Labor and Employment Litigation Update

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Suzanne Solomon, Partner, Liebert Cassidy Whitmore

LCW LIEBERT CASSIDY WHITMORE

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Suzanne Solomon
LIEBERT CASSIDY WHITMORE
135 Main Street, Seventh Floor
San Francisco, CA 94105
Telephone: (415) 512-3000

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DISCRIMINATION AND HARASSMENT

General Information about Discrimination and Harassment can be found in the Municipal Law Handbook, Chapter 4, "Personnel," Section VIII, "Antidiscrimination Laws." http://onlaw.ceb.com/onlaw/gateway.dll?f=templates&fn=default.htm&vid=OnLAW:CEB

District Court Improperly Entered Judgment Against Bank Employee Claiming Harassment by Bank Customer

Christian v. Umpqua Bank (9th Cir. 2020) 984 F.3d 801

Jennifer Christian began working for Umpqua Bank (Umpqua) in 2009 as a Universal Associate. In late 2013, a customer asked Christian to open a checking account for him. Afterwards, the customer began visiting the bank to drop off notes for Christian. These notes stated that Christian was the most beautiful girl he had ever seen and that he would like to go on a date with her. Christian and her colleagues began to feel concerned, and Christian told the customer that she was not going to go on a date with him. However, the behavior continued and the customer eventually sent Christian a long letter. Christian showed the letter to her manager, a corporate trainer, and other colleagues. The corporate trainer warned her to be careful.

Around the same time, Christian learned from colleagues that the same customer had visited another branch of the bank repeatedly asking how he was going to get a date with her. The corporate trainer advised Christian to call the police, and she became increasingly concerned for her safety. Nonetheless, on Valentine's Day, the customer sent Christian flowers and a card. Christian again shared the card with her manager, the corporate trainer, and other colleagues.

Subsequently, Christian told her manager that she did not want the customer to be allowed to return to the bank. According to Christian, the manager promised he would not allow the customer to return, but never advised the customer of that decision. Despite Christian's efforts, the customer continued to deliver her letters and visit the bank. On one occasion, the customer also attended a charity event where Christian was volunteering.

A few days after the charity event, the customer returned to the bank to reopen his account that another branch had closed. Rather than ask the customer to leave, Christian's manager instructed her to open the new account for him. After the customer continued coming

to the bank with no apparent banking business to do, Christian reported the situation to the regional manager of another region.

Christian called in sick and refused to return to work until a no-trespassing order was implemented to bar the customer from visiting the bank. However, her manager ordered her to come to work and directed her to "hide in the break room" if the customer returned. Christian also requested in writing that the bank close the customer's account and obtain a no-trespassing order against him. In addition, Christian asked that she be transferred to a different bank location, even though the only position available was for fewer hours per week. While Umpqua eventually closed the customer's account and transferred Christian to a new location, she resigned. She said that her doctor advised that it was bad for her health to continue working there.

Christian sued the bank for gender discrimination in violation Title VII, among other claims. Title VII prohibits sex discrimination in employment. To establish sex discrimination under a hostile work environment theory, an employee must show she was subjected to sex-based harassment that was sufficiently severe or pervasive to alter the conditions of employment, and that her employer was liable for this hostile work environment. To determine whether conduct is sufficiently severe or pervasive, courts consider the totality of the circumstances, including: 1) the frequency of the conduct; 2) its severity; 3) whether it is physically threatening or humiliating; and 4) whether it unreasonably interferes with an employee's work performance.

The district court entered judgment in favor of Umpqua, finding that no reasonable juror could conclude the customer's conduct was severe or pervasive enough to create a hostile work environment. Christian appealed.

On appeal, the Ninth Circuit found that the district court erred in three respects. First, the district court erred in isolating the various harassing incidents. The harassment Christian endured involved the same type of conduct, occurred relatively frequently, and was perpetrated by the same individual. Further, Christian experienced the harassment not as isolated and sporadic incidents, but rather as an escalating pattern of behavior that caused her to feel afraid in her own workplace.

Second, the Ninth Circuit concluded the district court erred in declining to consider incidents in which Christian did not have any direct, personal interactions with the customer, such as when he sent her flowers or would sit in the bank lobby. Specifically, the court noted that Title VII does not impose any such requirement for direct, personal interactions.

Finally, the Ninth Circuit determined the district court erred in neglecting to consider evidence of interactions between the customer and third parties, such as the customer's repeated visits to the other bank branch to badger Christian's colleagues about her. Offensive comments do not all need to be made directly to an employee for a work environment to be considered hostile. Christian learned from her colleagues that the customer was persistently contacting them to obtain information about her. It did not matter she did not witness that conduct firsthand.

In addition, the court concluded that Umpqua was liable for this harassment. An employer may be held liable for sexual harassment on the part of a private individual, such as a customer, if the employer either ratifies or acquiesces in the harassment by not taking immediate or corrective actions. The court noted that while Umpqua may have decided not to allow the customer back after he sent Christian flowers, Umpqua did not implement that decision by actually informing the customer not to return or by closing his account. Additionally, Umpqua did not take any other action to end the harassment, such a creating a safety plan for Christian or discussing the situation with bank security. Moreover, while the bank eventually transferred Christian to a different location and closed the customer's account, the Court noted that Umpqua's "glacial pace" was too little, too late. It also noted that the bank placed the bulk of the burden on Christian herself.

Accordingly, the Ninth Circuit determined that the district court improperly entered judgment for Umpqua on Christian's Title VII gender discrimination claim.

Terminated Employee Could Not Establish Claims Under The CFRA Or FEHA Because He Failed to Establish That He Requested and Was Denied Leave
Choochagi v. Barracuda Networks, Inc. (2020) 60 Cal.App.5th 444

In March 2012, Barracuda Networks, Inc. (Barracuda) hired George Choochagi as a Technical Support Manager. In May 2013, Choochagi reported to HR that his former supervisor had made inappropriate sexual comments to him and suggested that he was not "man enough" for his position. Choochagi's former supervisor also told him he was not part of the "boys club."

In January 2014, Choochagi sought medical treatment for severe migraine headaches and eye irritation. Choochagi notified the Director of Sales Engineering and one of his supervisors that he needed to take time off from work. Barracuda gave Choochagi the time off he initially requested. But when Choochagi approached his supervisors about taking additional time off, they seemed "irritated" and attempted to force Choochagi to quit. One month later, a supervisor told Choochagi he "must decide whether he wants to be fired or gracefully quit." Choochagi

refused to resign and maintained that he had performed well. Barracuda terminated his employment.

Choochagi initiated a lawsuit against Barracuda alleging, among other things: 1) disability and gender discrimination, retaliation, and failure to prevent discrimination and retaliation under the Fair Employment and Housing Act (FEHA); and 2) interference and retaliation under the California Family Rights Act (CFRA).

Barracuda moved to dismiss the case on the grounds that Choochagi was a poorly performing employee. Barracuda argued that while Choochagi would follow explicit instructions, he could not proactively solve problems or come up with creative solutions. Barracuda also presented evidence that Choochagi's supervisors and team had immediately felt misgivings about his leadership. For example, Choochagi's performance evaluation indicated he "demonstrated poor leadership skills" and had not improved in key areas of concern.

As to medical leave, Barracuda argued that Choochagi never specifically requested it. Barracuda said that Choochagi did inform his supervisors he was experiencing headaches and needed to follow up with his doctors. According to Barracuda, Choochagi only mentioned taking time off in one email and ultimately took the leave as requested.

Finally, Barracuda argued that it properly investigated Choochagi's complaint about his supervisor. Even though the supervisor denied saying anything inappropriate, Barracuda reminded the supervisor of its policies and instructed him not to have any type of sexually explicit communication in the workplace.

The trial court entered judgment for Barracuda on all but two of Choochagi's claims. The case proceeded to trial on the remaining claims, including Choochagi's disability discrimination claim. The jury found Barracuda had no liability. After the trial court denied Choochagi's request for a new trial, Choochagi appealed.

As relevant here, the California Court of Appeal considered the merits of Choochagi's claims regarding CFRA interference, CFRA retaliation, FEHA retaliation, and FEHA failure to prevent discrimination and retaliation. With respect to Choochagi's CFRA claims, the Court of Appeal determined that the trial court properly found for Barracuda. To establish CFRA interference, an employee must prove: 1) he is entitled to CFRA leave rights; and 2) the employer interfered with those rights. Similarly, to establish a cause of action for CFRA retaliation, the employee must prove: 1) the employer was a covered employer; 2) he was

eligible for CFRA leave; 3) he exercised his right to take qualifying leave; and 4) he suffered an adverse employment action because he exercised the right to take CFRA leave.

The court noted that Choochagi could not establish either of these claims because he failed to present evidence that he asked for and was denied leave. While Choochagi mentioned his headaches and sent a single email requesting time off, these facts would not have alerted Barracuda to the CFRA criteria that an employee was requesting leave to take care of his own serious health condition that made him unable to perform his job functions. Further, because the court found Choochagi did not request leave, there could be no adverse employment action taken because of a request for leave. Accordingly, the court found the trial court properly entered judgment for Barracuda on these claims.

The Court of Appeal also concluded the trial court properly decided Choochagi's FEHA retaliation and failure to prevent claims. First, Choochagi could not establish FEHA retaliation because the individuals responsible for terminating his employment were not aware of the HR complaint Choochagi had made against his former supervisor. Thus, Choochagi could not establish the requisite causal link between his protected activity and termination. Second, Choochagi could not establish a claim for failure to prevent discrimination and retaliation since Barracuda submitted evidence it had anti-discrimination policies and procedures in place and that its HR department directed an immediate investigation into Choochagi's complaint. The Court of Appeal concluded Choochagi's evidentiary objections were without merit.

