed policy. It filed a lawsuit seeking to prohibit the LASD from disclosing the names of deputies on the list to anyone outside the LASD, absent full compliance with the *Pitchess* statutes.

The trial court ultimately issued a preliminary injunction barring general disclosure of the *Brady* list to the district attorney or other prosecutors, except pursuant to the *Pitchess* statutes. The trial court's injunction, however, provided an exception for deputies who were potential witnesses in a pending criminal prosecution. i.e., it allowed for a type of *Brady* "alerts." Under the injunction, the names of these deputies could be disclosed on an individual basis outside the *Pitchess* process. On appeal, however, the Court of Appeal approved the injunction and went a step further to hold that even *Brady* alerts were improper. Absent compliance with the *Pitchess* processes, the LASD could not disclose to prosecutors the names of any deputies on the *Brady* list, even those deputies who were potential witnesses in a pending criminal prosecution.

The California Supreme Court granted review of the case. In an opinion by Chief Justice Cantil-Sakauye, the Supreme Court reversed the decision of the Court of Appeal and held that the

"confidentiality" language of the *Pitchess* statutes authorized a sheriff's department to share *Brady* alerts with prosecutors for particular cases.

The Court first evaluated the extent to which the new law SB 1421, effective January 1, 2019, affected its analysis. That law, which was passed and went into effect while this case was pending, made non-confidential, and in fact open for public inspection, many types of police officers personnel records that could cause an officer to be included on a *Brady* list. This includes, among other specific types of records, those relating to incidents in which a sustained finding was made of dishonesty by a peace officer or custodial officer directly relating to the reporting, investigation, or prosecution of a crime and also any sustained finding of perjury, false statements, filing false reports, destruction, falsifying, or concealing of evidence." The Court found basically that although some of this SB 1421 information might constitute what places an officer on a *Brady* list, it was not exhaustive of the types of misconduct and information that might do so. Thus, the passage of SB 1421 did not make it so *Brady* lists and alerts contain only non-confidential information, and the Court still had to resolve the issue presented by this case. (The Court also observed in a footnote that it was not deciding at this point whether SB 1421 affects the confidentiality of records that existed before the statute's January 1, 2019 effective date.)

In reaching the merits, the Court held that the "confidentiality" requirement of the *Pitchess* statutes should be interpreted to allow law enforcement agencies to comply with their constitutional obligations under *Brady* by providing limited alerts to prosecutors. The Court reasoned as follows:

"In common usage, confidentiality is not limited to complete anonymity or secrecy. A statement can be made 'in confidence' even if the speaker knows the communication will be shared with limited others, as long as the speaker expects that the information will not be published indiscriminately." . . . So, for example, it is hard to imagine that the term "confidential" would categorically forbid one employee of a custodian of records, tasked with maintaining personnel files, from sharing those records with another employee assigned to the same task. Put differently, deeming information "confidential" creates insiders (with whom information may be shared) and outsiders (with whom sharing information might be an impermissible disclosure). The text of the *Pitchess* statutes does not clearly indicate that prosecutors are outsiders, forbidden from receiving confidential *Brady* alerts."

The Court concluded: "Viewing the Pitchess statutes 'against the larger background of the prosecution's [*Brady*] obligation,' we instead conclude that the Department may provide prosecutors with the *Brady* alerts at issue here without violating confidentiality."

The Court did not hold that a sheriff's department could forward an entire *Brady* list to prosecutors, but addressed *Brady* alerts, in particular the process by which a sheriff's department advises prosecutors that a witness in a particular case is on the list. The Court's holding will greatly facilitate the ability of law enforcement and prosecutorial agencies to work together to comply with obligations under *Brady*, without, as the Court explained, significant compromise of officer state law rights secured by the *Pitchess* statutes.

Certain Peace Officer Personnel Records Created Before 2019 Are Also Public Records Under New California Law

Walnut Creek Police Officers' Association v. City of Walnut Creek, 33 Cal.App.5th 940 (2019).

