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Labor and Employment Litigation Update

7/17/2013

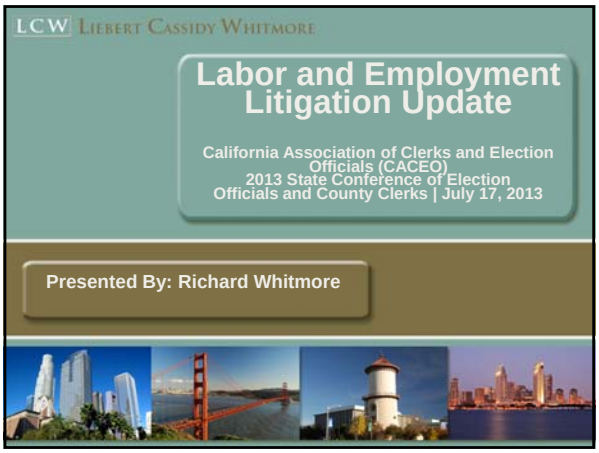
PRESENTED BY:

Richard S. Whitmore

Labor and Employment Litigation Update

2013 State Conference of Election Officials and County Clerks | July 17, 2013

Presented by: Richard Whitmore



Public Meeting

- An ordinance prohibiting "insolent" behavior at city council meetings is unconstitutionally vague.

Acosta v. City of Costa Mesa (9th Cir. 2013) ___ F.3d ___ [2013 WL].

Records

- Public employers must provide unions with the personal contact information (including home addresses) of non-member unit employees.

County of Los Angeles v. Los Angeles County Employee Relations Com'n (Cal. 2013) ___ P.3d ___ [2013 WL 2348163].

Records

- A community college commits an unfair labor practice when it fails to provide a union with a list of employees who did not have retirement election forms in their personnel files.

Santa Monica Community College District (2012) PERB Decision No. 2303-E [__ PERC ¶ ___].

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Records

- In addition to current employees, former employees and employee representatives may inspect and receive copies of personnel files for three years after employment ends.

Labor Code Sec 1198.5 (as amended 9/30/12)

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Records

- When a trial court denies a request for public records from a police department, the requesting party must challenge the denial by extraordinary writ.

MinCal Consumer Law Group v. Carlsbad Police Department (2013) ___ Cal.App.4th ___ [2013 WL 831462].

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Labor Relations

- A city need not give guidance to the union on what might be acceptable when it rejects an MOU that had been tentatively agreed between a union and the city representatives.

Stationary Engineers Local 39, International Union of Operating Engineers, AFL-CIO v. City of Lincoln (2012) PERB Dec No. 2284-M [___ PERC ¶ ___].

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Labor Relations

- A county has no duty to bargain when a union inadequately requests bargaining over a decision to end a take-home vehicle program.

County of Sacramento (2013) PERB Decision No. 2315-M [____ PERC ¶ ____].

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Labor Relations

- A union is entitled to bargain over the effects of an employer's installation of surveillance cameras in work areas.

Rio Hondo Community College District (2013) PERB Decision No. 2313 [37 PERC ¶ 197].

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Labor Relations

- A city's imposing of its last, best, and final offer does not relieve the union of the duty to bargain over remaining unresolved matters.

City of Santa Rosa (2013) PERB Decision No. 2308-M [___ PERC ¶ ____].

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Labor Relations

- A county violated its own rules when it placed certain peace officers in a bargaining unit with investigators.

County of Yolo (2013) PERB Decision No. 2316-M [___ PERC ¶ ____].

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Labor Relations

- A city cannot unilaterally impose unpaid furloughs unless it first makes a last, best and final offer and declares impasse.

City of Long Beach (2012) PERB Dec No 2296-M [___PERC ¶ ___].

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Labor Relations

- A union is entitled to arbitrate a dispute over whether unilaterally imposed furloughs violate an MOU.

City of Los Angeles v. Superior Court (6/20/13) _____ Cal 3d _____.
www.metnews.com/sos/cgo//0613//S192898

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Labor Relations

- A public sector union is barred from proceeding to fact finding if it fails to meet certain time limits, but otherwise cannot waive the right to fact finding.

Government Code Sec 3505.4

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Retirement

- Union employees may sue when a city unilaterally deletes a long-standing contractual promise to pay half of retiree health premiums.

International Broth. v. City of Redding (2012) 210 Cal.App.4th 1114.

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Retirement

- Ninth Circuit sets forth the pleading requirements for asserting an implied contract to provide vested healthcare benefits to retirees.

Sonoma County Association of Retired Employees v. Sonoma County (9th Cir. 2013) ___ F.3d ___ [2013 WL 690839].

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Retirement

- Retired university employees may pursue their claim that they were entitled to continuing health care benefits based on a theory of implied contract.

Requa v. Regents of the University of California (12/31/12) 213 Cal App 4th 213.

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Retirement

- The City of San Diego must rescind a charter amendment adopting pension reform because of its failure to meet and confer, despite overwhelming voter approval of the amendment.

San Diego Municipal Employees et al v. City of San Diego, PERB Case No LA-CE-746 *(February 13, 2013)* [___PERC___].

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Retirement

- Attorney General grants union leave to sue charter city to determine whether city met its collective bargaining obligations before proposing charter amendment.

Office of Attorney General, __ Ops. Cal. Atty. Gen. __ (April 15, 2013) [2013 WL 1703747].

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Retirement

- CALPERS provides guidance on when compliance with the Public Employees' Pension Reform Act, (PEPRA) for new employees would create an illegal 'impairment of contract,' including the requirement for agencies to file a "certificate" of impairment.

http://www.lcwlegal.com/83895

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Retirement

- Standby pay in a city fire department is not reportable compensation for purpose of PERS retirement calculations.

City of Pleasanton v. Board of Administration of the California Public Employees' Retirement System (2012) 211 Cal.App.4th 522.

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Discipline

- A police officer can be fired for multiple instances of misconduct, despite her contention that the Department had violated her Due Process and POBR rights.

Richardson v. City and County of San Francisco (2013) _____ Cal App 4th _____ 2013 WL 1091746.

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Discipline

- Ethical wall is no longer a sufficient safeguard to allow attorneys from the same firm to act as advisor and advocate in contested administrative matter.

Sabey v. City of Pomona (2013) ___ Cal.App.4th ____ [2013 WL 1613618].

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Discipline

- A county may end a past practice of allowing deputies pre-interview access to IA files without meeting and conferring.

Association of Orange County Deputy Sheriffs v. County of Orange (6/12/13)_____ Cal App 4th _____ (4th District No. G047167).

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Discipline

- Hospital's prohibition against discussion of internal investigations interfered with employee rights.

Banner Health System D/B/A Banner Estrella Medical Center (N.L.R.B. 2012) 358 NLRB No. 93 [2012 WL 3095606].

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Discipline

- A probationary sergeant cannot be rejected from probation since he was not served with the notice of rejection before the end of the probationary period, as required by the City charter.

Hernandez v. City of Los Angeles (2012) 2012 WL 3989165, unpublished / noncitable.

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Discipline

- A terminated correctional officer who violated the Department's drug-free workplace policy by taking medicinal marijuana is entitled to reinstatement.

Wilson v. State Personnel Board (2012) 2012 WL 4127322, unpublished/noncitable.

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Discipline

- A city administrator is not entitled to protection as a whistleblower even though she is fired for refusing to agree to an arguable violation of the city charter.

Edgerly v. City of Oakland (2012) 211 Cal.App.4th 1191, as mod

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Discipline

- An employee who conducts his own "overly aggressive" investigations of co-employees cannot be fired since he qualifies as a 'whistleblower."

McVeigh v. Recology San Francisco (2013) 213 Cal App 4th 443.

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Contracting Out

- A general law city may only contract out for "special services" and not merely to provide more "cost-effective" government.

Costa Mesa City Employees' Association v. City of Costa Mesa (2012) 209 Cal.App.4th 298, review den.

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Workers Compensation

- Probation officer's psychiatric injury is potentially barred by personnel action defense because injuries were substantially caused by an internal affairs investigation.

County of Sacramento v. Workers' Compensation Appeals Board (2013) ___ Cal.App.4th ___ [2013 WL 1715802].

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Workers Compensation

- A government employee driving to work from an appointment with a workers' compensation doctor is not acting within the scope of employment.

Fields v. State of California (2012) 209 Cal App 4th 1390.

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Discrimination

- To establish that discipline was discriminatory, an employee must show that the discipline was "substantially motivated" by discrimination, but even then the employer can limit its liability by showing it would have imposed the same discipline without discrimination.

Harris v. City of Santa Monica (2013) 56 Cal 4th 203.

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Discrimination

- A county employee laid off for economic reasons cannot establish that the revenue shortfall is a pretext for discrimination or retaliation.

Hancock v. County of Plumas (May 2013) Cal Court of Appeals No. C071084 – Unpublished.

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Discrimination

- Effective December 30, 2012, FEHC issues new disability regulations regarding reasonable accommodation, interactive process, essential functions and the legal standards in "mixed motive" cases.

www.dfeh.ca.gov

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Discrimination

- Effective December 30, 2012, California's Fair Employment and Housing Council issues new pregnancy disability regulations regarding health payments, limits on leaves and related issues.

www.dfeh.ca.gov/res/docs/FEHC

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Discrimination

- If a pregnant employee is disabled, then California law requires employers to grant leave of more than the four (4) months mandated by federal law, so long as there is no undue hardship.

Sanchez v. Swissport, Inc. (2013) 213 Cal.App.4th 1331.

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Discrimination

- Disabled nurse's termination was not unlawful because regular attendance was an essential job function.

Samper v. Providence St. Vincent Medical Center (9th Cir. 2012) 675 F.3d 1233.

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Discrimination

- Placing employee on disability leave did not constitute a "Dismissal" under county retirement law.

Mooney v. County of Orange (2013) 212 Cal.App.4th 865, rehg. den.

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Affordable Care Act

- Large employers face penalties if they fail to provide adequate, affordable health insurance to "substantially all" their full-time employees by January, 2014.

www.lcwlegal.com/files/12544_ACA2013

Affordable Care Act

- Department of Health and Human Services proposes appeal process for employers regarding employee's subsidy determination in the exchange.

www.lcwlegal.com/84158

Affordable Care Act

- OSHA issues regulations addressing retaliation under the Affordable Care Act.

OSHA Fact Sheet 3461 (February 22, 2013)

Affordable Care Act

- Department of Labor updates COBRA election notice to include alternatives available through the health insurance marketplace.

www.dol.gov/ebsa/cobra.html

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Affordable Care Act

- As of July 1, 2013 employers must start measuring employee hours under a transitional measurement period.

IRS Notice 2011-21 (May 23, 2012).

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Harassment

- Pakistani employee who was taunted and intimidated by his Indian colleagues could take his hostile work environment case to trial.

Rehmani v. Superior Court (2012) 204 Cal.App.4th 945.

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Harassment

- Employer could lawfully terminate at-will employee for dishonesty during harassment investigation.

McGrory v. Applied Signal Technology, Inc. (2013) 212 Cal.App.4th 1510.

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First Amendment

- A police union president may sue for retaliation based on his union activities when the Chief delays his 5% POST pay.

Ellins v. City of Sierra Madre (2013) _____ F 3d _____2013 WL 1180299.

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First Amendment

- Public employee speech made pursuant to "official duties" does not have First Amendment protection and cannot form the basis for a retaliation claim.

Dahlia v. Rodriguez (9th Cir. 2012) 689 F.3d 1094, rehearing en banc granted by (9th Cir. 2012) 704 F.3d 1043.

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Thank you

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PUBLIC MEETING

An Ordinance Prohibiting "Insolent" Behavior At City Council Meetings Is Unconstitutionally Vague.

On December 6, 2005, the Costa Mesa City Council voted to approve an agreement with Immigration and Customs Enforcement (ICE) to grant Costa Mesa police officers the authority to enforce federal immigration laws in the City. In accordance with the California Brown Act, the City granted members of the public the right to comment on the ICE agreement. Consistent with its internal rules, the City Council afforded each speaker three minutes during public comment.

Acosta, a founding member of an organization that represents the rights of undocumented and immigrant workers, attended the meeting to express his disapproval of the proposal. In his comments, he twice called the Mayor a "racist pig." When the Mayor cut Acosta's speaking time short and called a recess, Acosta called him a "fucking racist pig."

Due to media attention, the City Council again placed the ICE agreement on the agenda for its January 3, 2006 meeting. During the public comment portion of the meeting, Acosta asked audience members who agreed with his viewpoint to stand up. Acosta disregarded the Mayor's subsequent requests to stop asking the audience to stand up. The Mayor then abruptly recessed the meeting and City police officers attempted to take Acosta out of the chambers. Acosta argued with the officers and resisted their attempts to remove him. Once outside the chambers, Acosta continued his efforts to resist the officers and he was ultimately arrested.

Acosta brought suit against the Mayor, the City, the Chief of Police, and individual police officers claiming, among other things, that Costa Mesa Municipal Code section 2-61 unconstitutionally restricts speech and that the City selectively enforced the Ordinance as to him because of his criticism of the Council. The trial court dismissed Acosta's claim that Code section 2-61 is overbroad and unconstitutional. The court also granted summary judgment to the individual police officers who removed Acosta on the basis of qualified immunity. A jury subsequently rejected Acosta's claims that the City and the Mayor violated his First and Fourth Amendment rights, implicitly finding that his conduct was disruptive and Acosta appealed.

In order for a court to invalidate a statute on the basis of over breadth, there must be a realistic danger that the statute will significantly compromise the First Amendment rights of parties not present in court. While a city may not unnecessarily restrict protected speech at a city council meeting, it may permit the presiding officer to eject a speaker for disturbing or impeding a meeting.

In this case, section 2-61(a) prohibited more than actual disruption; it also prohibited "insolent" behavior. Section 2-61(b) also made it unlawful for any person to "make any personal, impertinent, profane, insolent, or slanderous remarks." On rehearing, the Court held once again that the ordinance "unnecessarily sweeps a substantial amount of non-disruptive, protected speech within its prohibiting language," and is therefore unconstitutionally overbroad.

The Court also held, however, that because the word "insolent" could not be removed without changing the grammar, meaning, or purpose of the ordinance, the rest of the ordinance had to be invalidated. Because both subsections (a) and (b) prohibited non-disruptive conduct, the Court was not "confident" that the City would have enacted the statute absent the unconstitutional parts.

The Court affirmed the lower court's determination that the statute was applied in a constitutional manner to Acosta, and also affirmed the discretionary act immunity granted to the Mayor and Chief of Police, and the qualified immunity granted to the individual officers who removed Acosta from the meeting. The officers were reasonably believed the ordinance was constitutional when they removed Acosta from the meeting.

Acosta v. City of Costa Mesa (9th Cir. 2013) ___ F.3d ___ [2013 WL].

Note:

Reasonable restriction of public comments is lawful, but agencies should carefully review any rules that restrict the content or manner of public comment to ensure such restrictions are not unconstitutional.

RECORDS

Public Employers Must Provide Unions With The Personal Contact Information (Including Home Addresses) Of Non-Union Member Unit Employees.

The California Supreme Court has issued a decision, *County of Los Angeles v. Los Angeles County Employee Relations Commission*, that requires a public employer to disclose home contact information for all bargaining unit members to the representative for the bargaining unit.

The Service Employees International Union, Local 721 ("Union"), is the exclusive representative for several bargaining units of County employees. Approximately 14,500 County employees were not members of the Union. The Union was required to annually send a *Hudson* notice to County employees in their bargaining units, informing the unit employees of their membership options, applicable fees, and reasons they were required to pay the fees. Included in the Union's *Hudson* notice was a solicitation letter to join the Union or forms to decline to join. The forms requested names, home addresses, and home telephone numbers of County employees who decline to join the Union. The Union had names and telephone numbers for less than half of the 14,500 non-members. In the past, the Union prepared the *Hudson* notice, the County prepared the mailing labels, and the County Employee Relations Commission ("Commission") mailed the *Hudson* notices, along with the Union's solicitation letter and forms.

During negotiations in 2006, the Union proposed a change to the MOU *Hudson* notice obligation that would require the County to furnish the Union with names and home addresses of employees covered by the agency shop provisions each year. The Union wanted the personal information of the non-members to communicate about union activities and events, but also as a recruitment tool. The County maintained that the information was irrelevant to any collective bargaining issue and disclosure would impede on non-members' constitutional privacy rights. The County proposed they continue their current *Hudson* mailing method or negotiate a procedure that would authorize the release of the information.

The Union rejected both of the County's options, withdrew its proposal to modify the *Hudson* notice provision, and filed an unfair practice charge against the County. The unfair practice charge was heard by the Commission. Relying on decisions of the Public Employment Relations Board ("PERB") and the National Labor Relations Board ("NLRB"), the Commission ordered production of the personal information of non-member County employees. The County filed a petition for writ of mandate seeking relief from the Commission's decision on the grounds that disclosure of non-members' personal information violated their privacy rights under California law.

The trial court agreed that the non-members had a right to privacy in their home contact information, but denied the County's petition, finding that the privacy interests of non-members were outweighed by the public policy interests favoring collective bargaining. The trial court determined that the Union needed the information to fulfill its duties of representation and the disclosure of the information did not violate non-member's privacy rights under California law. The County appealed and the Court of Appeals reversed. The Court of Appeals held that non-member County employees were entitled to notice and an opportunity to object to disclosure of their home contact information to the Union before that information was disclosed. The Court of Appeals determined that employees who provide their home contact information as a condition of employment have a reasonable expectation that that information will remain confidential except as required to be disseminated to governmental agencies and benefit providers. The Court of Appeals fashioned a notice and opt-out procedure that the parties were required to follow upon remand that would not deprive the Union of its right to contact information for non-members and would also allow the County to inform non-members whose privacy interests would be affected.

The California Supreme Court granted the Union's petition for review. The Supreme Court agreed with the Court of Appeals that the Union is entitled to the home contact information of non-members, but reversed the portion of the decision imposing specific procedural requirements for disclosure of that information upon the parties.

The Supreme Court first considered whether the Union was entitled to obtain the personal information (home addresses and telephone numbers) of all represented employees, including non-member employees. Unlike the Court of Appeals, the Supreme Court found NLRB and PERB decisions to be persuasive authority in interpreting the Meyers-Milias-Brown Act ("MMBA"). Both NLRB and PERB decisions hold that names and addresses of public employees are presumptively relevant to collective bargaining and therefore subject to disclosure

to unions. The Court said that NLRB and PERB decisions are persuasive guidance and the Court should follow PERB's interpretations unless they are clearly erroneous.

The Court held that the failure to provide relevant information about non-member employees violated the County's obligation under the MMBA to bargain in good faith. The Court explained that contact information is presumptively relevant to bargaining, so it must be disclosed unless the employer can show the information is not relevant or provide adequate reasons why the information cannot be provided.