Teacher With Electromagnetic Hypersensitivity Could Pursue Only Her Reasonable Accommodation Claim

Brown v. Los Angeles Unified Sch. Dist. (2021) 60 Cal.App.5th 1092

Laurie Brown has been a teacher employed by the Los Angeles Unified School District (LAUSD) since 1989. In 2015, LAUSD installed an updated Wi-Fi system at the school where Brown taught that would accommodate the iPads, Chromebooks, and tablets LAUSD intended to provide its students. During public comment before LAUSD installed the new system, an environmental scientist and expert on electromagnetic frequency stated she could not support the installer's conclusions about the safety of the new Wi-Fi system. LAUSD's medical personnel also indicated they were uncertain about any long-term effects the Wi-Fi system may have on students and staff, but LAUSD promised to continue actively monitoring any developments.

Soon after LAUSD installed the new system, Brown had chronic pain, headaches, nausea, itching, ear issues, and heart palpitations. Brown thought the new Wi-Fi caused her symptoms. Brown reported her symptoms, and her school granted her leave from work "due to these

symptoms, on an intermittent basis, for several days thereafter." After Brown returned to work the following week, she immediately fell ill again. Brown's doctor subsequently diagnosed her with electromagnetic hypersensitivity, which is also referred to as "microwave sickness."

Brown then requested accommodations. LAUSD held its first interactive process meeting with Brown on July 15, 2015. Following the meeting, LAUSD agreed to disconnect the Wi-Fi access points in Brown's assigned classroom and in an adjacent classroom. LAUSD also agreed to use a hardwired computer lab with Wi-Fi turned off. However, Brown alleged that LAUSD's accommodations were not reasonable and did not work. For example, while LAUSD disconnected the routers in Brown's classroom and one adjoining classroom, other classrooms nearby continued to have their routers active. Another one of Brown's physicians subsequently placed her on a medical leave of absence for three months.

While on leave, Brown filed a second request for accommodation. Brown requested that LAUSD further reduce her exposure using paints and other forms of shielding materials to block Wi-Fi and radio frequencies in her classroom. After another interactive process meeting, LAUSD denied Brown's second request for accommodation, relying on testing the installer performed that indicated the system was safe. Brown appealed the denial, and LAUSD agreed to provide a "neutral expert EMF inspection for further microwave measurements." However, the parties could not reach an agreement about the expert to use. During this time, a third physician extended Brown's medical leave through June 2016.

Brown expressed frustration that LAUSD was retracting an accommodation it had promised and claimed she could not return to work without being overcome with crippling pain. She also alleged she was forced to go out on a disability leave, which exhausted her approximately 800 hours of accrued paid leaves. Brown then sued LAUSD, alleging it discriminated against her based on her electromagnetic hypersensitivity, failed to accommodate her condition, and retaliated against her in violation of the Fair Employment and Housing Act (FEHA). The trial court dismissed Brown's lawsuit finding she failed to plead sufficient facts to support each of her claims, and Brown appealed.

On appeal, the Court of Appeal concluded that Brown could not establish her claims for disability discrimination or retaliation. For both discrimination and retaliation claims under the FEHA, an employee must show that the employee took an adverse employment action because of the employee's membership in a protected classification or protected activity. However, the court concluded Brown could not make this showing. For Brown's disability discrimination claim, the court noted she could not establish an "adverse employment action" because she merely alleged that LAUSD would not reasonably accommodate her disability. The court reasoned Brown was improperly conflating an "adverse employment action" with a failure to

accommodate claim. Further, the court found that Brown did not show any facts from which to infer any discriminatory intent. This is because Brown did not have any facts to suggest that LAUSD: 1) clung to any belief that the campus was safe; or 2) refused to accommodate her because it was biased against her as a person with a disability.

However, the Court of Appeal concluded that Brown adequately alleged facts sufficient to support a claim for failure to provide reasonable accommodation. Brown alleged that LAUSD did agree on a reasonable accommodation (to hire an independent consultant to determine where on-campus exposure to the electromagnetic frequencies was most minimal) and then changed its mind, deciding the campus was "safe." Since these allegations were sufficient to support a claim for failure to accommodate, the court reversed the trial court's decision regarding this claim only.

Employee Could Not Establish That Reduction In Force Was Discriminatory
Foroudi v. Aerospace Corp. (2020) 57 Cal.App.5th 992

David Foroudi worked as a senior project engineer at The Aerospace Corporation (Aerospace). Foroudi's supervisors counseled him regarding deficiencies in his performance and warned him that failure to improve could result in corrective action. Under the collective bargaining agreement, Aerospace management assigned all bargaining unit employees, including Foroudi, to a value ranking based on their performance. "Bin 1" contained the highest-ranked employees and "bin 5" contained the lowest. In 2010 and 2011, Foroudi was ranked as bin 5.

In late 2011, Aerospace learned that its funding would be significantly impacted by Department of Defense budget cuts. In response, Aerospace began implementing a company-wide reduction in force (RIF). The pool of eligible employees was divided into those ranked in bins 4 and 5 in 2011; new employees who were unranked; and employees on displaced status. Management then ranked RIF-eligible employees based on several criteria, including bin ranking, performance issues, and skills and expertise. Foroudi's managers ultimately selected him for the RIF because he was in the lowest ranking bin, he did not have a strong background in algorithmic applications for GPS navigation, and he had received prior performance counseling. Aerospace notified Foroudi he would be laid off in March 2012. In Foroudi's division, one laid off employee was in his 80's, two were in their 70's, 17 were in their 60's, 46 were in their 50's, 24 were in their 40's, and six were in their 30's. Foroudi's duties were given to an employee who was 14 years younger than Foroudi and who was considered an expert in GPS technology.

In January 2013, Foroudi filed a charge with the California Department of Fair Employment and Housing (DFEH) alleging discrimination, harassment, and retaliation because of his age, association with a member of a protected class, family care or medical leave, national origin, and religion. He also filed a charge of discrimination with the U.S. Equal Employment

Opportunity Commission (EEOC). More than one year later, Foroudi filed an amended DFEH charge alleging that he was laid off because of his protected statuses.

In August 2014, Foroudi and four other former Aerospace employees filed a civil complaint against Aerospace, alleging among other claims, age discrimination in violation of the Fair Employment and Housing Act (FEHA). The complaint also alleged that Aerospace used the RIF as pretext to hide its motivation to terminate Foroudi because of his age, and that the RIF had a disparate impact on employees over the age of 50. In January 2015, the employees filed an amended complaint to add a cause of action under the Federal Age Discrimination in Employment Act and class action allegations.

After a federal court dismissed the employees' disparate impact and class allegations because they were not included in the DFEH charge, the matter was remanded to California superior court. Foroudi subsequently contacted the DFEH and EEOC to amend his charges to include class and disparate impact allegations, but the superior court did not let Foroudi file an amended civil complaint.

Aerospace then moved to dismiss Foroudi's case. Aerospace claimed that he could not establish a prima facie case of age discrimination, nor provide substantial evidence that Aerospace's reasons for the RIF were a pretext for age discrimination. Foroudi argued that discriminatory intent was evident because: 1) he was more experienced and qualified than the younger employee who took over his work; 2) his statistics showed the RIF had a disparate impact on older workers; 3) Aerospace did not rehire him after he was laid off; and 4) his managers gave "shifting" reasons for selecting him for the RIF. The superior court found in favor of Aerospace. Foroudi appealed.

The California Court of Appeal affirmed the superior court's ruling. First, the court upheld the decision to deny Foroudi the opportunity to amend his complaint. The court noted that the EEOC did issue Foroudi a new right-to-sue letter after the federal court remanded the case. But, the exhaustion of EEOC remedies did not satisfy the requirements for Foroudi's state law FEHA claims. While Foroudi attempted to add the class claims to the DFEH charge, he did so more than three years after the DFEH had permanently closed his case and nearly two years after he filed his civil complaint. Foroudi could not argue his charge including the class and disparate impact claims "related back" to his prior DFEH charge because he was asserting new theories that could not be supported by his prior DFEH charge. Accordingly, Foroudi could not show he exhausted his administrative remedies as to his class and disparate impact claims.

Next, the court agreed to enter judgment in favor of Aerospace. The court reasoned that even assuming Foroudi could establish a prima facie case, Aerospace had legitimate, nondiscriminatory reasons for Foroudi's termination that Foroudi could not show were

pretextual. Aerospace's evidence showed it instituted the company-wide RIF after learning it faced potentially severe cuts to its funding and selected Foroudi using standardized criteria.

The court found that Foroudi could only proceed by offering "substantial evidence" that Aerospace's reasons for terminating Foroudi were untrue or pretextual and that Foroudi had not meet this burden. For example, the court noted that he was not replaced by a younger employee. Rather, Aerospace eliminated Foroudi's position and created a new position that combined Foroudi's former duties with the duties of an existing employee. Further, the court noted that for Foroudi's statistical evidence to create an inference of intentional discrimination, it had to "demonstrate a significant disparity" and "eliminate nondiscriminatory reasons for the apparent disparity." The statistical evidence Foroudi offered did not account for the age-neutral factors that were considered in connection with the RIF, such as an employee's experience, performance, and the anticipated future need for the employee's skill.

For these reasons, the Court of Appeal affirmed the superior court's ruling and awarded Aerospace its costs on appeal.

City May Deduct Post-Termination Earnings From Award In Wrongful Termination Case.
Morgado v. City & County of San Francisco (2020) 53 Cal.App.5th 1216

In 2017, the California Court of Appeal concluded that the City and County of San Francisco wrongly terminated Paulo Morgado from his job as a police officer. As a remedy, the court directed the City to vacate Morgado's termination and reinstate him pending an administrative appeal. The City did reinstate Morgado. But, the City then suspended him without pay retroactive to his 2011 termination. Morgado argued that the retroactive suspension was inconsistent with the court order. The court agreed and issued an order holding the City in contempt. The contempt order required the City to "unconditionally" vacate Morgado's termination and suspension, and compensate him with front pay and benefits he would have earned between his termination and court victory.

