2d Civil Case No. B257890

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

RYAN ATKINS, et al.,

Plaintiffs and Respondents,

vs.

CITY OF LOS ANGELES,

Defendant and Appellant.

Appeal From The Superior Court of Los Angeles County
Los Angeles Superior Court Case No. BC449616
Honorable Frederick C. Shaller, Judge

APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF AND [PROPOSED] BRIEF IN SUPPORT OF APPELLANT CITY OF LOS ANGELES

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APPLICATION TO FILE AMICUS CURIAE BRIEF

To Presiding Justice Dennis M. Perluss:

Pursuant to Rule 8.200(c) of the California Rules of Court, amici curiae the League of California Cities and the California State Association of Counties respectfully request leave to file the amicus curiae brief submitted herewith in support of appellant City of Los Angeles. Timothy T. Coates and Alison M. Turner of Greines, Martin, Stein & Richland LLP authored the proposed brief, and no other person or entity made a monetary contribution to fund its preparation or submission.

The League of California Cities (the "League") is an association of 474 California cities dedicated to protecting and restoring local control in order to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its legal advocacy committee, comprised of 24 city attorneys from all regions of the state. The committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The committee has identified this case as having such significance. The League believes its perspective will assist the court in deciding this matter.

The California State Association of Counties ("CSAC") is a nonprofit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California, and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter with the potential to affect all California counties.

All members of the League and CSAC (collectively "amici") have a common interest in providing reasonable accommodation to employees who are injured on the job or otherwise disabled, and in creating a discrimination-free environment for those who, despite their disabilities, can continue to be productive members of the workforce. The concern that the amici have with the judgment in this case is twofold: (1) the potential expansion of employer obligations under the Fair Employment and Housing Act ("FEHA") to include an obligation heretofore unrecognized — namely, the obligation to promote an individual whose employment was temporary, indeed conditional on the successful completion of a training program, into a permanent position in the public workforce as an accommodation for any injury, including a temporary injury; and (2) the possible unintended consequences for other cities and counties if employer obligations under FEHA are determined in the context of the unique facts presented by the City of Los Angeles, that is, if the City's particular policies and practices are deemed to be FEHA obligations. These matters merit this Court's consideration as it determines whether the judgment below must be reversed, as amici believe it should be.

Accordingly, amici curiae League of California Cities and California State Association of Counties request leave to file the amicus curiae brief submitted herewith.

DATED: March 10, 2016

Respectfully submitted,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

PROPOSED BRIEF OF AMICI CURIAE LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF APPELLANT CITY OF LOS ANGELES

INTRODUCTION

As the Court is aware, this case concerns causes of action asserted under the Fair Employment and Housing Act. (Gov. Code, § 12900, et seq. ("FEHA").) Plaintiffs are individuals who were temporary employees, and not yet (and perhaps never to be) qualified for the position for which they had applied—police officer. They persuaded a jury that they were entitled to permanent positions elsewhere in the City's general workforce as an accommodation for injuries suffered while in training, and thus to award them damages calculated on the basis of life-time employment. The judgment in their favor represents a radical expansion of employer obligations under FEHA. The accommodation validated by the verdict is on its face a promotion, a form of accommodation FEHA heretofore did not require. If the judgment is allowed to stand, the consequences will be burdensome and disruptive in terms of personnel management and budgeting for cities and counties with limited resources. Thus, amici curiae League of California Cities and the California State Association of Counties (collectively "amici") respectfully urge this Court to reverse, for reasons more fully explained below.

STATEMENT OF FACTS

In the interest of economy, amici adopt the statement of facts set forth in the opening brief filed by appellant City of Los Angeles.

ARGUMENT

THE JUDGMENT SHOULD BE REVERSED: IT IS NOT ONLY INCONSISTENT WITH FEHA, BUT THE EXPANSION OF EMPLOYER OBLIGATIONS IT REPRESENTS WILL HAVE NEGATIVE CONSEQUENCES FOR PUBLIC ENTITIES.

A. Contrary To Settled Law, The Judgment, If Affirmed, Will Require Employers To Promote Temporary Employees To Permanent Positions As An Accommodation Under FEHA, A Requirement That Will Negatively Impact Cities and Counties.

The plaintiffs in this case are individuals who were injured while training to become police officers at the City of Los Angeles's Police Academy. These individuals were temporary employees. They were in "temporary training positions"—they had to pass training in order to become police officers, not a sure thing even for the physically fit. As trainees, they were not yet qualified for the permanent position for which they had applied; passing the application process for the Police Academy meant only that they were qualified to be temporary trainees. They were injured before they qualified for a permanent position, even on a conditional probationary basis.