Although a public employer is obligated under the MMBA to disclose the home contact information to the exclusive representative, the question of whether privacy rights under Article 1, Section 1 of the California Constitution prohibit disclosure was a question of first impression for the Court. The Court applied a balancing test from *Hill v. National Collegiate Athletic Ass'n* (1994) 7 Cal.4th 1 to determine whether the non-member's right to privacy outweighed the Union's interest in disclosure of contact information. Under *Hill*, a court must determine whether there is: (1) a legally protected privacy interest, (2) a reasonable expectation of privacy, and (3) an invasion of privacy that is serious in nature and scope. The Court determined that there was a protected privacy interest in non-member employees' home contact information. The Court also determined that the non-member employees possessed a reasonable expectation of privacy in that information, as the County had never previously disclosed home contact information for non-members to the Union and many non-members had specifically declined to provide that information to the Union. However, the Court also found that the non-members' expectation of privacy was diminished because disclosure of home contact information was the "overwhelming norm" in labor relations. Finally, the Court determined that disclosure of the home contact information would be a serious invasion of privacy.

After determining that disclosure of the home contact information would invade the privacy of non-member employees, the Court was required under the *Hill* case to balance the non-members' privacy interest in their home contact information against the Union's interest in obtaining the information. The Court held that the Union's interest in obtaining the home contact information outweighed the non-members' privacy interest. The Court noted that the Union has a duty of fair representation to all employees in the bargaining unit, including non-members. That duty would be frustrated if the Union did not have access to the home contact information for non-members. Additionally, the Court noted that the obligation to send a yearly *Hudson* notice to employees falls on the Union, not the employer, even though the County and the Commission had historically provided that notice.

Finally, the Court noted that the privacy invasion is relatively mild, and the parties could negotiate or the Commission could adopt specific procedures to allow non-members to opt-out of providing their home contact information. The Court also held that the Court of Appeals exceeded its authority by ordering the parties to adopt specific notice and opt-out procedures instead of letting the parties develop those procedures on their own.

County of Los Angeles v. Los Angeles County Employee Relations Com'n (Cal. 2013) ___ P.3d ___ [2013 WL 2348163].

Note:

This decision means that a public employer who fails to provide relevant home contact information upon request will violate its obligation under the MMBA to bargain in good faith. If an employer wishes to avoid disclosing the personal information of bargaining unit employees who are not members to the exclusive representative, it may negotiate opt-out procedures with the exclusive representative.

A Community College Commits An Unfair Labor Practice When It Fails To Provide A Union With A List Of Faculty Who Did Not Have Retirement Election Forms In Their Personnel Files.

The collective bargaining agreement (CBA) between the Santa Monica Community College District and the Santa Monica College Faculty Association states that part-time faculty who do not belong to a public retirement system must enroll in one of the listed retirement programs, which includes the CalSTRS. It further states that the office of Human Resources (HR) will provide part-time faculty members with information as to each of the retirement options.

During a 2009-2010 internal audit, the District discovered that some part-time faculty did not have the California State Teachers' Retirement System (CalSTRS) retirement election form in their personnel file, which is required by the Education Code. The HR office sent a letter to certain part-time faculty informing them that they had not completed the election form. As a result of the letter, Mitra Moassessi, the president of the Association, began receiving phone calls from part-time faculty, reporting that when they were hired, they had not been informed of the option to enroll in the CalSTRS defined benefit plan. Moassessi requested a list of the individuals who had received the letter. The District provided it to him two days later. The following month, Moassessi emailed the HR office and requested an updated list of those who did not have the election form in their file. The HR office stated that the list was assembled by counsel and therefore was protected by attorney-client and work product privileges. The Association then filed an unfair practice charge with the Public Employment Relations Board (PERB) alleging that the District violated the Educational Employment Relations Act (EERA).

PERB held that an exclusive representative is entitled to all information that is relevant and necessary to the discharge of its duty of representation. PERB uses a liberal standard, similar to a discovery-type standard, to determine the relevance and necessity of requested information. An employer can refuse to release information that is otherwise relevant and necessary if it has a valid defense, such as legal privileges, or if the release will compromise employee privacy rights.

Here, the District asserted that the Association's duty of fair representation did not extend to information pertaining to outside forums such as CalSTRS. The Board held, however, that the information was related to an employee's option to select retirement options as set forth in the parties' CBA, and retirement benefits for current employees is a mandatory subject of bargaining. Thus, according to PERS, the requested information was presumptively relevant and also necessary to the Association's representation of its members. And, while the District claimed attorney-client and work product privileges in its denial letter, it failed to cite to the privileges in

its post-hearing brief, and its release of the original list demonstrated that it had waived any privilege. Thus, the District violated the EERA by failing to provide the updated list.

Santa Monica Community College District (2012) PERB Decision No. 2303-E [__ PERC ¶ ___].

Note:

This decision should not stand for the proposition that an agency should automatically turn over any document that relates in any way to a mandatory subject of bargaining. Before turning over any documents or records, review carefully for any information that may violate attorney-client or work product privileges, or may reveal confidential information about agency employees.

In Addition To Current Employees, Former Employees And Employee Representatives May Inspect And Receive Copies Of Personnel Files For Three Years After Employment Ends.

Under Labor Code section 1198.5, an employee has the right to inspect the personnel records that his or her employer maintains relating to the employee's performance or to any grievance concerning the employee. A.B. 2674, signed into law on September 30, 2012, amends section 1198.5. The bill now entitles employees to receive a copy of the records, not just to inspect, and explicitly grants the rights to current and former employees and employee representatives. It establishes that an employer is required to maintain an employee's personnel records for a period of not less than three years after termination of employment, and requires employers to make the records available within 30 days of receiving a request. Employers will not be required to comply with more than 50 requests for a copy of the above-described records filed by a representative or representatives of employees in one calendar month. The bill will not apply to an employee covered by a valid collective bargaining agreement if the agreement provides, among other things, for a procedure for inspection and copying of personnel records, nor will it apply to employees covered by the Public Safety Officers Procedural Bill of Rights Act.

In the event an employer violates these provisions, a current or former employee or the Labor Commissioner may recover a penalty of $750 from the employer and/or may obtain injunctive relief and attorney's fees. However, while an employer who failed to permit an employee to inspect the employee's personnel records used to be guilty of a misdemeanor punishable by a fine or imprisonment, this bill instead provides that a violation will only constitute an infraction.

Labor Code Sec 1198.5 (as amended 9/30/12).

Note:

While A.B. 2674 expands employee inspection rights, it also helps clarify the law regarding employer obligations, especially in formerly unclear areas such as how long an employer

was required to maintain employee records following termination and how long he or she had to comply with a request.

When A Trial Court Denies A Request For Public Records From A Police Department, The Requesting Party Must Challenge The Denial By Extraordinary Writ.

MinCal Consumer Law Group made a Public Records Act request to the Carlsbad Police Department for records stemming from identify theft incidents. The Department permitted MinCal to inspect the Department's publicly available log, which only contained information for the past 30 days and claimed that information over 30 days old was "historical" and thus not subject to mandatory disclosure under the Act.

MinCal filed a petition for writ of mandate seeking to compel the City to make the records available and then filed an appeal after the trial court denied its petition. The City argued that the Court of Appeal has no jurisdiction because MinCal's sole remedy was to file a petition for writ of mandate.

Government Code section 6259 provides that when a public official refuses to disclose material requested under the Act, and the trial court issues an order supporting the decision, the court's order is not a final judgment that can be appealed. Rather, the objecting party must file a petition with an appellate court for issuance of an extraordinary writ. Statutory filing deadlines are mandatory and jurisdictional, meaning that if a writ petition is not filed within the time limit, the Court of Appeal lacks the power to review the trial court's ruling.

MinCal did not comply with Government Code section 6259 by filing an extraordinary writ petition. Rather, it filed a notice of appeal. While appellate courts may treat a notice of appeal as a writ petition under limited and extraordinary circumstances, MinCal did not provide an extraordinary or compelling reason for the Court to do so. Further, even if it had, MinCal missed the applicable filing deadline, and the Court of Appeal lacked the jurisdiction to hear the matter. On that basis, the Court of Appeal dismissed the appeal.

MinCal Consumer Law Group v. Carlsbad Police Department (2013) ___ Cal.App.4th ___ [2013 WL 831462].

Note:

Where a trial court determines that an agency has rightfully withheld documents or information requested under the Public Records Act, the requesting party cannot simply appeal the denial. Rather, the requesting party must file an "extraordinary writ" with the Court of Appeal. The chances of the Court of Appeal granting an extraordinary writ are very low.

LABOR RELATIONS

A City Need Not Give Guidance To The Union On What Might Be Acceptable When It Rejects An MOU That Had Been Tentatively Agreed Between A Union And The City Representatives.

Following the expiration of their memorandum of understanding, the Stationary Engineers Local 39, International Union of Operating Engineers, AFL-CIO (Local 39) and the City of Lincoln negotiated a new tentative agreement. After Local 39's membership rejected the tentative agreement, the parties negotiated a second tentative agreement, which Local 39 also rejected. When the Local 39 membership finally ratified the third tentative agreement, it was submitted to the City Council for authorization. The Council discussed the agreement in an open session during which the Council did not take a vote, but directed City staff to continue working with Local 39 to come to a comprehensive agreement. The City continued to offer to meet and confer, but no further actual bargaining sessions were held.

Local 39 claimed the City violated section 3505.1 of the Meyers-Milias-Brown Act (MMBA), which provides that if the employee organization and public agency reach an agreement they shall jointly prepare a written MOU and "present it to the governing body or its statutory representative for determination." According to Local 39, the Council did not consider, conduct a vote, or take any other action related to the tentative agreement, thus violating §3505.1. The administrative law judge (ALJ) dismissed the complaint for failing to establish a violation of the MMBA, and PERB upheld the decision.

The ALJ found that the City Council communicated its "determination" by commenting that the tentative agreement did not go far enough and by directing staff to continue negotiating a comprehensive agreement. Despite Local 39's contentions otherwise, the MMBA does not require the City Council to provide guidance about what needed to be changed in order to make the agreement acceptable.

Stationary Engineers Local 39, International Union of Operating Engineers, AFL-CIO v. City of Lincoln (2012) PERB Dec No. 2284-M [___ PERC ¶ ___].

A County Has No Duty To Bargain When A Union Inadequately Requests Bargaining Over A Decision To End A Take-Home Vehicle Program.

Beginning in 1995, the County of Sacramento allowed sewer district supervisors to take their County-issued vehicles home at night in order to facilitate the supervisors' response to emergencies. In October 2010 the County notified Ken Akins, the supervisors' union representative, that it intended to discontinue this benefit for approximately 20 of the supervisors who had not been called frequently to respond to emergencies in the past year. The letter stated that the supervisors would be provided with 30 days' notice of the change, as required by the County's Home Vehicle Retention Policy, and asked Akins to contact the County by October 13, 2010 if he wanted to discuss the issue.

In early November 2010, Akins called the County representative and scheduled a meeting to discuss the issue. At the November 16, 2010 meeting, the County went over the data that supported discontinuing the Home Vehicle Retention Policy, and Akins said that he would confer with his members and "get back" to the County. Akins wrote a letter to the County on November 30, 2010, in which he stated the supervisors' objection to the discontinuance and asked for possible meeting times so that "various issues" relating to the discontinuance could be discussed. The County responded on December 17, 2010, asking Akins for possible meeting times and informing him that it would be moving forward with termination of the policy. Two weeks later, Akins responded and asked the County to refrain from terminating the policy. The County informed him a week later that the change had already been implemented, but that it was willing to meet to answer any remaining questions.

The union filed an unfair practice charge on March 8, 2011. The Office of the General Counsel dismissed the charge, finding that the County's duty to negotiate was never triggered because the union neither explicitly requested to negotiate effects nor identified any specific effects of the decision that would be negotiable. The union appealed, and PERB affirmed the dismissal.

In some cases, merely requesting to discuss a matter is sufficient to put an employer on notice of the union's desire to bargain. However, when a decision is negotiable only as to its effects on terms and conditions within the scope of representation, the union representative must indicate in its demand that it seeks to negotiate the effects, rather than the decision itself.

Some past PERB decisions have added the requirement that the union must also identify the specific effects of the non-negotiable decision. In line with the recent *Rio Hondo Community College District* casebelowPERB held that such specificity is not required, and disavowed any cases that hold otherwise. In order to trigger an employer's duty to negotiate, the union representative only has to identify a subject matter within the scope of representation and indicate a desire to bargain over the effects of the decision, as opposed to the decision itself. PERB held that, in this case, Akin's communications with the County failed to satisfy either element. PERB also rejected the union's argument that the County had agreed to negotiate and was therefore obligated to maintain the policy until negotiations were complete. The December 17 email in which the County asked for possible meeting times clearly stated that the County intended to move forward with termination of the policy. PERB found that, absent evidence of other negotiations or a valid demand to bargain, the email indicated a willingness to answer questions, not an agreement to negotiate. It stated that "[t]o hold otherwise would penalize the employer for doing what the purpose of the MMBA envisions- promoting full communication between public employers and their employees." PERB dismissed the charge without leave to amend.

County of Sacramento (2013) PERB Decision No. 2315-M [___ PERC ¶ ____].

Note:

As indicated by this decision and the Rio Hondo Community College District *decision listed below, PERB will apparently not require unions to identify the specific negotiable effects of a decision in order to trigger an employer's duty to bargain. As long as the union demonstrates that it seeks to bargain effects, rather than the decision, and that the subject impacted by the decision is within the scope of bargaining, an employer is likely obligated to bargain. As PERB explained in* Rio Hondo Community College District, *the bargaining table is the proper place for discussing the anticipated future impact of a non-negotiable decision that has not yet been implemented.*

A Union Is Entitled To Bargain Over The Effects Of An Employer's Installation Of Surveillance Cameras In Work Areas.

In mid-April 2009, the Rio Hondo Community College District (District) informed the California School Employees Association (CSEA) of its intent to install security surveillance cameras in its new Learning Resource Center and accompanying parking lots. In early June 2009, CSEA sent a letter to the District requesting to negotiate over the effects of the District's intent to install surveillance cameras. The letter stated that "it is not CSEA's intention to prevent the District from using such cameras but rather to ensure that the District does not use the cameras to monitor CSEA bargaining unit employees while they are at work and for the District to use footage or video images to evaluate, monitor, and/or potentially attempt to discipline classified employees." The District responded on June 30, 2009, denying CSEA's request to negotiate.

CSEA filed an unfair practice charge against the District in October 2009. The administrative law judge (ALJ) concluded that the District's denial of CSEA's request to negotiate constituted a refusal to bargain in violation of the Educational Employment Relations Act (EERA). The ALJ determined that CSEA properly requested to bargain over the effects of the District's decision to install security cameras, namely, the effects the cameras may have on performance evaluations and potential discipline. The District filed exceptions to the ALJ's proposed decision, but the Public Employment Relations Board (PERB) adopted the ALJ's findings of fact and conclusions of law.

The District contended that CSEA failed to request to bargain in a timely manner, and thus waived its right to bargain effects. However, PERB stated that waiver of the right to bargain must be clear and unmistakable. Silence is insufficient on its own to constitute waiver; it must be accompanied by another indicia of intent, such as unreasonable delay (generally, more than three months). PERB further stated that silence for less than three months could support an inference of intent to relinquish bargaining rights where, for instance, an employer provides notice that it is facing an externally imposed deadline for action.

In this case, PERB held that CSEA did not clearly waive its right to bargain. It waited less than two months to request bargaining, and the District failed to allege that it faced any external deadline to install the cameras or that CSEA's deadline caused any prejudice.

The District also argued that CSEA failed to clearly identify the "specific effects" of the District's decision that it wished to negotiate. PERB stated that such specificity is unnecessary, holding that a union's demand is sufficient if it clearly identifies subject matters within the scope of representation and indicates a desire to bargain over the effects of the decision as opposed to the decision itself. Upon receiving such a demand, the employer has an obligation to either bargain or seek clarification of (1) the areas of impact proposed for negotiation and (2) whether these areas of impact are within the scope of representation. In this case, PERB held that CSEA's letter clearly requested to negotiate over the effects of the decision to install surveillance cameras.

The District further contended that the "type of evidence" it uses for evaluations and discipline of employees is not a matter within the scope of representation. Under the EERA, a subject is within the scope of representation if (1) it is logically and reasonably related to wages, hours, or an enumerated term and condition of employment; (2) it is likely to divide people along union-management lines; and (3) the employer's obligation to negotiate the matter would not significantly abridge its management rights.

PERB noted that evaluation and disciplinary procedures are enumerated terms and conditions of employment, and held that the type of evidence used to substantiate employee performance evaluations or discipline is logically and reasonably related to those procedures. Workplace rules concerning internet usage are negotiable, and video monitoring presents the same concerns. Further, the use of surveillance cameras is of concern to both employees and employers, and may lead to disagreements of whether and how the video records should be used. It could be proffered merely to corroborate a first-hand account, or serve as the sole evidence of misconduct. Negotiating is an appropriate means of resolving this inherent conflict. Finally, requiring negotiation over the effects of video surveillance would not significantly abridge any management rights. Therefore, an employer's decision to install security surveillance cameras in areas where employees work or take breaks has an effect on discipline and performance evaluations, and is a subject matter within the scope of representation.

Finally, the District argued that the ALJ's proposed decision failed to discuss the actual impact of the installation and use of surveillance cameras on the terms and conditions of the CSEA unit members' employment. PERB held that a *prima facie* case of refusal to engage in effects bargaining only requires the charging party to show a reasonably foreseeable prospective impact, not an actual impact. PERB disavowed any prior PERB decisions that hold otherwise.
On that basis, PERB concluded that the District violated the EERA by refusing to bargain with CSEA about the effect of a decision to install security cameras.

Rio Hondo Community College District (2013) PERB Decision No. 2313 [37 PERC ¶ 197].

A City's Imposing Of Its Last, Best, And Final Offer Does Not Relieve The Union Of The Duty To Bargain Over Remaining Unresolved Matters.

The memorandum of understanding (MOU) between the City of Santa Rosa and the Operating Engineers, Local 3 expired on June 30, 2009. The parties bargained for a successor agreement for nearly a year and engaged in impasse procedures, but were not successful. On May 25, 2010, the City imposed its last, best, and final offer (LBFO) that contained only one term: a two-tiered retirement plan.

Two weeks later, the City wrote to the Operating Engineers and requested that bargaining begin on a new MOU. The Operating Engineers refused, claiming it had no duty to negotiate for one year from the date of the City's imposition of its LBFO. The union stated that by implementing only one term, the previous MOU remained the status quo until the end of the 2010/2011 fiscal year.

The City responded by advising the Operating Engineers of its intention to reduce employee compensation by five percent in order to deal with the declining fiscal situation. The Operating Engineers continued to assert that it had no duty to bargain. The City declared impasse and presented the Operating Engineers with a proposal for the five percent wage reduction. The Operating Engineers filed an unfair practice charge.