Next, Morgado argued that the City was only partially complying with the court's order. Instead of paying him in full, the City offset the payment owed to Morgado based on his post-termination earnings as a mortgage broker. Morgado argued that the City used his tax returns for the years he was employed as a broker and suspended as a police officer to deduct $181,402. Morgado obtained a second order of contempt against the City directing it to repay the amount deducted. That ruling made its way to the California Court of Appeal.

On appeal, the sole issue was whether the "front pay"- or the future wages Morgado lost for the time between his termination and his court victory-- was subject to an $181,402 deduction for the side income he earned during that time. In public and private employment cases, the governing remedial principle is that the remedy should return the employee to the financial position he would have been in had the employer's unlawful conduct not occurred. Employees, however, are generally not entitled to recover in excess of make-whole damages.

The court first considered whether an employer can offset front pay. Morgado argued that front pay is immune to offset. The Court of Appeal disagreed. The court noted that there was no basis "in logic or fairness" to exclude front pay from the principle of "make-whole relief." The court reasoned that the purpose is to make a wrongfully terminated employee whole. Thus, front pay must be subject to deduction to avoid overcompensation.

The court then evaluated whether the City could take a deduction for income generated by "moonlighting" or side employment. The court noted that if an employee would have earned such income regardless of his employment status, the income cannot be deducted from the wrongful termination compensation. Here, the court reasoned that if Morgado had not been terminated and suspended, he would not have been able to take up secondary employment as a mortgage broker and he would not have earned the disputed income. Thus, the City was justified in deducting the compensation from his front pay award.

Finally, the court analyzed whether the City calculated the $181,402 deduction properly. The court noted that the $181,402 was based on the total pre-tax income Morgado made as a broker. The court concluded that taking away $181,402 from Morgado, when he earned only a portion of that figure after taxes, would deprive him of money that he was properly owed. The court remanded the issue for the parties to determine the proper post-tax amount of the deduction.

Employee Did Not Show Employer Willfully Violated Her FMLA Rights
Olson v. United States by & through Dep't of Energy (9th Cir. Nov. 23, 2020) 980 F.3d 1334

Andrea Olson contracted to work with the Bonneville Power Administration (BPA) as a Reasonable Accommodation Coordinator in 2010. In this role, Olson assisted employees in need of accessibility accommodations at work, trained managers and employees on their rights and responsibilities, and maintained records and documentation. In late 2011, BPA declined to renew Olson's contract for another year. Instead, BPA required Olson to work through MBO Partners, a payroll service provider that had a master services agreement with BPA to facilitate certain independent contractors.

In 2013, Olson began experiencing anxiety, and in March 2014, Olson made a formal accommodation request through MBO Partners. Among other things, Olson requested to telework. MBO Partners subsequently informed BPA's Director of Human Resources of Olson's request. Shortly thereafter, Olson's anxiety increased, and she informed BPA she would be out of the office for two weeks. Olson then formally invoked leave under the Family and Medical Leave Act (FMLA) through MBO Partners, and she requested that MBO Partners inform her before sharing information about her condition or leave with BPA. Olson informed BPA that she would be out of the office for two more weeks and that she hoped to start a transition plan soon.

While on leave, Olson performed limited teleworking for which she billed BPA. However, because BPA did not have an expected date for Olson's return, it began exploring whether an existing employee could take on Olson's responsibility. After Olson contacted BPA's Equal Employment Opportunity office to discuss filing a complaint, BPA sent Olson an email stating that her network access had been terminated in accordance with security policies. Despite termination of her network access, Olson still billed BPA for three hours of her time the next month.

In early May 2014, Olson told BPA that she intended to attempt a trial work period that she and her physician had agreed upon. BPA responded that she was under a "stop work" order and that she would have to meet with a BPA manager before returning to work. On May 27, 2014, Olson formally filed an EEO complaint alleging that BPA had violated her FMLA rights. While BPA agreed to allow Olson to telework more on June 11, 2014, she did not accept the offer and did not return to work. Nearly three years later, on March 13, 2017, Olson filed a lawsuit claiming that BPA willfully interfered with her rights under the FMLA.

The district court concluded that BPA never provided Olson with notice of her FMLA rights. However, it also found that Olson's lawsuit was untimely because BPA's conduct was not willful. Specifically, the court noted that that BPA consulted with its legal department about how to proceed during Olson's FMLA leave, opted not to terminate her, offered her a trial work period, and made efforts to restore her to an equivalent position. Olson appealed.

In general, the FMLA provides job security to employees who must be absent from work because of their own illness or to care for family members who are ill. FMLA interference can take many forms, such as using FMLA leave as a negative factor in hiring, promotions, and disciplinary actions. Employers also have a duty to inform employees of their entitlements under the FMLA. However, failure to provide notice alone is not a cause of action; rather, employees must prove that the employer interfered with their exercise of FMLA rights.

On appeal, Olson argued that BPA's lack of notice interfered with her FMLA rights because she would have structured her FMLA leave differently had she been given notice and because BPA's actions during her FMLA leave exacerbated her FMLA-qualifying condition of anxiety.

The Ninth Circuit panel, however, determined that it did not need to decide whether BPA's failure to give notice constituted inference. Under the FMLA, a lawsuit must generally be brought within two years "after the date of the last event constituting the alleged violation". This deadline is extended to three years for "willful" violations. The court reasoned that because the "last event constituting the alleged violation" occurred no later than June 11, 2014 (when BPA emailed Olson allowing her to telework more), she would have to show that BPA's conduct was willful to avoid the statutory time bar for her March 2017 lawsuit.

The Ninth Circuit concluded that the district court was correct in finding Olson could not prove willfulness. For a willful violation to occur, the employee must show the employer knew or showed reckless disregard for whether its conduct was prohibited by statute. The court noted that the district court applied this standard and found little evidence that BPA knew or showed reckless disregard for whether it was violating Olson's FMLA rights. Accordingly, the Ninth Circuit concluded that Olson's claim was indeed barred by the statute of limitations.

RETALIATION

General Information about Retaliation can be found in the Municipal Law Handbook, Chapter 4, "Personnel," Section VI, "Employee Rights Against Retaliation."
http://onlaw.ceb.com/onlaw/gateway.dll?f=templates&fn=default.htm&vid=OnLAW:CEB

Ninth Circuit Addresses How First Amendment Rights Impact An Agency's Ability To Discipline A Law Enforcement Officer For A Social Media Post
Moser v. Las Vegas Metropolitan Police Department (9th Cir. Jan. 12, 2021) 984 F.3d 900

In 2015, an individual shot a police officer with the Las Vegas Metropolitan Police Department (Department). Department officers later found and arrested that suspect. Upon seeing news of the suspect's capture, Charles Moser, a SWAT sniper with the Department, commented the following on a friend's Facebook post about the shooting: "It's a shame he [the suspect] didn't have a few holes in him[.]" Moser made the comment through his personal Facebook profile while off-duty at home.

An anonymous tip notified the Department of Moser's comment, prompting an internal investigation wherein Moser admitted his comment was inappropriate, but explained that he was expressing frustration that the suspect ambushed and shot one of the Department's officers. Moser also removed the comment from social media approximately three months after posting it. Based on the investigation's findings, Moser was transferred out of SWAT and placed back on patrol out of concern that his comment indicated he had become "a little callous to killing." Upon his dismissal from the SWAT team, Moser sued the Department, alleging violation of his free speech right under the First Amendment.

The district court granted summary judgment for the Department, holding that the government's interest in employee discipline outweighed Moser's First Amendment right under the applicable balancing test for speech by government employees. Moser appealed, and the Ninth Circuit reversed the district court's grant of summary judgment.

The Ninth Circuit first identified the framework for considering the First Amendment rights of government employees. An employee must first establish: (i) he spoke on a matter of public concern; (ii) he spoke as a private citizen rather than a public employee; and (iii) the relevant speech was a substantial or motivating factor in the adverse employment action. Once this is established, the burden then shifts to the government to show that it: (iv) had an adequate justification for treating the employee differently than other members of the general public; or (v) it would have taken the adverse employment action even absent the protected speech. If the employer cannot meet this burden, then the employee's speech is protected under the First Amendment.

On appeal, Moser and the Department only disputed the fourth factor of this test, which requires courts to balance the First Amendment rights of the employee against the government's administrative interest in avoiding disruption and maintaining workforce discipline. As part of this balancing test, the Ninth Circuit noted that courts may consider the content of a government employee's speech to determine how much weight to give the employee's free speech interests. However, the Ninth Circuit held that it could not balance Moser's First Amendment interests against the Department's administrative interests due to two factual disputes.

First, the Ninth Circuit held a factual dispute existed as to the meaning of Moser's Facebook comment. The Department alleged Moser's comment objectively advocated for unlawful violence by law enforcement, and therefore, is not at the core of First Amendment protection. In contrast, Moser contended that his comment merely expressed frustration at the dangers law enforcement officers face in the line of duty, which should receive higher First Amendment protection.

Second, the Ninth Circuit held another factual dispute existed regarding whether Moser's Facebook comment would cause disruption to the Department. The Ninth Circuit noted that the Department failed to provide enough evidence to support its prediction that the comment would cause disruption in the workplace because there was no evidence that anyone knew about the post other than the individual who anonymously notified the Department of the comment. The Court also noted that there was little chance the public would have seen the comment because Moser deleted it.

Based on these two factual disputes, the Ninth Circuit held that the district court erred in granting summary judgment to the Department and remanded the case to the district court.