Senate Bill No. 1421 ("SB 1421"), which went into effect on January 1, 2019, allows the public to obtain certain peace officer personnel records by making a request under the California Public Records Act. Prior to SB 1421, these records were only available by court order and in narrow circumstances. The peace officer personnel records that are now public records include those relating to: a peace officer who shoots a firearm at a person; a peace officer's use of force that results in death or great bodily injury; or a sustained finding that a peace officer either sexually assaulted a member of the public or was dishonest.

Since SB 1421 went into effect, numerous public agencies across California have been involved in lawsuits over whether the new law applies to records created before 2019.

In its first published decision addressing the issue, the California Court of Appeal held that applying SB 1421 to pre-2019 records does not make the new law impermissibly retroactive. The court noted that "[a]lthough the records may have been created prior to 2019, the event necessary to 'trigger application' of the new law – a request for records maintained by the agency – necessarily occurs after the law's effective date." The court reasoned that the new law "does not change the legal consequences for peace officer conduct described in pre-2019 records . . . Rather, the new law changes only the public's right to access peace officer records." Thus, SB 1421 allows the public to request certain peace officer personnel records that were created before January 1, 2019.

LABOR NEGOTIATIONS AND THE MMBA

County Violated MMBA by Removing Leadership Duties from Hospital Division Chief

Reese v. County of Santa Clara, PERB Decision No. 2629-M (2019).

Jeffrey Reese began working for the County of Santa Clara as a urologist in 1990. In 1996, Reese began serving as the division chief of urology in the surgery department at Santa Clara Valley Medical Center ("SCVMC"), a County hospital. Reese reported to Gregg Adams, the chair of the surgery department.

In 2010, Valley Physicians Group ("VPG") became the exclusive representative for the County's physician bargaining unit. Between November 2011 and April 2012, Reese participated in the joint labor-management committee focused on implementing the negotiated terms of the first memorandum of understanding ("MOU") between VPG and the County. In the fall of 2013, Reese joined VPG's bargaining team for successor MOU negotiations.

Starting in 2012, Jeffrey Arnold served as SCVMC's chief medical officer and was primarily responsible for managing the provider staff, hiring and firing physicians, and determining their salaries. Arnold participated as a member of the County's bargaining team from late 2013 through late 2014.

In the negotiations for a successor MOU between the County and VPG, Arnold indicated that physician workload needed to increase. Members of the VPG bargaining team, including Reese, expressed their concerns that if physician workloads became excessive, patient safety and service quality would be at risk. After bargaining, Reese continued to raise these concerns with Arnold.

After one of SCVMC's five urologists left and approximately 50,000 new patients were eligible to be served by the County health system, Arnold vetted urologist Dr. Tin Ngo for hire. Arnold offered Ngo a position without consulting or notifying Reese. Ngo was not Medical Board-certified at the time.

Before Ngo officially began work, Arnold told Adams that Reese was not the "correct" person to be chief and suggested that Ngo replace Reese. Adams objected to Arnold's plan because it would violate his department's policies, which required a division chief to be Medical Board-certified. Adams also thought the decision to replace Reese was premature.

Arnold then informed Adams that he was proposing to have Ngo named as "interim chief." Once again, Adams rejected Arnold's proposal because Ngo was not yet Medical Board-certified. Instead, Arnold decided to install Ngo as a "medical director," and give Ngo most of Reese's authority as chief. Arnold increased Ngo's pay to equal Reese's. While Reese did not suffer a pay loss, 90% of his leadership duties were removed.

To prove that an employer has discriminated or retaliated against an employee in violation of the Meyers-Milias Brown Act ("MMBA"), the employee must show that: 1) he or she exercised rights under the MMBA; 2) the employer had knowledge of the exercise of those rights; 3) the employer took adverse action against the employee; and 4) the employer took the action because of the exercise of those rights. If the employee proves these elements, the burden shifts to the employer to demonstrate that it would have taken the same action, even in the absence of the protected conduct.