The judgment awarded these individuals substantial damages, including damages for future economic loss, calculated on the theory that they were entitled to be accommodated by reassignment to permanent open positions in the general work force because of their disabilities.[1/] "Reassignment" under such circumstances

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[1/] For example, one plaintiff named Orea was awarded in excess of $2 million for an injury sustained two days after he started training. (See Respondents' Brief ("RB") at page 22 [started training August 18, injured August 20].)

equates to a "promotion," from a temporary to a permanent position with full job security, among other benefits.[2/]

Such a result and construction of FEHA is problematic for a number of reasons. First, it is inconsistent with existing law under FEHA and substantially expands the statutory mandate:

> The obligation to reassign a disabled employee who cannot otherwise be accommodated does 'not require creating a new job, moving another employee, *promoting the disabled employee*, or violating another employee's rights under a collective bargaining agreement.' [Citation.]

(*Hastings v. Department of Corrections* (2003) 110 Cal.App.4th 963, 972, emphasis added; see also *Spitzer v. The Good Guys, Inc.* (2000) 80 Cal.App.4th 1376, 1389.)

Second, if promotion were to be among the mandated forms of reassignment, the result would be undesirable and untenable: a temporary employee would potentially be better off getting injured than he or she otherwise might be, because a permanent position is not only permanent, with the job security that entails, but in the public employment context, it is also a constitutionally-protected property right that cannot be infringed without affording due process, including procedures such as an evidentiary hearing. (See *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, 215; *Cleveland Bd. of Educ. v. Loudermill* (1985) 470 U.S. 532, 545-46.) Temporary or probationary employees, on the other hand, generally have no property interest in their employment triggering due process rights. (See *Lubey v. City and County of San Francisco* (1979) 98 Cal.App.3d 340; *Williams v. Los Angeles City Dept. of Water & Power* (1982) 130 Cal.App.3d 677).

[2/] Of course, local civil service rules, which vary from city to city, may address and define such a reassignment otherwise for their own purposes, as might agreements with public employee unions.

Third, the negative, unintended consequences of permitting the judgment to stand would be far-reaching. For example, many if not most cities and counties are without their own training programs for police officers. If they do not limit themselves to lateral hires, they hire, or offer to hire, contingent on the completion of a POST-certified training program at, for example, a local college or at the academy of a local sheriff's department or other large municipal police agency.[3/] If a potential recruit is injured during the training program offered by such a third-party, is the city or county nonetheless obligated under FEHA to provide the recruit with a permanent position in its general workforce, assuming one is vacant, when what it more urgently needs and can best afford is another law enforcement officer? If so, cities and counties may well be hesitant to risk offering the incentive of future employment to encourage individuals to sign up for peace officer training programs. They will want to hire only laterals, for which the competition among employers is generally stiff, or the rare individuals who have undergone POST training without any offer of employment at the other end. There can be no doubt under such circumstances that the pool of available applicants to meet law enforcement needs will very soon diminish even more than it already has.

More generally, cities and counties frequently create term-limited temporary positions for a limited purpose with a limited budget. If a temporary employee in such a position is injured or diagnosed with a condition that prevents him or her from doing that job, must the city or county reassign him or her to a vacant permanent position elsewhere in the work force? Since the temporary term-limited slot must be filled too, such a requirement would be a strain on the limited public budget and disruptive of the efficient planning and management of personnel needs.

[3/] POST stands for Peace Officer Standards and Training set by the California Commission on such standards and training.

Yet the clear implication of the judgment in this case is that such a promotion is not only permissible, but required by FEHA. In *Raine v. City of Burbank* (2006) 135 Cal.App.4th 1215, 1224-1227, this Court held that an employer has no duty to accommodate by making a temporary accommodation permanent if to do so would require the employer to create a new position just for the employee. So here, there should be no duty to accommodate by making a temporary employee permanent, if to do so would require the employer to promote the employee. Promotion is exactly what appears to be required by this judgment: from a temporary position—which might or might not have led to a permanent position—to a permanent position with all the benefits which that entails, not the least of which is job security. As a result, plaintiffs' few days or weeks in training entitled them here to damages representing loss based on the rest of their working lives.

In *Hastings v. Department of Corrections, supra*, the plaintiff was a candidate for the position of corrections officer who suffered injuries while training. As the reviewing court explained, he had never "qualified for the position" of corrections officer, presumably because his hiring was conditional on successful completion of training. (110 Cal.App.4th at p. 972.) "In these circumstances he [was] not entitled to reassignment to another position with different qualifications." (*Ibid*.) The court determined the plaintiff's entitlement to another position in the general workforce, like anyone else's, would have to come by way of a civil service examination, not by way of FEHA. (*Id*. at pp. 972-973.) That should be the result in this case for the same reason, and because reassignment that amounts to a promotion is not a requirement of FEHA. The implications of the judgment, if allowed to stand, are particularly burdensome to cities and counties that do not have and cannot afford to have the same policies and practices as the City of Los Angeles.