Qualified Immunity Did Not Apply To First Amendment Retaliation Claim
Sampson v. County of Los Angeles (9th Cir. 2020) 974 F.3d 1012

Natia Sampson is the paternal aunt of a minor named H.S. In 2014, after learning that H.S.'s parents had been incarcerated, Sampson volunteered to become H.S.'s legal guardian. The Los Angeles County juvenile dependency court ordered H.S. to be placed in Sampson's care pending Sampson's guardianship application. The Los Angeles County Department of Children and Family Services (DCFS) assigned social worker Ahmed Obakhume to H.S.'s case.

While Obakhume was assigned to H.S.'s case, he commented on Sampson's appearance and marital status, urged her to end her marriage, touched her inappropriately, and attempted to coerce her into riding in his vehicle. After several months of unwanted advances, Sampson complained about Obakhume's conduct to his supervisor, Nicole Davis. In responding to Sampson's complaint, Davis said that Obakhume was "one of her best" social workers and the only one willing to work with H.S.'s biological parents. Obakhume's conduct continued.

Sampson also experienced two other issues dealing with DCFS officials. One issue was that DCFS required Sampson to supervise visits between H.S. and the biological parents, even though Sampson expressed her unwillingness to do so. The other issue was that when Sampson had difficulties obtaining a special type of funding for caregivers, DCFS officials continued to incorrectly tell her there were unsatisfied requirements. Despite Sampson's numerous complaints and DCFS's assurances they would remedy these issues, they never did.

In August 2015, the juvenile court granted legal guardianship of H.S. to Sampson. Thereafter, H.S.'s biological father absconded with H.S. in October 2015 during a visit that Obakhume had said could be unsupervised. Obakhume visited Sampson's house to discuss the incident and told her that the social workers "stick together" and "cover for each other."

A month later, with Davis' permission, Obakhume filed unsupported allegations that Sampson was neglecting and abusing H.S. DCFS then sought an order from the juvenile court to remove H.S. from Sampson's care. After significant litigation and a brief period in which H.S. was removed from Sampson's custody, the California Court of Appeal returned H.S. to Sampson's care realizing that DCFS's allegations of abuse and neglect were unfounded.

Sampson subsequently sued DCFS and four individual DCFS employees, including Obakhume and Davis, under 42 U.S.C. § 1983. Sampson alleged sexual harassment in violation of the Equal Protection Clause of the Fourteenth Amendment, retaliation in violation of the First Amendment, and other constitutional claims. The district court granted qualified immunity to DCFS on Sampson's First and Fourteenth Amendment claims and dismissed all other causes of action. Sampson appealed the district court's dismissal based on qualified immunity for her Fourteenth Amendment equal protection and First Amendment retaliation claims.

In order to state a claim under Section 1983, Sampson had to plausibly allege that she was deprived "of a federally protected right" and that the "alleged deprivation was committed by a person acting under color of state law." In Section 1983 actions, qualified immunity protects government officials from liability for civil damages so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. To determine whether qualified immunity exists, a court will consider whether: 1) the person suing has plausibly alleged a violation of a constitutional right; and 2) the constitutional right was clearly established at the time.

The Ninth Circuit vacated the district court's grant of qualified immunity to DCFS on Sampson's First Amendment retaliation claim. The court reasoned that at the time of DCFS's misconduct, it was clearly established that the First Amendment prohibits public officials from threatening to remove a child from an individual's custody to chill protected speech. In other words, DCFS should have known that it was unconstitutional to retaliate against Sampson for speaking out about the sexual harassment she allegedly suffered. The court then remanded the claim to the district court to determine whether Sampson could meet the first prong of the test, namely whether she plausibly alleged a retaliation claim under the First Amendment.

Regarding Sampson's Fourteenth Amendment equal protection claim, the Ninth Circuit affirmed the district court's grant of qualified immunity. The court noted that unlike Sampson's retaliation claim, the right of private individuals to be free from sexual harassment at the hands of social workers was not clearly established at the time. However, the court nonetheless determined that moving forward, public officials, including social workers, violate the Equal Protection Clause of the Fourteenth Amendment when they sexually harass individuals while providing them social services.

Employer's Failure To Investigate Whether A Conviction Was Judicially Dismissed Indicates Retaliation

Garcia-Brower v. Premier Auto. Imports of CA, LLC (2020), 55 Cal. App.5th 961

Tracey Molina was hired by Premier Automotive Imports of CA, LLC (Premier), an automobile retailer, in January 2014. On her job application, Molina did not disclose a dismissed conviction for misdemeanor grand theft. The application asked if the applicant had ever pleaded guilty, or been convicted of, a misdemeanor or felony. But it also instructed that "the question should be answered in the negative as to any conviction for which probation has been successfully completed . . . and the case has been dismissed."

After passing a background check indicating that she had not sustained any felony or misdemeanor convictions in the past seven years, Molina began working at Premier in February 2014. However, after four weeks with the company, the Department of Motor Vehicles (DMV) mistakenly reported to Premier that Molina had an active criminal conviction for grand theft. Molina's conviction was officially dismissed in November 2013, but the Department of Justice did not enter the dismissal in its database until March 25, 2014. Premier double-checked its background report, which indicated that Molina did not have any convictions. But Premier did not investigate the discrepancy between its background report and the DMV's report, nor did it contact the DMV for more information. Premier terminated Molina for falsification of her job application, despite Molina's several explanations that her conviction had been judicially dismissed. When the DMV issued Premier a corrected notice three weeks later, Premier did not rehire Molina.

Molina filed a retaliation complaint with the Labor Commission in April 2014. In December 2016, the Labor Commissioner determined that Premier had unlawfully discharged Molina and ordered Premier to reinstate her with back pay. Premier refused to comply with the order. The Labor Commissioner then filed an enforcement action on Molina's behalf for violations of Labor Code Sections 98.6 and 432.7. The trial court found in favor of Premier on the grounds that there was no evidence Premier was aware at the time it terminated Molina that her conviction had been judicially dismissed. The Labor Commissioner appealed.

Labor Code Section 432.7 prohibits an employer from asking a job applicant to disclose any conviction that has been judicially dismissed, and bars an employer from using any record of a dismissed conviction as a factor in the termination of employment. Section 98.6 prohibits an employer from retaliating against an applicant or employee because the applicant or employee exercised a right afforded to him or her under the Labor Code.

The Court of Appeal determined the trial court erred because the Labor Commission had presented sufficient evidence to prove that: 1) Premier was aware or had reason to believe that Molina's criminal conviction had been judicially dismissed; 2) Premier retaliated against Molina for failing to disclose her dismissed conviction; and 3) the company used the dismissed conviction as an impermissible factor in her termination.

The court noted that Premier had credible information – in the form of its own background check – that suggested the DMV letter Premier received was incorrect or incomplete. Molina also testified that she explained to Premier several times that her conviction was dismissed. However, Premier took no steps to contact the DMV or otherwise investigate the discrepancy before terminating Molina on the basis of a "falsified" job application.

Further, the court noted that there was sufficient evidence to establish that Premier's employment decision was substantially motivated by Molina's failure to disclose her dismissed conviction on her job application. For example, the court pointed to evidence that when Molina was gathering her belongings to leave, she apologized and her supervisor responded, "You should have told me." Premier also explicitly indicated that Molina was fired for "falsification of job application" just days after it received the DMV letter, and the company refused to rehire her even after the DMV corrected its mistake. For these reasons, the Court determined that the trial court improperly entered judgment in Premier's favor on the Labor Commissioner's claims. The court remanded the case for a new trial.

EMPLOYEE EVALUATIONS AND DISCIPLINE

General Information about Evaluations and Discipline can be found in the Municipal Law Handbook, Chapter 4, "Personnel," Section IX, "Evaluating and Disciplining Employees" as well as Section X, "Employee Separation and Termination."
http://onlaw.ceb.com/onlaw/gateway.dll?f=templates&fn=default.htm&vid=OnLAW:CEB

Correctional Officer's Termination Upheld Due To Domestic Violence Conviction.
Hernandez v. State Personnel Board, et al., (2021) 60 Cal.App.5th 873

In October 2015, Anthony Hernandez, a Correctional Sergeant with the California Department of Correction and Rehabilitation (Department), choked his girlfriend of five months. Hernandez and his girlfriend told police that Hernandez lived with her approximately four or five days per week. Thereafter, Hernandez pled nolo contendere to a misdemeanor violation of Penal Code Section 273.5, which criminalizes the infliction of bodily injury on a spouse or cohabitant, or on another intimate partner in an "engagement or dating relationship."

The Department then terminated Hernandez. The Department stated that the conviction rendered him unable to possess a firearm. A federal law generally bans a person convicted of a misdemeanor crime of domestic violence from possessing any gun or ammunition. The Department noted that as a correctional officer, Hernandez must be able to carry a firearm at work.

Hernandez appealed to the State Personnel Board (Board). While the appeal was pending, the California Department of Justice and the Bureau of Alcohol, Tobacco and Firearms both notified Hernandez that federal law prohibited him from possessing a firearm. An administrative law judge also concluded that Hernandez was prohibited from possessing a firearm and held that his termination was proper. The Board adopted the judge's proposed decision, and Hernandez filed a petition for writ of administrative mandate with the trial court. The trial court denied the writ petition and Hernandez appealed.

The California Court of Appeal affirmed the trial court's decision. The Court of Appeal noted that a court should not disturb the penalty imposed on Hernandez in a mandamus proceeding unless the Department prejudicially abused its discretion.

Since the Department terminated Hernandez based on his inability to possess a firearm under federal law, the Court of Appeal examined federal law addressing domestic violence. Specifically, the Court of Appeal examined Title 18, Section 921(a), of the U.S. Code, which defines a crime of domestic violence as one involving the use or threatened use of a deadly weapon by (i) a current or former spouse, (ii) a person who is cohabitating with or has cohabitated with the victim as a spouse, or (iii) a person "similarly situated to a spouse" of the victim. After analyzing multiple cases confirming that a "live-in" boyfriend or girlfriend qualifies as someone "similarly situated" to a spouse under Section 921(a), the Court of Appeal held that Hernandez was a person "similarly situated to a spouse." Further, although Hernandez and his girlfriend only lived together for four or five days per week, the Court held this was sufficient.