The administrative law judge (ALJ) rejected the Operating Engineer's argument that it had no duty to bargain for one year after imposition of a LBFO, and the Public Employment Relations Board (PERB) agreed.

During the relevant period, Government Code section 3505.4, part of the Meyers-Milias-Brown Act (MMBA), stated that "[t]he unilateral implementation of a public agency's last, best, and final offer shall not deprive a recognized employee organization of the right each year to meet and confer on matters within the scope of representation . . . ."

The Operating Engineers argued that this section established a one-year "cooling off" period following implementation of a LBFO. However, the statute was added by the Legislature in order to deal with a 1999 Court of Appeal decision that allowed a city council to impose a multi-year MOU as its LBFO. In other words, the statute was meant to be a sword enabling unions to assert bargaining rights after imposition, not a shield protecting the union from an employer's legitimate demands to bargain. Further, a cooling off period would conflict with Government Code section 3505, which obligates public agencies and union representatives to "meet and confer promptly upon request by either party." On that basis, PERB upheld the dismissal of the Operating Engineer's unfair practice charge.

City of Santa Rosa (2013) PERB Decision No. 2308-M [___ PERC ¶ ____].

A County Violated Its Own Rules When It Placed Certain Peace Officers In A Bargaining Unit With Investigators.

Stationary Engineers Local 39, International Union of Operating Engineers, AFL-CIO (Local 39) is the exclusive representative for over 600 County of Yolo employees in 255 job classifications comprising the General Unit. The General Unit includes six peace officer classifications used in the Probation Department.

In 2010, Jennifer Ellasces, president of the Yolo County Probation Association (YCPA) filed a petition seeking to modify the General Unit to form a separate bargaining unit of peace officers which would be comprised of approximately 98 individuals. According to YCPA, the County's director of human resources, Mindi Nunes, determined that YCPA failed to provide proof that at least 30 percent of the employees in the General Unit no longer wished to be represented by the incumbent, Local 39.

A meeting took place between Nunes and YCPA. Accordingly to YCPA, Nunes stated that she denied the YCPA petition because she did not have sufficient staff to engage in collective bargaining with a newly recognized bargaining unit and it was her intent to include the classifications identified by YCPA in one of three existing law enforcement bargaining units. However, none of the three existing units wanted to merge with the YCPA-represented classifications and Ellasces objected to the proposed merger. After YCPA's request for unit modification and recognition was denied, YCPA appealed the decision to the Board of Supervisors.

At a November 2010 meeting, the Board removed the YCPA classifications from the General Unit and consolidated them with the Yolo County Investigators Unit (YCIA), one of the three existing law enforcement bargaining units. YCIA appealed, and the Board then removed the YCPA classifications and placed them into a separate unit.

Local 39 filed an unfair practice charge on the grounds that the County violated its own rules and the Meyers- Milias Brown Act (MMBA) in handling the YCPA petition. The administrative law judge found that the County did not violate the MMBA or its local rules. Local 39 filed exceptions, and PERB reversed in part.

PERB held that the Board violated the local rules by consolidating YCPA with YCIA when neither party had petitioned for such a change, thereby depriving Local 39, YCPA, and YCIA of notice and opportunity to be heard. PERB also held that the County's action deprived the Probation Department employees of their fundamental right to be represented by an exclusive representative of their own choosing.

PERB further held, however, that the Board did not violate any rules when it removed the YCPA classifications from the General Unit. Government Code section 3508 provides that a governing body may not prohibit the right of peace officers to "join or participate in employee organizations which are composed solely of those peace officers," and the YCPA petition presented a legitimate modification request based on this right. The County was ordered to pay

for any loss in wages or benefits incurred by employees in the Probation Department classifications who were merged into the YCIA unit.

County of Yolo (2013) PERB Decision No. 2316-M [___ PERC ¶ ____].

A City Cannot Unilaterally Impose Unpaid Furloughs Unless It First Makes A Last, Best, and Final Offer And Declares Impasse.

PERB stated that to prevail in a unilateral change case, the charging party must first establish that the employer breached or altered the parties' written agreement or an established practice. In 2008, the City of Long Beach began experiencing significant revenue shortfalls. The City Manager projected a nearly $17 million budget deficit for the 2008-2009 fiscal year. In October 2008, the City began exploring the idea of a five-day employee furlough. It met with the International Association of Machinists & Aerospace Workers, Local Lodge 1930, District 947 (IAM) three times in early 2009 to discuss cost savings options including furloughs and layoffs, but no agreement was reached and the City did not declare impasse or implement a last, best and final offer.

On May 5, the City Council voted to authorize the City's mandatory unpaid furlough plan for all regular, full-time employees. Some departments implemented business closure days while others required employees to take a "floating" unpaid furlough day of eight hours per month. Employees who worked a 9/80 schedule and who elected to take a "floating" furlough day on what would have been a 9-hour workday were required to use accrued leave for the extra hour. This requirement had never been discussed during the meetings between IAM and the City, and was not included in the City Council's resolution.

IAM filed an unfair practice charge with the California Public Employment Relations Board (PERB), alleging that the City violated the Meyers-Milias-Brown Act (MMBA) by unilaterally implementing furloughs without satisfying its obligation to meet and confer in good faith. The Administrative Law Judge (ALJ) determined that the City unlawfully implemented two furlough policies: one requiring furloughs of one eight-hour day per month and one requiring employees to use accrued leave to make up the extra hour on 9-hour work days. The City filed numerous exceptions to the decision, but PERB affirmed the ALJ's determination.

PERB stated that an employer does not make an unlawful change if its actions conform to the terms of the parties' agreement. PERB held that the MOU did not authorize the unilateral implementation of furloughs.

The City then argued that even if it had an obligation to bargain over the imposition of furloughs, it satisfied that obligation by meeting and conferring in good faith on multiple occasions prior to imposing the furloughs. The City also argued that it was not required to make a formal declaration of impasse, or to make a last, best and final offer, prior to implementation. In rejecting this argument, PERB noted that while the MMBA does not define the term impasse, the Educational Employment Relations Act (EERA) defines "impasse" to mean that "the parties to a

dispute over matters within the scope of representation have reached a point in meeting and negotiating at which their differences in positions are so substantial or prolonged that future meetings would be futile." PERB held that the EERA's definition of impasse is appropriate under the MMBA as well. It then held that, in this case, because the parties continued to discuss furloughs and schedule meetings, they never reached a point where further negotiations would have been futile. Therefore, regardless of whether the City declared impasse, impasse did not exist on May 5 when the City Council adopted the furlough resolution.

The City also argued that its action was a fundamental managerial policy or decision that fell outside the scope of representation. PERB noted that decisions directly affecting the quality and nature of public services are fundamental managerial decisions, while decisions that primarily affect wages and hours are generally within the scope of representation and subject to bargaining. In this case, PERB held that it was clear that the City viewed the matter to be within the scope of representation, as it repeatedly asserted to the City Council that the furloughs would be subject to the meet and confer process. It also found that it was "equally clear" that the decision was aimed at saving money by reducing employee wages, not aimed at affecting the quality of service to the public.

Finally, PERB rejected the City's argument that it imposed furloughs due to the existence of an emergency. PERB noted that the City did not declare fiscal emergency until two months after it implemented the furlough plan. Further, the City failed to establish that it had no alternatives to imposing furloughs.

On that basis, PERB ordered the City Council to rescind its furlough resolution and make all affected employees whole for any loss of wages or benefits.

City of Long Beach (2012) PERB Dec No 2296-M [___PERC ¶ ___].

Note:

In a footnote, PERB stated that it was not deciding whether the imposition of furloughs may fall within the scope of the management rights in another case. It simply stated that, in this case, there was no evidence that the City's decision was aimed at affecting the quality, nature or level of service to the public, as opposed to employee wages. Therefore, an employer could, hypothetically, implement furloughs unilaterally if the agency could successfully demonstrate that the furloughs were aimed at affecting the level of service to the public. This would be a risky argument. It is more likely that for most agencies, the decision to implement furloughs will fall within the scope of bargaining.

A Union Is Entitled To Arbitrate A Dispute Over Whether Unilaterally Imposed Furloughs Violate An MOU.

Faced with a $500 million budget deficit, the City Council of Los Angeles declared a fiscal emergency. Then the Council directed the Mayor to adopt a program of unpaid furloughs for non-sworn employees.

In response to the Council directive, the Mayor ordered one furlough day for each 80-hour pay period for affected employees.

Rather than challenge the negotiability of the Council's unilateral action, the Engineers and Architects Union filed a grievance. The grievance alleged that the furlough program violated the Memorandum of Understanding between the Union and the City. Specifically, the Union contended that furloughs violated a contract clause that provided members with "40 hours per week at the regular hourly rate." The Union also cited the agreed salary schedule which set pay rates for 52 weeks at 40 hours per week.

The City rejected the grievance and refused to arbitrate the dispute under the contractual arbitration provision. The City asserted that the MOU's Management Rights clause gave it authority to "relieve City employees from duty because of lack of work, lack of funds or other legitimate reasons." It also cited an MOU provision that allowed it to carry out its "mission" in emergencies.

The Union sued and sought a writ to compel arbitration. The Superior Court granted the writ but the Court of Appeal reversed, finding that arbitration would constitute an unlawful delegation of the Council's authority. The California Supreme Court granted review and sided with the Union, concluding that the dispute was arbitrable.

The Supreme Court discussed the role of the arbitrator being limited to applying and interpreting the terms of the MOU. This role would be entirely adjudicative, rather than a usurpation of the Council's legislative authority. Further, the Court found that the City Council had "created" the terms of the MOU and agreed that those terms could be interpreted by an arbitrator. Based on these determinations, the Court found that allowing an arbitrator to decide the dispute framed by the grievance would not constitute an unlawful delegation of Council authority.

In its analysis, the Court seemed to place particular emphasis on the definition of a grievance which the parties had agreed to include in the MOU. That definition covered any dispute over the "interpretation or application" of MOU provisions and any dispute over "department rules and regulations governing personnel practices and working conditions." This two-pronged definition of a grievance led the Court to conclude that the Union grievance was arbitrable "without question."

Three Justices (Corrigan, Baxter and Chin) dissented. They argued that allowing arbitration would destroy Management Rights as defined by the MOU. They also concluded that arbitration

would deprive the City Council of its discretionary authority. In strong language, the dissenters concluded that the majority would wrongfully "subject the decision of elected leaders in difficult times to second-guessing by an arbitrator who is not answerable to the voters."

City of Los Angeles v. Superior Court (6/20/13) _____Cal 3d _____.
www.metnews.com/sos/cgo//0613//S192898

A Public Sector Union Is Barred From Proceeding To Fact Finding If It Fails To Meet Certain Time Limits, But Otherwise Cannot Waive The Right To Fact Finding.

Approximately two years ago, Governor Brown signed AB 646, amending the Meyers-Milias-Brown Act, to require fact-finding as a means of resolving impasses in labor negotiations under certain circumstances.

AB 646 added Government Code section 3505.4, which required fact-finding, upon request of the union, if a mediator was unable to effect a settlement within 30 days of his or her appointment. However, in an apparent oversight, the legislation failed to place a time limit on the union's ability to request fact-finding. It also failed to state whether fact-finding was required if the agency did not agree to mediation.

On September 14, 2012, Governor Brown signed into law AB 1606, "clean-up" legislation for AB 646. Section 3505.4 now contains a timeframe within which the union must request fact-finding: not sooner than 30 days, but not more than 45 days, after a mediator is selected. AB 1606 also clarifies the right to fact-finding in situations where the parties do not submit the dispute to mediation. If the dispute is not submitted to mediation, an employee organization may now request fact-finding within 30 days after either party declares impasse.

Finally, section 3505.4 now states that the employee organization's procedural right to request fact-finding cannot be expressly or voluntarily waived. This amendment does not require fact-finding where an employee organization has not timely requested it, but appears to prohibit an employee organization from waiving the right to fact-finding in general. The law went into effect on January 1, 2013.

To see the full text of AB 1606, go to: http://leginfo.ca.gov/ pub/11-12/bill/asm/ab_1601-1650/ab_1606_ bill_20120914_chaptered.html

Note:

The fact-finding requirement and the timelines set forth in AB 1606 will add months onto the negotiating process for those agencies that proceed to impasse. Agencies should attempt to commence negotiations sooner in consideration of these new impasse procedures.

RETIREMENT

Union Employees May Sue When A City Unilaterally Deletes A Long-Standing Contractual Promise To Pay Half Of Retiree Health Premiums.

Local 1245 of the International Brotherhood of Electrical Workers (IBEW) filed a petition for writ of mandate alleging that the City of Redding unilaterally retracted its promise to pay 50 percent of City employees' medical insurance premiums after retirement. The trial court dismissed the petition on the grounds that (1) the right of active employees to receive future medical insurance benefits cannot be vested because it is subject to the collective bargaining process and (2) the memorandum of understanding (MOU) between the parties cannot be deemed to provide vested rights because the MOU remains in force only until its expiration. IBEW appealed.

After IBEW appealed, the California Supreme Court issued its decision in *Retired Employees Assn. of Orange County, Inc. v. County of Orange* (2011) 52 Cal.4th 1171 which we reported on in our January 2012 Client Update. The Retired Employees case held that under California law, a vested right to health benefits for retired county employees can be "implied" from a county ordinance or resolution under certain circumstances.

Applying the holding in Retired Employees, the Court of Appeal reversed the trial court and held that IBEW adequately pleaded that the City had agreed to provide future retirement benefits – 50 percent of medical insurance premiums to active employees. The Court also held that the fact that the future right of active employees to receive retiree medical insurance benefits remained subject to the collective bargaining process does not necessarily mean that prior MOUs ratified by the city council did not already create a contractual obligation that survived the expiration of the MOUs. In other words, the Court determined that since "vesting remains a matter of the parties' intent," the petition adequately alleged a mutual intention by the City and the union to extend future retirement benefits to active employees. The union alleged that since 1979, its MOU with the City promised to pay 50% of the group medical insurance premiums for retirees and their dependents. The union further alleged that the City unilaterally cut this benefit in 2011 by providing a subsidy of only 2% per year of service, up to a maximum of 50%, thus violating the City's promise to maintain the benefit. This was sufficient to state a claim against the City.

International Broth. v. City of Redding (2012) 210 Cal.App.4th 1114.

Note:

This case provides another valuable lesson about the importance of word choice in employment contracts and memoranda of understanding. The Court repeatedly relied upon the fact that the prior MOUs between the City and the union promised to pay "fifty percent (50%) of the group medical insurance program premium for each retiree and dependents, if any, presently enrolled and for each retiree in the future" (emphasis added.) The Court suggested that the promise to pay fifty percent of medical insurance benefits to retirees may

have expired with the MOU if the phrase "for each retiree in the future" was not included in the language. Because the language was included, however, the Court determined that the most reasonable interpretation of the MOU is that the benefit was promised to active employees when they retired, even beyond the term of the MOU. This case, and the Retired Employees case illustrates the need to expressly limit the scope of MOU language where an agency does not intend benefits to become vested and survive the expiration of the MOU.

Ninth Circuit Sets Forth The Pleading Requirements For Asserting An Implied Contract To Provide Vested Healthcare Benefits To Retirees.

This decision is the latest in a line of cases that has followed *Retired Employees Association of Orange County, Inc. v. County of Orange* (2011) 52 Cal.4th 1171, in which the California Supreme Court held that a County may form an implied contract to provide vested healthcare benefits in perpetuity.

In August 2008, the Board of Supervisors for the County of Sonoma enacted a resolution to limit the County's healthcare benefit contributions to $500 per month for retirees, with a five-year phase-in period. In response, the Sonoma County Association of Retired Employees filed suit on the ground that, among other things, the County's resolution breached both express and implied contracts. The complaint further alleged that the County made two past promises to retirees: (1) beginning in 1964, the County promised to pay "all or substantially all" of the costs of post-retirement healthcare benefits for its retirees and their dependents, and (2) the County entered into a "tie agreement" in 1985, which promised that the County would treat retirees and their dependents the same as it treated the active management employees with respect to healthcare benefits and the County's payment of costs. The complaint also claimed that the County intended these promises to create healthcare benefits that would continue during the lives of the retirees and their dependents.

The County filed a motion to dismiss the complaint and the district court granted the County's motion without leave to amend. The court noted that the Association failed to allege the existence of any documents that demonstrated the County's express agreement to provide healthcare benefits to retirees in perpetuity. The Association appealed.

While the appeal was pending, the California Supreme Court issued the County of Orange decision. In light of the County of Orange decision, the Ninth Circuit held that in order to survive a motion to dismiss, the Association's complaint must "plausibly allege" that the County (1) entered into a contract that included implied terms providing healthcare benefits to retirees that vested for perpetuity; and (2) created that contract by ordinance or resolution.

Applying this framework, the Ninth Circuit held that the Association plausibly alleged that the County entered into memoranda of understanding (MOU) that provided healthcare benefits to retirees that included an implied term that the benefits were vested for perpetuity. The Association stated, in its complaint, that it would support its allegations with testimony from former employees who drafted the relevant MOUs, resolutions and other documents establishing

the County's intent to provide retiree health benefits in perpetuity. The Ninth Circuit held that this was sufficient to at least claim that the County entered into a contract that included implied terms to provide vested healthcare benefits to retirees.

The Ninth Circuit further held, however, that the Association was unable to point to a resolution or ordinance that created a contract that implied such vested benefits. The Court stated that the Association needed to identify resolutions and ordnances that "clearly evince" an intent to grant vested benefits. While the Association summarily stated that the MOUs were "Board-ratified," it did not allege that the Board ratified the MOUs by resolution or ordinance, nor did the Association submit copies of any such ordinances or resolutions. On that basis, the Court held that the district court did not err when it dismissed the complaint. However, the Court held that the district court should have provided the Association leave to amend their complaint.

Sonoma County Association of Retired Employees v. Sonoma County (9th Cir. 2013) ___ F.3d ___ [2013 WL 690839].

Note:

This is the latest in a line of cases that has followed the Orange County decision. The case is an important one as the Ninth Circuit has identified the proper standard for pleading an implied contract for health benefits for retirees. It is important to remember that the court was only looking to see whether the Association's complaint could survive a motion to dismiss. It is also notable that the Ninth Circuit stated that even if the Association can sufficiently amend its complaint, the Association carries a "heavy burden" of establishing that the County intended to create a compensation contract by ordinance or resolution, and an "equally heavy burden" of establishing that the contract's implied terms provided vested healthcare benefits to retirees.

Retired University Employees May Pursue Their Claim That They Were Entitled To Continuing Health Care Benefits Based On A Theory Of Implied Contract.

Four retirees who had worked at Lawrence Livermore National Laboratory had received health benefits for many years from the University of California (UC). UC had run the Lab and employees who worked there were considered University employees. When those employees retired they continued as members of the University of California Retirement System (UCRS), receiving health care benefits under that plan.