The Public Employment Relations Board concluded that the County removed Reese's division chief duties because of his involvement with VPG, which violated the MMBA. PERB noted that "Reese first contested Arnold's stated interest in increasing the physicians' workload during successor MOU bargaining and thereafter continued to advocate for additional staffing to ease the urology staff's workload." PERB also noted that removing Reese's duties as division chief limited his ability to oppose Arnold's plan to increase physicians' workload. Thus, "Arnold's managerial concerns about Reese were directly related to the very matters he had raised in the course of his protected conduct."

Fire Protection District Violated MMBA When It Denied Represented Employees Longevity Differential

United Chief Officers Association v. Contra Costa County Fire Protection District, PERB Decision No. 2632-M (2019). [Judicial Appeal Pending]

The PERB found that a County Fire Protection District violated the MMBA when it granted unrepresented employees a longevity differential but denied the benefit to employees represented by the union.

In 2006, the Contra Costa County Board of Supervisors passed a resolution that provided about 600 classifications of County employees a longevity differential consisting of a 2.5% increase in pay for 15 years of service. The resolution described the eligible County employees as "Management, Exempt and Unrepresented Employees."

The United Chief Officers Association ("Association") represented the Fire Management Unit of the Contra Costa County Fire Protection District ("District"), one of the County's special districts. In subsequent labor negotiations between the Association and the District, the Association demanded the same longevity differential previously granted to unrepresented management employees. The District rejected the Association's proposal, and admitted on several occasions that it did so to ensure that unrepresented employees are paid more than represented employees.

In 2008, the County Board of Supervisors adopted a resolution that extended the 2.5% longevity differential for 15 years of service to more than 1,000 unrepresented supervisory and managerial employees of the District. This effectively extended the differential to all unrepresented management employees of the District, except those in the represented Fire Management Unit. The Association filed a grievance, but the matter was not resolved. Subsequently, the Association filed an unfair practice charge alleging that the District interfered with the union and employee rights, and discriminated against them by treating them differently based on protected activity.

PERB discussed the difference between interference and discrimination charges. PERB noted that for interference, the focus is on the actual or reasonably likely harm of an employer's conduct to the protected rights of employees or employee organizations. Thus, to establish interference, the employee or employee organization does not need to prove the employer's motive, intent, or purpose. PERB noted that an interference violation will be found when the resulting harm to protected rights outweighs the business justification or other defense asserted by the employer. In contrast, the employer's unlawful motive, intent, or purpose is necessary to establish a case for discrimination. A charge of discrimination will be sustained if the employee shows that the employer would not have taken the complained-of conduct but for an unlawful motivation, purpose, or intent.

PERB found that the District interfered with the Association and employees' protected rights in violation of the MMBA. PERB noted that the District expressly distinguished between represented and unrepresented employees as the basis for granting employment benefits. Thus, the District's conduct discouraged employees from participating in organization activities, which is a quintessential protected right under the MMBA. PERB rejected the District's affirmative defenses outright, and concluded that the resulting harm outweighed the District's explanations.

PERB also found that the District discriminated against employees by treating Association-represented employees differently from unrepresented employees. The District only offered the differential to unrepresented employees in order to maintain "separation" in employment benefits between represented and unrepresented employees. Thus, PERB concluded that the District's conduct provided direct evidence of motive and inherently discriminatory conduct sufficient to support a discrimination allegation.

PERB ordered the District to pay each eligible current and former member of the District's Fire Management Unit the 2.5% longevity differential for 15 years of service.

Court of Appeal Declines to Invalidate Initiative Placed on Ballot in Violation of MMBA

Boling v. Public Employment Relations Bd., 33 Cal.App.5th 376 (2019).

The City of San Diego's Mayor Jerry Sanders championed a citizens' initiative in 2010 that would eliminate traditional defined benefit pensions for most newly-hired City employees, and replace them with defined contribution plans. The affected unions argued that Mayor Sanders was acting in his official capacity to promote the initiative and, in doing so, was making a policy determination that required meeting and conferring with the unions under the MMBA. The City's voters eventually adopted the initiative, without the City ever meeting and conferring with the unions.