Based on these facts, the Court of Appeal held that there was no abuse of discretion because the Department's decision to terminate Hernandez was correct as a matter of law.

WAGE AND HOUR

General Information about Wage and Hour issues can be found in the Municipal Law Handbook, Chapter 4, "Personnel," Section III, "Wage and Hour Laws."
http://onlaw.ceb.com/onlaw/gateway.dll?f=templates&fn=default.htm&vid=OnLAW:CEB

U.S. DOL Opinion Letter Says Certain Travel Time Between Home Office And Employer's Offices Is Not Work Time Under The Continuous Workday Rule.

On December 31, 2020, the U.S. Department of Labor (DOL) issued an opinion letter about whether an employer must pay for travel time for an employee who chooses to work from a home office part of the day and from the employer's office for part of the day.

Under the continuous workday rule, the time period from the beginning of an employee's work duties to the end of those activities on the same workday is compensable work time. The continuous workday rule applies once the employee begins the first task that is integral and indispensable to the tasks she was hired to perform. Travel that is part of an employee's principal activity, such as travel between worksites, is generally considered to be part of the day's work and is compensable.

The DOL opinion letter highlighted two categories of travel time that are not compensable under the continuous workday rule.

First, travel is not compensable if the employee is off duty. For example, an employee starts work at the employer's office, travels to a personal appointment (parent-teacher conference), and then completes the work day at home. In this case, the DOL opinion letter found that the employer need not pay for the time the employee spent traveling to and from the conference. The employee is free to use the time for her own purposes (the parent-teacher conference) and is therefore off duty even during the commuting time. The employee is not paid for this travel because she has been completely relieved of work duties and is traveling for her own purposes on her own time.

Second, travel is not compensable if the employee is engaged in normal commuting. For example, an employee works at home from 6-8 a.m., goes to a doctor's appointment from 9-10 a.m., drives to the employer's office at 11, and drives home at 6 p.m. in the evening. As in the first example, the employee is off duty when she travels to and from the doctor's appointment and when she attends the appointment. Although she did start work at home before her travel to

the doctor, she was completely freed from work duties once she started traveling to the doctor and she could use the entire time traveling for her own purposes. Such off-duty travel is not compensable under the continuous workday rule. When she traveled from the employer's office to her home at the end of the workday, it was normal commute time that need not be compensated.

The DOL concluded that when an employee arranges for her work day to be divided into a block worked from home and a block worked from the employer's office, separated by a block reserved for the employee for her own purposes, the reserved time is not compensable, even if the employee uses some of that time to travel between her home and the employer's office.

City Sanitation Workers Are Not In The "Transportation Industry" Under Wage Order No. 9.

Miles v. City of Los Angeles (2020) 56 Cal.App.5th 728

The City of Los Angeles employs wastewater collection workers in the City's Wastewater Collection Systems Division (Wastewater Division) of its Bureau of Sanitation (Sanitation Bureau). The City's wastewater collection crews remove debris and storm water from the City's catch basins, sidewalk culverts, low flow sewage, and storm drain systems. They transport the debris to collection and treatment facilities. Some of the trucks the used to complete these duties are classified as commercial vehicles, which requires the driver to hold a commercial driver's license with tanker and air brake endorsements. The work involves substantial driving each day, sometimes more than 100 miles to as many as 90 work and disposal sites.

Three wastewater collection crew members sued the City on behalf of themselves and all other Wastewater Division employees, alleging that the City denied them meal and rest breaks from June 2, 2011 to the present in violation of Labor Code sections 226.7 and 512 and Wage Order No. 9. The employees alleged the City restricted their meal and rest breaks by requiring them to: "remain on-call at all times; refrain from sleeping on the job; refrain from returning to their yard until the end of their shift; refrain from leaving the work locations during their shift; refrain from using City vehicles for personal business, including traveling to lunch breaks; refrain from congregating with other Wastewater Division employees during their shift; and refrain from leaving their work vehicles during their shift." In general, Wage Order No. 9 explicitly requires public entities to provide meal and rest breaks to "commercial drivers" in the "transportation industry."

After many years, the City filed a motion to dismiss the employees' Wage Order No. 9 claims, arguing that Wage Order No. 9 did not apply because they did not work in the transportation industry. Alternatively, the City argued that Wage Order No. 9 applied only to those wastewater collection employees who were permitted to drive the City's commercial vehicles. The trial court concluded that Wage Order No. 9 applied only to workers in the transportation industry, and that undisputed evidence indicated that the Wastewater Division's primary purpose was to maintain the City's sanitary and storm sewer systems. The court noted that any driving performed by its employees was incidental to that primary objective. The trial court entered judgment in the City's favor, and denied the employees' the opportunity to assert new federal claims. The employees appealed.

On appeal, the court rejected the employees' arguments and affirmed the trial court's ruling. The court noted that the main purpose of the business, and not the job duties of the employee, determines which wage order applies. The court relied on the language of Wage Order No. 9 stating that a business whose purpose is transportation is considered to be in the transportation industry. The court reasoned that to conclude that the incidental activities the Wastewater Division employee performed involving transportation "would read the word 'purpose' right out of the order." Although some employees were required to operate commercial vehicles to carry out the Sanitation Bureau's purpose, the purpose of the Wastewater Division was to clean the City's sewers. Thus, the trial court properly entered judgment in the City's favor.

Fifth Circuit Rejects Two-Step Certification Process For FLSA Collective Actions.
Swales v. KLLM Transp. Servs., L.L.C. (5th Cir. 2021) 985 F.3d 430

The Fair Labor Standards Act (FLSA) permits "similarly situated" employees to bring a collective action against their employer for federal wage and hour violations. However, the FLSA does not define what "similarly situated" means. Congress later amended the FLSA's collective action procedure, through the 1947 Portal-to-Portal Act, to require similarly situated employees to opt-in via a written consent. Neither Congress nor the U.S. Supreme Court, however, have provided further guidance for the proper procedure for certifying collective actions.

District courts across the nation have arrived at a loose consensus as to the process for certifying the appropriateness of FLSA collective actions. Courts have adopted a nearly universal two-step approach. In the first step, known as "conditional certification," the employee must make a modest factual showing that they and the potential opt-in employees were victims of a common policy or plan that violated the law. If conditional certification is granted at the

first step, the court proceeds to the second step. In the second step, following discovery, the court will decide whether the case can proceed on a collective basis by determining whether the employees who have joined the lawsuit are in fact "similarly situated." If the employees are not similarly situated, the action may be decertified.

KLLM Transport Services (KLLM) transports refrigerated goods throughout the county, using either company-owned trucks operated by its employee-drivers, or trucks provided by other drivers classified as independent contractors. A number of workers at KLLM who drove trucks under independent contractor agreements with the company initiated a collective action lawsuit alleging that KLLM misclassified them, and all other "similarly situated drivers," as independent contractors rather than employees. The workers alleged KLLM violated the FLSA's minimum wage requirement they were entitled to as employees.

After the parties conducted a significant amount of discovery, the workers moved for conditional certification. Applying its own variation of the two-step approach, the district court ultimately granted the workers' request for conditional certification, thereby certifying a collective action of potentially thousands of KLLM truck drivers. KLLM immediately filed a petition for appeal by permission, which the Fifth Circuit granted.

On appeal, the Fifth Circuit rejected the two-step certification rubric. The court relied on the only two principles it found to be binding on district courts: 1) the FLSA's text that declares (but does not define) that only those "similarly situated" may proceed as a collective action; and 2) the Supreme Court's admonition that a district court may "facilitat[e] notice to potential" employees for case-management purposes. The court noted that while the two-stage approach may be "common practice," nothing in the FLSA, nor in Supreme Court precedent interpreting it, requires or even authorizes any "certification" process.

Instead, the court concluded that a district court should identify, at the outset of the case, which facts and legal considerations will be material to determining whether a group of employees is "similarly situated." Then, the district court should authorize preliminary discovery accordingly. The Fifth Circuit noted that a district court should make this determination "as early as possible" and not after a lenient, step-one "conditional certification."

Agency Preempts California Wage Order Requiring Meal And Rest Breaks For Commercial Motor Vehicle Drivers.
Int'l Bhd. of Teamsters, Local 2785 v. Fed. Motor Carrier Safety Admin. (9th Cir. 2021) 986 F.3d 841

The Federal Motor Carrier Safety Administration (FMCSA) is tasked with issuing regulations on commercial motor vehicle safety. The FMCSA also has authority to determine that state laws on commercial motor vehicle safety are preempted following a multi-step process.

Under federal law, a property-carrying commercial motor vehicle driver "may not drive without first taking 10 consecutive hours off duty," and "may not drive after the end of the 14-consecutive hour period without first taking 10 consecutive hours off duty." Within that 14-hour period, a driver may only drive 11 hours. Federal regulations also impose weekly driving limits.

In 2011, the FMCSA revised the federal hours-of-service regulations and adopted rules on breaks for truck drivers. Subject to certain exceptions, a property-carrying commercial motor vehicle driver working more than eight hours must take a least one 30-minute break during the first eight hours. This break requirement supplemented longstanding federal regulations prohibiting a driver from operating a commercial motor vehicle if the driver was too fatigued or unable to safely drive.

Under California Wage Order 9-2001, however, "all persons employed in the transportation industry" who work more than five hours a day are entitled to a "meal period of not less than 30 minutes." An employee is entitled to a second meal period of not less than 30 minutes when working more than 10 hours in a day. Employees and employers can mutually agree to waive these meal breaks under certain circumstances. The wage order gives transportation employees 10-minute rest breaks for every four hours worked. An employer who fails to provide a meal or rest break must pay the employee one additional hour of pay at the employee's regular rate of pay for each workday that the meal or rest break period is not provided.