In 2007 the federal Department of Energy did not renew its contract with UC to run the Lab. Instead, DOE contracted with a private consortium. Shortly after being relieved of responsibility for running the lab, UC terminated the retirees' membership in UCRS. Responsibility for retiree health coverage was transferred to the private consortium. The new coverage was more expensive and inferior to what the retirees had been receiving under the UCRS plan.

The retirees sued UC and contended that they were entitled to continue with the UCRS retiree health coverage on a theory that there was an implied contract assuring them of continued coverage. They also argued asserted legal theories of promissory and equitable estoppel. The retirees cited several facts to support their legal theories, including (1) UC had expressly authorized health benefits for the retirees; (2) UCRS had been providing retiree health benefits for more than 50 years; and (3) multiple handbooks and other UC publications reiterated the right of retirees to receive "lifetime" health care benefits.

The trial court sustained UC's demurrer without leave to amend. The Court of Appeal reversed the trial court on the issues of implied contract, promissory and equitable estoppel. It affirmed dismissal of the cause of action based on express contract.

The Court of Appeal decision relied on the California Supreme Court decision in Retired Employees Association of Orange County v. Court of Orange (2011) 53 Cal 4th 1171 (REAOC). The REAOC decision allowed retired county employees to assert an implied contract theory to challenge the County's placing retired and active employees in separate health insurance pools. The Court applied the reasoning of REAOC to find the UC employees had adequately pleaded facts sufficient to survive demurrer. It directed the trial court to allow the retirees to proceed with discovery to see if they could prove their case on theories of implied contract, promissory or equitable estoppel.

Requa v. Regents of the University of California (12/31/12) 213 Cal App 4th 213

The City of San Diego Must Rescind A Charter Amendment Adopting Pension Reform Because Of Its Failure To Meet And Confer, Despite Overwhelming Voter Approval Of The Amendment.

Mayor Jerry Sanders has pursued pension reform in the City of San Diego for several years. The position of Mayor in San Diego has authority to develop bargaining proposals and to oversee negotiations, with agreements subject to City Council approval.

From 2006 to 2010 the City and its unions disagreed over changes to the retirement plans available to employees through the San Diego City Employees Retirement System (SDCERS). The City had managed to accomplish some reform but had not been as successful in those efforts as the Mayor felt was needed.

In 2010 Mayor Sanders decided to pursue an initiative to replace the existing defined benefit plan with a defined contribution plan for new employees and to make certain other changes. His rationale for pursuing this reform was his contention that the City's future pension obligations were underfunded by $2 billion. There had also been a 2010 defeat at the polls of a sales tax measure that would have improved the City's financial picture.

Mayor Sanders believed that he was pursuing a citizen initiative, rather than a city proposal, and that fact relieved him of any duty to meet and confer with city unions. His intent was to avoid

having to go through the City Council. He felt that the Council had "watered" down his earlier efforts at pension reform and did not think the Council would support his current approach. The Mayor's campaign to help gather signatures for the initiative included holding press conferences and describing the advantages of the reform in his 2011 State of the City address. He described these actions as those of a private citizen who was also holding the position of Mayor.

In 2010 and 2011 a competing pension reform approach was offered by a council member. Through a series of internal negotiations, a compromise between the two approaches was achieved. The Mayor's administrative staff had been actively involved in the negotiations. The City Attorney had also been involved but the mayor asserted that their roles had only been as private citizens.

In 2011 the City unions demanded to meet and confer over the Mayor's "citizen" initiative. Based on an opinion from the City Attorney, the Mayor refused to meet and confer. The unions challenged the Mayor's refusal, arguing that the Mayor was acting in his official capacity as Mayor, not as a private citizen. The Mayor responded that it was possible for him to serve in both a public and private capacity at the same time. The unions pursued litigation but did not succeed in enjoining the election. The charter amendment went to the voters in June 2012 and the electorate approved pension reform by a two-to-one margin (67% to 33%).

In addition to pursuing litigation, the unions also filed unfair labor practice charges with PERB. PERB assumed jurisdiction and continued to do so even after the vote. On February 13, 2013, a PERB Administrative Law Judge issued a 58 page decision finding that the initiative supported by the Mayor was not a 'citizen' initiative, but a city-sponsored effort. Therefore, the ALJ concluded the Mayor had an obligation to meet and confer prior to placing the initiative on the ballot. The remedy ordered by the ALJ, inter alia, was for the City to "rescind" the provisions of the initiative, "return to the status quo" and "make affected bargaining unit members whole."

The City's next step is to appeal the ALJ's decision to the PERB Board. Thereafter, litigation is a virtual certainty.

San Diego Municipal Employees et al v. City of San Diego, PERB Case No LA-CE-746 *(February 13, 2013)* [___ PERC ¶___].

Attorney General Grants Union Leave To Sue Charter City To Determine Whether City Met Its Collective Bargaining Obligations Before Proposing Charter Amendment.

Voters of the City of San Jose passed Measure B, an initiative measure that amended the City's charter to add a new article entitled "The Sustainable Retirement Benefits and Compensation Act." Measure B, among other things, lowered pension benefits and increased retirement contributions and minimum retirement ages for new City employees. It also increased retirement contribution levels for all current City employees who do not change to an alternative, less expensive retirement plan.

The San Jose Police Officers' Association sought permission from the Office of the Attorney General to sue the City in *quo warranto* on the question of whether the City met its obligations under the Meyers-Milias-Brown Act (MMBA) to meet and confer with the Association before the City Council voted to place Measure B on the ballot. In response, the City argued that the Attorney General should not grant leave to sue because (1) the City bargained to impasse over the contents and terms of Measure B, and (2) granting leave would result in a multiplicity of legal actions addressing the validity of Measure B.

While *quo warranto* actions generally challenge whether an individual is lawfully holding or exercising the powers of a public office or franchise, it may also be used to resolve allegations that a charter city unlawfully exercised its power to amend its charter. A private party may not file an action in *quo warranto* without consent from the Attorney General. The Attorney General, in determining whether to grant the application, looks to see whether the application presents a substantial issue of fact or law that warrants judicial resolution, and whether granting the application would serve the public interest.

The parties agreed to utilize impasse procedures if they failed to reach an agreement by October 31, 2011. However, after that date, there were unsuccessful attempts at mediation and both parties submitted further proposals. The Attorney General noted that while the duty to bargain may be revived by a "change in circumstances," it is not the province of the Attorney General to resolve the merits of a controversy or conclusively answer questions such as whether the City's duty to negotiate was revived, or whether it was reasonable for the Association to expect that the City's duty to negotiate would continue after October 31, 2011. It concluded only that the questions presented substantial factual and legal issues, and that a *quo warranto* suit was the proper forum to resolve them.

As for the City's argument that granting leave to sue would result in multiplicity of proceedings, the Attorney General reviewed the other complaints and legal disputes involving Measure B and found that they involved different complaining parties and/or legal questions. Therefore, the disputes did not present an adequate opportunity for the parties in this case to air their respective and opposing positions regarding the MMBA dispute. On that basis, it granted the Association leave to sue.

Office of Attorney General, __ Ops. Cal. Atty. Gen. __ (April 15, 2013) [2013 WL 1703747].

Note:

> *The most common "change in circumstances" to break impasse occurs when one party proposes a concession from its earlier bargaining position.* (State of California (Department of Personnel Administration) *(2013) PERB Decision No. 2102-S.) However, an insubstantial or frivolous concession will not constitute a "change of circumstances" sufficient to break impasse and revive a duty to bargain. (See* Public Employment Relations Bd. v. Modesto City Schools Dist. *(1982) 136 Cal.App.3d 881, 900.) Whether a concession is insubstantial or frivolous must be determined on a case-by-case basis.*

CALPERS Provides Guidance On When Compliance With The Public Employees' Pension Reform Act, (PEPRA) For New Employees Would Create An Illegal 'Impairment Of Contract,' Including The Requirement For Agencies To File A "Certificate" Of Impairment.

What Is An Impairment Of A Memorandum of Understanding ("MOU")?

The Public Employees' Pension Reform Act ("PEPRA") prohibits employers from paying any portion of a "new member's" member contribution rate. New member contribution is 50% of total normal cost. CalPERS recently released new actuarial reports to employers reflecting what the member contribution rate will be for new members of your agency. However, the PEPRA states that, "If the terms of a contract, including a memorandum of understanding, between a public employer and its public employees, that is in effect on January 1, 2013, would be impaired by any provision of this section, that provision shall not apply to the public employer and public employees subject to that contract until the expiration of that contract. A renewal, amendment, or any other extension of that contract shall be subject to the requirements of this section."

This leaves employers wondering, ***"when would a memorandum of understanding ("MOU") be 'impaired'"?***

According to a Decmeber 2012 CalPERS Circular Letter, CalPERS suggests that it means a contradiction between an existing MOU and the PEPRA with respect to either or both employer paid member contributions ("EPMC") and/or cost sharing. It means that by requiring new members to pay 50% of total normal cost as required by PEPRA, it would directly conflict with an existing MOU which provides that employees covered by that MOU would pay something other than their full member contributions. If the employer identifies an impairment of an existing MOU, the employer is required to complete and submit to CalPERS a "Certification of Memorandum of Understanding (MOU) Impairment."

This all boils down to contract interpretation. What does the contract say and does it directly conflict with the PEPRA. Here are some examples of when there may or may not be an impairment of a memorandum of understanding or contract:

- "During the term of this memorandum of understanding, employees will pay their own member contributions" or "During the term of this memorandum of understanding, the employer will not pay for any part of the employees' member contributions."
  - This would not constitute an impairment of the MOU because there is not a direct conflict between the PEPRA and the MOU. New members will pay 50% of total normal cost immediately upon hire.
- "The employer agrees to pay 4% of the employees' member contributions to PERS."

- This would constitute an impairment of the MOU because there is a direct conflict between the PEPRA and the MOU. The PEPRA prohibits employers from paying any portion of new member contributions, but the MOU states the employer will pay a portion of member contributions. In this case, the employer will pay 4% of the new member's contribution rate and the new member will pay the remainder of his/her new member contribution rate.

- "The employer agrees to pay the full amount of member contributions up to a maximum of 8%."
  - This would constitute an impairment of the MOU because there is a direct conflict between the PEPRA and the MOU. In this case, the employer will pay the "full amount" of the new member contribution rate, but no more than 8%.

There are many different variations in language and nuances which can make it difficult to know if there is an impairment, what that impairment is, and how much in contributions are to be paid by the employer and by the new member. One thing is for sure, CalPERS requires that the sum total of all new member and employer contributions must be paid when due, whether by the employer or the member. Thus, whatever is arrived at in determining the employer and member contribution rate for an impaired MOU, PERS expects and requires that the total amount of contributions be paid.

Employers are advised to seek legal counsel if it is unsure about whether there is an impairment of an MOU or about the amount new members should pay in contributions during the current term of an MOU which was entered into before January 1, 2013. Employers are reminded that once the existing MOU expires, is renewed, or amended, new members must immediately begin paying 50% of total normal cost and employers are prohibited from picking up any portion of new member contributions.

When Do You Know If a "Break In Service Of More Than Six Months" Means Your New Hire Is a "New Member"?

By now, California public employers know that most of the PEPRA applies only to "new members." "New members" is strictly defined under the PEPRA as anyone who meets any of the following:

- An individual who becomes a member of any public retirement system for the first time on or after January 1, 2013, and who was not a member of any other public retirement system prior to that date.

- An individual who becomes a member of a public retirement system for the first time on or after January 1, 2013, and who was a member of another public retirement system prior to that date, but that public retirement system does not have reciprocity with the new employer's public retirement system.

- **An individual who was an active member in a retirement system and who, after a break in service of more than six months, returned to active membership in that system with a new employer.**

It is this last category of "new member" that will become critically important to members of CalPERS. With the majority of cities and special districts in California participating in CalPERS, as well as some counties, it is a common occurrence for an employee of one CalPERS agency to leave employment and go to work for another CalPERS employer. If that employee has a "break in service" of more than six months, that employee is a "new member" and is subject to the provisions of PEPRA including the new defined benefit formulas (i.e. 2% at 62 for miscellaneous members or one of the three new safety formulas), and the prohibition on employer paid member contributions.

This begs the question, ***"what is a 'break in service'?***" Is it a break in PERSable service credit? Is it a break in actual employment between the two employers? Or is it something else?

If a "break in service" is to mean a break in PERSable service credit, this could have ramifications for employees who take extended unpaid leaves of absence before they are separated from employment as the unpaid leave of absence would not generate any PERSable service credit.

However, a recent CalPERS Circular Letter suggests that PERS does not view "break in service" to mean a break in PERSable service credit. The CalPERS Circular Letter states that a "break in service" means the time between the "permanent separation" date to the date of a new appointment with a new CalPERS employer. The issue becomes, then, what is a permanent separation date?

The CalPERS guidance states that permanent separation date is "often the day after the last day on payroll," suggesting there could be instances of when permanent separation date will not be the day after the last day on payroll.

CalPERS uses the term "appointment" to refer to "a continuous block of employment with a single employer from the hire date, regardless of whether the employee is qualified for membership on that date, until the permanent separation date." **A permanent separation is not required, however, when an employee begins a leave of absence. The beginning to the end of a leave of absence is a change in appointment, but not a permanent separation.**

Accordingly, it is understood that for purposes of determining a "break in service of over six months" in establishing whether a new hire is a "new member," the measure will be from the "permanent separation" date as reported by the first employer to the date of a new appointment as reported by the second employer. CalPERS employers should keep in mind that the determination of a "new member" will be automatically generated by CalPERS based on the former employer's reporting of "permanent separation" date and the new employer's reporting of "new appointment." If a new hire is established by CalPERS to be a new member, you may not treat that employee as a classic employee. If the new employee disputes his or her status as a new

member, the employee's recourse is to inquire with CalPERS and his or her former employer to determine if there was an error in the reporting of the permanent separation date.

This originally appeared as a blog post at http://www.lcwlegal.com/83895.

Standby Pay In A City Fire Department Is Not Reportable Compensation For Purpose Of PERS Retirement Calculations.

James Linhart joined the Pleasanton Fire Department in 1984 and became a local safety member of PERS. Beginning in 1998, Linhart worked a 40-hour workweek. However, he was also assigned to a "back-up schedule," which required him to be available to report for emergencies during certain times. Linhart would work beyond his 40-hour workweek when filling in for operations Division Chiefs, or when required by the press of work. Linhart was also required, on occasion, to respond to emergencies on the back-up schedule.

The City's "Compensation Plan" generally provided that a Division Chief assigned to a standby schedule shall be compensated in an amount equal to 7.5% the Division Chief's base salary. Linhart continued to receive standby pay until his retirement in 2006.

In 2006, Linhart retired as a Division Chief and began receiving a retirement allowance. From 1998 to 2006, the City made PERS contributions on behalf of Linhart and five other safety employees. The City calculated its PERS contributions by including, as pensionable special compensation, the standby pay the employees received. Though PERS has a procedure for alerting agencies when there are discrepancies in the member earnings and the retirement contributions reported to PERS, no such report was generated in this case. In July 2006, PERS informed the City that standby pay was not reportable compensation for retirement purposes.

The City initiated an administrative appeal with PERS, asserting that PERS was refusing to pay retirees the benefits to which they are entitled.

Under the Public Employees' Retirement Law, Government Code section 20000, et seq. (PERL) and PERS regulations, a PERS member's benefits are determined according to a statutory formula. Not all items of compensation paid in addition to the member's base salary count as pensionable special compensation. Pensionable special compensation includes only payments the PERS board has affirmatively determined to be special compensation as reflected in board regulations (Regulation 571). An item of special compensation not listed in Regulation 571 cannot be used in determining a member's final compensation for pension purposes.

The administrative appeal was assigned to an administrative law judge (ALJ). The ALJ issued a proposed decision stating that Linhart's standby pay was not special compensation because it paid for services rendered outside his normal working hours. In accordance with procedure, the proposed decision was submitted to the PERS Board for determination. Along with the proposed decision, the attorney that represented PERS before the ALJ also provided the Board with a recommendation that it adopt the ALJ's findings and a summary of the evidence presented to the

ALJ. The Board also received a document from Linhart's attorney arguing that the ALJ's decision was erroneous.

After Linhart's attorney received a copy of the materials submitted by the PERS attorney to the Board, he complained that the submission was improper because it came from the same attorney who represented PERS in the administration hearing, thus violating Linhart's due process rights. The Board nonetheless adopted the ALJ's recommendation.

Linhart's attorney then petitioned the trial court to overturn the Board's determination based, in part, upon the due process claim. The trial court ruled that Linhart's due process rights were violated "when the PERS attorney acted as both prosecutor in the hearing on Linhart's claim to benefits . . . and as the advising staff person from the agency to its Board when the Board made the final adjudicatory decision." The trial court also determined Linhart's standby pay should have been included as part of his pensionable compensation because it could be counted as a "training premium," "holiday pay," "management incentive pay," "off-salary schedule pay," or "shift differential" under Regulation 571.

On appeal, the Court of Appeal first held that the communications between the staff attorney and the decision maker (i.e. the PERS Board) did not violate Appellant's Due Process rights. The Court cited Nightlife Partners v. City of Beverly Hills (2003) 108 Cal App 4th 81 and ultimately relied on the California Supreme Court decision in Morongo Band of Mission Indians v. State Water Resources Control Board (2009) 45 Cal 4th 731. The Court cited and followed the standards set out by the Supreme Court in deciding there is no violation of Due Process if (a) the challenged communications are not ex parte; (b) Appellant has a simultaneous opportunity to communicate with the decision maker; and (c) the decision maker is not subject to the staff attorney's direction or authority.

The Court of Appeal also determined that the standby pay Linhart sought was not special compensation within the parameters of Regulation 571. According to Linhart's testimony, the standby pay was compensation for his availability to work outside of his traditional 8:00 a.m. to 5:00 p.m. schedule. Further, the standby pay did not meet the definition of any of the five types of extra pay defined in Regulation 571.

City of Pleasanton v. Board of Administration of the California Public Employees' Retirement System (2012) 211 Cal.App.4th 522.

Note:

The case raises important issues relating to due process and special compensation under PERS. As for the due process concerns, public agencies frequently must respond to challenges that an employee's due process rights were violated in some way. Several previous cases have addressed the issue of what type of communications an advocate for a public agency can have with the decision maker. For example, such communications may arise during the course of a termination appeal hearing. The case provides helpful guidance on this issue. As for the issue of special compensation, for classic PERS members, clients

should refer to 2 C.C.R. 571 for all special compensation items. If not listed in the regulation, it will not be PERS-able. For new members under the Pension Reform Act, we are still awaiting a final determination of which items of special compensation will apply.

DISCIPLINE

A Police Officer Can Be Fired For Multiple Instances of Misconduct, Despite Her Contention That The Department Had Violated Her Due Process and POBR Rights.