In 2018, the California Supreme Court held that the City violated the MMBA because Mayor Sanders made a policy decision to advance a citizens' pension reform initiative without meeting and conferring with the affected employees' unions. The California Supreme Court then remanded the case to the Court of Appeal to determine the appropriate remedy for the City's violation of the MMBA.

On remand, the Court of Appeal declined to invalidate the citizens' pension reform initiative. The Court of Appeal concluded that because the voters adopted the initiative and the initiative has taken effect, the initiative can only be challenged in a special quo warranto proceeding. Thus, the validity of the initiative was beyond the scope of the court's review.

However, the Court of Appeal did order the City to meet and confer with the unions over the effects of the initiative and to pay the affected current and former employees the difference, including interest, between the compensation the employees would have received before the

initiative went into effect, and the compensation the employees received after the initiative became effective. The court reasoned that this remedy reimburses the employees for the losses they incurred and reduces the City's financial incentive for refusing to bargain.

Additionally, the Court of Appeal ordered the City to cease and desist from refusing to meet and confer with the unions. Instead, the Court found that the City is required to meet and confer upon the unions' request before the City can place a measure on the ballot that affects employee pension benefits or other negotiable subjects.

PERB Holds that Its Jurisdiction Includes Claims Brought By Employee Organizations that Represent Police Officers and Deputy Sheriffs

Association of Orange County Deputy Sheriffs v. County of Orange, PERB Decision No. 2675-M.

This case concerned whether PERB has jurisdiction to hear claims brought by employee organizations that represent peace officers as that term is defined in Penal Code 830.1, and whether the County was obligated to bargain changes to an ordinance creating an Office of Independent Review (OIR) that advised the Sheriff-Coroner on certain in-custody incidents and complaints against law enforcement personnel. The Board held for the Association on the jurisdictional issue and for the County on the merits. This decision is very significant as it provides a very clear holding from PERB that it believes that employee organizations (labor associations and unions) that represent only sworn peace officers (officers and sheriffs) can directly file unfair practice charges with PERB and that PERB has jurisdiction to adjudicate those charges.

During the relevant time period, the Association of Orange County Deputy Sheriffs (Association) was a bargaining unit composed of 1693 peace officers, as that term is defined in Penal Code 830.1, and 115 non-peace officers. (Penal Code 830.1 defines persons who are peace officers to include deputy sheriffs and police officers.)

In 2008, the County passed an ordinance creating an OIR to advise the Sheriff-Coroner regarding in-custody incidents involving death or serious injury and complaints against law enforcement personnel. In 2015, the County notified the Association of its intent to change its OIR ordinance to extend OIR authority to cover the District Attorney's Office, among other changes. The Association argued that the decision to change the OIR ordinance and the effects of the decision were matters within the scope of representation. In December 2015, the County implemented changes to the OIR without meeting and conferring with the Association. The Association then filed an Unfair Practice Charge (UPC) in June 2016.

As part of its response to the UPC, the County moved to dismiss, arguing PERB lacked jurisdiction to hear claims brought by 830.1 peace officers. According to the County, section 3511 of the MMBA bars claims by persons who are peace officers as defined in section 830.1 of the Penal Code, as well as claims that impact Penal Code 830.1 peace officers. The ALJ

disagreed, relying on a 2015 PERB Decision that found the Board had jurisdiction over charges brought by employee organizations representing bargaining units that include, in whole or in part, persons who are peace officers. The County then excepted to the ALJ's ruling on jurisdiction and the matter was heard before the PERB Board.

After a lengthy discussion of statutory history and statutory framework, the Board affirmed the ALJ's decision and rejected the County's arguments, holding that PERB has jurisdiction over claims brought by employee organizations that represent or seek to represent bargaining units composed partially *or entirely* of Penal Code 830.1 peace officers. In other words, while section 3511 of the MMBA prohibits natural persons who are peace officers pursuant to Penal Code 830.1 from filing claims with PERB, *their Associations may do so*.