In 2008, a group of motor carriers filed a petition to the FMCSA seeking to preempt California's meal and rest break requirement as applied to commercial motor vehicle drivers subject to the FMSCA's hours-of-service regulations. However, the FMCSA ruled that it lacked the authority to preempt California law because the meal and rest break rules applied beyond the trucking industry and were thus not "on commercial motor vehicle safety."

In 2018, two industry groups asked the FMCSA to revisit its 2008 decision. Following public comment, the FMCSA declared California meal and rest break rules preempted as applied to operators of property-carrying motor vehicles subject to the federal hours-of-service regulations. California's Labor Commissioner, labor organizations, and affected individuals challenged the decision.

In reviewing the FMCSA's determination, the Ninth Circuit considered whether the FMCSA's preemption decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." The court noted that Congress expressly gave the FMCSA authority to preempt state laws "on commercial vehicle safety" if the agency decides certain criteria are met. The court concluded that the FMCSA reasonably determined that a California state law "on commercial motor vehicle safety" was already addressed by FMCSA's regulations. Finally, the court found that the fact California law regulates meal and rest breaks in a variety of industries does not compel the conclusion that the FMCSA's meal and rest break rules are not also "on commercial motor vehicle safety." Thus, the court determined that California's meal and rest break rules were within the FMSCA's preemption authority.

Further, the Ninth Circuit found that the FMCSA's determination that California's meal and rest break rules were more stringent than federal regulations was reasonable and supported. The court noted that California law requires more breaks, more often, and with less flexibility as to timing. It also noted that the FMCSA reasonably determined that the California state law: 1) had no safety benefit; 2) was incompatible with the regulation prescribed by the agency; and 3) would cause an unreasonable burden on interstate commerce. Any one of these three enumerated grounds would have been enough to justify a preemption determination pursuant to the authority Congress granted the FMCSA.

For these reasons, the Ninth Circuit determined the FMCSA's decision was entitled to deference, and the Labor Commissioner's challenge lacked merit.

INDEPENDENT CONTRACTORS

General information regarding independent contractors can be found in section 4.46 in the Municipal Law Handbook
https://onlaw.ceb.com/onlaw/gateway.dll?f=templates&fn=default.htm&vid=OnLAW:CEB

California Supreme Court Concludes Dynamex Decision Applies Retroactively
Vazquez v. Jan-Pro Franchising Int'l, Inc. (2021) 10 Cal.5th 944

The California Supreme Court decided *Dynamex Operations West, Inc. v. Superior Court* in 2018. *Dynamex* determined how the term "suffer or permit to work," as used in the California wage orders, should be interpreted for purposes of distinguishing between employees who are covered by the wage orders and independent contractors who are not.

The *Dynamex* decision also adopted the so-called "ABC test." Under the ABC test, a worker is an independent contractor to whom a wage order does not apply only if the employer establishes that the worker:

A) Is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact;

B) Performs work that is outside the usual course of the hiring entity's business; and

C) Is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.

In *Vazquez v. Jan-Pro Franchising Inernational, Inc*., the Ninth Circuit requested the California Supreme Court to determine whether the *Dynamex* decision applies retroactively. The California Supreme Court noted that its decision in *Dynamex* did not overrule any prior California Supreme Court cases, nor disapprove of any prior California Court of Appeal decisions. These facts supported the retroactive application of *Dynamex*.

Jan-Pro argued that a narrow exception to the general retroactivity rules applied because it reasonably believed that the question of whether a worker should be considered an employee or an independent contractor would be determined by application of the multi-factor test established in *S.G. Borello and Sons, Inc. v. Department of Industrial Relations*.

The Supreme Court disagreed. The Court reasoned that California wage orders have included the "suffer or permit to work" standard as one basis for defining who should be treated as an employee for purposes of the wage order for more than a century. Additionally, the Court noted that at least since the 1930s, the "suffer or permit to work" standard has been understood as embodying "the broadest definition" of employment. Further, the Court pointed out that the multi-factor *Borello* test Jan-Pro attempted to rely on was not a wage order case. Moreover, that decision did not analyze who is an employee for purposes of a wage order. Finally, the Court noted that the factors articulated in the *Dynamex* case drew on the factors articulated in *Borello*. Thus, they were not beyond the bounds of what employers could reasonably have expected.

For these reasons, the Court determined employers were clearly on notice well before the *Dynamex* decision that, for purposes of the obligations imposed by a California wage order, a worker's status as an employee or independent contractor might depend on the suffer or permit to work prong of an applicable wage order. Accordingly, the Court confirmed that the *Dynamex* decision applies retroactively.

LABOR RELATIONS AND THE MMBA

General Information about Labor Relations and MMBA can be found in the Municipal Law Handbook, Chapter 4, "Personnel," Section XI, "Labor Negotiations and the Meyers-MiliasBrown Act (MMBA)"
http://onlaw.ceb.com/onlaw/gateway.dll?f=templates&fn=default.htm&vid=OnLAW:CEB

MOU Provision Authorized Charter County To Recover Overpayments From Employees
Association for Los Angeles Deputy Sheriffs v. County of Los Angeles (2021) 60 Cal.App.5th 327

The Association for Los Angeles Deputy Sheriffs (ALADS) is the union representing sworn non-management peace officers employed by the Los Angeles County (County) Sheriff's Department (Department). The memorandum of understanding (MOU) between ALADS and the County includes provisions that address "Paycheck Errors," including overpayments and underpayments.

The MOU provision on overpayments states that "employees will be notified prior to the recovery of overpayments." Further, "recovery of more than 15% of net pay will be subject to a repayment schedule established by the appointing authority under guidelines issued by the Auditor-Controller. Such recovery shall not exceed 15% per month of disposable earnings (as defined by State law), except, however, that a mutually agreed-upon acceleration provision may permit faster recovery."

In April 2012, during a conversion to a new payroll system, the County failed to apply an agreed-upon cap to certain bonus payments. The error resulted in salary overpayments to 107 deputies.

In May 2017, the County sent letters to these deputies, informing them of the overpayment, and giving them two repayment options: remit the payment in full, or repay the amount through payroll deductions at a specified rate. In April 2018, the County sent the deputies letters stating it would deduct the overpayments as described in the prior letters.

In May 2018, the County began the paycheck deductions. Thereafter, ALADS filed grievances on behalf of the affected employees, challenging the deductions from their paychecks to recover the overpayment amounts.

While the parties addressed the grievances through the County's administrative procedures, ALADS also went to court. ALADS sought a writ of mandate and declaration that an overpayment provision of the MOU between ALADS and the County was unenforceable because it violated wage garnishment law and the Labor Code. Specifically, ALADS alleged the deductions violated Labor Code Section 221, which makes it unlawful "for any employer to collect or receive from an employee any part of wages" paid to the employee. ALADS alleged that the wage garnishment law provided the exclusive procedure for withholding an employee's earnings.

The County demurred to the writ of mandate on multiple grounds, including that ALADS failed to exhaust administrative remedies, and that neither Labor Code Section 221 nor wage garnishment law applied to the County. The trial court granted the demurrer solely on the ground that ALADS failed to exhaust administrative remedies. ALADS appealed, and the Court of Appeal affirmed the trial court's ruling, but on the grounds that Labor Code Section 221 and the wage garnishment laws do not prevent a charter county from agreeing to MOU provisions regarding the recovery of overpayments.

The union argued it was not required to exhaust administrative remedies because the available administrative remedy would be futile since it would require all 107 deputies to bring individual grievances addressing the same issue: namely, the County's ability to recover overpayments under the MOU. The Court of Appeal agreed, holding that the administrative remedy was inadequate because it would not provide "classwide" relief for the 107 deputies.

However, the County argued that ALADS could not state a valid claim because of the home rule doctrine, which gives charter counties like the County the exclusive right to regulate matters relating to its employees' compensation. The Court of Appeal agreed and held the recovery of overpayments pursuant to a MOU was within the authority of a charter county as part of its exclusive right to regulate compensation. For similar reasons, the Court of Appeal noted that wage garnishment law did not prohibit the County from recouping overpayments.

MOU Provision Allowing Purge Of Negative Personnel Records Over One Year Old Violated The Public Policy Supporting The State's Merit System.

Dep't of Human Res. v. Int'l Union of Operating Engineers (2020) 58 Cal.App.5th 861

The California Department of Human Resources (State) had a memorandum of understanding (MOU) with the International Union of Operating Engineers (the Union) regarding terms and conditions of employment for State employees classified as bargaining unit 12. MOU Article 16.7(G) said that "materials of a negative nature" placed in an employee's personnel file shall, at the request of the employee, "be purged ... after one year." This provision did not apply to "formal adverse actions" as defined in the Government Code or to "material of a negative nature for which actions have occurred during the intervening one year period."

In 2014 and 2015, an employee in bargaining unit 12, referenced as B.H., reviewed his personnel file at the Department of Water Resources (DWR) and requested that materials of a negative nature be purged. In March 2016, DWR disciplined B.H. by reducing his salary by 10% for one year. This discipline was based on various acts or omissions between 2013 and the end of 2015. To support the discipline and demonstrate that B.H. received progressive discipline, DWR referenced numerous counseling and corrective memoranda that contained negative material in the notice of disciplinary action. The dates of these memoranda ranged from 2007 to 2015.

After B.H. appealed his discipline, the parties reached an agreement to settle the disciplinary action. In the settlement agreement, B.H. agreed to accept a 10% salary reduction for six months and waive his right to challenge his disciplinary action in any other proceeding. During the settlement discussions, the Union filed a grievance alleging the DWR violated MOU Article 16.7 by relying on prior corrective action to discipline B.H. since the memoranda on file for more than one year should have been purged. The parties were unable to resolve the dispute and participated in arbitration. The arbitrator found the State violated the MOU and ordered the State to "cease and desist" from violating Article 16.7.