Officer Marvetia Richardson had been a police officer in the San Francisco Police Department for sixteen (16) years. Following an investigation, the Department terminated her employment on three (3) separate grounds. First, the Department concluded that Officer Richardson had improperly accessed the California Law Enforcement Telecommunications System (CLETS) a total of 48 times in a fifteen (15) month period. She improperly used the system seeking information for personal purposes, including seeking data about her girlfriend and her girlfriend's former husband. She admitted that she had accessed CLETS for unauthorized reasons, but contended that she had never disclosed any confidential information.

The Department's second reason for terminating Richardson was her involvement in a check fraud scheme with checks totaling nearly $28,000. Despite having been an investigator in the Department's fraud unit, Richardson participated in an arrangement whereby checks were made out to her, she then cashed them, withheld part of the cash and returned the remaining cash to the signer of the checks. The checks were drawn on an actual account but the signer had no authority to access that account.

The Department's third grounds for discipline was her conduct at her residence in Antioch when local officers entered to deal with a disturbance. Her language and actions were found to constitute obstructing an officer and bringing discredit to the Department.

Officer Richardson's asserted primarily procedural defenses to the disciplinary charges. She argued that the CLETS and bad checks matters could not be used against her because the Department had not issued a notice of discipline within a year of learning of the charges, as required by Government Code Sec 3304(d). She also contended that the incident at her residence in Antioch could not serve as a basis for discipline because the Antioch officers had violated her Fourth Amendment rights against unreasonable search and seizure. Finally, she argued that her Due Process rights had been violated because the San Francisco City Attorney's office had both advised the Police Commission at her appeal hearing and also presented the Department's case to the Commission.

Officer Richardson sued the Department when the Police Commission rejected her arguments and upheld her dismissal. The Superior Court denied her request for a writ of administrative mandamus and she appealed to the Court of Appeal.

The Court of Appeal upheld Richardson's dismissal. It concluded that the CLETS and check fraud charges were not barred by the one year limitations period in Section 3304(d). Specifically, the Court found that there had been pending criminal investigations of Richardson's conduct that tolled portions of the one year period.

With regard to the incident at the Antioch residence, the Court concluded that excluding evidence of her conduct because of a possibly unreasonable search and seizure was not appropriate in an administrative disciplinary appeal matter. Such an exclusion would have been appropriate in a criminal proceeding. The Court also observed that the Antioch officers who allegedly violated her Fourth Amendment rights were not from the Department (San Francisco) imposing the discipline.

Finally, we regard to Richardson's contention that it was improper for the City Attorney's office to advise the Commission and present the case to the Commission, the Court found that there were adequate "standing screens" in place in the City Attorney's office. The Court relied on Morongo Band of Mission Indians v. State Water Resources Control Board (2009) 45 Cal 4th 731 in affirming the procedures in place in the City Attorney's Office. One designated attorney advised the Commission and she did not communicate with the attorneys putting on the case.

Based on these conclusions, the Court of Appeal upheld the termination of Officer Richardson by affirming the denial of her requested writ of administrative mandamus.

Richardson v. City and County of San Francisco (2013) _____ Cal App 4th _____2013 WL 1091746.

Ethical Wall Is No Longer A Sufficient Safeguard To Allow Attorneys From The Same Firm To Act As Advisor And Advocate In Contested Administrative Matter.

The Court of Appeal decision in *Sabey v. City of Pomona* will change the way public agencies and their law firms handle advisory arbitration cases. Prior to the *Sabey* decision, the case of *Howitt v. Superior Court* (1992) 3 Cal.App.4th 1575, was understood to allow two attorneys from the same firm to discharge different functions in an advisory arbitration type proceeding as long as they erected, and respected, an ethical wall between them by having no communication about the matter and preventing each other from accessing their respective files and documentation. Thus, one attorney could function as an advocate, presenting the case to the arbitrator, hearing officer, administrative law judge, board or commission, depending on what sort of hearing format the agency used. The second attorney could then be the legal advisor to the decision maker, i.e. arbitrator, hearing officer, etc.

Now, in *Sabey v. Pomona*, the Second District Court of Appeal has set down the clear rule that this sort of arrangement is not acceptable when the two attorneys are partners in the same firm. The Court thus limited the viability of the *Howitt* decision to public law offices, e.g. County Counsel or City Attorney offices where the lawyers are employees of their respective agencies.

Glenn Sabey was a Pomona police officer who was terminated for misconduct. He appealed and an administrative hearing was held before an advisory arbitrator. The arbitrator found that Sabey had engaged in the conduct as alleged with one exception. However, the arbitrator determined that termination was not the appropriate penalty and recommended that the discipline be reduced to reinstatement without back pay or benefits. Debra Bray, a LCW partner, represented the City in the arbitration hearing.

The matter then went to the City Council which had the prerogative to accept, modify or reject the recommended decision. Peter Brown, also a LCW partner, advised the Council. Consistent with the *Howitt* decision, an ethical wall was implemented between Bray and Brown and they did not talk to each other about the matter, and they were prevented from accessing each other's files. The Council accepted the arbitrator's factual findings but reinstated the penalty of discharge.

Sabey then petitioned the superior court for administrative mandate and raised an objection to the participation of two attorneys from the same firm. The trial court ruled against Sabey and he took the matter up on appeal where he obtained a reversal of the judgment.

In her decision for the Court, Justice Judith Ashmann-Gerst wrote that, even though there was no evidence of bias, there was a sufficient appearance of the possibility of impartiality that "experience teaches that the probability of actual bias" was "too high to be constitutionally tolerable." The Court held that, because two partners from the same firm have both a fiduciary responsibility to each other, as well as a duty to their client, the "appearance of unfairness and bias" compels a prohibition on the participation of the two lawyers from the same firm.

Justice Ashmann-Gerst wrote that this risk alone required the Court's decision. "The rule we announce today is simple. Agencies are barred from using a partner in a law firm as an advocate in a contested matter and another partner from the same law firm as an advisor to the decision maker in the same matter."

The Court distinguished the *Howitt* decision, opining that attorneys in the same public law office, who are governmental employees, do not have a fiduciary duty to each other as do private firm attorneys, as they do not have the impetus to seek business that law firm partners have. Accordingly, the Court of Appeal reversed the judgment and sent the case back to the trial court which in turn is required to remand the matter to the City Council. Officer Sabey may have won a victory in principle only, as the Council will have the option to obtain independent legal counsel and revisit its decision, which could still result in his termination.

Sabey v. City of Pomona (2013) ___ Cal.App.4th ____ [2013 WL 1613618].

Note:

The message of this decision is that agencies and law firms are now precluded from having two attorneys from the same firm participate in a contested administrative matter in two capacities—as an advocate before the trier of fact and as a legal advisor to the official(s) making the decision. An "ethical wall", previously believed to be a sufficient safeguard to

preclude bias and impartiality, is no longer acceptable. Agencies and law firms should be reviewing their pending cases to determine whether they have any matters open where the Sabey decision could require reexamination of the procedures that were used.

A County May End A Past Practice Of Allowing Deputies Pre-Interview Access To IA Files Without Meeting And Conferring.

The Sheriff of Orange County decided that deputies being investigated for misconduct should no longer have access to the internal affairs investigative file prior to being interviewed. The order implementing this change ended many years of a departmental practice allowing such access. Prior to the Sheriff's order, deputies under investigation were allowed to review investigative files that included witness statements, manager's notes and even physical evidence like videos. That review could include the deputy's attorney and/or union representative.

The Sheriff concluded that allowing this access prior to the deputy's interview by the IA investigator interfered with the Department's ability "to conduct prompt, thorough and fair investigations." She also determined that such access could affect the deputy's recollection of events and did not "promote truth-seeking." Finally, the Sheriff concluded that a change in the pre-interview access was "absolutely necessary to ensure the integrity and reliability of future internal affairs investigations" and to reflect the "best practices" for conducting IA investigations. The Sheriff's change in practice did not affect a deputy's right to a copy of all materials at the time discipline is proposed, in accordance with *Skelly v. State Personnel Board* (1975) 15 Cal 3d 194.

The Association immediately demanded to meet and confer over the Sheriff's new policy. The Sheriff rejected that demand and the Association sued. The primary arguments made by the Association in its lawsuit were that the Sheriff's actions violated the duty to meet and confer and breached the "zipper clause" in the parties' MOU. The Superior Court denied the Association's request for a preliminary injunction and the Association appealed.

On appeal the Association contended that the Sheriff's order adversely affected 'working conditions,' thereby triggering a duty to meet and confer. The Court rejected that contention by relying on *Association for Los Angeles Deputy Sheriffs v. County of Los Angeles* (2008) 166 Cal App 4th 1625 (ALADS). In *ALADS* the County had held that changing a 25-years practice of allowing a deputy to consult with a lawyer or representative before an interview did not create a duty to meet and confer. The Court also concluded that there was no violation of the parties' Memorandum of Understanding since the "zipper clause" did not cover past practices like the one at issue.

Interestingly – and perhaps most significantly – the Court concluded that the Sheriff's actions constituted "a fundamental managerial policy decision" within the authority reserved to the Sheriff. This conclusion was based on the Sheriff's expressed desire to protect the integrity of internal affairs investigations.

Association of Orange County Deputy Sheriffs v. County of Orange (6/12/13)_____Cal App 4th _____(4th District No. G047167).

Hospital's Prohibition Against Discussion Of Internal Investigations Interfered With Employee Rights.

JoAnn Odell, a human resources consultant at a hospital operated by Banner Health Systems, routinely asked employees who made complaints not to discuss the complaints until the hospital completed an investigation. A technician named James Navarro filed a complaint with the hospital regarding its method of sterilizing surgical instruments. On February 19, 2001, he refused to follow directions from his supervisor on the basis that cleaning the instruments as directed would endanger patients. He received a "coaching" from his supervisor, and filed a complaint with the National Labor Relations Board (NLRB) alleging that the coaching was retaliation for protected activity, e.g., filing a complaint.

The ALJ found that the coaching was permissible because the supervisor believed Navarro was being insubordinate and had no knowledge of the alleged protected concerted activity. It also found that the consultant's practice of asking employees not to discuss complaints under investigation did not violate the National Labor Relations Act (NLRA).

The NLRB affirmed the ALJ's finding that the coaching was not unlawful, but held that the request for investigation confidentiality violated the NLRA rights of the employees involved. Section 7 of the NLRA protects the rights of employees to communicate with coworkers about wages, hours, and other terms and conditions of employment. The NLRB stated that in order to justify a prohibition on employee discussion of ongoing employee misconduct investigations, the employer must demonstrate a legitimate business justification that outweighs the employee's section 7 rights. It stated that the Employer's generalized concern about protecting the integrity of its investigations was insufficient. Rather, it has a burden to determine whether witnesses need protection, evidence is in danger of being destroyed, testimony is in danger of being fabricated, or there is a need to prevent a cover up. The NLRB found that "Odell's statement, viewed in context, had a reasonable tendency to coerce employees, and so constituted an unlawful restraint of Section 7 rights."

Banner Health System D/B/A Banner Estrella Medical Center (N.L.R.B. 2012) 358 NLRB No. 93 [2012 WL 3095606].

Note:

While the NLRA applies only to private sector companies, NLRB decisions can be persuasive authority in MMBA public sector cases. This case is contrary to sound investigative practice and argues in favor of back-to-back interviews of witnesses.

A Probationary Sergeant Cannot Be Rejected From Probation Since He Was Not Served With The Notice Of Rejection Before The End Of The Probationary Period, As Required By The City Charter.

Sergeant Hernandez was promoted from officer to sergeant in the Los Angeles Port Police Department. As a sergeant he was required to complete a 6-month probationary period before he became a permanent sergeant. Early in his probationary period, Hernandez requested a week's vacation that coincided with the ending of his probationary period. His request was approved.

Near the end of his sergeant probationary period, but before his scheduled vacation, Hernandez was involved in an incident involving a suspicious box that could have been a bomb. He failed to follow department procedures in advising officers how to deal with the box. It turned out that the box contained clothes, not a bomb. Nevertheless, Hernandez was counseled about what he had done wrong, but he was not told his mistakes could lead to his rejection from the sergeant position.

The Department rejected Hernandez from the position of probationary sergeant and returned him to the position of officer. The Department decision to reject him from probation came within a week of the end of his probationary period. The City of Los Angeles Charter required that he be served with the notice of rejection before the end of the probationary period.

The Department tried to contact Hernandez but was not successful. They called him at his home but did not reach him because he was on his scheduled vacation at Lake Tahoe. A lieutenant called him on his cell phone and said he had important papers for him. Hernandez explained that he was at Lake Tahoe on his approved vacation. Notwithstanding this information, the Department continued to try to serve Hernandez with the rejection notice at his home. They sent the notice by first class mail, then by registered mail and finally left a copy of the notice at his home. No further attempt was made to locate him at Lake Tahoe. He returned from vacation one day after the expiration of his probationary period and picked up the several rejection notices.

Hernandez sued and alleged that the failure to serve him with the rejection notice during the probationary period, as required by the City Charter, was insufficient to remove him from the position of sergeant. He contended that he was now a "permanent" sergeant and could only be removed 'for cause." The California Court of Appeal agreed with Hernandez, citing the City Charter section that mandated service of rejection before the end of the probationary period. The Court said that the Department was required to comply with the Charter, unless after a "due diligence" effort to comply, the Department could not locate him. The Court concluded that the Department's efforts find Hernandez fell far short of any 'due diligence' standard.

Hernandez v. City of Los Angeles (2012) 2012 WL 3989165, unpublished / noncitable.

A Terminated Correctional Officer Who Violated The Department's Drug-Free Workplace Policy By Taking Medicinal Marijuana Is Entitled To Reinstatement.

Lyn Wilson served as a correctional officer for the State Department of Corrections and Rehabilitation. She suffered from migraine headaches. She was prescribed traditional medications but they did not work. She obtained a prescription for medicinal marijuana which she inhaled in a vaporized form three times a week after work. It helped reduce the pain from the migraines.

Two months after beginning her marijuana regimen, Wilson failed a random drug test administered by the Department. She was demoted to a temporary administrative clerical position. She continued using the marijuana for another two months because she felt that she would eventually be able to justify the positive drug test. However, she was terminated before being given that opportunity.

Wilson challenged her termination by seeking a hearing before an Administrative Law Judge assigned by the State Personnel Board. The ALJ determined that Wilson honestly did not believe she was violating Department policy by using a drug prescribed by a doctor. Therefore, the ALJ concluded that her dismissal was improper and ordered her reinstated. The Department refused and she sued.

The California Court of Appeal determined that Wilson's violation of the Department's drug-free workplace policy was not willful. As evidence, the Court cited Wilson's continued use after testing positive. The Court also found that "there was no evidence that Wilson was incompetent, had neglected her job duties or that her marijuana use had caused any discredit to the Department."

Based on these conclusions, the Court upheld the ALJ's order of reinstatement.

Wilson v. State Personnel Board (2012) 2012 WL 4127322, unpublished/noncitable.

A City Administrator Is Not Entitled to Protection As A Whistleblower even though She Is Fired For Refusing To Agree To An Arguable Violation Of The City Charter.

In 2003, Jerry Brown, then-Mayor of the City of Oakland, appointed Deborah Edgerly as city administrator. Pursuant to the City charter, the city administrator serves at the pleasure of the mayor and can be discharged at any time, for any reason. As city administrator, Edgerly had authority over various City departments, including the police department, and was responsible for the City's budget and expenditures. In 2007, Ron Dellums replaced Jerry Brown as Mayor. In October 2007, knowing that Mayor Dellums could replace her at any time, Edgerly gave notice that she planned to retire as of July 31, 2008.

While serving as city administrator, Edgerly questioned several of Mayor Dellum's expense reimbursement requests, including requests for payment of personal expenditures like the

Mayor's wife's cell phone bill. However, Edgerly did not know if Mayor Dellum was aware that she questioned his reimbursement requests, with the exception of a utility bill that Edgerly told the Mayor she could not reimburse. Edgerly ultimately approved most of the requests.

On June 7, 2008, Edgerly's nephew was involved in a police incident. Edgerly contacted the police, identified her office, and sought explanations. The Mayor, believing the incident created the appearance of a conflict of interest, asked Edgerly to sign documents ceding control of the police department to another City official. Edgerly refused to appoint the Mayor's designee. On July 1, the Mayor terminated Edgerly's employment effective immediately.

Edgerly filed suit alleging that she was wrongfully terminated for refusing to violate the City's charter, municipal code, and civil service rules and resolutions. The trial court dismissed her claims on the basis that a charter city's laws cannot be the basis for violation of a state whistleblower statute. Edgerly appealed, and the Court of Appeal affirmed.

Labor Code section 1102.5(c), the "Whistleblower Protection Statute," prohibits employers from retaliating against an employee for refusing to participate in an activity that would violate a state or federal rule, statute, or regulation. To prove a cause of action under section 1102.5(c), the plaintiff must establish a prima facie case of retaliation.

Despite Edgerly's argument that section 1102.5(c) should apply to retaliation for violations of local laws, the Court of Appeal held that the unambiguous statutory language only includes retaliation for violations of federal and state laws. Because other California whistleblower statutes specifically prohibit retaliation for an employee's refusal to violate a federal, state or local law, the omission of the term "local law" from section 1102.5(c) indicates the legislature's intent to exclude it.

Edgerly argued that because she alleged the Mayor violated Government Code section 87100, she stated a claim pursuant to Labor Code section 1102.5. Government Code section 87100 prohibits a public official from, among other things, using his official position to "influence a governmental decision" in which he has a financial interest. Edgerly contended that the Mayor's reimbursement requests violated the statute. However, the corresponding regulations clarify that reimbursements of expenses are specifically excluded from the definition of "material financial effect." Further, Edgerly approved two of the three requests and did not tell anyone she believed the requests violated any statutes.

Finally, the Court of Appeal held that even if Edgerly did refuse a reimbursement request, it would not state a claim under section 1102.5 because any refusal was consistent with her general job description and duties. Thus, her claims are not actionable under section 1102.5. On that basis, the Court of Appeal affirmed dismissal of all of Edgerly's claims.

Edgerly v. City of Oakland (2012) 211 Cal.App.4th 1191, as mod.

Note:

This decision is helpful in defending against claims under Labor Code section 1102.5. First, it makes clear that section 1102.5 only applies to violations of federal and state laws, not local ordinances, rules, orders, or general personnel matters. In addition, the case raises an interesting argument that a public employee cannot sustain a whistleblower claim when notifying the employer about suspected actions is consistent with the employee's job duties.

An Employee Who Conducts His Own "Overly Aggressive" Investigations Of Co-Employees Cannot Be Fired Since He Qualifies As A 'Whistleblower.'