The Board found for the County on whether the County had an obligation to bargain changes to its OIR ordinance that expanded the jurisdiction of the OIR, authorized the OIR to work with departments beyond the Sheriff-Coroner, and authorized the OIR to provide legal advice on non-law enforcement employee misconduct. According to the Association, the changes to the OIR were within the scope of representation because legal advice provided by the OIR attorneys could influence disciplinary decisions, which, according to the Association, would affect the discipline process and disciplinary procedure. Disciplinary procedure is a mandatory subject of bargaining under the MMBA. The Board disagreed, finding the changes to the OIR ordinance only concerned management's direction to its legal counsel for the performance of legal services, which is outside the scope of representation and the MMBA's meet-and-confer requirement. PERB drew a distinction between citizen review board procedures and advice of legal counsel, finding that the directions an employer gives its legal counsel about how to provide it with legal advice is so attenuated from the employment relationship that it is outside the scope of representation. The Board concluded, "[u]ltimately, the OIR ordinance functions much like a contract for legal services and concerns only how OIR attorneys and staff will provide the County with legal advice; it does not change or have effects on the disciplinary procedure."

RETIREMENT

Employee Who Settles a Pending Termination for Cause and Agrees Not to Seek Reemployment Is Not Eligible for Disability Retirement

Martinez v. Public Employees' Retirement System, 33 Cal.App.5th 1156 (2019).

In 2001, Linda Martinez began working at the State Department of Social Services ("DSS") after working for the State since 1985. During this time, Martinez also served in various positions with her union.

In 2014, DSS sought to terminate Martinez's employment and provided her with a notice citing numerous grounds for her dismissal. Martinez challenged the dismissal, believing that her termination "was taken in retaliation for her union activities."

The parties later negotiated a settlement. DSS agreed to: pay Martinez $30,000; withdraw the notice for dismissal; and remove certain matters from her personnel file. In return, Martinez agreed to voluntarily resign effective September 30, 2014. DSS also agreed to cooperate with any application for disability retirement filed by Martinez within the six months following her voluntarily resignation.

Martinez filed her disability retirement application on the grounds that she could longer function in her role at DSS because of various job-related conditions. The California Public Employees Retirement System ("CalPERS") cancelled her application. CalPERS notified Martinez that she was not eligible for disability retirement because she was "dismissed from employment for reasons which were not the result of a disabling medical condition" and that "the dismissal does not appear to be for the purpose of preventing a claim for disability retirement." Martinez appealed the denial to the Board of CalPERS, which denied Martinez's petition for reconsideration.

Martinez and her union then sued CalPERS, its Board, and DSS to request the court to order the Board to set aside and reverse its decision. The trial court denied Martinez's petition.

Ordinarily, governmental employees lose the right to apply for disability retirement if they are terminated for cause. However, prior decisions have carved out exceptions to this general rule. For example, in *Haywood v. American River Protection District*, 67 Cal.App.4th 1292 (1998), the court held that a terminated-for-cause employee can still qualify for disability retirement when the conduct which prompted the termination was the result of the employee's disability. In *Smith v. City of Napa*, 120 Cal.App.4th 194 (2004), the court concluded that a terminated employee may qualify for disability retirement if he or she had a "matured right" to a disability retirement prior to the conduct that prompted the termination.

Further, relying on *Haywood* and *Smith*, the CalPERS Board determined that an employee loses the right to apply for disability retirement when the employee settles a pending termination for cause and agrees not to seek reemployment. The CalPERS Board reasoned that such a situation is "tantamount to dismissal." (*In the Matter of Application for Disability Retirement of Vandergoot*, CalPERS Precedential Dec. No. 12-01 (2013).)

On appeal, Martinez argued that *Haywood* and *Smith* have been superseded by statute and that the Board's decision in *Vandergoot* is no longer precedential. Specifically, Martinez relied on a 2008 amendment to the retirement law that provides "[i]n determining whether a member is eligible to retire for disability, the board or governing body of the contracting agency shall make a determination on the basis of competent medical opinion and shall not use disability retirement as a substitute for the disciplinary process." Thus, Martinez argued that determinations of eligibility for disability retirement can only be made because of competent medical opinion.