The State subsequently sought trial court review of the award. In its lawsuit, the State argued the award should be vacated because the arbitrator's interpretation of Article 16.7 violated public policy by undermining State departments' ability to take appropriate disciplinary action based on progressive discipline. The State also argued the arbitrator's interpretation of Article 16.7 would interfere with the State Personnel Board's constitutional duty to review disciplinary action. The trial court disagreed and found that the arbitrator correctly interpreted the MOU. The State appealed.

The appellate court first noted that the merit principal of State civil service employment mandates that: "In the civil service permanent appointment and promotion shall be made under a general system based on merit ascertained by competitive examination." Under this merit principle, State employees are to be recruited, selected, and advanced under conditions of political neutrality, equal opportunity, and competition on the basis of merit and competence. MOU's, even when approved by the Legislature, may not contravene the merit principle.

The court noted that enforcing Article 16.7 as the arbitrator had interpreted it would impermissibly undermine the State merit principle. This is because the State would be unable to retain, consider or rely on negative material in counseling and corrective memoranda older than one year old after a file-purge request. The court reasoned that these documents memorialize an employee's ongoing work performance, provide warnings of areas needing improvement, and may have a material bearing on subsequent disciplinary decisions. Purging these records would substantially undermine that State's ability to make fair and fact-based evaluations of employee performance and take disciplinary action based on merit. For these reasons, the court concluded the arbitrator's decision violated public policy.

Further, the court concluded the arbitrator's interpretation would interfere with the State's ability to carry out progressive discipline, which is required by the State Personnel Board. The court noted that the DWR had extensively documented B.H.'s behavior over the years with counseling and corrective memoranda. However, under the arbitrator's interpretation, that evidence had to be removed and could not be used or relied on to support the disciplinary action or to verify that progressive discipline occurred. If B.H. exhibited similar work deficiencies in the future warranting disciplinary action, DWR would have no record that it followed progressive discipline. Finally, the State Personnel Board could not confirm whether the DWR followed progressive discipline rules if the purge was permitted.

Thus, the court determined the trial could should have vacated the arbitrator's award.

PERB Rules County Impermissibly Surface Bargained Revisions To Class Specifications.

United Public Employees v. County of Sacramento 2020 PERB Decision No. 2745-M

The County of Sacramento's Department of Airports has approximately 11 Airport Operations Dispatchers II, and three Airport Operations Dispatchers Range B. According the job description for the Airport Operations Dispatcher I/II classification, all dispatchers must have no criminal history, a valid California Driver License, meet certain physical requirements, and pass a background check. All dispatchers must perform a variety of communications functions, including receiving, evaluating, and responding to requests for emergency and non-emergency services.

In 2016, the County's Emergency Medical Services Agency notified the County that any dispatch units accepting calls for emergency medical assistance would be required to use an updated dispatch procedure. It also required all emergency medical dispatchers to obtain and maintain an Emergency Medical Dispatch (EMD) certification. To obtain an EMD certification, an emergency medical dispatcher must: 1) be 18 years of age or older; 2) possess a high school diploma or general education equivalent; 3) possess a current, basic Healthcare Provider Cardiac Life Support card; and 4) complete an approved training course.

After receiving notice of the new procedure, the County initiated a classification study to determine whether to revise the Airport Operations Dispatcher I/II classification to include the EMD certification requirement. The County notified United Public Employees, Inc. (Union), the

union representing the Airport Operations Dispatcher I/II class specification, of the classification study and offered to meet and confer over the revisions and the certification requirement.

After the parties agreed to several class specification revisions, the County withdrew the changes asserting it was not required to bargain the EMD certification requirement. Throughout the course of the negotiations, the Union sought a wage increase based on the certification requirement. However, the County rejected the Union's proposals, stating that the wage proposals should be raised during the negotiations for the parties' successor memorandum of understanding (MOU), which were occurring simultaneously. The Union asked to continue discussions regarding the wage issue, but the County left the negotiations table. While the County later indicated it remained willing to engage in effects bargaining, the Union did not request it. The County subsequently implemented the EMD certification requirement, but did not revise the Airport Operations Dispatcher I/II class specification.

The Union then filed an unfair practice charge, alleging the County failed to meet and confer in good faith over revisions to the class specification. The Administrative Law Judge (ALJ) issued a proposed decision concluding the County made an unlawful unilateral change to the terms and conditions of the dispatchers' employment, even though the Union's unfair practice charge never included a unilateral change allegation. The County filed exceptions to the ALJ's decision.

The Public Employment Relations Board (PERB) concluded it was improper for the ALJ to analyze the case under the unilateral change theory. PERB noted that a complaint alleging a unilateral change – a per se violation of the Meyers-Milias-Brown Act (MMBA) – typically alleges that the respondent changed a policy without affording the exclusive representative prior notice or an opportunity to meet and confer over the change or its effects. While the Union did not allege that the County changed the policy without providing the union notice or an opportunity to meet and confer over the change or its effects, PERB noted that this omission did not necessarily foreclose consideration of the unilateral change theory. However, the Union neither amended its complaint nor demonstrated that the unalleged violation doctrine had been satisfied. Further, at no point during PERB's investigatory or hearing processes did the Union raise an independent unilateral change theory. Thus, PERB concluded the County did not have sufficient notice that a unilateral change theory would be litigated in this case.

While PERB determined the Union could not establish a unilateral change theory, it nonetheless determined that the County violated its bargaining obligations under the MMBA by surface bargaining over the revisions to the class specification. PERB first noted that the County was obligated to negotiate about the addition of the EMD certification requirement. PERB reasoned that changes to job specifications, including certification requirements and other qualifications, are within the scope of representation unless the changes at issue do no more than is required to comply with an externally-imposed change in the law. The County attempted to invoke this exception since the Emergency Medical Services Agency required the certification, but PERB concluded that the exception did not apply. PERB found that the Emergency Medical Services Agency was a County entity, so it did not qualify for the externally-imposed law exception. In addition, PERB found that the underlying state Emergency Medical Services Act did not set an inflexible standard or ensure immutable provisions that would negate the County's duty to bargain with the Union.

Next, PERB also concluded that the County was required to bargain with the Union regarding its wage proposals. While the County argued that the Union was required to make its wage proposals in successor MOU negotiations, PERB disagreed. PERB noted that the Union's wage proposals were made in response to the County's proposed revisions to the class specification, which included a new training and certification requirement. PERB reasoned it would be "patently unfair under these circumstances" to allow the County to propose new terms and conditions of employment within the scope of representation while simultaneously preventing the Union from making integrally related counterproposals. Indeed, such conduct would constitute prohibited "piecemeal" bargaining tactics. Thus, once the County proposed revised class specifications, it was obligated to negotiate at the same table any proposals by the Union on related matters within the scope of representation.

Having concluded that the County was required to bargain over the revisions to the class specification and the Union's wage proposals, PERB determined that the County had surface bargained. PERB noted that the ultimate inquiry in surface bargaining cases is whether the totality of the conduct was sufficiently egregious to frustrate negotiations or avoid agreement. PERB reasoned the County exhibited a take-it-or-leave it attitude by taking the position the EMD certification requirement was not negotiable and repeatedly rejecting the Union's attempts to discuss a wage increase tied to the change in the class specification. Further, the County implemented the EMD certification requirement without first bargaining with the Union to impasse or agreement. For these reasons, PERB found the County surface bargained in violation of the MMBA.

A Manager's Emails Praising An Employee's Criticism Of Union Interfered With Union's MMBA Rights.

California Public, Professional and Medical Employees, Teamsters Local 911 v. City of San Diego, 2020 PERB Decision No. 2747-M.

California Public, Professional and Medical Employees, Teamsters Local 911 (Union) represents five classifications of lifeguards in two bargaining groups at the City of San Diego. At all relevant times, the Union and the City were parties to a single memorandum of understanding (MOU) covering both units.

The City's Police Department receives all emergency 911 calls. Prior to December 2016, the City's police dispatchers would transfer certain emergency calls to one communications center to dispatch firefighters and paramedics, and to a separate center to dispatch lifeguards.

On December 15, 2016, the City changed its policy to require dispatchers to first route inland water rescue calls to the firefighters and paramedics. Under the new policy, dispatchers began to send firefighters as the primary responders to certain calls to which lifeguards had previously responded. The Union perceived this change caused a loss of bargaining unit work

and filed a grievance. The Union also protested the policy change in letters to the City Councilmembers and the City's Fire Chief in January and February 2017.

In March 2017, the Union claimed at its press conference that the new dispatch policy had contributed to the drowning of a young child. Soon afterward, the City held its own press conference to present its view of the tragedy. At a morning briefing after the Union's press conference, the City's Lifeguard Chief told the lifeguards that Department management was "displeased" at the Union's performance at the press conference and that each lifeguard participant would be held accountable. A Marine Safety Lieutenant emailed other lifeguards from his personal email account using the subject heading "Lifeguard Union Fail" and indicating that the Union's press conference had let down City lifeguards and sullied their reputation. The Lifeguard Chief responded to the Marine Safety Lieutenant by email to praise him for his leadership.

In June 2017, the City and the Union executed a settlement agreement requiring the Union to dismiss the 2016 dispatch policy grievance. In exchange, the City agreed to rescind the new dispatch policy and restore the status quo that existed prior to December 2016. Additionally, the parties agreed to meet and confer in accordance with the Meyers-Milias-Brown Act (MMBA) on the mandatory subjects of bargaining, including the dispatch procedure for inland water rescue.