In 2000, Brian McVeigh began working for Recology, a company that provides waste collection, recycling and disposal services to San Francisco residents and businesses. In September 2005, McVeigh's supervisor received a tip that an employee was overstating the actual weight of recyclables purchased by Recology, resulting in an overpayment by Recology to the customer, and possibly a kickback to the employee. The suspected employee admitted the conduct. McVeigh reported this information to General Manager John Jurinek, who directed McVeigh to call the San Francisco police, resulting in the employee's arrest. McVeigh also received tips from coworkers that the same misconduct was occurring at other Recology recycling locations and in September 2005, McVeigh reported this information to the San Francisco police.

Jurinek and Operations Manager Joe Damele counseled McVeigh about his "overly aggressive" management style. Employees complained that McVeigh seemed intent on finding wrongdoing, and that he was "witch-hunting."

Over the next few years, McVeigh spent increasing time focusing on potential fraud. McVeigh's efforts did reveal other instances of fraud whereby recycling weights were being inflated, resulting in too much money being paid to customers and the potential for kickbacks. McVeigh reported to management that employees were engaged in fraud and that managers were aware of the problem, but did not remedy the situation. McVeigh continued to inform the police of his suspicions and allegations.

In May 2008, Recology prepared a report recommending that McVeigh be separated from Recology because he had a "headstrong attitude" and could not get along with other employees. The report also referenced allegations McVeigh made against other employees. General Manager Crosetti determined that McVeigh's allegations were made in bad faith and terminated his employment.

McVeigh filed suit against Recology alleging, among other things, that he was terminated in violation of whistleblower protections found in California Labor Code section 1102.5. Recology moved for summary judgment on this cause of action, and the trial court granted the motion principally on the ground that the illegal activity McVeigh reported was committed by McVeigh's coworkers rather than the "employer." McVeigh appealed and the Court of Appeal reversed.

Labor Code section 1102.5, "California's general whistleblower statute," protects employees from retaliation for "disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation." The Court of Appeal reasoned that the whistle-blower statute should be given a broad construction commensurate with its broad purpose of encouraging workplace whistleblowers to report unlawful acts without fearing retaliation. The Court of Appeal, therefore, concluded that Labor Code section 1102.5 protects employee reports of unlawful activity by third parties (such as contractors and peer level employees) as well as unlawful activity by an "employer." The Court of Appeal also held that a report of illegal activity can constitute protected conduct even if the complaining party made the report as part of his or her official duties.

McVeigh v. Recology San Francisco (2013) 213 Cal.App.4th 443.

Note:

The decision potentially expands the scope of Labor Code section 1102.5 claims by encompassing reports that co-workers, as opposed to the employer, are engaged in unlawful activity. In addition, the Court of Appeal rejected the argument that McVeigh could not violate section 1102.5 because his report of unlawful activity was made within the scope of his official duties. The Court of Appeal in Edgerly v. City of Oakland *(2012) 211 Cal.App.4th 1191, held that any whistleblowing activities that fall within an employee's general duties are not actionable. Both cases were decided by different divisions of the Court of Appeal, First District. Thus, there appears to be a dispute in the law which may be clarified by future decisions.*

CONTRACTING OUT

A General Law City May Only Contract Out For "Special Services" And Not Merely To Provide More "Cost-Effective" Government.

The City of Costa Mesa is a general law city. In 2011, it approved a plan to outsource a number of city services, including street sweeping, graffiti abatement, animal control, jail operations, special event safety, graphic design, reprographics, telecommunications, payroll, employee benefit administration, building inspection, park, fleet, street and facility maintenance, and information technology services. The goal of the City's outsourcing plan was to improve the financial security of the City by providing "cost-effective government." As a result of the outsourcing plan, over 100 city employees received layoff notices.

The Costa Mesa City Employees' Association (CMCEA) filed suit on behalf of the employees who received layoff notices and sought a preliminary injunction to prevent the implementation of

the outsourcing plan. The City argued that it had no obligation to negotiate over the decision to outsource, but only over the impact of any outsourcing. The City also argued that Government Code section 54981 [providing that a local agency could contract with any other local agency for the performance of municipal services or functions] gave the City a statutory right to contract out for City services.

In response, CMCEA argued that Government Code section 54981 did not give the City the right to contract out services to a private entity unless the contract involved "special services" and that the services targeted for outsourcing were not "special services." Rather, the CMCEA claimed the outsourcing plan targeted services that had been performed by City employees.

The trial court granted a preliminary injunction, and the Court of Appeal affirmed.

In order to obtain a preliminary injunction, the moving party must be able to show that it will suffer irreparable harm if the injunction is not granted. If the party is able to show irreparable harm, the court must examine the likelihood that the moving party will prevail on the merits, and the relative harm to both parties if the injunction is granted or denied.

In this case, the Court of Appeal held that the possibility that the CMCEA members may lose their jobs due to the outsourcing plan qualifies as irreparable harm. The Court held that it did not matter that the City was only in the process of issuing Requests for Proposals (RFPs) for the services targeted to be outsourced. Instead, the Court determined that the CMCEA members were in "serious peril" of being terminated; thus, it was not premature to issue a preliminary injunction to prevent the outsourcing pending final determination of CMCEA's lawsuit.

In granting the preliminary injunction, the Court also balanced the harm to CMCEA members if the injunction were not granted against the interim harm to the City if the injunction were granted. The City argued that its citizens have a substantial interest in the City providing better services and improving its financial security and that outsourcing was necessary to achieve these goals. The Court of Appeal recognized that the City and its citizens have an interest in cost-effective government, but held that the injunction would not prevent the City from moving forward with its outsourcing plan. Rather, it would just prevent the City from actually entering into outsourcing contracts for a period of time. When weighed against the potential job loss for CMCEA members, the Court determined that the relative harm tipped in favor of granting the injunction.

The Court also held that CMCEA demonstrated some possibility that it will prevail on the merits of its action. First, the applicable MOU between the parties contemplated that the City would "involve" CMCEA in outsourcing plans before such plans were finalized. Second, the Court determined that Government Code sections 37103 and 53060 allow a city to contract with persons or corporations that provide "special services" in financial, economic, accounting, engineering, legal, or administrative matters. The Court also determined that Government Code section 54981 only authorizes contracts between local agencies, not contracts with private entities for city services.

The Court of Appeal also validated a prior Attorney General opinion stating that the authority to contract as provided in the Government Code is limited to "special services" in specified areas and that cities could not ignore these limitations solely on the basis of cost savings. On that basis, the Court held that, with the exception of outsourcing jail services and payroll services, which the Penal Code and Government Code specifically authorize, the Legislature did not intend to allow the city to outsource "any of the other services at issue," nor was there evidence that the city employees were "incapable of providing any of those services." Therefore, since there was some possibility that CMCEA will succeed in its lawsuit, the Court upheld the trial court's granting of a preliminary injunction.

Costa Mesa City Employees' Association v. City of Costa Mesa (2012) 209 Cal.App.4th 298, review den.

Note:

The Court of Appeal decision is not a final determination of the merits of CMCEA's lawsuit against the City, but only a determination that a preliminary injunction should be issued to prevent the City from signing outsourcing contracts with private entities. However, general law cities should still take note that this decision upholds a significant limitation on the ability to contract out services to private companies. First, general law cities must show that the targeted services constitute "special services" in specified areas, as set forth in the Government Code. Second, a general law city cannot justify outsourcing non-special services to private entities by claiming that cost savings necessitates the action. The Court also distinguished general law cities from charter cities which have "nearly complete control over its municipal affairs and [are] not bound by the general laws of the state."

WORKERS COMPENSATION

Probation Officer's Psychiatric Injury Is Potentially Barred By Personnel Action Defense Because Injuries Were Substantially Caused By An Internal Affairs Investigation.

In 2007, Michael Brooks began working at the County of Sacramento's juvenile hall as a supervising probation officer. Brooks supervised the Security Emergency Response Team (SERT). Brooks felt that the officers in the SERT team resisted and undermined his authority. In November 2007, Brooks counseled two SERT officers for work-related issues.

The following month, Assistant Chief Deputy John O'Brien met with Brooks and gave him a memo entitled "Admonition & Notice of Internal Affairs Investigation." The memo directed Brooks to refrain from any supervisory duties related to Ron Parker, a SERT team member, and to refrain from any abusive language or conduct that could be construed as threatening. Brooks believed the directives were unreasonable and he asked to be placed on administrative leave

while the investigation was pending. The County denied the request, but allowed him to change shifts in order to reduce contact with Parker. On January 2, 2008, Brooks went to work, saw that Parker was also scheduled to work, became upset, and filed a workers' compensation claim.

Psychiatrist Ann E. Allen, M.D., the agreed medical evaluator, diagnosed Brooks with adjustment disorder with depressed and anxious moods. Dr. Allen expressed her opinion that three factors caused Brooks' disorder: (1) Parker's complaint; (2) the internal affairs investigation; and (3) Brooks' feelings that his supervisors were not supporting him.

The County denied Brooks' claim for injury to his psyche, arguing that his claim was barred by the "personnel action" defense found in Labor Code section 3208.3. A workers' compensation judge (WJC) found in Brooks' favor, but the Workers' Compensation Appeals Board rescinded the decision and returned the matter to the trial level for further development of the record. The WCJ issued a second decision in Brooks' favor, and the Board affirmed. The County filed a petition for writ of review, which the Court of Appeal granted.

Labor Code section 3208.3 states that a worker's psychiatric injury is not compensable "if the injury was substantially caused by a lawful, nondiscriminatory, good faith personnel action." "Substantial cause" is defined as "at least 35 to 40 percent of the causation from all sources combined." "Personnel action" is defined as "conduct attributable to management in managing its business, including such things as reviewing, criticizing, demoting, transferring, or disciplining an employee."

The Court noted that the reports and deposition testimony of the agreed medical evaluator, Dr. Allen, were confusing and ever changing. In one report, Dr. Allen apportioned one-third of Brooks' psychiatric injury causation to Parker's grievance, one-third to the internal affairs investigation, and one-third to Brooks feeling unsupported by his supervisors. At her deposition, Dr. Allen admitted that the causes for Brooks' psychiatric injury were all interrelated. The Court noted that the internal affairs investigation was a personnel action and, according to Dr. Allen, accounted for 1/3 or 33.3 percent of the causation. Therefore, as long as a very small amount of the remaining causation could be attributed to personnel actions, the personnel actions were a substantial cause of Brooks' injury and his claim would, therefore, have to be denied. The Court also noted that "feeling unsupported" is not a cause of an injury; it is an injury or symptoms of an injury. The record demonstrated that Brooks' feelings were caused, at least in part, by the investigation and Brooks' shift changes, both of which were personnel actions. The Board erred when it relied on Dr. Allen's opinion, instead of the record, to determine what caused Brooks' feelings that he was not being supported. On that basis, the Court remanded so that the record can be further developed regarding whether Brooks' injuries were caused by a personnel action.

County of Sacramento v. Workers' Compensation Appeals Board (2013) ___ Cal.App.4th ___ [2013 WL 1715802].

Note:

It is not unusual for employees to file workers' compensation claims that are based, at least in part, upon alleged psychiatric injuries caused by personnel actions, such as criticism, transfers, discipline, or other incidents. The decision affirms the "personnel action" defense which allows agencies to make nondiscriminatory personnel decisions without being subject to workers' compensation liability. The decision also stands for the proposition that an employee's reaction to a personnel decision is part of the claimed injury and not a separate source for the injury. In this case, Brooks' belief that he was not supported by his supervisors was not a separate cause for his injury, but the manifestation of the injury itself.

A Government Employee Driving To Work From An Appointment With A Workers' Compensation Doctor Is Not Acting Within The Scope Of Employment.

Linda Gadbois was prison cook at Avenal State Prison. She suffered a job related injury and was treated through her employer's workers' compensation network. She was dissatisfied with her treatment so she opted for a second treatment by another workers' comp doctor suggested by her employer. While returning to work from her second appointment, Gadbois was involved in an automobile accident with another vehicle. She died from her injuries and the driver of the other vehicle, Kenneth Fields, was severely injured.

Fields sued the estate of Gadbois and also sued Gadbois employer, the State of California. He argued that Gadbois was acting within the scope of her employment when driving to work from her appointment with the workers' comp doctor. To support his "scope" argument, Fields cited several facts. First, he said that Gadbois was paid by the State for the day of the accident. Second, he argued that the Department had given her the name of the doctor she was consulting. Third, he cited the requirement that Gadbois had to attend workers' compensation medical appointments.

The State responded that its paying Gadbois for the day of the accident was actually a death benefit and it would have paid her even if she had been on vacation. The State also argued that Gadbois was not driving a State vehicle and was not conducting State business. Finally, the State contended that Gadbois chose to seek alternative treatment rather than being required to do so.

The trial court granted the State's motion for nonsuit and Fields appealed. The Court of Appeal upheld the granting of nonsuit. Of particular importance to the Court was the fact that driving was not part of Gadbois' job as a prison cook. The Court also discussed the difference between 'scope of employment' as a standard for tort liability in this case and the workers' comp standard of 'arising out of employment in the course of employment' (AOE/COE). The court observed that the tort standard is much narrower than the workers' comp standard. Based on this analysis, the Court concluded that the State was not liable for any of Mr. Field's injuries.

Fields v. State of California (2012) 209 Cal App 4th 1390

DISCRIMINATION

To Establish That Discipline Was Discriminatory, An Employee must Show That The Discipline Was "Substantially Motivated" By Discrimination, But Even Then The Employer Can Limit Its Liability By Showing It Would Have Imposed The Same Discipline Without Discrimination.

In a much-anticipated decision, the California Supreme Court has held that an employee claiming discrimination under the California Fair Employment and Housing Act (FEHA) has the burden to prove that discrimination on the basis of a protected characteristic was a substantial motivating factor for an adverse employment action. In addition, if the employer proves, by a preponderance of the evidence, that it would have made the same employment decision in the absence of any discrimination, the employee is not entitled to receive damages, but may be entitled to other relief, including reasonable attorneys' fees.

The City of Santa Monica's city-owned bus service, Big Blue Bus, hired Wynona Harris as a bus driver trainee in October 2004. During her training period, Harris had an accident that the City deemed "preventable." Nonetheless, Harris successfully completed her training and the City promoted her to the position of "at-will" probationary part-time bus driver. During her probationary period, Harris had a second preventable accident. In February 2005, Harris reported late to work and received her first "miss-out," which is a driver's failure to give her supervisor at least one hour's warning that she will not be reporting for her assigned shift. Harris received her second "miss-out" in April 2005.

The following month, Harris told her supervisor, George Reynoso, that she was pregnant. Reynoso asked Harris for a doctor's note clearing her to continue to work. Harris provided the note permitting her to work with some restrictions. On the same morning that Harris provided the doctor's note, Reynoso received a list of probationary drivers who were not meeting standards for continued employment. Harris was on the list. Her last day of work was May 18, 2005.

Harris filed suit against the City pursuant to the FEHA and claimed that she was terminated because she was pregnant, a form of sex discrimination. During the subsequent trial, the City asked the trial court to give the jury a "mixed-motives" jury instruction which stated: "if you find that the [City's] action, which is the subject of [Harris'] claim, was actually motivated by both discriminatory and non-discriminatory reasons, the [City] is not liable if it can establish . . . that its legitimate reason, standing alone, would have induced it to make the same decision." To establish a "mixed-motives" defense, the City would have to prove that it had a legitimate reason for terminating Harris which, standing alone, would have induced it to make the same decision even if the City was also motivated by discriminatory reasons.

The court refused to give the instruction. Instead, the court instructed the jury that all Harris had to show was that her pregnancy was a "motivating factor/reason" for the discharge even though other factors may have contributed to her termination. The jury found that Harris's pregnancy was a motivating reason for her discharge and awarded over $177,000 in damages. The City appealed.

The Court of Appeal reversed the award of damages and concluded that the court's refusal to provide the "mixed-motives" jury instruction was prejudicial error. Harris appealed, and the California Supreme Court affirmed the Court of Appeal decision, in part.

Government Code section 12940(a) prohibits an employer from taking an employment action against a person "because of" the person's protected characteristic, such as race, sex, or disability. The Supreme Court analyzed the phrase "because of" to determine whether it required an employee to prove that a protected characteristic was the sole, or "but for" cause of a disputed employment action, or merely a motivating factor in the employer's decision. The Court looked to federal case law and the purposes underlying the FEHA to ultimately determine that a plaintiff must show that discrimination was a substantial motivating factor, rather than a "but for" factor, or merely a motivating factor, in the disputed employment action.

In addition, the Court concluded that if the employer proves, by a preponderance of the evidence, that it would have made the same employment decision in the absence of any discrimination "at the time it made its actual decision," the employee is not entitled to receive damages. The employer does not, however, fully escape liability. The employee may still be entitled to declaratory relief, injunctive relief, or, most significantly, reasonable attorney's fees and costs. The Court remanded the case to the trial court to determine whether discrimination was a substantial motivating reason for the City's decision to terminate Harris's employment.

Harris v. City of Santa Monica (2013) 56 Cal.4th 203.

Note:

The Harris *decision attempts to answer the question: What is the trier of fact to do when it finds that a mix of discriminatory and legitimate reasons motivated the employer's decision to make an adverse employment action? The answer is that the trier of fact must first determine that the employee proved, by a preponderance of the evidence, that discrimination was a substantial factor motivating the disputed employment action. Second, the employer then has an opportunity to prove, by a preponderance of the evidence, that it would have made the same decision for lawful reasons. Third, if the employer can carry its burden of proof, the employee cannot be awarded damages, back pay or reinstatement, but can be awarded declaratory or injunctive relief and reasonable attorney's fees. The case provides a "mixed bag" for employers and employees. Though rejecting the City's argument that Harris must prove that her pregnancy was the "but for" cause for her termination, the Court also rejected Harris' position that it was sufficient for her to merely show that discrimination was a "motivating" factor. In addition, the Court recognized the City's right to establish a "same decision" defense, but held that such a defense is not an absolute bar to damages.*

A County Employee Laid Off For Economic Reasons Cannot Establish That The Revenue Shortfall Is A Pretext For Discrimination Or Retaliation.

Plaintiff had been employed as a Records Management Tech for eight years with the County of Plumas. During that time she had taken several medical leaves and filed worker's compensation claims. She had also received several negative performance evaluations, and had been transferred to a different position in hopes that her performance would improve.

In August 2009, the County experienced a revenue shortfall and the Board of Supervisors enacted a resolution eliminating several County positions, including the position the employee held. The employee filed her lawsuit, arguing that the revenue shortfall was a pretext for discrimination against her based on her age, disabilities, gender, and prior complaints. She also claimed that her negative performance evaluations and transfer were discriminatory and retaliatory.

The County argued that it was immune from any suit based on its elimination of the employee's position, because that decision, contained in a resolution by the Board of Supervisors, was an enactment for which a government agency may not be sued. The County also established that the employee had not presented any evidence indicating that the County or the individual supervisors had any discriminatory or retaliatory intent toward her. The Court granted the motion in favor of the County and the individual defendants.