B. The Judgment Erroneously Equates The Policies and Practices Of The City Of Los Angeles With FEHA Requirements.

The Respondents' Brief states:

> Plaintiffs only claimed that the City, consistent with the City Charter, its own Agreement with the League [the police union] and its own policy and practice [should] reasonably accommodate Plaintiffs by reassignment to existing, open positions. The jury got it right when it determined that the City's failure to do so violated FEHA.

(RB 47; see also RB 36 [evidence the City failed to accommodate plaintiffs despite City Charter 1014 and the agreement with the union supports the jury findings that the City violated FEHA].)

City Charter section 1014 provides that disabled employees may be reassigned without having to take a competitive civil service exam, and under city civil service rules, upon recovery, the employees may return to the class they previously held if the appointing authority (here, the LAPD) approves such a return. (9 Appellant's Appendix ["AA"] 1792; 1839.) The union agreement provides for a good faith effort to obtain employment elsewhere in the city for injured recruits. (9 AA 1781.) The policies and practices reflected in these local rules, and the union agreement, may be *consistent* with FEHA, but they should not be read into the statute to be *requirements* of FEHA.

It is settled that FEHA does not require public employers to exempt disabled employees from taking a civil service exam for a vacant position in another classification. (See *Hastings v. Department of Corrections*, *supra*, 110 Cal.App.4th at pp. 976-977 [under provisions of the state Constitution, "an employee is not entitled as an accommodation to reassignment to a position in a different civil service classification without complying with the competitive examination process of the civil service laws"].) The point of the competitive examinations is to ensure

appointments are made "'on the basis of merit, in order to preserve the economy and efficiency of [public] service.'" (*Id*. at p. 975, quoting *State Personnel Bd. v. Fair Employment and Housing Com.* (1985) 39 Cal.3d 422, 439.) Equally important is the perception of fairness critical to morale in any workplace, a perception that is fostered by the competitive examination process.

It should also be noted that cities and counties, as a general rule, do not have the luxury of holding open a position of police officer on the hope that an injured recruit will eventually be able to complete training successfully and qualify for it; they need to fill the position with the first available trained and qualified individual as soon as possible, or risk a problem of under-staffing. The problem of under-staffing is particularly difficult when a force is small to begin with. Similarly, with respect to other temporary positions, cities and counties need to fill the positions immediately so that the job for which they were created can be completed within the term allowed, while the allocation of funds for them is available.

To the extent plaintiffs contend that the available permanent positions should be deemed temporary accommodations under City of Los Angeles policies—in the sense of being positions to hold them until they were sufficiently recovered to return to training and a future in the police force—such a situation is also untenable. Filling permanent positions only temporarily leads to ongoing instability in the workforce and creates a need for constant readjustment which is detrimental to the functioning of any city or county.

The judgment imports policies unique to the City of Los Angeles into FEHA. Such a result is not only erroneous, but it would also create bad law and worse policy for cities and counties.

CONCLUSION

For the foregoing reasons, amici curiae the League of California Cities and the California State Association of Counties respectfully urge this Court to reverse the judgment in this case and enter judgment in favor of the City of Los Angeles.

DATED: March 10, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.204(c)(1), I certify that the attached **APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF AND [PROPOSED] BRIEF IN SUPPORT OF APPELLANT CITY OF LOS ANGELES** is proportionately spaced and has a typeface of 13 points or more. Excluding the caption page, tables of contents and authorities, signature block and this certificate, it contains 2,059 words.

DATED: March 10, 2016

Alison M. Turner

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

On March 10, 2016, I served the foregoing document described as: **APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF AND [PROPOSED] BRIEF IN SUPPORT OF APPELLANT CITY OF LOS ANGELES** on the parties in this action by serving:

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BY MAIL: As follows: I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with United States Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

Executed on March 10, 2016, at Los Angeles, California.

(State): I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Pauletta L. Herndon

From:	nobody@jud.ca.gov
To:	Paula Herndon
Subject:	E-File Case B257890, Ryan Atkins, et al. v. Cit, Submitted 03-10-2016 02:23 PM
Date:	Thursday, March 10, 2016 2:23:26 PM
Attachments:	B257890_ACB_LCC & CSAC.pdf

The following Appellate Document has been submitted.

Case Type: Civil

Division: 7

Case Number: B257890

Case Name: Ryan Atkins, et al. v. City of Los Angeles

Name of Party: Amici Curiae League of California Cities & California State Association of Counties

Type of Document: Amicus Curiae Brief (ACB)

Name of Attorney or Self-Represented Party Who Prepared Document: Alison M. Turner

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