Thereafter, the parties met to negotiate on several occasions. The City's initial proposal for a new dispatch procedure largely mirrored the procedure the City had agreed to rescind under the grievance settlement agreement. The Union responded by filing an unfair practice charge. While the parties continued negotiating, they were never able to reach an agreement. The City maintained the same dispatch policy it had followed prior to the grievance.

During this same time, the Union and the City were also disputing the makeup of the City's special search and rescue teams and their deployment to Hurricane Harvey. The Union's spokesperson held another press conference to protest what he considered to be the Fire Chief's action to block a City search and rescue team from responding to that hurricane. The City issued its own press statement in response. The Fire Chief then decided to reduce lifeguard representation on one of the City's special search and rescue teams because he did not believe the lifeguards had all of the necessary skills or experience for emergency operations.

Following this press conference, the same Marine Safety Lieutenant emailed an internal distribution list with the subject heading "Union Fail Part V." In this email, the Marine Safety Lieutenant referenced a letter from another city's fire chief that criticized the Union's comments at the press conference. He also wrote that based on the Union's actions, lifeguard representation on a particular search and rescue team was being reduced 40%. The Lifeguard

Chief once again praised the Marine Safety Lieutenant via email. The Fire Chief then reduced lifeguard representation on the team in question from 11 lifeguards to seven. The City later promoted the Marine Safety Lieutenant to a position in another unit.

The Union then amended its unfair practice charge to allege the City violated the MMBA by: 1) negotiating in bad faith during the negotiations required under the grievance settlement; 2) retaliating against the Union and the employees it represents for protected activities; and 3) sending emails that constituted unlawful interference with MMBA rights.

The Public Employment Relations Board (PERB) addressed each of the Union's allegations in turn. First, PERB concluded that the City did not bargain in bad faith in the negotiations following the grievance settlement. PERB noted that the City adequately explained its proposals and showed flexibility in its approach from the outset. In addition, multiple City witnesses testified that the City indeed reverted to the pre-grievance dispatch policy pursuant to the settlement agreement. PERB dismissed the Union's bad faith bargaining claim.

Second, PERB considered the Union's retaliation claim. To establish a prima facie case of retaliation, the charging party has the burden to prove that: 1) one or more employees engaged in an activity protected by a labor relations statue that PERB enforces; 2) the respondent had knowledge of the protected activity; 3) the respondent took adverse action against one or more employees; and 4) the respondent took the adverse action "because of" the protected activity. If the charging party meets its burden, the responding party then has the opportunity to prove that it would have taken the same action absent protected activity.

PERB found the Union could establish a prima facie case. But, PERB ultimately concluded the City could prove that it would have taken the same action, even absent the Union's protected activities. PERB found that an email from the Marine Safety Lieutenant to the California Office of Emergency Services Fire and Rescue Chief, more than any protected activity, caused the Fire Chief to reduce lifeguard representation on one of the City's special search and rescue teams.

Lastly, PERB concluded that two emails the Lifeguard Chief sent to the Marine Safety Lieutenant praising him for the "Union Fail" emails constituted unlawful interference. To establish a prima facie interference case, a charging party must show that a respondent's conduct tends to or does result in some harm to protected MMBA rights. First, PERB found that the emails linked the reduction of Union work to the Union's press conference. Second, PERB reasoned that lifeguards learning of these emails could infer that they might avoid adverse action or obtain preferential treatment if they opposed Union leadership. PERB found that this was especially true in light of the Lifeguard Chief's statement that lifeguards participating in the first press conference would be held accountable.

RETIREMENT

General Information about Pension and Retirement Systems can be found in the Municipal Law Handbook, Chapter 4, "Personnel," Section II(F)(4)
https://onlaw.ceb.com/onlaw/gateway.dll?f=templates&fn=default.htm&vid=OnLAW:CEB

Sheriff's Termination Appeal Was No Longer Viable After Disability Retirement
Deiro v. Los Angeles County Civil Service Commission (2020) 56 Cal.App.5th 925

Martin Diero began working for the Los Angeles County Sheriff's Department in 1997. Diero was injured on duty on May 30, 2012, and he continued to work through October 3, 2013, after which he had the first of two surgeries. Diero was not able to return to work following his surgery, and he remained on leave thereafter.

On May 1, 2015, Diero applied to the Los Angeles County Employees Retirement Association (LACERA) for a service-connected disability retirement. Two months later, and before LACERA approved Diero's retirement application, the Department issued Diero a Notice of Intent to Terminate his employment for bringing discredit to him and the Department. After a pre-disciplinary meeting, the Department notified Diero it was terminating his employment effective August 12, 2015. Diero timely appealed the discharge to the Civil Service Commission (Commission), which referred the matter to a hearing officer.

A few months later, while the disciplinary proceedings were pending, LACERA granted Diero's application for a service-connected disability retirement. LACERA later issued a notice to Diero stating that the effective date of his retirement was August 13, 2015, the day after his discharge. Despite having retired, Diero and the Department participated in hearings on Diero's appeal of his discharge. The hearing officer ultimately recommended that Diero's discipline be reduced to a 30-day suspension, and the Commission's agenda included a proposed decision to accept the recommendation.

The Department later filed a motion to dismiss the appeal on the grounds that Diero had retired, and therefore, the Commission lacked jurisdiction over any appeal relating to his employment. The Commission granted the motion, and Diero filed a petition for writ of mandate seeking trial court review of the decision. In the writ petition, Diero asserted, for the first time, that if he were to prevail in his disciplinary appeal and be reinstated, any retroactive salary would change his disability retirement pension. The trial court denied the petition.

On appeal, the court determined that the Commission properly dismissed Diero's appeal. The court reasoned that the Commission's jurisdiction derives from the County's Charter, which defines an employee as "any person holding a position in the classified service of the county." Relying on this language and on previous decisions, the court concluded that Commission has no jurisdiction to order reinstatement or any form of wage relief, to a retired person whose "future status as an employee by definition is no longer at issue." The court affirmed the trial court's decision and awarded the Department its costs on appeal.

Retiree Forfeited Part Of Pension Because Of Criminal Conduct
Wilmot v. Contra Costa County Employees' Retirement Association (2021) 60 Cal.App.5th 631

In December 2012, Jon Wilmot, an employee with the Contra Costa County Fire Protection District, submitted his application for retirement to the County's retirement authority, the Contra Costa County Employees' Retirement Association (CCERA), established in accordance with the County Employees Retirement Law of 1937 (CERL). On January 1, 2013, the California Public Employees' Pension Reform Act of 2013 (PEPRA) took effect, which included a provision mandating the forfeiture of pension benefits/payments if a public employee is convicted of "any felony under state or federal law for conduct arising out of or in the performance of his or her official duties."

In February 2013, Wilmot was indicted for stealing County property. In April 2013, CCERA approved Wilmot's retirement application, fixing his actual retirement on the day he submitted his application in December 2012. Also in April 2013, Wilmot began receiving monthly pension checks. In December 2015, Wilmot pled guilty to embezzling County property over a 13-year period ending in December 2012. Thereafter, the CCERA reduced Wilmot's monthly check in accordance with PEPRA's forfeiture provision.

Wilmot petitioned for a writ of traditional mandate and declaratory relief. He argued that the CCERA's application of the PEPRA's felony forfeiture provision was improper because the statute does not apply retroactively to persons who retired prior to PEPRA's effective date. The trial court disagreed, holding that the CCERA properly applied the forfeiture provision to Wilmot's pension.

Wilmot appealed, and the Court of Appeal affirmed the trial court's decision.

First, Wilmot argued when PEPRA took effect in January 2013, he was no longer a "public employee" because he worked his final day and submitted his retirement paperwork in December 2012. The Court of Appeal disagreed, stating that an employee's retirement

application is pending until approved by a retirement board under the CERL. When PEPRA took effect, Wilmot's application was submitted, but CCERA did not approve his application until April 2013. Thus, he was subject to PEPRA's forfeiture provision.

Second, Wilmot argued he was improperly being "divested" of his vested pension benefits. Again, the Court of Appeal disagreed. Relying on the Court of Appeal's pervious decision in *Marin Association of Public Employees v. Marin County Employees' Retirement Association*, the Court of Appeal confirmed that anticipated pension benefits are subject to reasonable modifications and changes before the pension becomes payable and that an employee does not have a right to any fixed or definite benefits until that time.

Third, Wilmot argued that application of the forfeiture provision "impaired the obligation" of his employment contract with the Contra Costa County, which is prohibited by the California Constitution's contract clause. The Court of Appeal disagreed. The Court acknowledged that to be constitutional under the contract clause, modification of public pension plans must relate to the operation of the plan and intend to improve its function or adjust to changing conditions. Relying on the Supreme Court's decision in *Alameda County Deputy Sheriff's Association v. Alameda County Employees' Retirement Association* and the Court of Appeal's decision in *Hipsher v. Los Angeles County Employees Retirement Association*, the Court of Appeal noted that one of the primary objectives in providing pensions to public employees is to induce competent persons to remain in public employment and render faithful service. Therefore, withholding that inducement if an employee's performance is not faithful (such as Wilmont who pled guilty to embezzling County property for 13 years) is a logical and proper response to improve the function of a public pension plan.

Fourth, Wilmot argued applying the PEPRA's forfeiture provision was an unconstitutional *ex post facto* law -- meaning a law that only makes an act illegal or that increases the penalties for an infraction after the act has been committed. The Court of Appeal disagreed, holding the forfeiture provision is a civil remedial measure, not a criminal penalty, and does not improperly increase the penalty for Wilmot's misconduct. Rather, the forfeiture provision merely takes back from Wilmot what he never rightfully earned in the first place due to his failure to faithfully perform in public service.

Accordingly, the Court of Appeal determined that the CCERA properly applied the PEPRA's forfeiture provision to Wilmot because of his admitted criminal conduct during his employment.