The employee appealed the superior court's ruling. The Court of Appeal affirmed the superior court's decision, finding that the grant of summary judgment was proper and awarded the County its costs on appeal.

Hancock v. County of Plumas (May 2013) Cal Court of Appeals No. C071084 – Unpublished.

Effective December 30, 2012, FEHC Issues New Disability Regulations Regarding Reasonable Accommodation, Interactive Process, Essential Functions And The Legal Standards In "Mixed Motive" Cases.

The Office of Administrative Law approved new disability regulations proposed by the Fair Employment and Housing Commission, now the Fair Employment and Housing Council, which took effect on December 30, 2012. The most significant changes are identified below:

- The new regulations change the standard for disability discrimination under the Fair Employment and Housing Act (FEHA). The Commission amended Regulation 7293.7, which used to state that "Disability discrimination is established by showing that an employment practice denies, in whole or in part, an employment benefit to an individual because he or she is an individual with a disability." The Commission removed the "because of" language and instead indicated that disability discrimination can be

established if the disability "was one of the factors" that influenced the employment decision.

- In its Statement of Purpose, the new regulations provide that the primary focus in cases brought under the Fair Employment and Housing Act (FEHA) should be whether employers have provided reasonable accommodation, whether all parties have complied with their obligations to engage in the interactive process and whether discrimination has occurred. These are the main areas that employers need to focus upon when addressing disability issues.
- The regulations contain a more detailed description of the factors that will constitute evidence of whether a particular job function is essential, such as a validated job analysis and accurate, current written job descriptions.
- The regulations provide that an employee with a disability is entitled to preferential consideration of reassignment to a vacant position over other applicants and existing employees. However, ordinarily, an employer is not required to accommodate an employee by ignoring its bona fide seniority system, absent a showing of special circumstances, such as where variations to the seniority system are allowed.
- The Commission has specified that an employer shall initiate an interactive process when (1) an applicant or employee with a known disability requests a reasonable accommodation, (2) the employer otherwise becomes aware of the need for an accommodation through a third party or by observation, or (3) the employer becomes aware of the possible need for an accommodation because the employee has a disability and has exhausted leave under the Workers' Compensation Act, the California Family Rights Act (CFRA), the Family Medical Leave Act (FMLA), or other federal, state or employer leave provisions.
- The regulations contain detailed descriptions of the interactive process and the type of medical documentation and information employers can request to facilitate the process in situations where the disability is not obvious.

The new regulations became effective December 30, 2012 and can be found online at: http://www.dfeh.ca.gov/res/docs/FEHC%20 Disability%20Regs/FEHC%20FINAL_ DISABILITy_REGS_12-18-12%20_2_.pdf.

Note:

Agencies should be aware of the new regulations which provide some needed guidance on several issues relating to disabled employees in the workplace. One of the most significant changes in the regulations is the statement that disability discrimination can be found if disability was "one of the factors" that resulted in an employment decision.

Effective December 30, 2012, California's Fair Employment And Housing Council Issues New Pregnancy Disability Regulations Regarding Health Payments, Limits On Leaves And Related Issues.

The Fair Employment and Housing Commission, now the Fair Employment and Housing Council, revised Pregnancy Disability Leave (PDL) regulations that were approved by the Office of Administrative Law. These new regulations make a few significant changes:

- The new regulations provide that an employer must maintain and pay for health insurance coverage for an eligible female employee who takes pregnancy disability leave for the duration of the leave, not to exceed four months over the course of a 12-month period. Coverage begins on the date the pregnancy disability leave begins and it must be maintained at the same level and under the same conditions that coverage would have been provided if the employee had continued in employment continuously for the duration of the leave.
- The new regulations further provide that the time that an employer maintains and pays for group health coverage during PDL cannot be used to meet an employer's obligation to pay for 12 weeks of group health coverage during leave taken under the CFRA, and that the entitlements to employer-paid group health coverage during pregnancy disability leave and during CFRA are two separate and distinct entitlements.
- A new regulation, 2 C.C.R. 7291.17, discusses notice requirements and medical certification requirements for PDL. This regulation closely mirrors FMLA/CFRA requirements for notice and medical certification and provides that, except in a medical emergency where there is no time to obtain it, an employer may require an employee to supply a written medical certification from a health care provider of the medical need for a reasonable accommodation, transfer or PDL. The regulation further states that if the need is not foreseen, an employer must provide at least 15 calendar days for an employee to submit the certification.

The new regulations became effective December 30, 2012 and can be found online at: http://www.dfeh.ca.gov/res/docs/FEHC%20 Pregnancy%20Regs/FINAL_APPROVED_PREG_REGS_CLEAN_11_30_12.pdf.

Note:

Please feel free to contact us with any questions regarding the impact of the new PDL regulations. Most agencies already continue health insurance coverage for employees who are on pregnancy disability leave, but the regulations make it mandatory.

If A Pregnant Employee Is Disabled, Then California Law Requires Employers To Grant Leave Of More Than Four (4) Months Mandated By Federal Law, So Long As There Is No Undue Hardship.

Swissport, Inc. hired Ana G. Fuentes Sanchez in August 2007 as a cleaning agent. In February 2009, Sanchez was diagnosed with a high-risk pregnancy, requiring bed rest. Sanchez was not scheduled to give birth until on or about October 19, 2009. After her diagnosis, Sanchez requested and received a temporary leave of absence. Sanchez alleges that Swissport afforded her just over 19 weeks of leave pursuant to the California Family Rights Act (CFRA) and the Pregnancy Disability Leave Law (PDLL). Sanchez further alleges that Swissport "abruptly" terminated her employment on July 14, 2009 because of her pregnancy and/or requests for accommodation and that Swissport never contacted her to engage in an interactive process.

Sanchez filed suit against Swissport alleging nine causes of action, including claims for discrimination on the basis of pregnancy, pregnancy-related disability, and sex, failure to prevent discrimination, retaliation, and failure to engage in a good faith, timely interactive process. Swissport demurred to the complaint, arguing that even if all the allegations set forth in the complaint were true, Sanchez still could not state a cause of action. Swissport's demurrer was based on the argument that because it had provided Sanchez with all leave mandated by the CFRA and the PDLL, it had satisfied its obligations under the FEHA and did not discriminate against her. The trial court agreed with Swissport and sustained the demurrer without leave to amend. Sanchez appealed, and the Court of Appeal overruled the trial court's decision.

The FEHA requires an employer to provide reasonable accommodations for an employee's known disability unless the employer shows that an accommodation would produce an "undue hardship." One potential reasonable accommodation is to provide an extended leave of absence. The PDLL is contained within the broader provisions of the FEHA. The PDLL provides that, "[i]n addition to the provisions that govern pregnancy, childbirth, or a related medical condition in Sections 12926 and 12940," an employer must "allow a female employee disabled by pregnancy, childbirth, or a related medical condition to take a leave for a reasonable period of time not to exceed four months and thereafter return to work." The PDLL further provides that it shall not be construed as diminishing in any way the other FEHA provisions that cover pregnancy, childbirth, or medical conditions related to pregnancy or childbirth.

Swissport argued that once the PDLL's four-month leave period expired, Sanchez was not entitled to any other protection under the FEHA. The Court of Appeal disagreed and held that the PDLL was intended to augment, not supplant, the FEHA. Reasonable accommodations pursuant to the FEHA may include leaves of absence of no statutorily fixed duration. According to the Court, if compliance with the PDLL were construed as satisfying the requirements of the FEHA, it would diminish the FEHA's coverage of pregnancy-related disabilities and prevent disabled employees from receiving additional reasonable accommodations to which they may be entitled. While Sanchez will still have to demonstrate that she can perform the essential functions of her position with reasonable accommodation, the Court of Appeal held that the trial court should not have dismissed Sanchez's claims.

Sanchez v. Swissport, Inc. (2013) 213 Cal.App.4th 1331.

Note:

While the Court of Appeal was only analyzing whether Sanchez's complaint sufficiently stated a claim for relief under the FEHA, the case is an important one. The Court of Appeal held that an employer may be required to accommodate an employee disabled due to pregnancy by allowing the employee to take an extended leave of absence that exceeds the sixteen weeks set forth in the PDLL. In addition, the Court of Appeal held that Swissport should have engaged in the interactive process with Sanchez to determine whether additional leave was a reasonable accommodation and/or whether other forms of reasonable accommodation existed. Agencies should also be aware that new pregnancy disability regulations identify numerous circumstances under which an employee may be "disabled by pregnancy" (severe morning sickness, pregnancy-induced hypertension, preeclampsia, etc.). These forms of pregnancy disability trigger an employee's right to take leave under the PDLL and require agencies to potentially provide extended leave, or another form of reasonable accommodation, if the employee is still disabled due to pregnancy after leave under the PDLL is exhausted. Agencies should review personnel rules or memoranda of understanding that mention pregnancy disability leave to ensure that its policies do not conflict with current law.

Disabled Nurse's Termination Was Not Unlawful Because Regular Attendance Was An Essential Job Function.

Monika Samper was a nurse in the neo-natal intensive care unit (NICU). NICU nurses provide a high level of intensive care to premature infants and require special training. The Hospital's attendance policy allowed employees to take up to five unplanned absences during a 12-month period. Although only a part-time nurse, Samper had attendance problems for several years.

In 2005, Samper was diagnosed with fibromyalgia and her attendance problems continued. The Hospital agreed to a highly flexible accommodation: Samper was allowed to call in when having a bad health day, and to move her shift to another day in the week without finding someone to cover her shift. When her attendance problems persisted, the Hospital agreed not to schedule Samper's two shifts per week on consecutive days. When her attendance still did not improve, Samper requested an exemption from the attendance policy altogether. The Hospital eventually terminated her employment.

Samper sued the Hospital for failing to reasonably accommodate her in violation of the Americans with Disabilities Act (ADA). The district court granted summary judgment in favor of the Hospital and the Ninth Circuit Court of Appeals affirmed.

To state a *prima facie* case for failure to accommodate, Samper must show, among other things, that she is a qualified individual who is able to perform the essential functions of the job with or without reasonable accommodation.

Attendance can be an essential job function if: (1) the employee must work as part of a team; (2) the job requires face-to-face interaction with clients and other employees; or (3) the job requires the employee to work with items and equipment that are on site. Here, a NICU nurse's attendance is an essential job function for all three reasons. Samper's job required teamwork with other NICU nurses, face-to-face interaction with co-workers and patients, and access to medical equipment. Moreover, the job description for the position emphasized the need for regular attendance and punctuality, particularly because it was very difficult to find replacements for these specialized positions.

The Court found that Samper's request for an exemption from the attendance policy far exceeded the realm of reasonableness. She argued that because the Hospital could allow her to be absent five times, the Hospital could reasonably accommodate her being absent more often. The Court, however, strongly disagreed and found that Samper's request to be absent as much as she wanted to was not a reasonable accommodation that would allow her to perform her essential job functions, but rather it would exempt her from the essential job function of regular attendance. The Court found that the Hospital was not legally required to exempt Samper from her essential job duties.

Samper v. Providence St. Vincent Medical Center (9th Cir. 2012) 675 F.3d 1233.

Note:

Surprisingly enough, the courts have found that regular attendance is not an essential job function for all jobs. This case, however, gives employers better guidance regarding when attendance can be considered an essential job function. Specifically, attendance is an essential job function when: (1) the employee must work as part of a team; (2) the job requires face-to-face interaction with clients and other employees; or (3) the job requires the employee to work with items and equipment that are on site.

Consequently, even if an employee's disability is the cause of absences, an employer does not have to eliminate or modify an attendance policy, if the essential job duties necessitate that the employee regularly report to a workplace. Employers should consider the three factors listed above to determine whether attendance is indeed an essential function of a job and then update job descriptions accordingly.

Placing Employee On Disability Leave Did Not Constitute A "Dismissal" Under County Retirement Law.

Valerie Mooney began working for the County of Orange as a deputy probation counselor in 1990. In June 2004, Mooney suffered a back injury while pushing a linen cart and took a two-month medical leave. Shortly after returning from leave, Mooney sustained a second aggravating injury and took another two-month medical leave. Mooney returned to work

without restrictions in November 2004. However, from March 2005 through May 2006, she was placed on a restriction of working no more than 40 hours per week.

In May 2006, the County informed Mooney that it could no longer accommodate her restriction, thus she was not cleared to work. The County engaged in the interactive process with Mooney and she was given a clerical assignment. In January 2007, Mooney's physician imposed more work restrictions and the County informed Mooney that it could not accommodate her permanent work restrictions and that she was not to return to work until the County made a determination regarding accommodation of her permanent work restrictions. Mooney and the County engaged in further interactive process meetings, but no suitable position was found.

Mooney filed for disability retirement with the Orange County Employees Retirement System (OCERS) on the grounds that her disability prevented her from meeting the minimum physical qualifications for her classification. The County did not assist with her application. Instead, the County continued to seek reasonable accommodations for Mooney while her application was pending.

OCERS denied Mooney's disability retirement application for "insufficient evidence of permanent incapacity." Mooney and the County continued to engage in interactive meetings. Pursuant to these meetings, the County offered Mooney two positions, but she denied them both because she was not willing to take any position unless it allowed her to keep her sworn status and safety retirement benefits. Throughout this time, Mooney remained out on disability leave. The County did not dismiss or terminate Mooney's employment.

Mooney filed suit against the County in April 2010, alleging a number of causes of action, including that the County violated Government Code sections 31721(a) and 31725. The trial court granted the County's motion for summary adjudication as to the Government Code claims. Mooney appealed and the Court of Appeal affirmed.

Government Code section 31725 requires that, if an employee applies for disability retirement and her application is denied, her employer [barring the employee's successful appeal of the denial] must reinstate the employee if it previously "dismissed" her for having a disability. The Court evaluated the word “dismissed” and found that, like the terms "terminated" and "released," it describes circumstances in which the employment relationship has ended at the employer's election.

Here, the Court found that it was undisputed that the County never dismissed or terminated Mooney from her employment. Rather, Mooney remained on disability leave. Furthermore, the continued interactive meetings were indicative of the ongoing employment relationship. The County also offered Mooney two positions within her work restrictions, which she rejected. The Court held that to the extent Mooney lacked income following the denial of her retirement application; it was the product of her failure to accept alternative employment offered by the County.

Similar to section 31725, Government Code section 31721(a) states that an employer may not "separate" because of disability an employee otherwise eligible to retire for disability, but must apply for disability retirement for the eligible member. The Court held that the Legislature intended the term "separate" as used in section 31721(a) to have the same meaning as "dismissed" in section 31725.

Mooney v. County of Orange (2013) 212 Cal.App.4th 865, rehg. den.

Note:

The case follows the earlier holding of Stephens v. County of Tulare *(2006) 38 Cal.4th 793, in which the California Supreme Court interpreted the term "dismissed" to literally mean "remove from employment" for purposes of Government Code section 31725. The holding is applicable to agencies governed by the County Employees Retirement Law of 1937. Agencies covered by the Public Employees' Retirement Law ("PERL"), should be cautious that though the PERL contains language nearly identical to section 31721 (section 21153 of the PERL prohibits an employer from "separating" an employee because of disability), there are decisions under the PERL which are not consistent with the Mooney case. However, the Mooney case does rely upon a PERL case,* Gonzalez v. Department of Corrections & Rehabilitation *(2011) 195 Cal.App.4th 89, review den., in which the Court of Appeal held that section 21153 prohibits "separation of a disabled employee, i.e. termination; it does not prohibit demotion or transfer."*

AFFORDABLE CARE ACT

Large Employers Face Penalties If They Fail To Provide Adequate, Affordable Health Insurance To "Substantially All" Their Full-Time Employees By January, 2014.

The Affordable Care Act consists of thousands of pages of rules and regulations affecting employers. Proposed regulations released on January 2, 2013 clarify laws employers need to be aware of prior to the effective date of the Act.

Under the Affordable Care Act, the Employer Shared Responsibility Provisions will take effect on January 1, 2014. This law will subject large employers (i.e. over 50 full time equivalents) to a monthly penalty under two circumstances:

(1) the large employer fails to provide "substantially all" of its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage and any full-time employee is certified to the employer as having received a subsidy for coverage through the exchange ("no-coverage penalty"); or

(2) the large employer offers coverage to "substantially all" of its full-time employees (and their dependents) that is "unaffordable" or does not provide "minimum value" and a full time employee is certified to the employer as having received a subsidy for coverage through the exchange ("unaffordable coverage penalty").

On December 28, 2012 the IRS and Treasury Department issued proposed regulations regarding the Employer Shared Responsibility Provisions (aka the penalties that take effect January 1, 2014). These proposed regulations provide some significant additional guidance.

LCW has prepared a thorough summary of the proposed regulations that can be found at: www.lcwlegal.com/files/125544_ACA2013.pdf.

Department Of Health And Human Services Proposes Appeal Process For Employers Regarding Employee's Subsidy Determination In The Exchange.

Starting January 1, 2014 large employers, *i.e.*, those with 50 or more full time equivalent employees, may be subject to a penalty (called the "assessable payment") if one of its employees purchases coverage through the Health Insurance Exchange while qualifying for a subsidy. A subsidy is a premium tax credit or cost sharing reduction. For more information on this general rule, please see our February *Client Update*: http://www.lcwlegal.com/83997.

On January 14, 2013 the Department of Health and Human Services (HHS) proposed regulations that will provide employers with a process to appeal the Exchange's determination that an employee is eligible for advance payment of tax credits or a cost-sharing reduction. It is important to note that this process is separate and distinct from the process that the IRS will propose for assessing tax penalties. However, the process for an employer to challenge a subsidy determination is important because an employee's receipt of subsidized coverage in the exchange is the trigger for the IRS' assessment of the penalty. Exchange eligibility appeals may be conducted by the Exchange itself or an appeals entity (a body designated to hear appeals of eligibility determinations, etc.). Employer appeals may be appealed directly to HHS where the Exchange has failed to establish an appeals process. The proposed regulations state that any appeal process must at least provide for the following:

- The exchange will notify an employer when its employee is determined to be eligible for advance payment of tax credits or cost sharing subsidies.
- The employer will have 90 days from the date of the notice to appeal a determination that the employer does not provide minimum essential coverage or that the employer provided coverage is not affordable to the employee. The law provides guidelines for employers to make affordability determinations.
- The employer will be allowed to submit evidence to support its appeal. The proposed regulation anticipate this evidence will include: information as to whether coverage is offered, whether the employee has taken up such cover-

age, the employee's portion of the lowest cost plan offered, and whether the employee is in fact employed by the employer.

- The appeal will be reviewed de novo` by one or more impartial officials who were not directly involved in the eligibility determination.
- The appeals entity must provide notice of the decisions to the employer and employee within 90 days of the date the appeal request is received.