However, the Court of Appeal disagreed. The court noted that the section Martinez relies on "is but a single sentence in a single statute, and cannot be examined to the exclusion" of the entire retirement law. The Court noted that Martinez's voluntary resignation "constituted a complete severance of the employer-employee relationship, thus eliminating a necessary requisite for disability retirement." As a result, the Court said that the 2008 amendment to the retirement law did not supersede *Haywood* and *Smith*. Further, the Court concluded that the Board's decision that a settlement not to seek reemployment is "tantamount to dismissal" was "eminently logical." Thus, the precedent established in *Haywood*, *Smith*, and *Vandergoot* remains the law.

Interim Finance Manager Retained Through Regional Government Services Was an Employee Entitled to CalPERS Membership and Contributions

Fuller v. Cambria Community Services District, PERS Case No. 2016-1277.

Tracy Fuller served as an Interim Finance Manager for the Cambria Community Services District ("CCSD") from March to November of 2014 following the former Finance Manager's retirement. Fuller previously worked with other CalPERS member agencies, and retired within the CalPERS system. Throughout Fuller's retention, CCSD actively sought to (and eventually did) hire a permanent Finance Manager replacement. CCSD retained Fuller through Regional Government Services ("RGS"), a joint powers authority that does not contract with CalPERS. RGS has worked with over 200 local agencies since approximately 2002. RGS hires retirees as employees of RGS, and classifies itself as an independent contractor which is not subject to CalPERS pension laws.

CalPERS audited CCSD in late 2014, and issued a report finding Fuller was not an independent contractor and should have been enrolled in CalPERS as an eligible employee. CCSD appealed CalPERS' determination. Throughout the audit and appeal, CCSD, RGS and even Fuller agreed and characterized her service as a third-party contractor and RGS employee.

The CalPERS Board of Administration adopted the Administrative Law Judge's ("ALJ") proposed decision and determined that Fuller was a common-law employee of CCSD. Thus, CCSD was required to pay pension contributions on Fuller's behalf as a CalPERS member. The Board noted that the California Supreme Court has held that the retirement law's provisions regarding employment incorporate the common law test. Under this test, an employer-employee relationship exists if the employer has the right to control the manner and means of accomplishing the desired result (as opposed to simply the result, which instead establishes an independent contractor relationship). Courts will also consider a number of other secondary factors in this analysis.

The Board and the ALJ primarily relied on the following factors to determine that Fuller was a common law employee who must be enrolled in CalPERS: 1) CCSD ultimately had the right to control the manner and means in which Fuller accomplished her assignments; 2) RGS could not reassign Fuller without CCSD's consent; 3) Fuller ultimately reported to CCSD's General Manager; 4) CCSD's General Manager and Administrative Services Officer ("ASO")

determined and issued her particular assignments, not RGS; 5) CCSD's General Manager and ASO evaluated her work; 6) Fuller's work, although different in kind from her predecessor, simply reflected the particular financial work CCSD needed at the time, and was not sufficiently distinguishable from any other past Finance Manager's duties; 7) CCSD provided Fuller with an office, phone, limited access to its computer systems, and an email address; 8) CCSD paid for Fuller's local housing; 9) CCSD described Fuller as a staff member in its board minutes; 10) RGS did not provide any specialized services and the ALJ held "operating as an Interim Finance Manager for a public agency is not a distinct occupation or business, and is work usually done under the principal's direction"; 11) RGS and CCSD's independent contractor agreement provided for an option to extend the agreement on a month-to-month basis, past the specified four-month term; and 12) although CCSD paid Fuller indirectly through RGS, Fuller was still paid by the hour, not the job. Accordingly, the Board and ALJ concluded that the weight of the factors supported a finding that Fuller was a CCSD employee. Further, because the Board determined CCSD should have known Fuller was improperly classified, it imposed additional liability on CCSD.