Employers should maintain documentation of the coverage they offer to full-time employees and keep records related to how they determine which employees qualify as "full-time" based on employee hours of service. Employees averaging over 30 hours of service per week are considered "full-time." Employers who adopt the Look Back Measurement Method Safe Harbor for purposes of determining employee full-time eligibility should keep documentation evidencing that they adopted and implement the Safe Harbor. Employers will need documentary evidence to appeal the exchange's determination that an employee qualifies for a subsidy and to challenge penalty assessments made by the IRS.

www.lcwlegal.com/84158

OSHA Issues Regulations Addressing Retaliation Under The Affordable Care Act.

The Occupational Safety and Health Administration ("OSHA"), a division of the Department of Labor, recently published regulations which implement the anti-retaliation provision of the Patient Protection and Affordable Care Act. Section 1558 of the Act prohibits retaliation by an employer against an employee who:
a) Receives health insurance premium tax credits or a subsidy in the exchange;

b) Reports potential violations of protections afforded under Title I of the Act, which provides guaranteed availability protections among other things;

c) Testifies in a proceeding concerning such violation;

d) Assists or participates in a proceeding concerning a violation; or

e) Objects to, or refuses to participate in, any activity, policy, practice, or assigned task that the employee (or other such person) reasonably believes to be in violation of any provision of Title I of the Act.

The regulations set forth the procedures and timeframes for handling retaliation complaints, including investigations, hearings, and appeals procedures. The regulations also set out the remedies available for an aggrieved employee.

An aggrieved employee may file a complaint with OSHA within 180 days of the aggrieved conduct. Upon receipt of the complaint, the Assistant Secretary for OSHA will notify the employer of its rights. The employer will have 20 days after receiving notice of the complaint to

file a written statement, affidavits or documents in support of its position. The employer may also request a meeting with the Assistant Secretary to present its position.

In filing a complaint, the employee need only allege a subjective, good faith, and objectively reasonable belief that his or her participation in a protected activity was a contributing factor to an adverse employment action taken against him. If the employee successfully alleges that a protected activity was a contributing factor for an adverse employment action and the employer fails to show that it would have taken the same adverse action absent the protected activity, the Secretary will proceed to investigate the complaint.

After completing its investigation and within 60 days of the filing of the complaint, the Assistant Secretary will issue the written findings. Both parties have 30 days after the written findings are issued to file an objection and to request a hearing with the Chief Administrative Law Judge from the United States Department of Labor (DOL). If no objection is filed, the written findings will become the final decision of the Secretary and will not be subject to judicial review. If a hearing is held before an administrative law judge (ALJ), the ALJ's order will be effective 14 days after the date of the decision unless a timely petition for review is filed with the Administrative Review Board (ARB), DOL. The decision of the ALJ becomes final if the ARB does not accept the case for review within 30 days of the filing of the petition. If the ARB conducts a review, it will issue its final decision within 120 days of the conclusion of the hearing.

Within 60 days after issuance of a final order, a party may file a petition for review of the final order with the United States Court of Appeals.

An employee may file an anti-retaliation complaint directly in the appropriate district court under two circumstances: (1) Within 90 days of receiving the Assistant Secretary's written findings (provided that there is no final decision); or (2) if more than 210 days have passed since the filing of the complaint and the Secretary has not issued a final decision.

Remedies include reinstatement, affirmative action to abate the violation, back pay with interest, front pay, compensatory damages, and up to $1,000 award for attorneys' fees.

OSHA Fact Sheet 3461 (February 22, 2013).

Note:

Under the new regulations, employers must be mindful of not only the ACA's coverage requirements but also potential retaliation claims for actions taken against employees who receive subsidized coverage through the exchange. Accordingly, employers should ensure that its management and supervisory personnel are well trained in employee relations with regard to the ACA.

Department of Labor Updates COBRA Election Notice to Include Alternatives Available Through the Health Insurance Marketplace

The Department of Labor has updated its model COBRA election notice to reflect the recent changes in health care reform. Among other changes, the form now notifies qualified beneficiaries that COBRA alternatives will be available in 2014 through the Health Insurance Marketplace, and that preexisting condition exclusions to health care plans will be prohibited beginning in 2014.

The form can be found on the DOL website at www.dol.gov/ebsa/cobra.html.

As of July 1, 2013 Employers Must Start Measuring Employee Hours Under A Transitional Measurement Period.

Full implementation of the Affordable Care Act's (ACA) Employer Shared Responsibility provisions is quickly approaching. The Employer Shared Responsibility provisions generally go into effect on January 1, 2014, and apply to all large employers (50 or more full-time employees, including full-time equivalents). A full-time employee who obtains subsidized health coverage through the exchange (aka Marketplace) could trigger a penalty to his/her employer. The IRS will assess penalties to employers that fail to offer affordable health coverage that provides minimum value to substantially all of their full-time employees and their dependent children (up to age 26). In 2014 if an employer takes steps to offer coverage to dependent children of full-time employees, then an employer will not be penalized for failure to offer such coverage. However, in 2015 an employer may be exposed to penalties for failure to offer coverage to dependent children of its full-time employees.

Employers will need to determine which employees are "full-time" in order to manage exposure to the penalties. ACA defines a "full-time" employee for purposes of the penalties as one who averages 30 or more hours per week.

The IRS will impose penalties on a month-by-month basis, unless employers adopt the optional Look Back Measurement Method Safe Harbor, which allows employers to determine whether an employee is full-time or part-time over the course of a longer period (i.e. up to one year). Large employers with numerous seasonal, variable hour or temporary employees who average over 30 hours of service per week in any given month will likely benefit by adopting the Look Back Measurement Method Safe Harbor.

For employers who adopt the Look Back Measurement Method Safe Harbor, proposed regulations provide transition relief for 2014. The transition relief allows an employer to use a period of at least six consecutive calendar months from 2013 to measure employees' hours, rather than the entire 2013 calendar year. This "transitional measurement period" must meet the following conditions:

- Be shorter than 12 months, but no less than six months long

- **Have begun no later than July 1, 2013**
- End no earlier than 90 days before the first day of the plan year beginning on or after January 1, 2014.

An employee's status during the transitional measurement period will determine how that employee is treated (i.e. as full- or as part- time) during the associated stability period in 2014 for purposes of the penalties. Employers who intend to adopt this safe harbor and who wish to take advantage of the transitional relief must have implemented procedures to track employee work hours as of July 1, 2013, if such data collection was not already in place.

IRS Notice 2011-21 (May 23, 2012).

HARASSMENT

Pakistani Employee Who Was Taunted And Intimidated By His Indian Colleagues Could Take His Hostile Work Environment Case To Trial.

Mustafa Rehmani, a Muslim born in Pakistan, worked as a System Test Engineer for Ericsson, Inc. In November of 2009, Ericsson terminated Rehmani after he admitted to sending prohibited emails from his co-worker's email account. A few days before his termination, Rehmani reported to Human Resources that several of his Indian colleagues had been harassing him based on his national origin and religion.

After his termination, Rehmani sued Ericsson for harassment based on national origin and religion, retaliation, and failure to investigate and prevent harassment and retaliation in violation of the Fair Employment and Housing Act (FEHA). The employer won summary adjudication on the harassment claim, and the California Court of Appeal reversed.

To establish a hostile work environment harassment claim, an employee must show that he was subjected to harassment based on a protected classification, and that the harassment was sufficiently severe or pervasive to alter the conditions of the employee's employment and create an abusive working environment. Harassment can include intimidation, ridicule and insult.

Rehmani alleged that three of his Indian colleagues were frequently rude, dismissive, and hostile towards him because of his national origin and religion. He cited his colleagues' unwillingness to help him with projects, and alleged that the harassment became increasingly more severe and pervasive following the November 2008 attacks in India by Pakistani terrorists. Rehmani alleged that his colleagues made the following statements to or about him: (1) "Pakistan and Afghanistan need[ed] to be bombed and wiped out because of all the terrorist activity there and because it was spreading to India"; (2) "You're not going to blow me up, right?"; (3) "What is going on in Pakistan? It is a messed up country and it is creating a mess in the region and in India." In addition, on September 11, 2009, Rehmani was out of the office, and one of his Indian

colleagues joked that Rehmani was out "celebrating 9/11 and planning terrorist attacks." Rehmani further alleged one of his Indian colleagues instigated sending out an email on 9/11 stating it was Rehmani's birthday, when it was not. Rehmani asserted that he had reported all of these incidents to his supervisor, who allegedly told Rehmani that she did not want to hear his complaints.

The Court concluded that there was sufficient evidence for a jury to conclude that Rehmani was harassed because of his religion and/or national origin and that his complaints to his supervisor were sufficient to trigger an investigation into harassment. Rather than presenting only isolated incidents of harassment, Rehmani offered evidence of a pervasive pattern of rudeness, taunting, and intimidation from Indian co-workers.

Rehmani v. Superior Court (2012) 204 Cal.App.4th 945.

Note:

Public entities usually have "zero tolerance" non-harassment policies that prohibit employees from any conduct that targets a protected status. The goal of those policies is to prevent conduct from becoming so severe or pervasive that it creates a hostile environment. While harassment that targets a person because of his or her sex is usually the most prevalent, this case illustrates that harassment can also include conduct that targets religion and national origin. Supervisors must not allow such conduct in the workplace. Any time a complaint of harassment on the basis of religion, national origin, or any other protected status is received, either formally or informally, the agency must conduct an investigation. This is true even if the complaint appears to have no merit whatsoever. An investigation may also be triggered by the following:

- *When a person, other than the aggrieved person, complains about harassment;*
- *When someone indicates that inappropriate conduct is occurring, even if the word "harassment" is not used;*
- *When a supervisor personally observes inappropriate conduct or language, or has general knowledge of a potentially hostile work environment. In this situation, the supervisor must request that any inappropriate conduct cease and that an investigation be conducted.*

Employer Could Lawfully Terminate At-Will Employee For Dishonesty During Harassment Investigation.

When John McGrory accepted a written job offer from Applied Signal Technology, Inc. (AST) in 2005, he acknowledged in writing that his employment with AST would be at-will. During his employment, McGrory supervised an openly gay female employee named Dana Thomas. In 2009, McGrory issued Thomas a performance improvement plan. Thomas, not believing her

work merited a PIP, complained that McGrory was only criticizing her work on the basis of gender and/or sexual orientation.

AST hired an outside attorney to conduct an investigation. The investigator concluded that while McGrory did not engage in gender or sexual orientation discrimination, he was uncooperative and untruthful during the investigation because McGrory refused to disclose how he ranked his subordinates and which employees had complained about Thomas. McGrory refused to answer these questions based on his concern for the privacy of his coworkers. The investigator also found that McGrory violated AST's sexual harassment/personal ethics policies by making inappropriate jokes.

As a result of the report, AST terminated McGrory. During an exit interview, AST told McGrory that he was not being terminated as a result of his conduct towards Thomas, but due to being uncooperative during the investigation and the "factual denials" he made.

McGrory filed suit against AST, alleging that he was wrongfully discharged in violation of public policy. Specifically, McGrory claimed he was terminated in violation of the public policies that protected the privacy of coworkers, precluded retaliation for making statements during an internal affairs investigation and guaranteed employees an unbiased investigation. The trial court granted AST's motion for summary judgment on the basis that AST had provided a legitimate, non-discriminatory reason for terminating McGrory. McGrory appealed, and the Court of Appeal affirmed.

While an employer can terminate an at-will employee for no reason, it cannot terminate an at-will employee for an unlawful reason. McGrory argued that Government Code section 12940(h), part of the Fair Employment and Housing Act (FEHA), shields anyone from retaliation who participates in a discrimination investigation, even if the participant is uncooperative and untruthful. Government Code section 12940(h) makes it an unlawful employment practice to discharge or otherwise discriminate against anyone because the person has "testified or assisted in any proceeding under this part." While California courts have not looked at the specific issue, some federal courts interpreting Title VII have held that immunity for participation in an investigation is limited to sincere participation. It does not prohibit an employer from imposing discipline for an employee's misbehavior during an internal investigation, such as attempting to deceive the investigator.

On that basis, the Court of Appeal held that Government Code section 12940(h) does not shield an employee against termination, or lesser discipline, for either lying or withholding information during an employer's internal investigation of a discrimination claim. Rather, such conduct is a legitimate reason to terminate an at-will employee.

McGrory v. Applied Signal Technology, Inc. (2013) 212 Cal.App.4th 1510.

Note:

Public agencies are not subject to public policy claims, such as those at issue in this case However, the case serves as a reminder that any agency must be able to provide legitimate, non-discriminatory reasons for terminating any employee, including at-will employees. In addition, the case reaffirms an agency's right to discipline employees who are dishonest or who omit key facts during an administrative investigation as long as the agency's actions are in good faith.

FIRST AMENDMENT

A Police Union President May Sue For Retaliation Based On His Union Activities When The Chief Delays His 5% Post Pay.

John Ellins is president of Police Officers Association in the Sierra Madre police department. Despite the Police Chief Marilyn Diaz' efforts to initiate an open door policy and schedule meetings to improve communications with the POA, the Association held a no-confidence vote which passed unanimously. Led by Ellins, the Association issued press releases and made public statements highly critical of the Chief's job performance. Among the specific allegations against the Chief by the Association was that she would fall asleep at City Council meetings.

Prior to the no-confidence vote, Ellins had been the subject of three (3) internal affairs investigations from 2006 through 2008. They involved associating with a former convict, trying to convince a sergeant to void a ticket for the ex-con, failing to cite a theft suspect for marijuana possession and making statements that residents who do not evacuate in the face of a flood were "stupid" and "deserved to die." The incident involving the ex-con resulted in a two-week suspension. In addition to the IA investigations, the Chief referred to the District Attorney allegations she had received from another police chief that Ellins sold and used anabolic steroids, was guilty of assault with his duty weapon and had engaged in "sexual misconduct while on duty." The District Attorney did not file any charges against Ellins.

In early 2009, Ellins sought the Chief's signature to qualify for 5% extra pay for his Advanced POST certificate. The Chief did not sign the certificate because she said she had questions about Ellins' moral character. After waiting four (4) months, Ellins sued in federal court, alleging that the Chief was retaliating for Ellins' union activities, especially his leading the no-confidence vote.

Six (6) months after Ellins sued, the Chief signed the POST certificate, making it retroactive to the date of the lawsuit. She stated that she hoped her signing would cause Ellins to "forego" his lawsuit. POST approved the retroactive payment to Ellins, but he still did not receive the 5% premium pay for the four (4) month period between his application and his filing of the lawsuit.

The District Court granted the Chief's motion for summary judgment and dismissed Ellins' case. He appealed and the Ninth Circuit reversed, allowing him to pursue his litigation. The primary rationale for the Ninth Circuit decision was its conclusion that Ellins' actions were not part of his regular job as a police officer. According to the Court, his efforts as union president, especially dealing with the no-confidence vote, were outside the scope of his job duties and were not merely for his own personal benefit.

Instead, his efforts were on behalf of Association members and involved issues that were of public concern. As such, his activities were protected by the First Amendment and he could sue for retaliation.

The Court also discussed certain facts it deemed relevant. It focused on the Chief's making the POST pay retroactive only to the date of Ellins lawsuit, not to the date Ellins sought the POST premium. The Court speculated that if Ellins had not sued, his added pay might have been delayed indefinitely.

The Court reversed the District Court regarding qualified immunity for the Chief. The District Court had granted her such immunity, but the Ninth Circuit found that she had acted unreasonably since the law was clearly established that a union president engaged in union activities is acting privately and not within the scope of his job duties.

Finally, the Ninth Circuit upheld dismissal of Ellins' claim that there was a city policy to deny First Amendment rights under *Monell v. Department of Social Services of City of New York* (1978) 436 658. Specifically, it found that the Chief acted on her own and she was not a policy-maker.

Ellins v. City of Sierra Madre (2013) _____ F 3d _____2013 WL 1180299

Public Employee Speech Made Pursuant To "Official Duties" Does Not Have First Amendment Protection And Cannot Form The Basis For A Retaliation Claim.

The U.S. Court of Appeals for the Ninth Circuit determined that a Burbank police detective could not assert a First Amendment retaliation claim based on his allegedly having complained about abusive interrogation tactics. In Dahlia v. Rodriguez, the Court held that the alleged speech of plaintiff Angelo Dahlia was made pursuant to his "official duties" as a member of law enforcement and accordingly that the speech could not have First Amendment protection. In doing so, the Court applied the existing rule of the Ninth Circuit that police officers in California inherently have, as part of their "official duties," the duty appropriately to report illegal conduct by anyone, including their own colleagues and superiors. The United States Supreme Court has previously held, in the landmark case *Garcetti v. Ceballos* that public employee speech made pursuant to "official duties" does not have First Amendment protection, and cannot form the basis for a retaliation claim. Dahlia confirms that, for police in particular, the scope of "official duties" actually includes much of what can form the basis for a whistleblower claim.

The Supreme Court's reasoning behind its "official duties" test in Garcetti was that, if a public employee speaks in his or her capacity as an "employee" rather than a "citizen," the employee is engaging in speech that the government has itself created or "commissioned" by employing the individual in the first place. In the Court's view, it is improper for a public employee to have First Amendment rights in speech which essentially "owes its existence" to the government's employment of the individual.

In Dahlia, the plaintiff police detective alleged that he had complained to his superiors for months about supposed abusive and unlawful conduct at the Burbank Police Department, including supposed improper conduct during interrogations. Dahlia's complaint alleged that the Burbank Police Department placed him on administrative leave pending investigation four days after he disclosed details on this supposed misconduct in interviews with the Los Angeles Sheriff's Department. He further alleged that placing him on leave was retaliation for his protected speech, and he named the City, its Chief of Police, and several Lieutenants and Sergeants as defendants in his lawsuit. Most of the defendants moved to dismiss, and the District Court, even assuming the facts in Dahlia's complaint to be true, ruled in favor of defendants on the First Amendment claim.

A unanimous three-judge panel of the Ninth Circuit affirmed the trial court's decision and held that Dahlia could not assert a First Amendment retaliation claim because his speech at issue was part of his "official duties" as a police officer. The Court held that, in the Ninth Circuit, "California police officers are required, as part of their official duties, to disclose information regarding acts of corruption."

The Ninth Circuit's Dahlia decision made one ruling favorable to police officers suing for retaliation, however. The District Court had found the plaintiff's First Amendment claim to lack merit for the alternative reason that mere placement of an officer on administrative leave was not an "adverse employment action" that could support a First Amendment retaliation claim. The Ninth Circuit disagreed. It held that "under some circumstances, placement on administrative leave can constitute an adverse employment action." The Court described that it was premature to make the determination in this particular case and that it would need more information than was pleaded in the complaint. The Court observed that even if Dahlia had been placed on paid rather than unpaid leave, the standard for an adverse employment action "may very well" be met in Dahlia's case given the change in working conditions and loss of responsibilities, among other things, that the administrative leave entails.

Dahlia v. Rodriguez (9th Cir. 2012) 689 F.3d 1094, rehearing en banc granted by (9th Cir. 2012) 704 F.3d 1043.